No. 22-7604

IN THE SUPREME COURT OF THE UNITED STATES

HARBANS SINGH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record

NICOLE M. ARGENTIERI
Acting Assistant Attorney General

JAVIER A. SINHA
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether petitioner's Confrontation Clause rights were violated when an asylum officer testified at trial to statements that petitioner made, through interpreters who did not testify, during an asylum interview.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-4a) is not published in the Federal Reporter but is available at 2022 WL 17749250.

JURISDICTION

The judgment of the court of appeals was entered on December 19, 2022. A petition for rehearing was denied on February 16, 2023 (Pet. App. 5a). The petition for a writ of certiorari was filed on May 17, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Washington, petitioner was convicted of making a false statement on an immigration document, in violation of 18 U.S.C. 1546(a) and 2; accepting, possessing, and using an immigration document procured by fraud, in violation of 18 U.S.C. 1546(a) and 2; and making a false statement to a department or agency of the United States, in violation of 18 U.S.C. 1001(a)(2). C.A. E.R. 79. The district court sentenced petitioner to time served. Id. at 80. The court of appeals affirmed. Pet. App. 1a-4a.

1. Petitioner, a citizen of India, had been living in the United Kingdom for several years when, in November 2014, he was arrested twice in London for sexually assaulting girls under the age of 15. Presentence Investigation Report (PSR) ¶ 7; C.A. Supp. E.R. 139, 556. After each arrest, petitioner was charged, held in custody overnight, and then released on bail. C.A. Supp. E.R. 556-558, 566-572, 575-577.

That same month, petitioner applied for a tourist visa to travel to the United States. PSR ¶ 8. In his visa application, petitioner answered "No" to a question about whether he had "ever been arrested or convicted for any offense or crime." Ibid.; C.A. Supp. E.R. 596-597. Petitioner also stated in that application

that he spoke English in addition to Punjabi and Hindi. C.A. Supp. E.R. 596.

Petitioner was issued the visa and used it to enter the United States in January 2015. PSR ¶ 8. Petitioner then failed to appear for his scheduled return flight to the United Kingdom. Ibid. In May 2015, a court in the United Kingdom convicted petitioner in absentia on three sexual-assault charges and sentenced him to one year in prison. Ibid.; C.A. Supp. E.R. 271.

2. In July 2015, petitioner applied for asylum in the United States. PSR ¶ 9. In his application materials, petitioner concealed his arrests and convictions in the United Kingdom. Ibid.; C.A. Supp. E.R. 655-656, 744-745.

In September 2017, a Department of Homeland Security (DHS) asylum officer interviewed petitioner in person as part of the asylum application process. C.A. Supp. E.R. 744, 759. Two Punjabi interpreters took part in the asylum interview. Id. at 757. One interpreter was chosen by and brought by petitioner to translate for him in person. Id. at 529, 532-533, 715, 754-755. A second government-certified interpreter (called a "monitor") participated in the interview by phone to ensure the accuracy of the first interpreter's translations. Id. at 713-715, 757-758.

The asylum officer began the interview by instructing the interpreters to translate her statements and petitioner's

statements "word-for-word * * * without adding or subtracting anything." C.A. Supp. E.R. 756-757. Petitioner confirmed that he understood his interpreter. Id. at 757. The asylum officer then explained to petitioner that the purpose of the interview was for him to explain why he was applying for asylum and for the officer to gather the necessary information to make a decision. Id. at 759. The officer put petitioner under oath and he was told that he could face criminal consequences if he lied. Id. at 760-762. Petitioner confirmed that he understood and signed an oath form. Ibid. During the interview, petitioner repeatedly answered "No" to questions aimed at eliciting whether he had ever been arrested, detained, or interrogated by law enforcement. PSR ¶ 9; C.A. Supp. E.R. 767-770.

3. In November 2020, a grand jury in the Western District of Washington returned a superseding indictment charging petitioner with making a false statement on an immigration document (his visa application), in violation of 18 U.S.C. 1546(a) and 2; accepting, possessing, and using an immigration document procured by fraud, in violation of 18 U.S.C. 1546(a) and 2; and making a false statement during an asylum interview, in violation of 18 U.S.C. 1001(a)(2). C.A. E.R. 150-152.

Before trial, the government indicated that it might call the two interpreters from petitioner's asylum interview as witnesses.

C.A. Supp. E.R. 302. Both interpreters, however, had medical issues potentially affecting their ability to travel and testify in person. Id. at 49, 302, 310-312, 494-495. The government raised the possibility of the interpreters testifying by two-way videoconference -- an arrangement the government had agreed to for a number of petitioner's witnesses -- but petitioner objected. Id. at 302, 310–311. In explaining that objection, petitioner's counsel offered conflicting statements about whether the interpreters' testimony would be necessary or appropriate. See id. at 302-303 (stating that counsel did not understand the "relevance" of the interpreters' testimony, but that if they offered "habit testimony," that would need to be confronted); id. at 306 (suggesting that the interpreters' testimony might not be necessary unless defense counsel "open[ed] the door" to it); id. at 308 (stating that the "safer bet is to just allow them to testify and just let me cross-examine them"); id. at 309 (suggesting that the issue be deferred until trial).

After the government ultimately chose not to call the interpreters as witnesses, petitioner objected on the theory that the interpreters' testimony would be constitutionally required if the asylum officer testified about petitioner's answers in the interview, C.A. Supp. E.R. 35, 39-40. The district court held an evidentiary hearing on petitioner's objection on the second day of

trial. Id. at 505. The interpreters testified by two-way videoconference, and petitioner's counsel cross-examined them. Id. at 506-520. Both interpreters testified that they did not remember petitioner's interview. Id. at 508, 511, 513-514, 520.

Following the hearing, the district court overruled petitioner's Confrontation Clause objection. C.A. Supp. E.R. 532-536. Applying circuit precedent, the court found that the interpreters acted only as a "language conduit" for petitioner in the interview, such that the translated statements were properly treated as petitioner's own and their admission did not raise a confrontation issue. Id. at 532; see id. at 532–534. The trial resumed, and in his closing argument, counsel for petitioner argued that the government's failure to call the translators as witnesses should create reasonable doubt in the jurors' minds about petitioner's guilt. Id. at 1026-1027.

The jury found petitioner guilty on all counts. C.A. E.R. 79. The district court sentenced him to time served. Id. at 80.

4. The court of appeals affirmed petitioner's convictions in an unpublished memorandum disposition. Pet. App. 1a-4a. With respect to the confrontation issue, the court of appeals found that the district court did not err in determining that the translators acted as language conduits in interpreting petitioner's statements. Id. at 3a-4a. The court accordingly

applied its prior decision in United States v. Nazemian, 948 F.2d 522 (9th Cir. 1991), cert. denied, 506 U.S. 835 (1992), and reasoned that the asylum officer's testimony about petitioner's statements therefore did not implicate the Confrontation Clause, Pet. App. 3a-4a. Relying on its prior decision in United States v. Hieng, 679 F.3d 1131 (9th Cir. 2012), the court also rejected petitioner's argument that Nazemian had been abrogated by Crawford v. Washington, 541 U.S. 36 (2004). Pet. App. 4a.

ARGUMENT

Petitioner renews his claim (Pet. 7-12) that the admission, through the asylum officer, of his translated statements to the officer during his asylum interview violated the Confrontation Clause because the interpreters at his interview did not also testify. That claim lacks merit. As the court of appeals correctly recognized -- in agreement with the overwhelming majority of the courts of appeals and state high courts to address the issue post-Crawford -- the interpreters acted only as language conduits for petitioner's own statements, and the relevant declarant for constitutional purposes was therefore petitioner himself. In addition, the statements in this case were nontestimonial and would present no confrontation issue even if they were treated as those of the interpreters. This Court has repeatedly denied petitions for certiorari raising Confrontation

Clause challenges to the admission of translated statements.* The same result is warranted here.

1. The Confrontation Clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him." U.S. Const. Amend. VI. In Crawford v. Washington, 541 U.S. 36 (2004), this Court construed that provision in light of "the common-law history of the confrontation right," Michigan v. Bryant, 562 U.S. 344, 353 (2011) (citing Crawford, 541 U.S. at 50), and held that absent a prior opportunity for cross-examination, testimonial hearsay by a witness adverse to the defendant is generally barred by the Clause, Crawford, 541 U.S. at 68. This Court has reinforced in cases following Crawford that the Confrontation Clause "applies only to witnesses 'against the accused,'" Samia v. United States, 143 S. Ct. 2004, 2012 (2023) (citation omitted), and applies only to statements that constitute "testimonial hearsay," Davis v. Washington, 547 U.S. 813, 823 (2006) (citation omitted); see Bryant, 562 U.S. at 354-355, 359 n.5.

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* See Lopez-Ramos v. Minnesota, 140 S. Ct. 845 (2019) (No. 19-5936); Ye v. United States, 579 U.S. 903 (2016) (No. 15-1002); Santacruz v. United States, 570 U.S. 919 (2013) (No. 12-6807); Budha v. United States, 568 U.S. 1164 (2013) (No. 12-7148); see also Garcia-Chicol v. Arkansas, 141 S. Ct. 880 (2020) (No. 20-5834) (argument raised in statement of case but not listed as question presented).

The lower courts in this case correctly determined that petitioner's confrontation right was not violated because the interpreters acted only as "language conduits" for petitioner during his asylum interview. Pet. App. 3a-4a; see C.A. Supp. E.R. 532-534. The statements were therefore non-hearsay party admissions falling outside the Confrontation Clause. See Fed. R. Evid. 801(d)(2)(A) (providing that a party's own statements offered against him at trial are not hearsay). And as the courts of appeals have recognized, Crawford does not affect the admissibility of a defendant's out-of-court admissions at a criminal trial. See, e.g., United States v. Tragas, 727 F.3d 610, 615 (6th Cir. 2013); United States v. Crowe, 563 F.3d 969, 976 n.12 (9th Cir. 2009); United States v. Ramos-Cardenas, 524 F.3d 600, 609-610 (5th Cir.) (per curiam), cert. denied, 555 U.S. 908, and 555 U.S. 949 (2008); United States v. Tolliver, 454 F.3d 660, 664-665 (7th Cir. 2006), cert. denied, 549 U.S. 1149 (2007).

The petition does not dispute the factual findings underlying the lower courts' treatment of the interpreters as language conduits only. Instead, petitioner contends (Pet. 7) that the Ninth Circuit's precedent treating a translator as a conduit for the speech of the foreign-language speaker "is at odds with this Court's holding in Crawford" and "based on this Court's previous precedent in Ohio v. Roberts," 448 U.S. 56 (1980), which

established a reliability standard that Crawford abandoned. But as the court of appeals recognized below (Pet. App. 4a), the language-conduit standard is consistent with Crawford.

The language-conduit inquiry addresses the issue of whether a particular out-of-court statement is hearsay -- i.e., whether the out-of-court declarant is the interpreter or the individual giving the statement that the interpreter translated (here, petitioner). See, e.g., United States v. Nazemian, 948 F.2d 522, 525-526 (9th Cir. 1991), cert. denied, 506 U.S. 835 (1992). As noted above, the Confrontation Clause applies only if the challenged statement is third-party hearsay; the language-conduit inquiry addresses that threshold question and is therefore analytically distinct from, and antecedent to, a determination of whether the Confrontation Clause applies. Crawford reassessed the scope of the Confrontation Clause, but that decision did not address what constitutes hearsay in the first instance.

As petitioner notes (Pet. 8), the four-factor test articulated in Nazemian for determining whether interpreted statements should be viewed as the interpreter's or the original declarant's turns in part on issues related to the translation's reliability. See 948 F.2d at 527. But that limited role of reliability does not contravene Crawford. Any consideration of reliability under the Nazemian test is relevant only to determining

to whom a statement is attributable (i.e., whether the Confrontation Clause applies at all), not to whether the Clause has been satisfied (the reliability standard considered and rejected in Crawford, see 541 U.S. at 62-63).

In its 2012 decision in United States v. Hieng, 679 F.3d 1131, (9th Cir.), cert. denied, 568 U.S. 1055 (2012), the Ninth Circuit carefully analyzed and explained why Crawford does not disturb the language-conduit standard. Id. at 1139-1141. Consistent with the foregoing analysis, the court of appeals recognized that Crawford and its progeny "make it clear that, if a testimonial statement is introduced, the Sixth Amendment requires opportunity for confrontation of the person who made the statement," but those decisions "do not address the question whether, when a speaker makes a statement through an interpreter, the Sixth Amendment requires the court to attribute the statement to the interpreter." Id. at 1140.

2. Petitioner errs in claiming (Pet. 9-11) a conflict in the lower courts that warrants this Court's intervention. Since Crawford, three courts of appeals and two state courts of last resort have issued published decisions addressing Sixth Amendment challenges to the introduction of translated statements made by the defendant or another witness. Four of those five courts -- the Fourth and Ninth Circuits and the Arkansas and Minnesota

Supreme Courts -- have found no Confrontation Clause problem in admitting such testimony based on agency or language-conduit approaches. See United States v. Shibin, 722 F.3d 233, 235, 248-249 (4th Cir. 2013) (plain-error posture), cert. denied, 572 U.S. 1089 (2014); Hieng, 679 F.3d at 1140-1141; Garcia-Chicol v. State, 597 S.W.3d 631, 638-639 (Ark.), cert. denied, 141 S. Ct. 880 (2020); State v. Lopez-Ramos, 929 N.W.2d 414, 417-423 (Minn. 2019), cert. denied, 140 S. Ct. 845 (2020); see also United States v. Budha, 495 Fed. Appx. 452, 454 (5th Cir. 2012) (per curiam), cert. denied, 568 U.S. 1164 (2013) (adhering to the majority position in an unpublished decision). Only one court, the Eleventh Circuit, has held otherwise. See United States v. Charles, 722 F.3d 1319, 1321-1330 (2013) (concluding that it had been error to permit a border patrol officer to testify "as to the out-of-court statements made by an interpreter who translated [the defendant's] Creole language statements into English" during an interrogation). That shallow and lopsided disagreement does not warrant this Court's intervention.

3. Further review is especially unwarranted in this particular case, because even if the interpreters' translations during the asylum interview should be viewed as their own statements rather than petitioner's, they were not testimonial. The statements' admission thus presented no Confrontation Clause

issue at all, and they would be admissible even in the Eleventh Circuit.

A statement is "testimonial" only if "the circumstances objectively indicate * * * that [its] primary purpose" is to establish "past events potentially relevant to later criminal prosecution." Bryant, 562 U.S. at 356 (quoting Davis, 547 U.S. at 822); see Ohio v. Clark, 576 U.S. 237, 244-246 (2015) (statements are not testimonial if they "were not made with the primary purpose of creating evidence for [a defendant's] prosecution"). "Where no such primary purpose exists, the admissibility of a statement is the concern of state and federal rules of evidence, not the Confrontation Clause." Bryant, 562 U.S. at 359. And this Court has made clear that "not all 'interrogations by law enforcement officers' are subject to the Confrontation Clause." Id. at 355 (quoting Crawford, 541 U.S. at 53).

In this case, the translators' statements were not testimonial for two independent reasons. First, the translators' primary purpose in making those translated statements was simply to facilitate communication between petitioner and the asylum officer during the interview. That purpose is mechanical; an interpreter's job is to provide that service to various speakers, in various contexts, for various types of statements.

Second, to the extent the purpose of the interview is relevant, its primary purpose was to further the processing of petitioner's application for immigration relief, not to enable a future prosecution. As courts of appeals have recognized, statements made for the purpose of immigration processing or immigration relief do not qualify as testimonial. See, e.g., United States v. Santos, 947 F.3d 711, 729 (11th Cir. 2020), (recognizing that DHS officer's annotations on defendant's naturalization application were nontestimonial because they were made "for the primary purpose of determining [the defendant's] eligibility for naturalization" (citation omitted)), cert. denied, 141 S. Ct. 1048 (2021); United States v. Lang, 672 F.3d 17, 22-23 (1st Cir.) (same), cert. denied, 566 U.S. 1041 (2012); United States v. Caraballo, 595 F.3d 1214, 1229 (11th Cir. 2010) (recognizing that information in an agent-generated immigration form was nontestimonial because the form "is primarily used as a record by the [government] for the purpose of tracking the entry of aliens into the United States"). That is so even if "an incidental or secondary use of the [immigration] interviews" and forms "actually furthered a prosecution." Caraballo, 595 F.3d at 1229.

Here, as the asylum officer explained to petitioner at the interview's outset, the "purpose" of the interview was for him to

explain "why he was applying for asylum and for [the officer] to gather the necessary information to make a decision." C.A. Supp. E.R. 759. Although the asylum officer and her agency had learned of petitioner's arrests in the United Kingdom at the time of the interview, their information was "incomplete" and they were awaiting more information from U.K. authorities. Id. at 721-723, 878–879. And the asylum officer testified that she would have been required to ask petitioner about his criminal history as part of the asylum interview regardless. Id. at 725, 739-740. The primary purpose of the interview was thus immigration processing, not criminal prosecution.

Because the statements here were not testimonial, they would have been admitted even under the outlier approach of the Eleventh Circuit. While that court has excluded translations by a nontestifying interpreter in the context of a border-patrol interrogation, see Charles, 722 F.3d at 1321, it has elsewhere recognized that statements made for the primary purpose of determining the defendant's eligibility for immigration benefits are not testimonial, even if they later become relevant in a prosecution, see Caraballo, 595 F.3d 1214 at 1229; see also United States v. Garcia-Solar, 775 Fed. Appx. 523, 529 (11th Cir. 2019) (per curiam) (describing Charles as holding "that statements to an interpreter are testimonial when they are made during an

interrogation where the defendant is detained and suspected of a crime"), cert. denied, 140 S. Ct. 2519 and 140 S. Ct. 2520 (2020).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General

NICOLE M. ARGENTIERI
Acting Assistant Attorney General

JAVIER A. SINHA
Attorney

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