No. 19-____

IN THE
Supreme Court of the United States

RENADO SMITH AND RICHARD DELANCY,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

MICHAEL CARUSO
Federal Public Defender
BRENDA G. BRYN
ANSHU BUDHRANI
Assistant Federal Public Defenders
1 E. Broward Blvd.
Suite 1100
Ft. Lauderdale, FL 33301
Counsel for Richard Delancy

ALBERT Z. LEVIN
ALBERT Z. LEVIN, P.A.
Courthouse Center
40 N.W. 3d St., Ste. 200
Miami, FL 33128
Counsel for Renado Smith

NEAL KUMAR KATYAL
Counsel of Record
MITCHELL P. REICH
HOGAN LOVELLS US LLP
555 Thirteenth St., N.W.
Washington, D.C. 20004
(202) 637-5600
neal.katyal@hoganlovells.com
Counsel for Petitioners

QUESTIONS PRESENTED

The Confrontation Clause permits prosecutors to introduce the out-of-court testimonial statements of an absent witness only if the witness is "unavailable" despite the government's "good-faith effort to obtain [the witness's] presence at trial." *Barber* v. *Page*, 390 U.S. 719, 724-725 (1968). The questions presented are:

1. Whether the government makes a good-faith effort to obtain a witness's presence at trial if it curtails its search for that witness because it already has the witness's deposition testimony.

2. Whether the government makes a good-faith effort to obtain a witness's presence at trial if it forgoes an "easy" investigative step that it has "reason to believe" would procure the absent witness.

3. Whether a witness is "unavailable" if the government releases the witness from its custody without making any arrangements to secure the witness's presence at trial.

PARTIES TO THE PROCEEDING

Renado Smith and Richard Delancy, petitioners on review, were the defendants-appellants below.

The United States of America, respondent on review, was the plaintiff-appellee below.

RELATED PROCEEDINGS

The following proceedings are directly related to this petition:

- *United States* v. *Delancy et al.*, No. 1:16-cr-20908-JAL (S.D. Fla.) (Delancy Judgment entered July 10, 2017; Smith Judgment entered July 18, 2017), *aff'd*, *United States* v. *Smith et al.*, Nos. 17-13265 & 17-13330 (11th Cir. July 2, 2019) (reported at 928 F.3d 1215).

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

IN THE
Supreme Court of the United States

NO. 19-___

RENADO SMITH AND RICHARD DELANCY,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

Renado Smith and Richard Delancy respectfully petition for a writ of certiorari to review the judgment of the Eleventh Circuit in this case.

INTRODUCTION

The Confrontation Clause permits the admission of a witness's out-of-court testimonial statements against a criminal defendant only where the witness is "unavailable" despite the government's "good-faith effort to obtain [the witness's] presence at trial." *Barber* v. *Page*, 390 U.S. 719, 724-725 (1968). In the decision below, a divided panel of the Eleventh Circuit dramatically eroded that fundamental constitutional protection. Over a vigorous, 43-page dissent, the majority permitted the prosecution to play for the jury a videotaped deposition of the prosecution's star witness despite the fact that the government's agent admitted, repeatedly and under oath,

that he curtailed his search for the witness because her "videotaped deposition was already taken," Pet. App. 51a-53a; that the government forwent an "easy" investigative step—searching a law-enforcement database for the address of the witness's boyfriend—that it had "reason to believe" would lead it to the witness, *id.* at 42a; and that the government had the witness in its custody and "mistakenly" let her go, Pet. App. 28a.

By sanctioning these remarkable deviations from the government's obligation of good faith, the Eleventh Circuit deepened no fewer than three different splits of authority on the scope of the Confrontation Clause's "unavailability" requirement—each of which has profound significance for the day-to-day functioning of criminal trials. And, on every question, the Eleventh Circuit badly erred. It ran together the "two *separate*" prerequisites for admitting out-of-court testimony: unavailability and a prior opportunity to cross-examine. *Ohio* v. *Roberts*, 448 U.S. 56, 65 (1980) (emphasis added), *abrogated on other grounds*, *Crawford* v. *Washington*, 541 U.S. 36 (2004). It adopted a toothless definition of "good-faith effort" that is irreconcilable with this Court's precedents. And it flouted the Court's foundational decision in *Motes* v. *United States*, 178 U.S. 458 (1900), which held that a witness is not unavailable for purposes of the Confrontation Clause where "his absence was due to the negligence of the prosecution," *id.* at 474—exactly what occurred here.

The Confrontation Clause is one of our Founders' most vital guarantees of liberty. *Crawford*, 541 U.S. at 59. The deep and pervasive division among the Circuits has caused the scope of that protection to

vary widely based on nothing more than geography. And, if left undisturbed, the Eleventh Circuit's decision—which occupies the extreme end even among those courts that have construed the Confrontation Clause most stingily—will invite (indeed, openly permit) efforts by prosecutors to avoid subjecting their witnesses to "testing in the crucible of cross-examination" before a jury. *Id.* at 61. Certiorari should be granted, and the Eleventh Circuit's decision should be reversed.

OPINIONS BELOW

The Eleventh Circuit's opinion (Pet. App. 1a-105a) is reported at 928 F.3d 1215. The District Court's ruling on admissibility (Pet. App. 106a-114a) is unreported.

JURISDICTION

The Eleventh Circuit entered judgment on July 2, 2019. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment of the U.S. Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him * * * .

STATEMENT

1. In November 2016, the U.S. Coast Guard found a boat with 21 passengers adrift at sea halfway between Key Largo, Florida, and Bimini, Bahamas. Pet. App. 2a. The boat had run out of fuel six days earlier, and its passengers were tired and dehydrated but otherwise in good health. *Id.* at 2a-3a. Most

of the boat's passengers were Haitian; its operators, Smith and Delancy, were nationals of the Bahamas. *Id.* at 2a.

Upon making contact with the vessel, Coast Guard personnel asked Smith and Delancy where they were headed. *Id.* at 3a. Smith and Delancy said that they had been traveling from Freeport, Bahamas, to Bimini, but had run out of fuel and gone off course. *Id.* at 2a-3a. The officers could not determine the boat's original route because it had been adrift for so long; nonetheless, they suspected that Smith and Delancy were trying to smuggle the boat's passengers into the United States. *Id.* at 3a. The Coast Guard brought Smith, Delancy, and two passengers, Davidson Francois and Vanessa Armstrong Vixama, to the United States for further questioning. *Id.* at 5a, 8a.

2. In December 2016, a federal grand jury indicted Smith and Delancy for conspiracy to commit alien smuggling, alien smuggling, and attempted illegal reentry. *Id.* at 1a, 7a-8a; *see* Delancy CA11 App. 29-32. Shortly thereafter, the government filed material witness complaints against Francois and Vixama. Pet. App. 8a, 10a n.2. Both were arrested, transferred to the custody of the U.S. Marshals Service, and appointed counsel. *Id.* Immigration and Customs Enforcement ("ICE") then lodged immigration detainers against Francois and Vixama so that, once they were released from the custody of the U.S. Marshals, they could be returned to ICE custody. *Id.* at 8a-9a, 10a n.2.

Vixama and Francois gave videotaped depositions in January and March 2017, respectively. *Id.* at 9a, 10a n.2. In her deposition, Vixama testified that her

family paid $5,000 for her passage with Smith and Delancy, and that she boarded the boat in Freeport "to come to the United States." *Id.* at 6a. Francois, in contrast, was uncertain about the boat's ultimate destination: He stated that while he "believed the boat was going to the United States * * * he did not personally know where the boat was heading when he left Freeport because the defendants 'didn't tell [the passengers] anything.'" *Id.* at 5a (brackets in original).

After each deposition, a magistrate judge dismissed the material witness complaints. *Id.* at 10a & n.2. By law, ICE agents then had 48 hours to enforce the immigration detainers. *Id.* at 10a. ICE promptly detained Francois following his deposition and deported him to Haiti. *Id.* at 10a n.2. ICE did not, however, pick up or detain Vixama within 48 hours. *Id.* at 10a. Accordingly, "on February 6, 2017, the U.S. Marshals released Vixama from their custody." *Id.* The government did not obtain Vixama's contact information or address before releasing her, nor did it take any other measures to ensure that she would appear at petitioners' trial.

3. Craig Nowicki, the case agent, learned that Vixama had been released from custody on February 7, 2017. *Id.* He briefly made an effort to locate Vixama: On the night of February 7, Nowicki called Vixama's uncle (whose phone number Vixama had shared with Nowicki months earlier, when she was "anxious" and asked to speak to someone "to put herself at ease," *id.* at 8a), and learned the uncle's address in Coral Springs, Florida. *Id.* at 10a-11a. ICE agents waited two weeks before visiting the uncle's house. *Id.* at 11a. By then, Vixama could not

be found at the house, and the occupants said they did not know where she was. *Id.*

The government then ceased its efforts to find Vixama for nearly two months. As Agent Nowicki later testified, "we had the video deposition of her testimony already," and so he saw no need to file a subpoena, reach out to ICE for additional support, or continue looking himself. *Id.* at 150a, 152a-153a, 161a. At one point in March, Nowicki asked several ICE agents whether they had located Vixama. *Id.* at 124a. An ICE supervisor responded that ICE "did not have the manpower to go look for her again," and Nowicki did not follow up. *Id.* at 124a, 153a.

The government did not take any further action to locate Vixama until April 12, 2017—five days before the scheduled start of petitioners' trial. *Id.* at 11a. On that date, the Assistant United States Attorney (AUSA) assigned to the case emailed Vixama's court-appointed counsel and asked if he knew Vixama's contact information. *Id.* at 11a-12a. Vixama's counsel responded that Vixama was "in Delaware" and "doesn't have a phone," but that the attorney had given the AUSA's "contact info to her boyfriend." *Id.* at 12a. Two days later, Vixama's attorney provided the name and phone number of Vixama's boyfriend, stating that "[y]ou can call her now at this number" and "I believe she will cooperate." *Id.* at 13a. The AUSA contacted Vixama's counsel three more times—once to send a subpoena, another time to ask if he had learned anything further about Vixama's whereabouts, and a final time to provide a copy of a bench warrant. *Id.* at 12a-13a, 15a. Agent Nowicki also called the boyfriend's number twice and sent him two text messages. *Id.* at 13a-14a. When

the government received no response from Vixama or her boyfriend, it ended its search. *Id.* at 14a. Nowicki testified that "one of [the reasons]" he did not do more—such as "attempt[ing] to ascertain [the boyfriend's] address in Delaware by running [his] name" through a law-enforcement database—was because "she's already given the videotaped deposition." *Id.* at 158a.

4. On April 17, 2017—the first day of trial—the government informed the court and defense counsel for the first time that Vixama had mistakenly been released from its custody and was believed to be with her boyfriend in Delaware. *Id.* at 13a-14a. The government also disclosed that it had been searching for Vixama since April 12, but had not procured her attendance at trial. *Id.* The government moved to play Vixama's videotaped deposition for the jury, contending that she was "unavailable" for purposes of the Confrontation Clause. *Id.* at 14a. Smith and Delancy objected, arguing that the government had not met its burden to show that Vixama was unavailable. *Id.* at 14a-15a.

The District Court held a hearing to determine whether the government had made adequate efforts to secure Vixama's attendance. *Id.* at 15a-16a. At that hearing, Agent Nowicki acknowledged that Vixama was "an essential witness to this case." *Id.* at 152a-153a. He also testified repeatedly that the government curtailed its efforts to locate Vixama because it already had her videotaped deposition in its possession. *Id.* at 150a, 152a-153a, 158a, 161a.

Nevertheless, the District Court ruled that "the Government made good-faith and reasonable efforts to locate [Vixama] once she had been released." *Id.*

at 107a-111a. It thus deemed Vixama "unavailable" for purposes of the Confrontation Clause, and permitted the prosecution to play her videotaped deposition for the jury over petitioners' objections. *Id.* at 16a, 111a-112a. That deposition provided the only consistent, direct evidence that petitioners had been attempting to enter the United States—a critical element of each charge against them. *See id.* at 103a-104a (Rosenbaum, J., concurring in part and dissenting). The prosecutors repeatedly invoked Vixama's testimony during their closing arguments as evidence of petitioners' guilt. *See* Smith CA11 App. 132, 134, 137, 148, 149, 150.

The jury found Smith and Delancy guilty on all counts. *Id.* at 16a. The District Court sentenced Smith to concurrent sentences of 87 months for conspiracy and illegal reentry, and 60 months for alien smuggling. *Id.* at 16a-17a. It sentenced Delancy to concurrent sentences of 90 months for conspiracy and illegal reentry, and 60 months for alien smuggling. *Id.* at 17a.

4. A sharply divided panel of the Eleventh Circuit affirmed. *Id.* at 2a. Writing for the majority, Judge Hull stated that "it is not our job to second guess, in hindsight, the prosecutor's efforts." *Id.* at 39a. Nor did the panel think it was appropriate to "think of 'additional steps' the prosecutor might have taken." *Id.* at 50a. Instead, the panel stated that "our task is to examine the government's cumulative efforts here to determine if * * * the government made a good-faith, reasonable effort to obtain Vixama's presence at trial." *Id.* at 26a.

The panel was "convinced" that the government's efforts satisfied that standard. *Id.* The panel

"start[ed] with how Agent Nowicki attempted to locate Vixama *** after learning of Vixama's release": by contacting Vixama's uncle and requesting that ICE agents visit his home. *Id.* The panel did not fault Agent Nowicki for halting his efforts when that initial effort "failed to locate Vixama." *Id.* After all, the panel observed, ICE stated that it "did not have the manpower to look for her again at that time," and, "[i]mportantly, *** Vixama had given her deposition." *Id.* at 26a-27a.

"Even so," the panel continued, "[i]n the week leading up to the April trial, the government continued its efforts to locate Vixama by reaching out to her former counsel *** four times, issuing a trial subpoena, and thrice attempting to communicate with Vixama using her boyfriend's cell phone number." *Id.* at 27a. The panel found it "patently reasonable" for the government to "rely on" Vixama's attorney and boyfriend in this way, given that the government lacked an "address or cell phone" for Vixama, and she was "obvious[ly] determin[ed] to go into hiding and to elude capture." *Id.* at 27a-28a. When those efforts failed, the panel said, the government had discharged its duty to make "a good-faith effort that was reasonable under the factual circumstances of this case." *Id.* at 30a.

The panel refused to consider whether the government should have taken "additional investigatory step[s]," even ones the government "ha[d] 'reason to believe' might assist in locating" Vixama. *Id.* at 42a. The panel described this analysis as "Monday-morning quarterbacking of the prosecutor and Agent Nowicki's efforts"; it was sufficient, in the panel's view, that "this is not a case where the government

took *no* action when presented with a new lead." *Id.* at 43a-44a (emphasis added). Further, the panel noted that the while the additional steps petitioners and the dissent proposed—such as searching law enforcement databases for Vixama's boyfriend's address in Delaware—were "easy," they would not have removed *all* of the "investigatory hurdles" to locating Vixama. *Id.* at 42a, 46a. For instance, the panel pointed out that the government would still have had to send an agent to the boyfriend's address in Delaware, and then "actually find the boyfriend at that address." *Id.* at 46a-47a.

The panel also "reject[ed] the * ** position" that "the government's efforts were unreasonable because Agent Nowicki considered the fact that Vixama's videotaped deposition was already taken." *Id.* at 50a-51a. The panel acknowledged that Agent Nowicki "candidly admitted he considered that fact" when determining the extent of his search. *Id.* at 51a. But, in the panel's view, "neither the case agent, nor the prosecutor, nor this Court, is required to pretend Vixama was never deposed" when determining whether she was "unavailable." *Id.* On the contrary, the panel said that this fact is "relevant and important" in assessing the reasonableness of the government's search. *Id.* at 53a.

Judge Rosenbaum filed a lengthy and vigorous dissent. *Id.* at 64a-105a.[1] She explained that, by "uphold[ing] the government's lackluster efforts as

---

[1] Judge Rosenbaum concurred in a separate portion of the majority opinion denying Smith's claim of prosecutorial misconduct. *See* Pet. App. 30a-35a. Petitioners do not seek review of that ruling.

reasonable," the majority "create[d] an unconstitutionally low (and unpredictable) bar for what constitutes 'reasonable' effort to find a witness." *Id.* at 65a. Under this Court's precedents, Judge Rosenbaum noted, "the government must take reasonable steps to follow up on a promising lead" to locate an absent witness. *Id.* at 71. Yet the panel "excuse[d] the government from undertaking reasonable and routine efforts" that it had "reason to believe" would lead to Vixama, such as running Vixama's boyfriend's name through a law-enforcement database. *Id.* at 80a-84a. By dismissing any inquiry into the efficacy and reasonableness of additional steps as "impermissible Monday-morning quarterbacking," the majority insulated the government's "inadequate efforts" from Sixth Amendment scrutiny. *Id.* at 85a, 88a.

Judge Rosenbaum also noted that Agent Nowicki "conceded" that the government "stopped well short of the efforts it would have undertaken to find Vixama" had it not "already had her recorded testimony." *Id.* at 77a. Judge Rosenbaum explained that other Circuits have held that the Confrontation Clause requires "the State to make the same sort of effort to locate and secure the witness for trial that it would have made if it did not have the prior testimony available." *Id.* at 76a-77a & n.6 (quoting *Cook* v. *McKune*, 323 F.3d 825, 836 (10th Cir. 2003)). Yet the majority reached the opposite conclusion: It "*lower[ed]* the reasonableness bar" because the government had Vixama's prior deposition testimony. *Id.* at 92a-93a (emphasis added).

Finally, Judge Rosenbaum observed that "the admission of [Vixama's] deposition testimony was not

harmless," and that "[e]ven the Majority Opinion does not argue that it was." *Id.* at 103a. Rather, the case agent himself described Vixama as "an 'essential' witness,'" *id.* at 104a, and her testimony provided the only reliable "direct evidence" that Smith and Delancy were "bound for the United States." *Id.* at 103a-104a. Thus, Judge Rosenbaum concluded, because the admission of Vixama's testimony was unconstitutional, "the judgment should be vacated and the case remanded." *Id.* at 105a.

REASONS FOR GRANTING THE PETITION

The Confrontation Clause gives force to "the Framers' preference for face-to-face accusation" by "establish[ing] a rule of necessity": Prosecutors may not convict a defendant using a witness's out-of-court testimony unless the witness is "unavailable" despite the government's "good-faith effort to obtain his presence at trial." *Roberts*, 448 U.S. at 65, 74 (quoting *Barber*, 390 U.S. at 724-725); *see Crawford*, 541 U.S. at 54-56. The opinion below effects a dramatic curtailment of that right. In a sweeping opinion, the Eleventh Circuit (1) held that the government may curtail its search for an absent witness because it already has the witness's deposition testimony, Pet. App. 50a-53a; (2) permitted the government to forgo an "easy" investigate step that it had "reason to believe" would lead it to an absent witness, *id.* at 42a; and (3) exempted the government from any scrutiny for releasing a witness from its custody without making arrangements to secure that witness's attendance at trial, *id.* at 28a-29a.

In each respect, the panel sharply split from the holdings of other Circuits and flatly contradicted this Court's precedents. Further, it created a how-to

manual for prosecutors seeking to avoid the guarantees enshrined for criminal defendants in the Confrontation Clause. Certiorari should be granted to bring the Eleventh Circuit in line with the majority of courts, and to prevent this decision from inviting governmental efforts to deny criminal defendants "the right * * * to be confronted with the witnesses against [them]." U.S. Const. amend. VI.

I. THE ELEVENTH CIRCUIT'S DECISION DEEPENS MULTIPLE SPLITS OF AUTHORITY ON THE SCOPE OF THE CONFRONTATION CLAUSE.

A. The Circuits Are Split on Whether the Government May Curtail Its Search for an Absent Witness Because It Has the Witness's Prior Deposition Testimony.

The Eleventh Circuit's decision deepens a sharp, 8-4 split on whether the Confrontation Clause permits the government to curtail its search for a witness because it has that witness's prior deposition testimony. Five Circuits and three state high courts hold that such conduct is categorically unreasonable; three Circuits—including the Eleventh—now hold that it is permissible.

1. The First, Third, Sixth, Tenth, and D.C. Circuits, as well as the high courts of Hawaii, Arizona, and the District of Columbia, have all held that the Confrontation Clause requires the government to make the same efforts to find an absent witness as it would have made if it lacked the witness's prior deposition testimony. The D.C. Circuit first held in *United States* v. *Lynch*, 499 F.2d 1011 (D.C. Cir. 1974), and reiterated as recently as this August, that "[w]hen the government seeks to rely on prior rec-

orded statements of a witness on the ground that the witness is unavailable, it bears the burden of establishing that its unsuccessful efforts to procure the witness's appearance at trial were 'as vigorous as that which the government would undertake to [secure] a critical witness if it has no [prior] testimony to rely upon in the event of 'unavailability.'" *United States* v. *Burden*, --- F.3d ---, 2019 WL 3917651, at *7 (D.C. Cir. Aug. 20, 2019) (quoting *Lynch*, 499 F.2d at 1023). In *United States* v. *Mann*, 590 F.2d 361 (1st Cir. 1978), the First Circuit likewise held that the government fails to make a "good faith effort" to locate an absent witness if it "d[oes] not make as vigorous an attempt to secure the presence of the witness as it would have made if it did not have the prior recorded testimony." *Id.* at 367; *see, e.g.*, *United States* v. *French*, No. 1:12-cr-00160-JAW, 2014 WL 34802, at *11 (D. Me. Jan. 6, 2014).

The Third, Tenth, and Sixth Circuits agree with this view. In *Cook*, the Tenth Circuit held that "a good measure of reasonableness is to require the State to make the same sort of effort to locate and secure the witness for trial that it would have made if it did not have the prior testimony available." 323 F.3d at 836 (citing *Mann* and *Lynch*). In *McCandless* v. *Vaughn*, 172 F.3d 255 (3d Cir. 1999), the Third Circuit found the government's search inadequate because the court had "the firm conviction that the prosecution's efforts to assure [the witness's] presence would have been far less casual * * * [i]f the prosecution had not had [the witness's] preliminary hearing testimony." *Id.* at 269 (citing *Mann* and *Lynch*). Along much the same lines, in *Brumley* v. *Wingard*, 269 F.3d 629 (6th Cir. 2001), the Sixth Circuit held that "the *knowing preparation* of a

videotaped deposition as a substitute for the trial testimony *of a constitutionally available witness* is inconsistent with the values of the Confrontation Clause, despite reduced concerns with reliability." *Id.* at 642 (emphases in original).

The high courts of Hawaii, Arizona, and the District of Columbia have all adopted the same rule. In *State* v. *Lee*, 925 P.2d 1091 (Haw. 1996), the Hawaii Supreme Court "expressly adopt[ed] the *Lynch* standard." *Id.* at 1102. In *State* v. *Edwards*, 665 P.2d 59 (Ariz. 1983), the Arizona Supreme Court likewise found that *Lynch* and *Mann* set forth "[a]n appropriate standard to apply" in determining the adequacy of the government's search. *Id.* at 64. Likewise, in *Brooks* v. *United States*, 39 A.3d 873 (D.C. 2012), the D.C. Court of Appeals adopted the *Lynch* standard word-for-word, *id.* at 883, and found the government's search inadequate because its "lackadaisical approach was [not] 'equally as vigorous as that which the government would [have] undertake[n]' to prevent [the witness] from disappearing had it not had her prior testimony." *Id.* at 888 (quoting *Lynch*, 499 F.2d at 1023).

2. In contrast, four courts—the Eighth, Ninth, Fourth, and Eleventh Circuits—have held that the government and the courts may take into account the existence and quality of a witness's prior deposition testimony in determining the lengths to which the government must go to procure the witness's attendance at trial.

In *United States* v. *Johnson*, 108 F.3d 919 (8th Cir. 1997), the Eighth Circuit held that "[t]he question of reasonable means [to procure a witness] cannot be divorced from * * * the reliability of the former testi-

mony[ ] and whether there is reason to believe that the opposing party's prior cross exam was inadequate." *Id.* at 922. Thus, the Eighth Circuit held that the prosecution employed "'reasonable means' to procure" a witness, despite "fail[ing] to subpoena" that witness while "he was on vacation in Florida," because the officer's former testimony was highly "reliable" and the defendant "failed to note any specific need for additional cross examination." *Id.*

The Ninth Circuit has taken a similar approach. In *United States* v. *Yida*, 498 F.3d 945 (9th Cir. 2007), the court held that the government failed to make reasonable efforts to procure a witness's attendance at trial where it released him from its custody "without having any means of compelling his return." *Id.* at 957-960; *see infra* pp. 22-23. But the Ninth Circuit emphasized that "our assessment of the reasonableness of the government's actions would be altered if its efforts included the taking of a witness's video-recorded deposition before allowing deportation to occur." 498 F.3d at 959. Playing that videotaped deposition, the court reasoned, would have been "almost as good as if [the witness] had testified live," and thus would have relieved the government of the obligation to take "alternative[ ]" measures otherwise required to secure the witness's attendance at trial. *Id.* at 959-960.

The Fourth Circuit's decision in *United States* v. *Rivera*, 859 F.2d 1204 (4th Cir. 1988), is to similar effect. The government there released several alien witnesses from its custody and allowed them to leave the country after taking their depositions. *Id.* at 1207. But the court found the government's actions reasonable because the defendants "were present at

the taking of the depositions" and had an opportunity to "cross-examine[ ] the witnesses." *Id.* at 1207, 1208-09. The witness's "testimony could be and was adequately secured by deposition," the court concluded, and so "the actions of the United States attorney in this case were reasonable." *Id.* at 1208-09.

In the decision below, the Eleventh Circuit unequivocally adopted the same view. The case agent responsible for finding Vixama "candidly admitted," over and over again, that he curtailed his search because "Vixama's videotaped deposition was already taken." Pet. App. 50a-51a; *see id.* at 150a, 152a-153a, 158a, 161a. Yet the Eleventh Circuit "reject[ed] the * * * position" that this conduct rendered the government's efforts unreasonable. *Id.* at 51a-52a. On the contrary, the panel stated, the government and the court need not "pretend Vixama was never deposed," *id.* at 52a, and indeed the existence of Vixama's videotaped deposition was a "relevant and important" consideration in determining what efforts were adequate to locate Vixama, *id.* at 53a.

B. The Circuits Are Split on Whether the Government May Forgo an Easy Investigative Step That It Has Reason to Believe Would Procure an Absent Witness.

The Eleventh Circuit's decision also deepens a 3-5 split as to whether the government may forgo a low-cost investigative step that it has reason to believe would procure a witness's appearance at trial. Three Circuits hold that failing to take such a minimal step necessarily renders a search unreasonable; two Circuits and three state high courts have rejected that proposition.

1. The Fifth, Third, and Sixth Circuits all hold that the government's decision to forgo a minimal investigative step that has a reasonable prospect of procuring a witness is *per se* unreasonable. In the Fifth Circuit, "deposition testimony is admissible only if the government has *exhausted* reasonable efforts to assure that the witness will attend trial." *Aguilar-Ayala* v. *Ruiz*, 973 F.2d 411, 418 (5th Cir. 1992) (emphasis added). Thus, in *United States* v. *Tirado-Tirado*, 563 F.3d 117 (5th Cir. 2009), it found the government's search unreasonable because, despite "conduct[ing] a fairly exhaustive investigation of [a witness's] whereabouts," the government "fail[ed] to make [certain] minimal efforts"—such as remaining in contact with the witness after his release from custody—that could have procured the witness's appearance without "requir[ing] significant government resources." *Id.* at 124-125 (5th Cir. 2009).

The Third Circuit likewise holds that a search is unreasonable if the government does not make the "minimal effort necessary to follow up" on a promising lead as to the witness's whereabouts. *McCandless*, 172 F.3d at 268. In *McCandless*, prosecutors took several steps to locate a witness named John Barth over a two-month period, including visiting and calling his home, checking police records, and speaking to his neighbors and family. *Id.* at 267-269. Yet prosecutors "fail[ed] to adequately investigate [a] fresh lead" as to Barth's location: a statement by his wife that "she had met Barth in Dover, Delaware just two weeks earlier." *Id.* at 268, 270. Instead of taking the routine and low-cost steps of checking "phone records" or "further press[ing] Mrs. Barth regarding her husband's location," prosecutors "simply accepted the quick assurance of the

Dover police that they had no record of Barth." *Id.* at 268. The Third Circuit concluded that that omission rendered the search unreasonable. *Id.* at 270.

The Sixth Circuit, too, has repeatedly held that a search is unreasonable if there is "strong evidence that other avenues of inquiry" that the government forwent "might not have been futile." *Tate* v. *Flenoy*, 47 F.3d 1170, at *9 (6th Cir. 1995) (Table) (per curiam). In *United States* v. *Quinn*, 901 F.2d 522 (6th Cir. 1990), the court rejected a search as inadequate because, despite making various efforts to locate a witness, the government did not examine "county or city records," obtain the witness's "forwarding address," or "check with relatives prior to trial." *Id.* at 528. Likewise, in *Brumley*, the court rejected reliance on a witness's out-of-court testimony because "a means existed for obtaining [the witness's] presence" that the government did not pursue: invoking the Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings. 269 F.3d at 641. Conversely, in *Crown* v. *Caruso*, 108 F.3d 1376 (6th Cir. 1997) (Table), the Sixth Circuit found that the government "satisfied its burden of making a reasonable, good-faith attempt to locate" a witness because it "followed several leads into a number of states, all of which resulted in dead ends." *Id.* at *2.

2. In contrast, the Tenth Circuit, several state high courts, and now the Eleventh Circuit all hold that courts may not fault the government for *failing to take* additional investigative steps, no matter how low-cost or promising they may be, if those steps that the government *did* take were, in the court's judgment, reasonably extensive.

The Tenth Circuit, for example, has held that "the Sixth Amendment does not require the prosecution to exhaust every possible means of producing a witness at trial." *Acosta* v. *Raemisch*, 877 F.3d 918, 930 (10th Cir. 2017). In *Acosta*, the government checked the witness's "last known address," "spoke twice a week with [her] grandfather," and "enlisted the aid" of a crime unit to search "areas she was known to frequent." *Id.* at 929. The court acknowledged that prosecutors "failed to undertake several other steps it could have taken to find her," including checking her arrest records and visiting her relatives' homes. *Id.* at 930. But, in the Tenth Circuit's view, the prosecution may "engage[ ] in good-faith efforts to produce [a] witness, even though the prosecution had a lead it did not pursue." *Id.* It was enough, the court reasoned, that "the prosecution did far more than make 'absolutely no effort' to obtain [the witness's] presence at trial." *Id.* at 929.

The high courts of Rhode Island, California, and Nebraska have all taken a similar approach. In *State* v. *Sosa*, 839 A.2d 519 (R.I. 2003), the Rhode Island Supreme Court held that "the touchstone of our unavailability analysis is reasonableness, not exhaustion," and that it was immaterial whether "additional steps could have been taken" to locate an absent witness where the investigator "pursued the same avenues of inquiry that led him to locate" the witness in the past. *Id.* at 525. In *People* v. *Fuiava*, 269 P.3d 568 (Cal. 2012), the California Supreme Court held that its finding of unavailability was "not affect[ed]" by the fact "that additional efforts might have been made or other lines of inquiry pursued" to find the witness. *Id.* at 614. So too in *State* v. *Trice*, 874 N.W.2d 286 (Neb. 2016), the Nebraska Supreme

Court stated, in applying its state-law equivalent of the federal unavailability rule, that "[w]hen considering whether a good faith effort to procure a witness has been made * * * , the proper inquiry is whether the means utilized by the proponent prior to trial were reasonable, not whether other means remain available at the time of trial or whether additional steps might have been undertaken." *Id.* at 295-296.

The Eleventh Circuit firmly joined this latter camp in the decision below. The panel deemed the government's search for Vixama reasonable based on an analysis of those actions the government *did* take, without taking into account whether the government *failed to pursue* other, reasonable means for finding Vixama. *See* Pet. App. 26a-30a. It then expressly rejected the dissent's "proposed * * * rule" "that the government does not make a good-faith, reasonable effort as a matter of law" if it fails to take an "easy" step that it has "reason to believe" would lead to a witness—in this case, running a "database search" for Vixama's boyfriend's address in Delaware. *Id.* at 42a. The majority did not dispute that this step was "easy," nor that it "stood a decent chance of leading the prosecution * * * to Vixama." *Id.* Rather, it dismissed the entire inquiry proposed by the dissent as "Monday-morning quarterbacking." *Id.* at 43a, 50a. It was enough, in the majority's view, that "this is not a case where the government took *no* action when presented with a new lead." *Id.* at 43a-44a (emphasis added).

C. The Circuits are Split on Whether the Government Must Take Steps to Secure a Witness's Attendance at Trial Before Releasing the Witness from Its Custody.

Last, the Eleventh Circuit's decision widens a 7-2 split as to whether the government's actions are unreasonable if the government fails to make any efforts to secure a witness's attendance at trial before releasing that witness from its custody.

At least five Circuits and two state high courts hold that the government's failure to take such actions renders its search unreasonable. In *Burden*—a decision released just weeks after the Eleventh Circuit's decision here—the D.C. Circuit held that "the duty to use reasonable means to procure a witness's presence at trial includes the duty to use reasonable efforts to prevent a witness from becoming absent in the first place." 2019 WL 3917651, at *9. Accordingly, it held, where "[t]he government does not dispute that it made no efforts before deporting [a witness] to secure his presence at trial[,] [t]he witness *** was not 'unavailable' such that prior testimony could be admitted consistent with the Confrontation Clause." *Id.*

"Other courts *** agree." *Id.* at *7. The First Circuit held in *Mann* that "[i]mplicit *** in the duty to use reasonable means to procure the presence of an absent witness is the duty to use reasonable means to prevent a present witness from becoming absent." 590 F.2d at 368. The Fifth Circuit held in *Tirado-Tirado* that a search was unreasonable where "[t]he government failed to make any concrete arrangements with [a witness] prior to his deportation" (and then later "fail[ed] to make *** minimal ef-

forts" to get him back). 563 F.3d at 123-125. Even the Ninth Circuit in *Yida* explained that a witness is not unavailable "when the government itself shares some of the responsibility for its inability to produce the witness at trial." 498 F.3d at 956. It thus "adopt[ed] the First Circuit's approach *** [of] assessing the reasonableness of the government's actions *both before and after* [the witness's] material witness warrant was released and he was deported." *Id.* at 956-957 (emphasis in original) (citing *Mann*). The Tenth Circuit and the high courts of the District of Columbia and Rhode Island have all issued similar rulings.[2]

The Fourth Circuit disagrees. In *Rivera*, it found two witnesses "unavailable" even though "the United States by its own efforts made them unavailable," by allowing them to "le[ave] this country voluntarily after they were deposed and released from custody." 859 F.2d at 1207. In the Fourth Circuit's view, the government "had a dual responsibility" to "consider the rights of the witnesses, as well as the rights of the [defendant]," and so could not be faulted for "releas[ing] [them] from custody" and failing "to

---

[2] *See Sosa*, 839 A.2d at 526 ("the duty to undertake reasonable efforts to procure a witness's attendance at trial includes the concomitant duty to make reasonable efforts to prevent that unavailability in the first place"); *Brooks*, 39 A.3d at 883 (the reasonableness inquiry "may take into account the government's efforts *prior* to the witness going missing"); *United States* v. *Rothbart*, 653 F.2d 462, 466 (10th Cir. 1981) (faulting the government for "clear[ing] existing obstacles to [the witness's] journey outside the jurisdiction of the court by taking his deposition and releasing him from subpoena").

ensure that they would be present at trial two months later." *Id.*

The Eleventh Circuit joined the Fourth in the decision below. The panel "start[ed]" its analysis by evaluating the steps that Agent Nowicki took to find Vixama "*after* learning of Vixama's release" from the custody of the U.S. Marshals. Pet. App. 26a (emphases added). The panel did not scrutinize how the government "mistakenly released" Vixama from its custody in the first place. *Id.* at 28a. Nor did it fault the government for failing to obtain Vixama's address or contact information, to require Vixama to remain in contact with the government, or otherwise to take steps to keep track of Vixama before releasing her. And the court overlooked these omissions notwithstanding that the government had been holding Vixama on a material witness warrant, and so knew full well that she would be a key witness at petitioners' trial. *See id.* at 8a-10a.

* * *

In short, the decision below represents a dramatic deepening of division among the lower courts on three vitally important questions of Sixth Amendment law. The Eleventh Circuit joined three already-deep splits: In direct contradiction of the rules that prevail in five Circuits and three States (and in agreement with two Circuits), it permitted the government to make a less "vigorous * * * attempt to secure the presence of the witness [than] it would have made if it did not have the prior recorded testimony." *Mann*, 590 F.2d at 367; *see* Pet. App. 51a-53a. In disagreement with the rules that govern in three Circuits (but in agreement with the Tenth Circuit and three States), it allowed the government

to forgo "minimal effort[s] necessary to follow up" on a "fresh lead" as to a witness's whereabouts. *McCandless*, 172 F.3d at 268-270; *see* Pet. App. 42a-44a, 50a. And, contrary to a nearly simultaneous decision by the D.C. Circuit and the decisions of at least four other Circuits and two States (but in alliance with the Fourth Circuit), the panel found a witness unavailable despite the fact that the government "made no efforts" to "prevent [the] witness from becoming absent in the first place." *Burden*, 2019 WL 3917651, at *9; *see* Pet. App. 8a-10a, 26a.

This deep, pervasive, and growing division on one of the Constitution's core protections is intolerable. A defendant's "right * * * to be confronted with the witnesses against him" should not wax and wane depending on the jurisdiction in which he is arrested or the courthouse in which he is prosecuted. U.S. Const. amend. VI. Certiorari should be granted and the lower courts' division on the scope and meaning of the confrontation right should be resolved.

II. THE ELEVENTH CIRCUIT ERRED ON EACH QUESTION PRESENTED.

Certiorari should also be granted because, on each of the three questions at issue, the Eleventh Circuit erred. A straightforward reading of this Court's precedents, as well as the basic purposes and original meaning of the Confrontation Clause, support the other side of each split, and make clear that the circumscribed, incomplete, and belated efforts the government made to locate Vixama did not establish that she was "unavailable" to testify at petitioner's trial.

1. First, this Court has made clear that the government's possession of a witness's deposition testi-

mony does not permit the government to make a less vigorous effort to locate that witness. On the contrary, it has long held that "[t]he Confrontation Clause operates in *two separate ways* to restrict the range of admissible hearsay." *Roberts*, 448 U.S. at 65 (emphasis added). First, the Clause "establishes a rule of necessity": "[T]he prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant." *Id.* Second, "*once a witness is shown to be unavailable*," the Clause "ensur[es] the defendant an effective means to test adverse evidence," *id.* (emphasis added), by permitting the admission of testimony of "witnesses absent from trial" only if "the defendant has had a prior opportunity to cross-examine," *Crawford*, 541 U.S. at 59.

As Justice Scalia explained in *Crawford*, this two-part test is firmly rooted in the Framers' understanding of the confrontation right. *Id.* at 53-56. "[T]he Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." *Id.* at 53-54. By enshrining that protection in the Confrontation Clause, the Framers vindicated their "preference" for "face-to-face confrontation at trial," where the witness's "discrediting demeanor [can] be viewed by the factfinder" and the trial context and human nature "make[ ] it more difficult to lie against someone." *Roberts*, 448 U.S. at 63-65 & n.6 (internal quotation marks omitted).

Allowing the government to curtail its search for a witness simply because it has that witness's out-of-court testimony collapses the two discrete protections

the Confrontation Clause embodies. Under the Eleventh Circuit's approach, the government may render a witness "unavailable" in part *because* the defendant had an opportunity to cross-examine the witness. Pet. App. 50a-53a. But the Court has made clear that the Confrontation Clause embodies "two *separate*" protections. *Roberts*, 448 U.S. at 65 (emphasis added). And it has held—in accord with the Framers' own understanding—that courts may take into account that the defendant had a prior opportunity for cross-examination only "once a witness is shown to be unavailable." *Id.*

Furthermore, the Eleventh Circuit's approach is irreconcilable with the principle that "the Sixth Amendment establishes a rule of necessity." *Id.* At least until now, that rule has meant that the government must secure the attendance of a witness in court unless "no possibility of procuring the witness exists," despite the government's "'good-faith effort to obtain his presence at trial.'" *Id.* at 74 (quoting *Barber*, 390 U.S. at 724-725). The Eleventh Circuit's approach establishes what is more fairly called a rule of convenience; a witness who *could* be obtained through otherwise-reasonable effort need not be produced if the government has what it judges to be a good enough substitute for in-court testimony. Such an intentionally curtailed search can hardly be considered a "good-faith effort." *Id.*

The Eleventh Circuit and some lower courts have suggested that because a video deposition is "almost as good" as live testimony, courts have less reason to be concerned about a witness's unavailability where such a deposition exists. *Yida*, 498 F.3d at 959; *see* Pet. App. 52a-53a. But a fundamental premise of the

Confrontation Clause is that the right to "face-to-face confrontation *at trial*" is an incomparable mechanism for ascertaining truth. *Roberts*, 448 U.S. at 63 (emphasis added); *see Crawford*, 541 U.S. at 61-62. The Court has previously rejected efforts to qualify that right based on a malleable interest-balancing test or "amorphous notions of 'reliability.'" *Crawford*, 541 U.S. at 61-62. The Court should not allow lower courts to replicate that error in their interpretation of the Confrontation Clause's "unavailability" prong. *See, e.g.*, *Johnson*, 108 F.3d at 922 (stating that "[t]he question of reasonable means cannot be divorced from * * * the reliability of the former testimony").

2. The Eleventh Circuit was also incorrect to hold that a witness is unavailable despite the government's failure to take an "easy" investigative step that it had "reason to believe" would lead to that witness. Pet. App. 42a.

This Court has explained that "[t]he lengths to which the prosecution must go to produce a witness * * * is a question of reasonableness." *Roberts*, 448 U.S. at 74 (citation omitted). "The law does not require the doing of a futile act. Thus, if no possibility of procuring the witness exists * * * 'good faith' demands nothing of the prosecution." *Id.* "But if there is a possibility, albeit remote, that affirmative measures might produce the declarant, the obligation of good faith may demand their effectuation." *Id.* Put differently: The government must take "affirmative measures" that have even a "remote" prospect of locating a witness if those efforts are "reasonable[ ]" in scope. *Id.*

Every one of the Court's unavailability precedents is consistent with that straightforward principle. In *Barber*, the Court deemed the state's efforts unreasonable because it "made no effort to avail [itself] of *** alternative means of seeking to secure [the witness's] presence at *** trial," even though those methods were readily available. 390 U.S. at 724. In *Roberts*, the Court held that the government was not required to take "other steps" to locate a witness because "the great improbability that such efforts would have resulted in locating the witness *** neutralizes any intimation that a concept of reasonableness required their execution." 448 U.S. at 75-76. And in *Hardy* v. *Cross*, 565 U.S. 65 (2011) (per curiam), the Court held that the state was not required to take "additional steps" to find a witness where there was "no reason to believe" additional steps would have led to the witness. *Id.* at 71.

The Eleventh Circuit's decision cannot be squared with these precedents. It would permit the government to decline to take low-cost, routine measures that have a good chance of procuring a witness simply because the government has taken a substantial number of *other* measures that have failed. *See supra* p. 21. But the failure of some measures in no way establishes the "futil[ity]" of additional efforts. *Roberts*, 448 U.S. at 74. And where those additional efforts are routine and require little effort, it is difficult to comprehend how it would be unreasonable to "demand their effectuation." *Id.*

The Eleventh Circuit sought support for its rule in this Court's statement that, "when a witness disappears before trial, it is always possible to think of additional steps that the prosecution might have

taken to secure the witness's presence." *Hardy*, 565 U.S. at 71 (citing *Roberts*, 448 U.S. at 75); *see* Pet. App. 50a. But the Court immediately followed that observation by stating that the prosecution need not "exhaust every avenue of inquiry, *no matter how unpromising*." *Hardy*, 565 U.S. at 71-72 (emphasis added). The Court has never exempted the government from its obligation to undertake affirmative measures that *are* promising and that would require minimal expenditure of resources.

3. Finally, the Eleventh Circuit erred in holding that the government's efforts were reasonable despite the fact that the government "mistakenly" released Vixama from its custody without undertaking any measures to secure Vixama's presence at trial. Pet. App. 28a-29a.

This Court confronted a closely analogous circumstance in one of its foundational Confrontation Clause cases, *Motes* v. *United States*. There, the government took a witness "into [its] custody," but allowed him to "stay at the hotel at night with his family"; then, on the eve of trial, the witness "absconded." 178 U.S. at 468. The government "made diligent search" for the witness and put out a reward for his arrest, but those efforts proved unsuccessful. *Id.* at 469. The trial court deemed the witness unavailable and permitted his prior cross-examined testimony to be read to the jury. *Id.* at 470-471. But this Court reversed. The witness's "absence was manifestly due to the negligence of the officers of the government," the Court explained. *Id.* at 471. And the Court was "unwilling to hold it to be consistent with" the Confrontation Clause "to permit the deposition or statement of an absent witness * * * to be

read at the final trial, when * * * his absence was due to the negligence of the prosecution." *Id.* at 474.

This Court has consistently adhered to the principles announced in *Motes* in the century since. In *California* v. *Green*, 399 U.S. 149 (1970), for instance, the Court held that the Confrontation Clause permits "admitting [a witness's] testimony given at [a] preliminary hearing * * * as long as the declarant's inability to give live testimony is in no way the fault of the State." *Id.* at 166 (citing *Motes*); *see also id.* at 167 n.16 (the "necessity" that supports the unavailability doctrine is "the State's 'need' to introduce relevant evidence that through no fault of its own cannot be introduced in any other way"). And it is not hard to see why. Among other reasons, "[f]ailing to factor the government's own contribution to the witness's absence into the Confrontation Clause analysis would warp the government's incentives," *Burden*, 2019 WL 3917651, at *7, and "sanction the government's procuring depositions of witnesses, especially shaky witnesses, but then discourage attempts to bring the witness to trial so long as the government is satisfied with what is in the transcript," *Mann*, 590 F.2d at 367 (footnote omitted).

This case is on all fours with *Motes*. The government's release of Vixama without making any arrangements necessary to secure her testimony was plainly the result of "negligence"—on the part of ICE, which failed to enforce its immigration detainer, and on the part of the prosecution, which knew that Vixama was a material witness and would need to be located soon thereafter. *See* Pet. App. 10a n.2, 28a, 45a (acknowledging that Vixama "was mistakenly

released"). As *Motes* makes clear, even a "diligent search" cannot compensate for this clear breach of the government's obligations. *Motes*, 178 U.S. at 469. Yet the Eleventh Circuit not only permitted the admission of Vixama's testimony, but exempted the government from any scrutiny for its failure to retain custody of Vixama or release her on terms that would ensure her presence at trial. If the facts of *Motes* occurred today in the Eleventh Circuit, it is difficult to see how a court could come out the same way as this Court following the decision below.

III. THIS CASE IS OF CONSIDERABLE IMPORTANCE.

This case is profoundly important. Every day, in every jurisdiction in this country, criminal defendants are placed in jeopardy of life and limb based on the testimony of witnesses for the prosecution. Ensuring that prosecution witnesses testify in court, subject to live cross-examination before a jury, is one of the most basic protections our criminal justice system affords the accused, and provides a vital check against wrongful convictions. *See Crawford*, 541 U.S. at 61-62; *Roberts*, 448 U.S. at 63; *Green*, 399 U.S. at 158. The "genius of [this] 18th-century device" has not diminished "as applied to 21st-century evidence." *Williams* v. *Illinois*, 567 U.S. 50, 119 (2012) (Kagan, J., dissenting). The examples are too numerous to count in which witnesses who appeared reliable in pretrial examinations faltered when placed on the stand, face-to-face with the person accused and the finder of fact ultimately responsible for determining their truthfulness.

To work properly, however, the Confrontation Clause requires the government to make "a good-

faith effort" to find the witnesses whom it wishes to employ against the defendant. *Barber*, 390 U.S. at 724-725. The government has incomparable resources to locate witnesses that criminal defendants lack—particularly vulnerable and poorly-resourced defendants such as the aliens in this case. And only the government has the power to hold witnesses in custody or use the tools of state power to find them. If the government's obligation of good faith is slackened, then more defendants will be tried and convicted on the basis of out-of-court statements, without the protections afforded by live cross-examination before the jury.

The Eleventh Circuit's decision represents the culmination of an alarming series of precedents in which lower courts have gradually chipped away at the government's burdens under the Sixth Amendment. In a single sweeping decision, the Eleventh Circuit joined multiple other Circuits and state courts in sanctioning not one but three far-reaching limitations on the confrontation right: prosecutors in the Eleventh Circuit may now (1) curtail their efforts to find a witness whom they have already deposed; (2) forgo minimally costly measures that the government has reason to believe would find a witness; and (3) release witnesses from their custody without making any attempt to secure their attendance at trial. Any one of these limits would represent a dangerous erosion of the Confrontation Clause's protection that would merit this Court's review. Together they represent a wholesale retreat from the protections the Confrontation Clause affords.

If left undisturbed, this decision will inevitably cause more witnesses to be deemed "unavailable,"

and so enable more defendants to be tried without an opportunity to confront the witnesses against them at trial. And it will open the door to predictable abuses by federal, state, and local prosecutors throughout the Eleventh Circuit, who now have a strong incentive (and a potent justification) to do less in locating witnesses whom they do not wish to subject to the "crucible" of in-court cross-examination. *Crawford*, 541 U.S. at 61.

This case is a compelling vehicle to bring the Eleventh Circuit and other courts in line with this Court's precedents. Each of the issues is starkly presented: Agent Nowicki repeatedly stated that he curtailed his efforts because he had Vixama's deposition testimony; conducting a database search for the boyfriend's address was unquestionably "easy" and something the government had "reason to believe" might locate Vixama; and the government indisputably did nothing to secure Vixama's attendance at trial before releasing her. There is accordingly no factual dispute. The only question is whether this conduct rendered the government's efforts unreasonable. And the Court has the benefit of two exhaustively detailed opinions airing competing views on that question. *See* Pet. App. 1a-105a.

Furthermore, there is no procedural impediment that would hamper the Court's review. The case is on direct review. Petitioners vigorously objected to the admission of Vixama's deposition at trial and on appeal. *Id.* at 5a-6a, 112a-114a. And the majority conspicuously did "not argue" that "the admission of the deposition testimony was *** harmless," as it plainly was not. *Id.* at 103a-104a (Rosenbaum, J., dissenting); *see* Pet. App. 152a-153a (government's

acknowledgment that Vixama was "an essential witness to this case"). Resolution of the merits of the Confrontation Clause issues would therefore be dispositive as to whether petitioners' convictions must be vacated.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

MICHAEL CARUSO
Federal Public Defender
BRENDA G. BRYN
ANSHU BUDHRANI
Assistant Federal Public Defenders
1 E. Broward Blvd.
Suite 1100
Ft. Lauderdale, FL 33301
Counsel for Richard Delancy

ALBERT Z. LEVIN
ALBERT Z. LEVIN, P.A.
Courthouse Center
40 N.W. 3d St., Ste. 200
Miami, FL 33128
Counsel for Renado Smith

NEAL KUMAR KATYAL
Counsel of Record
MITCHELL P. REICH
HOGAN LOVELLS US LLP
555 Thirteenth St., N.W.
Washington, D.C. 20004
(202) 637-5600
neal.katyal@hoganlovells.com
Counsel for Petitioners

SEPTEMBER 2019