No. 24-1082

In the Supreme Court of the United States

AGHEE WILLIAM SMITH, II,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

REPLY IN SUPPORT OF CERTIORARI PETITION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

INTRODUCTION

The government does not dispute that there is a circuit split on the kind and degree of effort required to meet the test for unavailability under the Confrontation Clause. Nor does it dispute that it made no effort in Smith's case to *compel* three of his accusers to appear live. The government's position is that, because it "*informed* the victim witnesses that they would need to attend trial," and the witnesses "*informed* the government that they could not travel to Virginia," it could deem those witnesses unavailable without any use of the judicial process. Gov. 8 (emphases added) (quotation marks omitted). As Judge Heytens explained in his dissent, the government is "unable to cite any case" for this view, and its approach would "erod[e] criminal defendants' confrontation rights whenever a witness's reasons for not appearing are valid and sympathetic." A52, 56. The Court should grant certiorari.[1]

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[1] For purposes of certiorari, we have assumed that the witnesses had plausible reasons for declining to testify, because the question presented turns on the government's efforts. But we note that the government's claims about those witnesses disintegrated under gentle scrutiny. For example, one witness, S.B., said she was unable to travel to trial because of anxiety. She later admitted that she had "recovered" from her anxiety; that she had been "speaking" to women's business groups about her recovery; and that she was planning to move to Virginia—the state of Smith's trial. The government's factual discussion (Gov. 2-3, 8) omits these points.

ARGUMENT

A. The Fourth Circuit's Decision Created A Split In Authority.

Under this Court's precedents, a witness is "unavailable" only if the government has made "good-faith efforts * * * to locate and present" the witness—using any "procedures" by which "the witness *could* be brought to the trial." *Ohio v. Roberts*, 448 U.S. 56, 74, 77 (1980) (emphasis added). But in the government's view, it may simply ask a witness to appear at trial, "corroborate[]" the witness's reasons for declining to appear, and decide on its own whether those reasons are justified. Gov. 8. This view is consistent with the Fourth Circuit's decision: that the Confrontation Clause does not require any "specific step to secure the witness's appearance." A37.

That position, however, conflicts with the great weight of authority. Courts have articulated the opposing view in a variety of ways:

- The government "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." *United States v. Burden*, 934 F.3d 675, 686 (D.C. Cir. 2019) (emphasis added) (quotation marks and brackets omitted).

- The government must "make *concrete arrangements* for [a witness's]

attendance at trial," including serving him "with a subpoena." *United States v. Tirado-Tirado*, 563 F.3d 117, 123-24 (5th Cir. 2009) (emphasis added).

- The government must "pursue *all available* leads." *State v. Lee*, 83 Haw. 267, 279 (1996) (emphasis added).

- The government must "*compel* [a witness's] attendance" via "*the court's process*." *People v. Foy*, 245 Cal. App. 4th 328, 348-50 (2016) (emphases added).

- The government's efforts "must be *unstinting*." *State v. King*, 287 Wis. 2d 756, 759 (2005) (emphasis added).

- A "witness's known reluctance to testify *adds* to the government's burden * * * because it makes her failure to appear voluntarily all the more foreseeable." *Brooks v. United States*, 39 A.3d 873, 886 (D.C. 2012) (emphasis added).

The government does not dispute that the Fourth Circuit has a very different conception of the good-faith test than these other courts. But it insists that this case is "factually distinct from" the others we cited. Gov. 10. For example, the government says that *Burden* and *Tirado* are different because they "involved witnesses who had been removed from the country before trial." *Id.* If anything, though, that made the situation more difficult for the government than in Smith's case—which is why the courts held that the government needed to make efforts *beyond* a

subpoena to secure the presence of the witnesses. *Burden*, 934 F.3d at 683, 688; *Tirado*, 563 F.3d at 123.

It is true, as the government points out, that both courts found the government partially responsible for the difficulty of securing the witnesses. Gov. 10-11. But that factor simply increased the government's already substantial burden. In every case, *Burden* explained, the government must make efforts that are "as vigorous as that which the government would undertake to secure a critical witness if it has no prior testimony to rely upon." 934 F.3d at 686 (brackets omitted). "Where the government itself bears some responsibility for the difficulty of procuring the witness, * * * [it] will have to make *greater exertions* to satisfy the standard." *Id.* (emphasis added).

The government also notes that *Burden* "reject[ed] any *per se* rule that no witness the government deports can be considered unavailable" (934 F.3d at 689), and that neither *Burden* nor *Tirado* "adopts [a] categorical subpoena rule." Gov. 11. We have not suggested that there are entire categories of witnesses—like deportees—who can never be deemed "unavailable." And there are certainly situations where a subpoena will be futile—for example, when the witness is not within the court's subpoena power. But the government is still "unable to cite any case where a witness within the trial court's subpoena power was declared constitutionally 'unavailable' despite the government never even serving a subpoena." A57 (Heytens, J., dissenting).

The government summarily dismisses our other cases because they "assessed unavailability in

light of the 'totality of the circumstances.'" Gov. 11-12. But those circumstances only confirm that the government's efforts fell far short here. In *Lee*, the state had no idea where the witnesses were. 83 Haw. at 271. In *Brooks*, an "unreliable" witness went missing in the middle of trial. 39 A.3d at 876, 878. And in *King*, the witness was terrified about testifying because the defendant had "raped, robbed, and beat" her. 287 Wis. 2d at 759. In each case, however, the court held that a subpoena was required, and stressed the distinction between a witness's willingness to testify and the government's efforts to compel the witness to testify. By focusing entirely on the former, the Fourth Circuit created a split in authority.[2]

B. The Government's Authorities Do Not Support Its Position.

The cases cited by the government (Gov. 9-10) further underscore the novelty of the decision below. In *Hardy v. Cross*, 565 U.S. 65 (2011), this Court explained that it has "never held that the prosecution must have issued a subpoena if it wishes to prove that a witness *who goes into hiding* is unavailable." *Id.* at 71 (emphasis added). There, the Court denied relief

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[2] The government notes that it "told the witnesses that the government was serving them with subpoenas." Gov. 8 (quotation marks omitted). But it is undisputed that the government never actual attempted service. A55. The government also says that "nothing in the record suggest[s] the witnesses would have complied with a subpoena." Gov. 10. But as Judge Heytens explained, "there is at least a *possibility*—however remote—that a person who has expressed an unwillingness or inability to travel to attend a trial may change their tune when presented with a legal document ordering them to appear." A55-56 (quotation marks omitted).

under AEDPA where the state court found that the prosecutor had made "superhuman efforts to locate" the witness. *Id.* at 69. That case bears no resemblance to Smith's, in which "[t]he government knew where the witnesses were." A54-55 (Heytens, J., dissenting).

Next, the government cites cases where witnesses were permitted to testify remotely because of age-related infirmities or health conditions. Gov. 9. These cases, too, do not support the decision below. In *United States v. Bond*, 362 F. App'x 18 (11th Cir. 2010), the government claimed that, "due to age and physical limitations, the victims would be unable to travel to Georgia to testify at trial." *Id.* at 19. The Eleventh Circuit did not address whether the government made good-faith efforts to procure the witnesses. It instead held that the defendant had waived his Confrontation Clause claim because he had "never challenged" the district court's finding of unavailability. *Id.* at 22; *see also id.* (briefly discussing the standard for unavailability under Rule 804(4), not under the Confrontation Clause); *United States v. Keithan*, 751 F.2d 9, 12 (1st Cir. 1984) ("Keithan failed . . . to challenge the witnesses' inability to attend trial. Instead, she based her attack on the availability of alternate government witnesses who *could* attend the trial." (emphasis in original)).

In *United States v. Mallory*, 902 F.3d 584, 590 (6th Cir. 2018), the government sought to introduce the deposition testimony of a witness "suffering from a number of debilitating conditions," including "dementia," "bladder cancer," and "acute renal failure." *Id.* 589 (brackets omitted). Unlike here, the government submitted "*medical records*" showing that

"the witness's specific symptoms and the duration and the severity of the illness preclude[d] the witness from testifying." *Id.* at 590 (emphasis added) (quotation marks omitted). The defendant did not argue that the government should have subpoenaed the witness; her main position was that the records were not quite up to date. *Id.* The Sixth Circuit declined to "require the government to disprove the possibility of miraculous rejuvenation," or to "provide more medical records confirming what everyone already knew." *Id.* (quotation marks omitted).

Similarly, *United States v. McGowan*, 590 F.3d 446 (7th Cir. 2009), involved a witness who was "almost bedridden," "required oxygen twenty-four hours a day, and "suffered from severe diabetes, diabetic neuropathy, and biliary cirrhosis, among other things." *Id.* at 450. The district court held an evidentiary hearing to determine the unavailability of the witness, complete with reports and affidavits from treating physicians. *Id.* at 454-55. Again, the defendant did not take issue with the government's efforts to produce the witness; his complaint was that the trial court had not conducted a new evidentiary hearing "on the *day of trial*." *Id.* at 454 (emphasis added). The Seventh Circuit held that there "was nothing to be gained by delaying the trial to hold an additional evidentiary hearing on an issue over which there was no serious dispute." *Id.*

In sum, none of these cases addressed whether the government made sufficient efforts to compel the witnesses' presence at trial, because the defendants never challenged (or waived) any argument on that point. And in each case, there were medical records

leaving little dispute that the witnesses were entirely debilitated. Here, the government did nothing more than *observe and document* the alleged justifications for the witnesses' refusal to attend trial. If that is sufficient, the unavailability rule has no teeth.

C. The Court Should Reject The Government's Conclusory Harmless Error Argument.

Finally, the government includes a half-page argument that "any error in admitting the witnesses' testimony was harmless." Gov. 12-13. The Fourth Circuit majority did not adopt that rationale, and with good reason: "The government has been unable to identify a single case finding it harmless to admit the entire testimony of a witness who accused the defendant of committing a crime—much less a case where the same violation happened three times during one trial." A57-58 (Heytens, J., dissenting). The government "repeatedly referenced all three absent witnesses by name during both its initial closing argument and its rebuttal." A58 (Heytens, J., dissenting). Its brief ignores all these points. This case presents a clean vehicle to resolve a critical constitutional question.

CONCLUSION

The Court should grant Smith's petition for writ of certiorari.

Respectfully submitted,

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