No. 25-512

IN THE

Supreme Court of the United States

JIBRIL ADAMU,

Petitioner,

v.

UNITED STATES,

Respondent.

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

REPLY BRIEF

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INTRODUCTION

Petitioner Jibril Adamu respectfully submits this Reply to the government's Opposition ("Opp.") and in further support of his Petition for a Writ of Certiorari ("Pet."). The government's Opposition fails to meaningfully address the primary points Adamu raises in the Petition. This Court should grant Adamu's Petition (1) to resolve the circuit split on whether the crime of possession with intent to distribute under 21 U.S.C. §959(c)(2) applies extraterritorially and (2) to provide clarity on criminal defendants' right to cross-examine analysts who create extraction reports.

REASONS FOR GRANTING THE PETITION

I. Section 959(c)(2) Does Not Apply Extraterritorially

1. The government argues this Court should not grant the Petition, because Adamu was convicted of conspiring both to distribute under §959(c)(1) and to possess with intent to distribute under §959(c)(2), rendering any error here harmless. *See* Opp.9. In effect, then, the government seeks to leave this circuit split unresolved in perpetuity. Possession with intent to distribute and distribution are almost always charged together. *See Thompson*, 921 F.3d at 274 (concurring opinion).[1] Thus, the government's argument would render this issue virtually incapable of resolution. In the meantime, defendants will continue to challenge the extraterritorial application of §959(c)(2)

1. Cases previously cited in the Petition are short-cited herein. Unless otherwise noted, case text quotations omit all internal quotation marks, citations, alterations and footnotes.

in cases outside of the D.C. Circuit, which will consume valuable judicial resources throughout the country. *See, e.g.*, *United States v. Blount*, 764 F. Supp. 3d 281, 290 (W.D. Pa. 2025); *United States v. Sosa-Egas*, 2022 U.S. Dist. LEXIS 71829, at *5 (M.D. Fla. Apr. 19, 2022). This Court's resolution of this narrow legal issue would obviate the need for continued litigation in the lower courts over the reach of this frequently charged statute.

Contrary to the government's claim, this Petition presents the ideal vehicle to resolve this circuit split, because it presents a purely legal question—there is no harmlessness barrier here. The Second Circuit did not address harmlessness and solely ruled on the legal issue. Pursuant to this Court's usual practice, it may decide the purely legal question of whether §959(c)(2)'s extraterritorial application was erroneous and remand to the Second Circuit to address harmlessness. *See Neder*, 527 U.S. at 25; *Carella v. California*, 491 U.S. 263, 266–67 (1989); *Rose v. Clark*, 478 U.S. 570, 584 (1986).

Even if this Court is inclined to consider harmless error, the error here was not harmless. The harmless error analysis in *Thompson* is distinguishable. There, the evidence was strong for both distribution and possession with intent to distribute. 921 F.3d at 269. Here, if credited, the evidence was stronger on the possession charge as compared to the distribution charge. The government's strongest evidence against Adamu (in a weak case overall) was that he was the pilot of a plane on which one kilogram of cocaine was allegedly found. The jury could have concluded this evidence supported Adamu's participation in a possession conspiracy while on this flight, but that Adamu was not part of a broader distribution conspiracy.

It is therefore entirely possible the jury convicted Adamu on the possession charge, but not the distribution charge, charged in the same count. However, it is impossible to know, because the jury returned a general verdict on that count. Thus, the error is not harmless, and this Court should overturn the verdict. *See United States v. Ekinci*, 101 F.3d 838, 844 (2d Cir. 1996).

2. On the merits, the government fails to counter the fact that §959(c)(2) is unambiguous, based on the canon *expressio unius est exclusio alterius*. *See Thompson*, 921 F.3d at 266. The government fails to even address the canon, let alone offer any reason why it does not apply. The canon means "expressing one item of an associated group or series excludes another left unmentioned." *Esteras*, 145 S. Ct. at 2040. In several of §959's subsections—specifically §959(a), (b), and (d)—Congress omitted the word "possession," using only "manufacture or distribution." Whereas, in the statute's title and subsection (c), Congress used the words "possession, manufacture or distribution." There is no clearer example of Congress knowing how to use a word, here "possession," and intentionally excluding that word from the provision extending extraterritorial jurisdiction. Therefore, Congress intentionally omitted the word "possession" in the extraterritorial provision in §959 and, thus, did not intend it to apply to the possession crime.

This Court's precedent applies a presumption against extraterritoriality to the provision. That presumption requires a court to consider whether "Congress has affirmatively and unmistakably instructed that the provision at issue should apply to foreign conduct." *Abitron*, 600 U.S. at 417–18. The presumption applies with

full force here. The provision is unambiguous. Congress did not "affirmatively and unmistakably" instruct the provision applies extraterritorially. *Id.* And, even if the statute were ambiguous, the presumption and the rule of lenity—which the government did not even address—require the Court to construe the statute against extraterritorial application. *Aramco*, 499 U.S. at 250–51; *Davis*, 588 U.S. at 464.

3. The government argues this plain reading creates "anomalous" results. Opp.7. Not so. This reading of statute, excluding extraterritorial application of possession with intent to distribute, makes perfect sense. Congress reasonably concluded the lower-level possession crime occurring abroad does not justify the expenditure of the significant resources to extradite and try a person here, instead opting to expend such resources only on the more serious crimes of distribution and manufacturing. This Court should "give effect to, not nullify," Congress' legislative determination. *Esteras*, 145 S. Ct. at 2041.

The government's remaining arguments are a rehash of those raised in—and rejected by—*Thompson*. *See* Opp.6–9. They are all meritless for the same reasons articulated there. *See* 921 F.3d at 266–67 (rejecting argument that, absent extraterritorial application, §959(c)(2) would be superfluous); *id.* at 266 (rejecting argument that "acts of" distribution would include myriad preceding acts as "unlikely reading"); *id.* at 268 (refusing to examine what "congressional intent might lurk unexpressed in the statute").

Regarding the government's claim that reading §959 to exclude extraterritorial application of the possession

crime renders it "redundant" of §841(a), Opp.7, such an argument is no basis to discount the statute's plain text. As this Court has noted, "[a]ny overlap between [two statutes] is beside the point." *Pasquantino v. United States*, 544 U.S. 349, 358 n.4 (2004). "The Federal Criminal Code is replete with provisions that criminalize overlapping conduct." *Id.* "The mere fact that two federal criminal statutes criminalize similar conduct says little about the scope of either." *Id.*

In any event, §959(c) is not as redundant as the government claims. Indeed, it has a much narrower scope than §841, insofar as it specifically criminalizes possession with intent to distribute aboard an aircraft. In that regard, it reflects a legislative determination to prioritize that specific crime, by making it a separate charge available on top of §841(a), which increases the sentencing exposure for a person convicted of both crimes for the same conduct. *See Setser v. United States*, 566 U.S. 231, 236 (2012). The government is wrong that the separate domestic application of §959(c) "has no independent force at all." Opp.7.

II. The Extraction Reports Contain Testimonial Hearsay

1. The government argues the Confrontation Clause does not require cross-examination of "data[] which has no human author," debating about whether CNP analyst Bakmaz or a machine was the "author" of the Extraction Reports and whether the reports contained a "human's interpretation." Opp.10–11. But its focus on authorship and interpretation are meant to distract from the actual question at issue, namely, whether the Extraction Reports

contain Bakmaz's "statements" under Rule 801. The government fails to even cite the rule, let alone explain why Bakmaz's written input and selections into Cellebrite, which are reflected in the Extraction Reports, are not his "statements" thereunder. *See* Fed. R. Evid. 801(a) ("statements" include "written assertion" and "nonverbal conduct" if "the person intended it as an assertion"). Its sidestep is telling. Bakmaz's "statements" about the extraction process are clearly reflected in the reports, whether they were generated by a machine or not and whether the reports reflect "a human's interpretation" or not. The government offered those "statements" for their truth. They are hearsay. *See* Fed. R. Evid. 801(c).

2. In urging otherwise, the government effectively reiterates arguments *Bullcoming* already rejected, claiming Bakmaz need not be cross-examined because the "extraction reports constitute the software program's own reporting of which automated processes were run and what resulting data was extracted." Opp.11. In *Bullcoming*, this Court rejected the proposition the analyst who conducted the laboratory test was a "mere scrivener," such that the "true accuser" was the machine that ran the test, while the analyst simply recorded results. *Bullcoming*, 564 U.S. at 659–60. The analyst's report contained a number of "representations, relating to past events and human actions not revealed in raw, machine-produced data," which were "meet for cross-examination." *Id.* at 660. The Court cited the report's representations the analyst had received the sample intact with an unbroken seal, checked to ensure the forensic report number and sample number corresponded, and performed a particular test, adhering to a precise protocol. *Id.* Thus, the analyst did more than simply transcribe the test results.

Bearing these principles in mind, *Bullcoming* identified a litany of problems presented by surrogate testimony about a machine-run laboratory test. The state court there had concluded the testifying analyst, Razatos, could substitute for the analyst who conducted the test, Caylor, "because Razatos qualified as an expert witness with respect to the gas chromatograph machine and...laboratory procedures." *Id.* at 661. "But surrogate testimony of the kind Razatos was equipped to give could not convey what Caylor knew or observed about the events his certification concerned, *i.e.*, *the particular test and testing process he employed*." *Id.* at 661 & n.7 (emphasis added). Moreover, without Caylor taking the stand, defense counsel could not ask questions "designed to reveal" his "incompetence, evasiveness, or dishonesty." *Id.* at 662; *Melendez-Diaz*, 557 U.S. at 319.

3. Here, as in *Bullcoming*, Bakmaz was no mere scrivener. His report contained "representations, relating to past events and human actions not revealed in raw machine-produced data." *Bullcoming*, 564 U.S. at 660. He made representations about the type of phones he examined, the phones' IMEI numbers, the date and time of the extractions, the date and time the reports were generated, the types of extractions he performed and the profiles and equipment he used, information of note about the process, and the information he was able to locate. All of this was "meet for cross-examination." *Id.*

Although the government attempts to minimize Bakmaz's actions by describing them passively, *see* Opp.11 ("the inputs with which it was run," "the report was generated," "which automated processes were run and what resulting data was extracted"), Bakmaz actively

performed these tasks and inputted information about the process into the Extraction Reports. In other words, artificial intelligence did not conduct the Cellebrite extraction process; a human did. The Extraction Reports reflect his hearsay statements about that process, and Adamu had the right to cross-examine him about that process.[2] *See id.*; Fed. R. Evid. 801.

But beyond the four corners of the Extraction Reports, as in *Bullcoming*, Adamu had the right to confront Bakmaz about not just the "particular [extraction] and [extraction] process he employed," *Bullcoming*, 564 U.S. at 661, but also about his proficiency in conducting it, the care taken in handling the evidence, and his veracity, *see id.* at 661–62, 661 n.7. Santos, the SDNY analyst who testified at trial, knew nothing about what happened in Croatia, so Adamu could not cross-examine him regarding any of these facts.

In particular, among other questions, the government denied Adamu the opportunity to cross-examine Bakmaz about (1) how the phones were stored in Croatia during the nearly one-year period for which there is no record; (2) who had access to them during that time; (3) whether the phones were manipulated during that period; (4) whether Bakmaz was properly trained; (5) whether Croatian authorities had proper procedures and whether Bakmaz adhered to them; (6) whether previous failed or successful extractions on the phones may have altered the data;

2. The government claims Adamu was "wrong to assert that Santos did not even review the forensic images, which contain the raw data," because "Santos *did* review the forensic images." Opp.11 n.1. But Santos testified clearly that he "didn't look at the original forensic image." Tr. 883:20–21.

(7) whether Bakmaz selected the appropriate extraction methods, and whether those methods captured more or less data than other methods available; (8) why he took manual screenshots of certain data and whether he missed certain data in that process; (9) whether he excluded certain information from the reports and, if so, why; and (10) whether he or anyone else altered the reports with readily-available software.

Furthermore, the government denied Adamu the ability to cross-examine Bakmaz about his veracity and bias, including whether he had faced any previous disciplinary actions, previously lied on reports or in testimony, or sought to curry favor with his superiors or U.S. authorities. *See Melendez-Diaz*, 557 U.S. at 318. None of these questions were asked, and none were answered at trial.

In upholding Santos's surrogate testimony, the Second Circuit disregarded *Bullcoming*'s admonition not to "dispens[e] with confrontation simply because the court believes that questioning one witness about another's testimonial statements provides a fair enough opportunity for cross-examination." 564 U.S. at 662. By permitting such surrogate testimony, the Court insulated the report's underlying testimonial statements from cross-examination, while simultaneously allowing them to be used against Adamu. The Confrontation Clause does not permit this outcome. *See Smith*, 602 U.S. at 799; *Bullcoming*, 564 U.S. at 660–62; *Davis*, 547 U.S. at 826.

4. Seeking to avoid this conclusion, the government attempts to distinguish cases concluding a non-testifying analyst's input into extraction reports qualifies as

testimonial hearsay. *See* Opp.12. Specifically, it cites the Fourth Circuit's statement in *Arce* that "a Cellebrite report that stopped at downloading the files would not typically implicate the Confrontation Clause." 49 F.4th at 392. That may be so, but that is not this case. As in *Arce*, the reports here reflect "input from law enforcement officers" beyond the data extracted from cell phones. *Id.* That human input is a hearsay statement under Rule 801.

The government's attempt to distinguish the Eighth Circuit's decision in *Juhic*, likewise fails. *See* Opp.12. That case supports the conclusion the Extraction Reports contain hearsay statements. There, the court opined that "[m]achine-generated records usually do not qualify as 'statements' for hearsay purposes but can become hearsay when developed with human input." 954 F.3d at 1089. Just as Bakmaz's report contained representations about the process he performed and the information he was able to locate using Cellebrite, *Juhic* concluded the computer-generated reports contained hearsay, because they reflected "human statements and determinations," *i.e.*, a series of notations in the report created by the person who generated the report.[3] *Id.*

5. The government argues "this case would be an unsuitable vehicle to consider the question presented, because the court of appeals found that any Confrontation

3. The government argues *Hajbeh* is inapplicable. Opp.12 n.2. However, *Hajbeh* stated: "Distilled to its essence, *Melendez-Diaz* holds that admission of an incriminating report summarizing a law enforcement official's forensic investigation without the opportunity to cross-examine the report's author violates the Confrontation Clause." 565 F. Supp. 3d at 77. That rationale applies here.

Clause violation was harmless beyond a reasonable doubt." Opp.13. The Second Circuit, however, erred in holding the violation harmless. Although the Second Circuit reasoned the Extraction Reports "constituted only a small fraction of the government's evidence," Pet.20a, the record belies that assertion. While this Court often leaves harmless error analysis to the lower courts, it also "plainly has the authority" to overturn the lower court on this issue. *United States v. Hasting*, 461 U.S. 499, 510 (1983).

The Second Circuit failed to even address the government's extensive reliance on the Extraction Report evidence during its presentation to the jury. The government admitted 140 exhibits through Santos, who testified for hours regarding the "voluminous" evidence he read in the reports. Cooperating witness Cardona-Cardona also testified about many of those exhibits. During its jury addresses, the government repeatedly highlighted this evidence and how it corroborated Cardona-Cardona. *See, e.g.*, Tr. 989:3–7; *id.* at 990:23–25; *id.* at 993:16–20. Such extensive reliance demonstrates the improper admission of this evidence was not harmless. *See Garlick*, 1 F.4th at 136; *Becker*, 502 F.3d at 135–36.

Nor did the Second Circuit confront the jury's note sent just prior to reaching its verdict. The jury requested "all texts/WhatsApp between Adamu and Fofana or Landji," text messages derived from the Extraction Reports. *See* Tr. 1163:13–17. This note leaves no question the jury considered these text messages in the final phase of its deliberations and the Extraction Reports influenced the verdict. *See Sullivan*, 508 U.S. at 279 ("Harmless-error review looks...to the basis on which the jury actually rested its verdict."). The standard here is harmless error

beyond a reasonable doubt, and that standard cannot be met considering this jury note.

The government cites other evidence in support of its harmlessness claim, in particular, certain recordings and Adamu's post-arrest statement referencing Cardona-Cardona. That evidence, however, is not nearly as strong as the government contends. In Adamu's post-arrest statement, he allegedly said (1) he knew Cardona-Cardona, a renowned drug kingpin, was involved in drug trafficking; (2) he unsuccessfully helped him try to buy planes; and (3) he had once flown a plane without drugs that Cardona-Cardona later filled with drugs without his knowledge. As for the recordings, Adamu was not on them; they capture other persons allegedly referring to Adamu tangentially and in coded language. This evidence is hardly compelling. Accordingly, the error was not harmless beyond a reasonable doubt.

CONCLUSION

Adamu respectfully requests that this Court grant his petition for a writ of certiorari.

Respectfully submitted,

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