No. 24-1082

In the Supreme Court of the United States

AGHEE WILLIAM SMITH, II, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals permissibly admitted the videotaped testimony of three witnesses—at which petitioner and his counsel were present and engaged in cross-examination—after determining, based on the findings of the district court, that the witnesses were unavailable under the Sixth Amendment's Confrontation Clause following the government's reasonable good-faith effort to secure their presence at trial.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-58a) is reported at 117 F.4th 584. The order of the district court (Pet. App. 75a-85a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 18, 2024. A petition for rehearing was denied on November 15, 2024 (Pet. App. 86a-87a). On February 7, 2025, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including April 14, 2025, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Virginia, petitioner

was convicted on two counts of conspiring to commit mail and wire fraud, in violation of 18 U.S.C. 1341, 1343, and 1349, and four counts of wire fraud, in violation of 18 U.S.C. 1343. Pet. App. 5a, 20a, 59a-60a. He was sentenced to 156 months of imprisonment, to be followed by three years of supervised release. *Id.* at 20a, 61a, 63a. The court of appeals affirmed. *Id.* at 1a-58a.

1. Petitioner engaged in two fraudulent investment schemes, "primarily target[ing] elderly victims." Pet. App. 17a. To accomplish his fraud, petitioner "vastly inflated his own experiences and successes" and "falsely advised his victims that the * * * investments had successful track records, that they were safe * * * , and that they carried low risk." *Id.* at 18a.

Petitioner "emphasiz[ed] his religious beliefs" to his victims, "[s]everal of [whom] had learned of [petitioner] through a Christian broadcast radio show that [petitioner] had conducted about financial investments." Pet. App. 18a. And petitioner "continued to sell those fraudulent investments to his victims, even after being warned that he was being investigated * * * and sued for misrepresentations." *Ibid.*

Petitioner's fraud caused his elderly victims to suffer tens of thousands, and in some cases hundreds of thousands, of dollars in losses. See, *e.g.*, Pet. App. 18a.

2. A federal grand jury in the Eastern District of Virginia indicted petitioner on two counts of conspiracy to commit mail and wire fraud, in violation of 18 U.S.C. 1341, 1343, and 1349, and on four counts of wire fraud, in violation of 18 U.S.C. 1343. Pet. App. 5a; see *id.* at 20a, 59a-60a.

a. During the preparations for trial, the government "discovered" that three elderly victims who lived near Sacramento, California—V.H., S.B., and K.S.—could

not travel to Virginia for the trial. Pet. App. 12a; see *id.* at 12a-13a. Around the time of trial, V.H. was 73 years old; "the sole caretaker of her" blind husband, who was also suffering from "the early stages of dementia"; and could not "travel or drive long distances." *Id.* at 13a. S.B. was 81 years old; suffered from "extreme, crippling anxiety," which led to her medical retirement and rendered "her unable to travel"; and, like V.H., could not "drive long distances." *Id.* at 83a-84a; see *id.* at 13a. K.S. was 64 years old; suffered from vertigo, which "prevent[ed] him from flying"; and was also the sole caretaker of his wife, who "suffered an accident in which she was severely injured" around the time when the trial was scheduled to occur. *Ibid.*; see *id.* at 13a.

The time when the trial was scheduled to occur was also "during the COVID-19 pandemic." Pet. App. 2a. And "due to their ages and health conditions, * * * each [of the witnesses was] at increased risk of serious health complications if infected with COVID-19." *Id.* at 13a. While the government "informed" the three witnesses "that they were going to have to" attend the trial, *id.* at 84a—and "that the government was serving" them with subpoenas, D. Ct. Doc. 294-4, at ¶¶ 6, 13, 20 (Nov. 10, 2021)—each of the three elderly victims told "the Government that they [were] unable to" attend the trial in Virginia for the reasons specified above, Pet. App. 84a.

b. The government subsequently moved to take video depositions of the witnesses pursuant to Federal Rule of Criminal Procedure 15. Pet. App. 81a. Under Rule 15, "[a] party may move that a prospective witness be deposed in order to preserve testimony for trial," and "[t]he court may grant the motion because of exceptional circumstances and in the interest of justice." Fed. R. Crim. P. 15(a). Petitioner did not oppose the

motion, but he did move to exclude the trial admission of the depositions on the theory that the government had failed to show that the witnesses were unavailable to testify in person, and that admission of the testimony would violate the Sixth Amendment's Confrontation Clause. Pet. App. 12a, 81a-82a.

In response to petitioner's motion, the government provided the declaration of a U.S. Postal Inspector who "corroborated each of the witnesses' individual situations with respect to, inter alia, their health problems and inability to travel to and testify in a Virginia trial." Pet. App. 13a. In particular, government agents contacted "V.H., S.H., and S.B., and affirmed their unavailability." *Id.* at 17a (quoting *id.* at 84a). And after the originally scheduled trial date was continued, the government filed a supplemental declaration in which the inspector "explained and confirmed that the bases for the three witnesses not being able to travel to and be present at the trial * * * were unchanged and continued to apply." *Id.* at 15a; see *id.* at 14a-15a.

The district court denied petitioner's motion. Pet. App. 81a-85a. Pointing to the postal inspector's declarations, the district court determined that the government had laid "out in detail why the witnesses [were] unavailable and the good faith efforts * * * made to procure their attendance at trial." *Id.* at 83a. The court thus found that the government had "made a good faith effort to obtain their presence at trial" and that the witnesses were "'demonstrably unable to testify in person.'" *Id.* at 84a (quoting *Crawford* v. *Washington*, 541 U.S. 36, 45 (2004)).

c. At trial, the government presented evidence from 34 witnesses and introduced over 475 exhibits. Gov't C.A. Br. 18-22. The evidence included testimony from

"[m]ore than 20 victims of the conspiracy," including twelve victims of petitioner. *Id.* at 21. That testimony included the videotaped testimony of the three witnesses that the district court had found to be unavailable. See *id.* at 45-46. Petitioner had been "present with his lawyer at each of the three depositions," and "his counsel was accorded a full opportunity to cross-examine the three victim witnesses." Pet. App. 36a.

3. The court of appeals affirmed petitioner's convictions and sentence. Pet. App. 1a-58a.

The court of appeals recognized that the Confrontation Clause requires "prosecutorial authorities [to] have made a good faith effort to obtain [a witness's] presence at trial." Pet. App. 33a-34a (quoting *Barber* v. *Page*, 390 U.S. 719, 725 (1968)). The court explained that "[a] showing of good faith requires that a 'reasonable effort' be made to secure the witness's appearance." *Id.* at 37a (citing *Ohio* v. *Roberts*, 448 U.S. 56, 74 (1980), abrogated in part on other grounds by *Crawford*, 541 U.S. at 60-68). And it reasoned, based on a prior decision of this Court, that "'the law does not require the doing of a futile act,'" the actual service of a subpoena, or "any other specific step." *Ibid.* (quoting *Roberts*, 448 U.S. at 74) (brackets omitted).

On the particular facts of this case, the court of appeals found that the district court had "correctly concluded that the prosecutors engaged in good faith efforts to secure the three victim witnesses' trial presence." Pet. App. 37a-38a. It emphasized that while the government had "informed all of the deposed witnesses that they were going to have to attend and testify at trial," all three witnesses "informed the Government that they were unable to do so." *Id.* at 38a (brackets omitted) (quoting *id.* at 84a). And it noted that the

government "had reached out to the three witnesses in several instances to ascertain their ability or inability to travel and to testify in Virginia." *Ibid.*

The court of appeals was also "satisfied that the district court [did] not clearly err in concluding that the three victim witnesses suffered from medical conditions that precluded [them] from traveling long distances during the COVID-19 pandemic." Pet. App. 39a. The court of appeals explained that "[i]n this situation, public health concerns and the personal safety of the three victim witnesses provided strong support" for the district court's ruling. *Ibid.*

Judge Heytens dissented. Pet. App. 52a-58a. He questioned whether a witness can be "constitutionally 'unavailable'" if the government never served the witness with a subpoena, and took the view that the admission of the witnesses' depositions was not harmless. *Id.* at 55a-58a.

ARGUMENT

Petitioner renews his contention that the three victim witnesses were not "unavailable" for purposes of the Confrontation Clause, arguing that the government failed to make a good-faith effort to secure their trial attendance. Pet. 1, 13-14. The court of appeals correctly determined that the government made such an effort. That factbound decision does not conflict with any decision of this Court or another court of appeals. Contra Pet. 9-13. Finally, the overwhelming evidence of petitioner's guilt, including in-person testimony from other victims, makes this a poor vehicle for a writ of certiorari. This Court has previously denied a writ of certiorari when presented with a similar claim, see *Smith* v. *United States*, 140 S. Ct. 907 (2020) (No. 19-361), and should follow the same course here.

1. The Confrontation Clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him." U.S. Const. Amend. VI. That guarantee prohibits the admission of testimonial hearsay in a criminal trial unless the declarant is "unavailable" to testify and the defendant has had a "prior opportunity to cross-examine" the witness. *Crawford* v. *Washington*, 541 U.S. 36, 54 (2004).

A witness is "unavailable" if the "the prosecutorial authorities have made a good-faith effort to obtain his presence at trial." *Hardy* v. *Cross*, 565 U.S. 65, 69 (2011) (per curiam) (quoting *Barber* v. *Page*, 390 U.S. 719, 724-725 (1968)); see *Ohio* v. *Roberts*, 448 U.S. 56, 74 (1980), abrogated in part on other grounds by *Crawford*, 541 U.S. at 60-68. A good-faith effort "does not require the doing of a futile act" to procure a witness. *Roberts*, 448 U.S. at 74. If "a possibility" exists that "affirmative measures might produce the declarant, the obligation of good faith *may* demand their effectuation." *Ibid.* But whether such measures must be pursued—that is, "[t]he lengths to which the prosecution must go to produce a witness"—"is a question of reasonableness." *Ibid.* (citation omitted); see *Hardy*, 565 U.S. at 70.

Thus, where a prosecution has reasonably attempted to procure a witness's presence at trial, it does "not breach its duty of good faith effort" just because it could have taken "other steps." *Roberts*, 448 U.S. at 75. Although "[o]ne, in hindsight, may always think of other things" a prosecution could do, "reasonableness" does not require such efforts if, "[g]iven the[] facts" of the case, it is unlikely they "would have resulted in" the witness appearing and testifying. *Id.* at 75-76.

2. The court of appeals' decision in this case correctly identified the relevant precedents and applied them. As the court noted, the government informed the victim witnesses that they would need to attend trial. Pet. App. 37a-38a. Indeed, the government told the witnesses that "the government was serving" them with subpoenas. D. Ct. Doc. 294-4, at ¶¶ 6, 13, 20. The three witnesses, however, informed the government that they could not travel to Virgina due to their individual circumstances which, variously, included being the "sole caretaker" of ailing or severely injured spouses and medical conditions like extreme anxiety or vertigo that made travel impossible. Pet. App. 13a, 16a. Furthermore, "due to their ages and health conditions," each faced an "increased risk of serious health complications if infected with COVID-19." *Id.* at 13a; see *id.* at 38a-39a.

The government "corroborated" the witnesses' claims through personal observation, interactions with the witnesses (V.H. and S.B., for example, had to be driven to their depositions), and interviews. Pet. App. 13a; see *id.* at 38a, 83a-84a. And when trial was continued, the government "reconfirmed the continuing unavailability of the three victim witnesses." *Id.* at 14a. In light of the facts and circumstances, the court of appeals agreed with the district court that the witnesses were "demonstrably unable to testify in person" and that the government met its good-faith obligation. *Crawford*, 541 U.S. at 45; see Pet. App. 38a-39a. As both lower courts found, it would have been unreasonable for the government to have attempted to force the witnesses to appear knowing that their health and family conditions rendered them unable to travel across the country for trial. See Pet. App. 37a-39a, 83a-85a.

The lower courts' resolution of this case is consistent with the common law, which treated witnesses who were "unable to travel" as unavailable. *United States* v. *Shayota*, 934 F.3d 1049, 1053 (9th Cir. 2019) (O'Scannlain, J., specially concurring) (quoting *Lord Morley's Case*, 6 How. St. Tr. 769, 770 (H.L. 1666)). It is also consistent with the Federal Rules of Evidence, which consider a declarant "unavailable * * * if" he "cannot * * * testify at the trial * * * because of * * * a then-existing infirmity, physical illness, or mental illness." Fed. R. Evid. 804(a)(4). And it is consistent with decisions from other courts of appeals, which have recognized that "[t]he infirmity of an elderly witness that makes travel a 'grave physical hardship'" can render the witness unavailable under the Confrontation Clause. *United States* v. *Bond*, 362 Fed. Appx. 18, 22 (11th Cir. 2010) (per curiam); see *United States* v. *Mallory*, 902 F.3d 584, 590 (6th Cir. 2018); *United States* v. *McGowan*, 590 F.3d 446, 454-455, 456 (7th Cir. 2009); *United States* v. *Keithan*, 751 F.2d 9, 12 (1st Cir. 1984).

Petitioner nonetheless insists (Pet. 9-10, 13-14) that a witness can never be deemed unavailable unless the government issues a subpoena for the witness. But that per se rule has no sound basis in this Court's precedents. The Court 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 for Confrontation Clause purposes," *Hardy*, 565 U.S. at 71, and petitioner fails to identify any decision of this Court adopting an inflexible subpoena requirement in any other context. Such a requirement would be at odds with the Court's repeated recognition that "[t]he lengths to which the prosecution must go to produce a witness * * * is a question of reasonableness." *Id.* at 70 (quoting

Roberts, 448 U.S. at 74). And the Court has made clear that at least in some circumstances—such as a sexual assault witness so fearful of an assailant "that she is willing to risk his acquittal by failing to testify at trial"—"the issuance of a subpoena may do little good." *Id.* at 71.

On the particular facts of this case, petitioner points to nothing in the record suggesting the witnesses would have complied with a subpoena. Indeed, if anything, the record suggests otherwise. The witnesses informed the government they could not attend the trial after being told "the government was serving" them with subpoenas. D. Ct. Doc. 294-4, at ¶¶ 6, 13, 20. And no inflexible subpoena requirement mandated that the government go through the motions of serving a subpoena on victim witnesses whose "personal circumstances * * * , compounded with the pandemic, make them unavailable to appear at trial," Pet. App. 83a, and who had indicated that they would not—for verified and understandable reasons—comply, see *id.* at 38a-39a.

2. Contrary to petitioner's claim (Pet. 9-13), the decision below does not conflict with the decisions of other courts. The decisions that petitioner cites are factually distinct, and none stands for the proposition that a prosecutor must always formally issue a subpoena—regardless of the circumstances—to show that a witness is unavailable.

The two circuit decisions—*United States* v. *Burden*, 934 F.3d 675 (D.C. Cir. 2019) and *United States* v. *Tirado-Tirado*, 563 F.3d 117 (5th Cir. 2009)—each involved witnesses who had been removed from the country before trial. See *Burden*, 934 F.3d at 687; *Tirado-Tirado*, 563 F.3d at 123. In *Burden*, the D.C. Circuit took the view that the government "b[ore] some

responsibility for the difficulty of procuring the witness" and should have "ma[d]e greater exertions to satisfy the standard of good-faith and reasonable efforts." 934 F.3d at 686. And in *Tirado-Tirado*, the court of appeals found that the government had not made "'good faith' or 'reasonable' efforts to secure the physical presence of" a witness where it had "failed to make any concrete arrangements with [the witness] prior to his deportation" and "delayed attempting to contact him about making such arrangements shortly before trial." 563 F.3d at 123; see *id.* at 124-125.

This case does not involve similar circumstances. There is no reason to conclude that the D.C. Circuit would view the government as responsible for the witnesses' health issues, family situations, and the COVID-19 pandemic. Nor does this case involve facts akin to the Fifth Circuit's decision in *Tirado-Tirado*. Neither decision adopts the categorical subpoena rule that petitioner advances; indeed, the decision in *Burden* appeared to agree with the government that "any *per se* rule" about deportation would not be "[c]onsistent with the fact-intensive nature of the [good-faith] standard." 934 F.3d at 689. It is accordingly far from clear that either decision would require a result different from the one that the court of appeals reached in this case.

Petitioner similarly errs in attempting (Pet. 11-12) to find support for his per se rule in state-court decisions. In *State* v. *Lee*, 925 P.2d 1091 (1996), the Supreme Court of Hawaii assessed unavailability in light of "the totality of the circumstances as reflected in the record before" it, *id.* at 1102; while those circumstances reflected no effort to serve subpoenas, *ibid.*, the court did not hold that they would be required in a case like this one, where the witnesses made clear—for sound reasons—

that they could not appear at trial by subpoena or otherwise. The District of Columbia Court of Appeals likewise conducted "a context- and fact-specific analysis," in *Brooks* v. *United States*, 39 A.3d 873, 883 (2012), that would not necessarily require a formal subpoena in a case like this. And the similarly fact-specific decision of the Court of Appeals of Wisconsin in *State* v. *King*, 706 N.W.2d 181 (2005), abrogated in part on other grounds by *Giles* v. *California*, 554 U.S. 353, 376 (2008), is not even a decision of "a state court of last resort," Sup. Ct. R. 10(b); see also *King*, 706 N.W. 2d at 187 (emphasizing prosecution's knowledge that witness believed "she didn't have to [testify] if she didn't get a subpoena") (quoting witness's grandmother).

3. At all events, this case would be a poor candidate for reviewing the question presented because any error in admitting the witnesses' testimony was harmless. Petitioner had a full and fair opportunity to cross-examine V.H., S.B., and K.S. during their depositions, and "the videotapes allowed the jury to fully experience [the witnesses'] testimony, to view [their] demeanor, to hear [their] voice[s] and to determine [their] credibility," *McGowan*, 590 F.3d at 456.

Furthermore, the testimony of the three witnesses was only a small part of the evidence against petitioner. Even aside from extensive documentary evidence, "[m]ore than 20 victims of the vast conspiracy testified at trial," including nine other "victims to whom [petitioner] had directly sold bogus investments." Pet. App. 17a; see Gov't C.A. Br. 46. The testimony from those nine victims overlapped almost entirely with the deposition testimony of the three absent witnesses. See Gov't C.A. Br. 45-47. And the substantive wire-fraud counts on which petitioner was convicted were not

premised on fraud against any specific victims. See Indictment 28-29. Thus, overwhelming evidence supports petitioner's convictions, even apart from the videotape depositions of victims V.H., S.B., and K.S.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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