No. 05-971

In the Supreme Court of the United States

NAKIA A. ROY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record

ALICE S. FISHER
Assistant Attorney General

JOEL M. GERSHOWITZ
Attorney

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

QUESTIONS PRESENTED

1. Whether the jury instructions constructively amended the murder charge against petitioner in violation of the Fifth Amendment.

2. Whether certain out-of-court statements were admitted at trial in violation of the Confrontation Clause.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Constitution, statutes and rules:

Rules—Continued: Page

Miscellaneous:

In the Supreme Court of the United States

No. 05-971

NAKIA A. ROY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-24a) is reported at 871 A.2d 498.

JURISDICTION

The judgment of the court of appeals was entered on April 7, 2005. A petition for rehearing was denied on November 4, 2005 (Pet. App. 25a-26a). The petition for a writ of certiorari was filed on February 2, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1257.

STATEMENT

After a jury trial in the Superior Court of the District of Columbia, petitioner was convicted on one count of second-degree murder, in violation of D.C. Code Ann. §§ 22-2403, 22-3203 (1996); four counts of assault with a

dangerous weapon, in violation of D.C. Code Ann. § 22-502 (1996); five counts of possessing a firearm during a crime of violence, in violation of D.C. Code Ann. § 22-3204(b) (1996); one count of carrying a pistol without a license, in violation of D.C. Code Ann. § 22-3204(a) (1996); and one count of simple assault, in violation of D.C. Code Ann. § 22-504 (1996 & Supp. 2000). Petitioner's sentences of imprisonment on the various counts added up to a minimum of 25 years and 180 days of imprisonment and a maximum of life imprisonment. The court of appeals affirmed, with one judge concurring in part and dissenting in part. Pet. App. 1a-24a.

1. The evidence at trial showed that Nacheta Harris had been petitioner's girlfriend and the mother of his child. After breaking up with petitioner, Harris began dating co-defendant Edward Settles. On the morning in question, petitioner began running toward Harris and Settles as they arrived at the house of Harris's cousin on Valley Avenue. Seeing petitioner, Settles fled. Petitioner stopped where Harris was standing, punched her in the face, and then ran after Settles, firing three or four shots from his gun. Settles escaped. Petitioner then returned to Harris, punched her in the face again, and went to a field leading to Tenth Place. Pet. App. 2a.

Settles went to the apartment of a friend, Andre Brown, to retrieve his gun. At the request of Settles, Brown drove Settles and another friend of Settles, Bernard James, to Tenth Place. Settles was in the front passenger seat with the window down and the gun in his lap when the car entered Tenth Place. After they entered Tenth Place, petitioner emerged from a stairwell holding a gun with his arm extended. Settles fired three shots at petitioner, who returned fire with several shots of his own. Grace Edwards was fatally struck by a stray

bullet as she took her morning walk. Pet. App. 3a; Gov't C.A. Br. 8-9.

2. At petitioner's joint trial with Settles, Brown testified that, as the car carrying Settles, James, and Brown turned on to Tenth Place and Settles saw petitioner emerge from the stairwell, Settles stated, "[t]here that nigger go right there." Pet. App. 9a. The trial court admitted that and other out-of-court statements by Settles under the present sense impression exception to the hearsay rule, which, regardless of the availability of the declarant, permits the admission of out-of-court "statements describing or explaining events which the declarant is observing at the time he or she makes the declaration or immediately thereafter." *Hallums* v. *United States*, 841 A.2d 1270, 1276-1277 (D.C. 2004); see Fed. R. Evid. 803(1) .

3. The government's principal theory at trial was that petitioner was guilty of first-degree murder in that, intending to shoot Settles, he fired a bullet that struck Edwards instead.

Alternatively, the government took the position that petitioner was at least guilty of second-degree murder for his participation in the gun battle that resulted in the shooting of Edwards, regardless of whether he fired the fatal shot. Pet. App. 10a, 11a n.7. With respect to that alternative theory, the trial court instructed the jury that it could convict petitioner of second-degree murder if it found both causation and intent. The court stated that "[a] person causes the death of another person if his actions are a substantial factor in bringing about the death and if death is a reasonably foreseeable consequence of his actions." *Id.* at 11a n.8. The court also instructed the jury that it could find causation if it concluded beyond a reasonable doubt that (1) petitioner was

"armed and prepared to engage in a gun battle"; (2) he in fact engaged in the gun battle; (3) he did not act in self-defense; (4) his conduct was "a substantial factor" in Edwards's death; (5) and it was "reasonably foreseeable" that death or serious bodily injury to an innocent bystander would result of his conduct. *Ibid.* As for intent, the court instructed the jury that it must find that petitioner had "the specific intent to kill or serious[ly] injure" the decedent, or that he "acted in a conscious disregard of an extreme risk of death or seriously bodily injury" to her. *Ibid.* The jury convicted petitioner of second-degree murder, with no indication whether it relied on the "gun battle" theory or not.

4. On appeal, petitioner contended that the trial court erroneously declined to grant him a severance. He argued in part that the joint trial was prejudicial because it deprived him of the opportunity, in violation of the Confrontation Clause, to cross-examine Settles concerning his out-of-court statements that were admitted at trial—in particular, his statement "[t]here that nigger go right there" when he saw petitioner. Pet. App. 5a-6a, 9a. In rejecting the severance claim, the court of appeals found no merit to petitioner's Confrontation Clause argument. The court noted that, under *Crawford* v. *Washington*, 541 U.S. 36, 69 (2004), "the only indicium of reliability sufficient to satisfy constitutional demands [when testimonial statements are at issue] is confrontation." Pet. App. 9a. The court concluded, however, that the statement here was not testimonial within the meaning of *Crawford* because "it was not made to the police for purposes of accusation or prosecution; it was simply a present sense impression statement that Settles made to his fellow passengers." *Ibid.* The court added that because the statement "would likely have been admissi-

ble" at a separate trial, "no manifest prejudice" resulted from the trial court's refusal to grant a severance. *Ibid.*

Petitioner also contended that the trial court's "gun battle" instruction constructively amended the indictment. The court of appeals concluded that there was no constructive amendment because "the events upon which the jury rendered its verdict were [not] 'distinctly different' from the facts alleged by the grand jury." Pet. App. 16a n.13 (quoting *Carter* v. *United States*, 826 A.2d 300, 306 (D.C. 2003)). The court explained that, having been charged with first-degree murder, petitioner was on notice that the government could request a lesser-included offense instruction—in this case, "second-degree depraved heart murder." Pet. App. 16a n.13. The court added that the indictment alleged that petitioner killed Edwards by shooting at Settles, Brown and James, and that, throughout the trial, the government proceeded on the theory that petitioner and Settles engaged in a gun battle that resulted in Edwards's death. *Ibid.*[1]

ARGUMENT

1. Petitioner contends (Pet. 9-19) that the trial court's second-degree murder instruction constructively amended the indictment because it set forth a causation theory—that Edwards was shot as a consequence of a

[1] Judge Glickman filed an opinion concurring in part and dissenting in part. Pet. App. 20a-24a. He took the view that the causation instruction improperly "allowed the jury to find [petitioner] guilty of murder even if it was Settles who shot Ms. Edwards without finding that [petitioner] had already joined in the combat or had provoked Settles to shoot—i.e., without finding that [petitioner] did anything that proximately caused the fatal shot." *Id.* at 24a. Petitioner does not challenge the causation instruction on that ground in his petition for certiorari.

gun battle between Settles and petitioner—that was not charged in the relevant count.

a. A "[c]onstructive amendment occurs when 'the terms of the indictment are in effect altered by the presentation of evidence and jury instructions which so modify essential elements of the offense charged that there is a substantial likelihood that the defendant may have been convicted of'" an uncharged offense. *United States* v. *Wallace*, 59 F.3d 333, 337 (2d Cir. 1995) (quoting *United States* v. *Mollica*, 849 F.2d 723, 729 (2d Cir. 1988). As this Court stated in *Stirone* v. *United States*, 361 U.S. 212, 213 (1960), the focus of the analysis is on "whether [the defendant] was convicted of an offense not charged in the indictment."

There was no constructive amendment of the indictment here. In the first place, "the law is settled that an indictment on a greater offense puts the indictee on notice that the prosecution might also press a lesser-included charge." *Woodard* v. *United States*, 738 A.2d 254, 259 n.10 (D.C. Cir. 1999) (citation omitted). Second-degree murder, which is defined by D.C. Code Ann. § 22-2403 (1996) as killing with malice aforethought, "is clearly a lesser included offense for all purposes of first degree premeditated murder." *Fuller* v. *United States*, 407 F.2d 1199, 1228 (D.C. Cir. 1967), cert. denied, 393 U.S. 1120 (1969). Malice aforethought, for purposes of second-degree murder, embodies several distinct mental states, including "depraved heart" murder—*i.e.*, murder resulting from "a wanton and willful disregard of an unreasonable human risk * * * even if there is not actual intent to kill or injure." *Comber* v. *United States*, 584 A.2d 26, 38-39 (D.C. Cir. 1990) (en banc) (quoting Rollin M. Perkins & Ronald N. Boyce, *Criminal Law* 59 (3d ed. 1982)).

Further, the murder count against petitioner (Count 7) stated that petitioner "killed Grace Edwards, by shooting at Edward Settles, Jr., aka Pooh, Bernard James, and Andrew Brown, aka Dre, with a pistol on or about June 12, 2000 thereby causing injuries from which Grace Edwards died." Pet. App. 29a. Although that language alleged that Edwards was killed as a result of petitioner's shooting at Settles and his cohorts, it did not specify precisely how her death came about. See *Thomas* v. *United States*, 748 A.2d 931, 935-936 (D.C. 2000) (there is "no requirement that the theory [of liability] be set forth [in the indictment]"), cert. denied, 534 U.S. 917 (2001) and 540 U.S. 920 (2003). The charge certainly encompassed the theory that petitioner fired a shot at the three men that went astray and killed Edwards. But, as the court of appeals found (Pet. App. 16a n.13), it was also consistent with the theory that petitioner and Settles engaged in a gun battle that resulted in Edwards's death.

There can be no doubt that the grand jury found probable cause to believe that petitioner engaged in a gun battle with Settles that caused Edwards's death. That conclusion necessarily follows from Count 8, which charged Settles with causing Edwards's death by "engaging in a gun battle with [petitioner]." Pet. App. 29a. Read together, Counts 7 and 8 clearly establish that the grand jury found that petitioner engaged in a gun battle with Settles and that the gun battle led to Edwards being struck by a stray bullet, whether from petitioner's gun or from Settles's.[2]

---

[2] Petitioner argues (Pet. 18) that the fact that Count Eight specifically refers to murder by "gun battle" causation supports the inference that Count Seven charges only direct causation of murder. But Count 8 charged *Settles* with *second-degree* murder. Pet. App. 29a. That

b. Petitioner argues that there is a conflict among the circuits on whether a constructive amendment occurs when the theory of conviction rests on facts specifically alleged in the indictment but differs from the prosecution theory set forth in the indictment. The indictment in this case, however, did not set forth a specific theory about who—petitioner or Settles—fired the shot that killed Edwards. Rather, Count 7 was broad enough to permit conviction of petitioner on either theory.

In any event, the cases cited by petitioner (Pet. 13-17) do not help him. In most of those cases, the court of appeals reversed on constructive-amendment or variance grounds because the jury, unlike in this case, was permitted to convict based on *facts* different from those alleged in the indictment. For example, in *Lucas* v. *O'Dea*, 179 F.3d 412 (6th Cir. 1999), the jury was permitted to convict on a felony murder theory—*i.e*, on the theory that the defendant's accomplice shot the decedent during a robbery in which the defendant participated—whereas the indictment alleged only that "[defendant] shot . . . Paul Zurla with a pistol, causing his death," and did not, at least so far as the opinion indicates, even mention that the murder occurred during the commission of a felony. See *id*. at 416-418. And in *United States* v. *Doucet*, 994 F.2d 169, 172 (5th Cir. 1993), another case relied on by petitioner, the indictment alleged that the defendant unlawfully possessed an assembled machine gun, whereas the jury was allowed to convict him for possessing the unassembled parts of a machine gun, which was not alleged in the indictment. See also *United States* v. *Reasor*, 418 F.3d 466, 475 (5th

---

narrower charges were brought against Settles hardly suggests that Count 7, which charged *petitioner* with *first-degree* murder, intended to exclude a gun battle causation theory.

Cir. 2005) (allowing jury to convict for forging securities of drawee bank, whereas indictment charged forgery of securities of a church); *United States* v. *Milstein*, 401 F.3d 53, 65 (2d Cir. 2005) (allowing jury to convict for misbranding drugs on theory that drugs were contaminated, whereas indictment charged misbranding by repackaging drugs as if they were the original product); *United States* v. *Adamson*, 291 F.3d 606, 615-616 (9th Cir. 2002) (allowing jury to convict for wire fraud on basis that defendant misrepresented how computer servers were upgraded, whereas indictment charged that defendant misrepresented the fact that computer servers were upgraded); *United States* v. *Randall*, 171 F.3d 195, 210 (4th Cir. 1999) (allowing jury to convict for using a firearm in relation to a drug-trafficking offense based on predicate act other than that charged); *United States* v. *Pedigo*, 12 F.3d 618 (7th Cir. 1993) (same).[3]

c. Even assuming *arguendo* that there was a constructive amendment of the indictment, petitioner would not be entitled to relief under the plain-error standard, which applies here because this claim was not preserved

---

[3] In another case cited by petitioner (Pet. 15 n.3), the court of appeals declined to permit the government to argue that the evidence was sufficient to support the charge that defendant unlawfully took money orders from an authorized mail depository based on a different factual basis that had not been alleged in the indictment—that he took the money orders after the envelopes containing them had been delivered to his desk and he had mistakenly opened them. *United States* v. *Davis*, 461 F.2d 83, 90-91 (5th Cir.), cert. denied, 409 U.S. 921 (1972). In the two remaining cases that petitioner cites (Pet. 16, 17), the courts rejected constructive amendment claims. *United States* v. *Gonzalez Edeza*, 359 F.3d 1246, 1250-1253 (10th Cir.), cert. denied, 541 U.S. 1082 (2004); *United States* v. *Mosley*, 786 F.2d 1330, 1335 (7th Cir.), cert. denied, 476 U.S. 1184 (1986).

at trial.[4] See *Perkins* v. *United States*, 760 A.2d 604, 609 (D.C. 2000). In *United States* v. *Cotton*, 535 U.S. 625 (2002), this Court held that the plain-error standard applies to forfeited claims that an indictment failed to allege threshold drug quantities, a defect of constitutional magnitude after *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000). In the wake of *Cotton*, the courts of appeals have uniformly held that forfeited constructive amendment claims should be reviewed only for plain error. See, *e.g.*, *United States* v. *Gonzales*, 436 F.3d 560, 576-577 (5th Cir. 2006), petition for cert. pending, No. 05-10251 (filed Apr. 3, 2006); *United States* v. *Brown*, 400 F.3d 1242, 1253-1254 (10th Cir.), cert. denied, 126 S. Ct. 138 (2005); *United States* v. *Newton*, 389 F.3d 631, 638 (6th Cir. 2004), vacated and remanded on other grounds, 126 S. Ct. 280 (2005); *United States* v. *Hugs*, 384 F.3d 762, 766-767 (9th Cir. 2004), cert. denied, 544 U.S. 933 (2005); *United States* v. *Khilchenko*, 324 F.3d 917, 920 (7th Cir. 2003).

Although petitioner asserts (Pet. 18 n.4) that he did preserve his constructive-amendment claim at trial, he cites no transcript page so indicating. Although petitioner vigorously objected to the theory of causation in the challenged instruction on the ground that the case had not been tried on that theory, his objections never mentioned or asserted that the use of the instruction

---

[4] The local plain error rule mirrors the corresponding federal rule, compare D.C. R. Crim. P. 52(b) with Fed. R. Crim. P. 52(b)), and the local courts have construed it identically. See, *e.g.*, *Perkins*, 760 A.2d at 609 (citing this Court's decisions in construing local plain-error rule); see also, *e.g.*, *Baker* v. *United States*, 867 A.2d 988, 1002-1003 (D.C. 2005) (same), petition for cert. pending, No. 05-9531 (filed Feb. 21, 2006); *Williams* v. *United States*, 858 A.2d 984, 992 (D.C. 2004) (same), cert. denied, 125 S. Ct. 2954 (2005).

amounted to a constructive amendment of the indictment.[5] See 10/31/01 Tr. 516-520, 525.

Petitioner could not satisfy the plain-error standard for several reasons. First, any failure of Count 7 to sufficiently allege the government's "gun battle" theory was not "clear" or "obvious." See *United States* v. *Olano*, 507 U.S. 725, 732-734 (1993).

Second, petitioner received pre-trial notice of the theory and thus cannot plausibly claim to have been surprised or prejudiced by the "gun battle" instruction. At a joint pre-trial hearing, the government submitted a memorandum setting forth its theories of liability for both petitioner and Settles. With respect to petitioner, the memorandum stated that the government's primary theory was that petitioner was guilty of first-degree murder because he mistakenly shot Edwards, intending to shoot Settles, Brown, and James. In the alternative, the government stated that petitioner was also liable under a "depraved heart murder theory" for his participation in the gun battle on a public street, which resulted in Edwards's being shot. Pet. App. 10a.[6] At the conclusion of the hearing, the trial court ruled that it did

---

[5] Nor, contrary to petitioner (Pet. 18 n.4), does the opinion below indicate that the court of appeals considered petitioner's claim to be properly preserved. Having concluded that there was no constructive amendment, the court did not have to decide whether or not to apply the plain-error standard. See Pet. App. 16a n.13.

[6] See Gov't Mem. of Law Regarding Liability of Participants in a Gun Battle for Death of Innocent Bystander 6 ("Under traditional analysis, the evidence will establish that [petitioner] committed first degree murder by transferred intent from his continued effort to shoot and kill Settles (well after any perceived right of self defense had lapsed). Alternatively, [petitioner] also would be liable, like Settles, for depraved heart (conscious disregard) murder, as a willing participant in a gun battle on a residential street.").

not matter which defendant fired the bullet that killed Edwards, since the defendants' action "demonstrated conscious disregard of the safety of citizens in the District of Columbia when they sought to kill each other, and * * * to turn city streets into an urban battle ground." *Ibid.*

Finally, the grand jury manifestly concluded that Edwards was killed as a consequence of a gun battle between petitioner and Settles, as shown above. Moreover, if the petit jury convicted defendant of second-degree murder without relying on the "gun battle" theory, then any failure of the grand jury to charge the "gun battle" theory would certainly be harmless. And if the petit jury convicted defendant under the "gun battle" theory, it follows that the grand jury would have found that theory under its less rigorous burden of persuasion. See *United States* v. *Patterson*, 241 F.3d 912, 914 (7th Cir.) ("Once the petit jury finds beyond a reasonable doubt * * * that a particular drug and quantity was involved, we can be confident in retrospect that the grand jury (which acts under a lower burden of persuasion) would have reached the same conclusion."), cert. denied, 534 U.S. 853 (2001).[7]

2. Petitioner contends (Pet. 19-25) that certain out-of-court statements by Settles were admitted in evidence in violation of the Confrontation Clause. The only such statement he identifies is Settles's exclamation, "there that nigger go," which he made to his cohorts in the car as he observed petitioner on Tenth Place just before shooting at him. Petitioner's Confrontation

[7] Cf. *United States* v. *Mechanik*, 475 U.S. 66, 67 (1986) ("[T]he petit jury's verdict of guilty beyond a reasonable doubt demonstrates *a fortiori* that there was probable cause to charge the defendants for the offenses for which they were convicted.").

Clause claim is without merit and does not warrant further review.

a. Before this Court's decision in *Crawford*, an unavailable declarant's hearsay statement was admissible under the Confrontation Clause if the statement bore "adequate 'indicia of reliability.'" *Ohio* v. *Roberts*, 448 U.S. 56, 66 (1980) (quoting *Mancusi* v. *Stubbs*, 408 U.S. 204, 213 (1972). The government could satisfy the reliability requirement by showing either that the statement fell within a "firmly rooted hearsay exception" or that it otherwise possessed "particularized guarantees of trustworthiness." *Ibid.*[8]

In *Crawford*, the Court repudiated that framework with respect to "testimonial" hearsay, holding that testimonial hearsay would no longer be admissible under the Confrontation Clause based on a showing of the statement's reliability. The Court held that the Confrontation Clause categorically bars the admission of testimonial hearsay unless the witness is unavailable to testify and the defendant has had a prior opportunity for cross-examination. 541 U.S. at 68.

The Court did not resolve whether, with respect to "nontestimonial" hearsay, the Confrontation Clause continues to condition admissibility on a showing that

[8] Although petitioner contended on appeal that the admission of Settle's out-of-court statements violated the Confrontation Clause, he advanced that contention only as part of his claim that he should have been granted a severance, not as an independent claim that warranted reversal. Even if that did not constitute a waiver of the instant claim, petitioner's truncated argument led to the court of appeals' very brief discussion of the issue, which addressed only the question whether the statements were "testimonial" under *Crawford*, and did not address either the "firmly rooted hearsay exception" or the "particularized guarantees of trustworthiness" strands of the *Roberts* analysis. See Pet. App. 9a.

the statement falls within a firmly rooted hearsay exception or otherwise bears adequate indicia of reliability. The Court observed that its analysis "casts doubt on [its] holding" in *White* v. *Illinois*, 502 U.S. 346, 352-353 (1992), that the Confrontation Clause constrains the admissibility of nontestimonial hearsay; but the Court explained that it "need not definitively resolve whether [*White*] survives our decision today" because the issue was not "squarely implicate[d]." *Crawford*, 541 U.S. at 61. Accordingly, the courts of appeals have assumed after *Crawford* that the Confrontation Clause continues to condition the admissibility of nontestimonial hearsay on a showing that the statement falls within a firmly rooted hearsay exception or otherwise bears adequate indicia of reliability. See, *e.g.*, *United States* v. *Hendricks*, 395 F.3d 173, 179 n.7 (3d Cir. 2005); *United States* v. *Saget*, 377 F.3d 223, 227 (2d Cir. 2004), opinion supplemented, 108 Fed. Appx. 667 (2d Cir. 2004), cert. denied, 543 U.S. 1079 (2005).

b. Contrary to petitioner (Pet. 21), Settles's out-of-court statements did not come within *Crawford*'s categorical rule, because they were not testimonial in nature. Although the Court in *Crawford* did not provide a "comprehensive definition" of what constitutes "testimonial" hearsay, it did explain that, "[w]hatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a formal trial; and to police interrogations." 541 U.S. at 68. In addition, the Court made clear that such statements as a "casual remark" to a friend (*id.* at 51) and statements in furtherance of a conspiracy (*id.* at 56) —*i.e.*, statements made without any reasonable expectation that they would be used prosecutorially—are nontestimonial. Settles's statements to his cohorts in

the car while they were searching for petitioner fall in the latter category, and they do not bear any resemblance to the type of statements the Court in *Crawford* defined as testimonial.

There is no need to hold the petition pending this Court's decisions in *Davis* v. *Washington*, No. 05-5224 (cert. granted, Oct. 31, 2005), and *Hammon* v. *Indiana*, No. 05-5705 (cert. granted, Oct. 31, 2005). The issue in *Davis* is whether a battery victim's identification of her assailant in response to emergency questioning by a 911 operator was testimonial within the meaning of *Crawford*. The issue in *Hammon* is whether statements made in response to emergency questioning by a police officer at the scene of a crime were testimonial. Unlike the statements at issue in *Davis* and *Hammon*, the statements here were not made to police officers or their agents. *Crawford* makes clear that statements made to friends, acquaintances, and cohorts in crime without any expectation of the their subsequent use in a criminal prosecution are not testimonial, and the decisions in *Davis* and *Hammon* are unlikely to upset that conclusion.

c. Petitioner contends (Pet. 21-25) that, even if Settles's statement about seeing petitioner emerge from the stairwell was nontestimonial, it was inadmissible under the *Roberts* framework because it was unreliable. He argues (Pet. 24-25) that the statement was unreliable because Settles could have mistaken the man he saw for petitioner.

Petitioner never made this argument in the court of appeals. Although he argued that the present sense impression exception under which the statement was admitted was not "firmly rooted" for *Roberts* purposes, he did not otherwise assert that the statement was unreliable. And the court of appeals did not address the

question of whether the statement was reliable under *Roberts*. Hence, petitioner waived the claim. See *United States* v. *Lovasco,* 431 U.S. 783, 788 n.7 (1977).

In any event, the statement was inherently reliable. Settles had no motive to lie to Brown and James about seeing petitioner. And the fact that he opened fire on the man he saw suggests that he must have been certain about his identity, since he would not have wanted to shoot the wrong man.[9]

Even if Settles's statement was improperly admitted under *Roberts*, the error did not cause him prejudice, because the evidence overwhelmingly established that the man with the gun was petitioner. According to Brown, the man was dressed in black clothes and a black cap. Petitioner's own witness, Patricia Davis, testified that petitioner was the "man in black" on Tenth Street. Two other witnesses testified that the man who had earlier shot at Settles on Valley Avenue was dressed all in black, and one of them stated that, after Settles escaped, the shooter went to Tenth Place. Another witness to the gun battle on Tenth Place saw a man dressed in black with a black cap firing a gun. Still another observed petitioner on Tenth Place immediately after the shooting. Gov't C.A. Br. 68-69. In combination, that evidence—together with the evidence that petitioner and

---

[9] Petitioner argues (Pet. 22-23) that review by this Court is warranted because there is a circuit conflict on the issue of whether the present sense impression exception is "firmly rooted" under the *Roberts* test. Although the court of appeals noted that present sense impressions are recognized as reliable because of their spontaneity, Pet. App. 9a n.5, it did not hold that the exception was firmly rooted, and, as discussed above, Settles's out-of-court statement was reliable without the need to rely solely on the present sense impression exception.

Settles each intended to shoot the other—overwhelmingly established that the shooter in black was petitioner.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General
ALICE S. FISHER
Assistant Attorney General
JOEL M. GERSHOWITZ
Attorney

APRIL 2006