No. 14-602

IN THE
Supreme Court of the United States

ALEJANDRO ENRIQUE RAMIREZ UMAÑA,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

VINCENT J. BRUNKOW
ZANDRA L. LOPEZ
JANET C. TUNG
FEDERAL DEFENDERS OF SAN DIEGO, INC.
225 Broadway, Suite 900
San Diego, CA 92101

MALCOLM RAY HUNTER, JR.
P.O. Box 3018
Chapel Hill, NC 27515

DANIELLE SPINELLI
Counsel of Record
SONYA L. LEBSACK
WILMER CUTLER PICKERING HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000
danielle.spinelli@wilmerhale.com

BROOK HOPKINS
WILMER CUTLER PICKERING HALE AND DORR LLP
60 State Street
Boston, MA 02109

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES—Continued

DOCKETED CASES

STATUTORY PROVISIONS

OTHER AUTHORITIES

Alejandro Umaña was sentenced to death based on hearsay statements of suspect-informants who implicated Umaña in three unadjudicated murders that they themselves may have committed. As this Court has recognized, the notion that a defendant could be put to death based on that kind of unconfronted testimony would have "astounded" the Framers. *Crawford* v. *Washington*, 541 U.S. 36, 66 (2004).

The government's perfunctory brief in opposition does not dispute that lower courts are divided over whether the Confrontation Clause bars such testimony during capital sentencing proceedings. As the petition explained, other jurisdictions would not have permitted the unconfronted accusations that doomed Umaña. Nor does (or could) the government argue harmless error.

Instead, in what amounts to a telling concession that this case warrants certiorari, the government's primary contention is that, under *Williams* v. *New York*, 337 U.S. 241 (1949), the Confrontation Clause does not apply to capital sentencing at all. That argument merely highlights the need for this Court's review. The significant tension between the 65-year-old decision in *Williams* and this Court's subsequent Sixth and Eighth Amendment jurisprudence is the primary driver of the confusion among the lower courts. As both the concurring and dissenting opinions in the Fourth Circuit's narrow denial of en banc review noted, only this Court can resolve that tension and clarify the extent to which *Williams* remains good law. Given the conflict and disarray over this critical issue—one of the most important unresolved questions affecting capital sentencing—it is imperative that the Court do so. And this case, which presents the Confrontation Clause question in its clearest and most urgent form, is the ideal opportunity.

I. THE FOURTH CIRCUIT'S READING OF *WILLIAMS* CANNOT BE RECONCILED WITH THIS COURT'S MODERN SIXTH AND EIGHTH AMENDMENT JURISPRUDENCE

The government's principal argument for denying certiorari (at 15-16) is that the decision below correctly relied on *Williams* to hold that "the Sixth Amendment [does not] apply to capital sentencing" (App. 37a). Even if that were true, this Court's intervention would still be "vital" to address the widespread disagreement in the lower courts over whether and to what extent *Williams* remains good law. App. 121a; *see infra* Part II. As the petition explained (Pet. 22-31), however, that broad reading of *Williams* cannot be sustained in light of this Court's subsequent decisions on the scope of the Confrontation Clause and other Sixth Amendment protections, as well as the constitutional revolution in capital sentencing procedure.

1. *Williams* did not purport to address the Confrontation Clause and cannot be reconciled with the view of the Clause articulated in *Crawford*. The government contends (at 17-18) that *Williams* "set[s] out the constitutional rule applicable … [under] the Confrontation Clause," because it rejected Williams' claim as outside "the common-law confrontation right." But *Williams* nowhere mentions the Confrontation Clause, let alone the scope of the common-law confrontation right. Rather, *Williams* asked whether, as a matter of due process, courts could "treat[] the rules of evidence applicable to the trial procedure and the sentencing process differently." 337 U.S. at 244, 246 n.4. As this Court explained in *Crawford*, however, the Confrontation Clause is no mere "rule[] of evidence." 541 U.S. at 61, 68-69. While due process may require evidence that meets some minimum quantum of reliability, the Confrontation Clause, as it is now understood, entitles the

defendant to more. It mandates "not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." *Id.* at 61. *Williams* does not acknowledge or address that constitutional command.[1]

2. The government argues (at 15-16) that, historically, the confrontation right did not limit the evidence that could be considered at sentencing. For that proposition, the government relies solely on *Williams* itself. But, as the petition explained and the government nowhere rebuts, that aspect of *Williams*' reasoning has long been discredited in the capital context.

At the founding, the death penalty was mandatory for many felonies. Pet. 24; TCP Br. 5. Because determination of guilt and sentencing necessarily occurred in the same proceeding, capital sentencers considered only evidence presented subject to full adversarial rights, including the right of confrontation. The cases on which *Williams* relied for the proposition that judges had long enjoyed "'wide discretion'" in the sources they consulted at sentencing are therefore, unsurprisingly, all *non-capital* cases. Pet. 24 n.5; TCP Br. 3, 11-12.

The government's attempt (at 18) to distinguish early capital proceedings on the ground that the jury exercised "*no* discretion" in sentencing also fails. Juries regularly returned not-guilty verdicts or convicted of lesser offenses to avoid death sentences they viewed as unwarranted. Pet. 24; TCP Br. 5-8; *Woodson* v. *North Carolina*, 428 U.S. 280, 290 (1976). In short, at the founding, conviction and sentencing in capital cases were "inseparable," and the right of confrontation ex-

[1] *Crawford* soundly refutes the government's contention (at 18 n.5) that the understanding of the Confrontation Clause has not evolved since *Williams*.

tended to both. Douglass, *Confronting Death*, 105 Colum. L. Rev. 1967, 2018 (2005).

3. *Williams* rested on other premises that are clearly incorrect under today's law. *Williams* assumed that capital sentencing was entirely a matter of judicial discretion, and that a judge could choose death based on "no reason at all." 337 U.S. at 252. As the government does not dispute, that assumption—and the sharp distinction between trial and sentencing that *Williams* drew from it—cannot be squared with the current understanding of the constitutional requirements governing death sentencing. *See, e.g.*, *Lockett* v. *Ohio*, 438 U.S. 586 (1978); Pet. 26-28. Indeed, the post-*Furman* cases the government cites as evidence of *Williams*' continuing relevance are all *non-capital* cases in which broad sentencing discretion remains constitutionally permissible, and which are thus irrelevant to the question here. Opp. 17-18 (citing *Alleyne* v. *United States*, 133 S. Ct. 2151 (2013); *Nichols* v. *United States*, 511 U.S. 738 (1994); *United States* v. *Tucker*, 404 U.S. 443 (1972)).

4. Finally, in a passage in considerable tension with its primary position that *Williams* controls this case, the government appears to concede (at 19) that the Sixth Amendment—including the Confrontation Clause—extends to any factual findings necessary to a death sentence, even if those findings are made at sentencing. That is, of course, correct. *See Apprendi* v. *New Jersey*, 530 U.S. 466 (2000); *Ring* v. *Arizona*, 536 U.S. 584 (2002); Pet. 28-31. But the government contends (at 19) that no such factfinding occurs at the "selection" phase of an FDPA proceeding. That is simply wrong.

The FDPA requires the jury to find any statutory or nonstatutory aggravating factors unanimously and

beyond a reasonable doubt. 18 U.S.C. §3593(c). Before imposing a death sentence, the jury must then conclude that "*all* the aggravating … factors," taken together, outweigh any mitigating factors. *Id.* §3593(e) (emphasis added). Under this scheme, every aggravating factor the jury finds—statutory or non-statutory—is necessary to the death penalty that the jury imposes.

Bifurcating the sentencing trial into so-called "eligibility" and "selection" phases does not alter that analysis. Where, as here, the jury finds aggravating factors at both phases, a statutory aggravating factor found at the eligibility phase is not, by itself, sufficient to permit imposition of the death penalty. Rather, the jury must still find any non-statutory aggravating factors presented at the "selection" phase beyond a reasonable doubt, and must find that all the aggravating factors together outweigh any mitigating factors. 18 U.S.C. §3593(e). The government's choice to present a particular aggravating factor during the "selection" phase, as opposed to the "eligibility" phase, thus cannot render that factor constitutionally insignificant. What matters is not the "form" of the proceeding in which the factfinding occurs, but rather the factfinding's "effect" on the penalty. *Apprendi*, 530 U.S. at 494.

The Fourth Circuit's contrary reasoning permits prosecutors strategically to present the most damning, and least reliable, evidence against the defendant at the stage of the proceeding at which he enjoys the fewest protections. That is what occurred here, where the government's jury argument for death was based almost entirely on the unadjudicated murders "proven" through the unconfronted hearsay of other suspects in the crimes. Even if it could be viewed as consistent with *Williams*, that result cannot be reconciled with *Apprendi* or *Ring*.

II. ONLY THIS COURT CAN RESOLVE THE CONCEDED SPLIT OF AUTHORITY OVER APPLICATION OF THE CONFRONTATION CLAUSE TO CAPITAL SENTENCING

The government does not deny that the lower courts are divided over whether and when the Confrontation Clause applies in capital sentencing proceedings. Nor could it. Federal and state courts and commentators have repeatedly acknowledged the split. Pet. 14-15. And the consequences of the division are palpable: Capital defendants in certain jurisdictions can exercise their constitutional right to confront testimonial hearsay at sentencing, while those in other jurisdictions, like Umaña, can be sentenced (and executed) without that critical protection.

1. The government cannot dispute that in other jurisdictions Umaña would have been entitled to confront the testimony of the informants against him. As the petition explained, six state courts of last resort—Florida, Kansas, Maryland, Mississippi, North Carolina, and Texas—have held that a defendant's right to confrontation extends *throughout* capital sentencing. Pet. 17-18; *e.g.*, *Rodgers* v. *State*, 948 So. 2d 655, 663 (Fla. 2006) ("[A] defendant's rights under the Confrontation Clause apply to the guilt phase, the penalty phase, and sentencing."). Three federal district courts have reached the same conclusion in proceedings under the FDPA. Pet. 17; *see, e.g.*, *United States* v. *Mills*, 446 F. Supp. 2d 1115, 1129-1131 (C.D. Cal. 2006) (because the death penalty cannot be imposed unless all the aggravating factors taken together outweigh the mitigating factors, all aggravating factors are necessary to a death sentence and cannot be proven through testimonial hearsay).

The government contends (at 20-22) that the state decisions are of "limited … relevance" because they did not involve bifurcated sentencing proceedings. That misses the point. In those jurisdictions, courts have interpreted the Confrontation Clause to grant capital defendants the right of confrontation as to *all* evidence presented against them at sentencing. Those courts have not drawn any distinction between aggravating factors relevant to "eligibility" and factors relevant to "selection." To the contrary, several state court decisions specifically hold that a capital defendant is entitled to confront the witnesses against him even when the testimony in question does not relate to a statutory aggravating factor necessary to render the defendant death-eligible. *See, e.g.*, *State* v. *Carr*, 331 P.3d 544, 724 (Kan. 2014), *cert. granted on other grounds*, No. 14-450 (Mar. 30, 2015) (confrontation right extends to testimonial hearsay "used only to impeach defense witnesses")[2]; *Grandison* v. *State*, 670 A.2d 398, 413 (Md. 1995) (confrontation right extends to "victim impact witnesses as well as factual witnesses"); *Pitchford* v. *State*, 45 So. 3d 216, 251-252 (Miss. 2010) (same).

If Umaña had been tried in state court in any of these six states—including North Carolina, where the crime was committed—he would have been entitled to confront the witnesses who claimed he had committed prior murders. In the Fourth Circuit, Umaña was not permitted to do so, and absent this Court's intervention, he will be executed as a result.

---

[2] *See also* Kansas Petition for Certiorari at 21, *Kansas* v. *Carr*, No. 14-1450 (presenting question "whether the Confrontation Clause applies to hearsay evidence admitted … where 'eligibility' for the death penalty already has been established").

2. The government attempts (at 22-23) to impugn several of the state decisions as containing "limited analysis" not indicative of a "developed disagreement." That is incorrect. In *Carr*, 331 P.3d at 723, for example, the court expressly acknowledged that "jurisdictions are split" and explained that it "accept[ed] convincing arguments that confrontation law is applicable to a capital penalty phase trial." *See also Russeau* v. *State*, 171 S.W.3d 871, 880-881 (Tex. Crim. App. 2005) (relying on *Crawford* and noting that "ex parte affidavits of government employees" are "the very type of evidence the Clause was intended to prohibit"); *State* v. *Bell*, 603 S.E.2d 93, 115-116 (N.C. 2004) (explaining at length how victim statements to the police "trigger[] the requirement of cross-examination"); *Grandison*, 670 A.2d at 413 (analyzing defendant's claim under the Confrontation Clause).[3]

3. The government also contends (at 19-20) that further review is "[un]warrant[ed]" because the decision below is "consistent with" other decisions in the federal courts of appeals. But that consistency has an understandable origin: this Court's decision in *Williams*. Most court of appeals judges, including the Fourth Circuit panel majority below, have concluded that they are bound by *Williams* even if it "appears to rest on reasons rejected in some other line of decisions," *Rodriguez De Quinas* v. *Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989). *See* App. 36a-38a; *Muhammad* v. *Secretary, Fla. Dep't of Corr.*, 733 F.3d 1065, 1074 (11th Cir. 2013) ("[W]e must heed [the] admonition to resist the 'exhilarating opportunity of anticipating' the

[3] While the government asserts (at 23) that it is "[un]clear" whether *Grandison* relied on the Sixth Amendment or the Maryland constitution, the two are coextensive. *Snowden* v. *State*, 846 A.2d 36, 43 n.12 (Md. App. 2004), *aff'd*, 867 A.2d 314 (Md. 2005).

overruling of a decision of the Supreme Court."); *Szabo* v. *Walls*, 313 F.3d 392, 398 (7th Cir. 2002). Judges Wilkinson and Niemeyer concurred in the Fourth Circuit's closely divided decision to deny rehearing en banc precisely because they believed that to depart from *Williams* would be to "ignore a clear and consistent directive from the Supreme Court not to overturn higher precedent preemptively." App. 114a. *Williams* thus renders it unlikely that a typical split among the courts of appeals will develop in the near term.

Nonetheless, the strain and confusion caused by attempting to reconcile *Williams* with this Court's more recent Sixth and Eighth Amendment jurisprudence are evident in virtually all the decisions, state and federal, that have addressed the question. As discussed above, many state and lower federal courts have either "avoid[ed]" *Williams* or distinguished it—noting its tension with *Crawford*, *Ring*, or both. *Mills*, 446 F. Supp. 2d at 1127-1128 (citing cases). A number of court of appeals judges have reached similar conclusions. *See* App. 121a (Gregory, J., dissenting) ("[S]ince *Williams*, several lines of Supreme Court cases have created a sea change in death penalty procedure and Sixth Amendment doctrine."); *Muhammad*, 733 F.3d at 1082-1083 & n.4 (Wilson, J., concurring in part and dissenting in part) (similar); *United States* v. *Fields*, 483 F.3d 313, 365 & n.3 (5th Cir. 2007) (Benavides, J., dissenting) ("While *Williams* may have some enduring value with regard to the introduction of nontestimonial hearsay at sentencing, *testimonial* hearsay requires separate treatment.").

Indeed, the palpable tension between *Williams* and this Court's more recent decisions is reflected even in the court of appeals decisions that have purported to follow *Williams*. Neither the Fifth Circuit nor the court of appeals below, for instance, explained how *Williams*

can be "relevant, persuasive, and ultimately fatal" to challenges to the admission of testimonial hearsay at the "selection" phase, but not at the "eligibility" phase. *Fields*, 483 F.3d at 327 n.9, 338; Pet. App. 40a. Because *Williams* permits no such distinction, in drawing the distinction those courts have implicitly conceded that *Williams* has at least in part been superseded.

Ultimately, as both the concurrence and the dissent respecting denial of rehearing below recognized, only this Court—not the courts of appeals—can resolve the obvious tension between *Williams* and this Court's more recent precedents. App. 114a, 121a. That is a reason to grant certiorari, not to deny it.

III. This Case Is An Ideal Vehicle For Resolving One Of The Most Significant Unsettled Questions Regarding The Death Penalty

The question whether, and to what extent, the Confrontation Clause applies at capital sentencing is a recurring issue of profound consequence to the rights of capital defendants. It is an issue that can ultimately be resolved only by this Court. And this case presents the perfect vehicle to resolve the question.[4]

The government does not dispute that the hearsay at issue in this case is testimonial. It involves "the principal evil at which the Confrontation Clause was directed"—the "use of *ex parte* examinations as evidence against the accused." *Crawford*, 541 U.S. at 50. In fact,

---

[4] The government notes (at 23 n.12) that this Court denied certiorari on the Confrontation Clause question in *Kansas* v. *Carr*, No. 14-1450 and *Dunlap* v. *Idaho*, No. 13-1315. As the petition explained (at 32 n.7), both cases had significant vehicle problems not present here, including disputes over whether the evidence at issue was testimonial and whether any error was harmless.

this case presents the prototypical Confrontation Clause violation: the introduction of hearsay statements accusing the defendant by other suspects in the very crimes of which he is accused. Such "incriminations" are both "devastating to the defendant" and "inevitably suspect." *Bruton* v. *United States*, 391 U.S. 123, 136 (1968). And their "unreliability … is intolerably compounded when the alleged accomplice … cannot be tested by cross-examination. It was against such threats to a fair trial that the Confrontation Clause was directed." *Id.* In any event, even if the testimony here had been reliable—as the government half-heartedly suggests (at 12 n.4)—that could not justify "[d]ispensing with confrontation." *Crawford*, 541 U.S. at 62.

Moreover, the government has never claimed that the admission of the hearsay in this case was harmless. Nor could it. As this Court has noted, evidence of unadjudicated homicides is "the worst kind of bad evidence." *Wong* v. *Belmontes*, 558 U.S. 15, 26 (2009). Here, the government hinged its case for death on this "'most powerful imaginable aggravating evidence,'" *id.* at 28—evidence that Umaña "'had killed before'" (Pet. App. 69a-70a)—yet Umaña was never permitted to test the veracity of that evidence through cross-examination. It is difficult to conceive of a clearer example of the constitutional flaws in a capital sentencing proceeding stripped of the confrontation right. No better vehicle to address those flaws—and resolve the disagreement they have generated—will present itself in the future.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

VINCENT J. BRUNKOW
ZANDRA L. LOPEZ
JANET C. TUNG
FEDERAL DEFENDERS OF SAN DIEGO, INC.
225 Broadway, Suite 900
San Diego, CA 92101

MALCOLM RAY HUNTER, JR.
P.O. Box 3018
Chapel Hill, NC 27515

DANIELLE SPINELLI
Counsel of Record
SONYA L. LEBSACK
WILMER CUTLER PICKERING HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000
danielle.spinelli@wilmerhale.com

BROOK HOPKINS
WILMER CUTLER PICKERING HALE AND DORR LLP
60 State Street
Boston, MA 02109

MAY 2015