No. 15-8975

IN THE SUPREME COURT OF THE UNITED STATES

CAMILLE SOLOMON-EATON, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

IAN HEATH GERSHENGORN
Acting Solicitor General
Counsel of Record

LESLIE R. CALDWELL
Assistant Attorney General

SANGITA K. RAO
Attorney

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

QUESTION PRESENTED

Whether a child-protective-services caseworker's conversation with petitioner outside the presence of petitioner's criminal defense counsel violated the Sixth Amendment.

IN THE SUPREME COURT OF THE UNITED STATES

No. 15-8975

CAMILLE SOLOMON-EATON, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The summary order of the court of appeals (Pet. App. 1-5) is not published in the Federal Reporter, but is reprinted at 627 Fed. Appx. 47.

JURISDICTION

The judgment of the court of appeals was entered on January 15, 2016. The petition for a writ of certiorari was filed on April 14, 2016. 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 New York, petitioner was convicted on three counts of sexual exploitation of a child, in violation of 18 U.S.C. 2251(a); three counts of sexual exploitation of a child by a parent, in violation of 18 U.S.C. 2251(b); three counts of distribution of child pornography, in violation of 18 U.S.C. 2252(a)(2); and four counts of receipt of child pornography, in violation of 18 U.S.C. 2252(a)(2). The district court sentenced petitioner to 17 years of imprisonment, to be followed by a life term of supervised release. Pet. App. 17-18; Gov't C.A. Br. 1-2. The court of appeals affirmed. Pet. App. 1-5.

1. From October to December 2011, petitioner sexually exploited her daughter and distributed and received child pornography. During the course of her text-message conversations with a man named Caleb Wade, petitioner took sexually explicit photographs of her two-year-old daughter and sent them to Wade. Petitioner also obtained from Wade images of the sexual abuse of other children. Gov't C.A. Br. 3.

On March 26, 2012, agents from Homeland Security Investigations (HSI), a component of the Department of Homeland Security (DHS), joined by two workers from New York City's Administration for Children's Services (ACS), went to

petitioner's residence. After waiving her Miranda rights, petitioner agreed to talk with the HSI agents privately. Gov't C.A. Br. 7-9. She ultimately confessed to sending sexually explicit images of her daughter to a "guy" via text messages. Id. at 8. She specifically identified certain images of child pornography depicting her daughter. The HSI agents then arrested her. Id. at 8.

On March 27, 2012, petitioner was arraigned in the United States District Court for the Eastern District of New York on a charge of sexual exploitation of a child, 18 U.S.C. 2251(b). Compl. 1-5. The Federal Defender's Office was appointed to represent her. D. Ct. Doc. 2 (Mar. 27, 2012). Petitioner was released on bail. D. Ct. Doc. 5 (Apr. 3, 2012).

2. On April 10, 2012, petitioner was interviewed by Kerlyne Deriscar-Hinds, a child-protective-services caseworker employed by ACS. Gov't C.A. Br. 8. Hinds had filed a petition in Brooklyn family court initiating a proceeding to determine if the State should intervene to protect petitioner's child. See N.Y. Fam. Ct. Act § 1011 (McKinney 2010); see also C.A. App. 932. After a hearing in that case, Hinds spoke to petitioner outside the courtroom. Hinds asked petitioner what had caused police officers to come to her house. According to Hinds, petitioner then admitted sending to an acquaintance naked pictures of her daughter with the daughter's vaginal area

exposed. In the course of the conversation, petitioner also told Hinds that, at the time that she was sending images of her daughter to the acquaintance, she knew that her actions were wrongful. Gov't C.A. Br. 8-9, 24-26.

3. a. In December 2013, a grand jury sitting in the Eastern District of New York returned a second superseding indictment charging petitioner with three counts of sexual exploitation of a child, in violation of 18 U.S.C. 2251(a) (Counts 1, 3, and 5); three counts of sexual exploitation of a child by a parent, in violation of 18 U.S.C. 2251(b) (Counts 2, 4, and 6); three counts of distribution of child pornography, in violation of 18 U.S.C. 2252(a)(2) (Counts 7-9); and four counts of receipt of child pornography (Counts 10-13), in violation of 18 U.S.C. 2252(a)(2). C.A. App. 46-52.

b. Petitioner proceeded to a jury trial. She presented an insanity defense, arguing that she suffered from a severe mental disease that prevented her from knowing that her conduct was wrongful. The government's expert psychiatrist, Dr. Mark J. Mills, who had examined petitioner, testified that she did not suffer from any severe mental illness. Gov't C.A. Br. 9-10.

The government sought to call Hinds as a rebuttal witness to counter petitioner's insanity defense. Gov't C.A. Br. 16-18. Petitioner objected, suggesting that Hinds's conversation with petitioner had violated the Sixth Amendment because it was

conducted outside the presence of petitioner's criminal defense counsel. See C.A. App. 925-928. Petitioner argued that, because ACS personnel had accompanied federal agents when they arrested her, all ACS employees "could be viewed as agents * * * acting on behalf of the federal authorities * * * after right to counsel [had] attached under the Sixth Amendment." Id. at 925. The government responded that Hinds was not part of the team that went to petitioner's home with the HSI agents, id. at 927, but simply was "a state administrative worker doing her job in child services protection," id. at 926.

The district court first noted that petitioner's objection was "tardy" because the government had previously produced Hinds's statement, but petitioner had failed to make a motion to exclude it. C.A. App. 923. The court then explained that Hinds's "conversation regarding the background of what led to the child being separated from the mom" was not "focused on the prosecution of [petitioner]" but rather on whether the child was "being protected" and on petitioner's "right as a parent." Id. at 927-928. The court concluded that, "in this particular case, given the factual context," Hinds was not acting as an agent of law enforcement when she spoke with petitioner. Id. at 928-929. The court accordingly overruled petitioner's objection both because it was "tardy" and because it found "no legal basis for exclusion." Id. at 929.

Hinds then testified that petitioner had admitted sending to an acquaintance naked pictures of her daughter with her vaginal area exposed. She further testified that petitioner had admitted that, "at the time of her sending the pictures * * * she knew it was wrong, but she sent it anyway." C.A. App. 934.

c. The jury convicted petitioner on all counts. The district court sentenced petitioner to 17 years of imprisonment on Counts 1-6, 7 years of imprisonment on Counts 7-11 and 13, and 9 years of imprisonment on Count 12, all to run concurrently. The court also imposed a life term of supervised release on each count. C.A. App. 1340-1341.

4. The court of appeals affirmed in an unpublished summary order. Pet. App. 1-5. As relevant here, the court rejected petitioner's contention that Hinds's conversation with petitioner violated her Sixth Amendment right "to hav[e] counsel present at various pretrial 'critical' interactions between the defendant and the State, including the deliberate elicitation by law enforcement officers (and their agents) of statements pertaining to the charge," Kansas v. Ventris, 556 U.S. 586, 590 (2009) (citation omitted). Pet. App. 2-3. The court acknowledged that "[a]n individual who is not a law enforcement agent can become one for Sixth Amendment purposes." Id. at 2 (citing United States v. Whitten, 610 F.3d 168, 193 (2d Cir. 2010)). And the court explained that "[w]hile a social worker

is generally not an agent of the police, * * * when a child protective services caseworker has extensive interaction with law enforcement before and after interrogating the defendant, particularly when part of a formal multidisciplinary team or joint venture," the caseworker may qualify as a law-enforcement agent under the Sixth Amendment. Id. at 3.

On the record before it, however, the court of appeals found that Hinds was not a law-enforcement agent for Sixth Amendment purposes and therefore was permitted to question petitioner outside the presence of counsel in connection with her ACS duties. Pet. App. 3. The court explained that Hinds "was not part of a multidisciplinary team or joint venture with the government" and had conducted the interview weeks after petitioner's arrest "on her own initiative * * * for the purposes of her child abuse and neglect investigation," not to gather evidence for the criminal case. Ibid. "Hinds," the court further explained, "did not receive instructions from law enforcement regarding her interview beforehand, or conduct the interview with law enforcement present, or volunteer the results of her interview" to the federal prosecution team. Ibid. The court did not reach the government's argument that petitioner had forfeited her objection to Hinds's testimony by failing to raise it in a pretrial suppression motion or the government's

alternative contention that the plain-error standard should apply. See Gov't C.A. Br. 14-23, 33.

ARGUMENT

Petitioner renews her contention (Pet. 1-5, 12-35) that the admission at trial of her uncounseled statements to Hinds, a New York City child-protective-services caseworker, violated her Sixth Amendment right to counsel. The court of appeals correctly rejected that argument. The court's factbound, nonprecedential order does not conflict with any decision of this Court, another court of appeals, or a state court of last resort. Further review is therefore not warranted.

1. The court of appeals correctly rejected petitioner's argument that the admission of Hinds's testimony violated the Sixth Amendment. See Pet. App. 2-3.

a. The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to * * * have the Assistance of Counsel for his defence." The Sixth Amendment right to counsel attaches when "a prosecution is commenced, that is, at or after the initiation of adversary judicial criminal proceedings -- whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." McNeil v. Wisconsin, 501 U.S. 171, 175 (1991) (citations and internal quotation marks omitted); see Rothgery v. Gillespie Cnty., 554 U.S. 191, 198 (2008). In this case, the right attached when

petitioner was arraigned in March 2012, and at that time petitioner was appointed counsel.

The right to counsel guarantees that criminal defendants may "hav[e] counsel present at various pretrial 'critical' interactions between the defendant and the State." Kansas v. Ventris, 556 U.S. 586, 590 (2009) (citation omitted); see Fellers v. United States, 540 U.S. 519, 523 (2004); Michigan v. Harvey, 494 U.S. 344, 348-349 (1990); Maine v. Moulton, 474 U.S. 159, 176-177 (1985); United States v. Wade, 388 U.S. 218, 224-225 (1967); Massiah v. United States, 377 U.S. 201, 204-207 (1964). One of those critical interactions is "the deliberate elicitation by law enforcement officers (and their agents) of statements pertaining to the charge." Ventris, 556 U.S. at 590.

This Court has never held, however, that a defendant is entitled to have counsel present during discussions with government officials who are not "law enforcement officers" or "their agents." Ventris, 556 U.S. at 590; cf. United States v. Henry, 447 U.S. 264, 272-273 (1980) (defendant's fellow inmate who had agreement with government to act as paid "undercover informant" was considered a government agent for Sixth Amendment purposes). Many federal, state, or local officials, in the course of fulfilling their duties, may engage in conversations with a person facing criminal charges and may discuss matters that relate in some way to the charges. The Sixth Amendment,

which protects the right to counsel only in "criminal prosecutions," does not guarantee a right to counsel during interactions with government officials who are neither part of nor agents for the prosecution team, just as it does not guarantee the right to counsel in discussions with private citizens, even though both government officials and private citizens could be called to testify at a criminal trial about the defendant's inculpatory admissions. Rather, the focus of the prohibition against the "deliberate elicitation" of incriminating statements outside the presence of counsel is "the prosecutorial forces of organized society." United States v. Gouveia, 467 U.S. 180, 189 (1984); cf. Ohio v. Clark, 135 S. Ct. 2173, 2182 (2015) (holding that "[s]tatements made to someone who is not principally charged with uncovering and prosecuting criminal behavior are significantly less likely" to implicate the Sixth Amendment's Confrontation Clause than "statements given to law enforcement officers").

b. In light of those principles, the court of appeals correctly held that, given the record before the district court, Hinds's discussion with petitioner without her counsel present did not violate the Sixth Amendment. Hinds was a civilian employee of a state agency, not a state or federal law-enforcement officer. As the court of appeals understood the factual record in this case, Hinds was "not part of a

multidisciplinary team" in which she would have coordinated with federal prosecutors. Pet. App. 3. Hinds had no role in petitioner's arrest, and she contacted petitioner weeks after the arrest "on her own initiative * * * for the purposes of her child abuse and neglect investigation," a civil matter being adjudicated in a family-court proceeding. Ibid. She "did not receive instructions from law enforcement regarding her interview beforehand, or conduct the interview with law enforcement present, or volunteer the results of her interview" to the prosecution team. Ibid.[1] In short, the court of appeals found that Hinds was not part of the federal prosecution team or otherwise acting on behalf of the prosecution team when she conducted her interview. Accordingly, as a state employee pursuing a civil investigation relating to a family-court proceeding, she was permitted to discuss her civil investigation with petitioner outside the presence of petitioner's criminal defense counsel.

Petitioner makes a number of assertions that appear to conflict with the court of appeals' underlying factual determinations. Petitioner asserts (Pet. 7, 15-16), for example, that ACS and law enforcement formed a

[1] Although not indicated in the record, the government obtained Hinds's notes of her interview of petitioner only after serving a subpoena duces tecum on ACS. See Gov't C.A. Br. 14; accord Pet. 9.

"multidisciplinary team" and implies (Pet. 7-8, 32-34) that Hinds was working as part of that team. Petitioner also asserts (Pet. 8) that Hinds spoke with DHS officials about the case before the interview. And petitioner suggests (Pet. 32) that Hinds forwarded her report to the prosecution team. Petitioner's evident disagreement with the underlying factual conclusions of the court of appeals, however, provides no basis for review by this Court.[2]

Petitioner also argues (Pet. 16-26) that the court of appeals erred in applying "common-law agency principles," rather than a "functional approach," to resolve the question whether Hinds's conversation with petitioner violated the Sixth Amendment. Petitioner has forfeited that argument, however, because petitioner did not argue in favor of a "functional approach" in the court of appeals. To the contrary, in the

---

[2] Petitioner did not raise these factual assertions in the district court, and most of them were raised for the first time in her reply brief in the court of appeals. Compare Pet. C.A. Br. 5-6, 31-37, with Pet. C.A. Reply Br. 9-15; see McCarthy v. SEC, 406 F.3d 179, 186 (2d Cir. 2005) ("[A]rguments not raised in an appellant's opening brief, but only in his reply brief, are not properly before an appellate court."). She appears to rest her assertions on "records of the Administration for Children's Services concerning [petitioner], which were produced to defense counsel in discovery" and which she sent to the Second Circuit under seal. Pet. C.A. Br. 1 n.1; see Pet. 8 n.2. The ACS records, however, were never presented to the district court, and therefore were not part of the record on appeal.

court of appeals petitioner framed the critical question as whether "Hinds was acting as an agent of law enforcement for Sixth Amendment purposes," and urged the court of appeals to hold that "state law governs, at least in part, the subsidiary issue of whether Hinds was acting as an agent of law enforcement." Pet. C.A. Br. 32. And in any event, the court of appeals' short nonprecedential order did not set forth any general legal standard to govern similar questions going forward. Rather, it merely held that, on the specific facts here, Hinds was not acting as part of law enforcement in her conversation with petitioner. Given Hinds's lack of direction or coordination with the prosecution team and her exclusive purpose of advancing a civil investigation related to a family-court proceeding, that conclusion would be correct under either a functional approach or an approach derived from common-law agency principles.

c. Petitioner contends (Pet. 3) that the decision below is in tension with this Court's decisions in Mathis v. United States, 391 U.S. 1 (1968), and Estelle v. Smith, 451 U.S 454 (1981). That contention is mistaken.

In Estelle, a capital case, the district court "ordered the State's attorney to arrange a psychiatric examination of [the defendant] * * * to determine [his] competency to stand trial." 451 U.S. at 456-457. After the defendant was ruled

competent and was convicted of murder, the prosecution called the psychiatrist as a witness during the penalty phase to testify about the defendant's future dangerousness, a key factor in the capital-sentencing determination. Id. at 457-458. This Court held that the psychiatrist's examination violated the Sixth Amendment because the defendant had the "right to assistance of counsel before submitting to the pretrial psychiatric interview" -- although the Court expressly declined to hold that the defendant had the "right to have counsel actually present during the examination." Id. at 469, 470 n.14. The Court explained that "[d]efense counsel * * * were not notified in advance that the psychiatric examination would encompass the issue of their client's future dangerousness," and thus he "was denied the assistance of his attorneys in making the significant decision of whether to submit to the examination and to what end the psychiatrist's findings could be employed." Id. at 470-471.

Estelle does not support petitioner's contention that the Sixth Amendment right to counsel was violated by her interview by a child-protection official who was not connected to the prosecution team or even involved in the criminal case. As an initial matter, the psychiatrist in Estelle was ordered appointed by the judge overseeing the criminal case in order to elicit information for use in the criminal case, and the

psychiatrist sought in part to make a determination that would be critical in the penalty phase of the capital trial (the defendant's future dangerousness). 451 U.S. at 456-458. That situation bears no resemblance to a government official who interviews a person in pursuit of the official's responsibilities having nothing to do with a pending criminal prosecution, without direction from or coordination with the prosecution team.

But more significantly, Estelle did not rest on the principle that a criminal defendant has the right to counsel during "the deliberate elicitation by law enforcement officers (and their agents) of statements pertaining to the charge," Ventris, 556 U.S. at 590 -- the legal requirement at issue here. The Court did not hold that the defendant had a right to counsel during the actual examination by the psychiatrist. Estelle, 451 U.S. at 470 n.14. Rather, Estelle turned on the fundamental importance of a capital defendant's decision whether to submit to a psychiatric evaluation designed to determine future dangerousness, a consideration that has no relevance here. Estelle thus provides no basis to conclude that petitioner had a right to counsel during her conversation with Hinds.

Mathis is even further afield; it did not involve the Sixth Amendment right to counsel at all. Rather, Mathis concerned the distinct Fifth Amendment right against compelled self-

incrimination and, in particular, the requirement that, for statements to be admissible in the prosecution's case-in-chief, government interrogators must furnish a suspect in custody with Miranda warnings before asking incriminating questions. 391 U.S. at 3-4. The Court held that a suspect in state custody was entitled to Miranda warnings before being questioned by a federal tax investigator, even though the tax investigation may have been "initiated for the purpose of a civil action rather than a criminal prosecution." Id. at 4. The decision relied on the specific concerns underlying the Miranda doctrine: i.e., that "interrogation in certain custodial circumstances is inherently coercive," New York v. Quarles, 467 U.S. 649, 654 (1984) (footnote omitted). See Mathis, 391 U.S. at 4-5; see also Rhode Island v. Innis, 446 U.S. 291, 300 n.4 (1980) (noting that "the policies underlying the two constitutional protections are quite distinct"). Mathis did not have occasion to address whether the Sixth Amendment right to counsel attaches to non-custodial questioning by a government investigator unaffiliated with a prosecution team. It therefore does not cast doubt on the court of appeals' holding in this case.[3]

---

[3] Petitioner contends (Pet. 13 n.4) that "this Court has applied the same test for 'government agency' under both the Fifth and Sixth Amendments," citing Estelle, which also found that the admission of testimony based on the psychiatrist's examination violated the Fifth Amendment because the defendant had not been given Miranda warnings, see 451 U.S. at 461-469. Estelle, however, did not hold that any public official who must

2. The decision below does not conflict with the decision of any other circuit or any state court of last resort.

Petitioner contends (Pet. 24-25) that the decision below conflicts with the Third Circuit's decision in Saranchak v. Beard, 616 F.3d 292 (2010), cert. denied, 132 S. Ct. 128 (2011).

---

give Miranda warnings before conducting a custodial interrogation of a defendant is also prohibited from conducting an uncounseled interrogation under the Sixth Amendment. Rather, as explained, Estelle's Sixth Amendment holding turned on the particular importance of the "decision of whether to submit to [a psychiatric] examination" assessing a capital defendant's future dangerousness, id. at 471, and the Court did not hold that counsel must be present during the examination itself, see id. at 470 n.14. Estelle aside, no sound basis exists to extend Mathis's Fifth Amendment holding to the Sixth Amendment issue here. The Fifth Amendment prohibits the prosecution from entering into evidence in its case-in-chief a defendant's incriminating statements that may have been the product of governmental coercion, and unwarned, custodial statements could be the product of coercion even if a government official unrelated to the prosecution prompted the statements. The Sixth Amendment, in contrast, protects "fairness in the conduct of criminal causes" by ensuring that a defendant may consult his counsel during important interactions with the prosecution and the court. Massiah, 377 U.S. at 205 (internal quotation marks omitted). Questioning by a government official who is not part of, or acting on behalf of, the relevant law-enforcement team, but is instead acting pursuant to her civil statutory duties, does not implicate that guarantee. And in any event, a critical factor in Mathis was that "tax investigations frequently lead to criminal prosecutions," and, in fact, "the investigating revenue agent was compelled to admit" that "there was always the possibility during his investigation that his work would end up in a criminal prosecution." Mathis, 391 U.S. at 4. In this case, by contrast, the record contains no evidence that Hinds viewed her investigation as a possible prelude to a criminal prosecution, and the court of appeals found that she did not forward her notes to the federal prosecution team. Pet. App. 3.

That contention lacks merit. Saranchak, a habeas case, held that the Pennsylvania Supreme Court's conclusion that the defendant's counsel did not render ineffective assistance of counsel by failing to seek to suppress inculpatory statements that the defendant made to a county child-protective-services caseworker while in custody "was not an unreasonable application of, or contrary to, clearly established federal law." Id. at 305 (citing 28 U.S.C. 2254(d)(1)); see id. at 298-299, 301-306. Most of the Third Circuit's analysis concerned whether the introduction of the unwarned statements violated Miranda; the Court ultimately found "no interrogation by" the caseworker, and thus no Miranda violation.[4] Id. at 305; see id. at 301-306. In a three-sentence footnote, the court also rejected the petitioner's argument that the admission of the caseworker's statements violated the Sixth Amendment, explaining that the caseworker "did not engage in the type of deliberate elicitation of incriminating statements from [the petitioner] necessary to cause a violation of his Sixth Amendment rights." Id. at 305 n.7. The court had no occasion to consider whether the

[4] Petitioner relies (Pet. 24-25) on dictum in the Third Circuit's opinion distinguishing for Miranda purposes a child-protective-services interview of two persons "charged with offenses involving children." 616 F.3d at 304. The court's remark concerning the implications for Miranda of facts not before the court cannot create a conflict on the Sixth Amendment issue in this case.

caseworker should be treated as a law-enforcement agent for Sixth Amendment purposes, much less to develop a "functional approach" (Pet. 25) to that question.[5]

Petitioner also relies (Pet. 4, 22-24) on Commonwealth v. Howard, 845 N.E.2d 368 (Mass. 2006), and State v. Oliveira, 961 A.2d 299 (R.I. 2008). The critical fact in those decisions, however, was that the child-protective-services caseworkers had worked hand-in-hand with law enforcement agents as active members of the government's prosecution team. For example, in Howard, the Massachusetts Supreme Judicial Court explained that the social-services investigator was part of a multidisciplinary team, conducted a joint interview of the victim with law enforcement, "believed that * * * she had an obligation" to report certain information about the defendant to law enforcement, conducted an interview of the defendant in which the questions "were directed solely toward the issue of the defendant's guilt," and knew that her report would be forwarded

[5] Petitioner also cites (Pet. 24) the underlying Pennsylvania Supreme Court decision that the Third Circuit reviewed, Commonwealth v. Saranchak, 866 A.2d 292 (2005). That decision, however, did not even address an argument that defense counsel was ineffective for failing to seek suppression of the caseworker's statements under the Sixth Amendment. See id. at 302. Moreover, the Pennsylvania Supreme Court held that any suppression motion under Miranda would have been "meritless" because the caseworker "was concerned with the plight of [the defendant's] children" and was "a stranger to any aspect of the criminal case." Ibid.

to the prosecution team. 845 N.E.2d at 370-371. Likewise, in Oliveira, the Rhode Island Supreme Court emphasized that the child-services caseworker was part of a multidisciplinary team with prosecutors, had met and exchanged information with a prosecutor the day before interviewing the defendant, viewed one of her purposes in interviewing the defendant as to "add to the evidence," and was required to forward any child-abuse information obtained from the defendant to the police. 961 A.2d at 310. In each decision, the court appeared to attach critical weight to those factors. Here, by contrast, the court of appeals concluded that Hinds interviewed petitioner "on her own initiative * * * for the purposes of her child abuse and neglect investigation," not for eliciting incriminating evidence, was not part of a multidisciplinary team, and "did not receive instructions from law enforcement regarding her interview beforehand, or conduct the interview with law enforcement present, or volunteer the results of her interview" to the prosecution team. Pet. App. 3. The court of appeals' nonprecedential disposition is therefore entirely consistent with the state-court decisions that petitioner cites.[6]

[6] Petitioner also cites (Pet. 25) intermediate state-court decisions that involved far closer relationships between law enforcement and the child-protective-services caseworkers than this case. In any event, those decisions could not create a conflict warranting this Court's review.

3. Even if this case implicated a conflict of authority, it would be an unsuitable vehicle to address the circumstances in which the Sixth Amendment right to counsel attaches to discussions with government officials who are not members of, or acting on behalf of, the relevant law-enforcement team. The court of appeals' unpublished order was nonprecedential and did not purport to set out a general legal framework for resolving similar questions.

In addition, the district court ruled that petitioner was "tardy" in raising her objection to the admission of Hinds's testimony because she failed to file a pretrial motion to suppress the statement pursuant to Federal Rule of Criminal Procedure 12(b)(3)(C), without good cause. C.A. App. 929. For that reason, although the court of appeals did not reach the question in light of its summary resolution of the merits question, her claim was forfeited. See United States v. Klump, 536 F.3d 113, 120 (2d Cir.) ("It is well-settled that the failure to assert a particular ground in a pre-trial suppression motion operates as a waiver of the right to challenge the subsequent admission of evidence on that ground.") (citation and internal quotation marks omitted), cert. denied, 555 U.S. 1061 (2008); see also Gov't C.A. Br. 12-13.

Petitioner's failure to properly raise her Sixth Amendment claim below means that, at best for her, it is subject only to

plain-error review. See Gov't C.A. Br. 13-14. Any error by the district court was not "clear or obvious." United States v. Marcus, 560 U.S. 258, 262 (2010) (citation omitted). Nor did any error "affect[] the outcome of the district court proceedings" or "seriously affect[] the fairness, integrity or public reputation of judicial proceedings." Ibid (citation omitted); see Gov't C.A. Br. 33. Hinds's direct testimony was extremely brief, amounting to a few minutes in a four-day trial, ibid.; C.A. App. 932-934, and it formed only one piece of overwhelming evidence that petitioner was not insane. Indeed, petitioner made a statement to Dr. Mills that had substantially the same meaning as her statement to Hinds: that if a policeman had been present, she would not have engaged in the illegal conduct. C.A. App. 785. In its closing argument, the government referred to petitioner's statement to Hinds only once, alongside her statement to Dr. Mills, id. at 987, and in rebuttal summation, the government again mentioned the statement to Hinds only once, along with petitioner's other statements and actions showing that she understood the wrongfulness of her conduct, id. at 1045-1047. No reasonable possibility exists that petitioner would have been acquitted on the ground of insanity if Hinds's testimony had been excluded.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

IAN HEATH GERSHENGORN
Acting Solicitor General

LESLIE R. CALDWELL
Assistant Attorney General

SANGITA K. RAO
Attorney

JULY 2016