No. 15-8975

In the
Supreme Court of the United States

Camille Solomon-Eaton,

Petitioner,

v.

United States of America,

Respondent.

On Petition for a Writ of Certiorari to
The United States Court of Appeals
For the Second Circuit

REPLY BRIEF FOR PETITIONER

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ARGUMENT

I. The split is real, recurring, and ripe for resolution.

The government denies that the lower courts are divided over the constitutional question presented by this case. It contends that the Second Circuit's decision is "entirely consistent" with the rulings of other courts that have addressed the question, including the highest courts of Rhode Island and Massachusetts, *see State v. Oliveira*, 961 A.2d 299 (R.I. 2008); *Commonwealth v. Howard*, 845 N.E.2d 368 (Mass. 2006). *See* Brief for the United States in Opposition ("BIO") at 19–20. The government is wrong.

The government does not dispute that both *Oliveira* and *Howard* held that the Sixth Amendment did not permit a government-employed child protection investigator to interview the defendant about pending criminal charges without notifying defense counsel. But the government says the courts reached those holdings because the facts there differed from the facts here, not because the courts applied a different legal standard. BIO at 19–20. Not so. Both cases are materially indistinguishable from this case. Like Hinds, the child protection investigator in *Howard* was not an "agent of law enforcement" in the traditional sense (845 N.E.2d at 371); she had no "law enforcement powers" (*id.*) and was not working under the supervision of law enforcement (*id.*). Like Hinds, she was a "government official" (*id.* at 372) responsible for investigating civil matters. And like Hinds, she interviewed the defendant "in performance of her duties as a department investigator" (*id.* at 371) and "in furtherance of her responsibilities for the care and protection of children" (*id.* at 373)—not for the purpose of assisting the prosecution of the criminal case. Also, like Hinds, she interviewed the defendant "on her

own initiative" (Pet. App. 3), not as a member of a multidisciplinary prosecution "team"[1] or at the behest of law enforcement or with law enforcement present (845 N.E.2d at 371 & n.4). On the contrary, a law enforcement official in *Howard* had explicitly requested that the investigator "refrain from making any contact with the defendant until further notice, and gave no direction to [the investigator] with respect to his own [criminal] investigation." *Id.* at 370 (footnote omitted).

Nevertheless, the *Howard* court held, in conflict with the Second Circuit below, that the investigator was a "government agent" and that her uncounseled interview of the defendant therefore violated the Sixth Amendment. *Id.* at 372–73. The court reached this result not because the facts there were distinguishable, as the government asserts, but because the court interpreted the Sixth Amendment (as construed in *Massiah v. United States*, 377 U.S. 201 (1964), and in this Court's other right-to-counsel cases) differently than the Second Circuit does. As a consequence, the *Howard* court applied a legal test for government "agency" that cannot be reconciled with the test employed here by the Second Circuit (and by other courts on the long side of the split). *See* Pet. at 16–21. The *Howard* court declared, "The command of *Massiah* and its progeny is that we not tolerate

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[1] The government misreads *Howard* on this point. The *Howard* investigator participated with law enforcement in a joint interview of the child *victim* of the offense, not of the defendant, whom the investigator interviewed on her own initiative. 845 N.E.2d at 370–71 & nn. 1, 4. Moreover, the *Howard* court did not limit its holding to child protection investigators who work as official members of a "joint investigation team." The court stated that its holding extended to *all* government child-protection investigators in Massachusetts who interview defendants about pending criminal charges after the right to counsel has attached. *See* 845 N.E.2d at 373 n.6 (declaring "that department investigators are not permitted to engage in these types of interviews in the future").

interrogation practices by government officials or their agents that will provide the prosecution with the equivalent of direct police interrogation." 845 N.E.2d at 372 (citations and internal quotation marks omitted). The *Howard* court's "primary concern" was thus not with the investigator's subjective purpose but rather "with the constitutional implications of questioning on matters concerning pending charges posed *by persons whose official duties direct them to interact with a defendant and who may be required to turn any incriminating responses over to the police and prosecutor.*" *Id.* (emphasis added).

Under that objective, functional test, petitioner would prevail on her Sixth Amendment claim because Hinds's "official duties" required her, by law, to interview petitioner and to coordinate with law enforcement, as she did. Pet. at 7–8, 15–16, 29. Thus, contrary to the government's view, the Second Circuit's Sixth Amendment analysis conflicts with *Howard*, both with respect to the applicable constitutional test and the outcome, warranting this Court's intervention. *See, e.g.*, *Brigham City v. Stuart*, 547 U.S. 398, 402 (2006) (granting certiorari to resolve "differences among state courts and the Courts of Appeals concerning the appropriate Fourth Amendment standard governing warrantless entry by law enforcement in an emergency situation"); *County of Sacramento v. Lewis*, 523 U.S. 833, 839 (1998) (granting certiorari to resolve conflict over legal standard for establishing a due process violation in a law-enforcement pursuit case); *Hudson v. McMillian*, 500 U.S. 903, 903 (1991) (granting certiorari to decide "the correct legal test" for resolving an Eighth Amendment claim).

The Second Circuit's decision also conflicts with *Oliveira*. The investigator there, like Hinds, "did not interview the defendant at the direct behest of the police or prosecution." 961 A.2d at 310. But "she had met and exchanged information with them on the previous day as part of the [Child Advocacy Center] multidisciplinary 'team.'" *Id.* Similarly, though Hinds was not formally a member of the Instant Response Team (IRT) formed between ACS and law enforcement in this case, she had exchanged information with law enforcement before interviewing petitioner, as the government does not and cannot dispute. *See* Pet. at 8 (citing ACS file, at CS 150, 155, 157–59, 167).[2] And like Hinds, the investigator's "role as a child protective investigator was not primarily prosecutorial; rather it was to protect children who might have been at risk due to defendant's suspected abuse." 961 A.2d at 310–11. Nevertheless, like Hinds, the investigator "deliberately intended to elicit incriminating evidence from defendant, which she knew she would be required to turn over to the police, especially considering her awareness that a criminal prosecution had begun." *Id.* at 311. For that reason, the Rhode Island Supreme Court held that the interview violated the Sixth Amendment (*id.*)—a conclusion that conflicts with the Second Circuit's decision here.

[2] Though the government does not dispute the facts as recited in the petition, it complains that the ACS records were not properly made part of the appellate record. BIO at 12 n.2. The government waived this argument by not moving to strike the records in the court of appeals. *See Dugan v. Sullivan*, 957 F.2d 1384, 1388 n.5 (7th Cir. 1992) (government waived objection to inclusion of a memorandum in the record on appeal where it "never objected to the memorandum's inclusion or moved to strike it").

In short, contrary to the government's view, the question presented divides the federal courts of appeals and the state courts of last resort. That intolerable division invites this Court's guidance.

II. This case presents a suitable vehicle to resolve the split.

The government contends that this case is a poor certiorari vehicle because the Second Circuit's decision is "nonprecedential," "fact-bound," and "did not purport to set out a general legal framework" for resolving the question presented, and because the case suffers from alleged procedural complications. BIO at 8, 21–22. These contentions miss the mark.

First, the non-precedential nature of the decision below is not a basis for denying certiorari, as the petition explained and the government does not refute. *See* Pet. at 29–31; *see also* Michael Hannon, *A Closer Look at Unpublished Opinions in the United States Courts of Appeals*, 3 J. App. Prac. & Process 199, app. A at 241–50 (2001) (listing more than 50 unpublished opinions reviewed by this Court from 1974 to 2000).

Second, the court of appeals did not restrict its ruling to the facts of this case. Rather, it invoked the general test for government "agency" adopted by the New York Court of Appeals in *People v. Ray*, 480 N.E.2d 1065 (N.Y. 1985), and announced a set of factors that courts should consider in deciding when a child protection investigator qualifies as a government agent for purposes of the Sixth Amendment. *See* Pet. App. 2–3.

Third, this case does not involve procedural complications that would cloud this Court's review. The constitutional issue here was presented to, and decided by, both the

district court and the court of appeals. *See* Pet. App. 2–3, 13–16. Thus, the issue is fully preserved for this Court's consideration. *See United States v. Williams*, 504 U.S. 36, 41 (1992) (noting that the Court's "traditional rule … precludes a grant of certiorari only when the question presented was not pressed or passed upon below") (internal quotation marks omitted).

The government muddies the water by renewing a claim it made without success to the court of appeals—that petitioner failed to file a pre-trial motion to suppress in the district court, and therefore must satisfy the "plain error" standard on appeal to obtain suppression and a new trial. BIO at 21–22. The Second Circuit did not accept (or even mention) that claim, and it is mistaken. A defendant must file a motion to suppress before trial only if the motion is "then reasonably available." Fed. R. Crim. P. 12(b)(3). But the suppression motion here was not reasonably available before trial because the government did not advise the defense that it would call Hinds as a witness, or seek to introduce petitioner's uncounseled statements to her, until trial was underway. Accordingly, as petitioner argued below, the motion to suppress was timely, and "good cause" excused any lateness under Fed. R. Crim. P. 12(c)(3). *See* Corrected Brief for Defendant-Appellant Camille Solomon-Eaton at 37–41 (2d Cir. filed May 22, 2015) ("Corrected Second Circuit Brief"); Corrected Reply Brief for Defendant-Appellant Camille Solomon-Eaton at 15–27 (2d Cir. filed Sept. 25, 2015) ("Corrected Second Circuit Reply Brief").

Even if the plain-error standard conceivably applies, that contingency would not warrant denying review. In essence, the government attempts to convert a potential

alternative ground for affirmance (i.e., harmless error or the absence of prejudicial "plain error") into a vehicle problem. But this Court frequently considers cases that have been decided on one ground by a court of appeals, leaving other issues (including alleged plain-error or harmless-error issues) to be decided on remand, if necessary. *See, e.g.*, *McFadden v. United States*, 135 S. Ct. 2298, 2307 (2015) (granting review, deciding merits favorably to petitioner, and remanding to court of appeals with instructions to conduct harmless-error analysis "in the first instance"); *Rosemond v. United States*, 134 S. Ct. 1240, 1252 (2014) (granting review, deciding merits favorably to petitioner, and remanding to court of appeals to consider whether plain-error standard should apply and whether error was harmless); *Neder v. United States*, 527 U.S. 1, 25 (1999) ("Consistent with our normal practice where the court below has not yet passed on the harmlessness of any error, … we remand this case to the Court of Appeals for it to consider in the first instance whether the jury-instruction error was harmless."); *Tuggle v. Netherland*, 516 U.S. 10, 14 (1995) (noting that "this Court customarily does not address [harmless-error analysis] in the first instance" and remanding to court of appeals for examination of that question). As the government itself has repeatedly argued, uncertainty as to "the ultimate outcome" does not render a case an improper "vehicle for the Court to consider important questions," and "[t]he possibility that [respondent] might ultimately be able to [prevail on alternative grounds] … would not prevent the Court from addressing the questions presented in the petition." Reply Brief for the Petitioners at 10, *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199 (2012) (Nos. 11-246,

11-247); *accord* Reply Brief for the Petitioner at 8, *Astrue v. Capato*, 132 S. Ct. 2021 (2012) (No. 11-159).

III. The decision below is wrong.

Finally, the government fails in its effort to defend the merits of the Second Circuit's decision. That decision is mistaken, stands in tension with *Estelle v. Smith*, 451 U.S. 454 (1981), and *Mathis v. United States*, 391 U.S. 1 (1968), and undermines the Sixth Amendment right to counsel. *See* Pet. at 31–35.

The government argues that Hinds was not a "government agent" because she was merely a "civilian employee of a state agency, not a state or federal law-enforcement officer." BIO at 10. But as courts in the minority camp have recognized, the relevant Sixth Amendment question is not whether a child-protection investigator was a "law enforcement officer" in the traditional sense, but whether she was a "government official" whose duties made her interview of the defendant the functional equivalent of questioning by law enforcement. *See Oliveira*, 961 A.2d at 310–12; *Howard,* 845 N.E.2d at 372–73; *see also Mathis*, 391 U.S. at 3–5.

The government also claims that Hinds was not a government agent because her "exclusive purpose" was to gather evidence for a civil proceeding, not a criminal case. BIO at 13. But this point has force only if the investigator's subjective purpose matters. If, as a number of courts have persuasively ruled, an investigator's subjective "civil" purpose does not negate her status as a government agent, *see, e.g.*, *Oliveira*, 961 A.2d at

310–12; *Howard*, 845 N.E.2d at 372–73, then the Second Circuit's heavy reliance on this factor was error.

The government contends that petitioner did not argue below for a "functional approach" to assessing Hinds's status as a government agent. BIO at 12. Yes, she did. Petitioner's briefs expressly urged the Second Circuit to focus on Hinds's role as a government investigator, her statutory duties and powers, and the cooperative working relationship she and her agency enjoyed with law enforcement—i.e., her *functions*, not her subjective purpose—to determine whether she was a "government agent" when she interviewed petitioner without her counsel present. *See* Corrected Second Circuit Brief at 31–37, Corrected Second Circuit Reply Brief at 2–15. Indeed, in addition to citing *Oliveira, Howard*, and the other cases applying a functional approach, petitioner cited this Court's decision in *McMillian v. Monroe Cnty.*, 520 U.S. 781, 785–86 (1997), for the proposition that the court of appeals should look to state law to determine "the actual function of a government official." Corrected Second Circuit Brief at 32–33.[3]

The government also wrongly accuses petitioner of making assertions "that appear to conflict with the court of appeals' underlying factual determinations." BIO at 11. In

[3] Contrary to the government's position (*see* BIO at 13), petitioner's invocation of state law is fully consistent with the functional approach. Petitioner argued that "though federal law governs the ultimate question of whether Ms. Solomon's statements to Hinds were obtained in violation of the Sixth Amendment, *see Elkins v. United States*, 364 U.S. 206, 223–24 (1960), state law governs, at least in part, the subsidiary issue of whether Hinds was acting as an agent of law enforcement." Corrected Second Circuit Brief at 32–33 (citations omitted). State law is relevant, petitioner argued, because it establishes the duties and powers of Hinds and other ACS officials, mandating, for example, that they cooperate and coordinate with criminal law enforcement in sexual abuse cases involving children. *Id.* This is the same functional approach petitioner advocates here.

truth, petitioner accepts the facts as stated by the Second Circuit: namely, that Hinds (1) was not part of a multidisciplinary team or joint venture with law enforcement, (2) did not learn of this criminal case until after petitioner was arrested, (3) interviewed petitioner for the purposes of her child abuse and neglect investigation, and (4) 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 government. Pet. App. 3. But these facts do not negate Hinds's status as a government agent under the correct Sixth Amendment test. *See Oliveira*, 961 A.2d at 309–12; *Howard*, 845 N.E.2d at 371–73; *see also Mathis*, 391 U.S. at 3–5. Thus, petitioner does not challenge the facts as stated by the court of appeals but rather the incorrect legal standard the court employed.

No more persuasive is the government's attempt to reconcile the Second Circuit's decision with *Mathis* and *Estelle v. Smith*, 451 U.S. 454 (1981). *See* BIO at 15–16. True, *Mathis* involved questioning by an IRS agent in violation of the Fifth Amendment, not the Sixth. But the test for whether a government official is a "government agent" is the same under the both the Fifth and Sixth Amendments, as courts in the split have recognized, and as *Estelle* implicitly held. *See Oliveira*, 961 A.2d at 310 n.15 (concluding that "[i]t is evident that [*Estelle*'s] agency analysis [under the Fifth Amendment] applied likewise to its finding of a Sixth Amendment violation"). Indeed, even the Second Circuit

thought the test was the same—for it invoked the test for government "agency" set forth in *Ray*, a Fifth Amendment case. *See* Pet. App. 2–3; *Ray*, 480 N.E.2d at 1067–68.[4]

The government's strained effort to harmonize the Second Circuit's ruling with *Estelle* also fails. *See* BIO at 13–15. The doctor in *Estelle*, like Hinds, did not interview the defendant at the direction of law enforcement, as a member of the prosecution team, or for the purpose of assisting the prosecution. Rather, the doctor's interview was conducted "for the limited, neutral purpose of determining [defendant's] competency to stand trial." 451 U.S. at 465. Yet this Court, recognizing that an innocuous subjective purpose is not dispositive, held that the Sixth Amendment did not permit the prosecution to use the results of that uncounseled interview at the penalty phase of the trial "for a much broader objective that was plainly adverse to [the defendant]." *Id.* at 465, 469–71. Likewise, the Sixth Amendment, properly construed, did not allow the government to introduce the results of Hinds's uncounseled "civil" interview of petitioner to decimate her otherwise strong insanity defense and convict her criminally.

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In summary, nothing in the government's brief counsels against granting certiorari. The question presented is important, divides the lower courts, and is

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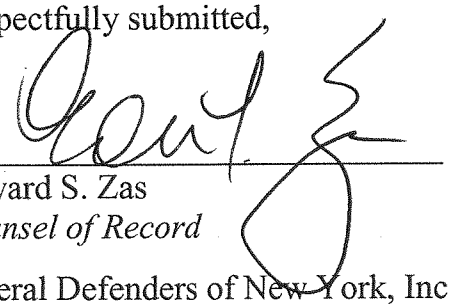
[4] The government labors to show that questioning a defendant in violation of the Fifth Amendment does not necessarily violate the Sixth Amendment, and vice versa. *See* BIO at 16–17 n.3. Petitioner never argued otherwise. A violation of the Fifth Amendment, for example, requires "custodial interrogation," *Miranda v. Arizona*, 384 U.S. 436, 444 (1966), whereas a violation of the Sixth Amendment requires only "deliberate elicitation" of an incriminating statement. *See, e.g., Fellers v. United States*, 540 U.S. 519, 523–24 (2004). But the test for whether the questioning official is a "government agent" is the same under both amendments. *See Estelle*, 451 U.S. at 465–69; *Oliveira*, 961 A.2d at 310 n.15.

appropriately resolved via this vehicle. And the Second Circuit's misguided decision, by erroneously focusing on an investigator's subjective purpose, and by mistakenly treating government-employed child-protection investigators as if they were private, disinterested parties, does real damage to the right to counsel guaranteed by the Sixth Amendment. It merits this Court's attention.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,



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