No. 11-

In the Supreme Court of the United States

MARCUS HARDY, Warden,
PETITIONER,

v.

IRVING L. CROSS,
RESPONDENT.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This Court has held that a missing witness is "unavailable" for trial, and that the Sixth Amendment therefore permits the prosecution to introduce her prior testimony in a future proceeding, so long as the State has made a "reasonable," "good faith" effort to find her. In this case, the state court upheld the introduction of a missing witness's prior, cross-examined testimony at respondent's trial, after concluding that the prosecution had undertaken "superhuman" efforts to find the witness and that additional investigation would have been "futile." The Seventh Circuit overturned respondent's conviction on federal habeas corpus review on the ground that prosecutors could have done more to ensure the witness's appearance at trial.

Did the Seventh Circuit violate 28 U.S.C. § 2254 and a long line of this Court's decisions by overriding state court determinations of law and fact and awarding habeas relief based on a constitutional rule that this Court has never recognized and that the Seventh Circuit derived entirely from its own precedent?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Marcus Hardy, Warden of Stateville Correctional Center in Joliet, Illinois, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit, which, in a published opinion, reversed the district court's denial of habeas relief pursuant to 28 U.S.C. § 2254.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit granting habeas relief (App. 1a-14a) is reported at 632 F.3d 356. The memorandum opinion of the United States District Court for the Northern District of Illinois denying relief (App. 15a-32a) is unpublished but reported at 2009 WL 367502. The order of this Court denying a petition for writ of certiorari on direct appeal (App. 33a) is reported at 543 U.S. 822 (Mem.). The order of the Supreme Court of Illinois denying a petition for leave to appeal on direct appeal (App. 34a) is reported at 803 N.E.2d 488 (Table). The unpublished opinion of the Illinois Appellate Court affirming Cross's judgment of conviction on two counts of criminal sexual assault (App. 35a-120a) is unreported.

JURISDICTION

The court of appeals entered judgment on January 13, 2011 and denied petitioner's timely petition for rehearing and rehearing en banc on February 14, 2011. App. 1a-14a, 121a. On May 13, 2011, Justice Kagan extended until July 14, 2011 the time within which to

file a certiorari petition. The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to * * * be confronted with the witnesses against him."

Section 2254 of Title 28 of the United States Code, enacted as part of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), provides in relevant part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States;
>
> * * *
>
> (e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be

> correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

STATEMENT

The decision below awards federal habeas corpus relief to an Illinois prisoner because the state courts purportedly applied the Sixth Amendment unreasonably. In violation of federal habeas law, the Seventh Circuit reached that conclusion only by construing its own, circuit precedent to announce constitutional requirements that this Court has never recognized and that other circuits refuse to impose. Further, the decision below disregards a finding of fact at the core of the state appellate court's decision, without requiring any evidence—much less the "clear and convincing" evidence that AEDPA demands—that this state court finding was erroneous. The decision below should be reversed, either summarily or after briefing and argument.

1. In 1999, respondent Irving Cross was tried by a jury on four counts of aggravated criminal sexual assault, two counts of criminal sexual assault, one count of aggravated kidnapping, and one count of kidnapping for the 1998 sexual assault of nineteen-year-old A.S. App. 36a, 39a. The jury returned a not-guilty verdict for aggravated kidnapping, and the court declared a mistrial on the remaining counts. App. 35a, 42a.

2. In early 2000, the State prepared to retry Cross. App. 42a. On March 28, 2000, after seeking unsuccessfully to locate A.S., the State moved to declare her "unavailable" and thereby use her prior

testimony—including extensive cross-examination by defense counsel—at Cross's second trial. App. 43a, 44a. The State's motion explained that on November 5, 1999, A.S. and her mother learned of the mistrial, and A.S. stated that she was willing to testify again. App. 43a. Since that time, the prosecutor had been in "constant contact" with A.S. and her mother, and A.S. had given "every indication" that she would testify at the retrial although she was "extremely frightened." *Ibid*. On March 10, 2000, the prosecutor learned from A.S.'s mother that A.S. had left home the day before and had not returned, at which point the State took steps to locate her. App. 43a-44a.

At a hearing on the State's motion, state investigator Mary Ember described those steps. App. 44a. She had checked repeatedly with A.S.'s mother, brother, and father, the Medical Examiner's office, "public health," Cook County Hospital, Cook County jail, the Illinois Department of Corrections, the Illinois Department of Public Aid, the Illinois Secretary of State, and the "Immigration Department." *Ibid*. A.S.'s mother told Ember that A.S. was "very fearful and very concerned" about returning to court. *Ibid*.

Detective Allen Jaglowski was also deployed to find A.S. App. 45a. He testified that he went to A.S.'s mother's home and returned, at different times of day, approximately every third day. *Ibid*. Jaglowski also went to A.S.'s father's home. *Ibid*. No one at either residence had seen A.S. for some time. *Ibid*. Jaglowski even visited A.S.'s mother on the morning of the motion hearing. *Ibid*. On that occasion, her mother advised Jaglowski that A.S. had called her about two weeks

earlier, and that A.S. indicated she was afraid and would not return to Chicago when told the police were looking for her. *Ibid*. A.S. provided her mother with no means of communicating with her while in hiding. *Ibid*. Jaglowski also checked the Medical Examiner's office, the Cook County Department of Corrections, and the house of a longtime friend of A.S.'s in Waukegan, Illinois. *Ibid*.

Finally, Claudia Morales, a victim-witness advocate for the prosecutor's office, testified that she met with A.S. and her mother both before and after Cross's first trial. *Ibid*. According to Morales, A.S. was "very afraid" to testify at the second trial but agreed to do so. App. 45a-46a. In March 2000, Morales called A.S.'s mother, who mentioned A.S.'s ex-boyfriend in Waukegan[1] and her enrollment in cosmetology school, although A.S. had not appeared at school for some time. App. 46a. Morales relayed this information to Jaglowski. *Ibid*.

Following the hearing on the State's motion, the trial court concluded that the State had "expended efforts that go way beyond due diligence," and that A.S. had made it impossible for the State to locate her because she did not wish to be found. *Ibid*; see also *ibid*. (State made good faith, "superhuman efforts" to locate A.S.). Accordingly, the court held that admission of A.S.'s prior, cross-examined testimony at trial would not violate Cross's confrontation rights. *Ibid*.

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[1] The record does not indicate whether the ex-boyfriend and the longtime friend in Waukegan are the same person. App. 19a n.3.

3. At the second trial, a police officer testified that on August 6, 1998, at approximately 4:25 a.m., he was flagged down by Leroy Hearon, who was driving a van with A.S. in the backseat. App. 47a. A.S.'s clothing was dirty, she had plant material stuck to her hair and clothes, and her face appeared red and puffy, as though she had been crying. *Ibid*. A.S. stated that she had been raped by a black male, whom she described as approximately six feet tall, 175 pounds, 30-35 years old, balding, with a mustache, a pockmarked face, and dark clothing. App. 47a, 48a. A.S. showed McCall the scene of the attack—a nearby backyard off of an alley behind a garage. App. 47a. Officer August Cervantes brought Cross, who matched A.S.'s description, to the scene. App. 48a. A.S. immediately identified Cross as her attacker. *Ibid*.

Because A.S. was unavailable, a law clerk from the prosecutor's office read A.S.'s testimony, including an extensive cross-examination by defense counsel, from the first trial. App. 44a, 50a-51a. Other witnesses testified about the aftermath of the crimes, forensic evidence, and Cross's apprehension. App. 48a-50a, 55a-58a. The jury returned guilty verdicts for two counts of criminal sexual assault and not-guilty verdicts for two counts of aggravated criminal sexual assault. App. 35a-36a. The court sentenced Cross to two consecutive thirty-year terms of imprisonment. App. 36a.

4. Among his arguments on appeal, Cross claimed that the State violated his Sixth Amendment confrontation rights by admitting A.S.'s testimony without establishing that she was "unavailable" to

appear in person at the second trial. App. 36a, 74a. The state appellate court rejected that claim, holding that the State had conducted a good faith, diligent search for A.S. App. 83a. The court held that it was "clear" from the evidence that A.S. had left Chicago, gone into "hiding[,] and did not want to be located." *Ibid*. Nevertheless, the State had "engaged two of its own employees as well as a detective" and had "undert[aken] an extensive search for A.S.," which included interviewing her family and friends, searching public records, and traveling to Waukegan. App. 44a-46a, 83a. These efforts were "reasonable" and thus sufficient to satisfy the constitutional standard for declaring a witness unavailable and admitting her prior, cross-examined testimony. App. 83a.

The state appellate court found no authority for Cross's argument that the Sixth Amendment required the State "to undertake efforts to maintain contact with A.S. during the intermission between trials," and to "subpoena A.S. or issue a bench warrant for her arrest." App. 84a-85a. And the court held specifically that pursuit of the "leads" Cross proposed for the State's investigation "would have been futile." App. 85a.

5. On October 3, 2005, Cross filed a federal habeas petition pursuant to 28 U.S.C. § 2254, raising his Sixth Amendment and other claims. Docs. 1, 7. The district court denied Cross's petition, holding in relevant part that the state appellate court did not unreasonably apply this Court's precedents in sustaining the admission of A.S.'s prior, cross-examined testimony. App. 15a, 24a-30a. As a threshold matter, the district court held that the state appellate court correctly

articulated the applicable Sixth Amendment standard—that a witness is constitutionally unavailable (for purposes of admitting her prior, cross-examined testimony) if "the government demonstrate[s] that it has made a good-faith [though unsuccessful] effort to obtain [the] witness's presence at trial." App. 24a-26a; see also App. 25a (government must undertake "reasonable[]" efforts but need not engage in "futile acts"). Deferring to the state appellate court's findings regarding the State's efforts to find A.S., the district court then held that the state court's application of this Sixth Amendment standard was not unreasonable, especially in light of other cases upholding similar efforts as constitutionally adequate. App. 28a-29a (collecting cases).

Specifically, and like the state appellate court, the district court rejected Cross's argument that the Sixth Amendment required the State "to keep A.S. under subpoena in order to demonstrate good faith." App. 27a. The court explained that *Berger v. California*, 393 U.S. 314 (1969) (*per curiam*) (on which Cross relied) did not require such measures, and lower courts had "consistently rejected the argument that the Confrontation Clause requires prosecutors to issue [a] subpoena or take other proactive measures when a witness appears to be hesitant to testify at trial." App. 27a. (collecting cases). In any event, the district court concluded, "the state had no apparent reason to keep [A.S.] under subpoena" because her testimony at the first trial "demonstrated [her] willingness to testify." *Ibid*.

Finally, the district court declined to grant federal habeas relief merely "because the state could have done more" to locate A.S. App. 28a. "Investigators could always investigate other leads," the court reasoned, "but the Constitution does not require the state to pursue increasingly improbable leads in perpetuity. It requires reasonableness. The state undertook significant efforts to locate A.S., despite her declared intention not to return to the city and her refusal to inform even her mother of her whereabouts." *Ibid*.

6. The Seventh Circuit reversed. Like the district court, the court of appeals recognized that "the Illinois appellate court accurately laid out the applicable law governing unavailability." App. 8a-9a. But the Seventh Circuit was ultimately "unconvinced by" the state court's "reasoning." App. 10a. Relying on its own decision on a direct criminal appeal in *United States v. Hite*, 364 F.3d 874 (7th Cir. 2004), cert. granted and judgment vacated, 543 U.S. 1103 (2005), the Seventh Circuit held that, in its view, the State's efforts to locate A.S. were "insufficient to satisfy the Confrontation Clause." App. 10a. Rejecting, without discussion, the state court's finding that additional search measures would have been futile, see *supra* p. 7, the Seventh Circuit opined that the information state investigators unearthed in their search was neither "noteworthy" nor "particularly helpful," and that the prosecution therefore should have taken additional steps to find A.S. App. 10a-11a. Again relying solely on its own circuit precedent, the court concluded that "'[i]f there is a possibility, albeit remote, that affirmative measures might produce the declarant, the obligation of good faith

may demand their effectuation.'" App. 13a (quoting *Burns v. Clusen*, 798 F.2d 931, 937 (7th Cir. 1986)).

Specifically, the Seventh Circuit faulted the State for not subpoenaing A.S. App. 13a. The court indicated that "Supreme Court precedent supports the use of such a court process to obtain the presence of certain material witnesses," *ibid.* (citing *Ohio v. Roberts*, 448 U.S. 56 (1980), *Barber v. Page*, 390 U.S. 719 (1968), and *Berger*), but the Seventh Circuit purported to find direct authority for its subpoena requirement only in its own precedent, App. 13a-14a ("We have held that the government's use of subpoenas or material witness arrest warrants is strong evidence of good faith.") (citing *United States v. Ochoa*, 229 F.3d 631 (7th Cir. 2000)). From the foregoing, the court extrapolated a Sixth Amendment rule that prosecutors must subpoena a missing witness for trial, if not in every case, then at least in every case where the witness is "critical" and the State learns "of her reluctance to testify and her proclivity to disappear without informing anyone of her whereabouts." App. 13a.

REASONS FOR GRANTING THE PETITION

The Seventh Circuit's published decision defies AEDPA and this Court's repeated admonition that lower court precedent is not a proper source of constitutional law on federal habeas review. For a state court to apply federal law "unreasonably," that law must be "clearly established" by the decisions of this Court alone. Accordingly, where this Court has announced a constitutional rule only in general terms, state courts enjoy maximum latitude in applying it. And a state court's application of a general rule is particularly difficult to condemn as "unreasonable" when it is consistent with other federal appellate decisions.

The Sixth Amendment rule on which this case turns is a general one—the State must undertake "reasonable," "good faith" efforts to secure a witness for trial before that witness is considered "unavailable" for Confrontation Clause purposes—and the Seventh Circuit recognized that the state court recited this rule properly in sustaining Cross's conviction. The Seventh Circuit nevertheless overturned that conviction, not because anything in this Court's decisions required it, but because the Seventh Circuit construed its own case law to impose more specific Sixth Amendment duties on the State. The court of appeals so held, moreover, notwithstanding decisions from other circuits that alone confirm the reasonableness of the Illinois court's ruling. Finally, in yet another violation of AEDPA, the Seventh Circuit faulted state prosecutors for failing to undertake the additional measures that its circuit precedent purportedly required, without affording any deference

to the state court's express finding that pursuing additional leads in the search for A.S. would have been futile.

These patent errors—in a published decision that threatens federal habeas law in the Seventh Circuit and runs contrary to decisions of other circuit courts—warrant reversal by this Court, either summarily or following full briefing and argument. See, *e.g.*, *Wright v. Van Patten*, 552 U.S. 120, 126 (2008) (*per curiam*) (summarily reversing Seventh Circuit's grant of habeas relief for failure to afford state court's decision AEDPA deference); see also *infra* p. 23.

1. "Congress viewed § 2254(d)(1) as an important means by which its goals for habeas reform would be achieved," *Williams v. Taylor*, 529 U.S. 362, 404 (2000), by placing "new constraint[s] on the power of a federal habeas court to grant a state prisoner's application," *Woodward v. Garceau*, 538 U.S. 202, 206 (2003) (internal quotations omitted; brackets in original). Under this subsection, state courts' purported misapplication of federal law is grounds for habeas relief only if their decisions run "contrary to, or involve[] an unreasonable application of, clearly established Federal law, *as determined by the Supreme Court of the United States*." 28 U.S.C. § 2254(d)(1) (emphasis added); see, *e.g.*, *Cullen v. Pinholster*, 131 S. Ct. 1388, 1399 (2011) ("State-court decisions are measured against this Court's precedents as of the time the state court renders its decision.") (internal quotations omitted); *Harrington v. Richter*, 131 S. Ct. 770, 785 (2011) ("Federal habeas relief may not be granted for claims subject to § 2254(d) unless it is shown that the earlier state court's decision

'was contrary to' federal law then clearly established in the holdings of this Court."). Thus, a federal court may not void a state conviction based on its own, circuit precedent; only constitutional rules "clearly established" by this Court apply. See, *e.g.*, *Renico v. Lett*, 130 S. Ct. 1855, 1865-1866 (2010).

2. The corollary to this rule is that the more general the constitutional standard as announced by this Court, the more latitude States have in applying it:

> "[e]valuating whether a rule application was unreasonable requires considering the rule's specificity. The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations."

Richter, 131 S. Ct. at 786 (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). With a general rule, it is more likely that there will be "no 'plainly correct or incorrect' answer in" a given case. *Lett*, 130 S. Ct. 1865 (quoting *Alvarado*, 541 U.S. at 664); see, *e.g.*, *Pinholster*, 131 S. Ct. at 1403 (denying habeas relief because standard against which petitioner's ineffective assistance of counsel claim was judged is general and thus provided state courts with greater latitude).

3. The Sixth Amendment rule on which Cross's habeas petition turns is a general one. A witness is constitutionally "unavailable"—so that transcripts from a prior court proceeding (at which the witness was subject to cross-examination) are admissible in lieu of live testimony—so long as the State "made a good-faith effort to obtain [her] presence at trial." *Barber*, 390 U.S. at 724-725. Whether the government's efforts satisfy

this standard is determined by their overall "reasonableness." *Roberts*, 448 U.S. at 74 (internal quotations omitted). Currently, this Court's decisions do not provide any more specific guidance, beyond these general pronouncements, and the foregoing is therefore the only "clearly established Federal law" that Illinois courts needed to apply reasonably to survive federal habeas review.

4. And as the district court correctly held, see App. 24a-30a, the Illinois Appellate Court applied this law reasonably. Even the Seventh Circuit acknowledged that the state court properly recited this Court's general rule. See App. 8a-9a. And nothing in this Court's jurisprudence supports, much less compels, the conclusion that the State's substantial efforts in seeking to locate A.S.—which included engaging three people to interview A.S.'s family and friends, to search public records, and to contact relevant agencies and institutions, see *supra* pp. 4-5—were unreasonable or undertaken in bad faith.

If anything, the three Supreme Court decisions cited by the Seventh Circuit—*Barber*, *Berger*, and *Roberts*—support the contrary conclusion. Of the three, *Barber* is the only one to find a Sixth Amendment violation, and the Court did so only because, in sharp contrast to this case, the prosecution made "absolutely no effort" to take available measures to secure the absent witness, an inmate incarcerated at a known location in a neighboring State. 390 U.S. at 723-725; see also *id.* at 725 ("the sole reason why [the witness] was not present to testify in person was because the State did not attempt to seek his presence"). *Berger*, in

turn, added nothing to the constitutional analysis, for it held merely that the rule announced in *Barber* had retroactive effect. Rather than find a Sixth Amendment violation (as the Seventh Circuit wrongly stated, see App. 13a), *Berger* merely remanded the case for application of the newly released decision in *Barber*. See 393 U.S. at 315.

Finally, *Roberts* actually *upheld* the State's efforts in that case as reasonable—efforts that were, if anything, less comprehensive than Illinois's attempts to find A.S. In *Roberts*, a direct criminal appeal, the government had served five subpoenas, but this was an empty exercise, for they were all served at the same location (the home of the witness's parents), and the one interview investigators did perform was with a parent who said that the witness had left home. See 448 U.S. at 75-76. Prosecutors failed to contact an out-of-state social worker who had spoken with the missing witness or even to communicate with the witness prior to trial. See *id.* at 58-59, 75-76. Yet in words that alone establish the reasonableness of the state court's decision here, the *Roberts* Court held that "the great improbability that [additional] efforts would have resulted in locating the witness, and would have led to her production at trial, neutralizes any intimation that the concept of reasonableness required their execution." *Id.* at 76. The Illinois Appellate Court likewise determined that, on the facts of this case and given the State's efforts to find A.S., further measures would have been futile. See App. 85a. As the district court held, see App. 24a-30a, this was a reasonable application of this Court's "clearly established" law.

5. Rather than afford the state court the heightened deference that AEDPA requires when the constitutional rule at issue is a general one, however, the Seventh Circuit used the absence of more specific Supreme Court authority to announce and apply its own view of what the Constitution demands. Such a clean-slate evaluation of what is "reasonable" for Sixth Amendment purposes would be appropriate on direct appeal, but not on habeas review, where a federal court must defer to a state court determination not foreclosed as unreasonable by this Court's precedent. See, *e.g.*, *Richter*, 131 S. Ct. at 785 (distinguishing between error sufficient to reverse on direct appeal and finding required to grant habeas relief). Here, as in *Richter*, "it is not apparent how the Court of Appeals' analysis would have been any different without AEDPA," *id.* at 786, for the Seventh Circuit faulted the state court for purportedly failing to hold prosecutors to constitutional duties never "clearly established" by this Court.

Specifically, the decision below concludes that the State should have taken "other proactive measures" to find A.S., including that prosecutors "should have issued a subpoena to secure [her] presence" at trial. App. 12a-13a. And while the Seventh Circuit appeared to recognize that this Court's precedent does not compel such a requirement—suggesting merely that *Barber*, *Berger*, and *Roberts* somehow combine to "support[]" such a rule, App. 13a—the Seventh Circuit found more direct authority requiring issuance of a subpoena and other "proactive measures" in its own case law. The decision below thus cites *Burns v. Clusen*, a pre-AEDPA habeas case, for the proposition that "'[i]f there is a

possibility, albeit remote, that affirmative measures might produce the declarant, the obligation of good faith may demand their effectuation,'" *ibid.*, a proposition that is out of line with the above-quoted language in *Roberts*, see *supra* p. 15.

The Seventh Circuit also cited its decision in *United States v. Hite*, a non-habeas, direct appeal, as authority for its conclusion that Illinois's efforts to find A.S. were "insufficient to satisfy the Confrontation Clause." App. 10a. Again, however, any specific duties that the decision below construes *Hite* to impose on prosecutors are not mandated by this Court's decisions. And *Hite* did not involve the Confrontation Clause in any event; rather, the defendant there challenged the district court's ruling that a defense witness was not "unavailable" within the meaning of the hearsay exception in Fed. R. Evid. 804(b)(3). See 364 F.3d at 882-883.

Finally, for its specific ruling that the Sixth Amendment required prosecutors to subpoena A.S., the court relied on its prior decision in *United States v. Ochoa*, another case decided on direct appeal rather than on habeas review. See App. 13a-14a. But again, no decision of this Court construes the Sixth Amendment to require prosecutors to subpoena reluctant witnesses, and the Seventh Circuit may not rely on its own precedent as "clearly established" federal law. In fact, however, even *Ochoa* did not interpret the Sixth Amendment to require the State to subpoena a witness. *Ochoa* considered the prosecution's issuance of a subpoena, among other state measures, in concluding that the government's efforts in that case were

"reasonable," but the court nowhere suggested that the subpoena was constitutionally required. 229 F.3d at 637-638. It is the Seventh Circuit's decision in this habeas case that first announced the circuit's new, more ambitious constitutional rule that prosecutors must subpoena a witness whenever that witness is "critical" and the State is aware "of her reluctance to testify and her proclivity to disappear" without notice. App. 13a.

As this Court has held time and again, such reliance on circuit precedent to fill in the gaps left open by Supreme Court case law violates AEDPA, and this alone is grounds to reverse the decision below. See, *e.g.*, *Lett*, 130 S. Ct. at 1866 (circuit court's decision "does not constitute 'clearly established Federal law, as determined by the Supreme Court,' § 2254(d)(1), so any failure to apply that decision cannot independently authorize habeas relief under AEDPA"); *Knowles v. Mirzayance*, 129 S. Ct. 1411, 1419 (2009) (circuit court failed to "cite any Supreme Court decision establishing a 'nothing to lose' standard in any of its three opinions in this case," precluding habeas relief "based on such a standard"); *Carey v. Musladin*, 549 U.S. 70, 77 (2006) ("Given the lack of holdings from this Court regarding the potentially prejudicial effect of spectators' courtroom conduct of the kind involved here, it cannot be said that the state court 'unreasonabl[y] appli[ed] clearly established Federal law.'") (brackets in original). "'[I]t is not an unreasonable application of clearly established Federal law for a state court to decline to apply a specific legal rule that has not been squarely established by this Court.'" *Richter*, 131 S. Ct. at 786 (quoting *Mirzayance*, 129 S. Ct. at 1413-1414). And this

Court has never required prosecutors to take the additional steps that the Seventh Circuit now demands.

6. In fact, the Seventh Circuit's misapplication of AEDPA was even more pronounced here, for several other circuits have rejected the constitutional requirement that the decision below announces. The fact that other federal courts are in line with the Illinois Appellate Court's decision is conclusive proof (if any were needed) that the latter decision was not an unreasonable application of this Court's Sixth Amendment precedent. See, *e.g.*, *Price v. Vincent*, 538 U.S. 634, 643 & n.2 (2003) (to support conclusion that state supreme court did not apply federal law unreasonably, Court explained that "numerous other [state and federal] courts [had] refused to find double jeopardy violations under similar circumstances"); see also *Musladin*, 549 U.S. at 76 (in denying habeas relief, citing fact that "lower courts have diverged widely in their treatment of defendants' * * * claims"); *Kane v. Garcia Espitia*, 546 U.S. 9, 10 (2005) (*per curiam*) (in denying habeas relief, remarking that "federal appellate courts have split on" disputed question).

Specifically, like the Illinois Appellate Court, several federal courts of appeals have declined to require prosecutors to take a particular affirmative step—including issuing a subpoena—before declaring a witness unavailable. Thus, the Ninth Circuit has held that "[t]he good faith obligation to resort to [an out-of-state witness subpoena] * * * arises only when the prosecutor knows the location of the witness." *Dres v. Campoy*, 784 F.2d 996, 999 (9th Cir. 1986) (citing *Poe v. Turner*, 490 F.2d 329, 331-332 (10th Cir. 1974)). In

other words, once good faith efforts to locate a witness prove unsuccessful, as they did here, there is no requirement to serve a futile subpoena. See *ibid.* Nor does the Constitution require the prosecutor to issue an anticipatory subpoena when the witness's whereabouts are still known. See *id.* at 1000. Rather, the Ninth Circuit has held that the prosecutor may legitimately make the "tactical decision * * * not to serve * * * a subpoena," for fear the witness "might flee" in response. *Ibid.* In reaching these conclusions, the Ninth Circuit rejected the argument that "*Barber* * * * suggests that a finding of good faith is precluded when the prosecutor fails to use [a subpoena]." *Id.* at 999. In short, the Ninth Circuit's decision is impossible to reconcile with the Seventh Circuit's holding here.

The Second, Eighth, and Tenth Circuits likewise have declined to impose strict rules requiring the use of subpoenas to establish a witness's unavailability. See *Christie v. Hollins*, 409 F.3d 120, 125 (2d Cir. 2005) (defense not required to subpoena witness to establish her unavailability for purposes of admitting prior, cross-examined testimony because "nothing in the record supports a belief that [the witness] could have been located to effect service of a subpoena"); *United States v. Johnson*, 108 F.3d 919, 922 (8th Cir. 1997) (prosecution's failure to subpoena witness did not preclude finding of unavailability); *Martinez v. Sullivan*, 881 F.2d 921, 924 n.1 (10th Cir. 1989) ("per se rule requiring use of [an out-of-state subpoena] in all cases as a necessary prerequisite to a finding of unavailability for purposes of the Confrontation Clause" is "contrary to decisions of the Supreme Court"); *Poe*, 490 F.2d at

332 (because whereabouts of witness were not known, subpoena not required to establish unavailability). At the very least, these decisions establish conclusively that the Illinois Appellate Court's decision here was not unreasonable.

7. For the foregoing reasons, the Seventh Circuit's decision violates § 2254(d)(1); but the court also withheld the deference that § 2254(e)(1) requires. The state appellate court determined that the evidence was "clear" that A.S. had left Chicago, gone into "hiding[,] and did not want to be located." App. 83a. Addressing Cross's argument that the State should have looked harder for A.S., the state court further held that pursuit of the "leads" Cross had proposed for the State's investigation "would have been futile." App. 85a. This factual finding is "presumed to be correct" on federal habeas review, and Cross offered no evidence, much less "clear and convincing evidence," to rebut that presumption. 28 U.S.C. § 2254(e)(1); see generally *Schriro v. Landrigan*, 550 U.S. 465, 473-474 (2007) (AEDPA "requires federal habeas courts to presume the correctness of state courts' factual findings unless applicants rebut this presumption with 'clear and convincing evidence.'").

But the Seventh Circuit, without mentioning § 2254(e)(1), disregarded the state court's finding that further measures to find A.S. and secure her appearance at trial would have been futile. The Seventh Circuit agreed with Cross that there were additional avenues the State should have pursued to satisfy its Sixth Amendment obligations (such as contacting A.S.'s current boyfriend or other Chicago-area friends, or

people affiliated with the beauty school A.S. had once attended). App. 11a. But the state appellate court had already rejected "investigat[ing] or question[ing] additional individuals" as "futile." App. 85a.[2] The Seventh Circuit's rejection of this finding of fact, without requiring "clear and convincing" evidence to overcome its presumption of correctness, contravenes § 2254(e)(1) and provides an independent reason to grant this petition and reverse the judgment below.

* * *

The Seventh Circuit's failure to defer to state court conclusions of law and findings of fact on federal habeas review, and its reliance on its own precedent for "clearly established" law, warrant this Court's intervention. Reviewing habeas petitions is "a commitment that entails substantial judicial resources." *Richter*, 131 S. Ct. at 780. "Those resources are diminished and misspent, however, and confidence in the writ and the law it vindicates undermined, if there is judicial

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[2] The state appellate court considered and rejected Cross's "argument that the State failed to follow specific additional leads or to investigate or question additional individuals as identified by [Cross]." App. 85a. The state court provided further "comment * * * on only one of [Cross's] arguments," that "the State should have interviewed people on the 'street corners' where A.S. 'carried out her trade.'" *Ibid*. That the state court did not specifically reject as futile each of the purported "leads" that Cross proffered is of no moment. *Cf. Pinholster*, 131 S. Ct. at 1402 ("Section 2254(d) applies even where there has been a summary denial.").

disregard for the sound and established principles that inform its proper issuance." *Ibid.* Where, as here, a court disregards these dictates, this Court has granted certiorari and summarily reversed. See *Bobby v. Mitts*, 131 S. Ct. 1762, 1765 (2011) (*per curiam*) (summarily reversing grant of federal habeas relief because state court determination that penalty phase instructions did not improperly influence jury to impose death sentence not unreasonable application of clearly established Federal law); *Felkner v. Jackson*, 131 S. Ct. 1305, 1307-1308 (2011) (*per curiam*) (same regarding grant of habeas relief on *Batson v. Kentucky*, 476 U.S. 79 (1986), claim); *Van Patten*, 552 U.S. at 126 (*per curiam*) (same regarding grant of habeas relief on ineffective assistance of counsel claim); *Bell v. Cone*, 543 U.S. 447, 459-460 (2005) (*per curiam*) (same regarding grant of habeas relief on claim that jury instructions violated Eighth Amendment). Likewise, this Court should summarily reverse here or, in the alternative, grant this petition and set the case for full briefing and argument. Either way, the decision below, which is impossible to reconcile with AEDPA, decisions of this Court, and the law in other circuits, should not be permitted to stand.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JULY 2011