No. 11-74

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The certiorari petition showed that the Seventh Circuit, on habeas review, improperly second-guessed the Illinois courts' application of Supreme Court standards for determining whether a witness is "unavailable" for Sixth Amendment purposes. The Illinois trial court had held that the protracted efforts of three state agents to locate A.S., the alleged victim of respondent's rape, were "superhuman" and went "way beyond due diligence," but that A.S. had made it impossible for the State to locate her because she did not wish to be found. App. 46a. Rather than limit its analysis to this Court's "clearly established" holdings as AEDPA requires, however, the Seventh Circuit relied on its own prior decisions (in pre-AEDPA and non-habeas cases) to announce a new rule of constitutional law and award habeas relief to respondent under that rule. Accordingly, this Court should grant the petition and reverse the Seventh Circuit's judgment, either summarily or after full briefing and argument.

The brief in opposition offers no reason to deny the petition. Respondent paints a skewed picture of the facts at odds with the state courts' controlling findings, mischaracterizes this Court's precedent and the decision below, and understates the importance of the Seventh Circuit's published decision as an invitation to void state criminal convictions without the deference that AEDPA demands. Ultimately, respondent makes the same fundamental mistake that the court below did—he considers it sufficient that the Seventh Circuit applied this Court's precedent reasonably in awarding habeas relief, when the proper question is whether the state courts applied that precedent unreasonably.

1. As described in detail in the petition, see Pet. 4-5, the prosecution undertook extensive

efforts—involving three employees over the course of more than two weeks—to find A.S. for respondent's second trial. The Illinois Appellate Court recounted these efforts, including repeated visits to the home of A.S.'s mother; a visit to the homes of A.S.'s father and an "old friend" of A.S.'s in Waukegan, Illinois; contact with A.S.'s brother; and inquiries of the Illinois Department of Public Aid, the Illinois Secretary of State, and other government agencies. App. 44a-46a. Meanwhile, as these investigations proceeded, A.S.'s mother waited two weeks, until the day before trial, before notifying prosecutors that her daughter had contacted her by phone and informed her that she was afraid to testify and would not be returning to Chicago. App. 4a, 45a. Finding that the State had "expended efforts that go way beyond due diligence"—efforts the court described as "superhuman"—but that A.S. simply did not want to be found, the state trial court admitted A.S.'s cross-examined testimony from the first trial, App. 46a, and the appellate court affirmed, App. 83a.

Contrary to these state court findings, respondent tries to depict the prosecutors as intentionally lazy in their search for A.S, see Br. in Opp. 2-5, but this effort fails. As an initial matter, respondent frequently cites his own lower-court briefs for factual statements that are not in the federal habeas record. See *id.* at 2-11. To be sure, the briefs themselves are "included in the 7th Circuit's record," as respondent insists, *id.* at 2 n.1, but

extra-record factual assertions in those briefs are not themselves part of the factual record in this case.[1]

More important, respondent's critique of the State's efforts is often misleading. For example, while he complains that the State failed to investigate certain possible leads, see Br. in Opp. 4-5, 17, 19-20, respondent fails to mention that he advanced this same argument in the state court, App. 51a, 77a, which found that pursuing these additional leads would have been "futile," App. 85a, a finding that respondent never challenged as "unreasonable" and that therefore controls on habeas review, see 28 U.S.C. § 2254(d)(2); see also 28 U.S.C. § 2254(e)(1) (requiring clear and convincing evidence to rebut state court's factual finding on federal habeas review).

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[1] In compliance with Rule 5(c) of the Rules Governing Section 2254 Cases in the United States District Courts, petitioner submitted two items from the state trial record to the district court: the State's motion to declare A.S. unavailable and the transcript from the motion hearing. Doc. 16 at 4-5; Doc. 19, Exhs. J & K. Respondent had an opportunity to introduce additional material he deemed necessary, but he did not submit the remainder of the trial record, and the district court did not request it. During appellate briefing, respondent belatedly moved to expand the record to include additional parts of the trial proceedings, but the district court denied the motion, Doc. 51, and the Seventh Circuit declined to rule on it, App. 3a n.1. The briefs that respondent now cites for factual support include references to the material that he unsuccessfully sought to make part of the record in federal court.

Nor is it clear what "further contact" the State should have "attempted" after learning that A.S. had phoned her mother. Br. in Opp. 5. Prosecutors only discovered that A.S. had called her mother on March 28, 2000, the day of the hearing on the State's motion to admit her prior testimony, App. 45a, and the day before respondent's second trial began, App. 4a, 46a. For the same reason, investigators were not "unreasonable," as respondent claims, for "mechanically visiting the morgue when the mother said [A.S.] was alive and had been speaking by telephone." Br. in Opp. 19. This again ignores the fact that prosecutors first learned that A.S. had called her mother only at the end of their investigation—two weeks after A.S. made the call—not at the beginning. App. 45a. Indeed, respondent even misdescribes the length of the investigation, claiming that it took less than two weeks, see Br. in Opp. 4, when in fact it continued for 15 to 18 days. Compare App. 45a; Doc. 19, Exh. K at E28 (search began between March 10 and March 13, 2000), with App. 4a, 45a (search ended on March 28, 2000).

In short, stripped of unsupported criticisms and errors, respondent's attempt to downplay the State's efforts to locate A.S. falls flat.

2.a. Respondent's legal points fare no better. Like the court below, he disregards the distinction, critical to the AEDPA framework, between a reasonable application of this Court's "clearly established" law and the *only* reasonable application of that law. Respondent insists that the Seventh Circuit ruled properly because the court "correctly relied on a combination of facts and circumstances to measure the lack of good-faith

diligence by the prosecutors to obtain the live witness for retrial," the "totality of the circumstances" test that this Court "required" in *Ohio v. Roberts*, 448 U.S. 56 (1980), overruled on other grounds by *Crawford v. Washington*, 541 U.S. 36 (2004). Br. in Opp. 16-17. But even if true, that proves merely that the Seventh Circuit reached a conclusion within the universe of reasonable outcomes under this Court's precedent. That may be sufficient to overturn a judgment on direct appeal, but it falls well short of the showing that AEDPA requires to void a state court conviction—that the state court's conclusion is "contrary to" or "unreasonable" under this Court's decisions. 28 U.S.C. § 2254(d)(1). Nothing in the decision below, or in the opposition brief, makes that showing.

b. Next, respondent makes much of the fact that the Seventh Circuit properly recited AEDPA's deferential standard of review, see Br. in Opp. 12, 17, but this does not permit the court to disregard that standard in practice. Routinely, this Court summarily reverses decisions, like the Seventh Circuit's here, that recite the proper AEDPA standard but fail to give it effect. See *Mitts v. Bagley*, 620 F.3d 650, 654 (6th Cir. 2010), rev'd, 131 S. Ct. 1762 (2011); *Jackson v. Felkner*, 389 Fed. Appx. 640, 640 (9th Cir. 2010), rev'd, 131 S. Ct. 1305 (2011); *Van Patten v. Deppisch*, 434 F.3d 1038, 1042 (7th Cir. 2006), vacated, 549 U.S. 1163 (2007), on remand to 489 F.3d 827 (7th Cir.), rev'd, 552 U.S. 120 (2008); *Cone v. Bell*, 359 F.3d 785, 790 (6th Cir. 2004), rev'd, 543 U.S. 447 (2005).

c. Respondent also fails in his effort to avoid the fact that—because this Court's good faith,

reasonableness standard for evaluating witness unavailability is a general one—state courts have substantial latitude in applying it. See Pet. 13 (citing *Harrington v. Richter*, 131 S. Ct. 770, 786 (2011), and *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). While recognizing that the lodestar for analyzing witness unavailability under this Court's decisions remains "reasonableness," see Br. in Opp. 13, respondent mistakenly contends that this Court has meaningfully "refine[d]" and "narrow[ed]" that general standard with various "'safely emerge[d]' principles," "propositions," "components," and "underpinning[s]." *Id.* at 13, 14, 18, 23. But this is a substantial overstatement, as respondent himself seems to acknowledge when he describes the *Roberts* test as a "totality of the circumstances" inquiry, *id.* at 17, and when he chooses terms like "grounded in" and "underpinning" to describe the relationship between these "refinements" and this Court's precedent, *id.* at 13, 16.

In fact, this Court's three decisions on witness unavailability furnish no precise rules for defining reasonable, good faith efforts to locate an absent witness. *Barber v. Page* found a constitutional violation because state authorities there "made absolutely no effort" to secure the witness's presence at trial from a known location, a complete lack of effort that (not surprisingly) fell short of a "good-faith effort." 390 U.S. 719, 723-725 (1968). And contrary to repeated misstatements by the Seventh Circuit and respondent, App. 13a; Br. in Opp. 13-16, 20, *Berger v. California* did nothing more than hold that *Barber* was retroactive, see

393 U.S. 314 (1969) (*per curiam*). Finally, while *Roberts* holds that a State "*may*" have to undertake certain affirmative acts to find a witness, 448 U.S. at 74 (emphasis in original), and that futile acts are not required, see *ibid.*, this gives lower courts substantial latitude to decide what conduct is required and what is futile on the facts of each case.

Like the decision below, respondent places substantial weight on one particular "refinement" purportedly found in these decisions—a focus on whether prosecutors subpoenaed the missing witness. See Br. in Opp. 16 ("Every prosecutor knows, in accordance with *Roberts* and *Barber* and *Berger*, that a subpoena is important to deter a witness from fleeing and to empower an entire police department to apprehend and bring the witness to court."); *id.* at 15 (describing *Berger* as having "adopt[ed] *Barber*'s importance of a subpoena or comparable writ"); *id.* at 19 (criticizing State's failure to utilize a subpoena or bench warrant, "despite * * * the use of subpoenas in *Ohio v. Roberts* and the pivotal use of court process in *Barber v. Page*"). Again, however, respondent reads far too much into these decisions, which nowhere say that the State's resort to a subpoena is "important" or "pivotal" under the Sixth Amendment.

In *Barber*, the witness was incarcerated in an out-of-state prison. 390 U.S. at 723. Understandably, the Court faulted prosecutors for not using a "writ[] of habeas corpus *ad testificandum*" to ensure his presence at trial, where that was an established procedure for retrieving a federal prisoner to testify in state criminal proceedings. *Id.* at 724. *Barber* says nothing about

cases like this one, where a witness reneges on her prior promise to testify, goes into hiding, and cannot be located. Meanwhile, *Roberts* held merely that the State's service of useless subpoenas (at the home of the witness's parents, who did not know how to reach the witness, see 448 U.S. at 75) did *not* violate the Sixth Amendment. See Pet. 15. No prosecutor could extract from this decision petitioner's rule making a subpoena "pivotal" in most cases.[2]

d. While stressing the importance of the State's failure to issue a subpoena, on the one hand, respondent simultaneously claims that the Seventh Circuit never actually announced a subpoena requirement, on the other. According to respondent, although the decision below requires "the consideration of a subpoena as a factor" in determining witness unavailability, Br. in Opp. 21, the Seventh Circuit "never held that there is * * * a requirement" that the prosecutor obtain a subpoena, or otherwise adopted a "*per se* rule[]," *id.* at 21-23. But respondent is incorrect. The Seventh Circuit directed prosecutors to obtain a subpoena whenever the witness is both "reluctа[nt]" to testify and "critical" to the prosecution. App. 13a. It is impossible to construe this as anything other than a rule requiring a subpoena under these (presumably not

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[2] Nor would such a rule be desirable. As the petition explains, a "prosecutor may legitimately make the 'tactical decision * * * not to serve * * * a subpoena,' for fear the witness might flee in response." Pet. 20 (quoting *Dres v. Campoy*, 784 F.2d 996, 1000 (9th Cir. 1986)).

uncommon) circumstances, and lower courts will undoubtedly treat it as such.

In this way, the Seventh Circuit's decision is at odds with decisions of the Second, Eighth, Ninth, and Tenth Circuits, as detailed in the petition. None of these courts required prosecutors to take a specific, affirmative step (such as obtaining a subpoena) to establish a witness's unavailability. See Pet. 19-21. And because petitioner relies on these decisions, not as evidence of a "split in the circuits," Br. in Opp. 21, but to confirm the reasonableness of the state court's decision, see Pet. 21, respondent's nit-picking about factual differences between the decision below and these other cases, see Br. in Opp. 21-22, gets him nowhere.

e. Finally, while respondent does not dispute that AEDPA bars federal courts from awarding habeas relief based on constitutional rules announced only at the intermediate appellate level, see Pet. 16-19 (collecting cases), he insists that the Seventh Circuit did not violate this rule when it relied on a string of its own (non-habeas and pre-AEDPA) decisions, see Br. in Opp. 15. Respondent's theory appears to be that these prior Seventh Circuit decisions merely applied this Court's established constitutional doctrine, and that citing them is therefore no different than citing the opinions of this Court. See *ibid.*

But respondent misses the point. The Seventh Circuit relied on its own prior decisions, not as mere proxies for this Court's decisions—and indeed, it would make little sense to do so, for why cite lower court authority for principles equally well settled by this

Court's own cases—but for the way in which those Seventh Circuit decisions applied and expanded upon this Court's "clearly established" law. Thus, the Seventh Circuit cites its own prior decision in *United States v. Hite*, 364 F.3d 874 (7th Cir. 2004), cert. granted and judgment vacated, 543 U.S. 1103 (2005), for the specific proposition that an investigation is insufficient when it consists largely of talking to family members, App. 10a, a point that this Court has never made. And the Seventh Circuit relied on its prior decision in *United States v. Ochoa*, 229 F.3d 631 (7th Cir. 2000), to emphasize the importance of issuing a subpoena to establish prosecutorial good faith in securing a trial witness, App. 13a-14a, another proposition that this Court has never endorsed, see *supra* pp. 7-8. That these appellate decisions may have applied this Court's precedent reasonably is irrelevant; such lower-court decisions do not provide grounds for habeas relief because they expand constitutional doctrine beyond this Court's "clearly established" law.

3. In a final salvo, respondent argues that the petition presents a question that is neither recurring nor important. But here again respondent relies on a skewed view of the facts (urging that "the extremity of the prosecutor's aberrant behavior is unlikely to ever happen again," Br. in Opp. 25), and of the decision below (asserting that "[t]he Seventh Circuit never stated that subpoenas are 'required' in 'every case'" involving a critical and reluctant witness, *ibid.*). More fundamentally, respondent misdescribes the petition, which seeks review not of his Confrontation Clause claim as an original matter but of the Seventh Circuit's

failure to give the state court's findings of fact and conclusions of law the deference that AEDPA demands. This latter issue *is* both recurring and important, as this Court confirms each time it grants certiorari and summarily reverses a similarly flawed circuit court opinion. See Pet. 22-23 (collecting cases). The Seventh Circuit's announcement of a new constitutional rule and its use of its own precedent to fill gaps left open by this Court's precedent is obvious on the face of the decision below. If uncorrected, the court's failure to follow AEDPA, in the teeth of this Court's consistent admonitions, risks unsettling habeas review in the Seventh Circuit and beyond.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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