No. 12-10691

IN THE
SUPREME COURT OF THE UNITED STATES

NATHAN S. BERKMAN,

Petitioner,

v.

STATE OF INDIANA,

Respondent.

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

BRIEF IN OPPOSITION TO THE PETITION

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QUESTIONS PRESENTED

1. Unlike some states (such as Florida), the Indiana rules of criminal procedure do not afford defendants the opportunity to take impeachment-only pre-trial depositions, *i.e.*, to take depositions with the *ex ante* expectation that the resulting testimony can be used only for impeachment at trial, even if the witness later becomes unavailable.

   The first question presented in this case, therefore, is whether, under these circumstances, a defendant's unlimited pre-trial deposition of a prosecutorial witness provides, consistent with the Confrontation Clause, a sufficient opportunity for cross-examination to enable the deposition's use as substantive evidence at trial if the witness is declared unavailable?

2. Under the Confrontation Clause, is a trial judge within his discretion to declare a witness unavailable when (1) the witness was on the stand but unable to continue because of a migraine headache and nausea; (2) the trial had already been delayed for several days because the witness had been in the hospital for four days; and (3) hospital personnel suggested that the witness may have had a stroke or seizure?

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STATEMENT OF THE CASE

1. In the months leading up to the murder of Olen Hawkins, Petitioner Nathan Berkman used cocaine on a daily basis. Tr. at 452-53, 486. He regularly purchased his cocaine from Hawkins, who was sixty-three years old at the time, and whom Berkman characterized as "a very good dude, very understanding, very nice." Tr. at 140, 1137-38. When Hawkins fronted drugs to Berkman and paid Berkman's utility bill, Berkman wound up owing Hawkins about $2,000. Pet. App. at D-2; Tr. at 142, 494, 567, 1140, 1142-43. On August 30, 2008, Berkman called Hawkins from a pay phone, told Hawkins he had the cash to repay the debt, and arranged a meeting at their usual location, a supermarket parking lot near Berkman's apartment complex. Tr. at 1230-31.

At the meeting in Hawkins' car, Hawkins pulled a bag of cocaine from his pocket and asked if Berkman had the money he owed. Tr. at 528, 673, 1157-58. Berkman suddenly reached over with a knife and fatally cut Hawkins' throat from ear to ear. Pet. App. at D-104; Tr. at 515, 528. Berkman took Hawkins' cell phone and threw it onto the supermarket's roof, pushed Hawkins' lifeless body to the passenger seat, and drove Hawkins' vehicle to the nearby apartment Berkman shared with his girlfriend, Arlene Timmerman. Pet. App. at D-104; Tr. at 529, 532. Berkman parked the vehicle in his garage, entered the apartment, and yelled for Timmerman. Pet. App. at D-104; Tr. at 345, 500-01, 532, 1241. Timmerman walked into the garage and noticed not only Hawkins' car but also that Berkman was wearing different clothes than when he left and that he had blood on him. Tr.

at 502-03, 616. Berkman showed Timmerman the body, which was still in the car's passenger seat, and told her that he had slit Hawkins' throat in the supermarket parking lot to obtain an ounce of cocaine. Tr. at 503-04.

As it happened, Berkman and Timmerman had a visitor that evening, friend and some-time drug customer Tanya Sullivan. Tr. at 338, 351-52. After Berkman showed Timmerman the body, they invited Sullivan to the basement, where the three smoked crack. Pet. App. at A-4. Sullivan recalled Berkman acting paranoid, ordering her to be quiet, frequently peeking out the basement windows and, at one point, vomiting. Tr. at 353-54. Sullivan asked about blood on Berkman's fingers, and Berkman replied that he had hurt someone really bad and that Sullivan did not want to know more. Tr. at 363-64, 366, 402-03. Sullivan eventually left around two o'clock in the morning. Tr. at 357-58, 1248.

Following what Timmerman described as a three-day "coke binge," Berkman conceived a plan to destroy Hawkins' vehicle and body, which had remained in the garage the entire time. Pet. App. at D-104-105; Tr. at 519. About two o'clock the morning of September 2, 2008, Berkman drove Hawkins' vehicle and bodily remains to a gas station, with Timmerman following in her car. Tr. at 520. At Berkman's direction, Timmerman filled up a red gas can, returned to her car, and followed Berkman as he drove Hawkins' vehicle to a field. Tr. at 520-22. There, Berkman poured the gasoline on Hawkins' car and torched it, then left with Timmerman in her car. Pet. App. at D-105; Tr. at 522.

On November 19, 2008, police discovered Hawkins' burned out car and charred skeletal remains, still in the field where Berkman (as yet unknown to police) had left them. Tr. at 222-24, 725-26. Police also found the red gas can, with leftover fuel, approximately fifty feet from the blackened vehicle. Tr. at 741-43, 746.

In June 2009, Timmerman contacted police. She told the interviewing officer on June 7 that Berkman killed Hawkins in the supermarket parking lot and that Hawkins' phone was on the supermarket roof. Tr. at 815-17. Police recovered the phone from the roof and the next day arrested Berkman, charging him with murder and felony murder in the perpetration of a robbery. Tr. at 818, 1039-40; Ct. of App. Appendix at 9.

2. While incarcerated before trial, Berkman confessed to fellow inmate Paul Barraza, who wrote a letter informing a deputy prosecutor of Hawkins' admission. Pet. App. at D-104-105, D-108. Based on that information, the State included Barraza on its witness list, which it disclosed to Berkman and the trial court on January 6, 2011. Ct. of App. Appendix at 35.

Shortly before the scheduled trial date, in January 2011, Berkman requested and obtained a continuance so he could depose Barraza. Pet. at 2. At the deposition, Barraza testified that Berkman admitted cutting Hawkins' throat and setting fire to his car and remains. Pet. App. at D-104-05. Berkman's counsel "questioned Barraza at great length regarding his criminal history, eliciting responses indicating that Barraza had been arrested thirteen times; had been first incarcerated between the ages of nine and eleven; and had 'for or five' felony

convictions. . . ." Pet. App. at A-11. The prosecuting attorney was present during the deposition, but did not question Barraza. Pet. App. at A-5.

By the time of trial in July 2011, Barraza had been released from custody, whereabouts unknown. Pet. at 2. After failing to locate Barraza, the State moved to read the transcript of Barraza's deposition into the record, which the trial court permitted. Pet. at 2. The State also called Timmerman as a witness. Pet. App. at A-8. She testified that Berkman, using Hawkins' own vehicle, brought Hawkins' dead body to her garage; that he showed her the corpse; that he admitted to slitting Hawkins' throat; that he left the dead body in the garage for three days; and that he disposed of Hawkins' remains by transporting Hawkins' vehicle and body to a field and burning them. Tr. at 502-04, 515, 519, 522. On cross-examination, Berkman's counsel elicited evidence of Timmerman's frequent drug use during the time of the murder and discrepancies between her trial testimony and what she had told police regarding how long Berkman had been out of the house and who had been at the house when he returned. Tr. at 577-78, 589-90, 596. The jury found Berkman not guilty of murder, but deadlocked on the charge of felony murder in perpetration of robbery. Pet. App. at A-4.

3. The State chose to retry Berkman on felony murder using the same principal witnesses.

Prosecutors attempted to serve a subpoena on Barraza at his last known address, but once again an investigator was unable to locate him. Pet. App. at A-9. The prosecutor believed Barraza to be in Florida, where he had fled to avoid an

outstanding arrest warrant. Pet. App. at A-9. When Barraza did not appear at the second trial, the State once again moved to introduce his deposition transcript into the record, which the judge permitted over Berkman's objection. Tr. at 697-98. Berkman's trial attorney—who had taken the deposition—read aloud the deposition questions and a deputy prosecutor read Barraza's answers. Pet. App. at D-24-26.

Prosecutors also once again called Timmerman, but at first she was unavailable because she was in the hospital. Tr. at 442. The Court continued the trial for a few days waiting for Timmerman to be discharged. Tr. at 438, 442. Five days later, Timmerman took the stand, but while testifying became nauseated and told the judge that she was "having an issue." Pet. App. at D-3. The judge recessed and brought the attorneys and Timmerman into chambers. The judge asked Timmerman "what's happening here?" Pet. App. at D-5-6. In response, Timmerman claimed to be "very nauseous." Pet. App. at D-6. She described how she had been hospitalized four days the previous week while undergoing tests for MS, explained that hospital personnel thought she may have had a seizure or stroke, and reported her history of migraine headaches. Pet. App. at D-3, D-6.

After observing Timmerman, the judge concluded that "I don't see how we're going to be able to continue with this . . . it doesn't even seem possible to me." Pet. App. at D-8. The judge noted that "the counsels agree that she's unable to be present . . . unable to testify," and after the jury returned declared Timmerman unavailable and ordered that her testimony from the first trial be read for the jury. Pet. App. at D-10-12. Berkman's counsel objected to the introduction of

Timmerman's former testimony and requested a mistrial, but admitted that "we've got a witness who is physically unable to testify." Pet. App. at D-13. Defense counsel argued that "there could come a time in the future when she could come available to testify," but did not ask for a continuance. Pet. App. at D-13.

In addition to the testimony of Timmerman and Barraza, the State called both Tanya Sullivan and Meghan Johnston to testify as to Berkman's erratic behavior on the night of Hawkins' murder, and Hawkins' wife testified that Berkman owed her husband approximately $2000. Tr. at 141-42, 353-54, 764-65.

The jury found Berkman guilty of the felony murder of Olen Hawkins, and the court sentenced him to sixty years in prison. Pet. App. at B-1.

4. On appeal, Berkman argued that the trial court should have declared a mistrial when Timmerman became unavailable and that the trial court abused its discretion in admitting Barraza's deposition testimony. Pet. App. at A-3-4. The Court of Appeals affirmed, holding that the trial court acted within its discretion in declaring Timmerman unavailable based on a personal interview and observations of her behavior, demeanor, and appearance. Pet. App. at A-8. Regarding admission of Barraza's deposition testimony, the Court of Appeals cited the State's reasonable, good-faith effort to secure Barraza's presence at trial as justification for declaring the witness unavailable and held that the pre-trial deposition of Barraza by Berkman's own lawyer was sufficient opportunity for confrontation. Pet. App. at A-9-11. The Court of Appeals explained that defense counsel's subjective motivation for taking a deposition in a criminal case is irrelevant for deciding whether the

deposition constitutes an "opportunity for cross examination" sufficient to satisfy the Confrontation Clause. Pet. App. at A-11-12.

Berkman sought discretionary review by the Indiana Supreme Court on the issues of Timmerman's unavailability and the admissibility of Barraza's deposition, but the court denied review without comment. Pet. App. at C-1.

REASONS TO DENY THE PETITION

I. This Case Does Not Concern "Discovery Depositions," and There Is No Lower-Court Conflict over Permissible Uses of "Discovery Depositions" in Any Event

Berkman urges the Court to review whether the Confrontation Clause bars the admission of so-called "discovery depositions" as former testimony when the witness is unavailable at trial. Pet. at 6. The term "discovery deposition," however, has no grounding in Indiana's procedural rules, which provide only for "depositions" generally. *See* Ind. R. Trial P. 30, 32. By virtue of the procedural rules prevailing in the states whose judicial decisions Berkman claims are in conflict with the decision below, Berkman apparently uses the term "discovery deposition" to refer to a deposition deemed *ex ante*, at the election of the defendant, to be for impeachment purposes only. Available only in a few states, such an impeachment-only deposition affords defendants an opportunity to gather evidence useable *against* the prosecution at trial (*i.e.*, for impeachment), with no risk of creating testimony useable *by* the prosecution at trial (*i.e.*, if the witness were to become unavailable).

Indiana permits criminal defendants to take pre-trial depositions with no *ex ante* limits on usage at trial. In other words, whether a deposition may be used at

trial depends on the judge's evaluation of witness unavailability and the defendant's opportunity for cross examination. *See* Ind. R. Trial P. 32(A)(3). Importantly, everyone knows these rules, and the attendant risks, in advance, and Berkman makes no claim of being blindsided by a change in the rules. So, what Berkman really seeks is a decree that all states must afford criminal defendants the opportunity to take risk-free, impeachment-only pre-trial depositions. Unsurprisingly, there is no conflict among lower courts as to whether the Confrontation Clause requires states to adopt such newfangled discovery devices, and there is no pressing national need for the Court to consider the issue.

A. State criminal procedures vary widely, depositions included

To begin, a defendant has no general constitutional right to discovery in a criminal case. *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977). Aside from disclosures of exculpatory evidence mandated by *Brady v. Maryland*, 373 U.S. 83 (1963), there is no right to "compel the pretrial production of information that might be useful in preparing for trial." *Pennsylvania v. Ritchie*, 480 U.S. 39, 53 n.9 (1987). This means that a defendant has no constitutional right to take the deposition of a prospective witness prior to trial. *Minder v. Georgia*, 183 U.S. 559, 562 (1902).

Accordingly, States vary significantly in terms of the criminal discovery procedures they use. *See* 5 Wayne R. LaFave, et al., Criminal Procedure § 20.2(a) (3d ed. 2007) (declaring that, by the mid-1970s, all jurisdictions "recognized a trial court's inherent authority to require pretrial discovery as an element of its control over the trial process[, but] they varied greatly in the leeway that they would grant

to the trial court in the exercise of that authority to compel discovery"). Each state determines a defendant's pre-trial discovery rights, including whether a defendant may conduct pre-trial depositions. *Johnson v. State*, 266 N.E.2d 57, 59 (Ind. 1971) (observing that "[discovery] is not an absolute and unconditional right" while affirming a trial court's denial of a defendant's motion to depose several prosecutorial witnesses).

States may legitimately make different policy choices in arriving at divergent pre-trial discovery rules. Broad discovery remains controversial in criminal cases, and each state must "by court rules or statutes . . . detail that discovery which must (or may) be given to the defense." *See generally* LaFave, *supra*, § 20.1(a). In making these rules, States must balance several competing policy considerations, such as the need to eliminate "trial by surprise," the Fifth Amendment barrier to the prosecution's ability to obtain equal discovery from a defendant, and the possibility of witness intimidation. LaFave, *supra*, § 20.1(b).

As a result, it is wholly unremarkable that states enact different policies when it comes to criminal pre-trial discovery. *See id.* Such differences are not a mark of a "conflict" in need of reconciliation, but are instead a natural and healthy outgrowth of our federalist system.

B. Pre-trial depositions in criminal cases are a relatively new device, and States vary in their rules and practices

Only in the last half-century have states afforded defendants the opportunity to initiate pre-trial discovery. LaFave, *supra*, § 20.1(c) (observing that the

American Bar Association in 1970 endorsed "discovery provisions extending substantially beyond even the broadest federal proposal, and a large number of states revised their discovery provisions in accordance with the ABA's proposed standards").

Some states allow depositions to be used for testimonial purposes at trial if the deponent is unavailable to testify, as long as the defendant had an opportunity to cross-examine the witness. *See infra* Part I.B.2. Others by rule—and not judicial interpretation of the Confrontation Clause—do not allow depositions to be used as trial testimony under any circumstances if the defendant is not in fact present at the deposition. *See infra* Part I.B.1. Only a few states, such as Florida, give defendants the option to take risk-free depositions, *i.e.*, depositions they know *ex ante* can be used solely for impeachment purposes.

Accordingly, the "conflict" that Berkman presents between the decision below and *State v. Lopez*, 974 So.2d 340, 350 (Fla. 2008), is not a conflict at all, but merely an example of how these different discovery rules are used in each state.

1. Florida's rules of criminal procedure create two "very distinct" types of depositions: "(1) depositions to perpetuate testimony as set forth in rule 3.190[(i)]; and (2) depositions for purposes of pre-trial discovery as set forth in rule 3.220(h)." *State v. Green*, 667 So.2d 756, 759 (Fla. 1995). Florida defendants who choose to participate in discovery may take "discovery depositions." Fla. R. Crim. P. 3.220(a), 3.220(h). Without leave of the court, the defendant may depose any "Category A" witnesses, including eye witnesses, alibi witnesses, investigating officers, and

expert witnesses who have not provided a written report or who are going to testify. Fla. R. Crim. P. 3.220(b)(1)(A)(i), (h)(1)(A). Critically, the rules expressly provide that "[a]ny deposition taken pursuant to this rule may be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness[,]" but may not be admitted as evidence against the defendant even if the witness is unavailable at trial. Fla. R. Crim. P. 3.220(h)(1).

Florida's rule expressly allowing a defendant to make a unilateral decision to depose a witness knowing in advance that there is no risk that the deposition could be used as substantive evidence at trial is notable in its generosity toward criminal defendants. It affords them even greater tactical advantages than the ABA has recommended. George C. Thomas III, *Two Windows into Innocence*, 7 Ohio St. J. Crim. L. 575, 593 (2010) (describing how Florida's statute providing defendants with a right to depositions for the purposes of discovery exceeded even the ABA's recommendations at the time).

Iowa's criminal discovery rules achieve the same result, but in a different way. In Iowa a defendant may depose any witness, and if the defendant is not present at the deposition, that deposition cannot be used as substantive evidence at trial, even if the witness is unavailable. *See* Iowa R. Crim. P. 1.704, 2.13(1), 2.27. Thus, a defendant in Iowa may in effect create an impeachment-only deposition simply by not attending the deposition.

Arizona has a similar rule, albeit with additional limits. Under criminal procedure Rule 15.3, a defendant may take a "discovery deposition" only when a

witness refuses to talk off the record. If the defendant does not attend such a deposition and did not waive his presence, the deposition cannot be used at trial (except for impeachment) without the defendant's consent, even if the witness is unavailable. Comments to Ariz. R. Crim. P. 15.3(b), (c), (d), and (e). The prosecutor, however, can invite the defendant to attend the discovery deposition. A defendant who declines the invitation has waived the right to attend and the deposition transcript can be used at trial if the witness becomes unavailable. *Id.* In Arizona, therefore, a defendant cannot unilaterally decide to take a risk-free deposition, but defense counsel knows as the deposition starts whether, under the circumstances (*i.e.*, if the defendant is attending or has been invited to attend), the deposition can later be used for impeachment only.

In Missouri, a defendant may depose any person, but a deposition transcript is substantively admissible only if the defendant was present, waived the right to be present in writing or in open court, or failed to comply with a court order to attend. *See* Mo. R. Crim. P. 25.12(a), 25.16(a). So in Missouri, as in Arizona and Iowa, the trial rules—not judicial interpretations of the Confrontation Clause—afford an *ex ante* expectation that a deposition is for impeachment only so long as the defendant does not attend the deposition.

In these states, as in in Florida, the criminal procedure rules allow defense attorneys to take a deposition knowing that the transcript of that deposition cannot be used against their clients as substantive evidence at trial. The Indiana trial

rules, however, afford defense attorneys no such expectation that they can take risk-free pre-trial depositions.

2. In Indiana, "the Rules of Criminal Procedure do not distinguish between discovery depositions and testimonial depositions." *Howard v. State*, 853 N.E.2d 461, 469 n.7 (Ind. 2006). Indiana permits pre-trial depositions with no prior showing of witness unavailability and with no *ex ante* limits on their use. Usage at trial turns on whether the witness is then available and whether the defendant "was present or represented at the taking of the deposition[.]" Ind. R. Trial P. 32; *see also* Ind. R. Trial P. 30; Ind. R. Evid. 804. And, as the Court of Appeals said below, "Indiana law does not seem to prohibit a defendant's attendance at discovery depositions." Pet. App. at A-12.

Accordingly, a defense attorney in Indiana is well aware at the time of the deposition that there is some risk the deposition could be used as substantive testimony at trial if the witness becomes unavailable. Indiana's procedural rules simply do not afford the defendant an opportunity for a risk-free, impeachment-only deposition.

C. These differing pre-trial discovery rules reflect different legitimate policy choices, not conflicts over the meaning of the Confrontation Clause

Berkman claims state courts are in conflict over whether "discovery depositions," *i.e.*, impeachment-only depositions, may be used at trial in the event of witness unavailability. No such conflict exists. Some states (such as Florida) have impeachment-only depositions, others (such as Indiana) do not, but these

differences are purely functions of state criminal procedure rules and the policy choices that underlie them, not of judicial constitutional interpretation. In other words, there is no conflict over the permissible uses of impeachment-only depositions, because Indiana, unlike Florida, does not afford defendants the right to take impeachment-only depositions.

Berkman cites *State v. Lopez*, 974 So.2d 340 (Fla. 2008), where the court precluded use of a pre-trial deposition at trial, as being in conflict with the decision below. But that decision turned on the unfairness of using a Rule 3.220(h) deposition at trial given the rule's express *ex ante* limit on using such depositions for impeachment only. Given that rule, a defendant would not know at the time of the deposition that it could possibly be his only opportunity to question the witness. *Id.* at 350. In contrast, a Florida defendant taking a Rule 3.190(i) deposition knows, like an Indiana defendant knows of any deposition he takes, that the resulting testimony might well be introduced at trial if the witness were to become unavailable and the defendant had the chance to be present for the deposition (regardless whether he availed himself of that opportunity). Fla. R. Crim. P. 3.190(i).

Subsequent Florida decisions reflect this emphasis on the differences in depositions under Florida's bifurcated deposition structure. *See Corona v. State*, 64 So.3d 1232, 1241 (Fla. 2011) (reiterating distinction between types of depositions in holding that admission of a 3.220(h) deposition at trial did not satisfy the Confrontation Clause); *Blanton v. State*, 978 So.2d 149, 155-56 (Fla. 2008) (citing

Lopez's reasoning for finding 3.220(h) depositions inadequate for the purposes of the Confrontation Clause); *State v. Contreras*, 979 So.2d 896, 911 (Fla. 2008) (noting that "for a discovery deposition pursuant to rule 3.220(h) to meet the *Crawford* requirement of an opportunity for cross-examination, it would have to be the functional equivalent of a rule 3.190[(i)] deposition to perpetuate testimony"). In short, the *only* Florida decisions rejecting the admission of a "discovery deposition" under the Confrontation Clause concern risk-free Rule 3.220(h) depositions, which, owing to the legitimate expectations of counsel, have no analogue in Indiana.

The Indiana Court of Appeals recognized that the reasons cited in *Lopez* for excluding "discovery" depositions at trial do not apply to Indiana for exactly this reason. Pet. App. at A-12. Under Florida trial rules, for example, a defendant is not permitted to attend an impeachment-only deposition. Pet. App. at A-12. Here, "Indiana law does not seem to prohibit a defendant's attendance at discovery depositions[.]" Pet. App. at A-12.

What is more, Berkman neither claims to have requested to attend the Barraza deposition nor asserts that the court denied him that opportunity. If Berkman is attempting to challenge Indiana's determination that the presence of a defense counsel at a deposition waives the cross-examination requirement of the Confrontation Clause, he did not adequately challenge this issue below and this Court should not address it now. Pet. at 18; *see also Farris v. State*, 753 N.E.2d 641, 646 (Ind. 2001) (holding that the active presence of the defendant's counsel at a deposition constituted a waiver of the Confrontation Clause).

To be sure, the *Lopez* court was also concerned that "the purpose of a discovery deposition is at odds with the concept of a meaningful cross-examination. Often discovery depositions are taken for the purpose of uncovering other evidence or revealing other witnesses." *Lopez*, 974 So.2d at 349. But while that concern is understandable in Florida where a trial lawyer has little motive to probe a witness in a discovery deposition under 3.220(h) because he is assured by rule that the deposition cannot be admitted at trial in lieu of the witness, trial counsel in Indiana does not have such an iron-clad guarantee, and must conduct his client's case accordingly. *Compare* Fla. R. Crim. P. 3.220(h), *with* Ind. R. Trial P. 30, 32; Ind. R. Evid. 804.

There is no right to a risk-free deposition in Indiana, and the transcript here reflects that Berkman's counsel understood as much and therefore worked hard to impeach Barraza's testimony during the deposition. As the Indiana Court of Appeals observed, "Berkman's trial counsel . . . spen[t] considerable time during the deposition impeaching Barraza with prior criminal convictions and arrests and also exploring his motive for approaching the authorities regarding Berkman's confession." Pet. App. at A-11. More specifically, Berkman's trial counsel got Barraza to admit to theft; having been arrested 13 times; having dealt cocaine; having been incarcerated before the age of twelve; and having "four or five" felony convictions, several of which were batteries. Pet. App. at A-11. And, recognizing the irony of Berkman's claim that the deposition did not provide him with a sufficient opportunity for cross-examination, the Court of Appeals noted that, with

the possible exception of the theft, none of Barraza's incriminating statements admitted into the record through the deposition would have been admissible for the purposes of impeachment if he had testified at trial. Pet. App. at A-11.

Thus, to characterize the Barraza deposition as "solely" for the purpose of acquiring information to prepare for trial ignores not only long-time Indiana procedural rules but also the actual content of the deposition.

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The interstate differences Berkman discusses in his petition relate to state procedural rules and policy choices, not to divergent interpretations of the Confrontation Clause. At most, Florida's *Lopez* case outlines a Confrontation Clause issue in circumstances where the defendant had, based on the trial rules, an *ex ante* right and expectation to take a deposition useable at trial only for impeachment, only to learn at trial that the deposition would be used as substantive evidence. *See Lopez*, 974 So.2d at 350. That scenario did not arise here, where Berkman and his lawyer had no such expectation based on the Indiana rules. This case is especially remote from the concerns that arose in *Lopez* considering that Berkman did not ask to be present at the deposition and has never disputed the ruling that his lawyer's participation in the deposition constituted waiver of any right to be present. There is no lower-court conflict to resolve here.

II. The Trial Court's Routine, Discretionary Decision to Declare Timmerman Unavailable Does Not Merit This Court's Attention

Berkman also asserts that the Indiana Court of Appeals created a "per se" rule that witnesses may be declared unavailable if they fall ill at any point during the trial, regardless of any other consideration. Pet. at 24. He says that the lower courts are "highly fractured" on this question and points to several cases that supposedly "take a position in stark contrast to" the Court of Appeals. Pet. at 22, 25.

Neither contention is correct. The decision below did not hold that any temporary illness renders a witness *per se* unavailable, and the highly fact-bound nature of witness unavailability determinations makes it impossible to discern any genuine "fractures" among lower courts. All Berkman really seeks on this point is for the Court to correct what he perceives to be a misapplication of agreed-upon law to the facts of this case, which of course is not the function of this Court. *See, e.g.*, Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.").

A. The Indiana Court of Appeals did not hold that any temporary illness renders a witness *per se* unavailable

Berkman principally complains about what he calls the "remarkably perfunctory" rationale of the Indiana courts for deeming Timmerman unavailable at trial. Pet. at 23. Berkman claims that the Indiana courts "gave no consideration either to the possibility that" Timmerman might have been able to testify later, or

to her importance to the trial, and thus implicitly held that these considerations are irrelevant in deciding whether a witness is unavailable. Pet. at 23-24.

First, Berkman ignores the full context of the trial court's determination that Timmerman was unavailable. By the time the court declared Timmerman unavailable, the trial had already been suspended for five days because Timmerman had been in the hospital. Tr. at 438, 442 (she was unavailable on Thursday and Friday and Monday was a holiday). Then, while on the stand, Timmerman informed the judge that she was "having an issue." Pet. App. at D-3. After recessing and bringing the attorneys and Timmerman into chambers, the judge asked Timmerman "what's happening here?" Pet. App. at D-6. Timmerman claimed to be "very nauseous," described how she had been hospitalized four days the previous week while undergoing tests for MS, explained that hospital personnel thought she may have had a seizure or stroke, and reported her history of migraine headaches. Pet. App. at D-3, D-6.

After hearing these statements, considering Timmerman's unavailability over the prior week, and observing Timmerman's demeanor, the judge concluded that "I don't see how we're going to be able to continue with this . . . it doesn't even seem possible to me." Pet. App. at D-8. The judge noted that the "counsels agree that she's unable to be present . . . unable to testify," and after the jury returned, the judge declared Timmerman unavailable. Pet. App. at D-10, D-12. While suggesting that Timmerman might later recover from her illness, defense counsel

conceded she was presently unavailable and failed to move to continue the trial. Pet. App. at D12-13.

These facts and circumstances make it clear that (1) the judge did consider the likelihood that Timmerman would recover in a reasonable amount of time, and (2) it was relatively clear to all that near-term recovery was so unlikely that another continuance could not be justified.

Second, the Court of Appeals, which reviewed the trial court's holding for abuse of discretion, also considered whether Timmerman might have been able to testify later. That court, facing a cold record and no documentary evidence conflicting with the trial court's determination, deferred to the trial court's judgment that "it doesn't even seem possible" that Timmerman would be able to testify—at that point or in the near future. Pet. App. at A-8. The Court of Appeals in no way suggested that the likelihood of the witness's recovery and the witness's importance to the trial were irrelevant to its review. It simply held that Indiana trial courts will be afforded deference when determining whether a witness is unavailable when that witness falls ill while testifying at a trial. "Under the circumstances of this case, we cannot conclude that the trial court abused its discretion in declaring Timmerman unavailable." Pet. App. at A-8. This holding is an unremarkable application of existing law.

B. Lower courts are not "highly fractured" about whether witnesses may be declared unavailable under the circumstances present here

Berkman asserts that the lower courts are "highly fractured" over whether "a witness suffering from a transient illness or disability" is rendered "*per se* unavailable, without considering the importance of her testimony or whether she might be able to testify after a reasonable delay." Pet. at 22-23. Not only does this assertion mischaracterize the decision below, but it also mischaracterizes the existing case law. In truth, there is nothing for the lower courts to be fractured *about*. The cases Berkman cites are inapposite because they all fail to address the question the trial court actually confronted: namely, whether a witness present in the courtroom whose illness had already delayed the trial several days should be treated as able to continue testifying notwithstanding debilitating symptoms of uncertain origin.

1. First, many cases Berkman cites are not even worth comparing because they address whether the defendant's right to a speedy trial was denied, not whether a witness was unavailable for purposes of the Confrontation Clause. *United States v. Hay*, 527 F.2d 990 (10th Cir. 1975); *United States v. Boatner*, 478 F.2d 737 (2d Cir. 1973); *Withee v. Commonwealth*, No. 2129-07-3, 2008 WL 4774409 (Va. Ct. App. Nov. 4, 2008); *People v. Roberts*, 146 P.3d 589 (Colo. 2006) (en banc); *State v. Hess*, No. 2003-CA-00348, 2004 WL 2913569 (Ohio Ct. App. Dec. 13, 2004).

What is more, *none* of those speedy trial cases rejected a finding of unavailability. Indeed, all but one (*Hay*, which did not mention availability) flatly

stated that the witness was, indeed, unavailable. *Roberts*, 146 P.3d at 594 (noting that no one—not even the defendant—argued that the witness was actually available); *Withee*, 2008 WL 4774409 at *4 n.6 (concluding that "[t]he Commonwealth's witness was unavailable to appear in court because her doctor had ordered bed rest for her"); *Hess*, 2004 WL 2913569 at *3 (holding that witness was unavailable "due to pregnancy as her doctor ordered her to bed rest"); *Boatner*, 478 F.2d at 742 (stating that the witness, a Louisiana resident, was unable to testify in New York because she was "pregnant and was advised by her doctor not to travel").

These cases present no material departure from the decision below.

2. Next, with regard to cases actually addressing witness unavailability under the Confrontation Clause, the Court of Appeals used the common standard of review regarding the trial court's determination that Timmerman was unavailable. This Court summarized its holdings on the standard for determining unavailability in *Barber v. Page*: "[A] witness is not 'unavailable' for purposes of the . . . exception to the confrontation requirement unless the prosecutorial authorities have made a good-faith effort to obtain his presence at trial." *Barber v. Page*, 390 U.S. 719, 724-25) (1968).

Lower courts agree that trial court determinations of unavailability may be reversed only for "abuse of discretion." Even cases that Berkman cites as supposedly contradicting the decision below embrace this point. *See, e.g.*, *Ecker v. Scott*, 69 F.3d 69, 73 (5th Cir. 1995) (upholding a finding of unavailability because "whether a witness is unavailable for Confrontation Clause purposes" is ordinarily a

matter for the trial court's "exercise of judgment" and will only be overturned if the reviewing court finds that the trial court abused its discretion); *United States v. Amaya*, 533 F.2d 188, 191 (5th Cir. 1976) (upholding trial court's decision to declare witness unavailable for trial after an automobile accident resulted in a loss of memory regarding witness's prior testimony); *United States v. McGowan*, 590 F.3d 446, 455-56 (7th Cir. 2009) (upholding determination of unavailability as "well within the [trial] court's discretion").

The Third Circuit's decision in *United States v. Faison*, which was quoted approvingly by the Fifth Circuit in *Ecker*, is even more explicit about the deference that should be accorded to trial courts: "There is evidence in this record that a decision not to adjourn might well have been within the parameters which we *must accord to trial judges* in their exercise of discretion in matters such as this." 679 F.2d 292, 296 (3d Cir. 1982) (emphasis added). The *Faison* Court ultimately overturned the trial court's decision, but not because it disagreed with its conclusion that the witness was ill and would be unable to testify for several weeks. *Id.* at 297. The crucial factor in the Third Circuit's decision was the trial court's "erroneous understanding of the applicable law," *i.e.*, the trial court did not grant an adjournment because it thought that doing so would violate the Speedy Trial Act, an understanding the Court rejected. *Id.*

The deference endorsed by these courts is exactly the standard the Indiana court of appeals employed here. The court stated that "[t]he admissibility of evidence . . . [and t]he decision whether to invoke the rule allowing admission of

prior recorded testimony is within the sound discretion of the trial court." Pet. App. at A-7. What is more, the court acknowledged that "the trial court personally interviewed Timmerman and was able to observe her behavior, demeanor, and appearance, something we cannot do." Pet. App. at A-8. The trial court's determination after personal observation of the witness that "I don't see how we're going to be able to continue with [her testimony]" and to use her prior recorded testimony instead was therefore not an abuse of discretion. Pet. App. at A-8.

3. Third, it is difficult to compare outcomes in unavailability cases which by nature tend to be highly fact-bound. As it happens, the majority of cases Berkman cites do facilitate comparisons among themselves, though not with this case, because they address whether pregnant witnesses are unavailable for the purposes of the Confrontation Clause. *See supra* Part II.B.1. These cases form a fundamentally distinct category because (unlike in this case) the trial court can know that a pregnant witness will likely be available to testify by a certain time, and the only question is the length of time the trial would need to be postponed.

Other cases Berkman cites are similarly incomparable. In *State v. Button*, 11 P.3d 483 (Idaho Ct. App. 2000), for example, the court overturned a finding of unavailability because the witness had missed a flight and would be delayed by a few hours, *i.e.*, "[t]he state in this case knew when Andreeva could be expected to arrive on a later flight that day—some time after 2:00 p.m." *Id.* at 487.

No such certainty was available here, where the trial court had no reason to believe that Timmerman would soon—or ever—be able to testify. Timmerman told

the trial judge that she had been hospitalized for four days the previous week while undergoing tests for MS and explained that hospital personnel thought she may have had a seizure or stroke. Pet. App. at D-3, D-6. After considering all of the evidence of Timmerman's illness, plus the amount of time Timmerman had already delayed the trial, the trial court reasonably decided that a continuance was likely to be in vain and declared Timmerman unavailable. Pet. App. at D-12.

4. Still other cases provide no relevant comparison because the court did not actually have the unavailable witnesses in court at all. In *Stoner v. Sowders*, 997 F.2d 209 (6th Cir. 1993), the supposedly unavailable witnesses not only were not in court for the trial judge to examine, but "were able to travel to the police department and depose on May 10, the day before the trial date, [and] *the Commonwealth failed to show why they were unavailable to give the same testimony one day later in court.*" *Id.* at 212 (emphasis in original).

Similarly, in *Burns v. Clusen*, 798 F.2d 931 (7th Cir. 1986), the original trial judge made a determination concerning the witness's availability before the trial was twice postponed and the case reassigned to another judge, who adopted the original judge's finding based on the prosecutor's—inaccurate—oral summary of the witness's doctor's testimony. *Id.* at 935, 938-39. The court observed that "[n]o findings on the basis of up-to-date evidence were made with respect to the witness' physical or mental conditions at or about the time of trial, even though the time interval between the medical examination of the witness and the determination of unavailability is highly relevant." *Id.* at 939. What is more, the court in that case

also criticized the prosecutor's decision, just two weeks before trial, not to enforce a subpoena against the witness as "a lack of a 'good faith effort' on the part of the State to secure L.L.'s presence at trial. Such actions suggested, instead, that the State elected not to seek enforcement of L.L.'s subpoena because it had an uncooperative witness on its hands." *Id.*

And in *State v. Perry*, 159 P.3d 903 (Idaho Ct. App. 2007), the reviewing court—relying only on state evidence rules only and not the Confrontation Clause—held that the trial court's determination of unavailability was erroneous, predicating its decision on the fact that the trial court had no idea how long the witness's illness would last. *Id.* at 907. The witness had been scheduled to testify, but on the morning of the trial the witness's daughter telephoned the court to notify it that her mother had suddenly become ill and would be unable to testify that day. *Id.* at 905. The only evidence for the witness's unavailability was the testimony of the witness's daughter, and the "sole question concerning the likelihood of [the witness's] future availability as a witness was an inquiry as to whether [the witness] 'might be feeling better tomorrow where she could come testify tomorrow morning.'" *Id.* at 907. The daughter simply responded that she did not "see it getting better within the next twenty-four hours," which the trial court took to be sufficient evidence of the witness's unavailability. *Id.* at 905. The reviewing court disagreed.

The decision below, where the trial judge examined the ill witness *in court* and was able to make a firm determination on the severity of her illness, especially

in light of how the witness's illness had already caused several days of delay, is not in conflict with these cases. Here, the trial judge did not need to rely on the secondhand information of doctors, nurses, or relatives, but was able to evaluate the witness's statements and symptoms directly. Accordingly, there is no tension whatever between the decision below and the decisions in *Stoner*, *Burns*, or *Perry*.

C. Harmless error analysis would necessarily accompany any finding of error, making this case an inappropriate vehicle to clarify case law

Confrontation Clause errors are not structural errors necessitating reversal regardless of other evidence; rather, they remain subject to the harmless error rule and cannot justify reversal of a conviction where the defendant's guilt is otherwise clear beyond a reasonable doubt. *See Delaware v. Van Arsdall*, 475 U.S. 673, 680-81 (1986). Accordingly, Berkman faces an especially high burden in making his case for certiorari because, given the harmless error rule, he must convince the Court to grant the petition on *both* issues or be turned away entirely. One suspects that this is the reason Berkman bothers with the second, highly fact-bound issue concerning whether Timmerman was truly "unavailable" at trial.

It requires little analysis to see why the harmless error rule would protect Berkman's conviction if the Court were to reverse the decision below on only one of the issues presented. Even without Barraza's deposition, a rational jury would, beyond a reasonable doubt, have found Timmerman's testimony sufficient to convict Berkman. Timmerman testified that Berkman, using Hawkins's own vehicle, brought Hawkins's dead body to her garage; that he showed her the corpse; that he

admitted to slitting Hawkins's throat; that he left the dead body in the garage for three days; and that he disposed of Hawkins's remains by transporting Hawkins's vehicle and body to a field and burning them. The exhibits of the burned vehicle and bones corroborated Timmerman's testimony, as did the parties' stipulation that the bones belonged to Hawkins.

Similarly, it is also beyond a reasonable doubt that a rational jury would have found Barraza's testimony sufficient to convict Berkman even if Timmerman's testimony were excluded. Barraza testified to two crucial facts: that Berkman admitted to killing Hawkins by cutting Hawkins's throat, and that Berkman admitted to disposing of Hawkins's body by setting fire to the vehicle and the remains. Again, the exhibits of the burned vehicle and bones, as well as the parties' stipulation that the bones belonged to Hawkins, corroborated this testimony.

Under either of the above scenarios, either alleged error, standing alone, is harmless. Indeed, it seems likely that the Petition presents two questions—the latter of which would require the court to wade into an area where all agree that trial courts are entitled to substantial discretion because the questions are so fact specific—in an attempt to avoid this harmless error analysis. There is no need for the Court to get involved here.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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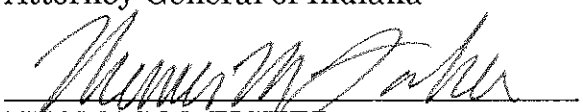

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