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
Court of Appeals of Indiana

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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I. Indiana is in clear conflict with other states as to whether, as a constitutional matter, the opportunity of an accused to depose a prosecution witness for discovery purposes provides an adequate opportunity for cross-examination.

The Petition demonstrates that Indiana is in clear conflict with other states on the first Question Presented: One group of states, including Indiana, treats the accused's opportunity to depose a prosecution witness for discovery purposes as providing a *constitutionally adequate* opportunity for cross-examination. Another group of states, including but not limited to Florida, does not. This is a simple, straightforward conflict of constitutional law, not, as the State attempts to characterize it, a mere difference of policy. Attempting to avoid this conclusion, the State argues with a strawman, inaccurately describes Petitioner's argument and its own procedures, and ignores the stunning consequences of its own theory.

The State contends that "what [Petitioner] really seeks is a decree that all states must afford criminal defendants the opportunity to take risk-free, impeachment-only pre-trial depositions." BIO at 8. That is wrong on at least two grounds.

First, Petitioner freely acknowledges a point argued at length by the State, BIO at 8-9, that an accused has no general constitutional right to discovery in a criminal case. A state does not have to grant an accused the right to take depositions for discovery purposes at all. The Federal rule – allowing criminal depositions only "in order to preserve testimony for trial," and even then only in "exceptional circumstances," Fed. R. Crim. P. 15(a)(1) – is typical and undoubtedly constitutional.

Second, Petitioner does not contend that, if a state does allow an accused to take

depositions of prosecution witnesses for discovery purposes, the accused has a right that they be "risk-free, impeachment-only." A deposition taken for discovery purposes is neither risk-free nor for impeachment only. The accused is seeking not just impeachment but more generally discovery – to learn what the witness's testimony will be and whatever other material information the witness may have. In return, the accused faces various risks: (1) Questioning the witness may draw out information harmful to the accused that otherwise would escape the prosecution's notice. (2) If the witness gives testimony at trial that is less favorable to the prosecution than the deposition testimony, then the prosecution could introduce the deposition testimony to prove the truth of what it asserts. *See, e.g.*, Fed. R. Evid. 801(d)(1)(A); Ind. R. Evid. 801(d)(1)(A). (3) If the accused contends that the witness's trial testimony is the product of some impediment, such as an improper motive, that arose since the time of the deposition, the prosecution may respond by demonstrating that the trial testimony is consistent with the deposition testimony, which would then be admissible for its truth as well. *See, e.g.*, Fed. R. Evid. 801(d)(1)(B); Ind. R. Evid. 801(d)(1)(B). (4) The witness may make statements at deposition that the prosecution could offer at trial for purposes other than to prove the truth of what they assert, *see, e.g., Tennessee v. Street*, 471 U.S. 409 (1985) – such as to show the witness's awareness of a given fact as of that time. (5) Questioning the witness at deposition may make the witness better able to handle cross-examination at trial.

Petitioner's *actual* contention is that the opportunity to depose a witness for discovery purposes does not provide an opportunity for cross-examination that satisfies

the Confrontation Clause. The State's attempt to characterize the divergence among the states on this matter as a mere policy choice should not obscure the reality – that it is a clear conflict on a matter of constitutional law.

A substantial number of states allow depositions not only to perpetuate testimony but also for discovery. They may do so, as Florida does, by separate provisions addressed to the two different types of depositions. Or they may do so, as Indiana does, by a single rule that is broad enough to encompass both types. The choice between these different rule-making styles does not affect the fact that a deposition taken to perpetuate testimony is a very different phenomenon from one taken for discovery. Only the prosecution, not the defense, would have any incentive to take the deposition of a prosecution witness to preserve the witness's testimony. And, at least in the ordinary case such as this one, only the defense, and not the prosecution, would have any need to take the deposition of a prosecution witness for discovery purposes.

It is ironic, then, that the State contends that "[t]he term 'discovery deposition' . . . has no grounding in Indiana's procedural rules, which provides only for 'depositions' generally." BIO at 7. Although the Indiana Rules of Trial Practice do not distinguish on their face between the two types of depositions, the Indiana Supreme Court, in the leading case of *Howard v. State*, 853 N.E.2d 461 (Ind. 2006), recognized that difference – and, like the court of appeals in this case, App. A11 to Petition, it even used the term "discovery deposition" in describing depositions taken by the defense for discovery purposes. Indeed, in a passage quoted in the Petition at 6-7, the *Howard*

court recognizes that "[t]he distinction between a 'discovery' deposition and a 'trial' deposition is not insignificant," and goes on to describe the very different purposes between the two, with the former often "not intended to be 'confrontational.'" 853 N.E.2d at 469 n.6.

Nevertheless, *Howard* held that a discovery deposition provides a constitutionally adequate opportunity for cross-examination, because any limits on questioning are self-imposed by the defense. *Id.* at 470; Petition at 7. As elaborated in the Petition, at 7-8, the Indiana courts have consistently applied this principle.[1] In this case, the court explicitly "decline[d] to adopt the Florida rule that the use of discovery depositions during a criminal trial does not satisfy constitutional confrontation requirements." It said that it "must respectfully disagree with" the holding of the Florida Supreme Court that "the motivation for [a discovery deposition] does not result in the 'equivalent of significant cross-examination.'" App. A11-12, *quoting in part State v. Lopez*, 974 So.2d 340, 350 (Fla. 2008) (*quoting in part Ohio v. Roberts*, 448 U.S. 56, 70 (1980)).

The State attempts to deflect this clear constitutional conflict by characterizing the law as recognized in Florida and other states as a mere policy choice to allow defendants to take the deposition of a prosecution witness without risking substantive use by the prosecution. But in fact, as the *Lopez* case makes particularly clear, these states have recognized that it is *unconstitutional* for a state to treat a deposition taken

[1] The State does not deny this; indeed, it bases one of its arguments on the contention that the adherence of the Indiana courts to this view is well established. *See infra* p. 5.

for discovery purposes as providing an adequate opportunity for cross-examination.

The State puts an odd spin on the Florida rules, suggesting that the outcome is different in Florida because its rules provide separate treatment for discovery depositions and depositions taken to perpetuate testimony. But that puts matters backwards. The Florida rules do not offer the accused any options unavailable under Indiana's broad deposition rule. Rather, Florida's rulemakers simply recognized at the drafting stage that the nature of a deposition of a prosecution witness depends fundamentally on the purpose for which it is taken. And the Florida Supreme Court, along with courts and rulemakers in other states,[2] has recognized that – for reasons summarized in the Petition at 12-17 – according the accused the ability to take the deposition of a prosecution witness for discovery purposes does not give him an opportunity for cross-examination satisfying the Confrontation Clause.

The State attempts to make much of the fact that its courts have clearly taken the contrary view; thus, it argues, an accused cannot claim surprise when a court later holds that deposition testimony that he took for discovery purposes is admissible against him to prove the truth of what it asserts. BIO at 8. But Petitioner's argument is not based on a claim of surprise as to Indiana's view of the law; it is simply that a discovery deposition does not give the accused a constitutionally adequate opportunity

[2] *See* Petition at 10-11. In some of these states, the principle that a discovery deposition does not provide a constitutionally adequate opportunity for cross-examination has shaped the rules governing such depositions, without the need for a judicial decision insisting on that principle. But that does not matter for present purposes: It is clear that these states have designed their rules in recognition of the constitutional confrontation right.

for cross-examination, and an accused should not be expected to act as if it did. And note that, though the State apparently suggests that an accused could protect himself by not taking a deposition, that is not so: If a discovery deposition gave an adequate opportunity for cross-examination, then the mere availability of the procedure, whether invoked or not, would satisfy the Confrontation Clause, because it is clearly established that the Clause only demands an adequate *opportunity* for cross-examination, not cross-examination itself. *Howard*, *supra*, at 470 ("*Crawford*[*v. Washington*, 541 U.S. 36 (2004)] speaks only in terms of the "opportunity" for adequate cross-examination.[3] . . . Whether, how, and to what extent the opportunity for cross-examination is used is within the control of the defendant.") *See* Petition at 16. Moreover, not just the deposition itself, but *any* testimonial statement made by the witness would then be admissible against the accused.[4]

In short, the position adopted by the Indiana courts allows a prosecution to rely on out-of-court testimonial statements, sworn or unsworn, so long as the witness is unavailable and the state allows discovery depositions. This system, of course, gives the state a perverse incentive to allow witnesses to slip away before trial, as occurred here. And in response to a Confrontation Clause objection, the prosecution can simply

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[3] Indeed, *Crawford* speaks of that opportunity 27 times.

[4] Indeed, in cases raising the issue of whether discovery depositions provide an adequate opportunity for cross, the proffered testimonial statement has often been one made outside the deposition. *See Lopez*, *supra*, 974 So.2d at 343-44; *Corona v. State*, 64 So.3d 1232 (Fla. 2011); *State v. Contreras*, 979 So.2d 896 (Fla. 2008); *Blanton v. State*, 978 So.2d 149 (Fla. 2008).

say, "You could have taken a deposition."

That, of course, is not the way our system runs. Prosecution witnesses have to give their direct testimony before cross-examination by the defense. If the prosecution is concerned that one of its witnesses may not be able to testify in the usual way, then it has a simple and time-honored expedient – give notice of its intent to take the witness's deposition to perpetuate testimony. But if, as here, it fails to do so, the Constitution does not allow it to treat the accused's opportunity to take a discovery deposition *as if* it were a deposition taken by the prosecutor to preserve testimony.

Some states recognize that; Respondent Indiana is among those that do not. *See* Petition at 11-12. Only this Court can resolve the conflict.

II. The completely unjustified declaration of Timmerman's unavailability demonstrates the need for this Court to give guidance to the lower courts.

The second Question Presented involves a frequently recurring issue that this Court has never addressed – the standards that should govern determination of whether a witness is deemed unavailable for purposes of the Confrontation Clause by reason of a temporary disability. This case demonstrates the lower courts' critical need for guidance on this issue. The Indiana courts joined others that have effectively constitutionalized the "then-existing" language of Fed. R. Evid. 804(a)(4), treating a transient disability as sufficient in itself to warrant a holding of unavailability. They thus failed to follow the proper approach, one adopted by many courts, which requires consideration and articulation of several factors, including but not limited to the likely duration of the disability.

In dealing with this issue, the State once again battles a strawman, as demonstrated most vividly by its treatment of *United States v. Faison,* 679 F.2d 292 (3d Cir. 1982). The State discusses *Faison* approvingly in support of the proposition that the unavailability decision lies within the sound discretion of the trial court. BIO at 23-24. But nobody denies that proposition. The State does *not* mention that *Faison* presented an important statement of the procedural and substantive standards that should govern the exercise of that discretion. Numerous federal circuits[5] and state courts[6] have followed *Faison* in this respect. The Indiana courts do not.[7]

Procedurally, *Faison* indicated, the trial court should "articulate [a] weighing of the relevant considerations." 679 F.2d at 296. And substantively, the court said, *id.* at 297:

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[5] *Ecker v. Scott*, 69 F.3d 69, 72-73 (5th Cir. 1995) (holding that the rationale of *Faison* applies in Confrontation Clause context, which is at least as demanding as Fed. R. Evid., 804); *United States v. McGuire*, 307 F.3d 1192, 1205 (9th Cir. 2002) (following *Ecker*); *United States v. Cabrera-Frattini*, 65 M.J. 241, 245-46 (C.A.A.F. 2007); *United States v. Jacobs*, 97 F.3d 275, 282 (8th Cir. 1996). Other cases adopting similar standards include *Stoner v. Sowders*, 997 F.2d 209, 211-13 (6th Cir. 1993) (holding "a cursory 'doctor's excuse'" insufficient to support a finding of unavailability); *Burns v. Clusen*, 798 F.2d 931, 937 (7th Cir. 1986).

[6] *E.g.*, *Earl v. State*, 672 So. 2d 1240, 1243-44 (Miss. 1996); *People v. Lyons*, 907 P.2d 708, 711 (Colo. Ct. App. 1995) (adopting *Faison* and holding that "if it appears that the witness' disability is only temporary, the trial court must consider, *and make findings upon*, the relevant circumstances . . ." (emphasis added)).

[7] The State goes to some effort, BIO at 21-22, to distinguish a set of cases cited in the Petition, at 25 n.30, in support of the proposition that if a disability "is a relatively brief one then the court should delay the trial rather than admit the prior statement of an absent witness." The State points out that several of those cases raised speedy-trial objections – hardly surprising given that this is the objection that an accused will raise if in fact the court does delay the trial to await live testimony. In any event, the fact that the State felt the need to distinguish these cases confirms that it continues to oppose the proposition for which they were cited.

> In exercising discretion a trial court must consider all relevant circumstances, including: the importance of the absent witness for the case; the nature and extent of cross-examination in the earlier testimony; the nature of the illness; the expected time of recovery; the reliability of the evidence of the probable duration of the illness; and any special circumstances counseling against delay.

Neither the trial court nor the appellate court in this case genuinely considered *any* of these factors, and they utterly failed to articulate a weighing of them. If they had complied with the *Faison* standards, the outcome certainly would have been different.

• The witness, Timmerman, was the most important one in the case. She not only reported a confession by Petitioner but claimed to have accompanied him in transporting and burning the body.

• Timmerman had been thoroughly impeached in the first trial, but the force of the cross-examination was severely impaired by denying the second jury evidence of her demeanor, App. D13, with her testimony presented instead through a reading by a deputy prosecutor. Petition at 28. Use of the transcript also denied Petitioner the chance to cross-examine Timmerman with respect to developments that had occurred since her prior testimony.[8]

• The courts made no attempt to determine the nature of Timmerman's illness. Remarkably, the State continues to rely, as the appellate court did, on the asserted fact

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[8] For example, Timmerman's testimony included the assertion that Petitioner, in the presence of his friend Shawn Black, had admitted the murder. Tr. Tr. 545. If Timemrman had testified live to this assertion at the second trial, counsel no doubt would have pressed her about its apparent inconsistency with testimony previously given at that trial by Black himself. Tr. Tr. 122. But of course that was impossible given that Timmerman did not testify live at that trial.

that Timmerman was tested for MS, and to speculate that perhaps she had suffered a stroke or seizure several days before. BIO at 24-25. Given the nature of MS, Petition at 23 n.28, continued reliance on it simply underscores the weakness of the State's claim of unavailability. Even if Timmerman had suffered a seizure the prior week, one wonders how that could have interfered with her ability to testify in the near future. And without more, one could hardly conclude that she had suffered a stroke, especially one that would have debilitated her for an extended period. Given Timmerman's acknowledged history, the more obvious explanation was that she was suffering from drug withdrawal, but neither court inquired into this possibility.

• Neither court made any inquiry, or drew any conclusions, concerning the expected time of Timmerman's recovery.[9] The State contends that "the trial court had no reason to believe that Timmerman would soon – or ever – be able to testify." BIO at 24. That is not only obviously wrong factually,[10] but it gets matters exactly backwards. It is *the prosecution's* burden to establish unavailability. *Crawford v. Washington*, 541 U.S. 36, 57 (2004); *Ohio v. Roberts*, 448 U.S. 56, 74-75 (1980). The State made no effort whatsoever to demonstrate that Timmerman would be unable to

[9] The State says that "the trial court reasonably decided that a continuance was likely to be in vain." BIO at 25. Its only basis for this assertion is apparently the court's conclusory declaration that Timmerman "is not going to be able to continue with this trial." App. D12. But the court gave no indication of a time frame: It appears that all it meant was that she would not be able to testify *that day*, which was inconsistent with the court's desire to "[s]peed the train up." App. D19.

[10] Timmerman complained about nausea, fever, and a possible migraine headache, not about anything that might prevent her for an extended period from testifying, and at one point she even suggested that she could testify within a few minutes, App. D7.

testify within a reasonable period.[11]

• The only evidence of Timmerman's condition considered by the trial court was its own non-professional observation of her and Timmerman's own brief account of her symptoms and of what an unspecified "they" had said at the hospital several days before. Timmerman herself indicated that she could testify within a few minutes, App. D7, and the court never pressed her on that. It never sought to learn in detail what medical professionals had examined her or what they had concluded – nor of course did the court or the State have a physician examine her after she had difficulty at trial, to give an expert opinion as to when she might be able to testify.[12]

• The only special consideration here was that this was a murder trial, one that resulted in a sentence of sixty years of incarceration for the Petitioner.[13] Conscientious regard for the Petitioner's rights would have precluded the cavalier approach the courts took in this case.

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[11] The State makes much of the fact that the defense did not suggest a continuance. But there is no doubt that the defense, suggesting that Timmerman would likely be able to testify on another day, objected to use of the transcript and moved for a mistrial. App. D12-13. Declaring a mistrial would have avoided the Confrontation Clause violation; it was not the defense's obligation to propose another means of doing so that would be more appealing to the court and to the State.

[12] Even in civil cases, it is standard practice to require medical testimony when the claim of unavailability is based on a condition requiring medical treatment. *State v. Chandler*, 376 N.E.2d 728, 733 (N.C. 1989).

[13] The State attempts to make much of the fact that the court had previously granted an adjournment of two days (not counting a weekend and holiday) while Timmerman was in the hospital. The State does not, however, respond to the presentation in the Petition, at 24 n.28, of several reasons why this fact has no bearing on the validity of the declaration of unavailability.

In short, this case reflects not merely a flagrant abuse of discretion by the trial court, and a failure of supervision by the appellate apparatus of the State, in the particular case. It also demonstrates a fundamental difference among the nation's courts. Most adhere to simple and sensible standards, procedural and substantive, to ensure that the trial court makes appropriate use of its discretion in declaring a witness unavailable because of a temporary disability. Others do not, and allow even a transient disability to be deemed sufficient in itself to warrant a conclusion of unavailability.[14] Only intervention by this Court can establish a uniform national approach, at a level general enough to give trial courts the discretion they need but sufficiently prescriptive, as to both procedure and substance, to ensure that courts throughout the nation take proper care in making unavailability determinations. And

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[14] In addition to this case, note, for example, the cases cited on p. 24 n. 29 of the Petition, all involving pregnancy. *See also People v. Phiewphaek*, 2010 WL 367478 (Cal. Ct. App. 2010). If, as the State suggests, a determination of unavailability is less justified in pregnancy cases because "the trial court can know that a pregnant witness will likely be available to testify by a certain time," BIO at 24, then the fact that these courts treat the existence of the disability as of a particular time as sufficient to hold the witness unavailable is particularly significant in showing the divergent approaches that courts take.

Other cases, not involving pregnancy, in which courts have treated a "then-existing" infirmity as sufficient for a determination of unavailability without further inquiry include *United States v. Bruce*, 142 F.3d 437 (Table) (6th Cir. 1998) (upholding, notwithstanding *Stoner*, *supra* note 5, declaration of unavailability based on written statement from doctor that witness would not be able to tolerate travel to court eleven days after abdominal surgery "due to her postsurgical comfort"; no inquiry into likely duration of disability or other *Faison* factors); *People v. Vinci*, 2012 WL 4713560 (Cal. Ct. App. 2012) (witness held "medically unavailable" because of prosecutor's representation that *her daughter* had surgery; no inquiry into duration of daughter's likely infirmity or degree of dependence on the mother's presence, or any *Faison* factor); *State v. Swindler*, 497 S.E.2d 318, 321 (N.C. Ct. App. 1998) (witness in first-degree murder trial held unavailable based on detective's opinion that she was unable to testify following a heart attack; no evidence offered as to duration of disability, and, though appellate court notes that "[i]t would have been better had the State presented at least an affidavit from Brown's doctor to explain her absence," admitting her prior testimony held not erroneous).

this case, presenting a blatant demonstration of the abuses that can arise absent such standards, is an ideal vehicle for that intervention.

III. Neither error was harmless. Accordingly, each of the Questions Presented is viable on its own.

The State makes the rather baffling argument that the harmless error rule would prevent reversal of Petitioner's conviction unless this Court were to reverse the Indiana courts on both of the questions presented. It contends that, beyond a reasonable doubt, a rational jury would have convicted Petitioner if *either* Barraza's deposition *or* the transcript of Timmerman's prior testimony had been admitted, without the other. BIO at 27, 28. But there is no need to speculate. That the State's contention is false is demonstrated neatly by the result of the first trial: The jury was presented with *both* Barraza's deposition and Timmerman's testimony, and it *declined to convict on either count*. Indeed, it acquitted on the first-degree murder charge, which must have meant that it failed to accept the accounts given by both Barraza and Timmerman. In fact, before the Indiana courts, the State went no further than to contend that each claimed error was harmless, principally because the testimony of each of the two corroborated that of the other. Appellee's Br., *Berkman v. State* (Ind. Ct. App. 2012), at 20, 24.

Moreover, the courts themselves never suggested that if either ruling was wrong the error would be harmless. Indeed, it is obvious that the testimony of either Barraza or Timmerman, taken alone, would have been considerably weaker than the testimony of both, taken together. The similarity of their accounts of confessions supposedly

made by Petitioner – with no clear explanation of how they may have gotten their stories together – presumably gave their testimony, taken together, some power. But if the jury had heard the testimony of only one of them, that power would have largely dissipated: At most, the jury would have heard the testimony of a person who had a significant interest in helping the authorities achieve a conviction and who knew where the victim's body was (and, in the case of Timmerman, where his phone was). Especially given the result of the first trial, it is impossible to say with any confidence – much less to say beyond a reasonable doubt – that in that circumstance the jury would have convicted.

CONCLUSION

Confrontation Clause cases since *Crawford* have focused principally on the question of what statements are testimonial. In this case, that is not an issue – Barraza's deposition and Timmerman's testimony from the first trial were both clearly testimonial. Rather, this case raises the two sides of another aspect of Confrontation Clause doctrine, the principle that an out-of-court testimonial statement may be admitted against an accused if the accused has had a prior opportunity for confrontation *and* the witness is unavailable. There is a clear conflict among the states as to whether a discovery deposition gives an accused an adequate opportunity for confrontation. And this case exemplifies a disturbing phenomenon, the treatment by some courts of a temporary disability as sufficient for a determination of unavailability without considering – and *a fortiori* without articulating consideration

of – the likely duration of the infirmity or other relevant factors. For the reasons stated above and in the Petition, the Petition ought to be granted.

Respectfully submitted,

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