No. 12-____

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

PETITION FOR A WRIT OF CERTIORARI

MARK A. BATES
7803 W. 75th Avenue, Suite One
Schererville, IN 46375
(219) 322-1271

T. EDWARD PAGE
Thiros & Stracci
200 East 90th Drive
Merrillville, IN 46410
(219) 769-1600

RICHARD D. FRIEDMAN
Counsel of Record
DAVID A. MORAN
625 South State Street
Ann Arbor, Michigan 48109-1215
(734) 647-1078
(734) 647-4188 (fax)
rdfrdman@umich.edu

QUESTIONS PRESENTED

1. Does a discovery deposition provide an opportunity for cross-examination satisfying the Confrontation Clause, and if so is that true even if the accused had no opportunity to be present?

2. Does a transient illness render a witness *per se* unavailable for purposes of the Confrontation Clause?

TABLE OF CONTENTS

TABLE OF CONTENTS, cont'd

APPENDIX

TABLE OF AUTHORITIES

CASES

STATUTORY AND STATE CONSTITUTIONAL PROVISIONS

RULES

SECONDARY SOURCES

PETITION FOR A WRIT OF CERTIORARI

Petitioner Nathan S. Berkman respectfully petitions for a writ of *certiorari* to the Court of Appeals of Indiana to review the judgment against him in *Nathan S. Berkman v. State of Indiana*, No. 45A04-1111-CR-583.

OPINIONS BELOW

The order of the Indiana Supreme Court denying transfer, App. C1, is unpublished but noted at 984 N.E.2d 221. The opinion of the Court of Appeals of Indiana, App. A1-13, is published at 976 N.E.2d 68. The relevant trial proceedings, excerpts of which are reproduced in Appendix D, are all unpublished.

JURISDICTION

The Court of Appeals of Indiana issued its decision on September 12, 2012. The Supreme Court of Indiana denied transfer on March 7, 2013. This Court has jurisdiction under 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL PROVISION

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him [and] to have compulsory process for obtaining witnesses in his favor."

STATEMENT OF THE CASE

The Respondent State charged Petitioner with murder and felony murder in the perpetration of robbery, both counts arising from the death of one Olen Hawkins; the State claimed that Petitioner had cut Hawkins's throat and stolen cocaine from him. Shortly before the scheduled trial date, the State gave Petitioner notice that Paul Barraza, a former cellmate of Petitioner, would be a witness against him. Petitioner sought and gained a continuance to allow him to take a discovery deposition of Barraza, pursuant to the State's ordinary criminal procedure. Defense counsel took the deposition in January 2011 at the prison where Barraza was incarcerated, while Petitioner was incarcerated in another county. The State took no steps to ensure that the deposition would preserve Barraza's testimony if he turned out to be unavailable at trial; as is standard practice in Indiana in the case of discovery depositions, Petitioner was not present at the deposition, and the State did not ask the court, when it granted the continuance, to provide otherwise.

The trial was conducted in July 2011, but by that time – though he had recently been incarcerated by the State – the State had lost track of Barraza. The trial court allowed the State, over Petitioner's objection, to read into the record the transcript of the discovery deposition, which included Barraza's testimony that Petitioner had confessed to the crime. Barraza – via the transcript – was one of two lead witnesses for the State. The other was Arlene Timmerman, Petitioner's former girlfriend. She testified live that Petitioner had told him he had killed Hawkins and that she had helped him dispose of the body. Timmerman turned out to be a very weak and

unpersuasive witness; her testimony was impeached in may ways, and her demeanor further undermined her credibility. After a full trial, the jury found Petitioner not guilty on the murder count, and it hung on the felony murder count.

The State retried Petitioner on the felony murder count. Timmerman began to testify live, but soon complained that she was feeling unwell and feared that she might be developing a migraine headache. Within minutes, the trial court, over Petitioner's objection, declared her unavailable to testify, and allowed introduction of her testimony from the first trial. And, as in the first trial, the court allowed the State to introduce the transcript of Barraza's discovery deposition. This time, the jury found Petitioner guilty of felony murder, and he was sentenced to sixty years of incarceration.

Petitioner appealed, contending, among other issues, that the State had violated his confrontation rights by introducing the transcript of Timmerman's testimony from the first trial and the transcript of Barraza's discovery deposition. The Court of Appeals of Indiana affirmed the conviction.

That court held summarily that the trial court had not abused its discretion in declaring that Timmerman was unavailable; given that Petitioner had cross-examined her in the first trial, therefore, it held that presenting the transcript of the testimony did not violate the Confrontation Clause. App. A8-9. The court noted that Timmerman complained of nausea and fever, thought she might be developing a migraine, and had been in the hospital the previous week, where she was tested for multiple sclerosis, and that hospital personnel thought she might have suffered a seizure or stroke. App. A8. But the appellate court, like the trial court, considered neither the importance of

Timmerman's testimony nor whether Timmerman would have been able to testify after a reasonable adjournment.

The appellate court also held that the State's minimal efforts to secure Barraza's attendance – attempting to serve a subpoena though he was known to have left the state – were sufficient for him to be declared unavailable. And it squarely rejected what it called "the Florida rule that the use of discovery depositions during a criminal trial does not satisfy constitutional confrontation requirements." App. A11. Petitioner argued that because the State did not question Barraza during the deposition Petitioner had been deprived of the opportunity to cross-examine him. The court acknowledged that this was "technically true" but concluded "that the cross-examination requirement was nonetheless satisfied here, in spirit if not in word," because Petitioner's counsel had not been limited in the questions he could ask Barraza in the deposition, "which spanned ninety-four pages in the transcript." App. A10-11. And as to the contention that a discovery deposition does not give the accused a motive to conduct the equivalent of trial cross-examination, the court said that it "must respectfully disagree" on that point with the Florida Supreme Court; according to the Indiana court, "the motive for a discovery deposition in a criminal case is close enough to that driving a defendant's approach to trial testimony." App. A12.

The Indiana Supreme Court denied a petition for transfer. App. C1. This Petition follows.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD RESOLVE THE QUESTION WHETHER DISCOVERY DEPOSITIONS SATISFY THE CONFRONTATION CLAUSE.

A. States Are Sharply Divided as to Whether a Discovery Deposition Gives an Accused an Adequate Opportunity for Cross-Examination.

In a substantial minority of states, including some very large ones, depositions are permitted in criminal proceedings not only for the traditional purpose of preserving the testimony of a witness who might be unavailable to testify at trial but also for the distinct purpose of pre-trial discovery.[1] In some states, whether a party may take a discovery deposition of an adverse witness is a matter of judicial discretion.[2] In others, such as Indiana and Florida, the rules allow discovery depositions as a matter of course.[3] Moreover, depositions for discovery are a pervasive part of American civil litigation, and sometimes a prosecution offers the testimony of a witness whose deposition the accused has had an opportunity to take in a civil action. The first

---

[1] 5 WAYNE R. LAFAVE, et al., CRIMINAL PROCEDURE (3d ed. 2007) § 20.2(e) n.82. Whether the governing statutes and rules distinguish between the two types of depositions or not, the distinction is ordinarily clear as a practical matter. For purposes of this case, it is sufficient to note that if the defense takes the deposition of a person identified as a prosecution witness, that is necessarily a discovery deposition: The defense would have no reason to depose such a witness to preserve his testimony.

[2] *See* Texas Code Crim. Proc. art. 39.02 (requiring "good reason"); N.H. Rev. Stat. § 517:13 (giving court discretion to permit depositions for "good cause shown," but providing that "[i]n any felony case either party may take a discovery deposition of any expert witness who may be called by the other party to testify at trial").

[3] Indiana Code 35-37-4-3 provides: "The state and the defendant may take and use depositions of witnesses in accordance with the Indiana Rules of Trial Procedure." Trial Procedure Rule 26(A)(1) provides for discovery by deposition, and Rule 32(A)(3) provides for substantive use of a deposition at trial if the witness is then unavailable.

Question Presented by this case is very simple, but extremely important, and it is one on which the states are in clear conflict: If an accused has an opportunity to take a discovery deposition of a prosecution witness, and the witness is deemed unavailable to testify at trial, has the accused been afforded the opportunity for cross-examination that the Confrontation Clause demands?[4]

The Court of Appeals of Indiana answered that question in the affirmative. This was in accord with the long-established law of the State, as enunciated in decisions of the Indiana Supreme Court, both before *Crawford v. Washington*, 541 U.S 36 (2004),[5] and afterwards. The lead case is *Howard v. State*, 853 N.E.2d 461 (Ind. 2006). There, the court endorsed Howard's statement, in his petition for transfer, that

> [t]he distinction between a "discovery" deposition and a "trial" deposition is not insignificant. The intended purposes of the two types of depositions are entirely different. Cross-examination inherent in a trial deposition is succinct and to the point. The goal is to disparage the witness' testimony before the trier of fact and accentuate that evidence which is favorable to the defendant. Cross-examination at a trial deposition would be intended to cast doubt on the credibility of the witness so that their testimony is not worthy of the jury's belief. A pre-trial discovery deposition, on the other hand, is intended to search out information

---

[4] There is no doubt that the deposition is a testimonial statement. *E.g.*, *Crawford*, 541 U.S. at 52; *Davis v. Washington*, 547 U.S. 813, 824 & n.3 (2006); *id.*, 547 U.S. at 836 (Thomas, J., , concurring in the judgment in part and dissenting in part); *Howard v. State*, 853 N.E.2d 461, 465 (Ind. 2006). Accordingly, it could be introduced against Petitioner only if Barraza was deemed unavailable *and* Petitioner had an adequate opportunity to cross-examine him. *Crawford*, 541 U.S. at 59. The demonstration of Barraza's unavailability was very weak. Although Petitioner does not present that issue as a separate basis for this Court to review the case, it does raise a concern, discussed *infra* pp. 16-17, that a prosecutor, satisfied with how a witness has testified in a discovery deposition, will happily stand by while the witness absconds.

[5] *E.g.*, *Farris v. State*, 753 N.E.2d 641, 646 (Ind. 2001); *Smith v. State*, 702 N.E.2d 668, 675-76 (Ind. 1998); *Abner v. State*, 479 N.E.2d 1254, 1262 (Ind. 1985).

> about the state's case. Often times, such a deposition is not intended to be "confrontational" because the deposing party wishes to encourage the witness to volunteer as much information as he or she can.

Id. at 469 n.6. Nevertheless, the court held that a discovery deposition gave the accused an adequate opportunity for cross-examination. It pointed to the fact that the examination was "vigorous and lengthy," but put it placed greater weight on the general ground that "*Crawford* speaks only in terms of the 'opportunity' for adequate cross-examination." Thus, it concluded, "[w]hether, how, and to what extent the opportunity for cross-examination is used is within the control of the defendant." *Id.* at 470.

The Indiana courts have consistently applied that principle.[6] For example, *Thomas v. State*, 966 N.E.2d 1267 (Ind. Ct. App.), *transfer denied*, 970 N.E.2d 665 (Ind. 2012), like this case, was a murder prosecution in which the accused took the discovery deposition of a key prosecution witness. Defense counsel went to great pains to emphasize to the witness that the deposition was for discovery purposes only and should not be regarded as a substitute for trial testimony:

> [W]e're here for a discovery deposition today. What that means is this isn't intended to replace you coming to trial . . . .[B]ecause this is a discovery deposition there are specifically some subject areas that I'm not going to cover. Also, the style and manner of the questioning would be different if this was intended to replace you testifying in Court. . . . [M]y client . . . is not here today and he's not waiving his right to have—to confront cross-examine witnesses or to have a face-to-face meeting with the witnesses against him, okay.

But when the witness did not appear at trial and was deemed unavailable, the

---

[6] *See Fair v. State*, 950 N.E.2d 375 (Table) (Ind. Ct. App. 2011); *Morgan v. State*, 903 N.E.2d 1010 (Ind. Ct. App.), *transfer denied*, 915 N.E.2d 993 (2009).

prosecution offered the deposition, the appellate court affirmed the resulting conviction, and the state supreme court denied transfer. The appellate court noted that the witness had not been questioned vigorously or in depth but, relying on *Howard*, it held, "The restrictions placed upon the scope, tenor, and purpose of the deposition were self-imposed and not dictated by law. . . . [T]he critical inquiry centers upon whether the opportunity was presented, not whether it was seized." *Id. at* 1272.

Similarly, in the present case the court of appeals held that because Petitioner was not "denied the opportunity to undermine Barraza or his testimony by asking any questions he saw fit," he had an adequate opportunity for cross-examination. App. A10-11. It expressed the belief that "a prudent defense attorney conducting a discovery deposition in a criminal case would not only attempt to ascertain what the substance of the testimony might be but also explore avenues by which the testimony or the witness's credibility might be attacked." App. A11. And it concluded that defense counsel in this case had done just that. *Id.* 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)).[7]

[7] The court also purported to distinguish *Lopez* on two grounds, but neither had any force. *Lopez* had pointed out that the defendant "is usually prohibited from being

The Indiana court accurately characterized the law of Florida. In *Lopez* and subsequent cases, the Florida Supreme Court has made clear that the Confrontation Clause prohibits the prosecution from introducing a discovery deposition in place of trial testimony. The *Lopez* court cited several factors supporting this conclusion, emphasizing in particular 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." 974 So.2d at 349. It noted the "fundamental distinctions" between preservation and discovery depositions that it had previously articulated: "How a lawyer prepares for and asks questions of a deposition witness whose testimony may be admissible at trial as substantive evidence under [Florida Rule of Criminal Procedure] 3.190 [authorizing preservation depositions] is entirely different from how a lawyer prepares for and asks questions of a witness being deposed for discovery purposes under rule 3.220 [authorizing discovery depositions]." *Id.* at 349-50, *quoting State v. Green*, 667 So.2d 756, 759 (Fla. 1995). The Florida Supreme Court has repeatedly reaffirmed *Lopez*'s

---

present" at a discovery deposition, 974 So.2d at 350, and the Indiana court said that "Indiana law does not seem to prohibit a defendant's attendance at discovery depositions." App. A12. It is true that sometimes an accused is able to attend a discovery deposition in Indiana, but that was not so in this case. *See infra* pp. 18-19. Lopez also said that a discovery deposition "cannot be admitted as substantive evidence at trial," 974 So.2d at 350, and the Indiana court said that "Indiana law . . . does not prohibit the use of depositions from unavailable persons as substantive evidence." App. A12. But that is effectively to restate the problem of the case. There is no getting around the central point: Indiana regards a discovery deposition as providing a constitutionally adequate opportunity for cross-examination, and Florida does not.

holding that "a discovery deposition is not the equivalent of a prior opportunity for cross-examination." *Corona v. State*, 64 So.3d 1232, 1235 (Fla. 2011); *accord*, *State v. Contreras*, 979 So.2d 896 (Fla. 2008); *Blanton v. State*, 978 So.2d 149 (Fla. 2008).

Although the Indiana court cited only the Florida Supreme Court as taking a contrary view, and cited no other states as agreeing with it, the conflict is in fact far broader. As in Florida, the Supreme Courts of Iowa[8] and Vermont[9] recognize that discovery depositions do not satisfy the confrontation right and so these courts do not allow prosecutors to use them as substantive evidence if the witness is unavailable at trial. Similarly, in Arizona[10] and Missouri[11], the accused can take a discovery

---

[8] *Otteson v. Iowa Dist. Ct.*, 443 N.W.2d 726 (Iowa 1989), drew a sharp distinction between discovery depositions and depositions to preserve testimony. The former, it said, were not "a stage of trial" –" the deposition was taken for discovery only; it was not attempted to be used at trial" – and therefore "the confrontation clause does not apply," and the accused had no right to be present. By contrast, the court said, if the deposition were to be used for perpetuation of testimony, the accused would have such a right. *Accord*, *Hill v. State*, 752 N.W.2d 31 (Table) (Iowa App. 2008); *Van Hoff v. State*, 447 N.W.2d 665 (Iowa App. 1989).

[9] *State v. Roya*, 708 A.2d 908, 909 (Vt. 1998) (The Sixth Amendment right of confrontation is a trial right that is not implicated by pretrial discovery restrictions. . . . Thus, the rape-shield deposition rule does not violate defendant's Sixth Amendment rights.").

[10] Arizona R. Crim. P. 15.3(a)(2) allows for discovery depositions, *see* Comment to Rule 15.3(a) ("Depositions may be ordered by the court . . . (2) to obtain discovery from an uncooperative witness"). Although the defendant has, for constitutional reasons, "a right to be present when the purpose of the deposition is perpetuation of testimony for use at trial," Comment to Rules 15.3(b), (c), (d) and (e), *citing Pointer v. Texas*, 380 U.S. 400 (1965), "where the deposition is for discovery from an uncooperative witness, the defendant is not given a right to be present." Comment to Rules 15.3(b), (c), (d) and (e). And the reason is clear: "The transcript of a Rule 15.3(a)(2) deposition cannot be used at trial without the defendant's consent if he was not present at its taking and did not waive his presence." *Id.* The Comment also

deposition with the assurance that it will not be offered against him as a substitute for trial testimony.

The Nebraska Supreme Court, by contrast, has lined up with Indiana: While recognizing that defense counsel "never had the opportunity to cross-examine" the witness, it has held that a discovery deposition gave defense counsel "an adequate opportunity to examine [the witness] with similar, if not exact, interest and motive on

---

provides: "If the prosecutor invites the defendant to be present at a Rule 15.3(a)(2) deposition, and he declines, he will have been given the opportunity to cross-examine required by Pointer v. Texas . . . ." Petitioner has consulted with several experienced Arizona criminal attorneys, none of whom is aware of a prosecutor ever extending any such invitation.

[11] Rule 25.16 of the Missouri Rules of Criminal Procedure provides for the admissibility at trial of a deposition under certain circumstances, among which are that the witness is unavailable and the accused "was personally present at the deposition and had the right of confrontation and cross-examination at the deposition," or waived that right in writing or in open court, or failed to attend the deposition despite a court order to do so. But under Rule 25.12(c), the accused is ordinarily not allowed to be present at a discovery deposition taken on his behalf. Indeed, Petitioner has consulted with several very experienced Missouri criminal defense lawyers, and they are unaware of any discovery deposition taken by an accused that the accused was allowed to attend. The effective rule in Missouri, therefore, is that discovery depositions may not be used as substantive evidence at trial.

Similarly, the Illinois Supreme Court, which allowed discovery depositions in capital cases for several years before the state abolished capital punishment, recognized that discovery depositions could not be used as trial evidence. *See* Former Supreme Court Rule 416(e)(iii) (providing that "[a]defendant shall have no right to be physically present at a discovery deposition"); *compare* Rule 414(e) (providing that "[t]he defendant and defense counsel shall have the right to confront and cross-examine" a witness in an "evidence deposition"); *People v. Spain*, 673 N.E.2d 414 (Ill. App., 1st Dist. 1996), *leave to appeal denied,* 679 N.E.2d 385 (1997) (holding that an evidence deposition could not be admitted because it was taken outside of presence of defendant and counsel).

matters relative to [the accused's] defense."[12] And Arkansas has gone even further, its appellate court holding that a *civil* discovery deposition taken by a co-defendant (and not attended by the accused or his counsel) gave an opportunity for cross-examination sufficient to satisfy the Confrontation Clause. *Simmons v. State*, 234 S.W.2d 321, 326 (Ark. Ct. Apps. Div IV 2006), *cited approvingly*, *Smith v. State*, 2012 WL 4788651, 977 N.E.2d 29 (Table) (Ind. Ct. App. 2012), *transfer denied*, 980 N.E.2d 325 (2013).

B. A Discovery Deposition Does Not Provide an Opportunity for Cross-Examination.

The view of the Indiana courts, and those of like mind, appears to be that, because the accused had the opportunity to ask questions of the witness, he effectively had an opportunity for cross-examination. But the job of the defense at a discovery deposition is, simply put, discovery, and not cross-examination. The difference is substantial, and crucial.[13]

---

[12] *State v. Allen*, 560 N.W.2d 829, 839 (Neb. 1997). *Accord*, *State v. Hayes*, 2003 WL 21523841 (Neb. App. 2003) ("the interest and motive of defense counsel was the same as at trial – irrespective of the fact that defense counsel took the deposition"). Subdivision 1 of Neb. Rev. St. § 29-1917 authorizes discovery depositions, and subdivision 4 provides: "A deposition taken pursuant to this section may be used at the trial by any party solely for the purpose of contradicting or impeaching the testimony of the deponent as a witness." On it face, it appears that this provision is a recognition that a discovery deposition cannot serve as a constitutionally adequate substitute for trial testimony – but in *Allen* the Nebraska Supreme Court held that it only applies if the witness is available at trial. 560 N.W.2d at 840.

[13] As one very experienced trial lawyer has noted:

> Amazingly, many judges simply do not understand the distinction between "discovery" depositions and "trial" cross-examination, which is taken by deposition simply because there is no other choice. The two are unrelated.

If the prosecution takes a deposition of one of its witnesses to preserve the testimony of that witness, then the deposition begins with the prosecutor securing the direct testimony of the witness, as at trial. After that, the accused has an opportunity for cross-examination. The job of the accused, at a preservation deposition or at trial, is the same – to use whatever tools may be available to impeach the witness's testimony. Ordinarily, the cross-examiner will control the scope of the answers by asking tightly focused questions, often admitting only of yes-or-no answers.

By contrast, a discovery deposition taken by the defense begins (and may, as this one did, end) with questioning by the defense. As the Indiana court recognized, this is not in fact *cross*-examination. The difference is not merely one of labels. It is a fundamental principle that "the Confrontation Clause imposes a burden on the prosecution to present its witnesses," *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 324 (2009). Once a prosecution witness testifies on direct, the defense knows the scope of the adverse testimony the witness has offered, and it can then assess how, and to what extent, it should try to impeach that testimony. The defense is in a much worse position if it has to start – and perhaps end – the questioning.

The aim of the party taking a discovery deposition is not to impeach the witness on the spot but rather to *learn* what the witness's testimony will be and to gather

---

James E. Butler, Jr., *Taking Cross Examination in Advance: The Trial Viddep* (2003), <http://www.butlerwooten.com/Articles/Taking-Cross-Examinations-in-Advance.pdf>, last visited June 5, 2013.

information that might help to impeach the witness or otherwise help the deposing party's case – that is, help the case *at trial* and perhaps after further investigation.[14] Accordingly, the deposing lawyer will typically – as in this case – use open-ended questions, designed to generate as complete answers as possible. The lawyer will usually want to be as *non*-confrontational as possible[15] – the lawyer is not trying to *demonstrate* weaknesses in the witness's testimony, or anything else for that matter, and instead will want to foster a cooperative tone. Thus, the lawyer will be perfectly satisfied to gather grains of potentially useful information surrounded, in an entirely undramatic way, by mounds of chaff. And if, for example, the witness testifies to a fact that may ultimately help the defense, the deposing lawyer will not try to call attention to it. Indeed, if a question would be likely to put the witness in an awkward position but unlikely to generate new information, the lawyer should probably decline to ask

---

[14] Petitioner's trial counsel, who is of counsel on this Petition, made the point quite explicitly at the beginning of the deposition:

> My name is T. Edward Page and the purpose of my questioning you today is to find out whatever information I can about you, to see how I can piece together your situation with what evidence I'm already aware of, to see what connections there are or might be. It's to help me understand what evidence you would give if called as a witness at trial and also it helps me to counsel my client on what his options may otherwise be. I'm gonna ask you a number of very, very personal questions. . . . My purpose is to get information from you so that I can use that information for myself and my investigators to explore possibilities more thoroughly than what we've been able to do up to now. That's why the court has granted a continuance.

App. D26-27.

[15] See App. D27 ("You will find me a gentleman but you'll find me . . . thorough.").

it: All that would probably be accomplished would be to put the witness on notice so that at trial he could offer a better answer. In particular, if the lawyer comes into the deposition with outside information that has substantial impeachment value, he will likely find it counter-productive to ask the witness about that at all.

The discovery deposition in this case illustrates these points. Although the deposition was lengthy, it simply cannot be characterized as cross-examination. Counsel spent most of the time gathering background information about Barraza, an inquiry that led far afield from the present case but that was designed to lead to the discovery of material for impeaching Barraza at trial. At no time did counsel challenge Barraza, act confrontationally, or bring in outside impeachment information. When the focus turned – quite briefly – to the critical matter for which the prosecution sought Barraza's testimony, counsel used a classic open-ended technique, saying, "Tell me from start to finish exactly what he told you." App. D104. Similarly, note counsel's handling of the fact that Barraza testified that Petitioner initially told him he had been framed and only later said he had killed Hawkins: "Can you suggest to me what it was that happened in the course of your relationship with him during those two or three weeks that led him – led to him telling you, not that he had been framed apparently, but that he did it?" App. D106. Issuing such an invitation on cross-examination might well be considered malpractice by a defense lawyer. This was plainly discovery, *not* cross-examination.

Furthermore, it would not be appropriate to determine after the fact, on the basis of the deposition actually taken, that the accused had an adequate opportunity

for cross-examination. As the Indiana Supreme Court has emphasized, "*Crawford* speaks only in terms of the 'opportunity' for adequate cross-examination." *Howard*, *supra*, 853 N.E.2d at 470; *accord, e.g., Fowler v. State*, 829 N.E.2d 459, 467 (Ind. 2005), *cert. denied*, 547 U.S. 1193 (2006) ("the defendant cannot complain of lack of confrontation that was available but not exercised."); *Thomas*, *supra*, 966 N.E.2d at 1272 ("[t]he critical inquiry centers upon whether the opportunity was presented, not whether it was seized"). If taking an extensive discovery deposition satisfies the Confrontation Clause, then so does the opportunity to do so – and this would mean that the mere creation of a system like that of Indiana, in which the accused has an opportunity as a matter of course to take the depositions of prosecution witnesses, would allow the prosecution the choice of not presenting any live witnesses at all.

Other problems as well would arise if the law called for an after-the-fact determination whether a particular discovery deposition was sufficiently comprehensive to amount to adequate cross-examination. Such a rule would require an intense case-by-case inquiry, comparing what questions counsel asked at deposition to what might have been asked at trial had the witness appeared. And it would put the accused in a terribly unfair position: Counsel would have to guess at what point attempts to take discovery were so extensive that a court would later determine that they amounted to an exercise of the confrontation right, rendering the deposition admissible at trial if the witness were deemed to be unavailable.

Moreover, any system that allows a discovery deposition to be used as substantive trial evidence against an accused encourages the possibility of

manipulative, or at least sloppy, behavior on the part of the prosecution. Suppose that, after the defense has taken a discovery deposition of a witness, the prosecution is happy to stand pat with the witness's testimonial statements already made, and would rather not present the witness live at trial, subject to cross-examination. Then if unavailability of the witness means that the discovery deposition is admissible, the prosecution has an incentive to let the witness slip through its fingers and then contend that he is unavailable for trial. In this case, for example, Barraza, a crucial witness in a murder trial, was incarcerated at least as late as January 2011, but by July the State claimed that it had no idea where he was and no feasible way of producing him. That would be much less likely to happen if the prosecution had to produce Barrza for cross-examination or lose the benefit of his testimony.

There is a better way, one that properly aligns incentives and does not cause the needless loss of evidence. If the prosecution believes that one of its witnesses may be unavailable at the time of trial, it can give notice that it will take a deposition for the perpetuation of the witness's testimony. The accused then has the right to be present and to cross-examine – understanding that this is indeed an opportunity for cross-examination and that there may not be another.[16]

What should not be countenanced is to treat a discovery deposition taken by the accused as if it were a preservation deposition taken by the prosecution.

---

[16] Allowing the prosecution to take the witness's deposition to perpetuate his testimony does not, of course, preclude the state from allowing the defendant to take an earlier deposition for discovery.

C. This Court's Intervention is Necessary to Establish that a Deposition Cannot Satisfy the Confrontation Clause if the Accused Had No Right to be Present.

While Indiana is not alone in deeming a discovery deposition an adequate opportunity for cross-examination, it does appear to be the only state to regard such a deposition as satisfying the Confrontation Clause even though the accused had no opportunity to be present at the deposition. The Indiana Supreme Court has held that "criminal defendants generally have no constitutional right to attend depositions," and that, although as a presumptive rule "depositions taken in the absence of defendants may not be admissible if the deponent is later unavailable for trial, . . . where defense counsel takes the deposition of a witness and actively participates in it, the defendant has waived his right of confrontation at trial." *Farris v. State*, 753 N.E.2d 641, 646 (Ind. 2001) (internal quotation marks omitted); *compare Brookhart v. Janis*, 384 U.S. 1, 4 (1966) ("The question of a waiver of a federally guaranteed constitutional right is, of course, a federal question controlled by federal law. There is a presumption against the waiver of constitutional rights . . . ."); *United States v. Williams*, 632 F.3d 129, 133 (4th Cir. 2011) (noting split among federal courts of appeals as to whether attorney can waive the accused's confrontation right so long as the accused does not affirmatively object). Moreover, in a setting like that of this case, in which the accused and the deponent are incarcerated in separate counties, ordinary Indiana practice affirmatively *prevents* the accused from attending a discovery deposition; the accused could not attend the deposition without persuading the court that there was good reason to allow him to do so, *see* Trial Rule 30(A) ("The deposition of a person confined in prison may

be taken only by leave of court on such terms as the court prescribes."), and it would be highly unusual practice to allow the accused to attend the deposition in these circumstances. *See, e.g., Thomas*, *supra* pp. 7-8 (accused does not attend discovery deposition but explicitly insists that he is not waiving confrontation right; court nevertheless holds that deposition may be introduced against him); *Kindred v. State*, 540 N.E.2d 1161, 1174-5 (Ind. 1989) (declaring that "the trial court has wide discretionary latitude in discovery matters as part of its inherent power to guide and control the proceedings" and approving decision of trial court not to allow accused deemed to be a flight risk to attend and take deposition – notwithstanding fact that accused was acting *pro se*).[17]

Ironically, the origins of this idiosyncratic Indiana rule lie in an older case that appears to have been based on the assumption that a discovery deposition could not be admitted at trial. In *Bowen v. State*, 334 N.E.2d 691, 695 (Ind. 1975), the court, in holding that the accused had no right to be at the discovery deposition of his young victim, declared that the confrontation right "is applicable to those criminal proceedings in which the accused may be condemned to suffer grievous loss of either his liberty or his property." And, it said, "[t]he taking of a deposition cannot directly have such consequences upon an accused, although a trial may." Thus, Indiana appears to have played a sort of shell game. Asked whether an accused could attend a discovery deposition, it first said no, because it casually assumed what *should* be the

[17] An unrelated part of *Kindred* was abrogated on other grounds by *Fajardo v. State*, 859 N.E.2d 1201 (Ind. 2007).

law, that such a deposition cannot become effectively a part of trial by being introduced substantively at trial. But then later, presented separately with the question of whether a discovery deposition offers an adequate opportunity for cross-examination, it did not adhere to that original assumption. *E.g.*, *Howard*, *supra*, pp. 6-7. And so the bottom line is that Indiana tolerates the admissibility of testimony taken at a proceeding that the accused had no right to attend – a blatant violation of the confrontation right.

By contrast, Arizona,[18] Florida,[19] Missouri,[20] North Dakota,[21] Ohio,[22] and

---

[18] *See supra* note 10.

[19] *See supra* note 7.

[20] *See supra* note 11.

[21] North Dakota R. Crim.P. 15(h) provides that a discovery deposition may be used in some circumstances substantively at trial if the witness is unavailable, "but it may be offered by the prosecution only if the defendant was present at its taking." The accused "must be present" at a deposition taken to perpetuate testimony, unless he appears before the court and waives the right, or leaves the deposition voluntarily, or is excluded because of his disruptive conduct. Rule 15(f).

[22] Ohio allows defense counsel to take a discovery deposition of material witness who will not be available for trial. Ohio Crim. R. 15(A); *see* 26 OHIO JUR.3D CRIMINAL LAW: PROCEDURE § 1076 (West database updated March 2013) ("either party may take the deposition of any material witness who will not be available for trial"). Art. I, §10 of the Ohio Constitution guarantees the accused "means and the opportunity to be present in person and with counsel at the taking of such deposition, and to examine the witness face to face as fully and in the same manner as if in court." And Rule 15(C) carefully implements the right of the accused to be present, providing:

> The defendant shall have the right to attend the deposition. If he is confined the person having custody of the defendant shall be ordered by the court to take him to the deposition. The defendant may waive his right to attend the deposition, provided he does so in writing and in open court, is represented by counsel, and is fully advised of his right to attend by the court

Vermont[23], all states that allow discovery depositions, recognize that if the accused did not have an opportunity to be present at a deposition, then use of the deposition as substantive evidence against the accused at trial cannot comport with the Confrontation Clause. That this point should be obvious does not diminish the need for this Court to establish it as the uniform law of the land.

II. INTERVENTION BY THIS COURT IS NECESSARY TO ESTABLISH THAT A TRANSIENT ILLNESS DOES NOT RENDER A WITNESS *PER SE* UNAVAILABLE FOR PURPOSES OF THE CONFRONTATION RIGHT.

Under *Crawford*, prior testimony may be admitted against an accused only if the accused had an adequate opportunity to cross-examine the witness *and* the witness is unavailable to testify live at trial. 541 U.S. at 59, 68. Only once in the last three decades – in a summary reversal based on the required standard of deference in *habeas*

---

at a recorded proceeding.

[23] The Reporter's Notes on the 1991 amendment to Vermont R. Crim. P. 15(h) state:

> Subdivision (h) . . . governing use is amended to state that a deposition may not be used as substantive evidence unless the defendant could have been present at its taking. This limitation will ensure that defendant has an opportunity to confront the deposed witness, whether or not that opportunity has been exercised.

WILLIAM A. NELSON, VERMONT CRIMINAL PRACTICE AND PROCEDURE § 24.26 (1993) makes clear that this requirement has "underpinnings in the defendant's right to confrontation."

cases, *Hardy v. Cross*, 132 S.Ct. 1490 (2011)[24] – has the Court considered the standards for determining unavailability; the last full-dress case in which it did so was, ironically enough, *Ohio v. Roberts*, 448 U.S. 56 (1980), which established the Confrontation Clause doctrine that *Crawford* rejected. Those two cases, and the others in which this Court has considered the standards for unavailability, *Motes v. United States*, 178 U.S. 458 (1900); *Barber v. Page*, 390 U.S. 719 (1968); *Mancusi v. Stubbs*, 408 U.S. 204 (1972), involved the rather fact-intensive question of how extensive prosecution efforts to secure the live testimony of the witness must be for the witness to be declared unavailable.[25] This case, by contrast, raises an aspect of unavailability that the Court has never considered – not whether the *prosecution* should have *done* more, but whether the *court* should have *waited* to secure the live testimony. And the Question Presented here is a simple and basic one on which lower courts are highly fractured: If a witness is suffering from a transient illness or disability, does that render her *per*

---

[24] *Hardy* illustrates some of the same problems with use of a transcript as are present in this case. There, as here, the accused was acquitted on one count at the first trial and the jury hung on another, a lead witness gave her testimony in an unconvincing manner – described there as "halting" by the trial judge, 132 S.Ct. At 491 – she was replaced at trial by a member of the prosecution team who read her prior testimony, and the second jury found the accused guilty. The difficulty must be tolerated when the witness is genuinely unavailable at the second trial, as the Illinois Supreme Court reasonably concluded the witness in Hardy was – but not when the witness would probably be able to testify after a short wait.

[25] The question of unavailability was also presented in *Lee v. Illinois*, 476 U.S. 530 (1986), but the majority did not reach it. There, the claimed unavailability was based on the fact that the witness had refused to testify, invoking the Fifth Amendment privilege. This, too, raises the issue of what more, if anything, the prosecution should have done (such as entering into a plea deal with the witness) to secure live testimony.

se unavailable, without considering the importance of her testimony or whether she might be able to testify after a reasonable delay?

The opinion of the Indiana Court of Appeals reflects an affirmative answer to that question. That court's justification for holding Timmerman unavailable was remarkably perfunctory:

> The trial court questioned Timmerman, who complained of nausea and felt that she might be developing a migraine. Timmerman also indicated that she had very recently been hospitalized for four days, with medical personnel suspecting MS, seizure, or stroke as the cause of her symptoms. Most importantly, the trial court personally interviewed Timmerman and was able to observe her behavior, demeanor, and appearance, something we cannot do.[26]

The trial court made no attempt to determine either a diagnosis or a prognosis for Timmerman's ailment. It made no attempt, for example, to have a physician examine her. (Given her extensive history of drug abuse, one might have thought the court would at least be interested in ascertaining whether she was suffering a transient reaction to drugs or withdrawal, or indeed whether her symptoms were genuine.) Like the trial court, the Court of Appeals gave no consideration either to the possibility that reasonable measures might have been taken to allow Timmerman to

---

[26] The reference to MS (multiple sclerosis) is highly revealing of the casual attitude the Court of Appeals took towards the question of unavailability. That a person is *suspected* of having MS – a disease with which many people live, very productively, for decades, *see* University of Maryland Medical Center, *Multiple sclerosis – Prognosis*, <http://www.umm.edu/patiented/articles/what_causes_multiple_sclerosis_000017_4.htm>, last visited June 4, 2013 ("Except in rare cases of severe disease, most people with multiple sclerosis have a normal or near-normal life span . . . . The majority of patients with MS do not become severely disabled. Twenty years after diagnosis, about two-thirds of people with MS remain ambulatory . . . .") – is hardly a reason to deem her unavailable to be a witness.

testify live – reordering witnesses,[27] for example, or a brief adjournment of the trial[28] – or to the importance that Timmerman's testimony played in the case. The rule applied by these courts is therefore a *per se* one – if a witness is unable to testify at a given moment in the trial, then she may be declared unavailable for Confrontation Clause purposes.

This view is in accord with that of numerous courts.[29] It appears to be in accord

---

[27] The State had called two other witnesses to court for the day that Timmerman began to testify, but these witnesses were not called to the stand that day even after Timmerman was excused. App. D22-23.

[28] The trial had been adjourned while Timmerman was in the hospital, but neither court below ascribed any significance to that fact; that is, neither suggested that once Timmerman became unable to continue after having begun to testify an adjournment would have been warranted but for the fact that an earlier one had been granted. And such a suggestion would have been improper: The decision facing the judge was how to proceed going forward given that Timmerman, having begun to testify live, was unable to continue. The history of Timmerman's condition might bear on a prognosis for the near-term future, though neither court inquired into that prognosis; the fact that an earlier adjournment was granted could not do so.

[29] For example, there are many cases reflecting this view that involve pregnant witnesses. *See State v. Benitez*, No. 2305/07 (Md. Ct. Spec. Apps. Dec. 14., 2009), *cert denied*, No. 42/10 (Md. 2010), *cert. denied*, 131 S.Ct. 2095 (2011); *United States v. Rollins,* 487 F.2d 409, 412 (2d Cir. 1973) (characterizing a witness who was out of state and "pregnant, with advice from her physician that she not travel," as "unavailable in the ordinary sense of the term"); *Phillips v. Pitchess*, 451 F.2d 913, 918 (9th Cir. 1971), *cert. denied*, 409 U.S. 854 (1972) (prosecution laid sufficient foundation to satisfy Confrontation Clause because "by the time the second trial commenced [the witness] was at such an advanced stage of pregnancy that she was unable to safely travel"); *State v. Jefferson*, 194 P.3d 557, 560 (Kans. 2008) (citing "*State v. Steward*, 219 Kan. 256, 263-65, 547 P.2d 773 (1976) (no abuse of discretion in allowing admission of testimony from earlier trial of same action, when witness unavailable because of advanced pregnancy)"); *St. Clair v. Commonwealth*, 140 S.W.3d 510 (Ky. 2004); *McKinney v. Fisher*, 2009 WL 3151106 (D. Idaho 2009) (relying on *United States v. McGuire*, 307 F.3d 1192 (9th Cir. 2002), also a pregnancy case, in disposing of a Confrontation Clause claim without considering the possibility of a continuance:

also with a literal view of Fed. R. Evid. 804(a)(4), a provision adopted by approximately 40 states, including Indiana, under which a witness is deemed unavailable if she cannot attend trial "because of death or *then existing* physical or mental illness or infirmity." (Emphasis added.)

The majority of courts, however, take a position in stark contrast to these decisions. They insist that the duration of the illness or infirmity is a critical factor in determining whether the witness should be deemed unavailable, because if the condition is a relatively brief one then the court should delay the trial rather than admit the prior statement of an absent witness. Indeed, one recent court – recognizing that "[a] witness is not 'unavailable' . . . merely because he or she cannot be present on a particular day" – held that, although the witness "suffered from a terminal illness, in the short term she might well recuperate enough to give her testimony at trial," and therefore the trial court erred in declaring her unavailable. *State v. Perry*, 159 P.3d 903, 906-07 (Idaho App. 2007).[30]

"Given that the facts here showed that Small was suffering from complications during her late-term pregnancy, which McKinney did not seriously dispute at the time, the good faith requirement was satisfied."); *People v. Garland*, 777 N.W.2d 732 (Mich.App. 2009), appeal denied, 783 N.W.2d 109 (2010) ("Based on the evidence on the record showing that the victim was experiencing a high-risk pregnancy, that she lived in Virginia, and that she was unable to fly or travel to Michigan to testify, the trial court did not clearly err by determining that the victim was unavailable.").

[30] *See also, e.g., United States v. Hay*, 527 F.2d 990, 995-96 (10th Cir. 1975), *cert denied*, 425 U.S. 935 (1976); *United States v. Boatner*, 478 F.2d 737, 742 (2d Cir.), *cert denied*, 414 U.S. 848 (1973); *People v. Roberts*, 146 P.3d 589 (Col. 2006); *Peterson v. United States*, 344 F.2d 419, 425 (5th Cir. 1965) ("Mrs. Flora was not dead, beyond the reach of process nor permanently incapacitated. She was simply unavailable at the time of trial . . . . Considering the seriousness of the charges and if the Government

Courts taking this approach often follow the lead of Wigmore in holding that the critical question is whether the duration of the illness or infirmity is "in probability such that, with regard to the importance of the testimony, the trial cannot be postponed." 5 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW 219 (Chadbourn rev. 1974). *See, e.g., United States v. McGowan*, 590 F.3d 446, 455 (7th Cir. 2009); *Burns v. Clusen*, 798 F.2d 931, 937 (7th Cir. 1986); *United States v. Faison*, 679 F.2d 292, 296-97 (3d Cir. 1982) (holding that the fact that witness was "too sick to testify at the time of trial" is "not . . . dispositive"; trial court, in responding to motions made during as well as before trial, must exercise discretion in determining whether to "adjourn[]the trial for a reasonable period to afford the witness enough time to recover from an illness which might be temporary"; among the factors to be considered are "the importance of the absent witness for the case," "the nature of the illness," and "the expected time of recovery"); *Ecker v. Scott*, 69 F.3d 69 (5th Cir. 1995) (following *Faison*); *United States v. Amaya*, 533 F.2d 188, 191 (5th Cir. 1976), *cert denied*, 429 U.S. 1011 (1977); *Stoner v. Sowders*, 997 F.2d 209, 212 (6th Cir. 1993) ("the specific inquiry must focus on both the severity and duration of the illness"); *State v. Button*, 11 P.3d 483, 487 (Idaho 2000) ("the unavailability of a witness must be of such duration that a continuance is not a practical alternative"); *accord* 29 AM.JUR.2D, EVIDENCE 765 ("The trial court may consider the expected duration of the illness and grant an

---

desired to use Mrs. Flora's testimony, it should have requested a continuance to a time when she could probably be present."); *Withee v. Commonwealth*, 2008 WL 4774409 (Va. App. 2008); *State v. Hess*, 2004 WL 2913569 (Ohio App. 5 Dist. 2004).

adjournment if the witness can be expected to recover within a reasonable time.").

In this case, there was no doubt of the importance of Timmerman's testimony: She was the lead witness in a murder trial, one that resulted in a sixty-year prison sentence, her testimony consuming nearly 200 pages of trial transcript.

And as to the duration of the disability, it appears that Timmerman would have been able to testify within days or hours, or even minutes. The court asked her whether she could "go back out there and [testify]" and she responded, "In a few minutes . . . ." App. D7. The court at first indicated intention to allow her a few minutes, *id.*, but then immediately – before court officials could even get her a soft drink or an antacid that she requested from her purse – decided that she should be deemed unavailable and that the transcript should be read. App. D8. And it was very clear that the impetus for the court's refusal to wait was its keen desire to wrap this felony murder trial up as quickly as possible. "Speed the train up, please," it told the prosecutor. App. D19.

Given that, as here, the witness could feasibly testify live at trial, the Confrontation Clause does not allow the transcript of prior testimony, even though given subject to confrontation, to be used instead. It is crucial to adhere rigorously to this requirement, for at least four reasons.

First, live testimony gives the trier of fact the opportunity to observe the demeanor of the witness in testifying. *E.g., Mattox v. United States*, 156 U.S. 237, 242-43 (1895); *United States v. Yida*, 498 F.3d 945, 950-51 (9th Cir. 2007). This opportunity is lost completely if, as in this case, the jury hears, rather than the live testimony of

the witness, the reading of a transcript.[31] Indeed, in this case the reading of the transcript was affirmatively misleading. Rather than observe Timmerman as she actually responded to questions by counsel, the jury observed an assistant district attorney reading from the transcript. And the problem was particularly acute: Timmerman was not only a crucial witness to the case, but had been a highly unpersuasive one at the first trial – as demonstrated by the fact that the jurors acquitted Petitioner of the murder charge and hung on the felony murder charge, a virtually unimaginable result if they had believed her testimony. As counsel pointed out to the court at the second trial, Timmerman was "successfully impeached on a number of points [at the first trial]. But if one can only but see how she reacted to some of the questions and how she testified, it just doesn't come across in this transcript." App. D13. And indeed, while the jury that observed Timmerman's demeanor in giving her crucial testimony refused to convict Petitioner, the jury that did not observe it found him guilty.[32]

Second,

> since "[w]itnesses who testify live at the current trial speak as of the current time," while witness testimony via "transcript speaks as of the time of the prior proceeding, and cannot be updated" the accused can only use recently acquired information in cross-examining a witness if that testimony is live. The ability to cross-examine a witness at trial using the most current investigative information available cuts to the heart of the Sixth Amendment's confrontation

---

[31] A video recording may, depending on various circumstances, including its quality, preserve an adequate opportunity to observe the witness's demeanor.

[32] The judge at the second trial stifled Petitioner's counsel when he tried to argue to the jury on the basis of the lack of demeanor evidence. App. D124.

clause.

Yida, *supra*, 498 F.3d at 951 (quoting in part an *amicus* brief submitted in that case by Petitioner's counsel). Again, this case illustrates the problem: In this case, defense counsel was stymied by inability to cross-examine Timmerman with respect to matters that witnesses had testified to in the second trial but not in the first.[33] Moreover, counsel would have been able to examine Timmerman about her continuing drug use since the first trial.

Third,

> witnesses who testify at both proceedings may expose inconsistencies between the two versions of their testimony, that can be exploited by the adverse party during cross-examination at the second proceeding, but witnesses whose prior testimony is introduced through a transcript at the current trial do not. Again, the core of the accused's right to confront the witnesses against him is implicated.

Yida, *supra*, 498 F.3d at 951. Of course, it is impossible to know with certainty whether Timmerman would have testified inconsistently with her testimony at the first trial, or with the other testimonial statements that she made; the trial court's ruling short-circuited the opportunity to find out. But given that there were significant inconsistencies each time she testified, it is certainly plausible to expect that she would have added to them at the second trial.

Petitioner freely acknowledges that an accused does not have an absolute right to a second cross-examination, or even a right to cross-examine a witness as of the time

---

[33] *See* App. D13 (defense counsel referring to inability to cross-examine with respect to "some things that have been brought up so far that . . . deal with some significant collateral issues").

of trial or to have the jury observe the witness's demeanor; if a witness becomes truly unavailable between the first trial on a charge and the second, then presumptively he must accept the first examination as is.[34] But Petitioner should not be stuck with the cross-examination from the first trial if the second trial can feasibly be held in such a way that the witness can testify live.

Finally, if a witness *could* be brought to trial but the prosecution has the option of presenting prior testimony instead, then the prosecution has a glaring opportunity for manipulation. As *Yida* said, "allowing the prosecution to present a transcript, rather than live testimony, may lead to the presentation of that transcript when live testimony is vulnerable for the prosecution's case." 498 F.3d at 951. The *Yida* court elaborated on the point by quoting a passage from the *amicus* brief submitted by Petitioner's counsel:

> If the prosecution believed that its case would be stronger by presenting the live, vivid testimony of the witness at the current trial, than by presenting the transcript of the prior testimony, then the prosecution would presumably secure the witness's presence and testimony at the current trial. Suppose, however, the witness's demeanor tends to be such that it diminishes rather than enhances his credibility; similarly, suppose the prosecution believes that cross-examination of the witness at the current trial would likely impeach her testimony more powerfully than would a reading of the transcript from the prior proceeding. In such circumstances, the prosecution might prefer to "stand pat," using the transcript rather than presenting the witness live at trial.

498 F.3d at 951 n.8. Again, this case provides a strong illustration. Timmerman's

---

[34] Presumptively, because in a given case the accused may demonstrate that the situation has changed so much between trials that he should not be deemed to have had an adequate opportunity and motive to cross-examine, and so the prior testimony should not be admitted at the second trial even if the witness is then truly unavailable.

testimony was vulnerable in large part for precisely the reasons suggested in the passage just quoted, because her demeanor was poor and because cross-examination based on current information would likely have been far more damaging to her testimony than the initial cross was. If the State had thought it needed Timmerman to testify at trial, but her condition prevented her from doing so for a short time, there can be little doubt that it would have done what many prosecutors have routinely done in similar situations – sought a brief adjournment.[35] It would have thought it needed her to testify at trial if she had not previously been subjected to cross-examination – or if it appeared that the trial court would hold that she was available to testify. Presumably if the prosecution had sought a brief adjournment so that a critical witness could testify live, the court would have granted it, as many courts have done. The principle applied by the Indiana Court of Appeals – that a temporary infirmity renders a witness unavailable without respect to whether the witness could testify at trial given a reasonable adjournment – therefore opens a window for manipulation by the prosecution. The only way to close that window is to adopt instead, as a matter of constitutional law, the contrary rule applied by the majority of courts, that in determining whether a temporary infirmity should be deemed to render a witness

[35] Because unavailability is often debatable and a matter of degree, the problem is a general one even given the unavailability requirement: If the prosecution wants the witness to testify live, it will make such efforts as necessary to produce her, and if it prefers to introduce her prior testimony it will argue that she is unavailable. The problem is particularly acute in a case like this one, in which securing the witness's testimony requires no prosecutorial effort, but only waiting a limited time until the witness is able to testify.

unavailable a court must consider whether a reasonable postponement would allow the witness to testify live.

III. THIS CASE IS AN EXCELLENT VEHICLE TO ADDRESS THE QUESTIONS PRESENTED.

This case presents in crisp, clean fashion two highly important questions governing the administration of the Confrontation Clause: whether a discovery deposition offers a satisfactory opportunity for cross-examination, and whether a transient disability constitutes *per se* unavailability. This Court has not addressed either of these aspects of Confrontation Clause doctrine – what constitutes an adequate opportunity for cross-examination, and what constitutes unavailability – since long before *Crawford*. This case does *not* require the Court to return to the issues that have recently divided it – what constitutes a testimonial statement for purposes of the Clause and when a statement should be deemed to have been used for the truth of a matter it asserts. *See, e.g., Williams v. Illinois*, 132 S.Ct. 2221 (2012).

There is no obstacle to the issues being considered here: Jurisdiction is clear; the issues were preserved below; the case comes here on direct review. And not only were the errors clearly not harmless, they were clearly critical to the result. If the prosecution had not been allowed to present the discovery deposition of Barraza, *or* if it had not been allowed to present the transcript of Timmerman's prior testimony, its case would have been far weaker. And if it had not been allowed to present the testimony of either of them, it would not have had a viable case.

Petitioner, in short, was convicted of felony murder and sentenced to sixty years

of incarceration on the basis of paper testimony of two witnesses, one of whom Petitioner never had a genuine opportunity to confront or to cross-examine and the other of whom was declared unavailable to testify live because of what appeared to be a very transient disability. This case provides an excellent chance for the Court to make resoundingly clear that the Confrontation Clause does not tolerate such a result.

CONCLUSION

For the foregoing reasons, the writ should be granted.

Respectfully submitted,

MARK A. BATES
7803 W. 75th Avenue,
Suite One
Schererville, IN 46375
(219) 322-1271

T. EDWARD PAGE
Thiros & Stracci
200 East 90th Drive
Merrillville, IN 46410
(219) 769-1600

RICHARD D. FRIEDMAN
Counsel of Record
DAVID A. MORAN
625 South State Street
Ann Arbor, Michigan 48109-1215
(734) 647-1078
(734) 647-4188 (fax)
rdfrdman@umich.edu