No. 10-____

IN THE
SUPREME COURT OF THE UNITED STATES

VICTORIANO BENITEZ,

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

On Petition for Writ of Certiorari to the
Court of Special Appeals of Maryland

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should a witness be deemed unavailable for Confrontation Clause purposes because of a then existing physical or mental illness or infirmity even though a reasonably short postponement would allow the witness to testify at trial?

2. Should determination of whether a witness is unavailable for purposes of the Confrontation Clause take into account simple and reasonable measures, other than attempting to enforce a timely subpoena, that the prosecution could have taken in advance to assure that the witness would be able to testify at trial?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Victoriano Benitez respectfully petitions for a writ of *certiorari* to the Court of Special Appeals of Maryland to review the judgment against him in *Victoriano Benitez v. State of Maryland*, No. 2305 (September Term, 2007).

OPINIONS BELOW

The orders of the Court of Appeals of Maryland denying *certiorari*, App. C1, and denying reconsideration (D1), the opinion of the Court of Special Appeals of Maryland, App. A1-43, and the relevant trial proceedings, App. E1-53, are all unpublished.

JURISDICTION

The Court of Special Appeals of Maryland issued its decision on December 14, 2009. That court issued an order denying reconsideration on March 11, 2010. The Court of Appeals of Maryland denied *certiorari* on June 11, 2010, and denied reconsideration of that decision on September 20, 2010. 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

Petitioner was convicted of serious crimes in part on the basis of testimony taken at a prior trial and presented to a second jury via audio tape. This was done because at the time of the second trial the witness, a crucial one for the prosecution, was out of state and deep into her ninth month of pregnancy. The prosecution knew about this before a jury was empaneled but revealed it only afterwards. The prosecution never sought, and indeed opposed, a continuance. And the trial court declined to consider whether a brief continuance that would allow the witness to testify live would be, or would have been, reasonable. Petitioner was severely prejudiced by this blatant violation of his confrontation rights.

The decision of the Maryland courts conflicts with decisions by other courts recognizing that a temporary infirmity is not sufficient for a witness to be deemed unavailable for purposes of the Confrontation Clause if a reasonable continuance would allow the witness to testify at trial. It also stands in clear contrast to decisions recognizing that the prosecution has an affirmative responsibility to shape circumstances making it more probable that witnesses will be able to testify live.

Petitioner was tried, beginning February 5, 2007, in the Circuit Court for Montgomery County, Maryland, on multiple counts of child sexual abuse. Petitioner was married to the paternal grandmother of the alleged victim, a girl named Yesenia. The abuse allegedly took place in the late 1990s, when Yesenia, born December 23, 1989, was a young child.

A critical witness for the prosecution was Yesenia's younger sister, Jasmine, born July 24, 1991. Jasmine testified that on one occasion she witnessed Petitioner putting his hand near Yesenia's private parts; she was the only person other than Petitioner and Yesenia who was present on any of the occasions when abuse allegedly occurred. She also testified that on several other

occasions Yesenia had told her that Petitioner had touched her inappropriately. Petitioner's counsel, believing that Jasmine's demeanor undermined her credibility, cross-examined her in a restrained manner.

Petitioner testified in his defense, denying all allegations; the theory of the defense was that the accusations were promoted by Yesenia's mother in the context of a divorce from, and custody battle with, Petitioner's stepson.[1]

The jury deliberated for over twelve hours. During deliberations, defense counsel was able for the first time to interview Jessica O., a half-sister of Yesenia and Jasmine. Jessica reported that Yesenia had told her that a friend of Yesenia's mother had touched Yesenia inappropriately.

The jury was unable to reach a verdict. On February 12, 2007, the court declared a mistrial. It then scheduled a new trial, before the same judge, to begin July 30, 2007.

On that date, before selection of the second jury began, Petitioner asked for a continuance to allow him additional time to find Jessica, who had been avoiding service. The State opposed the motion, and the court denied it.

Almost immediately after the jury was empaneled, the prosecution moved *in limine* for admission of an audio tape of Jasmine's testimony from the first trial. Jasmine had moved to Florida and the prosecutor presented a letter from a physician explaining that she was eight and one-half months pregnant, with labor to be induced within a few days if she did not give birth naturally; the physician advised that she could not travel to Maryland at that time.

Petitioner's counsel vigorously objected to introduction of the tape. He argued that the

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[1] Yesenia's first accusations were made approximately nine days after her mother was released from prison, a short time after the mother was served with custody and divorce papers – and nine months after Petitioner left the house where Yesenia lived.

Confrontation Clause precluded introduction of Jasmine's prior testimony unless she was unavailable, App. E10-11, 16, and that she should not be deemed unavailable because she would be able to testify after a relatively brief continuance, App. E16; he offered to waive any speedy trial or double jeopardy objections to such a continuance. App. E13, 18. He noted that he had not known that Jasmine could not attend trial at the designated time until after jeopardy had attached, and after the prosecution had opposed his motion for a continuance. App. E18-19.

Counsel also pointed to ways in which Petitioner was prejudiced by presentation of Jasmine's prior testimony: First, he had received important new information after Jasmine testified at the first trial that would be crucial in a renewed cross-examination – in particular, the suggestion by Jessica that a friend of Yesenia's mother had been the true perpetrator. Second, Jasmine's demeanor in testifying at the first trial was so tentative that it undercut her credibility. App. E22-23. Thus, the jury at the second trial would not have the benefit of the full demeanor evidence. App. E23. Furthermore, because he regarded Jasmine's demeanor at the first trial as so weak, he had conducted a relatively mild cross-examination, App. E22-23 – a choice that would not be appropriate given that the jury could not observe Jasmine. And he cited *Peterson v. United States*, 344 F.2d 419 (5th Cir. 1965), a leading case holding that admission of prior testimony by a witness who was in an advanced stage of pregnancy at the time of trial violated the Confrontation Clause because the prosecution should either have sought a continuance or foregone use of the witness's testimony. App. E16, 23.

The trial court, noting that *Peterson* was "pretty clear" in discussing "whether or not the witness will be available in the near future, whether or not a postponement should be requested," asked for the State's argument in response. App. E31. The State made no genuine attempt to distinguish *Peterson*. (The State said that *Peterson* held that the prosecution "should have been

required to elect either to proceed without [the witness's] testimony or to request a continuance," App. E33, but of course that was precisely the situation in this case.) Rather, the State rejected the approach of that case, saying repeatedly that it had "no authority" before a Maryland court. E32, 34. And, though Petitioner had clearly invoked the Confrontation Clause, the State argued that the only constraint was Maryland Rule of Evidence 5-804(4), which provides that a declarant is unavailable for purposes of the hearsay exceptions listed in Rule 5-804 if the declarant "is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity":

> [T]he Maryland Rule . . . is what governs our obligations . . . . And our rule specifically says a then existing physical infirmity. We're not talking about something that could be changed in a month, two months.
>
> Specifically the rule says a then existing. It is existing right now. It is now "then existing."

App. E32.

The trial court adopted the prosecution's approach rather than that exemplified by the *Peterson* case. It treated the Maryland rule as stating the governing standard on unavailability. App. E43-44. Thus, it expressed the opinion that Jasmine's inability to travel because of the late stage of her pregnancy clearly made her *per se* unavailable. App. E5-6. It declined to consider whether a continuance long enough to allow Jasmine to testify would be practical, or would have been practical had the prosecution asked for it before the jury was empaneled, App. E37 ("I'm not going to grant a continuance. So factor that out.); in passing, it referred to the state's "right to a speedy trial and to expeditious proceedings in a criminal case." App. E45.

Accordingly, the trial court regarded the prosecution as having had no obligation other than to attempt to enforce compliance with a timely subpoena. App. E43 (pointing out that State issued

subpoena, took steps to ensure service, and was prepared to pay for witness's transportation: "But for the condition that the witness is in her final stages of pregnancy, she would be able to travel."). And, though it characterized the prosecution's conduct as "not . . . very polite," App. E44, and as having thrown "a fast ball" at the defense, App. E12, it completely discounted any prejudice:

> The State is stuck with the tape of her previous testimony, the direct examination. The defense is stuck with the cross-examination. No one is at an advantage. It's a wash in terms of what this witness will say to the jury. . . . [B]oth sides are stuck with the same testimony.

Ap. E44-45. Thus, the court admitted the audio tape of Jasmine's testimony. Yesenia's testimony contradicted herself about the frequency of the presence in the house of her mother's live-in boyfriend, who may have been the abuser – but of course Petitioner was not able to examine Jasmine on this matter.

Once again, Petitioner testified, denying all allegations.

In closing, the prosecutor argued that there was "absolutely no evidence . . . from this witness stand" that "some other dude did it." App. E50. And again in rebuttal, the prosecutor argued: "There is no evidence before this Court, none, before you, that anyone other than Victoriano Benitez molested Yesenia." App. E53. During Petitioner's closing argument, the court prohibited counsel from commenting on the State's failure to produce Jasmine as a live witness. App. E51-52.

Petitioner was found guilty of one count of child abuse, two counts of second degree rape, and four counts of sexual offense in the third degree, and sentenced to a total of forty-five years in prison.

In the Court of Special Appeals, Petitioner again argued (among other grounds for reversal) that, even assuming Jasmine could not come to court when the trial was held, she should not be

deemed unavailable because a relatively brief continuance would have allowed her to testify at trial. App. A39. Petitioner explicitly invoked the Confrontation Clause in making this argument. Appellant's Brief, at 32. But the court rejected the argument. It held that "after setting this case in for a retrial, the prosecutor made reasonable efforts to procure the attendance of Jasmine." App. A41. Presumably – because the court did not further elaborate – those "reasonable efforts" were no more than the ones noted by the trial court, service of a subpoena and willingness to pay for Jasmine's travel had she then been able to travel. Certainly the court did not consider how long a continuance would have been necessary to allow Jasmine to testify at trial or whether such a continuance would have been reasonable. Like the trial court, it treated the "then existing" standard of the Maryland rule as controlling, App. A40, and it simply held:

> But for [Jasmine's] pregnancy, her imminent delivery date, and her doctor's orders, she would have been able to travel from Florida to attend the second trial. Therefore, we adopt the reasoning of the trial court and hold that Jasmine was unavailable and thus her former testimony was admissible.

App. A41.

The Court of Special Appeals affirmed the judgment of conviction, and declined a motion (stated on other grounds) for reconsideration. Petitioner then sought certiorari from the Court of Appeals of Maryland, among other reasons because the Court of Special Appeals erred in affirming the circuit court's ruling that Jasmine was unavailable. Petitioner argued, at page 12 of the petition, that "when balanced against the minimal prejudice of a brief postponement, the significant restraint on the Appellant's Sixth Amendment right of Confrontation was unwarranted."

The Court of Appeals denied certiorari, App. C1, and then denied rehearing. App. D1. This petition follows.

REASONS FOR GRANTING THE WRIT

I. THE FEDERAL AND STATE COURTS ARE SHARPLY DIVIDED ON THE QUESTIONS PRESENTED BY THIS PETITION.

Under *Crawford v. Washington*, 541 U.S. 36, 68 (2004), the Confrontation Clause prohibits introduction of a prior testimonial statement against an accused unless he has had an adequate opportunity to be confronted with the witness *and* the witness is unavailable to testify at trial. In this case, there is no doubt that Jasmine's prior statement – testimony from the first trial – is testimonial for purposes of the Confrontation Clause. The critical question is whether the witness should be deemed unavailable to testify at trial. The decision of the Maryland courts highlights conflicts among the lower courts on two issues, one relatively narrow and one relatively broad.

The narrower issue is this: If a witness is unable, because of an illness or infirmity existing at the time designated for trial, to come to court to testify, is that sufficient in itself for her to be deemed unavailable to testify, without regard to whether a continuance of reasonable length would allow the witness to testify at trial? Under the decision of the Maryland courts in this case, the answer is affirmative. The trial court, the reasoning of which was explicitly adopted by the Court of Special Appeals, and the Court of Special Appeals itself, both noted that Jasmine was unable to travel to court to testify because of the advanced state of her pregnancy. Notwithstanding the arguments made by Petitioner, neither court considered whether a continuance of reasonable duration would have allowed her to testify at the second trial.

This decision was in accord with those of numerous courts, both federal and state. Indeed, one has to look no further than cases involving pregnant witnesses to find decisions holding that an infirmity existing at the time of trial is sufficient for the witness to be deemed unavailable – without

considering the possibility that a continuance could avoid the problem.[2] This view appears to be in accord with the approach behind Fed. R. Evid. 804(a)(4), a provision adopted by approximately 40 states, including Maryland, under which a witness is deemed unavailable if she cannot attend trial "because of death or then existing physical or mental illness or infirmity." Indeed, as noted above, the trial court and the Court of Special Appeals both applied that language in this case, and deemed it sufficient to resolve the question of unavailability for purposes of the Confrontation Clause as well as of state evidence law.

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 grant a continuance rather than admit the prior statement of an absent witness. The *Peterson* case, which Petitioner cited at trial, and like this one involving a witness in advanced pregnancy, is

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[2] *See 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: "Given that the facts here showed that Small was suffering from complications during her late-term pregnancy, which McKinney 2did 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.").

a leading example.[3] But the cases involve other types of infirmity as well. 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." Therefore the trial court erred in declaring her unavailable. *State v. Perry*, 159 P.3d 903, 906-07 (Idaho App. 2007).

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. Amaya*, 533 F.2d 188, 191 (5th Cir. 1976); *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 adjournment if the witness can be expected to recover within a reasonable time."). Thus, prosecutors frequently request continuances so that their witnesses will be able to

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[3] *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 because of her pregnancy. Considering the seriousness of the charges and if the Government desired to use Mrs. Flora's testimony, it should have requested a continuance to a time when she could probably be present.")

testify at trial in pregnancy cases,[4] among others[5] – and they are held accountable if they do not. *E.g., Smith v. United States*, 106 F.2d 726 (4th Cir. 1939); *Button*, *supra*, 11 P.3d at 488 ("We hold that by failing to request a continuance under the circumstances of this case, the state failed to exercise good faith reasonable effort to obtain the testimony [of the absent witness]").

The decision in this case implicates a broader conflict as well. Decisions like this one, deeming a temporary disability to be sufficient for a determination of unavailability, allow the prosecution to treat the situation at the time designated for trial or immediately beforehand as fixed. If, given that situation, the prosecution cannot by reasonable measures procure the witness's testimony at trial at the designated time, then they declare the witness unavailable. Thus, the Court of Special Appeals held in this case that the prosecution "made reasonable efforts to procure the attendance of Jasmine," App. A41, but it recited no such efforts. Apparently, it was referring to the efforts noted by the trial court, issuance and service of a subpoena, and willingness to arrange for transportation.

By contrast, other decisions reject this narrow frame of reference for assessing the prosecutor's obligation. They recognize that the standard of "reasonableness" that determines "[t]he lengths to which the prosecution must go to produce the witness," *see Ohio v. Roberts*, 448 U.S. 56

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[4] *Withee v. Commonwealth*, 2008 WL 4774409 (Va. App. 2008) (continuance of nearly three months "due to the unavailability of a material witness for the Commonwealth as a result of her doctor's ordering her to be on bed rest during the final stages of her pregnancy"); *State v. Hess*, 2004 WL 2913569 (Ohio App. 5 Dist. 2004) (continuance granted in part because of "the unavailability of a complaining witness due to pregnancy as her doctor ordered her to bed rest").

[5] *E.g., United States v. Hay*, 527 F.2d 990, 995-96 (10th Cir. 1975); *United States v. Boatner*, 478 F.2d 737, 742 (2d Cir. 1973); *People v. Roberts*, 146 P.3d 589 (Colo. 2006). Such a continuance usually does not pose a speedy trial problem. *E.g., Barker v. Wingo*, 407 U.S. 514, 531 (1972) (noting that "a valid reason, such as a missing witness, should serve to justify appropriate delay"). In this case, Petitioner made clear he was willing to waive any speedy trial objection. App. E22.

(1980), may require the prosecutor to take anticipatory action to increase the probability that the witness will testify at trial. Some cases adopting this approach involve witnesses who have been deported or otherwise allowed by federal prosecutors to leave the country .

In *United States v. Mann*, 590 F.2d 361 (1st Cir.1978), for example, the court explained that implicit "in the duty to use reasonable means to procure the presence of an absent witness is the duty to use reasonable means to prevent a witness from becoming absent." *Id*. at 368. And, without adopting a *per se* rule requiring compulsory means, the Fifth Circuit agreed that "the government's good faith efforts to assure the witnesses' availability at trial should include efforts aimed at keeping the witnesses in the United States." *United States v. Allie*, 978 F.2d 1401, 1407 (5th Cir. 1992). *Accord, e.g., United States v. Tirado-Tirado*, 563 F.3d 117, 123 (5th Cir. 2009) ("The measures taken by the government in this case do not constitute 'good faith' or 'reasonable' efforts to secure the physical presence of Garay-Ramirez at trial. The government failed to make any concrete arrangements with Garay-Ramirez prior to his deportation . . . .); *cf. Motes v. United States*, 178 U.S. 458 (1900) (Confrontation Clause violated when witness disappeared through negligence of Government).[6]

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[6] Note also *United States v. Yida*, 498 F.3d 945 (9th Cir. 2007). There, after the court discussed Confrontation Clause principles as underlying the material Federal Rules of Evidence, the court held that a witness should not be considered unavailable given that the Government had deported him without informing either the trial court or the defense, without taking a video deposition, and without having any means of compelling his return. The court held:

> Here, it is clear that the appropriate time-frame should not be limited to the government's efforts to procure Reziniano's testimony after it let him be deported, but should instead include an assessment of the government's affirmative conduct which allowed Reziniano to be deported to Israel in the first instance, similar to the First Circuit's assessment in *Mann*.

498 F.3d at 955-56. Judge Gould, author of the majority opinion, also wrote a separate opinion

At stake, then, are two fundamentally different visions of the prosecution's obligation when it seeks to introduce the prior testimony of a witness without bringing the witness to trial. Under the view reflected by decisions like that of the Maryland Court of Special Appeals in this case, it is sufficient for the prosecution to issue a subpoena shortly before the designated trial date even though, under the circumstances then existing, the witness could not then be brought to court. Under the alternative view, the prosecution should do what it can to shape the situation – to act, one might say, as it presumably would, if it *had* to bring the witness in, because the accused had not had a prior opportunity for confrontation. Such shaping of the situation might require affirmative advance steps to increase the probability that the witness could be brought to trial on the scheduled trial date. Or, as in a case like this one, it might require nothing more than a request for a brief postponement of that date.

II. THE DECISION BELOW REFLECTS A FUNDAMENTAL MISUNDERSTANDING OF, AND SERIOUSLY IMPAIRS, THE CONFRONTATION RIGHT.

When a prosecutor seeks to introduce testimony given at a prior proceeding by a witness who does not testify at the current trial, the Confrontation Clause states what might be called an absolute rule and a rule of preference. The absolute rule is that the prior testimony is not admissible if the accused did not have an adequate opportunity and sufficient motive to examine the witness, presumably at that prior proceeding. *Crawford*, 541 U.S. at 68. Even if that rule is satisfied, our system prefers live testimony at trial, and so the prior testimony should not be admitted at the current trial if the witness is available to testify there. *Id.* The trial court – the reasoning of which was adopted by the Court of Special Appeals – failed to recognize that this rule of preference is an

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emphasizing the constitutional support for the result. *Id.* at 962-63.

integral part of the doctrine of the Confrontation Clause. *See* App. E12 ("I think you're out of the window on *Crawford*, because you already cross-examined the witness."), App. E43-44 (discussing Confrontation Clause only in context of prior opportunity for cross-examination). But for at least four reasons, it is important to maintain this rule – that is, to require that, even if the accused has previously had an opportunity to be confronted with the witness, the prosecution procure the live testimony of the witness if it can feasibly do so.

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 a transcript is presented instead, and lost nearly completely if, as in this case, an audio transcript is presented.[7] And in this case the lost opportunity was particularly important, because – as articulated by Petitoner's counsel, with no refutation by the prosecutor or the court – Jasmine's demeanor was weak and likely to undermine her credibility.

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

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[7] A video recording may, depending on various circumstances, including its quality, preserve an adequate opportunity to observe the witness's demeanor. Petitioner suggested in this case that presenting Jasmine's testimony by video would mitigate the prejudice. App. E24. The Confrontation Clause may not allow the prosecution to present testimony in the first instance by means of video transmission, when the witness and the accused are not in the same location, *see* Statement of Justice Scalia concerning Amendments to Rule 26(b) of the Federal Rules of Criminal Procedure, Apr. 29, 2002, available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/CR-26b.pdf. But the question in this context is whether video transmission of the witness's testimony is sufficient, given that the accused already has had an opportunity to be confronted with the witness and that it is difficult for the witness to come to court.

> current investigative information available cuts to the heart of the Sixth Amendment's confrontation 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 is a strong illustration of the problem: In this case, after Jasmine testified at the first trial – beginning before the conclusion of that trial and running right through Yesenia's testimony at the second trial, immediately before the audio tape was played – Petitioner's counsel learned information that would have led to a more searching cross-examination of Jasmine, if he had had the opportunity.

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 Jasmine would have testified inconsistently with her testimony at the first trial; the trial court's ruling short-circuited the opportunity to find out. But given that the witness was a young girl, testifying about events from the prior decade, it is certainly plausible that she would have.

It bears emphasis, and 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 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.[8] But Petitioner should not be "stuck with the cross-examination" from the

[8] 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

first trial – to use a phrase of the trial court, endorsed by the Court of Special Appeals, App. A39, 41 – if the second trial can feasibly be held in such a way that the witness can testify live. And the supposed fact that the prosecution is "stuck with . . . the direct examination" from the first trial does not eliminate the problem; to say that the matter is "a wash," as the trial court did, ignores the fact that it is the accused who has a constitutional right to be confronted with the witness, whose testimony may be, and in this case clearly was, instrumental in convicting him of a serious crime.

Finally, it is not at all true that the prosecution is "stuck" with the examination from the first case. 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. As *Yida* indicated, "the possibility of prosecutorial manipulation" was "not at

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and motive to cross-examine, the prior testimony should not be admitted at the second trial even if the witness is then truly unavailable. Whether or not those changes were so great in this case is not a question now presented. But the situation did indeed change, and given that Jasmine could have testified at the second trial if there had been a brief continuance, the loss of that opportunity prejudiced Petitioner.

issue" in that case. But it certainly is in this case, given that (1) a relatively brief continuance would have resolved the problem created by Jasmine's temporary infirmity, (2) the prosecution purposely did not reveal the problem until after the jury had been empaneled, when presumably the court would be less likely to order a continuance, and (3) Jasmine's 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 Jasmine to testify at trial, but her condition prevented her from doing so for several weeks, there can be little doubt that it would have done what many prosecutors have routinely done in similar situations – sought a brief continuance. 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 continuance so that a witness could testify live, the court would have granted it, as many courts have done. The rule adopted by the Maryland courts, that a temporary infirmity renders a witness unavailable without respect to whether the witness could testify at trial given a reasonable continuance, therefore opens a window for manipulation by the prosecution. The only way to close that window is to adopt the contrary rule of the majority of courts, that in determining whether a temporary infirmity should be deemed to render a witness unavailable a court must consider whether a reasonable continuance would allow the witness to testify live.

III. THIS CASE IS AN EXCELLENT VEHICLE FOR DETERMINATION OF THE QUESTIONS PRESENTED AND FOR GIVING LOWER COURTS GUIDANCE ON HOW UNAVAILABILITY SHOULD BE DETERMINED.

Because determination of unavailability requires consideration of all the circumstances of the case, unavailability determinations are usually heavily fact-bound. Hence, although the question of unavailability arises with great frequency, this Court has not taken a case since *Ohio v. Roberts*, 448 U.S. 56 (1980), calling on it to consider the circumstances in which a witness should be deemed unavailable. But this case presents an issue that is crisp and well-defined, not dependent on the facts of a particular case, and on which the lower courts are in conflict – whether an infirmity that makes a witness unable to testify at the time designated for trial renders her unavailable for purposes of the Confrontation Clause without consideration of whether she would be able to testify given a reasonable continuance. The case therefore presents an opportunity for the Court not only to resolve this issue but also to give broader guidance on the time frame within which courts should consider unavailability.

This case in particular presents unusually strong advantages for considering the questions presented, because it clearly illustrates *each* of the reasons why the Confrontation Clause prohibits the use against an accused of prior testimony unless the witness is unavailable at trial.

First, the deprivation of the jury's ability to observe Jasmine's demeanor evidence was critical because, Petitioner argued, her demeanor undercut the persuasiveness of her testimony.

Second, use of the prior testimony meant that at the second trial – the trial at which he was convicted – counsel was unable to cross-examine Jasmine on the basis of significant information he had learned since Jasmine testified at the first trial.

Third, the prosecution knew full well before jeopardy attached that Jasmine would be unable to testify at trial for some weeks, and yet it did not seek a continuance. Presumably it calculated that it would be better off using a recording of Jasmine's prior testimony than presenting her as a live

witness subject to fresh cross-examination. This case therefore presents a clear example of the danger of manipulation that the rule followed by the Maryland courts creates – that is, (1) the effect of that rule in giving the prosecution the choice of whether to stand pat with the testimony given at the first trial or to seek more favorable testimony at the second trial, and (2) the prejudice that this choice may cause the defense.

Finally, given the circumstances – among others, Jasmine's age and the long time lapse since the events she purported to describe – this is a case in which it would be notably *un*surprising if the testimony she gave at the second trial was substantially inconsistent with the testimony she gave at the first.

Nor is there any impediment to the Court taking this case. First, there is no doubt as to the jurisdiction of this Court. Second, the case comes here on direct appeal, simplifying the questions presented. Third, the Confrontation Clause issue is clearly preserved for review by this Court. At trial, Petitioner objected vigorously on Confrontation Clause grounds to admission of Jasmine's prior testimony. The trial court and the Court of Special Appeals both explicitly considered and rejected their arguments, and the Court of Appeals denied review. Fourth, there can be no plausible contention of harmless error. Jasmine's testimony was significant to the case, and Petitioner lost the opportunity to cross-examine her contemporaneously and to have the jury observe her demeanor. Finally, Petitioner raises before this Court no other issues that might result in reversing his conviction or mitigating his sentence. The case revolves entirely on the questions presented.

CONCLUSION

It is notably ironic that the last case in which this Court considered how to determine whether

a witness should be deemed unavailable is none other than *Ohio v. Roberts*, 448 U.S. 56 (1980). *Crawford*, in discarding the *Roberts* regime, cut the tie between the traditional rule against hearsay and the law governing the Confrontation Clause of the Sixth Amendment. Courts generally realize now that the accused's right to have an opportunity for cross-examination cannot be nullified by characterizing the statement, in accordance with hearsay standards, as reliable. But this case indicates that some courts are missing the point on the other side of confrontation doctrine, dealing with unavailability. The Maryland courts, like numerous others, treated the "then existing" standard enunciated by Fed. R. Evid. 804(a)(4) and its state counterparts as governing the unavaiability inquiry under the Confrontation Clause, and thus failed to consider that a reasonable continuance would have allowed Jasmine to testify subject to confrontation at the second trial. This Court should intervene to ensure that the lower courts do not continue to commit such flagrant errors.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

RESPECTFULLY SUBMITTED this 20th day of December, 2010.

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