No. 21-6012

In The

Supreme Court of the United States

MICHAEL D. RIMMER,

Petitioner,

v.

STATE OF TENNESSEE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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With Respect to Petitioner's Confrontation Clause Argument, as Previously Discussed, the Decision Below Stands in Defiance of *Crawford-Barber*; Moreover, the Decision Below Conflicts with Both Federal and State Law.

Rather than attempt to explain the troubling analysis from the Tennessee Supreme Court, comparing this case to *State v. Armes*, 607 S.W.2d 234 (Tenn. 1980)—a case where the question of what *minimal* showing from the State constitutes a good-faith effort was not before the court—the State, instead, characterizes petitioner's Confrontation Clause argument as error correction. Petitioner contends, however, that the lower court's lackadaisical approach itself conflicts with *Barber v. Page*, 390 U.S. 719 (1968), the cases that this Court has subsequently considered, s*ee e.g., Crawford v. Washington*, 541 U.S. 36 (2004), and the Confrontation Clause itself. *See* U.S. Const. amend. VI.

Moreover, the decision below clashes with two lines of related cases. The first follows the United States Court of Appeals for the District of Columbia's opinion *United States v. Lynch*, 499 F.2d 1011 (D.C. Cir. 1974). There, the appellate court announced that, for purposes of the Confrontation Clause, "[i]n the ordinary case, [demonstrating good faith] will require a search equally as vigorous as that which the government would undertake to find a critical witness if it has no . . . hearing testimony to rely upon in the event of 'unavailability.'" *Id.* at 1023. Since *Lynch*, courts, both federal and state, have adopted this factor in their analyses of good-faith efforts. *See e.g., Hawai'i v. Lee*, 83 Haw. 267, 278 (1996) ("We now expressly adopt the *Lynch* standard."); *see also United States v. Burden*, 934 F.3d 675, 686 (D.C. Cir. 2019)

("[The government] bears the burden of establishing that its unsuccessful efforts to procure the witness's appearance at trial were 'as vigorous as that which the government would undertake to [secure] a critical witness if it has no [prior] testimony to rely upon in the event of 'unavailability.'"), quoting *Lynch*, 499 F.2d at 1023.

The second line of cases, which accept *Lynch* and introduce three more factors, spring from the United States Court of Appeals for the Tenth Circuit's decision *Cook v. McKune*, 323 F.3d 825 (10th Cir. 2003). In adopting *Cook*, the Connecticut Supreme Court began by observing that "the United States Circuit Courts of Appeals have rejected a 'per se rule' or 'categorical approach' when it comes to assessing the reasonableness of efforts to produce a missing witness." *Connecticut v. Lebrick*, 334 Conn. 492, 511 (2020), quoting *Burden*, 934 F.3d at 689. The Connecticut court then noted that some federal appeals courts have identified "four objective criteria to guide the reasonableness inquiry." *Id.* at 511-512. Quoting *Cook*, the Supreme Court of Connecticut laid out the four-factor test it announced:

> "First, the more crucial the witness, the greater the effort required to secure his attendance. . . . Second, the more serious the crime for which the defendant is being tried, the greater the effort the [state] should put forth to produce the witness at trial. . . . Third, where a witness has special reason to favor the prosecution, such as an immunity arrangement in exchange for cooperation, the defendant's interest in confronting the witness is stronger. . . . Fourth, a good measure of reasonableness is to require the [s]tate to make the same sort of effort to locate and secure the witness for trial that it would have made if it did not have the prior testimony available."

Id. at 512, quoting *Cook*, 323 F.3d at 835-836; *see also California v. Wilson*, 11 Cal. 5th 259, 293-294, 484 P.3d 36, 62 (2021) (acknowledging *Cook* but observing that California has not adopted it; nevertheless, the court analyzed the defendant's confrontation clause under *Cook*); *Hammond v. Kentucky*, 2019 WL 6973754, at *5 (Ky. 2019) (memorandum) (recognizing *Cook* and analyzing unavailability under its framework).

As should be apparent from the opinions below, the Tennessee courts' analyses of petitioner's Confrontation Clause claim did not consider *Lynch* or the other three factors announced by *Cook*. *See* App. 29a-30a; 58a-60a; 84a-86a. Additionally, petitioner contends that had a court conducted an analysis under either *Lynch* or *Cook*, on this record, he would almost certainly be meritorious on this issue.[1]

Since *Lynch* and *Cook*, appellate courts have struggled to reconcile them, either ignoring them or endeavoring to distinguish them. *See United States v. Smith*, 928 F.3d 1215, 1241-1244 (11th Cir. 2019) (attempting to distinguish *Cook* and *Lynch* and employing a totality of factual circumstances analysis); *Hamilton v. Morgan*, 474 F.3d 854, 862-863 (6th Cir. 2007) (dissenting opinion pointing out majority's analysis eschews *Cook* and *Lynch*); *Zong Lor v. Jenkins*, 178 Fed. App'x 569, 571 (7th Cir.

[1] To begin with, Allard's testimony offered the most material piece of evidence against petitioner in this capital trial—a trial where the State failed to produce a body. Next, because the State moved to seek the death penalty in this first-degree murder case, the gravity of the case should have required the State to go to greater lengths to produce Allard. And while Allard was not offered an immunity deal, he was a jailhouse snitch who was given a letter that attested to his compliance, merely a few months before a separate parole hearing. Finally, it is hard to imagine that had the State not already secured Allard's testimony, it would have been content with a fruitless search of databases. This is demonstrated clearly by the fact that the State did not tell its own investigator that Allard had been previously incarcerated in Indiana. *See* App. 79a. Given this, the fourth factor, or *Lynch* factor, on its own would be enough for a court to find in petitioner's favor.

2006) (stating, in a conclusory manner, that *Cook* merely attempted to elucidate reasonableness); *Dobynes v. Hubbard*, 81 Fed. App'x 188, 190 (9th Cir. 2003) (memorandum) (rejecting analyzing petitioner's claim under *Cook* in an AEDPA, 28 U.S.C. § 2254, deference context); *Wilson*, 11 Cal. 5th at 293-294, 484 P.3d at 62. Other courts have continued to employ *Cook* or *Lynch*, including in an AEDPA deference context. *See Flournoy v. McKune*, 266 F. App'x 753, 757-759 (10th Cir. 2008) (analyzing the petitioner's Confrontation Clause claim under *Cook* and in the context of AEDPA deference); *see also McCandless v. Vaugh*, 172 F.3d 255, 266 (3d Cir. 1999) (citing *Lynch* and noting that "Confrontation Clause concerns are heightened and courts insist on more diligent efforts by the prosecution where a 'key' or 'crucial' witness' testimony is involved").

With such confusion, it is unsurprising that judges have remarked about the need for clarity from this Court. As observed by Judge Bea of the United States Court of Appeals for the Ninth Circuit, the question of unavailability is "hard" because "the Supreme Court has rarely addressed what it means to be 'unavailable' for Confrontation Clause purposes. In the few cases it has squarely answered the question, it has articulated a standard: the prosecution must show it made a 'good-faith effort' to secure the testimony of a witness." *Meras v. Sisto*, 676 F.3d 1184, 1191 (9th Cir. 2012) (Bea, J., dissenting). And with the exception of *Hardy v. Cross*, 565 U.S. 65 (2011), which addressed the issue of unavailability under an AEDPA

deferential standard of review,[2] "the Court has not revisited the standard for constitutional unavailability in the wake of the change in Sixth Amendment doctrine brought about by *Crawford*." *Id.*

To be sure, part of the attraction of a reasonableness standard in assessing a good-faith effort is that such a test offers trial courts, who observe witnesses and are better suited to make determinations about credibility, latitude to consider each case individually. However, it also has the potentiality—at least without further clarification—to permit courts to conduct paltry analyses, letting defendants' Confrontation Clause rights fall through the cracks. This is exacerbated by the fact that, as this Court has observed, there have been "seismic shifts in digital technology." *Carpenter v. United States*, 138 S. Ct. 2206, 2219, 201 L. Ed. 2d 507 (2018) (Fourth Amendment case analyzing a defendant's reasonable expectation of privacy). In other words, technology has changed our world exponentially since *Crawford* was decided in 2004. Consequently, it should come as no surprise that drastic changes have occurred in how investigations are conducted with the full emergence of the internet. Therefore, this Court's counsel is necessary, and the time is right to weigh in on what constitutes a good-faith effort, in light of modern technologies. Without such guidance, courts will continue to be free to conclude that an investigator conducting computer searches and not acting in some way upon those

[2] Title "28 U.S.C. § 2254(d) does not permit a federal court to overturn a state court's decision on the question of unavailability merely because the federal court identifies additional steps that might have been taken. Under AEDPA, if the state-court decision was reasonable, it cannot be disturbed." *Hardy v. Cross*, 565 U.S. 65, 72 (2011). Needless to say, petitioner comes before this Court now on direct review, and therefore, *Hardy* is inapposite for comparison.

searches is sufficient to satisfy what the Confrontation Clause demands because a few online searches from a desk is more than nothing.[3]

Turning to the case at bar, the State does not dispute that the record on appeal—regarding the State's good-faith effort—is limited to only S.A. Baker's testimony and the trial court's opinion from the bench.[4] Respectfully, the State appears to misapprehend the legal significance of this. To be clear, it is petitioner's argument that a state is required to *demonstrate* that the investigation it undertook was a good-faith effort. But, due to the paucity of the record, it is unknown what lengths the State actually went to in its search for Allard. Therefore, on the record here, petitioner's observation of the lack of information offered by S.A. Baker on "granular details as database search terms," Response, 8 n.2, goes to the heart of the argument that there was not—and is not—an adequate basis in the record for a court to conclude that the State conducted a good-faith effort.[5] And significantly, the "one, if ultimately fruitless, lead" the State argues occurred, *see* Response, 7 n.1, cannot be

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[3] [Defense Counsel]: Basically, what I hear you saying is you did a computer search?

[Witness S.A. Baker]: Yes, to find information related to this James Douglas Allard.

81a.

[4] Because respondent did not point out or object to petitioner's observation regarding the record on appeal, any later objection "may be deemed waived." U.S. S. Ct. R. 15 (2).

[5] In the digital age, . . . [a] vast amount of information can be accessed in a short amount of time using minimal physical effort. But this is true only if the proper electronic resources are used and the operator uses those resources properly. The efficacy of computer research necessarily is limited by *the contents of the databases searched*.

Lebrick, 334 Conn. at 516-517 (emphasis added).

considered by appellate courts in their review because, as the Tennessee Supreme Court previously concluded in *Armes*, "[t]he prosecuting attorney's statement to the [trial c]ourt concerning the efforts of the State's investigator to locate the witness cannot be considered as evidence of proof on the issue of the State's good faith effort." 607 S.W.2d at 237.[6] Petitioner also notes that, although the Tennessee Supreme Court and the State used the term "dead end" in describing the purported lead S.A. Baker discovered, the term dead end was never uttered on the record by the witness nor the trial court. *Compare* App. 29a; Response, 8, *with* 73a-88a.

Relatedly, the State does not appear to dispute that *it* bore the burden in showing it made a good-faith effort to produce Allard. *See Ohio v. Roberts*, 448 U.S. 56, 74-75 (1980), *overruled on other grounds by Crawford*, 541 U.S. 36; *see also Burden*, 934 F.3d at 686; *Smith*, 928 F.3d at 1227; *State v. Jones*, 568 S.W.3d 101, 129 (2019); *Brooks v. United States*, 39 A.3d 873, 883 (D.C. Ct. App. 2012) ("That burden, we have said, is 'substantial.'") (citation omitted). Thus, contrary to the State's curious suggestion in footnote 2 of its Response, petitioner was not required to cross-examine the State's witness to help the State demonstrate such a good-faith effort happened. *See* Response, 8 n.2.[7] Again, petitioner's point is to train this Court's

[6] "[The State]: For the record, there's a phone number that is associated here. I would let the Court know that has been attempted, and that is not a good number for this particular witness." App. 78a; *see also* 83a.

[7] Additionally, petitioner prays that the Court notes that he did not argue that the State failed to search outside of the State of Tennessee. *Compare* Response, 7 n.1 *with* Petition, 17. Rather, petitioner's point was that the testimony regarding a database used by S.A. Baker called NCIC, "which is a national search through the FBI," App. 77a, did not offer the trial court any substance of 1) what NCIC is; 2) what potential areas it can search; and 3) what S.A. Baker actually searched. Moreover, the State's apparent suggestion that the Court take judicial

focus on the dearth of evidence in the record. And petitioner's rhetorical examples are merely what could have, or should have, been asked of S.A. Baker or entered into evidence elsewhere that might have demonstrated a good-faith effort. Alternatively, other courts have used product specialists to help courts learn what specific databases actually search. *See Lebrick*, 334 Conn. at 502-503 (noting that the trial court heard from a product specialist regarding CLEAR operations and the information it searches).

Further, the State does not dispute that it did not tell S.A. Baker that Allard had been previously incarcerated in Indiana—a fact it undeniably knew. Thus, it withheld information, whether knowingly or not, from its own investigator that almost certainly would have helped with the investigation. Just as a good-faith effort must be required, so too should ineptitude be rejected. *See United States v. Yida*, 498 F.3d 945, 952 (9th Cir. 2007) ("Prosecutors must not only act in good faith but also

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notice that NCIC stands for "National Crime Information Center" should be rejected because the State offers no basis for the Court to take such notice. *See* Response, 7 n.1. In addition, the Tennessee Supreme Court gave no basis for its acceptance of what NCIC stands for. *See* App. 29a.

Importantly, this is not the State's only overstatement in addressing the Confrontation Clause issue. In footnote 3 of its Response, the State claims that other crime scene evidence corroborated Allard's testimony. Response, 8 n.3. Not completely so. To wit, the State asserts that "[e]xpert testimony agreed that blood stains were consistent with blunt force trauma. . . . The only detail that law enforcement could not corroborate was that the petitioner also shot Ellsworth." *Id*. However, the experts from *both* petitioner and the State testified that the blood stain evidence was consistent with blunt-force or sharp-force trauma; they both also testified that *there was no evidence that the bloodstains were caused by a gunshot*. *See* App. 7a-8a. This, coupled with the fact that the State was unable to produce a body of the alleged victim, belies the State's overstatement that crime scene evidence supported Allard's testimony. In addition, the State contends that Allard's testimony that "[petitioner] claimed that he took the motel's security camera tape and erased it" is corroborated by the fact that "[t]he security camera at the hotel was missing its tape." Response, 8 n.2. Yet, as the Tennessee Supreme Court noted, "[t]he motel office had a security camera, but because there was no videotape in it, [the motel manager] did not check to see if anyone had tampered with it." App. 4a. In any event, these comments from the State are irrelevant to the issue of the unavailability of Allard.

operate in a competent manner; a prosecutor cannot claim that a witness is unavailable because the prosecutor has acted in an 'empty-head pure-heart' way.") (citation omitted); *see also Burden*, 934 F.3d at 686 ("Where the government itself bears some responsibility for the difficulty of procuring the witness, . . . the government will have to make greater exertions to satisfy the standard of good-faith and reasonable efforts than it would have if it had not played any role.").

Because the opinion below is in contravention of federal law, and there is a split among the lower federal and state courts on how to assess constitutional unavailability with respect to the reasonableness of a good-faith effort, this Court should grant the petition and explain that, based on the record before it, the State failed to demonstrate that it conducted a good-faith effort in locating a witness. This case also allows the Court to clarify the reasonableness standard in light of the technological innovations in the last few years, which have changed how investigations are conducted. Last, this case gives the Court an opportunity to discuss that the State's withholding of basic information from its own investigator contributes to a lack of a good-faith effort.

If the Court Declines to Address Petitioner's Double Jeopardy Claim, this Issue Will Evade Review.

The State does not appear to contest that this Court may review petitioner's double jeopardy claim. Rather, it argues that petitioner's case makes a poor vehicle for this Court's consideration. *See* Response, 11. Initially, petitioner offers that if the Court does not address this argument, then this novel and important issue will evade review. In addition, the State forgets what the post-conviction court found in its order

granting relief: "the [S]tate admittedly failed to meet its responsibilities under *Brady*." App. 196a-197a. Thus, the State's position that "petitioner's misconduct claims, including his *Brady* claims, were found not to be meritorious" is simply wrong. Response, 11. The State also downplays the evidence it did not disclose to defense counsel at petitioner's first trial, stating it "disclos[ed] . . . only some of the evidence regarding another potential culprit." But, as previously discussed, the prosecutor withheld evidence of an eyewitness who identified two men at the crime scene on the morning of the crime with blood on their hands; that same witness did not identify petitioner in a lineup as one of those men. *See* App. 191a-192a. To be sure, the post-conviction court decided to grant petitioner relief under ineffective assistance of counsel, yet that, in and of itself, does not supplant the post-conviction court's other findings. Nor does the State offer any basis to ignore that court's findings.

Petitioner maintains that his double jeopardy claim is meritorious because the logic of *Kennedy* manifestly extends to petitioner's argument. *See generally Oregon v. Kennedy*, 456 U.S. 667 (1982); *see generally* U.S. Const. amend. V. Under the circumstances here, having given the State a second chance to prosecute petitioner, in light of its pervasive and purposeful misconduct, seriously puts into question the "fairness, integrity, or public reputation of judicial proceedings," *Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1908, 201 L. Ed. 2d 376 (2018), and the judiciary as an institution.

Therefore, this Court should grant leave and announce that the Double Jeopardy Clause does not tolerate the misguided prosecution that occurred at petitioner Michael Rimmer's first trial and bars reprosecution.[8, 9]

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[8] Petitioner would be remiss to not discuss overstatements and inaccuracies in the State's Response. These vary from mischaracterizations of the record to factual inaccuracies. For example, a mischaracterization is the State's claim that "[it] used Allard's testimony from petitioner's first trial because law enforcement could not locate Allard despite *extensive* searches of state and national databases." Response, 5-6 (emphasis added). Yet, the intermediate appellate court and the Tennessee Supreme Court were attentive to set forth only S.A. Baker's efforts and not characterize them as "extensive." An example of a factual inaccuracy is where the State writes that James Darnell and Dixie Presley "observed a man in a baseball cap depositing a thick bundle, which was wrapped in a *pink* blanket *or comforter*, in the trunk of a maroon Honda in the parking lot." Response, 3 (emphasis added). In the opinion below, the court noted that only Darnell observed a man and "[i]n his arms, the man cradled something thick that had been rolled up in a blanket." App. 3a. As should be apparent, there is no mention of the color of a blanket and no mention of a comforter. Additionally, the State claims that "[t]he State preserved a host of evidence from the car, including blood soaked patches of upholstery, swabs of blood . . . . Law enforcement also preserved . . . over 100 photographs taken of the car." Response, 11. In reality, as the Tennessee Supreme Court noted, only **one** blood-soaked patch of upholstery and **one** swab of blood were preserved. *See* App. 6a. In addition, "[t]he evidence technician took ninety-six photographs of the vehicle and its contents," App. 5a, not 'over 100 photographs,' as the State asserts.

[9] A significant incomplete recounting of a factual issue is where the State's notes that "[t]he DNA from the blood samples taken from the maroon Honda and the hotel were consistent with [the mother of the alleged victim's] DNA." Response, 4. For the sake of clarity and completeness, petitioner includes the Tennessee Supreme Court's exact recounting of the facts:

> From the evidence taken from the maroon Honda and collected at the crime scene, an FBI forensic examiner determined the DNA of the blood at the crime scene matched the blood found inside the vehicle. The forensic examiner also compared the DNA from the blood collected at the scene and from the vehicle to the DNA of the victim's mother, Marjorie Floyd. The examiner determined the blood was consistent with belonging to a daughter of Ms. Floyd. The DNA type from the blood on the towel collected from the scene matched the DNA type extracted from the victim's pap smear sample. To obtain DNA samples from the victim, investigators collected the victim's toothbrush, sweatpants, and makeup sponge from her home. The DNA extracted from these items was consistent with the DNA from the blood at the motel and inside the maroon Honda.

App. 6a-7a. Thus, the examiner's nuanced analysis was that the blood was consistent with a female offspring of the alleged victim's mother.

Although there are other examples of mischaracterizations or overstatements in the State's Response, petitioner has highlighted what he has deemed the most glaring.

Another incomplete assertion comes from the Tennessee Supreme Court's opinion below, and the State's Response, which stated that petitioner never picked up his final paycheck from Ace Collision Center. 3a; Response, 4. Yet, in his previous post-conviction hearing, petitioner entered into evidence his cleared check, denominated as Exhibit 56. Petitioner can include the exhibit and transcript accepting it into evidence should this Court require it.

[9] Finally, petitioner maintains that his due process destruction of evidence argument is preserved inasmuch as it was presented to the nisi prius.

CONCLUSION

For the foregoing reasons, petitioner prays that the Court grant the petition for a writ of certiorari. Upon due consideration, in the alternative, petitioner prays that this Court grant the petition, vacate the judgment, and remand for further proceedings.

Respectfully submitted,

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