

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

Gabriel Alexander Acosta — PETITIONER
(Your Name)

vs.

Rick Raemisch, Exexcutive Director, Colorado
Department of Corrections, "et al." — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court Of Appeals For The Tenth Circuit

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Gabriel Alexander Acosta , #128518

(Your Name)

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QUESTIONS PRESENTED

- 1) Whether the United States Court of Appeals for the Tenth Circuit violated the defendant's Sixth Amendment right to confrontation by erroneously upholding the Colorado Court of Appeals decision that the trial court did not err in admitting deposition testimony for the only eyewitness in a murder case, determined to be "unavailable," despite the fact that this witness was in the custody at the Denver County Jail and actually available during the jury trial, and whose availability was known to the court prior to the conclusion of jury deliberation.
- 2) Whether the United States Court of Appeals for the Tenth Circuit violated the defendant's Sixth Amendment right to confrontation by erroneously upholding the Colorado Court of Appeals opinion that the prosecution's search for the only eyewitness in a first degree murder trial was "reasonable" and "in good faith" even though the prosecution's interests were clearly contrary to producing this witness (whose live testimony contributed to an undesirable sentence at the co-defendant's trial), and whose perfunctory, delayed, and empty search efforts included efforts that were unlikely to produce the witness (such as a one-time *afternoon* drive down a street where the witness has been known to prostitute) and checking to see if the homeless, prostituting, drug-using witness had submitted a U.S.P.S. change of address form, while omitting customary search efforts that were likely to produce the witness, such as looking for the witness where she said she would be staying (and where she was staying) or contacting the witness' mother, brother, or sister?
- 3) Whether United States Court of Appeals for the Tenth Circuit violated the defendant's Sixth Amendment right to assistance of counsel by upholding the Colorado Court of Appeals decision that the defendant was not denied assistance of counsel when 1) the trial court asked the defendant to waive his right to speedy trial while unrepresented, and informed the defendant that if he did not waive the right, he would have go to trial without an attorney even though more than 50 days remained on the clock (defendant waived his right to speedy trial in order to be represented by counsel) and 2) that the defendant was not denied assistance of counsel when the trial court released the only eyewitness to the case while the defendant was still unrepresented and unable to object to the terms of the release?

LIST OF PARTIES

☐ All parties appear in the caption of the case on the cover page.

☒ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Rick Raemisch, Executive Director, Colorado Department of Corrections
Cynthia Coffman, Attorney General For The State Of Colorado

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APPENDIX B: United States District Court For The District Of Colorado No. 1:16-cv-02266-RPM: Ordered, that the application is denied and the Clerk shall enter judgement dismissing this civil action. Pursuant to 28 U.S.C. 2253, the applicant has made a substantial showing of violations of the Sixth Amendment and that reversal is required. Reasonable jurists could debate this Court's determination to the contrary. This a certificate of appealability is granted. March 30, 2017

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**IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI**

Petitioner Gabriel Acosta respectfully prays that a writ of Certiorari issue to review the judgment below.

OPINION BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit appears at Appendix A to this petition. The court's opinion has been designated for publication but is not yet reported.

The United States District Court for the District of Colorado issued its opinion on March 30, 2017. The judgement appears at Appendix B. The judgement is unpublished.

The Colorado Court Of Appeals issued its opinion on November 8, 2007. The opinion appears at Appendix C. The opinion is unpublished.

JURISDICTION

The United States Court of Appeals for the Tenth decided my case on December 15, 2017.

No petition for rehearing was timely filed in my case.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. Amend. VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

In this case the defendant's Sixth Amendment right to confrontation and the assistance of counsel were violated, and we respectfully request this Court's review and determination.

Because the instant matter is filed pro se, it must be liberally construed. *Haines v. Kerner* 104 U.S. 519 at 520-521. (1971.) *Hall v. Griego* 896 F Supp at 1043-1046. *Hall v. Bellman* 935 F 2d at 1006-1010. (10th Cir 1991.)

INTRODUCTION:

In this case, the defendant, Gabriel Acosta was arrested for murder in the first degree. Four days before the scheduled trial, his attorney withdrew, and without assistance of counsel, he was asked by the trial court to choose between waiving his right to speedy trial or proceeding to trial unrepresented. Six days later, while Acosta was still unrepresented, (although he waived his right to speedy trial in order to be represented) the court released the only witness to the case who had been jailed awaiting the trial, as she was a known flight risk. Acosta's trial date was reset, and the prosecution waited three months to begin searching for this witness, who had performed poorly at the co-defendant's trial. The trial court ruled that the witness was unavailable, and her deposition was read to the jury. However, before

the trial concluded, the witness was jailed. During jury deliberations, a motion for a mistrial was filed by the defense due to the fact that the witness was not “unavailable” and said motion was denied by the trial court. Acosta was found guilty of murder and sentenced to life without parole.

STATEMENT OF THE CASE:

On April 28, 2004, Gabriel Acosta (“Acosta”) and his girlfriend, Chante Dillon (“Dillon”), were arrested and indicted for the murder of Kimberly Dotson (“Dotson”).

Acosta was convicted of first degree murder and sentenced to life without parole, after a trial in which Patricia Medina (Medina), the only eyewitness, testified by deposition. Her deposition was the only evidence of deliberation, intent and the circumstances surrounding Dotson’s death, (Medina ultimately recanted this testimony when confronted (face to face.) On September 1, 2005, after Medina’s deposition was read to the jury, but while the trial was still in progress, Medina was arrested in Denver. However, Acosta’s new attorneys were not notified until September 7, 2005 after the jury had begun deliberating. Because Acosta’s new attorneys did not learn that Medina was “available” until then, Acosta lost the opportunity to confront her at trial. His attorneys did, however, move for a mistrial, which was denied. Subsequently, Acosta filed a motion for a new trial.

On October 21, 2005, the trial court held a hearing on the new trial motion, at which Medina testified. She recanted her testimony that Acosta had killed Dotson, admitted she had lied, and changed her testimony about where the murder had occurred. However, the court denied Acosta’s motion even though it recognized that Medina’s testimony was now more consistent with the physical evidence.

On direct appeal to the Colorado Court of Appeals on December 2, 2005, Acosta raised the following claims:

- a. Acosta was denied due process and counsel of choice when the court improperly failed to inquire into the nature of the Public Defenders’ conflict when they withdrew on March 31, 2005;
- b. Acosta’s right to due process and “Assistance of Counsel” was denied at two critical stages: on March 31, 2005 when Acosta was faced with the untenable choice of waiving speedy trial or proceeding pro se, and on April 6, 2005 when the court released Medina.
- c. Acosta’s Sixth Amendment confrontation rights were violated when the court permitted Medina’s deposition testimony to be admitted at trial.

The Colorado Court of Appeals affirmed Acosta’s conviction, rejecting his claims that he was denied his constitutional right to confront his accuser and to due process when the trial court, having released Medina from custody, admitted her deposition testimony at trial, and rejecting his claims that he was unconstitutionally deprived of his right to the

“Assistance of Counsel” at two critical stages: on March 31, 2005 when the Public Defenders withdrew and Acosta was compelled to relinquish his speedy trial rights with no attorney to advise him, and on April 6, 2005 when Medina, the only eye witness in a first degree murder trial, was released while Acosta was still not represented by counsel necessary to protect his rights, although the court said he would be.

The holding of the Colorado Court of Appeals was erroneous because the state court utterly failed to abide by and reasonably apply this Court’s precedent regarding the determination that “a declarant is unavailable.” *Crawford* 541 U.S. at 36. Under an actual evaluation of “reasonable” and “good faith efforts,” the actions of the state would unquestionably fail to satisfy the unavailability requirements; also, the state court utterly failed to abide by and unreasonably applied this court’s precedent regarding the accused’s right to representation by counsel at every critical stage.

Under an actual evaluation, it would be unquestionably clear that Acosta was deprived of his right to the assistance of counsel at two critical proceedings: March 31, 2005 which the Colorado Court of Appeals did not dispute was a critical proceeding, but reasoned that the trial court’s advisement was sufficient to protect the defendant’s constitutional rights.” Appendix C (In other words, the Colorado Court of Appeals held that the court represented Acosta), and at the hearing on April 6, 2005, when the only eye witness in a first degree murder trial was released when Acosta was not present, and was still not represented by counsel, although the court had said that he would be. Because of this error, this defendant may spend the rest of his life in prison.

Acosta filed a Habeas Corpus Petition on September 8, 2016, that tested the “reasonableness” of the prosecution’s search for Medina by looking at the record and asking: What did the State know at the time? What leads did it have? And what did it do with those leads? **The answer is almost nothing.** *Ohio v. Roberts*, 448 U.S. at 81 (Brennan, J, joined by Marshall and Stevens, JJ., dissenting) (“[I]t is not ‘hindsight’... that permits us to envision how a skilled investigator armed with this information... might have discovered [the witness’] whereabouts.”); cf. *Strickland v. Washington*, 446 U.S. 668, 690 (1984) (by analogy, one reviews the “challenged conduct on the facts of the particular case, viewed as of the time of counsel’s conduct”).

This was not a situation where Acosta “merely... identify[ing] additional steps that might have been taken”—steps that are “unpromising” or that have a “great improbability” of success. *Hardy v. Cross*, U.S. 132 at 490,495 (2011); *Ohio v. Roberts*, 448 U.S. at 75 (1980)(abrogated on other grounds by *Crawford*, 541 U.S. 36). This is also not a situation where “[o]ne in hindsight, may always think of other things.” *Roberts, Hardy*). Acosta’s argument was not based on “additional steps” or “hindsight” or “other things.” It was based on the elementary, common sense steps that the State would have, and should have, taken if “the shoe [had] been on the other foot” and it did not have Medina’s deposition. *Cook*, 323 at 836(quoting *McCandless v. Vaughn*, 172 at 255, 269 (3d Cir.1999)).

The State went through the motions, but it did not search for Medina in good faith. See *Cook* 323 at 832 (“[B]ecause there is a real cost to the defendant... the unavailability

requirement must be more than a formality.”). The inescapable conclusion from the evidence is that the State did not want to find her. It had her deposition. Moreover, Medina was a “shaky witness,” who admitted at Dillon’s trial that she had broken her promises, “lied” and “testified about things that were untrue.” *United States v. Mann*, 590 361,367 (1st Cir. 1978); (Dillon Trial Tr., March 24, 2005 at 33:1-13; 33-25-34; 34:4; 34:17-31).

Medina was jailed on three separate occasions for failure to appear in court as ordered. App. C at 21. Medina’s deposition was taken on December 15, 2004, when she was cross-examined by Dillon’s attorney, and again on December 22, 2004, when she was cross-examined by Acosta’s attorney. *Trial Transcripts* (V. 7/21:9-10; 83:15-19; V/8 11:19-23; 34:4-7.) At the conclusion of the deposition on December 22, 2004, Medina’s attorney requested that she be released assuring the court that she would appear for trial. Although the prosecution was skeptical, the court released Medina on a \$2500 PR bond and ordered her to report to supervised release (SRP). As the prosecution anticipated, Medina did not report to SRP. Appendix C (V. 7/10:13-11:4.) On January 20, 2005, her bond was revoked and a warrant issued for her arrest. She was subsequently arrested and jailed.

Medina testified at Dillon’s trial on March 24, 2005. Appendix C (at. 21). On April 6, 2005, the court held a hearing to discuss what to do with Medina. The court asked Medina if she had somewhere to live and she responded that she would be living with her brother. Neither the court nor the prosecution asked for her brother’s address or his phone number. *Cook*, 323 at 833, 837 (finding it unacceptable and the search inadequate where the prosecution did not force the witness to give his address...)

The court released Medina on a \$500 PR bond returnable the next day and for a second time, ordered her into Supervised Release Program (“SRP”) Medina’s bond was \$2000 less than before. *McCandless*, 172 at 268 (search inadequate, in part, because the government supported a reduction in bond that allowed the witness to gain his freedom...) But the court explained, “Ms. Medina this will be a test on both you and me to find out whether you are going to honor what I have to say.” Appendix C V31/3:25-4:2.) Incredibly, the state released Medina (a known flight risk) with no contingency plan. *Cook*, 323 at 837 (finding the search inadequate because “the state was taking a big risk by relying on the witness voluntary appearance, with no contingency plan”).

- On April 13, 2005 SRP filed a report indicating that Medina did not comply with the conditions of her release.
- The prosecution did nothing from April 13, 2005 through June 30, 2005.
- On July 1, 2005 the prosecution obtained a warrant.
- On July 11, 2005 the prosecution asked the lead detective to “try” to locate her.
- On August 15, 2005 a hearing was held (V.2/398 V.12.)
- The court ruled that the prosecution’s search was reasonable and permitted Medina’s deposition to read at the jury trial on September 1. App. C, 26-27.

The Colorado Court of Appeals affirmed, and in doing so, the court unreasonably applied clearly established Supreme Court precedent which holds that the Confrontation Clause

precludes the admission of deposition testimony unless the State made a good faith effort to find and bring Medina to trial. The Colorado Court of Appeals described the facts of the search as follows:

[1] A.D. [Angela Davidson] testified that she was assigned to locate and hand serve P.M. [Patricia Medina]. To this end, A.D. went to P.M.'s prior known address, the address listed on a traffic citation P.M. received, and visited the post office nearest P.M.'s last known address to see if P.M. filed a change of address form. Despite these efforts, A.D. testified that she was unable to locate P.M.

[2] M.L. [Det. Michael Lynch] testified about his knowledge of P.M.'s living situation and his prior conversations with P.M. Information from various sources indicated that she had no permanent residence and lived "on the streets" in the vicinity of East Colfax Avenue in Denver. P.M. told M.L. that there was no location where he would be able to contact her, and that the best way to contact her was through her grandfather. M.L. stated that he had a good rapport with the grandfather, who was "the one person from [P.M.'s] family who had been Case 1:16-cv-02266 Document 1 Filed 09/08/16 USDC Colorado Page 24 of 5615 cooperative with the police." M.L. stated he had had "at least a half-dozen" bi-weekly conversations with the grandfather, seeking to locate P.M., the most recent of which was two days before the hearing. M.L. had told the grandfather that if P.M. contacted him, he was to call police and try to hold her so that police could pick her up.

[3] M.L. also testified that he enlisted the aid of the Special Crime Attack Team (SCAT) unit of the police to search for P.M. The SCAT unit looked for her at the same Denver address at which she had earlier been arrested. They also looked for her on the streets in areas she was known to frequent. M.L. also made a search for her along Colfax Avenue.

[4] Testimony of M.L. also established that police had been given information that P.M. might have secreted herself in order to avoid testifying. Other information supplied to police indicated that a person who might have been her "pimp" might have been limiting her "freedom to come and go and that this guy was keeping a pretty good lid on her."

The Colorado Court of Appeals ruling was "an unreasonable application of" federal law and was "based on an unreasonable determination of the facts." 28 U.S.C. § 2254(d)(1), (2).

The CCA's description of the search efforts listed above **was incomplete, inaccurate and misstated**. The Colorado Court of Appeals ignored the fact that the State let Medina go in the first place, waited nearly three months to start looking for her, and then did not pursue the numerous leads and information it had. *Byrd v. Workman*, 645 F.3d 1159, 1171-72 (Tenth Cir.) ("[W]here the state courts plainly misapprehend or misstate the record... that misapprehension can fatally undermine the fact-finding process, rendering the resulting factual finding unreasonable," no ADEPA deference is owed) (Citation omitted), *cert. denied*, --- U.S. ---, 132 S. Ct. 763 (2011).

On the complete record relating to the search, as testified to by Detective Lynch and Investigator Davidson, no fair-minded jurist could disagree that the trial court and the Colorado Court of Appeals decisions finding Medina "unavailable" conflict with Supreme Court precedent and are unreasonable. *Harrington v. Richter*, 562 U.S. 86, 100-02 (2011).

What the state did:

On July 11, 2005, after he returned from a two month leave of absence, Detective Lynch was asked to look for Medina. (V.12/25:9-26:6.) But Lynch was busy with other cases and looking for witnesses was “not specifically [his] job function.” (V.12/23:4-5.)

His attempts to locate Medina consisted of: (i) contacting her grandfather, who told him “the next time he had any contact with her that he would contact the police and possibly try to hold her and have her picked up by the police when she showed up at his house,” after which Lynch “basically... ***sat back and waited for him [the grandfather] to contact me***” (emphasis added), (ii) **notifying the SCAT Unit to “keep an eye out for” Medina, which Lynch acknowledged was “some passive looking,”** and (iii) driving down Colfax Avenue *one afternoon on his way back from a court hearing in another case.* (V.12/26:10-12; 27:25-28:18; 32:17-22; 35:11-36:6.) The Oxford American Dictionary defines “search” thusly: “Try to find something by looking or otherwise seeking carefully and thoroughly.” THE NEW OXFORD AMERICAN DICTIONARY 1537 (2001).

Lynch also testified he had about six bi-weekly conversations with Medina’s grandfather. (That would mean three conversations between April 6, 2005 and August 29, 2005). (V.12/30:4-17.) And “he attempted to place calls at the phone number that [Medina’s mother] had given him earlier,” but “she would not get back with [him].” (V.12/39:18-25.)

What the state did not do:

1. **Medina’s brother.** On April 7, 2005 Medina told the court she would be living with her brother if she were released, but neither the prosecution nor the court asked his name, address or phone number. (V.31/2:24-5:8.) Lynch did not contact or even try to contact Medina’s brother. (V.12/40:25-41:4.) **It turned out Medina was living with her brother—the very place she told the court and the prosecutors she would be.** (V.31/2:24- 3:6; V.24/15:25-16:16; 20:12-22:5 and Exhibit 1 thereto.) **Failure to look for Medina in the obvious place—where she said she would be living (and was)—by itself would be sufficient to condemn this so-called search.** *Roberts*, 448 U.S. at 80 (Brennan, J., dissenting); *McCandless*, 172 F.3d at 269-70. ***The Colorado Court of Appeals does not mention the brother or the failure to contact him.***

2. **Medina’s sister.** Medina testified in her depositions on December 15 and 22, 2005 and at Dillon’s trial on March 24, 2005 that, on the night of the murder, Acosta, Dillon and Dotson stopped at Medina’s sister’s house so that Medina could pick up some clothes. (V.7/115:24-116:20; March 24, 2005 Dillon Unofficial Trial Tr. at 57:13-19.) She also testified that after the murder, Acosta and Dillon dropped her off at her sister’s house. (V.8/40:8-13.) And she testified that Officer Calicchia (*see* ¶ 6 below) took her to her sister’s house several days after the murder. (V.8/41:2-44:13; 78:16-22.) Case 1:16-cv-02266 Document 1 Filed 09/08/16 USDC Colorado Page 27 of 5618

Lynch testified that he did not know Medina had a sister but he was present on December

15, 2005 when Medina testified about stopping at her sister's to pick up some clothes. (V.12/29:14- Nonetheless, neither Lynch nor anyone else did anything with respect to contacting the sister or going to her home. *Roberts*, 448 U.S. at 80 (Brennan, J., dissenting); *McCandless*, 172 F.3d at 269-70. ***The Colorado Court of Appeals does not mention the sister or the failure to try and contact her.***

3. Medina's grandfather. Medina told Lynch, when he interviewed her on April 15, 2004, that "there was no place that [he] could actually contact her" and that he "would have to go through her **parents or her mom or grandfather** and that the grandfather probably [was] the best way to get ahold of her." (V.12/29:7-10.) **She told him she was living with her grandfather and gave Lynch his address and phone number: 3104 W. Alaska; 303-922-4798.** (*Interview with Patricia Medina*, WPD Case Report #2004-05040, Det. Michael Lynch, #769, April 15, 2004 ("Lynch Interview of Medina")¹¹ at 1.)

Lynch relied on the grandfather to contact him while Lynch "sat back and waited." However in early August, Medina showed up at her grandfather's house, spent two hours there, but the grandfather did not call Lynch until "the first part of the following week." (V.12/42:15-43:2.) Lynch admitted that the grandfather could have called the police while Medina was at the house, which he said he would do, but he did not. (V.12/43:3-7.) **Lynch knew (or should 11 Attached in its entirety as Attachment 10. Case 1:16-cv-02266 Document 1 Filed 09/08/16 USDC Colorado Page 28 of 5619 have known) that the grandfather could not be relied upon. Nonetheless, Lynch did nothing. *The Colorado Court of Appeals does not mention any of this.***

Lynch "put all his eggs in one basket"—the grandfather was the only family member he talked to. (V.12/41:3-4); *compare, e.g., Huerta v. Lewis*, 2014 WL 4060566, *5 (C.D. Cal. Aug. 14, 2014) (investigators made over 30 contacts with family members).

And while Medina may have told Lynch that the grandfather was "the best way" to contact her, he was not the only way. Medina also told Lynch "to go through her parents." (V.12/21:3-6; 29:7-10.) Lynch did not. *The Colorado Court of Appeals ignores all this and emphasizes the grandfather.*

While Lynch and the grandfather may have talked by phone, there is no evidence that Lynch or anyone else from the prosecution ever went to the grandfather's house, other than, Davidson, one time, unwittingly. (V.12/22:5-10; 23:2-4; 28:4-5.) ***The Colorado Court of Appeals agrees that Lynch's contacts with the grandfather were by phone; but it does not mention the fact that no one personally visited the grandfather. See ¶ [2] at 14, above; Breechen v. Reynolds*, 41 F.3d 1343, 1348 n.1 (Tenth Cir. 1994) ("Written determinations of historical fact by state courts are presumed to be correct."), *cert. denied*, 515 U.S. 1135 (1995).**

Lynch knew the grandfather had Medina's phone number and had "called her several times," but Lynch never asked for her phone number or tried to call her. (V.12/32:9-10); ***The Colorado Court of Appeals does not mention the failure to try and call Medina or to obtain phone records.***

4. **Medina's mother**, Christine Perez, accompanied Medina to the interview, at which time Perez gave Lynch her address: 3010 W. Archer Pl., Apt. 102. (Lynch Interview of Medina at 1-2.) Nonetheless, Lynch did not go to Medina's mother's house to interview her, even though Medina had told him "to go through... her mom;" he knew her correct address and phone number. (V.12/29:8-9; 32:23-33:2; 39:18-40:3); see ¶ [2] at 14, above; *United States v. Quinn*, 901 F.2d 522, 528 (6th Cir. 1990) (finding government's "singularly unenthusiastic" search included traveling to witness' former apartment and mother's home.) **He simply tried to call her and when she did not return his calls, he did nothing. The Colorado Court of Appeals does not mention the mother.** Case 1:16-cv-02266 Document 1 Filed 09/08/16 USDC Colorado Page 30 of 56215.

Lynch testified that the SCAT Unit "didn't really have any place to go to start looking other than Ben Moya's [the grandfather] place. (V.12/26:10-11; 28:20-22.) **But Lynch did not ask the SCAT Unit to go the grandfather's house, nor did he ask them to contact/visit any of the other family members such as her mother, brother, sister or father.** Compare, e.g., *Roberts*, 448 U.S. at 80 (Brennan, J., dissenting); *McCandless*, 172 F.3d at 269-70; *Grant*, 2011 WL 6257863 at *5.

Even the most rudimentary search includes talking to family members. Compare, e.g., *United States v. Hite*, 364 F.3d 874, 882-83 (7th Cir. 2004) (talking only to family members when other means were available is not sufficient), *cert. granted, judgment vacated, and remanded*, 543 U.S. 1103 (2005) **The Colorado Court of Appeals does mention the failure to contact Medina's brother, sister or mother.**

6. Officer Calicchia. Lynch did not follow-up with Calicchia about where Medina had taken him or about her sister. *Roberts*, 448 U.S. at 80 (Brennan, J., dissenting); *McCandless*, 172 F.3d at 269-70. **The Colorado Court of Appeals does not mention Lynch's failure to pursue this lead.**

7. Prostituting on Colfax. Medina was 19 years old at the time of the murder in 2004. (V.7/22:21-22; Lynch Interview of Medina at 1.) She had been a prostitute since she was 13 years old. (V.12/29:4-5.) On August 17, Medina's grandfather called Lynch to say that "somebody... had seen her on Colfax," prompting Lynch to drive down Colfax in the afternoon to look for her on his way back from court. (V.12/32:5-22.) Lynch "did pass that [information] on to my SCAT Unit to see if they **might have the opportunity** to go down to Colfax in the evening and see if they might be able to find her out there." (V.12/32:14-16, emphasis added.) **However, no one from the SCAT Unit testified, there is no evidence in the record the SCAT Unit looked for Medina. Roberts**, 448 U.S. at 74-75 (holding prosecution bears the burden of proof); **The Colorado Court of Appeals assumes the SCAT Unit actually did search for Medina on Colfax but there is no evidence of that.**

Lynch's spur of the moment decision to drive down Colfax one afternoon because he had some time, his inquiry to see if the SCAT Unit "might have the opportunity to go down Colfax in the evening", the lack of any explanation as to **why Lynch, who was charged with finding Medina, could not "go down" Colfax in the evening or why he limited his**

“search” to just a single drive-by one afternoon, and the lack Case 1:16-cv-02266 Document 1 Filed 09/08/16 USDC Colorado Page 32 of 5623 of any testimony from the SCAT Unit demonstrate the lack of urgency and commitment on the part of the prosecution to find Medina. See *McCandless*, 172 F.3d at 270 (finding search inadequate, in part, because of “failure to investigate this fresh lead”); *Malone*, 298 Fed. Appx. At 789 (search demonstrated “tenaciousness and commitment”). *The Colorado Court of Appeals merely says: “M.L....made a search for her along Colfax Avenue,” omitting the details which make this so-called “search,” limited to a drive-by, one afternoon, less than diligent.*

8. Diaz. Lynch was informed “initially” in July, that Medina was living with a man named Diaz who was possibly her pimp and supplying her with drugs. (V.12/30:21-31:4.) Lynch did not make any effort to try and contact Diaz or to figure out his first name. He simply said that he did not “have any leads,” but he did not use any of the resources available to law enforcement to try and locate Diaz. (V.12/31:8-9.) *Compare McCandless*, 172 F.3d at 270 (search inadequate, in part, because of “failure to adequately investigate this fresh lead”) with *Fernandez v. Romero*, 2015 WL 300493, *7 (C.D. Cal. Jan. 21, 2015) (listing 42 different available databases checked by the LAPD.) ***The Colorado Court of Appeals does not mention Lynch’s failure to use any of the databases or other resources available to him.***

9. “Keeping a pretty good lid on her.” In July, Medina’s grandfather also told Lynch that Diaz was “keeping a pretty good lid on her” and that he believed she was hiding. (V.12/30:24-31:7; 33:22-34:1.) ***The Colorado Court of Appeals emphasizes the fact that “she might have secreted herself.” Appendix C at 15.***

But even if what the grandfather said were true, Lynch knew in August that it was no longer true. Medina was out and about visiting her grandfather and was seen standing on Colfax. (V.12/32:79) Other than an afternoon drive-by, down Colfax, Lynch and the prosecution did not increase their efforts to try and find her. *Compare Grant*, 2011 WL 6257863 at *5 (finding State “stepped up its efforts” after “it became apparent that contacting [the witness] would be an issue”); *see also Roberts*, 448 U.S. at 76-77 (finding search adequate because the prosecution “had no clear indication, if any at all, of [the witness] whereabouts” and “there was no assurance that she could be found in a place from which she could be forced to return to Ohio”); *Malone*, 298 Fed. Appx. at 789-90 (finding efforts more “substantial” than those here were adequate because the State demonstrated “tenaciousness and commitment”). ***The Colorado Court of Appeals does not mention the State’s failure to intensify its efforts to find Medina in response to reports of her “sightings.”***

10. Stewart and Alameda. Medina’s grandfather told Lynch she might be living with Diaz “in an apartment or some motel” around Stewart and Alameda, but Lynch did not look for her there, nor did he ask the SCAT Unit to do so. (V.12/38:14-23.) So even assuming it were true that Medina had “secreted herself,” the State had a lead but did nothing with it. *See* ¶ [3] at 15, above; *cf. McCandless*, 172 F.3d at 270 (holding search inadequate, in part, because of “failure to adequately investigate this fresh lead”); *Grant*, 2011 WL 6257863 at

*5 (“Over the course of several weeks, the State had exhausted all of its leads without locating [the witness].”) ***The Colorado Court of Appeals does not mention Lynch’s failure to follow up on this lead tying Medina to a specific location.***

11. The old address where the SCAT Unit had found her before. In January 2005, the SCAT Unit located and arrested Medina at an address in Denver. (V.12/23:23-24:5.) Lynch testified that he ***“believe[s] they did attempt to locate her at the same address”*** (emphasis added), in July but he does not know for sure, nor did he testify about what that “attempt,” actually Case 1:16-cv-02266 Document 1 Filed 09/08/16 USDC Colorado Page 34 of 5625, entailed. No one from the SCAT Unit testified, so it is reasonable to conclude that they did not “attempt to locate her at the same address.” *See Roberts*, 448 U.S. at 74-75 (holding prosecution bears the burden of proof on the reasonableness of its efforts). But what is remarkable is that Lynch, who was in charge of finding Medina, does not know for certain what the SCAT Unit did or did not do. ***The Colorado Court of Appeals assumes that the SCAT Unit actually did look for her at that same address but the record does not support that.*** Appendix C at 15.

Nor is there any evidence in the record that the SCAT Unit “looked for her on the streets in areas she was known to frequent.” *See* ¶ [3] at 15, above. ***What Lynch said was: “I think there was some passive looking for her. They are out on the streets every night.” (V.12/28:8-18, emphasis added.)*** Once again, Lynch does not know—he simply assumes.

12. **Arrest records.** Medina was a known criminal, was a prostitute reportedly living with her pimp and a druggie. (V.8/65:24-66:23; V.12/11:17-24; 31:1-4.) Incredibly, the prosecution did not even check arrest records. (V.2/317, 319, 321, 405, 406); *compare, e.g., Grant*, 2011 WL 6257863 at *5 (finding, among other steps, State checked to see if witness was “incarcerated in nearby jurisdictions”); *see also Hardy*, 132 S. Ct. at 492 (checked two prisons).

If the State had checked arrest records or with the Adams County jail, the prosecution would have learned Medina was arrested on Thursday, September 1, 2005 (V.2/317, 319, 321, 405, 406); (cover email and faxes between Denver and Adams Counties 12); cf. Kyles v. Whitley, 514 U.S. 419, 437 (1995) (holding “prosecutor has a duty to learn of any favorable evidence,” including that known by the police).

REASONS FOR GRANTING THE PETITION:

Justice Kennedy has said “While states have different laws and defendants may be differently situated because they violate laws and were tried in different states, disparate treatment under the same Federal Constitution is quite a different matter.” ***Danforth v Minnesota* 552 U.S. 264(2008).**

This Petition should be granted because The Confrontation Clause prohibits the use of testimony from an absent witness unless “the declarant is *unavailable*. *Crawford*, 541 U.S.

36, 59. To prove that the witness is “unavailable,” the State must show “it made a good-faith effort to obtain the witness’s attendance at trial.” *Cook* 323, at 825, 832. “[P]erfunctory attempts” are “inadequate to establish good faith effort.” *Id.* at 839. Good faith efforts must be evaluated by use of a totality of the circumstances test. Petitioners

Herein lies the dilemma specific to the case at hand and to multiple cases each year; the lower courts, face the daunting task of interpretation of reasonable, good faith efforts to produce a witness for trial, prior to a determination of unavailability. This court has said that such a determination can only be made after the state has proven that “the declarant is *unavailable*.” *Crawford*, 541 U.S. 36, 59 (2004) Situated at the extreme poles between Barber and Roberts, armed with limited guidance, the lower courts continue to issue inconsistent, and conflicting opinions regarding “reasonable” “good faith efforts”, and “unavailability.” While the *Crawford* decision has overruled Roberts, courts continue to rely on Roberts for clarity regarding good faith, adequate efforts to produce a witness for trial.

These inconsistencies may be explained at least in part by the fact that it has been over a decade since this court has offered more succinct guidance relative to “the declarant is unavailable.” *Id.* 839. This case provides an excellent vehicle for the court at hand to demonstrate how tests for unavailability must be properly implemented, and what must be considered in such tests. Such direction is urgently needed to insure the protections of the populace are upheld and resources do not continue to be exhausted by the continuing litigation of vague “difficult to define” (Appendix A at 10) standards as they are applied to the Confrontation Clause.

This Petition should be granted because Petitioners right to confrontation was violated when the prosecution’s search for the only eyewitness in a first degree murder trial was deemed “reasonable” and “in good faith” even though the prosecution’s interests were clearly contrary to producing this witness (whose live testimony contributed to an undesirable sentence at the co-defendant’s trial), and whose perfunctory, delayed, and empty search efforts included efforts that were unlikely to produce the witness (such as a one-time *afternoon* drive down a street where the witness has been known to prostitute) and checking to see if the homeless, prostituting, drug-using witness had submitted a U.S.P.S. change of address form, while omitting customary search efforts that were likely to produce the witness, such as looking for the witness where she said she would be staying (and where she was staying) or contacting the witness’ mother, brother, or sister.

This Petition should be granted because Petitioner’s Sixth Amendment right to “effective, competent representation... necessary to guarantee assistance in the adversarial process, adequate to produce a fair, just, and reliable result” was violated at two critical stages:

On March 31, 2005, Acosta was faced with the untenable choice of waiving his speedy trial right or proceeding pro se to trial. Acosta waived his speedy trial right to **insure** he would have the advice and protection of representation in further proceedings. The court assured Mr. Acosta this would be the case prior to a hearing to discuss the release of the alleged eye

witness, Patricia Medina. However, Acosta's right to confront his accuser was irretrievably lost on April 6, 2005, when the state held a hearing and released the only eye witness against the petitioner, on a lower bond, with no safeguards in place. Acosta was not present and he was still without the representation and protection of counsel, although the court said he would be represented at this hearing.

The United States District Court found that "the importance of the right to confrontation of this critical witness weighs heavily in favor of a finding that these were critical stages of this prosecution and warrants a determination that the rulings of the Colorado Court of Appeals were unreasonable determinations of fact and unreasonable applications of the law." Appendix B at 5.

In the Judgement issued by the Tenth Circuit in *Acosta V Raemisch* (2017), the court opens its opinion with the statement that the United States District Court denied relief regarding Mr Acosta's claims that he was denied his Sixth Amendment Rights to confront witnesses against him, and to counsel at two critical stages, and the Tenth Circuit affirmed. (Appendix A at2) **What the opening did not include was the determination by the District Court that the applicant made a substantial showing of violations of the Sixth Amendment and reversal was required.**

From its opening the Tenth Circuit exposes an unwillingness to engage in an objective analysis of the arguments presented in Acosta's application for Habeas relief, specifically that the search for the only eye witness, able to testify to the actual events of the murder, was inadequate, and that Acosta was denied representation of counsel at two critical stages. Although, guilt or innocence is not the issue at hand in a Habeas Corpus Petition, the Court opens with a summary that states Acosta killed "Dotson," *Id.* 2 demonstrating that its mind is made up, relying on a misapprehension and a misconstruing of facts as they are presented by the Colorado Court of Appeals rather than an independent analysis of the circumstances of the facts, *the ends justify the means.*

In opposition to what the Tenth Circuit would lead a reasonable jurist to believe, the United States District Court was correct in their assessment "that the determination by the state that the search for Patricia Medina was reasonable was an **"unreasonable determination of fact and an unreasonable application of the law."** Appendix B at 5. The District Court relied on the opinion issued in *Cook v McKune* to determine the four pronged criteria for reasonable efforts to produce a witness for trial, and to support his conclusions that Colorado Court of Appeals erred in its findings. The District Court outlined the further actions required by the prosecution to uphold a determination of reasonableness, " 1) the more crucial the witness, the greater the effort required to secure the witnesses attendance; 2) the more serious the crime for which the defendant is being tried, the greater the effort the prosecution should put forth to produce a witness for trial; 3) where a witness has special reason to favor the prosecution, the defendants interest in confronting the witness is stronger." Appendix B at 6. The court found it questionable that there was sufficient evidence to convict Acosta without the testimony of Medina, "every effort must be exercised to produce this only eye witness at trial," but denied application after applying the wrong test for error, (sufficiency of the evidence as opposed to the Brecht test. The

state agreed this was the wrong analysis,) the District court granted a Certificate of Appealability, **“the applicant made a substantial showing of violations of the Sixth Amendment and that reversal is required.** Appendix B at 8.

In glaring opposition to conclusions made by other circuit courts, the Tenth Circuit Court of Appeals concluded in its opinion, “the issue is not whether the court should have imposed more restrictions on Ms. Medina, obtained more information, or kept her detained.” Appendix A at 19. The court was wrong when they held an exceedingly narrow interpretation “the issue is, whether the prosecution engaged in good-faith efforts to produce at trial (only),” *Id.* 19 ignoring the culpability of the state for having released Medina with no safeguards in place, ignoring the multiple family members with connection to Medina; ignoring the events that occurred after the trial began, specifically that Medina was actually jailed on the day her deposition was read to the jury, (the state did not know this because the state failed to check arrest records) “Perfunctory, going through the motions, *laid back* attempts “are inadequate to establish good faith.” *Cook* 323 at 839.

In stark and egregious contrast to the deliberate, “well-reasoned and, thus, ... not an abuse of discretion.” opinions issued by other Circuits, regarding “the declarant is unavailable,” the judgement here, *Acosta* (2017), demonstrates little more than a cursory analysis regarding reasonableness, (ignoring the circumstances of the facts) citing *Roberts* as their controlling standard “(I)f the states feeble exertions in this case can be called a good-faith effort . . . Sixth Amendment protections embodied by *Ohio v. Roberts* would be toothless” *Cook Id.* 839 the precedent the panel claims to rely on, turns against them.

McCandless v Vaughn (97-1585- 7) “if the prosecution did not have the witness’s preliminary testimony, and had needed the witness at trial, we are confident that the resources and effort would have been far greater... to countenance such a disparity would ill serve the interests protected by the Confrontation Clause.” *Reversed.*

Cook (323 at 9-10). “We are convinced that the holding that the State made a good faith effort to produce (witness) at trial was simply unreasonable. *Cook* was on trial for first degree murder. (Witness) was the key witness, whose testimony was necessary for conviction... he had run away once and had to be brought back in police custody... (failing) to get the witness address, the State put itself at the mercy of the witness whim regarding whether or not to return for trial... If the States feeble exertions in this case can be called good-faith effort to secure the witness for trial, the Sixth Amendment protections embodied in *Ohio v. Roberts* would be toothless.” *Reversed.*

Yida (06-10460-5) “The question of admissibility of a prior statement of an absent declarant . . . must be determined with reference to the rights of the accused as secured by the constitution of the United States. Confrontation Clause protections turn on what common law required... To that end, we agree with the First Circuit in *Mann* 590 F.2d 361, 367-368(1978) that “[i]mplicit . 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 present witness from becoming absent.” See *Mann*, 590 F.2d at 368. To be sure, the appropriate time-frame for assessing the government's actions will vary, according to the specific facts presented...This understanding of an expanded temporal period

finds support in Supreme Court case law.” Affirmed exclusion of prior testimony because the government did not establish that the witness was unavailable.

Just three of multiple opinions in other Circuits that come to exceedingly different conclusions regarding *reasonable, good-faith efforts* to produce a witness for trial in similar circumstances to the case at hand, in each of the three identified specifically, the court granted relief based on determinations that each defendant suffered (or could suffer) Sixth Amendment Confrontation Clause violations when witnesses were deemed unavailable, and they were not constitutionally unavailable.

Were a reasonable juror to scrutinize the opinions issued across the Circuits regarding “unavailability” and “reasonable, good-faith efforts” to produce a witness for trial, they must conclude that the opinion issued by the Tenth Circuit *Acosta v. Raemisch* (2017), fails to abide by this Courts precedent, and the norms established in the other Circuits for upholding precedent. In this case, the Tenth Circuit demonstrates a lack of intellectual rigor and integrity, unreasonably disregarding the processes that must be applied in analysis of Sixth Amendment rights specific to the Confrontation Clause.

This case provides an ideal opportunity for the Court to extend clarity and insight regarding “reasonable, good faith efforts” and “unavailability,” insuring that any reasonable juror will not come to the untenable conclusion that constitutional justice is dependent upon the arbitrary site of location.

This case would allow the Court to provide guidance to state and federal courts applying its precedent, and to habeas courts addressing claims under AEDPA .

Justice Kennedy has said, “While states have different laws, and defendants may be differently situated because they violated laws and were tried in different states, disparate treatment under the same Federal Constitution, is quite a different matter.” *Danforth v Minnesota* 552 U.S. 264(2008).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Gabriel Alexander Acosta

Date: May 7, 2018