

No. 17-9000

In the Supreme Court of the United States

GABRIEL ALEXANDER ACOSTA,
Petitioner,

v.

RICK RAEMISCH, EXECUTIVE DIRECTOR, COLORADO
DEPARTMENT OF CORRECTIONS, AND
CYNTHIA COFFMAN, ATTORNEY GENERAL, STATE OF
COLORADO,
Respondents.

On Petition for Writ of Certiorari to
The United States Court of Appeals for the Tenth Circuit

**BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI**

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QUESTIONS PRESENTED

Did the Tenth Circuit correctly conclude under AEDPA that Colorado's state courts reasonably applied this Court's "good-faith, reasonable efforts" test in determining that a missing witness was "unavailable" for purposes of the Confrontation Clause?

Did the Tenth Circuit correctly deny habeas relief because even assuming the state court unreasonably applied this Court's case law in analyzing Petitioner's denial-of-counsel claims, any such error was harmless?

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STATEMENT OF THE CASE

I. Facts and Trial Court Proceedings

Petitioner and his girlfriend, Chante Dillon, killed their roommate, Kimberly Dotson, after she wrecked Petitioner's car. Pet. App. A at 2–3, 6. They duct-taped, beat, and suffocated Dotson to death, then wrapped her body in trash bags and threw it into a dumpster. *Id.* at 2–3. Petitioner's fingerprints and palm prints were found on the trash bags and the roll of tape used in the crime, and both Petitioner and Dillon were charged with first-degree murder.

A woman named Patricia Medina was an eyewitness to the murder. However, Medina was reluctant to testify, and after she twice failed to appear in response to subpoenas, she was jailed until her testimony could be preserved. *Id.* at 3. That testimony was recorded in two videotaped criminal depositions, at the second of which she was thoroughly cross-examined by Petitioner's court-appointed counsel. When Medina later missed another court date, she was jailed again until Dillon's trial, at which she testified in person. *Id.* at 4.¹ By the time Dillon's trial was over, Medina had described the killing repeatedly: in a recorded statement to the police; in the two criminal depositions; and at Dillon's trial. Each time, she identified Petitioner and Dillon as the killers. *Id.*

Petitioner's trial was set to begin shortly after Dillon's. But about a week before trial, at a March 31, 2005 hearing, the public defender informed the trial

¹ Dillon was convicted of manslaughter. Pet. App. A at 4.

court that his office would have to withdraw from representing Petitioner because a non-waivable conflict of interest had arisen. *Id.* The trial court accepted the withdrawal and found that any appointed replacement counsel would need a continuance to prepare for Petitioner's trial. *Id.* The court accordingly advised Petitioner that, unless he wanted to proceed to trial *pro se*, he would have to waive his statutory speedy trial right, which generally provides for a trial within six months of arraignment and for which the time had nearly run.² *Id.* Petitioner confirmed that he wanted counsel and waived his speedy trial right after a full advisement.³ *Id.*

Because Petitioner's trial was obviously months away (and, in fact, did not begin for five more months), counsel for Medina—who was still being held in jail to secure her testimony—requested that the court release her from custody. *Id.* At an April 6, 2005 hearing, the trial judge discussed the issue with the prosecution, Medina, and counsel for Medina. Neither Petitioner nor counsel for Petitioner were present at the hearing. *Id.* at 5. The judge stated he was unwilling to indefinitely jail Medina to secure her testimony, but warned her that she would again be jailed if she failed to appear as ordered. *Id.* at 4–5. He set a \$500 bond, ordered her to report to pretrial supervision, confirmed she had somewhere to stay that night, ordered her to return to court the next morning and at regular intervals to be

² See Colo. Rev. Stat. § 18-1-405.

³ Petitioner's "waiver" was not a complete waiver of the right, but was instead treated as a defense request for a continuance, triggering a new six-month period. See Colo. Rev. Stat. § 18-1-405(3).

determined, and ensured that the prosecution could provide her with transportation to court. *Id.* at 5. Medina promised to comply, but fled the state for a time, then intentionally evaded the police upon her return to Colorado. *Id.*; C.A. App. at 1599–1602, 321, 335–36, 1953–55.

The prosecution was thus unable to locate Medina before Petitioner’s trial and sought to introduce her deposition in lieu of live testimony. Pet. App. A at 5. Petitioner argued that the deposition should be excluded because the police had not tried hard enough to find Medina. *Id.* at 15–16. The trial court rejected that argument, after hearing the testimony of two police investigators describing all they had done to try and find Medina for the past two months. *Id.* They had checked multiple former addresses of Medina; checked the post office for potential new addresses; visited the areas where she was seen and known to frequent; spoke with her parents; and spoke *twice a week* with her grandfather—“the one person from [her] family” who was “cooperative with the police.” *Id.* at 15–18. After hearing this evidence, the trial court concluded that Medina was unavailable for purposes of the Confrontation Clause and allowed her deposition to be introduced at Petitioner’s trial.⁴ C.A. App. at 899.

By chance, the same day that her deposition transcript was read in Petitioner’s trial, Medina was arrested on unrelated charges in Denver (a separate judicial district from Adams County, where Petitioner was on trial). But neither the

⁴ The deposition was video-recorded, but the defense chose to read the transcript of the deposition to the jurors rather than have them watch the video. Pet. App. B at 4; C.A. App. at 247, 374.

prosecution nor anyone who participated in the Dotson murder investigation knew of Medina's arrest until six more days had passed, by which time Petitioner's jury had already begun deliberations. Pet. App. A at 5–6. Upon learning of her arrest, the prosecutor informed the court and defense counsel, and the defense requested a mistrial. *Id.* The trial court denied the request. C.A. App. at 1557–59. After deliberation, the jury found Petitioner guilty of first degree murder. Pet. App. A at 7. He was sentenced to life without the possibility of parole.

Petitioner's Statement raises the issue of Medina's supposed post-trial recantation. *See* Pet. 5. The facts related to the recantation are these. About six months after Petitioner's conviction, the law firm representing Petitioner moved for a new trial, saying Medina would now recant. C.A. App. at 1586; Pet. App. B at 36. She would now accuse another man of the murder, they said, despite her consistent testimony (including under-oath testimony) in her police interview, two depositions, and Dillon's trial. The trial court held a hearing to consider the motion, at which Medina continually changed her testimony, repeatedly avoided questions on cross-examination, and was at a loss to explain why she would have falsely accused Petitioner—who she had only met the night of the murder—if he did not actually harm the victim. C.A. App. at 1628–76. It also came to light that Petitioner's defense team had met with Medina in jail *sixteen times* in the preceding month, spending hours with her, “correcting” her on facts, and had offered to provide her with counsel to handle any perjury charges against her. *Id.* at 1631–33, 1641, 1667, 1706, 1728.

After the hearing, the trial court made explicit findings rejecting Medina's recantation. *Id.* at 2781. The court concluded that "her testimony is motivated not specifically by ... the accurate recitation of what transpired ... but in substantial part based upon the sympathy now possessed by Medina for the Defendant." *Id.* The court therefore found that the "newly discovered evidence" of her recantation was not credible.⁵ *Id.* The court denied Petitioner's motion for a new trial, and Petitioner has not sought this Court's review of that denial.

II. Direct Appeal

On direct appeal, the Colorado Court of Appeals (CCA) affirmed Petitioner's conviction. It rejected Petitioner's argument that the police's pretrial efforts to locate Medina were insufficient to support a finding of unavailability. Pet. App. A at 15–17. It also rejected Petitioner's claim that he was entitled to automatic reversal because he was not represented (1) on March 31, when he waived his statutory speedy trial right, and (2) on April 6, when Medina was released from jail. *Id.* at 25–26.

The Colorado Supreme Court denied certiorari.⁶

⁵ Petitioner claims that the trial court "recognized" that Medina's recantation was "more consistent with the physical evidence." Pet. 5. But what the court actually said was that it assumed that if a new trial was granted, the defense would *argue* that her revised testimony was more consistent with the physical evidence. C.A. App. at 1766-67. And all this appears to mean is that, prior to trial, Medina said there was blood all over the living room, but there really was not, and when asked at the recantation hearing, she agreed there was not. *Id.* at 1621.

⁶ Petitioner also unsuccessfully sought state postconviction relief on claims not at issue here.

III. Federal Habeas Proceedings

Petitioner sought habeas relief in the United States District Court for the District of Colorado under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. § 2254. He claimed that (1) Medina’s deposition should not have been used at trial because she was not truly “unavailable” for Confrontation Clause purposes and (2) Petitioner was denied his right to counsel at critical stages of the proceedings.

This Court is well aware of AEDPA’s demanding standard. Because AEDPA relief is a “guard against extreme malfunctions in the state criminal justice systems, not a substitute for ordinary error correction through appeal,” *Harrington v. Richter*, 562 U.S. 86, 102–03 (2011) (internal quotation marks omitted), relief is precluded unless the underlying state-court decision was either “contrary to, or involved an unreasonable application of, clearly established Federal law,” § 2254(d)(1), or “based on an unreasonable determination of the facts in light of the evidence presented,” § 2254(d)(2). If one of these standards is met, the federal court reviews the relevant claim of constitutional error de novo.⁷ *Fry v. Pliler*, 551 U.S. 112, 119–20 (2007).

If constitutional error is found on de novo review, habeas relief is still not warranted unless the error *in fact* “had a substantial and injurious effect or

⁷ Even when de novo review applies to the legal claim, however, “a determination of a factual issue made by a State court shall be presumed to be correct” and the habeas petitioner still carries “the burden of rebutting the presumption of correctness by clear and convincing evidence.” 28 U.S.C. § 2254(e)(1).

influence in determining the jury’s verdict.” *Id.* at 116–17 (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993)). This standard applies even to constitutional trial errors which, on direct review, would require reversal unless the error was harmless beyond a reasonable doubt. *Davis v. Ayala*, 135 S. Ct. 2187, 2197 (2015). But on habeas review, “[f]or reasons of finality, comity, and federalism,” a “reasonable possibility” of prejudice does not justify putting state courts to the “arduous task” of conducting a retrial. *Id.* Instead, a petitioner must establish that he “was actually prejudiced by the error.” *Id.* Although there is a small class of errors that “defy analysis by ‘harmless-error’ standards,” *Arizona v. Fulminante*, 499 U.S. 279, 309 (1991), this is a “rare type of error.” *Ayala*, 135 S. Ct. at 2197 (quoting *Glebe v. Frost*, 135 S. Ct. 429, 430 (2014) (per curiam)). Structural error—which requires automatic reversal—involves a defect in the “trial mechanism” that infects the entire trial process, affecting “the framework within which the trial proceeds” “from beginning to end.” *Fulminante*, 499 U.S. at 309–10; *Brecht*, 507 U.S. at 629–30; Pet. App. A at 23.

Applying these standards, the district court in Petitioner’s case denied relief. Pet. App. B. The Tenth Circuit affirmed, rejecting Petitioner’s confrontation claim on the basis that the CCA reasonably applied decisions from this Court holding that, for a missing witness to be deemed “unavailable,” the police must have exercised “good-faith, reasonable efforts” to find her. Pet. App. A at 17. The Tenth Circuit further ruled that, assuming (without deciding) that the CCA unreasonably

applied this Court's case law in resolving Petitioner's denial-of-counsel claims, any such errors were neither structural nor harmful. *Id.* at 27–29.

REASONS FOR DENYING THE PETITION

There are no compelling reasons for granting the Petition. Although Petitioner asserts that lower courts need further guidance on the issues he raises, he offers little to support that assertion. Instead, Petitioner's primary contention is that the lower courts reached the wrong result. That is not only an insufficient basis for this Court's review, but is incorrect. As to Petitioner's confrontation claim, the Tenth Circuit correctly applied AEDPA and ruled that the CCA did not unreasonably apply the law in concluding that the prosecution exercised sufficient efforts to locate Medina. Investigators visited her prior addresses, spoke repeatedly with her *only* family member who was cooperative, and visited the location she was commonly seen. Although, as this Court has emphasized, more can always have been done, the applicable standard is simply a general requirement of good-faith, reasonable efforts. And that standard was satisfied here. As for Petitioner's denial-of-counsel claim, the Tenth Circuit correctly concluded that any error was harmless. The absence of counsel for Petitioner at the March 31 and April 6 hearings had no practical effect on what transpired and, in any event, did not have a substantial and injurious effect on Petitioner's guilty verdict.

I. This Court should deny certiorari on Petitioner's Confrontation Clause claim.

Contrary to Petitioner's argument, proper application of the Confrontation Clause under AEDPA is clear. Lower courts are not in need of clarification on this topic. And the Tenth Circuit's decision was correct.

- A. This Court has recently explained the clear rule: a missing witness may be deemed “unavailable” if “good-faith, reasonable efforts” have been made to locate her.

The Confrontation Clause allows the admission of testimonial hearsay against a defendant if (1) the declarant is “unavailable” at trial and (2) the defendant had a prior opportunity for cross-examination. *Crawford v. Washington*, 541 U.S. 36, 59 (2004).⁸

In the recent case of *Hardy v. Cross*, 565 U.S. 65, 69–70 (2011) (per curiam), this Court identified two prior cases that clearly establish the law for AEDPA review of unavailability claims like the one here: *Ohio v. Roberts*, 448 U.S. 56 (1980), and *Barber v. Page*, 390 U.S. 719 (1968).⁹ As noted in *Roberts*, “[t]he ultimate question is whether the witness is unavailable despite good-faith efforts undertaken prior to trial to locate and present that witness.” 448 U.S. at 74. And these cases confirm that “[t]he lengths to which the prosecution must go to produce a witness” is simply “a question of reasonableness.” *Hardy*, 565 U.S. at 70 (quoting *Roberts*, 448 U.S. at 74). When a defendant after-the-fact suggests additional efforts that could have been taken to locate a witness, but those efforts are unlikely to have succeeded, that weighs against the notion that “reasonableness required their execution.” *Id.* (quoting *Roberts*, 448 U.S. at 76).

⁸ Petitioner challenges only Medina’s unavailability, not whether he had a prior opportunity to cross-examine her.

⁹ Because *Hardy* had not been decided at the time of the CCA’s decision, it is not itself the “clearly established” law against which the CCA’s decision is judged. Rather, it is relevant because it reflects this Court’s application of AEDPA to a pre-*Hardy* state court decision.

To illustrate the rule, this Court in *Hardy* reviewed the facts of *Barber* and *Roberts*. In *Barber*, this Court had ruled that an imprisoned witness was *not* unavailable. There, the prosecution knew exactly where the witness was—in federal prison. And all the state had to do to produce him was obtain a standard writ for his transfer. The prosecution’s failure to do even that amounted to making “absolutely no effort to obtain [his] presence.” *Id.* at 69–70 (quoting *Barber*, 390 U.S. at 723). In other words, the witness was not properly considered “unavailable” because the prosecution could have but failed to have him transferred to court.

By contrast, in *Roberts* the prosecution’s “duty of good-faith effort” was met. The prosecution discharged that duty by serving subpoenas at the witness’s last-known address and mother’s home and by confirming that the mother did not know how to contact the witness and believed she had left the state. *Roberts*, 448 U.S. at 75–76. This was sufficient, this Court explained, even though the prosecution also knew that, several months previously, a social worker had called the mother from San Francisco because the daughter had applied for government assistance there. *Hardy*, 565 U.S. at 70. This Court explicitly recognized that the prosecution could have done much more—for example, “locate by telephone the San Francisco social worker,” *Roberts*, 448 U.S. at 75, presumably to obtain the address on the application or ask the social worker to contact the witness. And the prosecution “might have undertaken other steps.” *Id.* But the Confrontation Clause did not *require* those steps for unavailability. *Id.* “One, in hindsight, may always think of other things” that could have been done. *Id.*

After explaining the clearly established law, this Court in *Hardy* reversed the Seventh Circuit’s grant of habeas relief. In that case, the prosecution’s investigators had visited and called the witness’s parents and checked with local hospitals and several government agencies. 565 U.S. at 67. But they had failed to also contact (1) the witness’s boyfriend, (2) her friends in the area, and (3) the school she last attended. *Id.* at 71. And despite knowing the witness was reluctant to testify, she was not subpoenaed. *Id.* The Seventh Circuit concluded that these failings showed that the prosecution’s efforts were insufficient. However, this Court held that the Seventh Circuit was wrong. For one, the record did not establish that the prosecution should have thought that the boyfriend, friends, or school actually had information about the witness’s *current* whereabouts. *Id.* And as for the subpoena, “good faith” and “reasonableness” are not a constitutional mandate that the prosecution subpoena all reluctant witnesses. If a witness would risk the defendant’s acquittal out of fear, it was doubtful she would have come to court simply because a subpoena was issued. *Id.* And “more to the point,” this Court in *Hardy* emphasized that AEDPA’s standard of review precluded relief. *Id.* at 72. That “deferential standard” does not “permit a federal court to overturn a state court’s decision ... merely because the federal court identifies additional steps that might have been taken.” *Id.*

In Petitioner’s case, the Tenth Circuit recognized that *Hardy* had identified *Roberts* and *Barber* as the clearly established law for AEDPA cases involving unavailable witnesses. Pet. App. A at 12. And because the essential requirement of

Roberts and *Barber*—a “good-faith, reasonable” effort to locate witnesses—is general in nature, state courts therefore must be afforded substantial “leeway” in applying the rule. *See Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004) (“The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations.”).

B. Following this Court’s decision in *Hardy*, lower courts do not need further guidance on this issue.

Although this Court in *Hardy* answered the precise legal question Petitioner presents here, he nonetheless contends that “lower courts continue to issue inconsistent, and conflicting opinions regarding ‘reasonable’ ‘good faith efforts,’ and ‘unavailability.’” Pet. 14. He provides no examples of conflicting opinions post-*Hardy*; the opinions he cites as conflicting are all pre-*Hardy* decisions. *See* Pet. 16 (citing *United States v. Yida*, 498 F.3d 945, 950 (9th Cir. 2007); *Cook v. McKune*, 323 F.3d 825, 835-36 (10th Cir. 2003); *McCandless v. Vaughn*, 172 F.3d 255 (3d Cir. 1999); *United States v. Mann*, 590 F.2d 361, 363 (1st Cir. 1978)). They thus provide no basis for concluding that *Hardy* was inadequate to give the guidance lower courts needed.

And post-*Hardy* opinions confirm that this Court successfully provided sufficient guidance, illustrating for lower courts how the general “good-faith, reasonable efforts” test for unavailability applies in the context of AEDPA’s deferential standard. In 2013, for example, the Third Circuit applied *Hardy* in *Young v. Grace*, 525 F. App’x 153 (3d Cir. 2013) (unpublished), and found no basis for disturbing a state court’s unavailability ruling. As the Tenth Circuit did here,

the Third Circuit concluded that the state court in that case did not unreasonably apply the “good-faith, reasonable efforts” test where the police had made standard search efforts. The defendant raised other things the police could have done, claiming that “the detective delayed in her investigation, failed to contact [the witness] when he was incarcerated, failed to review the files containing [the witness]’s bail records, failed to contact [the witness]’s relatives other than his sister, and failed to contact [the witness] during his court appearances.” *Id.* at 159. Yet the Third Circuit denied habeas relief, pointing out that the state court’s ruling was “entitled to AEDPA deference” and holding that the state court’s finding of “good-faith efforts” was not unreasonable. *Id.*

District court cases post-*Hardy* have also been consistent with one another and with the Tenth Circuit’s opinion here. *See, e.g., Mason v. Paramo*, No. 16-CV-1176, 2018 WL 2287424, at *6 (S.D. Cal. May 18, 2018) (upholding state court unavailability finding where investigator “repeatedly tried to reach [the witness] using the means he had previously used” and recognizing *Hardy*’s holding that “the prosecution is not required to ‘exhaust every avenue of inquiry’”), appeal pending, No. 18–55803 (9th Cir. filed Jun. 18, 2018); *Mermer v. McDowell*, No. CV 16-932, 2016 WL 5329623, at *22 (C.D. Cal. Aug. 15, 2016) (unpublished) (upholding state court unavailability finding because, despite the existence of “other potential avenues” to investigate, witness had reportedly “gone into hiding” and his mother did not know where he was), report and recommendation adopted, 2016 WL 5329560; *Villaverde v. Smith*, No. 3:10-CV-00347, 2016 WL 1248721, at *7 (D. Nev.

Mar. 28, 2016) (unpublished) (upholding state court unavailability finding despite “a laundry list of other avenues” the state could have pursued), certificate of appealability denied, No. 16-15660 (9th Cir. Aug. 26, 2016); *Montoya v. McDowell*, No. CV 15-2042, 2015 WL 6125516, at *3 (C.D. Cal. Aug. 4, 2015) (unpublished) (upholding state court unavailability finding because, although police “could have taken additional steps to find the victim, including stepped-up searches of facilities that deal with the homeless,” “the Constitution does not require that the police take all conceivable actions”), report and recommendation adopted, 2015 WL 6126797; *Carter v. Bigelow*, No. 2:02-CV-326, 2012 WL 3964819, at *43 (D. Utah Sept. 11, 2012) (unpublished) (“As aptly stated by the Utah Supreme Court, the efforts made by the State were not exhaustive, but that is not the standard.”), *aff’d on other grounds*, 787 F.3d 1269 (10th Cir. 2015).

Petitioner also appears to suggest that this Court should grant certiorari because, even if Medina was properly deemed unavailable at the beginning of trial, that determination was invalidated by her subsequent arrest during trial. Pet. 13. Petitioner did not clearly make this argument before the federal district court or the Tenth Circuit, making this case a poor vehicle for answering that unusual and fact-specific question. Because he referenced the potential issue only once in his briefing to each court, C.A. App. at 1803–04; Tenth Cir. Reply Br. at 14, neither court’s decision discussed the issue in detail.

But even if the question were properly before this Court, Petitioner has not suggested that there is a split of authority or other compelling reason for this Court

to consider the issue. And the Tenth Circuit correctly explained in a footnote why such a theory would not provide a basis for relief under AEDPA. Because there is no clearly established holding of this Court on the question of whether a witness's arrest during trial affects unavailability where the parties and the court are unaware of the arrest, this Court's clearly established law "states only that 'the focus is on whether the prosecution made good-faith efforts to produce the witness 'prior to trial,' not during trial.'" Pet. App. A at 19 n.3 (quoting and adding emphasis to *Roberts*, 448 U.S. at 74).

In other words, even if the issue of Medina's arrest mid-trial had been properly briefed and fully ruled upon below, the state courts' failure to grant relief on such a theory could not represent an unreasonable application of this Court's case law. *See White v. Woodall*, 572 U.S. 415, 427 (2014) (explaining that even if the Sixth Circuit's preferred view of a Fifth Amendment issue would be "the logical next step," habeas relief was unavailable because: "we have not yet taken that step," "there are reasonable arguments on both sides," and the "appropriate time to consider the question as a matter of first impression would be on direct review, not in a habeas case").

C. The Tenth Circuit correctly denied relief on Petitioner's confrontation claim.

The general factual background for Petitioner's confrontation claim is not in dispute. Medina disappeared; the police could not locate her despite searching for several months leading up to trial; and the trial court ruled that this "unavailability" allowed her deposition to be introduced at trial. *See* Pet. App. A at

15-16. Applying AEDPA’s “deferential standard,” *Hardy*, 565 U.S. at 72, the Tenth Circuit considered this background and properly concluded that the CCA’s decision was neither contrary to nor involved an unreasonable application of this Court’s case law; nor was it based on an unreasonable determination of the facts.

1. The CCA’s decision was not contrary to or an unreasonable application of this Court’s case law.

As the Tenth Circuit recognized, Pet. App. A at 17, the CCA’s decision was not “contrary to” this Court’s case law. Rather, the CCA correctly summarized the holding of *Roberts*, stating: “To show unavailability of a witness in the constitutional sense, the party asserting unavailability must show that good faith, reasonable efforts were made to produce the witness for trial, but without success.” *Id.* at 15.

Nor did the CCA’s holding involve an unreasonable application of the decisions of this Court. The CCA concluded that Medina was properly deemed “unavailable” based on the investigators’ search efforts, pointing out that “good faith may not require the exhaustion of *every* possible means of securing the witness’s presence, especially if the means available appear futile, or if the witness may be in a position to frustrate efforts to compel her attendance.” *Id.* at 16–17. And the court correctly refused to “adopt a holding that would require a witness, such as [Medina], who has a demonstrated propensity not to appear, to be held in custody for over five months solely to ensure attendance at trial.” *Id.* at 17.¹⁰

¹⁰ A contrary holding would likely jeopardize the rights of potential witnesses.

The CCA's decision thus represents a straightforward, and certainly reasonable, application of this Court's case law. Contrary to Petitioner's claim that the prosecution did "almost nothing" to find Medina and "did not want to find her," because it "had her deposition," Pet. 6–7, the prosecution's investigators made serious efforts to locate her. They checked multiple former addresses of Medina; checked the post office for potential new addresses; visited the areas where she was seen and known to frequent; spoke with her parents; and spoke *twice a week* with her grandfather—"the one person from [her] family" who was "cooperative with the police." *Id.* at 15–18. The investigators were told that Medina did not have a permanent address, was living "on the streets," and was, in fact, hiding (or being hidden) from them to avoid testifying. *Id.*

In these circumstances, the Confrontation Clause "does not require the prosecution to exhaust every avenue of inquiry, no matter how unpromising." *Hardy*, 565 U.S. at 71–72. And in *Roberts*—where the duty of good faith was *satisfied*—the prosecution did far less than what was done here, relying on the witness's mother's statements that she thought the witness was out of state and did not know how to contact her and delivering subpoenas to the mother and the witness's last address, even though she no longer lived there. *Roberts*, 448 U.S. at 75–76. "Good-faith efforts" did not require following every other potential avenue, including calling the social worker who was the last person known to have information. *See id.*

The CCA's binding factual determinations refute Petitioner's claim that the prosecution's search efforts were "perfunctory, delayed, and empty." Pet. 14. And the proposed additional avenues Petitioner suggests would not render the investigators' efforts insufficient even on de novo review, let alone under AEDPA. This Court has made clear that, in hindsight, one can "always think of other things" that could have been done; and the unlikelihood that any of those suggested efforts would have succeeded weighs against ruling that "a concept of reasonableness required their execution." *Hardy*, 565 U.S. at 70.

2. The CCA's decision was not based on an unreasonable determination of the facts.

Nor did the CCA base its decision on "an unreasonable determination of the facts." 28 U.S.C. § 2254(d)(2). The Tenth Circuit here accurately quoted the CCA's relevant factual findings as follows:

A.D. an investigator for the district attorney's office testified that she was assigned to locate and hand serve Ms. Medina. To this end, A.D. went to Ms. Medina's prior known address, the address listed on a traffic citation Ms. Medina received, and visited the post office nearest Ms. Medina's last known address to see if Ms. Medina filed a change of address form. Despite these efforts, A.D. testified that she was unable to locate Ms. Medina.

M.L. a detective with the Westminster Police Department testified about his knowledge of Ms. Medina's living situation and his prior conversations with Ms. Medina. 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.

Ms. Medina 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 Ms. Medina's family who had been cooperative with the police." M.L. stated he had had "at least a half-dozen" bi-weekly conversations with the grandfather, seeking to locate Ms. Medina, the most recent of which was two days before the hearing. M.L. had told the grandfather that if Ms. Medina contacted him, he was to call police and try to hold her so that police could pick her up.

M.L. also testified that he enlisted the aid of the Special Crime Attack Team (SCAT) unit of the police to search for Ms. Medina. 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.

Testimony of M.L. also established that police had been given information that Ms. Medina 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."

Pet. App. A at 15–16 (additional paragraphing supplied, brackets omitted).

The hearing transcript confirms that these findings were accurate and not unreasonable in light of the state court record. *See* 28 U.S.C. § 2254(d)(2); C.A. App. at 310–11, 326–36. The findings are also presumed to be correct. *See* 28 U.S.C. § 2254(e)(1); *Martinez v. Sullivan*, 881 F.2d 921, 926 (10th Cir. 1989) (in unavailability claims, "the presumption of correctness applies to the basic, primary or historical facts").

Petitioner does not appear to dispute the factual determinations the CCA *actually made*. He instead faults the CCA for "emphasizing the [witness's] grandfather"; for "not mentioning" Medina's other family members; for "assuming"

the SCAT unit had searched on Colfax Avenue when the detective testified only that he told them the location; and by “emphasizing” that Medina “might” have been hiding. Pet. 8–13. These are not arguments that the state court’s factual determinations were *incorrect*—much less “unreasonable ... in light of the evidence presented in the State court proceeding,” 28 U.S.C. § 2254(d)(2); *see also* *Hunterson v. Disabato*, 308 F.3d 236, 250 (3d Cir. 2002) (holding that the state court had not unreasonably determined the facts, as petitioner was really “challenging the [state] court’s view of the gravity of what he did, not its determination of what occurred”). Nor was the CCA “unreasonable” to make logical inferences from the testimony, such as finding that the SCAT unit performed its standard functions by acting on information it was given. *See id.* (where “permissible inferences could be drawn either way, the state court decision must stand, as its determination of the facts would not be unreasonable”). Because the CCA’s decision was based on a reasonable determination of the facts, the Tenth Circuit properly denied relief under AEDPA.

II. This Court should deny certiorari on Petitioner’s denial-of-counsel claims.

Nor is there a compelling reason to grant certiorari on Petitioner’s Sixth Amendment claim. He asserts that his right to counsel was violated because he was unrepresented (1) on March 31, 2005, when he waived his statutory speedy trial right, and (2) on April 6, 2005, when the trial court granted Medina supervised release from jail. But there is no split of authority that would affect the outcome of this case, as all jurisdictions recognize that some errors regarding the right to

counsel are reviewed for harmless error. And the Tenth Circuit correctly concluded that even if there was error in this case, it was harmless.

A. There is no split of authority: jurisdictions agree that, unless deprivation of counsel contaminates the entire proceeding, review is for harmless error.

The law regarding the right to counsel in this context is well established.

“The Sixth Amendment guarantees a defendant the right to have counsel present at all critical stages of the criminal proceedings.” *Missouri v. Frye*, 566 U.S. 134, 140 (2012) (internal quotation marks omitted). This Court has held that “critical stages” include “arraignments, postindictment interrogations, postindictment lineups, and the entry of a guilty plea.” *Id.* Beyond that, this Court has generally “defined critical stages as proceedings between an individual and agents of the State (whether ‘formal or informal, in court or out,’) that amount to ‘trial-like confrontations,’ at which counsel would help the accused ‘in coping with legal problems or ... meeting his adversary.’” *Rothgery v. Gillespie Cty.*, 554 U.S. 191, 212 n.16 (2008) (internal citations omitted). It is thus “the need for counsel’s presence” that “makes a stage critical.” *Id.* at 212.

Moreover, not every Sixth Amendment violation resulting from a denial of counsel at a “critical stage” constitutes structural error—some such errors can be reviewed for harmlessness. *See, e.g., Ditch v. Grace*, 479 F.3d 249, 256 (3d Cir. 2007); *United States v. Lott*, 433 F.3d 718, 722 (10th Cir. 2006); *United States v. Owen*, 407 F.3d 222, 228 (4th Cir. 2005). For example, in *Coleman v. Alabama*, 399 U.S. 1 (1970), this Court held that a preliminary hearing under Alabama law was a “critical stage,” but nonetheless reviewed the denial of counsel for harmlessness. *Id.*

at 9–11. And in *Satterwhite v. Texas*, 486 U.S. 249 (1988), this Court found a violation of the Sixth Amendment right to counsel, but explicitly rejected the argument that automatic reversal applied. *Id.* at 256–57. The Court pointed out that it has applied automatic reversal to Sixth Amendment violations only where “the deprivation of the right to counsel affected—and contaminated—the entire criminal proceeding.” *Id.* at 257. This includes, for example, having conflicted counsel “throughout [the] entire proceeding” and the “total deprivation of counsel.” *Id.* In *Satterwhite*, by contrast, the denial of counsel resulted simply in the introduction of certain evidence that otherwise would have been excluded—a defect that could be assessed for harmlessness. *Id.*

There has been some occasional confusion over this Court’s statement in *United States v. Cronin* that prejudice is to be presumed whenever “the accused is denied counsel at a critical stage of his trial,” 466 U.S. 648, 659 (1984), but that confusion has not engendered a split of authority. “Indeed, every federal circuit court of appeals has stated, post-*Cronin*, that an absence of counsel at a critical stage may, under some circumstances, be reviewed for harmless error.” *People v. Murphy*, 750 N.W.2d 582, 586–87 (Mich. 2008) (Markman, J., concurring) (citing cases). Instead, any confusion has been over terminology, not substance. Compare *Ditch*, 479 F.3d at 256 (deprivation of counsel at “critical stages” may be reviewed for harmlessness, since this Court has used the phrase in more than one sense) with *Van v. Jones*, 475 F.3d 292, 311–13 (6th Cir. 2007) (deprivation of counsel at a “critical stage” requires automatic reversal because the definition

of “critical stage” incorporates the likelihood of prejudice). Courts agree on what matters: reversal is required when a deprivation of counsel “affected—and contaminated—the entire criminal proceeding.” *Satterwhite*, 486 U.S. at 257.¹¹

Under the AEDPA standard, for denial-of-counsel claims that are reviewable for constitutional harmlessness on direct appeal, a habeas petitioner must show he was “actually prejudiced” in order to receive relief. In other words, he must show that counsel’s absence had a “substantial and injurious effect or influence in determining the jury’s verdict.” *Brecht*, 507 U.S. at 623; *see also, e.g., Ditch*, 479 F.3d at 256 (applying *Brecht* to Sixth Amendment denial-of-counsel claim); *Mitzel v. Tate*, 267 F.3d 524, 534 (6th Cir. 2001) (same); *Hoffman v. Arave*, 236 F.3d 523, 540 (9th Cir. 2001) (same); *Yarborough v. Keane*, 101 F.3d 894, 899 (2d Cir. 1996) (same); *Owsley v. Bowersox*, 48 F. Supp. 2d 1195, 1203 (W.D. Mo. 1999) (recognizing that habeas petitioner “must prove actual prejudice from the absence of counsel”). These principles are settled and consistently applied by the lower Courts, and there is no need for this Court’s review.

¹¹ Moreover, *Cronic* did not involve the question whether a “critical stage” had occurred and did not involve a proceeding at which the defendant did not have an attorney. *Cronic* was an ineffective-assistance case announced the same day as *Strickland v. Washington*, 466 U.S. 668 (1984). The question was what standard applies to determine whether a defendant’s right to *effective* counsel requires reversal. *See Cronic*, 466 U.S. at 653–64. And as noted, this Court later clarified in *Satterwhite* that it is “Sixth Amendment violations that pervade the entire proceeding” that trigger automatic reversal. 486 U.S. at 256.

B. In rejecting Petitioner's denial-of-counsel claims, the Tenth Circuit correctly concluded that any error was harmless.

In addressing Petitioner's denial-of-counsel claims, the Tenth Circuit assumed unreasonableness and error in the state court's ruling, but affirmed the denial of habeas relief because the alleged errors were harmless under *Brecht*. Pet. App. A at 27. That harmlessness ruling was correct.

1. March 31 Hearing

The first proceeding Petitioner challenges occurred on March 31, 2005. In that hearing, the public defender moved to withdraw due to a non-waivable conflict of interest that had arisen. *Id.* at 4. Given the need for new counsel to get up-to-speed, and the impending end of the six-month speedy trial period, the trial court explained that Petitioner would either need to proceed *pro se* or waive his speedy trial right:

THE COURT: Obviously what everyone wants is to make sure that you have representation that is not compromised... . [But t]here's no way in the world that new counsel can be prepared to represent you next Monday. Do you understand, that Mr. Acosta?

MR. ACOSTA: Yeah.

THE COURT: Do you want to be represented by counsel? Do you want the Court to appoint new counsel to represent you?

...

MR. ACOSTA: Yeah.

THE COURT: Okay. You understand, Mr. Acosta, that if in fact I appoint new counsel to represent you, they're going to have to have some time. You have both a statutory and a Constitutional right to what's called a speedy trial.

Your statutory right to a speedy trial is that you be tried within six months of the date of arraignment. If in fact new counsel enters their appearance, you're going to have to waive that. We'll try to set it as quickly as possible, Mr. Acosta. But you also have to understand that they have to have enough time to prepare this case and be prepared for trial.

Are you willing to waive your right to speedy trial and to have the case reset?

MR. ACOSTA: I guess I have to.

THE COURT: Have there been any threats or promises by anyone to cause you to do so?

MR. ACOSTA: No.

THE COURT: How old are you, Mr. Acosta?

MR. ACOSTA: I'm 22.

THE COURT: What's the last grade in school you completed?

MR. ACOSTA: I went to college.

THE COURT: Have you had any type of alcohol, drugs, or medication within the last 24 hours?

MR. ACOSTA: No.

THE COURT: The Court finds you are knowing and intelligent, you understand your right to speedy trial. Further, the Court finds that your decision is freely, voluntarily, and intelligently made.

C.A. App. at 285–87.

In considering whether Petitioner's rights were violated because he did not have the advice of counsel regarding his speedy-trial waiver, the Tenth Circuit conducted a harmless-error review, applying *Brecht* in light of the fact that this was a state criminal conviction on federal habeas review. Pet. App. A at 24–25. This was the proper approach. The absence of counsel at this point in time did not pervade the entire proceeding: as the Tenth Circuit pointed out, counsel for Petitioner later entered an appearance, was fully prepared, and competently represented him at

trial and sentencing. *Id.* at 28–29. The March 31 proceeding was, in substance, a pretrial continuance hearing—a matter of practical housekeeping. In this context, the Tenth Circuit’s application of harmless-error review hardly represents an outlier approach. *See Murphy*, 750 N.W.2d 582, 586–87 (Markman, J., concurring) (citing cases of every federal circuit applying harmless-error review to denial of counsel at critical stage given the nature of the proceeding); *see also, e.g., United States v. Crowley*, 529 F.2d 1066, 1069–70 (3d Cir. 1976) (assuming a critical stage, but applying harmless-error review to denial of counsel at plea-withdrawal hearing); *United States v. Gutierrez-Arias*, 299 F. App’x 593, 595 (7th Cir. 2008) (unpublished) (although preliminary hearing is a critical stage, a deprivation of counsel is “subject to harmless-error review”).

The Tenth Circuit was also correct to conclude that any error *was* harmless, because counsel would have made no difference. Petitioner fully understood his rights and chose a prepared attorney (and constitutionally effective counsel) over a statutory “speedy trial.” And surely any competent counsel would not have advised Petitioner to try his first-degree murder case on his own, without counsel, in order to secure a “speedy trial.”

The correctness of the Tenth Circuit’s finding of harmlessness here is supported by the decisions of other courts that have found harmless, for similar reasons, alleged Sixth Amendment violations premised on denial-of-counsel claims. *See Jones v. Cuomo*, 254 F. App’x 6, 7–8 (2d Cir. 2007) (unpublished) (holding that any error was harmless where counsel was not appointed for the first eighteen

months of proceedings but was ultimately appointed with ample time to prepare, and no speedy trial violation occurred); *Owsley*, 48 F. Supp. 2d at 1203–04 (finding no actual prejudice because counsel would have made no difference; petitioner sufficiently argued the motion himself, but the motion was meritless); *Bourne v. Kansas*, No. 05-3363, 2007 WL 2213554, at *4 (D. Kan. July 31, 2007) (unpublished) (holding that even assuming a deprivation of counsel, “petitioner has not alleged that he suffered any harm from the denial of the motion for continuance and the motion for dismissal”).

Although the Tenth Circuit did not decide whether this was a “critical stage” of the proceedings, its finding of harmlessness is also supported by the decisions of other federal courts finding that similar proceedings were not “critical stages.” *See, e.g., United States v. Blum*, 65 F.3d 1436, 1441 (8th Cir. 1995) (concluding that a hearing at which defendant requested substitute counsel was not a critical stage, in part because the trial court conducted an adequate inquiry with defendant, and counsel “could have done little to affect th[e] ruling”); *Parker v. Burt*, 595 F. App’x 595, 598, 603–04 (6th Cir. 2015) (unpublished) (concluding that four hearings were not critical stages, even though the prosecution was granted a continuance at one and petitioner asserted his speedy trial rights were denied), *cert. denied*, 135 S. Ct. 2384 (2015); *Powell v. Grounds*, No. SACV 10-111, 2012 WL 7985727, at *17 (C.D. Cal. Sept. 18, 2012) (unpublished) (“[B]ecause the Supreme Court has never held that a continuance hearing constitutes a critical stage,” state court ruling “neither contravened, nor was an

unreasonable application of, clearly established federal law.”), report and recommendation adopted, 2013 WL 1739381.

2. April 6 Hearing

Likewise, the Tenth Circuit correctly held that the absence of counsel at the April 6, 2005 hearing was harmless. The purpose of that hearing was to determine how to proceed with regard to Medina. As stated above, she had been jailed leading up to Dillon’s trial, and she would have remained in jail until testifying at Petitioner’s trial, except that his trial would now be reset months in the future.

The trial court made clear it would not simply hold Medina indefinitely for trial. Pet. App. A at 4 n.1. But it confronted her with her prior failures to appear. Medina offered that if she did not obey, the court could “put her back in jail.” *Id.* at 4–5. The court agreed to release her, after confirming Medina had somewhere to stay and that the prosecution could transport her to court the next morning. *Id.* After Medina failed to appear, she was again found in contempt and jailed. C.A. App. at 2722.

Having assumed that it was error for Petitioner to not be represented by counsel at this hearing, the Tenth Circuit subjected the claim to harmless error review. It found any error harmless because the absence of counsel cannot be said to have “affected—and contaminated—the entire criminal proceeding,” *Satterwhite*, 486 U.S. at 257. Pet. App. A at 27. For one, as the Tenth Circuit recognized, and as discussed above, the absence of counsel did not result in a confrontation violation. *Id.* at 28. Medina was properly determined to be unavailable at trial, regardless of

the circumstances at the April 6 hearing or why the court released her in the first place.

Additionally, on a practical level, Petitioner is incorrect that if counsel had been present, Medina would have ultimately testified at trial. *See* Pet. 7, 15; Pet. App. A at 28. He argues that counsel could have secured contact information for Medina's brother (with whom she told the court she would stay) and could have requested stricter supervision. Pet. 7, 15; Pet. App. A at 28. But even if true, none of that would have made any difference. The record reflects that Medina did *not* ultimately go to her brother's the night she was released—she later admitted under oath that on the night she was released she stayed with “some guy” (not her brother); fled to Las Vegas the next day; and, upon return to Denver, lived “on the streets” evading the police. Pet. App. A at 5; C.A. App. at 1599–1602, 321, 335–36, 1953–55. Nor has Petitioner ever explained what stricter supervision counsel could have persuaded the court to impose that would have guaranteed Medina's attendance at trial. Given her demonstrated desire to avoid trial, there is no reason in hindsight to think that anything would have secured her attendance, short of keeping her locked up until whenever trial would occur—something the court was unwilling to do. Pet. App. A at 4 & n.1.

Finally, the absence of counsel was harmless here for another, equally important, practical reason. Even assuming that the absence of counsel resulted in the parties having to rely on Medina's deposition in lieu of live testimony, the deposition provided the *same things* live testimony would have provided. The right

to confrontation at trial promotes reliability by providing certain procedural rights: “the oath, cross-examination, and opportunity for the jury to observe the witness’ demeanor,” *United States v. Owens*, 484 U.S. 554, 560 (1988); *see also Crawford*, 541 U.S. at 61–62 (stating that confrontation ensures reliability but is ultimately “a procedural rather than a substantive guarantee”). Here, Medina’s deposition was taken pursuant to Colorado Rule of Criminal Procedure 15. Pet. App. C at 20. That rule exists “to preserve the testimony of the likely unavailable witness through an in-person appearance before the court, as though the person were testifying at the time of trial.” *People v. Arellano-Avila*, 20 P.3d 1191, 1193 (Colo. 2001). It thus provides for direct- and cross-examination under oath, by counsel, before the court, and in the defendant’s presence to the same extent as would occur at trial. *See Colo. R. Crim. P. 15(a)*.

And that is what occurred: Medina was placed under oath, testified in Petitioner’s presence, and was cross-examined by his counsel. C.A. App. at 206, 223, 229. And although the jury was unable to see Medina’s demeanor, that was because defense counsel *chose* to read the transcript instead of having the videotaped deposition played. *See* Pet. App. B at 3; C.A. App. at 374. Petitioner cannot now argue prejudice on the basis of his counsel’s own considered decision to provide the jury with less of what the Confrontation Clause provides.

Thus, the Tenth Circuit correctly concluded that, even assuming a denial of counsel at the April 6 hearing, it was harmless under the circumstances and did not have a “substantial and injurious effect on the verdict,” *Brecht*, 507 U.S. at 623.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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