

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 for The State of

Colorado

Respondents

On Petition for Writ of Certiorari to

The United States Court of Appeals for the Tenth Circuit

**PETITIONER'S REPLY TO BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI**

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PETITIONER'S REPLY:

In its Brief In Opposition To Petition for Writ of Certiorari the State opens with a Statement of the Case, intended to persuade this Court that violations of the Petitioners Sixth Amendment Rights to Confrontation and to the assistance of counsel at two critical stages, were justified and defensible, precluding the need for review. Suggesting that the errors made in this case regarding “good faith, reasonable efforts” (implying any action taken was adequate) and allowable under AEDPA, and that the unreasonable application of this Court’s law regarding the denial of counsel at two critical stages was harmless, is clearly erroneous, and in opposition to this Court’s precedent. Maintaining that there is no longer need for clarity regarding “good faith, reasonable efforts” following this Court’s decision in *Hardy v Cross (2011)*, and citing only opinions issued in the District Courts that align with their argument, while obviously omitting the conflicting opinion issued in The United States District Court for The District of Colorado (Appendix B) regarding the case at hand, the state’s contention fails.

On March 15, 2018, Petitioner, Gabriel Alexander Acosta submitted the following questions to this court respectfully requesting review:

- 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.**

According to the United States District Court for the District of Colorado, "The use of deposition testimony is a denial of the Sixth Amendment right of confrontation unless the witness is unavailable." (Appendix B 5) The State's response confirms that the only eyewitness was jailed and available prior to the conclusion of jury deliberations. The State also acknowledges that a motion for mistrial was filed(based upon the new information regarding the witness's detainment) prior to the conclusion of jury deliberations and denied by the trial court. The State's response supports the Petitioner's original assertion that only alleged eyewitness to the crime was not factually "unavailable" prior to conclusion of the trial court proceedings. The State suggests that 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 (both the court and the parties were aware that Medina was detained prior to the conclusion of jury deliberation) . . . there is no compelling reason for this Court to consider, or afford clarity regarding a witness deemed to be *unavailable* and who is no longer factually *unavailable* prior to the conclusion of trial proceedings. However, this Petition provides an ideal opportunity for the Court to extend clarity regarding the findings made in this circumstance.

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?

The State's response isolates the search "efforts" from the witness's known activities, behaviors and life circumstances, utilizing broad, generalized statements that imply efforts that were not actually made. For instance, the State describes the one-time afternoon drive down Colfax Avenue where the witness was known to prostitute, as "*visiting areas where she was seen and known to frequent.*" Interestingly, the State adds a new search effort – "spoke with her parents" (Brief in Opposition 3).

However, the case record does not reflect this effort, and in fact, *the Petitioner* asserts *in this very question* that the state *failed* to make this effort. The State's response simply reiterates prior empty efforts, such as speaking with the one family member who was "cooperative with the police" while omitting their failure to contact the witness's mother, father, sister or brother. The State's search efforts were not insufficient efforts, but rather, non-efforts, intended to deliberately avoid producing an undesirable witness. According to the United States District Court for the District of Colorado, "the prosecution has the duty to use reasonable efforts to bring the witness to trial." (Appendix B at 5) The factors outlined in *Cook vs. McKune* (10th Cir 2003) were applied by the Colorado Court of Appeals, when the court determined the search efforts were "reasonable." However, the United States District Court for the

District of Colorado disagreed with the Colorado Court of Appeals, applying the same criteria set forth in *Cook*, the District Court found the decision by the Colorado Court of Appeals was based on “an *unreasonable* determination of the facts.”

(Appendix B 6).

The petition at hand requests clarification regarding “reasonable search” due to conflicting circuit court opinions. The State asserts that clarification is unnecessary because, following *Hardy v Cross* (2011) district court opinions confirm that “general, good faith, reasonable efforts comply with AEDPA’s deferential standard.” The Petitioner confirms the need for clarification, as illustrated by the State’s reliance on district court opinions. The Petitioner is not denying the applicability of *Hardy*. However, there is no current Supreme Court case law that supports the absence of *good faith, reasonable effort, non-efforts, empty efforts* in deference to state opinion. Applying Hardy’s analysis, where the search was far more rigorous than here, the search still fails because the State “had reason to believe” there was “information” about Medina’s whereabouts which it ignored. There was nothing unpromising about those steps, the State does not know if Medina was where she said she would be, does not know if she is with other family members (her parents) (her brother, where she said she would be staying), does not know if homeless, drug using Medina is in jail, because the State did not look.

3. Whether the United States Court of Appeals for the Tenth Circuit violated the defendant's Sixth Amendment right to assistance of counsel by erroneously 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?

Petitioner asserts violation of his Sixth Amendment right to counsel at two separate (but connected) "critical stages" in the trial process.

Following the withdrawal of the Public Defender's office on March 31, 2005, the trial court denied Petitioner's right to proceed to trial with newly appointed counsel, even though more than 50 days remained on the speedy trial clock. Factually, Petitioner did not need to waive speedy trial on March 31, 2005. The trial court had restarted the 180 day speedy trial clock on December 3, 2004. (Jt.App. 0034-0035.) The court either forgot or miscalculated. (Jt.App. 0030; 0032-0034;

0283-0290; 2876; 2856.) But that is why Petitioner needed a lawyer—to protect him.

The trial court *assumed* Petitioner had to waive speedy trial if he wanted counsel. That was clear error, contrary to Colorado law and, therefore, objectively unreasonable. *Gallagher v. District Court*, 933 P.2d 583, 590 (Colo. 1997), holds that a court cannot assume that waiver is necessary, but must find, “supported by the record,” that the time remaining is insufficient for competent counsel to get ready for trial. Here, the court simply assumed. Significantly, in *Gallagher*, the Colorado Supreme Court concluded the “record ... does not support the conclusion that” 58 days (shorter than here) was insufficient for counsel to get ready for trial and remanded for fact finding. (Jt.App. 2857); 933 P.2d at 590, 592.

The State’s response affirms that the only options provided to the Petitioner by the trial court were a) to proceed to trial pro se, or b) waive his right to speedy trial. The Petitioner was unrepresented at this hearing and without the advice of an attorney. In the Brief in Opposition the State argues that the March 31, 2005 proceeding was in substance, a pretrial continuance hearing—a matter of practical housekeeping. However, both the Colorado Court of Appeals and United States District Court Judge Matsch concluded that this hearing was a critical stage. Not only did Petitioner waive his speedy trial right but the Court discussed Medina’s release- all while Petitioner was without counsel. If accepted, the State’s argument on

the facts here would mean a defendant would never need an attorney when confronted with waiving his speedy trial rights. None of the State's cases stand for that proposition. The trial court violated the Petitioner's Sixth Amendment right to speedy trial, by neglecting to inform the Petitioner of his right to proceed to trial with new counsel, and neglecting to inform Petitioner of his right to be represented by counsel before waiving his speedy trial right. Prior to the conclusion of this proceeding, the court addressed the issue of detaining the witness in light of the assumed trial delay. A hearing was scheduled for April 6, 2005 to discuss the release of the witness. The court assured the Petitioner that he would have counsel prior to, or at this hearing.

On April 6, 2005, the hearing proceeded as scheduled. In spite of the trial court's assurances, the *Petitioner remained unrepresented and was not present for the proceeding*. The witness, a known flight risk was released on a reduced bond (\$2000 less than her previous bond) with no safeguards in place, no address, and no contact information. The Petitioner had no opportunity to confer with counsel, object to the decision, or terms of the release. The Petitioner was also denied the opportunity to request that the hearing be rescheduled until counsel could be appointed.

The State concedes the violation of Petitioner's Sixth Amendment right, but asserts that the violation was harmless, based upon the Tenth Circuit's ruling that the

absence of counsel did not “affect and contaminate” the entire criminal proceeding, and that having counsel “wouldn’t have made a difference” anyway because the witness had no intention of appearing for trial and was later determined to be “unavailable” at trial. The State concludes as a final argument regarding harmlessness, “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 would provide the *same things* live testimony would have provided.” The State is erroneously and shockingly asserting that since a deposition is equivalent to live testimony, that the absence of counsel is a harmless error. Contrary to the State, counsel would have made a difference.

The facts refute the States assertion: at the April 6, 2005 hearing, this same witness testified in the co-defendant’s trial and largely contributed to an undesirable verdict. During the trial, the witness admitted under oath, that she had “broken her promises, lied, and testified about things that were untrue.” Given the witness’ previous testimony, the prosecution had every reason to support the witness’s release as evidenced by the outcome in the co-defendant’s trial.

The State claims the Court would not have jailed Medina until trial even if a lawyer had been present. That is not Petitioner’s argument. The choice was not between releasing Medina and jailing her indefinitely. The trial court should have kept Medina in jail until Petitioner had new counsel from whom the court could

“receive some direction” as to when he/she would be ready for trial. *Parker v. Booker*, 2011 WL 5984035, ** 13-14 (E.D. Mich. Nov. 30, 2011) (finding no critical stage because no rights were lost). According to the United States District Court for the District of Colorado: “The use of deposition testimony is a denial of the Sixth Amendment right of confrontation unless the witness is unavailable... (the witness) repeatedly failed to appear and keeping her in custody was critical to confront her testimony with a live cross-examination. A short continuance of the trial at the March 31st hearing would have ameliorated the judges concern about holding the witness in jail. 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 5.)

There is a cruel irony in what the trial court did in this case, making it objectively unreasonable. The court forced Petitioner to waive his speedy trial right so new counsel could prepare for trial. But it released the critical witness necessary for counsel to prepare—Medina—before new counsel entered their appearances two days later. (Jt.App. 0301.) As Judge Matsch pointed out, “[a] short continuance” would have solved the problem, but, on March 31, 2005 or April 6, 2005 Petitioner did not have “counsel acting in the role of an advocate” to protect his rights. (Jt.App.

2877-2878); *Cronic*, 466 U.S. at 656 (quoting *Anders v. California*, 386 U.S. 738, 743 (1967)).

Because the April 6, 2005 hearing directly implicated Acosta's right to confront Medina at trial, and because Acosta's right to confront Medina was irretrievably lost without counsel, the hearing was a "critical stage." *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004). Judge Matsch correctly held that the CCA's determination to the contrary was an "unreasonable determination of fact and an unreasonable application of the law. (Appendix B 5); *Wiggins v. Smith*, 539 U.S. 510, 529-30 (2003).

Although prejudice should have been presumed for both March 31, 2005 and April 6, 2005 and reversal automatic, because Petitioner lost his rights prejudice did not have to be presumed. OB at 44-48; *Cronic*, 466 U.S. at 659 n.25; *United States v. Lott*, 433 F.3d 718 (10th Cir.), *cert. denied*, 549 U.S. 851 (2006). March 31, 2005 and April 6, 2005 were two inter-connected links in a chain resulting in the disappearance of Medina and the improper use of her deposition. The prejudice was real. The error was not harmless. OB at 30-44.

Petitioner has argued that his waiver of speedy trial was the "but for" cause of the release of Medina and the "but for" cause of the loss of his Confrontation rights. OB at 47. Judge Matsch recognized this connection: "The importance of the right of confrontation of this critical witness weighs heavily in favor of

finding that these were critical stages.” (Appendix B 5)

The trial court recognized it as well. On March 31, 2005 the trial court promised Petitioner he would “have a new attorney, if not before, by at least April 6, 2005” when it was going to deal with Medina.⁶ (Jt.App. 0288, 0299:9-10.) The trial court, erroneously, thought Petitioner did not need a lawyer when he waived speedy trial. But it recognized that because he waived speedy trial, Medina would have to be dealt with and, for that, Petitioner needed a lawyer—and the court promised he would have one. Thus, in the court’s mind, the waiver and the ultimate release of Medina were connected.

The State implicitly recognizes this connection between the waiver and Medina’s release: “Medina would have been released regardless, *because* the trial court made a binding determination that appointment of new counsel would necessitate a speedy trial waiver.” AB at 76 . But it argues, March 31, 2005 and April 6, 2005 were separate events and should be viewed separately. *Id.* at 73. That argument ignores the consequences—the domino effect beginning with the waiver, resulting in Medina’s release and culminating in the use of Medina’s deposition and the denial of Petitioner’s Confrontation rights. *Crawford*, 541 U.S. at 69 (reaffirming the right “the Constitution actually prescribes: confrontation”).

Petitioner’s conviction should have been reversed for any one of the following: (i) the search (or lack of search) was objectively unreasonable and use of

Medina's deposition had a "substantial and injurious effect" on the verdict under *Brecht*, 507 U.S. at 629-30, or (ii) either March 3, 2005 or April 6, 2005 (or both) were critical stages and denial of counsel was a structural error requiring automatic reversal, or (iii) either March 31, 2005 or April 6, 2005 (or both) were critical stages and Petitioner established a "substantial and injurious effect" under *Brecht*.

The Brief in Opposition fails to provide new information that alters the questions presented to this Court in The Petition for Certiorari submitted on March 15, 2018.

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, Petitioner was faced with the untenable choice of waiving his speedy trial right or proceeding pro se to trial. Petitioner waived his speedy trial right to **insure** he would have the advice and protection of representation in further proceedings. The court assured the Petitioner this would be the case prior to a hearing to discuss the release of the alleged eye witness, Patricia Medina. However, Petitioner'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. Petitioner 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.

Based upon the violation of Petitioner's Sixth Amendment right of confrontation that occurred when the witness was deemed to be **unavailable when she was not factually unavailable** prior to the conclusion of the trial proceedings, and based upon violation of Petitioner's **right to counsel at two critical stages**, Petitioner requests

that this court dismiss the conviction in this case, or alternatively reverse the decision of the Colorado Court of Appeals and remand this case for further proceedings.

CONCLUSION

This Petition for Writ of Certiorari should be granted.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Gabriel A. Acosta". The signature is written in a cursive style with a long horizontal line extending from the left side of the first name.

September 17, 2018