S. Ct.

No. 11-74

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2011

Office of the Attorney General
AUG 23 2011
Solicitor General

MARCUS HARDY,

Petitioner,

-vs-

IRVING L. CROSS,

Respondent.

On Opposition to
Petition for a Writ of Certiorari

NOTICE AND PROOF OF SERVICE

TO: Honorable Lisa Madigan
Attorney General of Illinois
100 Randolph Street, 12th flr.
Chicago, Illinois 60601

Mr. Irving Cross
Reg. #N-03618
Box 112, Route 53
Stateville Correctional Center 60434

ATT'N: Michael A. Scodro, Solicitor General of Illinois

PLEASE TAKE NOTICE that the respondent Irving L. Cross has on this 20th day of August, 2011, forwarded to the Clerk of the Supreme Court of the United States this Brief in Opposition to the petition for a writ of certiorari, by depositing it in the United States Mail as permitted by Rule 29.2.

ENCLOSED please find one copy of said Brief in Opposition and one copy of his motion to proceed in forma pauperis.

EMILY EISNER
Attorney at Law
1463 South Indiana Avenue
Chicago, Illinois 60605
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The undersigned, being duly sworn on oath deposes and states that the aforementioned copies were served upon the above-named parties on August 20, 2011, by depositing same in the United States Mail in Chicago, Illinois.

SUBSCRIBED AND SWORN
Before me this 20th day
of August, A.D., 2011.

Notary Public

Official Seal
Frank Madea
Notary Public State of Illinois
My Commission Expires 07/15/2013

No. 11-74

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2011

MARCUS HARDY, Petitioner, -vs- IRVING L. CROSS, Respondent.	)	On Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Respondent IRVING L. CROSS asks leave to file the attached Brief in Opposition to the petition for a writ of certiorari without payment of fees or costs and to proceed in *forma pauperis*.

Respondent has previously been granted leave to proceed in *forma pauperis* in the United States District Court for the Northern District of Illinois.

Counsel for respondent was appointed under the Criminal Justice Act of 1964, 18 U.S.C., Sec. 3006A to represent the respondent in the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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No. 11-74

IN THE

SUPREME COURT OF THE UNITED STATES

MARCUS HARDY,

-vs- Petitioner,

IRVING L. CROSS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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No. 11-74

IN THE

SUPREME COURT OF THE UNITED STATES

MARCUS HARDY,		)
		)
		)
-vs-	Petitioner,	)
		)
IRVING L. CROSS,		) On opposition to petition for
		) a writ of certiorari to the
		) United States Court of Appeals
		) for the Seventh Circuit.
	Respondent.	)

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

The petition for a writ of certiorari should be denied.

STATEMENT OF THE CASE

The United States Court of Appeals for the Seventh Circuit granted the respondent habeas relief under the Antiterrorism and Effective Death Penalty Act ("AEDPA"), because the state court proceedings adjudicating his claim resulted in a decision that was an unreasonable application of clearly established federal law, as determined by the Supreme Court of the United States. *Cross v. Hardy*, 632 F.3d 356 (7th Cir. 2011). The Seventh Circuit deferred to the state appellate court for its knowledge of un-cited federal law but was compelled to find, based on *Ohio v. Roberts*, 448 U.S. 56 (1980), *Barber v. Page*, 390 U.S. 719 (1968), and *Berger v. California*, 393 U.S. 314 (1969), that the state appellate court did not reasonably apply federal law to the facts when the state appellate court rejected the constitutional claim.

Prior proceedings

The first trial was an Illinois prosecution on charges of aggravated kidnapping, aggravated criminal sexual assault, and criminal sexual assault.[1] The complainant had been an adult female who was stranded without bus fare at a bus-stop in Chicago on August 6, 1998, about four o'clock in the morning. (HP at 5) She had earlier refused a ride home from police after her current boyfriend had been arrested in his car. (HP at 5-6) Before the first trial, the trial court barred evidence of the complainant's prostitution, drug use, and arrest record. (HP at 6) At the first trial, the complainant testified on the charges and revealed that no other person witnessed the alleged offenses. (HP at 6) She took two minutes to answer each question. (HP at 6, Pet. Appen. E at 82a) The respondent argued to the first jury that, "Anybody who was in this room yesterday when [the complainant] testified . . . and saw her and heard her understands that she was not telling the truth." (OB at 45) The first trial ended in a verdict of not guilty of aggravated kidnapping and in a hung jury on the remaining counts. (OB at 13) Two days later, a victim-witness advocate for the State[2] advised the complainant of her need to re-testify. (OB at 16) The complainant appeared pale, depressed, and in tears but reluctantly said she would testify. (OB at 16, EXC. at 41) During the conversation, there was no promise to testify, either

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[1]The citations are to facts set forth in the 7th Circuit's decision and to the facts as set forth in supporting documents and briefs filed in this case, which were included in the 7th Circuit's record. These are: an excerpt from the state court trial proceedings, which was designated in the 7th Circuit as Exhibit #K pp. 1-71 ("EXC."); the opening brief on direct appeal ("OB"); the reply brief on direct appeal ("RB"); the decision on direct appeal, which is appended to the petitioner's certiorari petition ("Pet. Appen. E"); the rehearing petition on direct appeal ("RP"); the appeal to the Illinois Supreme Court ("PLA"); the habeas petition ("HP"); the reply to answer ("RA"); the certificate of appealability ("COA"); the opening brief in the 7th Circuit ("OB7"); and the reply brief in the 7th Circuit ("RB7"). The 7th Circuit's decision is referenced as ("Op.") The petitioner's petition is referenced as ("Cert. Pet.")

[2]The word "State" and the word "prosecutor" are used in this Brief interchangeably. As does the 7th Circuit, this Brief designates the state-courts as the state appellate court and the state trial court or "judge."

formal or informal. (RB7 at 8, 13, EXC. at 26-27, 40-41) The conversation did not occur in court but in the prosecutor's office after the complainant was taken with her mother by police. (EXC. at 25-26, 40, Pet. Appen. E at 45a) On the two occasions that the complainant had come into the court building, a detective had needed to escort her. (EXC. at 24-25, 25-26) The court declared a mistrial on November 3, 1999. The complainant was not under a subpoena or under the judge's warning to return to court, and the State did not remain in contact with her. (OB at 13, 38-39, 43, OB7 at 31, Pet. Appen. at 84a, 85a, EXC. at 25-26, 40)

Over four months later, on March 20, 2000, the State announced an inability to locate the complainant. (OB at 13) The State was satisfied with a seven-day continuance. (OB at 13, OB7 at 30) The State did not request a sixty-day continuance even though a sixty-day continuance was allotted under Illinois' speedy trial rules. (OB7 at 30); 725 ILCS 5/103-5(c). The State announced a plan to draft a motion to use a cold transcript in the complainant's stead, even before the seven-day continuance period had begun. (RB7 at 12-13) The State declared an intention, on this date, to try the case "with or without her." (RB7 at 12) Seven days later, on March 27th, the State moved to declare the complainant "unavailable," over objection, and to submit a transcript of her testimony. (OB at 13) The substance of the State's motion, which was unsworn, was the State's assertion of belief of the complainant's "every indication" to re-testify despite her "extremely frightened" state-of-mind. (RB7 at 15n. 5) The State's motion alleged, without specificity, a "constant contact" with the complainant and her mother by members of the Cook County State's Attorney's Office "without proffering a name or log of who, when, and where." (RB7 at 15n. 5) At a subsequent hearing on the motion, the State did not show that anyone----until March when the search commenced—had telephoned or visited even once. (RB7 at 15)

The coverage of the testimony at the hearing, regarding the State's contact with the complainant and lack thereof, dated back to the first trial. (RB7 at 15) At the hearing, the State presented the detective, the victim-witness advocate, and an investigator, who had checked the parents' two apartments, one former boyfriend's possible residence in Waukegan resulting in an interview with the boy's mother, various government agencies, and one "false" address over a less-than two-week period in March. (OB7 at 4) The case had been set for retrial since January, with a scheduled retrial date of March 29th, but the investigator had not been directed to locate the complainant until March 3rd. (Op at 4a, OB7 at 4) The detective had not started his search until March 12th. (OB7 at 4) The victim-witness advocate had learned of the Waukegan lead on March 10th, but the detective did not go there until March 21st or March 22nd. (EXC. at 33-34, 42) The State had declined to check the known street corners where the complainant had practiced her prostitution trade. (OB at 16, 21, RB at 5, EXC. at 58-59) No attempt had been made to interview a single friend or person on the street, including the complainant's current boyfriend and companions from the street on the night she was stopped. (OB at 16, 21, RB at 5, Op at 11a)[3] The State's people had spoken to the mother who had spoken to the complainant by telephone, shortly after March 10th, but their efforts were to repeat the same steps, including visits to the morgue and hospital, despite knowledge that the complainant was alive and well. (Op. at 11a, RB7 at 17-20) The mother separately told the detective and the victim-witness advocate that the

[3]The petitioner's petition asserts and implies that "family and friends" were interviewed and were attempted to be interviewed. (Cert. Pet. 7, 14) Unless the Waukegan ex-boyfriend's mother could be called a "friend," there were no interviews or attempted interviews of friends. (Op. 11a, EXC. at 3-39) Furthermore, the appellate court did not find that the ex-boyfriend from Waukegan and the "old" male "friend" from Waukegan were two different people or were two different "friends" of the complainant's. (Pet. Appen. E at 45a, 46a) There was only one trip to Waukegan and only one destination attempted there. (Op. at 10a)

complainant had enrolled in a cosmetology school after the mistrial, but the detective did not obtain the name or location of the school or otherwise follow-up on this lead either. (Op. at 11a, EXC. at 31-32, 42, 58) The detective testified that the complainant had telephoned her mother two weeks earlier to claim having "run away" and to report a fear of returning to the city and testifying. (Op. at 5a, EXC. at 30) There was no indication that she had left the city permanently or left the metropolitan area. (EXC. at 30, 59) The detective never claimed that he tried to trace the telephone call. (EXC. at 30) At the hearing, as before, no subpoena was sought to be served at the mother's or father's home even though the complainant had been in telephone contact with the mother. (EXC. at 30, 58-59) No further contact by the State was attempted.

The respondent protested and stressed that "the transcript doesn't do justice" to the complainant's demeanor, which was "distracted," "uninterested," "hesitating," "spacey," "extremely scared or nervous," and "extraordinary" at the first trial. (EXC. at 52, OB at 16) The State concurred but said she was "traumatized." (OB at 45, RB at 8, EXC. at 55) The judge acknowledged that the complainant had taken two minutes to answer each question. (Op. at 4a, Pet. Appen. E at 82a) The respondent's objection was based on the State's lack of good faith and lack of diligence in returning the complainant to trial. (OB at 16) A ground for the Sixth Amendment objection was the complainant's availability, where all feasible efforts had not been made in good faith to secure the complainant's appearance for retrial. (OB at 16) The respondent objected to "just relying on the mother's word" and argued the State's failure to check certain prominent places that the complainant would frequent. (OB at 16, EXC. at 58, 59) The respondent alerted the court to the "very temporary situation" of the complainant's absence as not the equivalent of unavailability, especially because of the disadvantage to the respondent from the loss of the complainant's extraordinary demeanor. (OB at 16, EXC. at 51-54, 56-57, 59) The

judge ruled that her extraordinary demeanor was irrelevant and that the complainant did "not want to be found." (EXC. at 4, 67) The judge refused to "speculate" that the complainant could be found "in another month, or two, or three" if the State tried harder. (EXC. at 68, OB7 at 5) The judge relied exclusively on Illinois law despite the respondent's Sixth Amendment claim. (EXC. at 51, OB at 9a-14a) Over the respondent's objections, the trial court granted the State's motion to substitute the complainant's transcript. (OB at 40)

The case proceeded to retrial after the judge refused to reconsider the pretrial rulings. (OB7 at 6) Over objection, the complainant's testimony was read by a law student, who was employed as a clerk with the prosecutor's office. (OB at 16-17, 50) Over further objection, the law student read, with some inflection in her voice, that the respondent abducted the complainant at knife-point, whereupon they had sex in the grass. (HB at 8-9) The respondent's additional objection included the ground that the prosecutor may not have admonished the law student not to use any inflection in her voice. (Pet. Appen. E at 52a) The respondent spread of record, "she's acting." (Pet. Appen. E at 52a) The prosecutor denied having told her to act. (Pet. Appen. E at 52a) The court concurred that "slight inflection" was apparent in her answers regarding the sex and admonished the prosecutor, "Tell her to answer the questions." (Pet. Appen. E at 52a) The respondent persisted that the prosecutor had apparently failed to admonish the law student before trial "not to act" in the first place. (Pet. Appen. E at 52a) The respondent's objections to the reader, instead of a neutral court reporter, and to the reader's behavior as acting the sexual episodes were overruled. (OB at 16-17, 48, 49, 50)

Neither in defense, nor on cross-examination, were the complainant's prostitution, prior cocaine use, and arrests allowed. (OB at 52) As offers of proof, the complainant's doctor would have testified to the complainant's outcry from the incident that "[The] patient reports being a

'hooker' up to last week and has used rock cocaine." (OB at 52) The complainant had purportedly practiced her prostitution trade on the street corners of Division and Central Park, Division and Monticello, Central Park and Potomac, and Grand and Pulaski, which were the locales of her encounter with the respondent within areas known for prostitution, but the evidence of prostitution was excluded. (RP at 8, OB at 18, 52) As proffered, two of the complainant's arrests were for criminal trespass to a vehicle, and one arrest was for retail theft. (OB at 53) The respondent did not testify and blamed the adverse rulings. (OB at 10-11) The respondent proffered his testimony based on the police report of his custodial statement made contemporaneously upon arrest. (OB at 10-11) As proffered, he had consensual sex in exchange for drugs with the complainant whom he recognized as a prostitute. (OB at 10-11)

At closing argument, the respondent was further precluded from arguing to the jury the reasons for the complainant's absence, either to compensate for the loss of her demeanor or to undo the damage from the reader's dramatic inflection. (OB at 17) The court admonished the jury not to concern itself with reasons why the complainant was not present. (OB at 17) The second jury found the respondent not guilty of aggravated criminal sexual assault but guilty of two counts of criminal sexual assault. (OB at 25) The court sentenced the respondent to sixty years imprisonment. (OB at 26)

The respondent's direct appeal to the Illinois appellate court challenged: 1) that the State's use of a transcript of the absent complainant's former testimony, as read by a law student employed by the prosecutor, violated the respondent's Sixth Amendment right to confrontation, where cross-examination was inadequate, and where the State did not act in good faith to conduct a diligent search to obtain the reluctant witness, whom the State knew had a disinterested, distracted, and dubiously-credible demeanor from the first trial ending in an acquittal and a hung

jury; 2) that the State knowingly reaped an advantage at the second trial from the above circumstances and pattern of conduct; and 3) that the court's suppression of the complainant's prostitution, drug use, and arrest record denied the respondent his due process right to present a defense and his Sixth Amendment right to confrontation, where the proffered defense was consent during an act of prostitution in exchange for drugs, and where the complainant's credibility was critical. (OB at 37-38) Regarding the first claim, the respondent argued, *inter alia,* that a source as rudimentary as the yellow pages of the telephone book revealed only ten cosmetology schools in the metropolitan area. (RB at 5)

Rejecting these arguments, the Illinois appellate court upheld the use of the transcript of the former testimony, and the use of the reader, despite "acknowledging concerns" over the absence of live testimony where the absent witness was also the victim and sole eyewitness whose credibility was "perhaps incredible or uncredible." (Pet. Appen. E at 82a-83a) The appellate court believed that its hands were tied by the Illinois legislators, who had carved no "exceptions" to the former-testimony exception to the hearsay rule. (Pet. Appen. E at 82a-83a)[4] In determining that the complainant was "unavailable," the appellate court found "no authority" for the State to have maintained contact, no subpoena "requirement," and no duty to have

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[4]The Illinois appellate court's unwavering belief that its hands were tied by the Illinois hearsay rule is as follows: "[T]he Illinois legislature has promulgated a provision that excuses the presence of live testimony when a witness is unavailable. It is logical to infer that the legislature, when doing so, was aware of the fact that because the witness would not be present, his or her demeanor could not be judged. However, the legislature made no exceptions in the act for either certain kinds or classes of witnesses, or when the witness' prior testimony is alleged to be uncredible. Similarly, our independent research has not revealed any Illinois case law providing for such exceptions or for excluding an unavailable witness' prior testimony because the credibility of that witness is deemed crucial. Thus, although we acknowledge the concerns with respect to the lack of live testimony, particularly where it involves the sole witness and credibility may be crucial, based on Illinois law, we decline to hold that [the complainant] A.S.' testimony was inadmissible because she was the sole eyewitness and perhaps incredible or uncredible. Accordingly, we must determine whether the State met its burden of establishing that A.S.' prior recorded testimony was admissible pursuant to the above-enunciated exception to the hearsay rule." (Pet. Append. E at 82a-83a)

investigated at any length including the locales of the complainant's practice of her prostitution trade and all of the other identified missed opportunities. (Pet. Appen. E at 84a, 85a) Although the respondent had cited the seminal case of *Barber v. Page*, 390 U.S. 719 (1968), the Illinois appellate court declined to address any High Court authority beyond a passing reference to *Ohio v. Roberts*, 448 U.S. 56 (1980). (Pet. Appen. E at 74a-85a) Although the respondent's constitutional claim was based on a combination of the State's conduct and omissions pursuant to law from the United States Supreme Court—and although the respondent was not advocating "requirements" or *per se* rules for each factor---- the appellate court declined to weigh factors in their factual constitutional totality but isolated them as a matter of Illinois or other lower court law. (Pet. Appen. E at 74a-85a) The only factor deemed pertinent by the Illinois appellate court to respondent's constitutional claim was the prosecutor's employment of more than one assistant to "detail" or "coordinate" the State's search for the witness, regardless of the brevity of the search, a lack of quality to the search, the recency of the absence, or any other circumstance. (Pet. Appen. E at 83a, 84a) The appellate court affirmed the convictions and sentence. (Pet. Appen. E at 36a) A petition for rehearing, persisting in the complainant's "availability" based on the known streets of the complainant's prostitution trade, was denied. (RP at 8, OB7 at 9)

The respondent filed a petition for leave to appeal to the Illinois Supreme Court, which raised the same constitutional grounds for relief. (PLA) To the highest state court, the respondent argued that Illinois had not attempted to remain in contact with the witness, seek a subpoena, request a bench warrant, or search for the witness for a reasonable time. (PLA at 2, 12-14) Without giving reasons, the Illinois Supreme Court denied the petition for leave to appeal. *People v. Irving Cross*, 205 Ill. 2d 600, 803 N.E.2d 488 (#96521, 10/7/03). The respondent filed

a petition for a writ of certiorari, which requested an interpretation of *Crawford v. Washington*[5] to assure a remedy under the constitution when face-to-face confrontation is necessary on retrial and because of the suppression of the three categories of impeaching evidence. The petition for a writ of certiorari was denied. *Irving Cross v. Illinois*, 543 U.S. 822 (2004).

In the district court, the respondent filed a petition for a writ of habeas corpus citing High Court precedent for all of the previous claims, including the claim under *Barber v. Page* and *Ohio v. Roberts*. (HP at 10-22) The district court rejected the respondent's constitutional claims but issued a written order granting the certificate of appealability, as follows, to be reviewed by the Seventh Circuit Court of Appeals:

> "Whether the State of Illinois engaged in a good faith effort to locate the complaining witness prior to [the respondent Irving] Cross' second trial, which if it had not, would have demonstrated that [the respondent Irving] Cross' conviction violated the *Sixth Amendment* to the United States Constitution." (COA, p. 2)

The district court's reasoning, in granting the certificate of appealability, was Illinois' brevity and lapse in searching for a "hesitant" witness, whose leads were left un-pursued, as constituting unreasonable efforts under the constitution. (COA, p. 2) Based on the certificate of appealability, the respondent appealed to the Seventh Circuit Court of Appeals. The respondent argued to the Seventh Circuit, pursuant to AEDPA, that:

> " The Illinois Reviewing Court Did Not Measure Or Reasonably Find That The Complaining Witness Was Constitutionally 'Unavailable,' Especially Where The Prosecutor's Conduct Toward The Witness After A Hung Jury Fell Short Of The Confrontation Clause Standard For Good Faith." (OB7 at 15)

In support, the respondent argued that the basic litmus of "unavailability" is well-established by

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[5]*Crawford v. Washington,* 541 U.S. 36 (2004), was pending and was decided during the pendency of the respondent's certiorari proceedings in 2004.

Barber v. Page and *Ohio v. Roberts,* as well as additional high court precedent with solid roots for over 100 years, which the Illinois courts applied wholly unreasonably. *Barber v. Page*, 390 U.S. 719 (1968); *Ohio v. Roberts,* 448 U.S. 56 (1980) *[overturned on other grounds]*. As argued by the respondent, the Illinois courts had unreasonably accepted as constitutionally diligent a prosecutor's multiple conspicuous failures to assure the live appearance of its sole accuser despite the particular circumstances. (OB7 at 15, 20-26, 30-32) As argued by the respondent, the Illinois courts had unreasonably dismissed as "irrelevant"--- or "not required"--- those circumstances that *Barber v. Page* had deemed key to the outcome of the habeas claim therein, and that *Ohio v. Roberts* had deemed certainly "relevant" to an analysis of a prosecutor's lack of good faith. (OB7 at 21, citing *Barber v. Page*, 390 U.S. at 725 [holding that the failure even to attempt to utilize court process—therein a writ of *ad testificandum*---was fatal to the State's position, because the importance of live testimony could "not be dispensed with lightly"]; *Ohio v. Roberts,* 448 U.S. at 74 [holding that "[I]f there is a possibility, albeit remote, that affirmative measures might produce the declarant, the obligation of good faith *may* demand their effectuation"]. To the Seventh Circuit, the respondent debunked the irrational rote refrain of the Illinois judges who, under the guise of rejecting "absolute bars" on former testimony, unreasonably abdicated the constitutional responsibility to weigh the factors and circumstances in determining if the prosecutor acted with the diligence due. (OB7 at 24, RB7 at 2) To the Seventh Circuit, the respondent exposed the unreasonable and the subverted refusals of the state appellate court, and the state trial court, to apply the federal law to the facts. (OB7 at 24-30, 30-33)

The Seventh Circuit's decision

The Seventh Circuit found that the respondent met his burden under the well-established habeas standard. (Op. at 7a, 14a) The Seventh Circuit found a violation of the respondent's Sixth

Amendment right to be "confronted with the witnesses against him," as implemented by *Ohio v. Roberts,* 448 U.S. 56, 66 (1980) and *Barber v. Page,* 390 U.S. 719, 724-25 (1968). (Op. at 8a) The Seventh Circuit concluded that the state trial court and appellate court unreasonably applied federal law to the facts in determining that the complainant was constitutionally unavailable. (Op. at 14a) The Seventh Circuit denied rehearing. (Pet. Appen. F at 121a) No judge asked for a vote on the petition for rehearing en banc, and all members of the panel voted to deny the petition for rehearing. *Id.*

REASONS FOR DENYING THE WRIT

The Seventh Circuit did not misstate the standards in this case and gave state courts the deference that was due. Lacking a conflict with this Court's case law or a conflict between Circuits, the petitioner is misstating the holding and language of the Seventh Circuit's decision, which did not impose a requirement on a prosecutor to serve a subpoena. The petitioner has no valid quarrel with the respondent's well-settled and rarely litigated claim. The petition for a writ of certiorari should be denied.

I.

THERE IS NO CONTROVERSY OR FEDERAL QUESTION FOR REVIEW.

1. The Supreme Court precedent of *Roberts* and *Barber* is "clearly established."

The Seventh Circuit followed AEDPA by relying on the clearly established supreme court precedent of *Roberts* and *Barber.* The Seventh Circuit identified the federal law and the federal supreme court precedent that require a habeas petitioner to prove both: 1) the State's failure to exercise good-faith diligence to bring a witness-accuser to trial, which is necessary to satisfy the Sixth Amendment; and 2) the state-courts' unreasonable determination of the accuser's Sixth

Amendment "unavailability" pursuant to clearly established supreme court decisions. (Op. at 2a)

Pursuant to this standard, the Seventh Circuit cited supreme court precedent of *Barber v. Page*, 390 U.S. 719 (1968), *Berger v. California*, 393 U.S. 314 (1969), and *Ohio v. Roberts*, 448 U.S. 56 (1980) and recited or summarized their holdings. (Op. at 8a-9a, 13a) *Roberts* particularly embraces *Barber* and *Berger* and clearly establishes that whereas reasonableness is the overall standard, certain "rules," "propositions," and "refinement" to reasonableness "safely-emerge." *Ohio v. Roberts*, 448 U.S. at 74. Among the refinements or safely-emerged propositions in *Roberts* are that non-futile acts should be diligently pursued, and that "affirmative measures may demand [to be] effectuat[ed]." *Ohio v. Roberts*, 448 U.S. at 74. (Op. at 9a, 13a) *Roberts* formally adopts, as a **"rule"**, *Barber*'s underpinning that "the possibility of a refusal [of information] is not the equivalent of asking and receiving a rebuff." [6] *Roberts* cites *Barber v. Page, California v. Green,* 399 U.S. 149 (1970), and *Berger v. California* for the refinement listed in *Roberts*, as

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[6]The holding of *Ohio v. Roberts* reads, in full, as follows: "The basic litmus of Sixth Amendment unavailability is established: '[A] witness is not 'unavailable' for purposes of . . . the exception to the confrontation requirement unless the prosecutorial authorities have made a *good-faith effort* to obtain his presence at trial.' *Barber v. Page, 390 U.S., at 724-725* (emphasis added). Accord, *Mancusi v. Stubbs, supra; California v. Green, 399 U.S., at 161-162, 165, 167, n. 16; Berger v. California, 393 U.S. 314 (1969).* Although it might be said that the Court's prior cases provide no further refinement of this statement of the rule, certain general propositions safely emerge. The law does not require the doing of a futile act. Thus, if no possibility of procuring the witness exists (as, for example, the witness' intervening death), 'good faith' demands nothing of the prosecution. But if there is a possibility, albeit remote, that affirmative measures might produce the declarant, the obligation of good faith *may* demand their effectuation. 'The lengths to which the prosecution must go to produce a witness . . . is a question of reasonableness.' *California v. Green, 399 U.S., at 189, n. 22* (concurring opinion, citing *Barber v. Page, supra).* The ultimate question is whether the witness is unavailable despite good-faith efforts undertaken prior to trial to locate and present that witness. As with other evidentiary proponents, the prosecution bears the burden of establishing this predicate. . . We accept as a general rule, of course, the proposition that 'the possibility of a refusal is not the equivalent of asking and receiving a rebuff.' *Barber v. Page, 390 U.S., at 724."* *Ohio v. Roberts,* 448 U.S. at 74-75 & 76.

invoked by the Seventh Circuit.[7] The *Roberts* rule and accompanying principles are thus squarely established by this Court.

The use of a subpoena is not required as a matter of law but is one of *Roberts'* principles from *Barber* that the state appellate court refused to acknowledge, and that the prosecutor failed to utilize despite opportunities. *Roberts,* 448 U.S. at 74. As cited by the Seventh Circuit, *Barber* granted habeas relief for the prosecutor's failure to use court process, plus *Barber* held that face-to-face confrontation may not be dispensed with "lightly." *Barber*, 390 U.S. at 725. Accordingly, *Berger* applied *Barber* retroactively and directed a state-court to weigh the same type of factors----i.e., the lack of a subpoena, the unreasonable reliance on informal methods like telegrams and phone calls, and the lack of opportunity to assess the particular witness' credibility-----which controlled the Seventh Circuit's analysis too. (Op. at 7a-14a) The Seventh Circuit was applying the federal supreme court precedent----that contains the "safely-emerge[d]" "refinement[s]"---- entirely consistently with AEDPA's dictates. *Ohio v. Roberts*, 448 U.S. at 74.

The Sixth Amendment clearly establishes a lesser or greater degree of diligence dependent on the case. *Ohio v. Roberts*, 448 U.S. at 74. This is "clearly established" federal law because the language of diligence "due", or the varying degrees of effort, stems directly from the *Roberts* supreme court precedent. *Ohio v. Roberts*, 448 U.S. at 61 & 74. *Roberts* holds that the "**lengths to which a prosecutor must go** to produce a witness" must vary as a matter of reasonableness. *Ohio v. Roberts*, 448 U.S. at 74 (emphasis added) [wherein a lesser degree of diligence to keep track of a witness would be reasonable because the witness was merely a rebuttal witness whom the State had no pre-trial inkling of a future desire for her testimony]. A prosecutor's lack of due

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[7]See footnote #6 *supra.*

diligence is measured not by a prosecutor's doing nothing but by his pattern of conduct and omissions under the circumstances of the case. *Ohio v. Roberts*, 448 U.S. at 74. Accord, *Berger*, 393 U.S. at 314-15 [adopting *Barber*'s importance of a subpoena or comparable writ, even though the defendant's relatives and employer had been contacted and telegrams had allegedly been received from him]. Applying *Roberts*, the Seventh Circuit did not apply an incorrect and "more ambitious" standard but the only standard that is allowed. (Cert. Pet. at 18); *Ohio v. Roberts*, 448 U.S. at 74.

The petitioner has overlooked that the holding and standards, as used and invoked by the Seventh Circuit, are direct quotations from *Roberts* itself---i.e., the rule regarding "affirmative measures" and the rule regarding "the lengths a prosecutor must go." *Roberts*, at 448 U.S. at 74 [also citing *California v. Green*, 399 U.S. at 189]. The *Burns* case, which is not the Seventh Circuit's "own" independent law (Cert. Pet. at 9-10, 16-17), **is quoting *Roberts* verbatim**. *Burns v. Clusen*, 798 F.2d 931, 937 (7th Cir. 1986), *citing Ohio v. Roberts*, 448 U.S. at 74. The quotation on "affirmative measures" being demanded and effectuated **originates in *Roberts***. Thus the petitioner's assertion of no "specific guidance" within this Court's decisions is mistaken. (Cert. Pet. at 14) *Roberts* contains the "safely-emerge[d]" fundamental principles used in this case.

The petitioner's attack on lower federal case law is confusing the mere application of clearly established supreme court precedent with a substitution of federal cases for law that is otherwise devoid of supreme court precedent in the first place. (Cert. Pet. at 18, *citing* cases lacking supreme court precedent). There is nothing forbidden or even unorthodox in a habeas court's supplemental use of federal applications of clearly established supreme court law. This Court's "unavailability" principles in *Barber* and *Roberts* are well understood by federal courts,

because they are well-established dating-back decades. These unavailability rules for the Sixth Amendment, whose strictness and clarity were reiterated in *Crawford*, are not open questions. *Crawford v. Washington*, 541 U.S. 36, 44 & 68 (2004). There is nothing controversial concerning the importance of a subpoena, which every prosecutor knows may "demand to be effectuated", in accordance with *Roberts'* principles, to demonstrate good faith. Every prosecutor knows, in accordance with *Roberts* and *Barber* and *Berger*, that a subpoena is important to deter a witness from fleeing and to empower an entire police department to apprehend and bring the witness to court. In accordance with *Roberts*, there is nothing un-established in treating a State's failure to subpoena a witness, as one of several and numerous failures or missteps, especially when the witness is the complainant. The quantum of effort to be expended, dependent on the importance of the witness and her proclivity to disappear, is not only grounded in *Roberts*, but is a matter of common sense. (Op. at 11a); *Cook v. McKune*, 323 F.3d 825, 835-36 (10th Cir. 2003). The Seventh Circuit's analysis, like *McKune*'s construing *Roberts*, unassailably recognizes that the Sixth Amendment stakes are commensurately higher when the witness is the sole accuser and the sole eyewitness. (Op. at 11a-12a). If anything, the added federal applications only buttressed the inescapable conclusion of the unreasonableness of the state court's opinion. The petitioner seeks to overturn the Seventh Circuit despite its meticulous and well-grounded constitutional reasoning in favor of petitioner's ungrounded embrace of unreasonable state-courts. This is not AEDPA's purpose.

2. The Seventh Circuit's decision is correct and should not be disturbed.

The Seventh Circuit Court of Appeals correctly relied on a combination of facts and circumstances to measure the lack of good-faith diligence by the prosecutors to obtain the live

witness for retrial and the unreasonableness of the state court's determination thereon. (Op. at 10a-14a) These were:

- the State's ample notice of the complainant's extreme reluctance re-testify and of the complainant's probable attempt to evade it, yet the State did nothing about it until the eve of retrial (Op. at 12a-13a);
- the State's failure to talk to several people who might have known of the complainant's whereabouts, such as her current boyfriend, friends in the Chicago area, or persons at the beauty school that she had been attending (Op. at 11a, 14a);
- the State's conduct, instead, to duplicate previous efforts that the State knew had failed (Op. at 10a, 14a);
- the State's failure to issue a subpoena even though the complainant had lived at the mother's address, and even though the mother had been in contact with the complainant (Op. at 12a-13a); and
- the State's incentive to avoid locating the complainant, since she was a crucial witness whose testimony had been "pause-filled and evasive," whereas a reader could give a far better performance. (Op. at 11a-12a)

The Seventh Circuit was relying on the totality of the circumstances, for *Roberts*, as required.

The Seventh Circuit correctly applied the standard of habeas review. The Seventh Circuit relied on AEDPA and quoted AEDPA accurately and in full. Reciting AEDPA, the Seventh Circuit utilized and knew that a state court's adjudication cannot be overturned unless the adjudication is an unreasonable application----and not merely an incorrect application----of clearly established federal law as articulated by supreme court precedent. *Williams v. Taylor*, 529 U.S. 362 (2000).

Time and again, the Seventh Circuit repeated the deferential standard of "unreasonable application." (Op. at 2a, 7a-8a, 9a, 14a) The Seventh Circuit's pronouncements never wavered from the correct framework of "unreasonable application" as the "central question on appeal." (Op. at 9a) Articulated as the "central question" was "whether the state appellate court unreasonably applied Supreme Court precedent when it affirmed the trial court's unavailability determination." (Op. at 9a) The Seventh Circuit included an additional statement of deference

that the conclusion was "not reached lightly." (Op. at 14a) The Seventh Circuit was stating that the state-court's focus needed to be the "reasonable and diligent measures," which were found to be wanting and unreasonable pursuant to the habeas petitioner's burden of proof. (Op. at 7a, 9a) In measuring the state-courts, the Seventh Circuit emphasized that the government is **not** required to do "everything it can to get a witness to testify," which afforded the State considerable latitude. (Op. at 9a)

The Seventh Circuit referred to the findings and grounds for the rulings from the state courts. (Op. at 4a-14a) The Seventh Circuit took into consideration the trial court's ruling that the complainant "did not want to be found" and the appellate court's characterization of the short and belated search as "extensive" when the Seventh Circuit reviewed the case under *Roberts* and AEDPA. (Op. at 6a, 9a-10a, honoring AEDPA's well-settled provision authorizing habeas relief when an adjudication of the claim "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." 28 U.S.C. § 2254(d)(2)). The Seventh Circuit's inquiry was "reasonable" diligence not simply the due diligence inquiry on direct review. (Op. at 9a) Had the stage been a direct appeal, the record supports a determination that diligent actions would have been successful, but the Seventh Circuit's opinion exercised restraint.

The Seventh Circuit deferred to the state appellate court for its knowledge of un-cited federal law, even though the state appellate court did not measure the prosecutor's diligence under the refinements or components of the *Roberts'* rule. (Pet. Appen E. at 74a-85a) In so deferring, the Seventh Circuit exposed the unreasonableness of the state appellate court's analysis and conclusion with utmost respect. (Op. at 9a-14a) The Seventh Circuit exposed the

unreasonableness of the state courts by objectively setting forth the state tribunals' unreasonable adjudications in view of the prosecutor's conduct under the circumstances of-record. (Op. at 9a-14a) The Seventh Circuit found that the "extensive search" remark was refuted by the record of duplication of unsuccessful steps when other steps were known, available, and yet conspicuously untried. (Op. at 9a-11a) At the same time of the State's neglect of known leads, the State took steps known to be unreasonable: to wit, mechanically visiting the morgue when the mother said she was alive and had been speaking by telephone. (Op. at 10a) The complainant had expressed to the prosecutor her tremendous reluctance to re-testify as early as the date of the mistrial in November, which was repeated by the mother on March 3rd, but the State took no additional step until March 10th to locate or contact her. (Op. at 12a-13a) Even then, the State repeated the same steps when the State knew that other steps could be tried. (Op. at 10a) Throughout a period of four months, none of the available proactive measures, such as subpoenas or bench warrants or informal visits, were ever used or even attempted, despite knowledge of the complainant's address and the use of subpoenas in *Ohio v. Roberts* and the pivotal use of court process in *Barber v. Page*. (Op. at 10a-14a) No fairminded jurist or prosecutor could rule-out knowledge of the complainant's whereabouts by teachers, friends, and classmates at the beauty school, at which she had enrolled after the mistrial, yet the known and recent lead of the school was not explored by anyone. (Op. at 11a, RB7 at 18, EXC. at 31-32, 58) The known sources of the current boyfriend and the known streets of the complainant's prostitution were likewise glaringly and unreasonably ignored. (Op. at 11a, OB7 at 31) Unlike the unreasonable state courts, the Seventh Circuit did not refuse to consider the prosecutor's knowledge of the complainant's extreme reluctance to re-testify, her proclivity of disappearing, her importance in both demeanor and role, and the omission

of known steps that a diligent and reasonable prosecutor would be expected to take for a witness who is most important to both sides. (Op. at 11a-14a)

Indeed, the Seventh Circuit accepted the state-courts' factual finding of the complainant's demeanor at the mistrial and further grounded its statements of the importance of the complainant's demeanor in her pause-filled answers at the first trial, which the prosecutor then preferred to replace with a transcript and reader who was a better speaker than the complainant. The facts showed this prosecutorial course of conduct of urging the use of the reader, over the respondent's objection, despite the recency of the complainant's absence, the recency of a lead, and the unreasonable neglect of current friends and known streets. (OB at 48)

In sum, the Seventh Circuit was finding that the state appellate court was unreasonably applying *Roberts, Barber,* and *Berger* to the facts of the State's behavior. 28 U.S.C. § 2254(d)(1) & (d)(2). The state appellate court was unreasonably construing the federal law during the corrupted process of the erroneous and unreasonable application to the facts. 28 U.S.C. § 2254 (d)(1) & (2). The state court's erroneous treatment of the prosecutor's behavior and omissions was so indefensible, under these clearly established Supreme Court precedents, to be an unreasonable application warranting the respondent's habeas relief. There is no reason to review the Seventh Circuit's decision.

3. There is no conflict among the Circuit Courts of Appeals or with this Court.

There is no conflict in authority. The decision of the Seventh Circuit is based on *Barber*, *Berger* and *Roberts*, whose fundamental governing principles are the same as the Seventh Circuit's. No Circuit Court case or case from this Court holds that a comparable violation of *Roberts*, *Barber*, and *Berger* is not entitled to habeas relief. The State does not even allege a

conflict regarding the right to habeas relief under these circumstances. The petitioner is the party who is unaligned, because the petitioner departs from *Roberts'* reasonableness analysis by seeking, instead, to forbid a federal court from ever considering the failure to subpoena, the subpoena's proactive usefulness, or the witness' importance to a Sixth Amendment right.

Nor is there a split in the circuits or a conflict with this Court over proactive measures, because the Seventh Circuit never held that there is such a requirement, and no Circuit has held that they may never be factors. The petitioner's five citations do not conflict with the Seventh Circuit, because they, too, follow *Roberts*[8] and allow—and do not disallow--- the consideration of a subpoena as a factor. (Cert. Pet. at 19-21) Indeed, in suggesting otherwise, the petitioner either mis-characterizes their holdings or omits their salient facts. *United States v. Johnson*, 108 F.3d 919 (8th Cir. 1997) [accepting good faith because the failure to subpoena involved a minor unimportant witness]; *Christie v. Hollins*, 409 F.3d 120 (2d Cir. 2005) [excusing a defense attorney's lack of a subpoena on a friendly defense witness, where actual messages were indeed communicated between trials, albeit mis-communicated by a third party, unlike the wholesale abandonment here of contact and of leads, after a mistrial, by the prosecutor]; *Poe v. Turner*, 490 F.2d 329 (10th Cir. 1974) [involving no un-pursued leads of a missing witness from Utah except that "it was said" he had applied for employment on a railroad somewhere "in the midwest", and involving a second witness who had moved "somewhere in the state of New York" but "had testified only briefly, and on a matter that was not a real issue"]; *Martinez v. Sullivan*, 881 F.2d 921 (10th Cir. 1989) [observing that the State had twice subpoenaed the witness, telephoned him, purchased his airplane ticket, mailed him a travel itinerary, placed him on an unrelated bond, and

[8]One citation, *Poe*, is pre-*Roberts* but it matches *Roberts* good-faith equivalent.

reasonably believed that his incentive to remain free on bond would prevent him from skipping]; *Dres v. Campoy*, 784 F.2d 996 (9th Cir. 1986) [involving a prosecutor's decision not to re-arrest a minor, who had already been under subpoena, based on the prosecutor's particular trepidation over keeping a juvenile for "three weeks" in jail].

In *Dres*, a tactical decision to forego a subsequent material witness warrant was honored also because the re-arresting of the minor a second time was the only step that the prosecutor had not taken, which is a far cry from the pattern of missed opportunities that comprised the Seventh Circuit's analysis here. Wholly consistent with the Seventh Circuit, *Dres* embraces *Barber,* as well as *Roberts*, and reiterates that securing a witness' informal word is ordinarily an insufficient indication of a prosecutor' good faith to obtain the witness when a prosecutor is on notice of an uncooperative adult in danger of flight. *Dres*, citing *People v. Masters*, 134 Cal. App. 3d 509 (1982), citing *Barber v. Page.* Thus, the Seventh Circuit is not "impossible to reconcile" with the Ninth Circuit, whose divergent facts are readily distinguishable and whose embrace of *Barber* is without a doubt. (Cert. Pet. at 20)

Entirely consistent with these Circuit Courts, the Seventh Circuit never intimated that good faith requires a subpoena of a witness who has no recent known address (*Poe*). The Seventh Circuit explicitly agreed that a lesser effort exerted toward a minor witness is constitutional (*Johnson*). The Seventh Circuit, having stated that "everything" need **not** be done (Op. at 9a), consistently disagrees that "every lead, no matter how nebulous, must be tracked to the ends of the earth" (*Poe*). The Seventh Circuit would accept that a prosecutor who is confronted with a juvenile witness could be making other comparable arrangements to secure her appearance besides sending and keeping the minor for many weeks in jail (*Dres*). The Seventh Circuit agreed

that *per se* rules for a particular method are not the test of unconstitutionality (*Martinez*). The petitioner's assertion of conflict with these cases is the petitioner's invention.

No conflict arises with *Harrington v. Richter,* 131 S. Ct. 770 (2011) and *Yarborough v. Alvarado*, 541 U.S. 652 (2004), which address the habeas standard for general versus specific constitutional rules based on a continuum. (Cert. Pet. at 13) There is no debate over the principle that the more general the rule, the greater the leeway afforded to state courts. (Cert. Pet. at 13) In this case, there are the narrowing principles in *Roberts* itself, which have existed in *Roberts* for over thirty years. *Ohio v. Roberts*, 448 U.S. at 74. Thus, the petitioner's understatement—if not misstatement--- of the *Roberts*' rule as a "general rule" of solely "reasonableness" and "good faith" should not remain unnoted. (Cert. Pet. at 13-14) The *Roberts/Barber* claim is not purely a generalized rule, akin e.g., to *Strickland's* rudderless one, but a standard "refined" by the "safely emerge[d]" principles. *Ohio v. Roberts*, 448 U.S. at 74. *Roberts*' pronouncement of the non-performance of a "futile act" is itself narrow and non-speculative because *Roberts*' primary example of futility is "the witness' intervening death." *Roberts,* 448 U.S. at 74. The seminal later case of *Crawford*, while not applying retroactively to this case, alludes to the "relatively strict rules of unavailability." *Crawford,* 541 U.S. at 44. No case has ever conflicted with the Seventh Circuit's treatment and held that any heightened or different statement of deference beyond AEDPA's deference applies. Unless and until a federal circuit creates a conflict, there is no controversy to be decided.

Suffice it to add that the petitioner's inability to identify a controversy in the case-law is not surprising. Unlike other claims having a "reasonableness" standard, a *Roberts* claim is not stymied by a presumption of competence--- or by a possible myriad of general off-the-record

strategies---- but encompasses a qualitatively different obligation to bring a witness to trial which is specific, verifiable, and clear-cut. Whereas a prosecutor may comply with the objective good-faith requirement by an assortment of methods, a prosecutor has no strategic choice or leeway to avoid live testimony and obtain an unfair advantage at a second trial. There is no "presumption" that a prosecutor who fails to bring a live witness to trial is acting reasonably, because there is no "strategy" or adversarial strategies, to avoid live testimony, permitted to a prosecutor. If anything, a prosecutor's strategic choice to avoid live testimony is the epitome of bad faith. No case creates a conflict, and no case creates a "presumption" of prosecutorial reasonableness. The petitioner's intimation of a higher standard of review beyond AEDPA's deferential standard relies on nothing. In sum, the petitioner identifies no conflict. There is no split of authority for this Court to resolve.

4. The petitioner's "Question Presented" is improper because it is a gross truncation and misstatement of the Seventh Circuit's analysis and holding.

The Seventh Circuit did not overturn the state court conviction "on the ground that prosecutors could have done more" than "superhuman efforts" to ensure the complainant's appearance at trial. (Cert. Pet. at 1) The Seventh Circuit's decision is not parochially based on speculation that "more could be done" but on a broad pattern of conduct, of both behavior and neglect, regarding leads and opportunities known to the State, including how the State dealt with the matter of its most important witness. (Op. at 7a-14a) "Superhuman" effort is not an historical fact, and AEDPA's deference rule does not bind federal courts to a state-trial judge's off-the-cuff remark, hyperbole, or untenable and unreasonable choice of a word. 28 U.S.C. 2254 (d)(2). *Roberts* holds that the "lengths a prosecutor must go" must depend on the nature of the case. *Ohio v. Roberts*, 448 U.S. at 74. Under *Roberts*, a short, belated, mechanical, and less-than thorough investigation was obviously not "superhuman," especially when the most important

witness was at stake. An insufficiency of "superhuman" effort and a speculation that more "could have been done" were not the holding or analysis in this case. (Op. at 7a-14a) The petitioner's "Question Presented" is not presented by this case----even aside from the failure to present a proper and important certiorari question for review.

5. A well-settled application of *Barber* and *Roberts* to facts is not an important federal question.

The rarity of litigation on unavailability violations further diminishes the importance of this case to anyone but the parties. Unavailability claims are rare, due to the enormity of tools in the State's arsenal to present its witnesses, the well-settled law, and the infrequency of both losing and needing the live witness for a re-prosecution. In the future, the "indicia of reliability" test for the absent witness' extraordinary demeanor will seldom still be litigated, because *Crawford* has superseded *Roberts* on this other criterion. Few prosecutors will behave so badly as not to subpoena, not to maintain contact, not to look very long, and not to pursue leads for its most important witness. Few prosecutors will behave so brashly as to pursue a course of repeated neglect and then present a better speaker to replace a pause-filled evasive complaining witness following a partly hung jury and acquittal. Review of this case is unwarranted where review of the merits would be a vacuous exercise, and where the extremity of the prosecutor's aberrant behavior is unlikely ever to happen again.

The Seventh Circuit did not impose "duties." (Cert. Pet. at 11, 17) The Seventh Circuit never stated that subpoenas are "required" in every case or in "every case where the witness is 'critical' and the State learns of 'her reluctance to testify and her proclivity to disappear without informing anyone of her whereabouts.' " (Cert. Pet. at 10) On the contrary, the Seventh Circuit emphasized that subpoenas were **not** a requirement but merely a factor among other facts. (Op. at

12a-14a); *Barber v. Page*, 390 U.S. at 724-725 [wherein the failure to attempt a writ of *ad testificandum* was a decisive factor for a lack of good faith in a pre-AEDPA habeas case]. The State's failure to subpoena the witness was merely one factor, among many, contributing to the conclusion of the unreasonableness of the state court judges, who refused to consider it or weigh the factors in context. (Op. at 14a) A subpoena was not a "duty" but "one such measure" among other measures----(like obtaining a material witness arrest warrant, or maintaining contact with the witness after the mistrial, or resuming contact with the witness before the proverbial eve of trial, or interviewing the current boyfriend, or pursuing the mother's lead on the beauty school)----none among them being tried. (Op. at 11a, 12a, 13a, 14a) The petitioner is twisting the Seventh Circuit's analysis and misstating its words. All the Seventh Circuit did was apply settled law to facts.

The Seventh Circuit's decision is a fact-bound grant of habeas relief that does not present any novel question concerning how to interpret or implement AEDPA, in contrast to cases like *Harrington* and *Pinholster*. *Harrington*, 131 S. Ct. at 783 [applying AEDPA's adjudication requirement to state courts' summary denials]; *Cullen v. Pinholster*, 131 S. Ct. 1388, 1401 (2011) [resolving the complicated legal conundrum of the viability of evidentiary hearings on habeas claims of ineffective assistance of counsel]. There is no legal or open question in the petitioner's case. The petitioner appears to be seeking a *de novo* review by this Court to make an overreaching decision to permit the irrational decision of the state-court to stand. Nowhere does the petition allege that the Seventh Circuit improperly stated AEDPA or *Roberts*. The petition is not worthy of certiorari where Rule 10 does not favor a petitioner's assertions of "erroneous factual findings or the misapplication of a properly stated rule of law." S. Ct. Rule 10.

CONCLUSION

For the reasons stated, the respondent prays that this Honorable Court deny a writ of certiorari.

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Dated: August 17, 2011.