

FILED
United States Court of Appeals
Tenth Circuit

PUBLISH

UNITED STATES COURT OF APPEALS

August 25, 2026

FOR THE TENTH CIRCUIT

Christopher M. Wolpert
Clerk of Court

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

No. 24-7100

COKER DEAN BARKER,

Defendant - Appellant.

**Appeal from the United States District Court
for the Eastern District of Oklahoma
(D.C. No. 6:21-CR-00175-JFH-1)**

Howard A. Pincus, Assistant Federal Public Defender (Virginia L. Grady, Federal Public Defender, with him on the briefs), Denver, Colorado, for Defendant-Appellant.

Jarrold Leaman, Assistant United States Attorney (Linda Epperley, Assistant United States Attorney; Christopher J. Wilson, United States Attorney, with him on the brief), Muskogee, Oklahoma, for the United States of America.

Before **TYMKOVICH**, **MURPHY**, and **MORITZ**, Circuit Judges.

MORITZ, Circuit Judge.

Coker Barker appeals his murder and firearm convictions, arguing that the district court's decision to allow William Lozer's prior testimony to be read to the jury violated his Sixth Amendment confrontation rights because the government

failed to show Lozer was unavailable despite reasonable, good-faith efforts. Because we conclude that under the circumstances, the government made reasonable, good-faith efforts to locate Lozer, we affirm Barker’s convictions.

Background

In May 2021, a grand jury indicted Barker and a codefendant for murder in Indian Country, using a firearm in relation to a crime of violence, and causing death in the course of violating 18 U.S.C. § 924(c), all in relation to the death of Mickel Kelough.¹ Before Barker’s April 2023 trial, the government—noting that it could not locate Lozer—sought to introduce Lozer’s testimony from a January 2020 preliminary hearing in Barker’s related state-court case.²

Under oath and subject to cross-examination from Barker’s counsel, Lozer testified that on the day of Kelough’s death, Barker told Lozer “that he was interrogating someone and asked [Lozer] to keep a lookout.” R. vol. 1, 114. Lozer further testified that after Kelough was killed, Barker “told [Lozer] about the killing[,] and [Lozer] recommended that [Barker] clean up the mess.” *Id.* at 115. Lozer also testified that while the two men were detained on unrelated charges, Barker wrote several notes, or “kites,” to Lozer detailing Barker’s murder of

¹ We adopt the spelling of various individuals’ names as set out in Barker’s opening brief. We note, however, that certain parts of the record spell Kelough’s name as “Michael Kelough” and Lozer’s name as “William Lozier.”

² Although Oklahoma initially charged Barker, the state case was later dismissed for lack of jurisdiction.

Kelough. *Id.* In one, Barker wrote, “we pretty much beat him to death. All of us didWe didn’t rob him. Didn’t take his money. He owed us.” *Id.* at 1162.

Opposing the government’s motion to admit this prior testimony from Lozer, Barker invoked his Sixth Amendment right to confront a witness against him. In particular, Barker argued that the government failed to make the required showing that Lozer was unavailable—a showing that turns on whether the government made reasonable, good-faith efforts to locate Lozer.

The government reported its efforts to the district court on several occasions. Those efforts commenced in February 2023, when the government prepared a subpoena for Lozer in anticipation of the trial scheduled for April. Soon thereafter, the government’s case agent asked the county sheriff for help locating him. In early March, a sheriff’s deputy contacted Lozer’s family in Seminole, Oklahoma. Lozer’s family reported “that they [had] not heard from [Lozer] in months.” *Id.* at 266. They also reported that Lozer had an infection on his arm when they last saw him; that they had taken him to a homeless shelter in Oklahoma City at his request; and that he had not attended a family member’s funeral, which they described as “odd.” *Id.* at 173. The case agent also contacted Lozer’s public defender, who likewise had not heard from Lozer in months, despite two outstanding warrants; the public defender reported that Lozer was “homeless and had no phone.” *Id.* at 266 (quoting *id.* at 174).

In late March, an FBI agent unsuccessfully attempted to locate Lozer “at a residence in Seminole . . . where it was believed he might be staying.” *Id.* at 269. According to the agent’s report, “[t]here was no answer at the front door after several

knocks[,] . . . no vehicles were parked in the driveway,” and there was no mail bearing Lozer’s name. *Id.* at 272. A separate FBI agent contacted at least three law-enforcement sources in the Seminole area seeking information on Lozer, again without success. The agent was able, however, to confirm that Lozer’s last-known addresses dated to 2020 “or prior” and that the Seminole residence “had been a rental by [Lozer’s] former girlfriend approximately four or five years ago.” *Id.* at 273 (cleaned up). The FBI agent also reported that the sheriff’s deputy who had previously contacted Lozer’s family followed up and learned that he was dropped off not “at a specific [homeless] shelter, but rather at Tinker Air Force Base,” where Lozer asked his relative for directions to “Devon Tower.” *Id.* at 270, 274.

Another FBI agent contacted Tinker Air Force Base, four surrounding law-enforcement offices, and three nearby homeless shelters. The Oklahoma City Police Department reported that Lozer was “transient.” *Id.* at 274. It also provided a telephone number for Lozer, which, when called, resulted in an automated not-in-service message. The air-force base and remaining police departments reported no contact with Lozer, and calls to the shelters “went unanswered.” *Id.*

The district court ultimately concluded that despite the government’s reasonable, good-faith efforts, Lozer was an unavailable witness. At trial, the government introduced Lozer’s prior testimony over Barker’s standing objection; it also admitted the kites that Barker had written to Lozer, accompanied by evidence that Barker’s fingerprints were on all but one of them. Additionally, the government introduced evidence that Barker made incriminating statements to several other

individuals besides Lozer, attempted to enter Mexico a few days after Kelough's death, and burned potentially damaging physical evidence.

The jury convicted Barker on all counts.³ The district court sentenced Barker to life in prison.

Barker appeals.

Analysis

On appeal, Barker renews his argument that admitting Lozer's testimony violated his Confrontation Clause rights. Our review is de novo.⁴ *United States v. Ibarra-Diaz*, 805 F.3d 908, 918–19 (10th Cir. 2015).

The Sixth Amendment's Confrontation Clause specifies that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the

³ After the verdict, on the government's motion, the district court vacated Barker's conviction for causing death in the course of violating § 924(c) as duplicative of Barker's conviction for using a firearm in relation to a crime of violence.

⁴ The government contends that we should review for plain error because Barker failed to object at trial when Lozer's prior testimony was read into evidence. But Barker's pretrial motion raised a Confrontation Clause issue, which the district court clearly and definitively ruled on. Per Federal Rule of Evidence 103(b), Barker wasn't required to renew his objection at trial "to preserve a claim of error for appeal."

Alternatively, the government contends that we should review for abuse of discretion because the argument relates to the admission of evidence. But whether admission of evidence violates Confrontation Clause rights is a question of constitutional law, not a discretionary decision about the Federal Rules of Evidence. Notably, the very quotation the government advances disproves its abuse-of-discretion argument: "Although a district court's evidentiary rulings are reviewed for abuse of discretion, *whether admission of such evidence violates the Confrontation Clause is reviewed de novo.*" Aplee. Br. 21–22 (emphasis added) (quoting *United States v. Hargrove*, 382 F. App'x 765, 778 (10th Cir. 2010)).

witnesses against him.” U.S. Const. amend. VI. The clause “bars the admission at trial of ‘testimonial statements’ of an absent witness unless [h]e is ‘unavailable to testify, and the defendant has had a prior opportunity’ to cross-examine h[im].” *Smith v. Arizona*, 602 U.S. 779, 783 (2024) (cleaned up) (quoting *Crawford v. Washington*, 541 U.S. 36, 53–54 (2004)).

Lozer’s prior testimony in state court was undoubtedly “testimonial” for Confrontation Clause purposes. *See Michigan v. Bryant*, 562 U.S. 344, 354 (2011) (noting that “at a minimum,” testimonial statements include “prior testimony at a preliminary hearing” (quoting *Crawford*, 541 U.S. at 68)). And Barker does not contest that he had a prior opportunity to cross-examine Lozer. So the only question is whether Lozer was an unavailable witness.

A witness is unavailable for Confrontation Clause purposes when the government’s reasonable, “good-faith efforts,” considered in the circumstances, nevertheless fail to procure the witness for trial. *Ohio v. Roberts*, 448 U.S. 56, 74 (1980), *abrogated on other grounds by Crawford*, 541 U.S. 36. The government has the burden to show that its efforts meet that standard. *Id.* at 74–75; *see also United States v. Burden*, 934 F.3d 675, 686 (D.C. Cir. 2019). “[P]erfunctory attempts” to locate witnesses are not sufficient. *Cook v. McKune*, 323 F.3d 825, 839 (10th Cir. 2003).

At the same time, “‘in hindsight, [one] may always think of other things’ the prosecution could have done.” *Acosta v. Raemisch*, 877 F.3d 918, 927 (10th Cir. 2017) (quoting *Roberts*, 448 U.S. at 75). But the Confrontation Clause does not

require efforts that have a “great improbability” of “locating the witness.” *Roberts*, 448 U.S. at 75–76. Accordingly, we have declined to adopt “a per se rule defining the measures that the prosecution must take before a witness can be deemed unavailable.” *Cook*, 323 F.3d at 835 (cleaned up); *see also Martinez v. Sullivan*, 881 F.2d 921, 924 n.1 (10th Cir. 1989) (“We think that deciding whether a prosecutor’s efforts are ‘reasonable’ and in ‘good-faith’ requires us to consider all the circumstances rather than to apply a per se rule.”).

Instead, we’ve set out several, nonexclusive considerations in evaluating the reasonableness of the government’s efforts: (1) “the more crucial the witness, the greater the effort required to secure his attendance”; (2) “the more serious the crime . . . the greater the effort the government should put forth”; (3) “where a witness has special reason to favor the prosecution, . . . the defendant’s interest in confronting the witness is stronger”; and (4) “a good measure of reasonableness is to require the [s]tate to make the same . . . effort to locate and secure the witness for trial that it would have made if it did not have the prior testimony available.” *Cook*, 323 F.3d at 835–36.

Applying these considerations to the facts here leads us to conclude the government acted reasonably and in good faith in searching for Lozer and nevertheless was unable to procure his presence at trial. First, as the government rightly concedes, Lozer’s prior testimony damaged Barker’s defense and was at least “important” to the government’s case. Aplee. Br. 26. That said, other witnesses testified that Barker made incriminating statements, Barker stipulated that he tried to

enter Mexico a few days after Kelough's murder, and some of the incriminating kites admitted at trial had Barker's fingerprints on them. And although murder is indisputably a serious crime that weighs in favor of substantial efforts to find Lozer, Barker identifies no "special reason" why Lozer would favor the prosecution. *Cook*, 323 F.3d at 836.

Further, despite the abstract possibility that the government would have taken additional steps to find Lozer had it not had his prior testimony, it's just as likely that the government would have reached the same conclusion—that Lozer was not likely to be found—even if it lacked his prior testimony. After all, Lozer was known to be transient. He lacked much in the way of contact information. What contact information the government did have was no longer accurate. His public defender had not heard from him. Nor had his family. He did not appear to be living at a former address in Seminole. Neither Tinker Air Force Base, his last-known location, nor any of the law-enforcement agencies surrounding the base had any recent contact with him. Despite the efforts of the case agent, sheriff's deputy, and three separate FBI agents, no recent information on Lozer's whereabouts or contact information turned up between February 2023 and March 2023. The government looked in likely places and checked with a variety of individuals likely to know his whereabouts. Yet it was unable to find him.

Barker suggests the government should have made additional efforts, such as checking with Lozer's family or calling the shelters again, visiting the shelters in person, or revisiting Lozer's known address. But in these circumstances, such efforts

were highly unlikely to be successful. *See Roberts*, 448 U.S. at 76. Lozer’s family dropped him at Tinker Air Force Base “months” prior to March 2023. R. vol. 1, 173. And the past-known address was Lozer’s former girlfriend’s pre-2020 address. Under these circumstances, further efforts by law enforcement appear equally unlikely to have succeeded.

No doubt the government could have pressed Lozer’s family for more detailed information. It could have canvassed every homeless shelter in the greater Oklahoma City area. It could have sent emails instead of calling. It could have begun looking for Lozer further in advance of trial. But “the Sixth Amendment does not require the prosecution to exhaust every possible means of producing a witness at trial.” *Acosta*, 877 F.3d at 930. No evidence indicated that Lozer was even alive in March 2023, let alone living in the Oklahoma City vicinity. Under these circumstances, the government’s efforts were far from perfunctory.

For comparison, consider *United States v. Rothbart*, where we concluded that the government failed to make a good-faith effort to obtain an absent witness when the government released the witness from a subpoena knowing the witness would be leaving the country. 653 F.2d 462, 466 (10th Cir. 1981). In *Cook*, we likewise found the prosecution’s efforts to locate the witness lacking where the witness was the *only* witness to testify that the defendant committed the murder, he received immunity in exchange for his preliminary-hearing testimony, and the prosecution’s efforts in advance of the preliminary hearing far outshone its efforts in advance of trial. *Cook*, 323 F.3d at 836–37. In fact, after securing the preliminary-hearing testimony, the

prosecution in *Cook* didn't even engage law enforcement to locate the witness, relying instead on the witness's equivocal promise to return to Kansas for trial. *Id.* at 837.

The facts here are starkly different. Lozer's absence was not of the government's own making, as in *Rothbart*. He was transient, and neither his family nor his attorney had seen him in months. And the government's efforts were not feeble in comparison to prior, pretrial efforts, as in *Cook*. What's more, the prosecution repeatedly engaged local and national law enforcement to find Lozer, including the FBI.

In sum, despite the government's reasonable and good-faith efforts to locate Lozer, Lozer was unavailable for trial. The introduction of Lozer's prior, cross-examined testimony thus did not violate Barker's confrontation rights.⁵

Conclusion

Under these circumstances, the government made reasonable, good-faith efforts to locate Lozer, and the district court did not violate Barker's Confrontation Clause rights by admitting Lozer's preliminary-hearing testimony. Accordingly, we affirm his convictions. Finally, we grant Barker's unopposed motion to supplement the record on appeal.

⁵ Finding no violation of the Confrontation Clause, we do not reach the parties' harmless-error arguments.