No. _____

_____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

ANDREW JOHN MILLER – Petitioner

vs

UNITED STATES OF AMERICA - Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO

6TH CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether review is warranted because the Petitioner-Appellant's convictions must be reversed and this matter remanded for a new trial where the admission of a Preliminary Examination transcript violated his 6th Amendment right to confront that witness, contrary to clearly established law?

Petitioner-Appellant Answers: "Yes"

Respondent-Appellee Answers: "No"

LIST OF PARTIES

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

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OPINIONS BELOW

Petitioner appealed his convictions in the Michigan appellate courts to the Michigan Court of Appeals, which rendered a written opinion denying Mr. Miller's appeal in all respects, in an Opinion dated April 22, 2010 (Appendix A, Michigan Court of Appeals Decision; APP 1-7). Petitioner sought leave in the Michigan Supreme Court, which denied leave on February 7, 2011.

Petitioner then sought habeas relief in the Western District of Michigan pursuant to 28 USC 2254. Petitioner's Writ of Habeas Corpus was denied on all claims in an opinion dated December 19, 2016, adopting the Magistrate's Report and Recommendation. (Appendix B, Western District of Michigan Opinion; APP 8-9)

Petitioner respectfully prays that a Writ of Certiorari issue to review the Opinion of the United States Court of Appeals, Sixth Circuit, affirming the District Court. (Appendix C, and is unpublished, Case Number 17-1061, dated June 12, 2018; APP 10-23). Petitioner filed a Petition for Reconsideration En Banc with the 6th Circuit, which was denied in an order dated August 10, 2018. (Appendix D, Order Denying Petition for Rehearing; APP 24).

JURISDICTION

The United States 6th Circuit Court of Appeals decided this case on June 12, 2018. A Petition for Reconsideration En Banc was filed by Petitioner with the 6th Circuit. The 6th Circuit denied the Petitioner for Reconsideration En Banc on August 10, 2018. The jurisdiction of this Court is invoked under 28 USC 1254(1); see also Rules of the Supreme Court of the United States, Rule 10.

RELEVANT STATUTORY AND CONSTITUTIONAL PROVISIONS

Section 2254 of Title 28 of the United States Code, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), reads, in relevant part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim – [¶] (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or [¶] (2) 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.
>
> (e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence. [¶] (2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that – [¶] (A) the claim relies on – [¶] (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or [¶] (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and [¶] (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

UNITED STATES CONSTITUTION, 6TH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall

have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

I. Brief Summary of the Allegations

Petitioner asserts that his 6th Amendment right to confront a witness, specifically, Angela McConnell, was violated when the trial court permitted the introduction of her Preliminary Examination over objection.

Mr. Miller asserts that under clearly established law on the 6th Amendment right to confront witnesses, a Preliminary Examination can never serve as an adequate opportunity to cross-examine to satisfy the 6th Amendment.

Even if a Preliminary Examination may afford, in some limited cases, an adequate opportunity to cross-examine to satisfy the 6th Amendment right to confrontation, under the facts of this case, the Preliminary Examination could not be admitted where the witness had recanted her version of events from the Preliminary Examination and withdrawn from her plea agreement.

Mr. Miller was certainly prejudiced by the admission of the Preliminary Examination testimony where the evidence was weak without the testimony of Ms. McConnell. There was no physical evidence tying Mr. Miller to the crime. No independent witnesses saw Mr. Miller at the scene.

Mr. Miller requests that this Honorable Court grant his Petition for Writ of Certiorari, reverse his convictions and order a new trial. At the new trial, the Preliminary Examination testimony of Ms. McConnell should not be admitted provided that she remains unavailable as a witness.

II. Facts Relevant to the Appeal of the Convictions

On May 22, 2008, a jury convicted Andrew Miller, the Petitioner, on all counts in the Information. Specifically, Mr. Miller was found guilty of Home Invasion 1st Degree (Count 1), Perjury (Count 2), Felony Murder (Count 3), Felony Murder (Count 4), Felony Murder (Count 5), and Felony Firearm (Count 6). (Felony Information, RE 2, Page ID# 183-185).

Marinus and Sary Polderman, along with their daughter, Anna Lewis, were murdered on Friday, August 31, 2000. (See generally Jury Trial transcripts, hereinafter "JT") Due to the nature of the crime, the police began an exhaustive investigation lasting over seven years. (JT V, 944-952; APP 239-247) As of September 2006, the police had made no arrests. (JT V, 944-952, APP 239-247)

Years after the crime, the "cold case" unit became involved, and within a few months, law enforcement was able to extract alleged confessions/admissions from co-defendant Brandy Miller, co-defendant Angela McConnell, and others. (JT V, 957-959; APP 252-254) These statements were used to prosecute five people: Benjamin Platt, Brandy Miller, Jerome Williams, Angela McConnell, and Mr. Miller. None of the statements by people who were, themselves, implicated in the crime, were corroborated with a single piece of physical evidence. In fact, the versions of the murders elicited from Ms. Miller and Ms. McConnell were contradicted by the known physical evidence.

Trial began on May 13, 2008. Various witnesses testified for the Government, including Ms. Miller, Mr. Miller's sister. The Government also introduced the

Preliminary Examination transcript of Ms. McConnell, over the objection of defense counsel. (See generally JT IV)

Put simply, Mr. Miller was convicted only on the testimony of Ms. Miller, the Preliminary Examination transcript from Ms. McConnell, and Mr. Miller's statements. There was absolutely no physical evidence tying any of the five co-defendants to the crimes charged in the Information. Further, no witnesses separate from the co-defendants could be found to substantiate a single fact concerning the crimes charged in the Information.

A. JURY TRIAL

Jury Trial began on May 13, 2008 and ended on May 22, 2008. Various law enforcement witnesses testified for the Government, including those who took the statements from Mr. Miller, and officers who had conducted a forensic analysis of the crime scene. Officers also testified concerning the extensive attempt they made to find physical evidence tying the co-defendants to the crimes. (JT V, 856-982; APP 152-277) Further, law enforcement attempted to find a witness independent of the five suspects who could place any of the co-defendants at the murder scene during the time the crimes were committed. (JT V, 846; APP 148) In the end, there was absolutely no physical evidence tying any of the co-defendants to the crimes, (JT III, 500-504, 527, 538-550; JT V 875-876, 993-994; APP 66-70, 93, 104-116; APP 171-172, 278-279), nor were there any independent witnesses to the crimes.

The physical evidence in this case was the only real evidence untainted by motives to lie and statements made under police pressure during lengthy and

repeated interrogations. The stories of Brandy Miller, and others, simply did not match the known physical evidence.

Fortunately for Mr. Miller, the police conducted an incredibly thorough investigation of the crime scene in this case. The best and most reliable evidence for Mr. Miller came from the government's own forensic expert, Marty Johnson. Detective Johnson, at the time of the trial, had over 34 years of experience as a forensic field investigator. (JT III, 439, 481; APP 046-047) He directed the overall collection of evidence at the crime scene. (JT III, 484-485; APP 050,-051) Detective Johnson also conducted a thorough analysis of Mr. Miller's truck, looking for any DNA evidence linking this truck, which was allegedly used in the murders, to the versions of the murders provided by Brandy Miller and others. (JT III, 538-550; PP 104-116)

The murder of the Polderman's and Ms. Lewis was gruesome. The crime scene was strewn with blood. Law enforcement took blood samples from everywhere and anywhere that blood was found in the house and garage. (JT III, 487-489: APP 053-055) It took DNA samples from everywhere and anywhere including the latex found in the garage, fingernail clippings from the three victims, and even a single eyelash found on the stairs. (JT III, 495-496; APP 061-062) Fingerprints were lifted from every possible point of contact, including all the door handles, the door of the car in the garage, and the phone in the kitchen. (JT III, 496, 504; APP 062, 070)

None of this known, scientific evidence found at the murder scene identified Mr. Miller in this case. (JT III, 481-557; APP 047-123) In fact, none of this uncontested, physical evidence matched any of the five people that the government

claimed murdered the Polderman's. (JT III, 481-557; APP 047-123) However, law enforcement found DNA evidence which identified an "unknown donor" from the two pieces of latex found in the garage in the blood of Mr. Polderman. (JT III, 508, 513; APP 074-079) Mr. Miller's DNA was not found in the Polderman home. (JT III, 526-527; APP 092-093) Mr. Miller's fingerprints were not found in the Polderman home. (JT III, 481-557; APP 047-123)

Law enforcement constructed a timeline establishing when the murders occurred. (JT V, 947-948; APP 242-243) Ms. Lewis arrived at the Polderman home between 2:10 p.m. and 2:20 p.m. and therefore could not have been attacked prior to that time. (JT V, 948; APP 243) The murder scene was first discovered by Fred Lewis somewhere between 5:30 p.m. and 6:00 p.m. (JT II, 415-422; APP 038-045)

In an effort to find any independent witnesses, law enforcement interviewed numerous people and put up fliers in the surrounding communities for any information. (JT V, 846; APP 148) Several witnesses who passed by the Poldermans' home between 2:30 p.m. and 6:00 p.m. were interviewed. (JT V, 1006-1015; APP 280-289) None provided any useful information. As an example, Teresa Gipson, who had an incentive to solve the murders of her family, testified unequivocally that she passed by the Polderman home on three separate occasions. (JT V, 1006-1015; APP 280-289) Although Brandi Miller claimed that a yellow Lincoln and a grey truck were driven to the Polderman home, she never saw a yellow Lincoln on the road or in the driveway. (JT V, 1006-1015; APP 280-289) Nor did she see a grey truck on the road or in the driveway. (JT V, 1006-1015; APP 280-289) She never saw anyone walking around the Polderman home. (JT V, 1006-

1015: APP 280-289) In the end, the Government did not, and could not, present one independent, untainted witness who saw the Lincoln or the truck at the Poldermans on the day of the murders. (JT V, 1006-1015; APP 280-289)

The prosecutor was left with only the testimony of co-defendants and any statements made by Mr. Miller to prove the case against Mr. Miller. The primary witness for the Government at trial was Ms. Miller, who received an exceedingly favorable plea resolution in exchange for her testimony. Ms. Miller was facing the same charges as Mr. Miller, mandatory life for Felony Murder. She testified unequivocally that she would have told the police anything to avoid a mandatory life sentence. (JT III, 673-674; APP 145-146) She emphasized repeatedly that she wanted to get home to her children as soon as possible and told the police her "trial version" of facts in order to do so. (JT III, 631, 672-674; APP 126, 144-146)

Further, Ms. Miller's statements contradicted the known physical evidence and made little sense. For instance, she testified that Mr. Polderman did not enter the garage at any time during the assaults. (JT III, 655-657; APP 134-136) Yet, the prosecutor's own expert witness testified, without challenge, that the blood evidence found in the garage established that Mr. Polderman was, in fact, in the garage during the murders. (JT III, 523-525; APP 089-091)

Ms. Miller, and for that matter Ms. McConnell, claimed that Ms. McConnell hit Ms. Lewis over the head with a crowbar in the kitchen area near the stairs on the main floor. (JT III, 660-661; APP 137-138) They testified that Ms. Lewis was bleeding so excessively that Ms. McConnell got blood all over her arm. (JT III, 660-661; APP 137-138) However, the Government's own expert testified, again without

challenge, that Ms. Lewis' blood was not found in the kitchen or near the stairs. (JT III, 523, 532; APP 089-098) That is a fact, not a story.

Ms. Lewis' blood was found in the back bedroom (JT III, 532; APP 098), but neither Ms. Miller nor Ms. McConnell could explain how Ms. Lewis ended up there. (JT III, 661-662; APP 138-139) Ms. Miller also told the jury that co-defendant Mr. Platt was bleeding in the Polderman home, but somehow, once again, no physical evidence of his blood was found in the home. (JT III, 648; APP 131) At trial, Ms. Miller also claimed that she vomited outside the home, but she told the police on an earlier date that she had vomited in the basement. (JT III, 663-664; APP 140-141) No vomit was found outside or inside the home.

Separate from Ms. Miller's testimony, the People introduced the Preliminary Examination testimony of Ms. McConnell over defense objection. Ms. McConnell had originally reached a plea agreement with the Government to testify at trial. That agreement called for a prison sentence of 35 to 52½ years. (JT IV, 693; APP 113) Prior to Mr. Miller's trial, Ms. McConnell recanted her statements made during the Preliminary Examination. (JT V, 849-851; APP 149-151) She moved the Court and was granted a withdrawal of her plea. Therefore, at the time of Mr. Miller's trial, Ms. McConnell no longer had a valid plea agreement with the Government and was asserting her innocence to the charges. During Mr. Miller's trial, Ms. McConnell asserted her 5th Amendment right to not incriminate herself, thus making her unavailable for cross-examination by the defense. (JT I, 4-6; APP 025-027)

The Government sought to introduce only Ms. McConnell's Preliminary Examination testimony and specifically requested that any evidence that Ms. McConnell had withdrawn from the plea agreement be excluded from trial. (JT I, 11-13; APP 032-034) Mr. Miller objected to the admission of any portion of the Preliminary Examination transcript on the basis that he would not be able to confront Ms. McConnell on her recantation including her assertion of innocence and other reasons for withdrawing from the plea agreement. (JT I, 7-11, 13-16; APP 028-032, 034-037) In the alternative, Mr. Miller specifically sought the admission of any evidence that Ms. McConnell had withdrawn from the plea agreement and was no longer an available witness for the Government. (JT I, 7-11; APP 028-032)

The Court permitted the Government to introduce Ms. McConnell's Preliminary Examination transcript, even though Mr. Miller would have no opportunity at trial to cross-examine Ms. McConnell on her recantation and the reasons for the same. (JT I, 16; APP 037) At the time of the Preliminary Examination, Mr. Miller had absolutely no idea that Ms. McConnell intended to recant or withdraw her plea. Thus, Mr. Miller could not and should not have been expected to cross examine on those vital areas.

The Court also denied Mr. Miller's request to introduce evidence that Ms. McConnell had withdrawn from the plea agreement. (JT V, 905; APP 200) The Government introduced the Preliminary Examination transcript, including the portions detailing Ms. Mc Connell's plea agreement. Because Mr. Miller was not permitted to introduce evidence of the withdrawal of the plea, the jury was left with the mistaken impression that they should assess Ms. McConnell's credibility based

on the plea agreement reached, even though that plea agreement no longer existed, and Ms. McConnell maintained her innocence.

At sentencing on June 30, 2008, Mr. Miller received mandatory life sentences on Counts 1, 2, and 3, 127 months to 40 years on Count 4, and 210 months to 40 years on Count 5.

B. DECISIONS OF MICHIGAN APPELLATE COURTS

Mr. Miller raised each of the issues contained in the Petition in the Michigan Court of Appeals and the Michigan Supreme Court. The Court of Appeals affirmed the judgment of the trial court. (APP 1-7) The Michigan Supreme Court denied the Application on February 7, 2011 without issuing an opinion. Supreme Court Decision, RE 2, Page ID# 194-195.

C. MAGISTRATE'S REPORT AND RECOMMENDATION

The Magistrate denied all of Mr. Miller's claims on November 11, 2016. Petitioner filed his objections to the Report and Recommendation on November 23, 2016. The District Court adopted the Report and Recommendation on December 19, 2016, less than thirty (30) days after the objections were submitted, and despite the large volume of materials to review on a de novo basis.

D. 6TH CIRCUIT COURT OF APPEALS DECISIONS

The 6th Circuit, in a written opinion, denied Mr. Miller's claim that his 6th Amendment right to confront Angela McConnell was denied. (APP 10-23) In reaching that decision, the 6th Circuit employed an unwarranted narrow view of what constitutes "clearly established" federal law for purposes of habeas review.

The 6th Circuit also utterly ignored the full body of United States Supreme Court Confrontation Clause caselaw that demands that a criminal defendant be given an adequate opportunity to cross-examine a witness at trial. Finally, the 6th Circuit failed to recognize that the evidence against Mr. Miller at trial, absent the testimony of Ms. McConnell, was extremely weak and biased. Mr. Miller was prejudiced by the Confrontation Clause violation.

The 6th Circuit denied Mr. Miller's Petition for Reconsideration En Banc on August 10, 2018. (APP 24).

REASONS WHY CERTIORARI SHOULD BE GRANTED

REVIEW IS WARRANTED BECAUSE THE PETITIONER-APPELLANT'S CONVICTIONS MUST BE REVERSED AND THIS MATTER REMANDED FOR A NEW TRIAL WHERE THE ADMISSION OF A PRELIMINARY EXAMINATION TRANSCRIPT VIOLATED HIS 6TH AMENDMENT RIGHT TO CONFRONT THAT WITNESS, CONTRARY TO CLEARLY ESTABLISHED LAW.

Mr. Miller requests United States Supreme Court review because the 6th Circuit opinion directly conflicts with established United States Supreme Court precedent that clearly sets forth the trial right to cross-examine a witness and additional precedent on the unconstitutionality of limiting cross-examination.

Since Mr. Miller's trial, counsel has struggled to understand how courts have continued to find that his 6th Amendment confrontation rights were not violated. Perhaps counsel has just not articulated well enough why clearly established law mandates a finding that Mr. Miller's confrontation rights were violated in this case.

To sharpen the focus of this Petition for a Writ of Certiorari, Mr. Miller's contention is that the cross-examination of Angela McConnell during a Preliminary

Examination simply cannot be considered an adequate prior opportunity to cross-examine so as to allow admission of her prior testimony at trial where she radically changed her version of events post-Preliminary Examination and Mr. Miller had NO opportunity to cross-examine her at trial on this new version of events. [1]

This 6th Circuit ignored clearly established federal law that the right to confront a witness is a **trial** right. Mr. Miller was not able to confront McConnell at trial. This legal principle takes on so much importance in this Petition because there is a vast body of United States Supreme Court jurisprudence that specifically details how certain limitations on cross-examination during trial can result in a violation of a person's confrontation rights. This body of law is clearly established and sets forth what actually constitutes an "adequate" opportunity for cross-examination to satisfy the Confrontation Clause. It was simply illogical and nonsensical for the 6th Circuit to find that certain limitations on cross-examination during trial are Confrontation Clause violations but then find that if similar limitations occur, de facto, because an unavailable witness' prior statements are not able to be challenged at trial, those limitations are not Confrontation Clause violations.

Under the AEDPA, this Honorable Court must first determine whether there is "clearly established" law governing the case. See Carey v Musladin, 549 US 70, 74–77, 127 SCt 649, 166 LEd2d 482 (2006). Law is "clearly established" when Supreme Court precedent unambiguously provides a "controlling legal standard." Panetti v Quarterman, 551 US 930, 953, 127 SCt 2842, 168 LEd2d 662 (2007).

[1] Ms. McConnell asserted her 5th Amendment right to not testify in Mr. Miller's trial.

"[C]learly established" law should be construed narrowly. See Wright v Van Patten, 552 US 120, 125, 128 SCt 743, 169 LEd2d 583 (2008); Musladin, 549 US at 76, 127 SCt 649. Nevertheless, "AEDPA does not 'require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied'.... The statute recognizes, to the contrary, that even a general standard may be applied in an unreasonable manner." Panetti, 551 US at 953, 127 SCt 2842 (quoting Musladin, 549 US at 81, 127 SCt 649 (Kennedy, J.). There is clearly established law governing this case.

The District Court and the 6th Circuit misunderstood the requirements of the AEDPA. The Magistrate incorrectly found that there is no "clearly established" federal law regarding the Confrontation Clause's requirement of an adequate opportunity to cross examine a witness. See Crawford v Washington, 541 US 36 (2004). In fact, Crawford clearly establishes a federal rule of law that a criminal defendant has a constitutional right under the Confrontation Clause to an "adequate" opportunity to cross-examine a witness at trial.

To the extent the lower courts found that the State courts' decisions were not an unreasonable application of federal law, that decision is also contrary to federal law and ignores that such an inquiry is inherently fact specific. The Magistrate did not explain how under the facts of this case, Petitioner was afforded an adequate opportunity to cross-examine witness McConnell at trial. Given the specific facts of this case, the State courts failed to follow clearly established federal law.

In this case, there is no question that Angela McConnell's prior Preliminary Examination testimony is "testimonial" under Crawford. Also, McConnell's

assertion of her Fifth Amendment right at the beginning of this trial (JT I, 4-6) rendered her "unavailable" for purposes of the Crawford rule. The question for this Honorable Court is whether the cross-examination of Ms. McConnell at Preliminary Examination, prior to her recantation, and made in furtherance of receiving the benefit of limiting the possibility that she would be sentenced to life without the possibility of parole if she was convicted as charged, afforded Mr. Miller an adequate opportunity to cross-examine such that his trial right to confront her was satisfied. This question actually involves two separate inquiries. The first inquiry is whether a Preliminary Examination can ever afford a defendant an adequate opportunity to cross-examine to satisfy a defendant's right to confront a witness at trial. Mr. Miller asserts that it cannot. Even if, as a category, a Preliminary Examination might afford a defendant a sufficient opportunity to cross examine, the question still arises whether, under the very unusual facts of this case, the Preliminary Examination did not adequately afford Mr. Miller the opportunity to confront Ms. McConnell, where she had recanted and withdrawn from her plea agreement.

Counsel typically does not employ analogies or metaphors in legal arguments because such techniques necessarily are not exact. However, given the absolute need to attempt to state Mr. Miller's position as clearly as possible, counsel is going to do so here.

Again, one must begin with the clear understanding that 6th Amendment Confrontation is a trial right. Now, assume that McConnell testified at Preliminary Examination (as it happened in this case). Again, assume that at Preliminary

Examination counsel conducted the exact cross-examination that occurred in this case. Then, further suppose that between Preliminary Examination and trial (exactly like in this case) McConnell withdrew from her plea agreement and chose to proceed to trial. Further, when withdrawing from her plea, McConnell provided the exact same letter that was later admitted at court.

So far, the analogy is exact, fact by fact, with what actually occurred in Mr. Miller's case. Here is where the analogy changes and demonstrates the fundamental error in the lower courts' decisions that Mr. Miller's Confrontation rights were not violated. Rather than choosing not to testify at Mr. Miller's trial, suppose McConnell actually did testify in his trial, post-recantation and post-withdrawal from her plea agreement. Now, assume the trial court **prohibited** defense counsel from questioning McConnell at all about her initial decision to plead guilty, her decision to withdraw from the agreement, her decision to withdraw her plea, her reasons for testifying to certain facts at the Preliminary Examination, the ways in which she learned those facts elicited at Preliminary Examination, and her current version, post-recantation, of what actually occurred. Instead, under this hypothetical, and again consistent with what happened at trial, assume the court **only** permitted the defense to introduce the recantation letter with absolutely no other questioning.

Imagine if Mr. Miller were actually prohibited at trial from questioning McConnell about any aspect of her recantation. That is exactly what happened to Mr. Miller.

Her unavailability should not, and cannot, diminish Mr. Miller's essential trial right to confront every witness against him. Yet, the 6th Circuit's finding does exactly that; it diminishes Mr. Miller's trial right to cross-examine on all manner of subjects, because McConnell's new version of events was so different in kind, and critical to the defense, that to eliminate any ability to cross-examine her on that new version is equivalent to, and legally the same as, prohibiting the cross-examination of a trial witness on those same subjects.

Put another way, the 6th Circuit failed to acknowledge and apply clearly established United States Supreme Court precedent on what constitutes an "adequate" opportunity to cross-examine. Merely because the opportunity in this matter occurred in a "prior" proceeding, the 6th Circuit denied Mr. Miller his essential trial right to an adequate opportunity to cross-examine McConnell. The 6th Circuit decision in this case actually concludes that if cross-examination occurred before trial, the adequacy of that "prior" examination need not meet the minimal standards of cross-examination during trial. The absurd result of the 6th Circuit decision is that Mr. Miller's right to Confrontation at trial was diminished because he cross-examined the witness before trial. If anything, because Confrontation is a trial right, any cross-examination that occurs before trial should at least meet and possibly exceed this Court's standards for what constitutes an adequate opportunity to cross-examine during trial under the 6th Amendment.

To be sure, this Honorable Court can distinguish the hypothetical, if the Court works hard enough to do so. Hopefully, as this Court reviews the rest of this Petition, this Court will recognize that admitting the Preliminary Examination

transcript in this case was a clear violation of Mr. Miller's 6th Amendment right to confrontation.

An analysis of Mr. Miller's claim should begin with Crawford v Washington, 124 SCt 1354 (2004). In that case, the Court stated clearly that the right to confront a witness is a trial right. Mr. Miller was denied his right to confront Ms. McConnell at trial. This trial right is a procedural one. Confrontation is guaranteed only through the crucible of cross-examination. As stated in Crawford:

> ". . . the (Confrontation) Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. The Clause thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined . . ." Crawford v Washington, ___ US ___; 124 SCt 1354, 1370-1371 (2004).

Thus, clearly established law requires the process of cross-examination of the witness at trial.

Admittedly, there is a limited exception to this trial right. Testimony from a prior hearing may be admitted at trial if the witness is unavailable only where the defendant had an adequate opportunity to cross-examination. Here is the crux of the violation in this case. Under clearly established federal law a defendant, at trial, must be afforded the opportunity to cross-examine on any motive to fabricate, inconsistent statements, plea agreements, etc. See Davis v Alaska, 415 US 308, 316-317 (1974). Davis states the law clearly:

> Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested. Subject always to the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation, the cross-examiner is not only permitted to

> delve into the witness' story to test the witness' perceptions and memory, but the cross-examiner has traditionally been allowed to impeach, i.e., discredit, the witness. One way of discrediting the witness is to introduce evidence of a prior criminal conviction of that witness . . . A more particular attack on the witness' credibility is effected by means of cross-examination directed toward revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand. The partiality of a witness is subject to exploration at trial, and is 'always relevant as discrediting the witness and affecting the weight of his testimony.' 3A J. Wigmore, Evidence s 940, p. 775 (Chadbourn rev. 1970). We have recognized that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross- examination Greene v. McElroy, 360 U.S. 474, 496, 79 S.Ct. 1400, 1413, 3 L.Ed.2d 1377 (1959). . ." Davis, at 316-317.

In this case, every lower court erred by ignoring the long line of United States Supreme Court precedent detailing what constitutes an adequate opportunity to cross examine at trial to satisfy the Confrontation Clause.

Here is a list of just a few of the Supreme Court cases that detail the parameters of what constitutes an adequate opportunity to cross-examine:

1. In Olden v. Kentucky, 488 U.S. 227, 109 S. Ct. 480, 102 L. Ed. 2d 513, 26 Fed. R. Evid. Serv. 609 (1988), the Supreme Court ruled that a trial court's refusal to permit a black defendant in a kidnapping, rape, and sodomy trial to cross-examine a white complainant regarding her cohabitation with a black boyfriend violated the defendant's Sixth Amendment right to confrontation.

2. In Delaware v. Van Arsdall, 475 U.S. 673, 106 S. Ct. 1431, 89 L. Ed. 2d 674, 20 Fed. R. Evid. Serv. 1 (1986), the Supreme Court ruled that a trial court's ruling prohibiting the defendant's cross-examination into the possibility that a witness was biased as a result of the State's dismissal of his pending public drunkenness charge violated the defendant's rights secured by the Confrontation Clause.

3. In Davis v. Alaska, 415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974), the Supreme Court held that refusal to allow a defendant to cross-examine a key prosecution witness to show

his probation status following an adjudication of juvenile delinquency denied the defendant his constitutional right to confront witnesses, despite a state policy protecting the anonymity of juvenile offenders, as the defendant had right to attempt to show that the prosecution witness was biased because of his vulnerable status. Denial of the right of effective cross-examination was a constitutional error of the first magnitude regardless of any absence of prejudice, the Court concluded.

4. In Smith v. State of Illinois, 390 U.S. 129, 88 S. Ct. 748, 19 L. Ed. 2d 956 (1968), the Court ruled that a defendant in a state narcotics case had a right guaranteed to him under the Confrontation Clause of the Sixth Amendments to cross-examine an informant who was the principal prosecution witness as to the informant's actual name and address. Noting that when the credibility of a witness is in issue the very starting point in exposing falsehood, the Court concluded that to forbid this most rudimentary inquiry at the threshold would effectively destroy the right of cross-examination itself.

5. Concluding that the right of cross-examination secured by the Confrontation Clause of the Sixth Amendment was violated, in Douglas v. State of Ala., 380 U.S. 415, 85 SCt 1074, 13 L. Ed. 2d 934 (1965), the Supreme Court found that a state defendant was denied his constitutional right of confrontation because he was unable to cross-examine a witness who had been convicted for the same crime and refused, while acting in his own interests, to answer any questions in reliance on his privilege against self-incrimination as to the witness' alleged confession which implicated the defendant and which was read to jury by the prosecutor under the guise of cross-examination after the witness had claimed the privilege. The Court added that the defendant's opportunity to cross-examine law enforcement officers, who had testified that the document read by the prosecutor to the jury was the witness' confession, was not adequate to redress the denial of the defendant's Confrontation Clause right.

6. In Bullcoming v New Mexico, 564 US 647 (2011), the Supreme Court held quite clearly that the Clause does not tolerate dispensing with confrontation simply because the court believes that questioning one witness about another's testimonial statements provides a fair enough opportunity for cross-examination.

In order to find that Mr. Miller's 6th Amendment right was not violated, this Honorable Court would have to find that the adequacy of a prior opportunity to cross-exam need not meet the standard for what constitutes an adequate opportunity to cross-examine at trial. The law simply does not support such a lesser standard, nor should it.

In this case, Mr. Miller was not given any opportunity to cross-examine McConnell post-recantation and after the withdrawal from the plea agreement. While Mr. Miller was allowed to inquire of the police and introduce a redacted version of her recantation (JT V, 849-851; APP 147-149, 149-151), those limited facts introduced at trial could not substitute for a full opportunity to cross-examine McConnell on, amongst other things: (1) why she recanted her story, i.e. her motive to recant; (2) how she was able to provide certain details stated at the Preliminary Examination; (3) the role of law enforcement in extracting these statements from her; (4) why she originally elected to plead guilty to these offenses; and/or (5) whether any of the previous versions she had told others were true. McConnell's recantation letter, introduced at trial, was devoid of any details. Cross-examination would have allowed Mr. Miller the opportunity to present detailed facts to support why the recantation should be believed! Petitioner did not have the opportunity to cross-examine McConnell on any of these subjects at the Preliminary Examination, because, at the time of the examination, she was still testifying consistent with the plea agreement she reached with the State.

Moreover, this Constitutional violation was exacerbated by the trial court's ruling that evidence that McConnell had withdrawn from her plea was **not** admissible at trial. Bias and/or motive to lie or tell the truth are always proper subjects of cross-examination. The jury had no idea why Ms. McConnell was not testifying. The jury had no idea that she had withdrawn from the agreement that led to her Preliminary Examination testimony. Mr. Miller was not given an adequate opportunity to explain why Ms. McConnell's prior testimony should not be believed post-recantation.

Again, Confrontation is a trial right to cross-examination. Mr. Miller should not have lost this right because the State's witness, McConnell, decided to radically change her version of events and completely disavow her prior testimony. The State chose to reach an agreement with her and present her as a witness at Preliminary Examination; through no fault of Mr. Miller, the State's witness turned on the State. Yet, the State still was able to use the disavowed testimony to convict Mr. Miller.

Coming back to the hypothetical, if McConnell had testified at trial post-recantation and the withdrawal of the plea, AND the trial court had prohibited any inquiry into her new version of events, the reasons for lying at Preliminary Examination, how she obtained the facts elicited at trial, and what actually happened, the Confrontation Clause violation would be clear because Mr. Miller would have been denied an adequate opportunity to cross-examine. The admission of her written statement as a substitute for cross-examination is an insult to

Crawford. Merely because the prior cross-examination occurred before trial does NOT lower the bar for a determination of whether that prior cross-examination was adequate.

As a separate issue, the jurisprudence of the United States Supreme Court supports that a Preliminary Examination can never afford a defendant an adequate opportunity to cross examine to satisfy the trial right to confront. See Barber v Page, 390 US 719, 88 SCt 1318 (1968). In Barber, the Supreme Court noted:

> "The right to confrontation is basically a trial right. It includes both the opportunity to cross-examine and the occasion for the jury to weigh the demeanor of the witness. A preliminary hearing is ordinarily a much less searching exploration into the merits of a case than a trial, simply because its function is the more limited one of determining whether probable cause exists to hold the accused for trial . . ." Id. at 725.[2]

The purpose of a Preliminary Examination is only to determine probable cause. As such, defense counsel may strategically choose not to conduct a thorough cross-examination of a witness to avoid revealing lines of questioning he may pursue at trial.

Moreover, the opportunity for cross-examination at the preliminary examination may come too early in the proceedings to be useful to the defense **at trial**. Put bluntly, facts arise in between the time of the preliminary examination and trial during the normal discovery process, guaranteed under Brady v Maryland, 373 US 83 (1963), that ultimately need to be explored at trial. As a result, clearly established federal law holds that an opportunity to cross-examine a witness at a

[2] See also Vasquez v Jones, 496 F3d 564, 577 (6th Cir 2007)(doubting whether the opportunity to question a witness at a preliminary examination satisfies the pre-Crawford understanding of the Confrontation Clause's guarantee of an opportunity for effective cross-examination).

preliminary examination is insufficient to satisfy the Crawford requirement of a prior adequate opportunity to cross-examine.

Here, Mr. Miller NEVER had the opportunity to explore the reliability and credibility of Ms. McConnell's Preliminary Examination testimony post-recantation.

At minimum, the right to confront witnesses requires that the defendant be given an adequate opportunity to effective cross-examination. In this case, the Government, the trial court, and the defense knew that Ms. McConnell had radically changed her version of events from her preliminary examination testimony at the time of trial. Mr. Miller never had an opportunity to confront Ms. McConnell on her version of events **at the time of trial.** Moreover, this change in her possible testimony was not insignificant. Through her recantation and withdraw of her plea, she admitted that the whole of her Preliminary Examination testimony was a lie. This Honorable Court need only find, on the facts of this case, that Mr. Miller was not afforded an adequate opportunity to effectively cross-examine Ms. McConnell at trial.

Ultimately, Mr. Miller has established that his 6th Amendment right to confront Ms. McConnell at trial was violated. He believes that because cross-examination is the chosen procedural safeguard to protect Confrontation rights, his rights were violated when the Preliminary Examination was introduced over objection. The error was not harmless. The evidence against Mr. Miller was weak. Admittedly, these were brutal crimes. But, the nature of the crimes do not and cannot change the actual weight of the evidence produced against a particular

defendant. Thus, this Honorable Court should reverse and remand for a new trial and order that McConnell's Preliminary Examination testimony not be permitted to be introduced at trial, if Ms. McConnell remains unavailable.

Mr. Miller was convicted on the words of an admitted liar, Brandy Miller, whose fabricated story was internally inconsistent, flew in the face of the known scientific evidence was the product of plea deal, and was only believed because the McConnell Preliminary Examination testimony was admitted and consistent with Brandy Miller's story.

The State did not present one piece of scientific evidence tying any of the five co-defendants to the murders, not a single piece of DNA or fingerprint evidence. Also, no independent witnesses could be found to place any of the five at the murder scene. The jury convicted, not because of the strength of the evidence, but because the crime was so horrific in nature, someone had to pay.

Concerning the testimony of Brandy Miller, her version of events was not credible for numerous reasons, including, but not limited to, certain facts surrounding her agreement to tell this story at the trials of the co-defendants:

> (1) She admitted during trial that she had told various people that the "trial version" of her story was a fabrication, a lie (JT III, 627, 670-674; APP 125, 142-146) and that law enforcement had fed her the "trial version" of events (JT III, 633, 670-674; APP 127, 142-146);
>
> (2) Ms. Miller was the first person during police interviews to admit to being at the scene of the murders (JT III, 626; APP 124);
>
> (3) Once she realized she was in trouble for placing herself at the scene, she would have done anything to avoid going to prison for the remainder of her life (JT III, 670-674; APP 142-146);

(4) She reached an agreement because she did not want to be taken from her children for the remainder of her life (JT III, 670-674; APP 142-146); and

(5) Ms. Miller, despite being charged initially with at least three mandatory life offenses for the murders of the Poldermans, reached a plea agreement calling for a minimum term of 15 years and a maximum term of 22 1/2 years on pleas to Murder-2nd Degree (JT III, 670-674; APP 142-146).

Ms. Miller impeached her own incredible story from her own mouth when she admitted to lying to nearly everyone on numerous occasions, yet the State relied heavily on this person's testimony to convict Mr. Miller.

Fortunately, the scientific evidence demonstrated that Ms. Miller's story was a fabrication. For example, Ms. Miller testified unequivocally that Marinus Polderman never exited the home during the murders and never entered the garage. (JT III, 655-657; APP 134-136) However, Sergeant Marty Johnson, applying known principles of fluid dynamics, testified that Marinus Polderman had actually been in the garage. (JT III, 523-525; APP 089-091) The blood evidence found in the garage established this fact, without any credible contradiction.

Ms. Miller also testified that Angela McConnell struck Anna Lewis in the head, on the main floor, near the kitchen, at the top of the stairs to the basement. (JT III, 660-661; APP 137-138). The blow was so devastating that blood spattered onto the arm of Angela McConnell. (JT III, 660-661; APP 137-138). Yet, law enforcement did not find a single drop of Anna Lewis' blood in the kitchen or at the top of the stairs. (JT III, 523, 532; APP 089-098). On a related topic, the police found Anna Lewis' blood in the back bedroom, but Ms. Miller did not have any explanation for this fact. (JT III, 532; APP 098).

Concerning other glaring problems with Ms. Miller's testimony, she testified that she vomited outside the home (or, inside, depending on which version was believed). (JT III, 663-664; APP 140-141). Law enforcement did not find any vomit. Ms. Miller claimed that Angela McConnell grabbed the Polderman's phone in the kitchen (JT III, 652), yet not a single fingerprint belonging to any of the five (5) co-defendants was found in the home (JT III, 481-557; APP 047-123). She insisted that the vehicles were outside the Polderman home for a substantial period of time during the murders (JT III, 636-637; APP 128-129), but not a single witness saw either the yellow Lincoln or Mr. Miller's truck at the Polderman's property that day. (JT V, 1006-1015; APP 280-289). This admitted liar also testified that Benjamin Platt was bleeding from a cut on his arm while in the Polderman home (JT III, 648-649; APP 131-132), yet, mysteriously, none of Platt's DNA was found. (JT III, 481-557; APP 047-123). Ms. Miller claimed that the three male co-defendants left the Polderman home covered in blood and entered either the yellow Lincoln or the truck. (JT III, 647-648; APP 130-131). Both vehicles were searched, the truck with great thoroughness, and no blood or DNA was found in either vehicle. (JT III, 538-550; APP 104-116).

The police conducted an exhaustive analysis of every possible piece of evidence inside and outside of the Polderman home. (See JT III, 481-557; APP 047-123) No DNA from any of the five (5) co-defendants, including Petitioner, was found. (JT III, 481-557; APP 047-123) Law enforcement did not find any fingerprint evidence (JT III, 481-557; APP 047-123), footprints that could be matched, or even any of the alleged stolen property (JT V, 951; APP 246). These five (5) young drug

addicts were somehow able to commit these brutal, violent crimes, in an atmosphere of pure chaos, without leaving any evidence identifying any of them as the assailants.

Finally, Mr. Miller's own "incriminating" statements did not substantially support the State's case. For instance, during the police interviews on March 13, 14, and 15, 2007, Mr. Miller admitted to entering the Polderman home before recanting. He never told law enforcement that he had assaulted any of the Poldermans. Also, his taped conversation with Jerome Williams did not specifically reference the Poldermans, nor did he make any admissions to any crimes in that statement.

Given the paucity of evidence, the error allowing Ms. McConnell's Preliminary Examination testimony into evidence where she later recanted the testimony given at the Preliminary Examination and was unavailable to testify at Mr. Miller's Trial, was not harmless. Mr. Miller's convictions must be overturned, and a new trial ordered.

If this Honorable Court finds that the Preliminary Examination testimony was admissible under the Confrontation and facts of this case, then Mr. Miller seeks a reversal of all counts and a remand with the additional order that Mr. Miller be permitted to introduce evidence that Ms. McConnell had withdrawn from her plea.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Supreme Court grant review of this matter.

Respectfully submitted,

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