No. 22-450

IN THE
Supreme Court of the United States

GREGORY SHIELDS, SR.,
Petitioner,
v.
COMMONWEALTH OF KENTUCKY,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Kentucky

BRIEF OF *AMICUS CURIAE* THE RUTHERFORD INSTITUTE IN SUPPORT OF PETITION FOR CERTIORARI

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QUESTION PRESENTED

When, if ever, does a preliminary hearing provide an "adequate opportunity" for cross-examination under the Confrontation Clause?

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INTEREST OF *AMICUS CURIAE*[1]

The Rutherford Institute is a nonprofit civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute provides legal assistance at no charge to individuals whose constitutional rights have been threatened or violated and educates the public about constitutional and human rights issues affecting their freedoms. The Rutherford Institute works tirelessly to resist tyranny and threats to freedom by seeking to ensure that the government abides by the rule of law and is held accountable when it infringes on the rights guaranteed by the Constitution and laws of the United States.

INTRODUCTION AND SUMMARY OF ARGUMENT

By allowing the admission of testimony based on a woefully inadequate opportunity for confrontation, the decision below violates the original understanding of the Sixth Amendment. The Framers recognized that there was no better method for the discovery of truth than live cross-examination before the jury as trier of fact. And nowhere was that method more critical than in a criminal trial—which placed in jeopardy the

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[1] Pursuant to Rule 37.6, *amicus curiae* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus curiae*, its members, and its counsel made a monetary contribution to its preparation or submission. Counsel of record for all parties received notice at least 10 days prior to the due date of the intention of *amicus curiae* to file this brief. All parties consented to the filing of the brief.

accused's life or liberty. The Framers understood English history and the evil that might follow from the absence of this fundamental right. So they ratified the Confrontation Clause to protect an accused's "right to a trial at which he should be confronted with the witnesses against him." *Reynolds v. United States*, 98 U.S. 145, 158 (1879).

To the founding generation, this right of confrontation served as an indispensable bulwark for the preservation of liberty. And it was scrupulously protected from diminution. Only a few firmly rooted common-law exceptions were recognized, and even those were strictly circumscribed. One such exception that had developed in England was for cases where the accused had "a prior opportunity for cross-examination." *Crawford v. Washington*, 541 U.S. 36, 46 (2004). But the Framers knew well of abuses posed by such an exception and cabined it accordingly: Only where the defendant could fully and effectively cross-examine the witness against him—in a manner equivalent to the trial right—would the Framers have tolerated the admission of prior testimony.

The decision below cannot be squared with this principle. Nor can it be squared with this Court's command that the scope of a defendant's confrontation rights be measured by "the original meaning of the Confrontation Clause." *Id.* at 60. The Kentucky Supreme Court sanctioned the admission of testimonial hearsay simply because petitioner had an opportunity to cross-examine his accuser at a preliminary hearing. But that opportunity was patently inadequate. Petitioner had no notice that the witness would testify, no meaningful discovery or

chance to investigate the prospective testimony, and—due to the very limited nature of the state law proceeding—no real motive to engage in the sort of fulsome cross-examination that he would conduct before the jury, the ultimate finder of fact.

As petitioner argues persuasively, lower courts have disagreed over how to reconcile this Court's return to the original understanding of the Sixth Amendment in *Crawford* with its earlier endorsement of the potential use of testimony from preliminary hearings. What's more, the decision below falls on the wrong side of that divide. The Court should grant certiorari to confirm that the theoretical opportunity to cross-examine one's accusers at a preliminary hearing is not, standing alone, sufficient to satisfy the Confrontation Clause. The Kentucky Supreme Court's contrary ruling deprives the petitioner of a right secured by the original understanding of the Sixth Amendment. And the lower courts' confusion on this matter warrants this Court's intervention.

ARGUMENT

I. Since *Crawford*, Lower Courts Continue To Depart From The Original Understanding Of The Confrontation Clause.

"One of the bedrock constitutional protections afforded to criminal defendants is the Confrontation Clause of the Sixth Amendment, which states: 'In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.'" *Hemphill v. New York*, 142 S. Ct. 681, 690 (2022) (alteration in original) (quoting U.S. CONST.

amend. VI).[2] At its core, the Confrontation Clause protects a defendant's fundamental right to cross-examine his accusers at trial. The Framers viewed the "right to cross-examination as indispensable, and that right was involved in and secured by confrontation." 2 JOHN HENRY WIGMORE, EVIDENCE § 1397, p. 1754 (Little, Brown & Co. 1904).

Until recently, though, this Court's Confrontation Clause jurisprudence "depart[ed] from the historical principles" underlying the right. *Crawford*, 541 U.S. at 60. The Court viewed the Confrontation Clause as reflecting only "a *preference* for face-to-face confrontation at trial." *Ohio v. Roberts*, 448 U.S. 56, 63 (1980) (emphasis added). And it thus permitted the introduction of testimonial hearsay at criminal trials—without any opportunity for cross-examination—if an unavailable witness's statement bore "adequate 'indicia of reliability.'" *Crawford*, 541 U.S. at 40 (quoting *Roberts*, 448 U.S. at 66).

In *Crawford*, this Court changed course, emphatically rejecting a "malleable" approach and "revis[ing] [its] doctrine to reflect more accurately the original understanding of the Clause." *Id.* at 60. As the Court explained, the Confrontation Clause "reflects a judgment" by the Framers, "not only about the desirability of reliable evidence," but also "about how reliability can best be determined"—that is, "by testing in the crucible of cross-examination." *Id.* at 61. To that end—and consistent with text and history—

[2] The Confrontation Clause is "made obligatory on the States by the Fourteenth Amendment." *Pointer v. Texas*, 380 U.S. 400, 403 (1965).

the *Crawford* Court stressed that the Sixth Amendment generally prohibits the prosecution from introducing "testimonial" hearsay absent "an adequate opportunity to cross-examine" the witness. *Id.* at 57. Such was the nature of the confrontation right as it was understood in 1791. *See id.* at 54–57.

Since *Crawford*, this Court has invariably looked to the text and history of the Confrontation Clause to discern the scope of the right. *See Hemphill*, 142 S. Ct. at 690–92; *Ohio v. Clark*, 576 U.S. 237, 248–49 (2015); *Williams v. Illinois*, 567 U.S. 50, 67–69, 82–83 (2012) (plurality op.); *Bullcoming v. New Mexico*, 564 U.S. 647, 658–59, 662 (2011); *Michigan v. Bryant*, 562 U.S. 344, 353–54, 358–59 (2011); *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 309–11 (2009); *Giles v. California*, 554 U.S. 353, 358–65, 369–73 (2008); *Davis v. Washington*, 547 U.S. 813, 823–26 (2006).

But *Crawford* itself did not disturb the Court's earlier endorsement of the "prior testimony" exception in *Roberts*. *Roberts* had not grounded its analysis in the original understanding of the Sixth Amendment. Still, *Crawford* suggested that the outcome of that decision—which admitted preliminary hearing testimony "tested" by "the equivalent of significant cross-examination," *Roberts*, 448 U.S. at 70—was consistent with the common-law exception for prior testimony where the defendant had an "adequate opportunity" for cross-examination. *See Crawford*, 541 U.S. at 57–58.

Yet the decision below illustrates how the lower courts have failed to take seriously the requirement that any derogation from the fundamental trial right be "adequate" in fact. The Kentucky Supreme Court

held that petitioner's confrontation right was not violated because he "was allowed the opportunity to cross-examine the witness at [a] preliminary hearing." *Shields v. Commonwealth*, 647 S.W.3d 144, 161 (Ky. 2022). The court reached this conclusion despite no prior notice that the witness would testify, *see id.* at 149; despite no prior discovery from the Commonwealth, *see id.* at 162, 169 (Keller, J., dissenting); and despite the preliminary hearing's extremely narrow purpose, which was "to determine whether there [was] sufficient evidence to justify detaining the defendant," *King v. Venters*, 595 S.W.2d 714, 714 (Ky. 1980).

The Kentucky court's approach is not consistent with the original understanding of the Confrontation Clause, which protects a fundamental *trial* right of criminal defendants. The few exceptions to this right were narrow and circumscribed. And the Framers were particularly familiar with the threat that pretrial testimony might present to the confrontation right. Thus, the mere theoretical opportunity for prior cross-examination would not support the admission of testimonial hearsay. To qualify for the prior-testimony exception, the opportunity must have been materially equivalent to the right to cross-examination at trial.

A. The Framers Adopted The Confrontation Clause To Enshrine A Fundamental Trial Right Of Criminal Defendants.

This Court has long regarded the Sixth Amendment's right of confrontation as providing a "trial right[]" for the accused. *Giles*, 554 U.S. at 375; *see also, e.g.*, *Barber v. Page*, 390 U.S. 719, 725 (1968);

Reynolds, 98 U.S. at 158. That understanding is firmly rooted in history and tradition. Indeed, the right of confrontation in criminal trials has "a lineage that traces back to the beginnings of Western legal culture." *Coy v. Iowa*, 487 U.S. 1012, 1015 (1988). *See generally* Frank R. Herrmann & Brownlow M. Speer, *Facing the Accuser: Ancient and Medieval Precursors of the Confrontation Clause*, 34 VA. J. INT'L L. 481 (1994). "The founding generation's immediate source of the concept, however, was the common law." *Crawford*, 541 U.S. at 43.

At common law, the admissibility of testimonial statements varied sharply between civil and criminal proceedings. The civil law "condone[d] examination in private by judicial officers" for later use at trial. *Id.* But where life or liberty were at stake, the "confronting of adverse witnesses" in open court and before the factfinder was generally viewed as the "only" acceptable "way of giving testimony" against the accused. 3 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 373–74 (1768). After all, it was well understood that "great opportunities are gained" through confrontation "for the true and clear discovery of truth." M. HALE, HISTORY AND ANALYSIS OF THE COMMON LAW OF ENGLAND 291 (4th ed. 1792). And the stakes in criminal trials were too high to trust any method other than cross-examination—"the greatest legal engine ever invented for the discovery of truth." *Ford v. Wainwright*, 477 U.S. 399, 415 (1986) (quoting 5 JOHN HENRY WIGMORE, EVIDENCE § 1367 (J. Chadbourn rev. 1974)). Accordingly, the "core" of the confrontation right that developed was a guarantee that, in all criminal prosecutions, the accused would have a meaningful opportunity to cross-examine the

witnesses against him "at the time of trial" and "'compel[] [them] to stand face to face with the jury.'" *California v. Green*, 399 U.S. 149, 157–58 (1970) (quoting *Mattox v. United States*, 156 U.S. 237, 242 (1895)); *see* 1 J. BISHOP, CRIMINAL PROCEDURE § 1090, p. 686 (2d ed. 1872) ("[T]he true construction of the ancient common law, [is] that, on the trial of a prisoner accused of any crime whatever, the witnesses against him must be produced in open court, meeting him face to face, and the opportunity given him to cross-examine them there.").

As *Crawford* observed, the Crown did not always respect this right of confrontation. *See* 541 U.S. at 43. For example, several "notorious instances of civil-law examination occurred in the great political trials of the 16th and 17th centuries." *Id.* at 44. But those departures from the confrontation right only underscored its importance. The common-law courts recognized the "abuses" that "the civil-law mode of criminal procedure" had spawned in the past, and they responded by zealously guarding criminal defendants' rights to confront—and most importantly, cross-examine—their accusers. *Id.* at 44, 50; *see, e.g.*, *King v. Dingler*, 2 Leach 561, 168 Eng. Rep. 383, 383–84 (1791); *King v. Woodcock*, 1 Leach 500, 168 Eng. Rep. 352, 353 (1789); *King v. Paine*, 5 Mod. 163, 87 Eng. Rep. 584, 584–85 (1696).

That crucial procedural safeguard carried over to the New World. American colonists were steeped in the English legal tradition. *See, e.g.*, 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 163, 165, pp. 147–49 (1833). And they similarly regarded "confrontation [as] a fundamental

right essential to a fair trial in a criminal prosecution." *Pointer v. Texas*, 380 U.S. 400, 404 (1965). The colonists accordingly enshrined that right in many of their state constitutions in the years leading up to the founding. *See* Virginia Declaration of Rights § 8 (1776); Pennsylvania Declaration of Rights § IX (1776); Delaware Declaration of Rights § 14 (1776); Maryland Declaration of Rights § XIX (1776); North Carolina Declaration of Rights § VII (1776); Vermont Declaration of Rights Ch. I, § X (1777); Massachusetts Declaration of Rights § XII (1780); New Hampshire Bill of Rights § XV (1783).

So, when a similar guarantee was not included in the federal Constitution, it provided an easy target for the Antifederalist opposition. For example, one influential essay stressed that "[n]othing can be more essential than the cross examining [of] witnesses, and generally before the triers of the facts in question." Letter IV from the Federal Farmer to The Republican (Oct. 12, 1787), *reprinted in* THE ESSENTIAL DEBATE ON THE CONSTITUTION 94, 99 (Robert J. Allison & Bernard Bailyn eds., 2018). And another emphasized that "[i]t is of great importance in the distribution of justice that witnesses should be examined face to face," and "that the parties should have"—not just any opportunity—but "*the fairest opportunity* of cross examining them in order to bring out the whole truth." Essay of Brutus XIV (Mar. 6, 1788), *reprinted in* 1 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 435 (1971) (emphasis added). "The First Congress responded by including the Confrontation Clause in the proposal that became the Sixth Amendment." *Crawford*, 541 U.S. at 49.

B. Exceptions To The Right To Cross-Examine One's Accusers At Trial And Before The Jury Were Strictly Limited.

Nothing in the Sixth Amendment's text permits "open-ended exceptions from the confrontation requirement to be developed by the courts." *Id.* at 54. Rather, the accused's "'right . . . to be confronted with the witnesses against him,' is most naturally read as a reference to the right of confrontation at common law, admitting *only* those exceptions established at the time of the founding." *Id.* (emphasis added) (quoting U.S. CONST. amend VI). Those exceptions, which were "far from numerous," always involved "peculiar circumstances." THOMAS M. COOLEY, CONSTITUTIONAL LIMITATIONS 387 (6th ed. 1890). And consistent with the common-law tradition, the Framers strictly limited their scope.[3]

Perhaps the most prominent exception was for "declarations made by a speaker who was both on the brink of death and aware that he was dying." *Giles*, 554 U.S. at 358; *see Crawford*, 541 U.S. at 56 n.6. But the exception was a narrow one, "restricted to indictments for homicide against the party who caused the death." *State v. Thomas*, 64 N.C. 74, 76 (1870). In those limited circumstances, dying declarations had "from time immemorial . . . been treated as competent testimony," due to the unique "necessities of the case," the need "to prevent a manifest failure of justice," and the common law's

[3] Indeed, "there is scant evidence that exceptions were invoked to admit testimonial statements against the accused in a criminal case." *Crawford*, 541 U.S. at 56 (emphasis omitted).

belief that "the sense of impending death is presumed to remove all temptation to falsehood." *Mattox*, 156 U.S. at 243–44; *see also Thomas*, 64 N.C. at 76 (grounding the rationale for the exception in "the maxim, 'no man shall take advantage of his own wrong'").

The common law similarly departed from the trial right of confrontation in cases of "forfeiture by wrongdoing." *Giles*, 554 U.S. at 359. But that exception was equally narrow. It did not apply whenever the defendant's wrongdoing "caused a person to be absent" from trial; rather, it "applied only when the defendant engaged in conduct *designed* to prevent the witness from testifying." *Id.* at 359, 361.

Short of those exceptions, this Court has recognized only one other common-law departure from the requirement for live, in-court testimony at trial. And that is where the defendant had a "prior opportunity for cross-examination" of the declarant. *Crawford*, 541 U.S. at 46. History shows, however, that to the extent the Sixth Amendment incorporated this exception at all, it was very limited. Not all prior opportunities—even those from pretrial proceedings—would have sufficed. Instead, the Framers would have tolerated testimonial hearsay only where the defendant was previously afforded an "adequate opportunity to cross-examine" the declarant, such that the "'substance of the constitutional protection [was] preserved.'" *Id.* at 57 (quoting *Mattox*, 156 U.S. at 244).

Indeed, one of the "principal evil[s] at which the Confrontation Clause was directed" was the Crown's exploitation of testimony gathered from pretrial

examinations. *Id.* at 50. "In England, pretrial proceedings in criminal cases were governed by the so-called Marian statutes," which were passed in the 1550s and "offered the prisoner at least a theoretical opportunity to confront and cross-examine his accusers." Robert Kry, *Forfeiture and Cross-Examination*, 13 LEWIS & CLARK L. REV. 577, 580, 583 (2009). It is "doubtful" that the Marian statutes were enacted "to produce evidence admissible at trial." *Crawford*, 541 U.S. at 44. Nevertheless, testimony obtained from such proceedings eventually "came to be used as evidence in some cases" in the early English courts. *Id.*

But this practice was met with considerable resistance on both sides of the Atlantic. For example, one contemporary treatise criticized the use of Marian depositions as "very unsatisfactory," because the defendant "ha[d] not those assistances for analy[zing] the proofs which are adduced against him, which exist upon a solemn trial." 2 ROBERT JOSEPH POTHIER, A TREATISE ON THE LAW OF OBLIGATIONS, OR CONTRACTS 232 (William David Evans trans., 1806). The depositions were "taken under circumstances[] in which the adverse party had not a fair opportunity of cross-examination, or in which such an examination, being unusual, could not reasonably be expected to have taken place." *Id.* Notably, that criticism echoed the Antifederalist argument, which called for "the fairest opportunity of cross examining" witnesses "in order to bring out the whole truth." Essay of Brutus XIV, *supra*. Meanwhile, another English treatise called for strict limitations on the admissibility of pretrial examinations, stressing that even though "[i]t [was] true that the prisoner has had the power to

cross-examine the witness," it "was at a time and under circumstances very disadvantageous to the prisoner." 2 THOMAS STARKIE, THE LAW OF EVIDENCE 487 (1826).[4] And, in the United States, "a 1795 Virginia manual decried the rule of admissibility" altogether "on the ground that 'the accused party has not the same advantage of cross examination'" that he would otherwise. Robert Kry, *Confrontation Under the Marian Statutes: A Response to Professor Davies*, 72 BROOK. L. REV. 493, 535 (2007) (quoting WILLIAM HENING, THE NEW VIRGINIA JUSTICE 148 (Richmond, Nicolson 1795)).

These sources reflect the importance of a robust confrontation right to the founding generation, which sought to distance itself from the abuses "that the Marian statutes invited." *Crawford*, 541 U.S. at 50. More so than in England, "cross-examination was at the heart of the new trial process" that developed in the colonies. Randolph N. Jonakait, *The Origins of the Confrontation Clause: An Alternative History*, 27 RUTGERS L.J. 77, 116 (1995). And some early American decisions held that a defendant's right of confrontation was violated even if he had a prior opportunity to cross-examine the witness in a full-blown trial. *See Finn v. Commonwealth*, 26 Va. (5

[4] Around the founding, the criteria for admitting pretrial examinations steadily tightened in England. As one treatise notes, prosecutors eventually bore the "affirmative" burden to show that the defendant "had a full opportunity of cross-examining the witness" and, at least where the defendant was uncounseled, that the court had "allowed the prisoner sufficient time to consider what questions he would put." 2 EDMUND POWELL, THE PRACTICE OF THE LAW OF EVIDENCE 255 (1856).

Rand.) 701, 708 (1827); *State v. Atkins*, 1 Tenn. (1 Overt.) 229, 229 (1807) (per curiam).

In short, the Framers were well aware of the risks presented by pretrial English proceedings. They adopted the Confrontation Clause to protect an indispensable right to cross-examine one's accusers—a right that was "designed to promote reliability in the truth-finding functions of a criminal trial." *Kentucky v. Stincer*, 482 U.S. 730, 737 (1987). And they recognized that not just any chance for questioning could serve that end. Only if the witness's testimony were "taken at a time and under circumstances" affording an opportunity for cross-examination equivalent to that provided by a trial, *Pointer*, 380 U.S. at 407, would "[t]he substance of the constitutional protection [be] preserved," *Mattox*, 156 U.S. at 244. Only then might the defendant have a fair "opportunity of obtaining a clear discovery" for the factfinder, "which can never be had upon any other method of trial." 3 BLACKSTONE, *supra*, at 373. And so only then might the Confrontation Clause permit an exception to the defendant's "right to a trial at which he should be confronted with the witnesses against him." *See Giles*, 554 U.S. at 372 (quoting *Reynolds*, 98 U.S. at 158).

C. The Decision Below Is Inconsistent With The Original Understanding Of The Confrontation Clause.

The Kentucky Supreme Court's decision is contrary to the original understanding of the Confrontation Clause. It all but ignores the defendant's right to confront his accusers *at trial*. And it unduly expands the "prior opportunity" exception to

that otherwise "categorical constitutional guarantee[]" beyond what the history can bear. *Crawford*, 541 U.S. at 61, 67. This Court's review is warranted to correct course in the state courts and to provide clear guidance regarding the meaning and scope of the Confrontation Clause.

The decision below endorses a hollow right that neglects the Framers' understanding of "confrontation [as] a fundamental right essential to a fair trial in a criminal prosecution." *Pointer*, 380 U.S. at 404. Where, as here, an accuser is sprung upon a defendant with no notice and before discovery at a preliminary hearing, the defendant lacks any meaningful opportunity to subject the accuser's testimony to "testing in the crucible of cross-examination." *Crawford*, 541 U.S. at 61. Cross-examination under those circumstances is no cross-examination at all, and it neither "preserve[s]" "the substance of" nor vindicates the confrontation right. *Mattox*, 156 U.S. at 244; *cf. Douglas v. Alabama*, 380 U.S. 415, 419–20 (1965) (holding that admission of statement where declarant could not be meaningfully cross-examined because he invoked his Fifth Amendment right violated the Confrontation Clause).

Moreover, the decision below is "at odds with the Confrontation Clause's very mission—to advance 'the accuracy of the truth-determining process in criminal trials.'" *Tennessee v. Street*, 471 U.S. 409, 415 (1985) (quoting *Dutton v. Evans*, 400 U.S. 74, 89 (1970)). For "at a pretrial hearing, where different strategic calculations dull the motive to cross-examine, even the Framers would agree that it is an ineffective tool of ensuring reliability." Daniel Huff, *Confronting*

Crawford, 85 NEB. L. REV. 417, 438 (2006); *see also Barber*, 390 U.S. at 725 ("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.").

Instead, the Framers understood the paramount importance of a robust confrontation right that could not so easily be stripped away. *See* Letter IV from the Federal Farmer to The Republican, *supra*; Essay of Brutus XIV, *supra*. Here, the circumstances surrounding the witness's testimony and petitioner's supposed ability to cross-examine her belie any claim that petitioner had "the fairest opportunity" to cross-examine his accuser and "bring out the whole truth." Essay of Brutus XIV, *supra*. Quite the opposite. Petitioner was given no notice or discovery to allow his counsel to prepare a cross-examination, and the testimony was given in a proceeding seeking to determine only whether the Commonwealth had probable cause to charge him. A "fair opportunity of cross-examination" under such circumstances "could not reasonably be expected to have taken place." 2 POTHIER, *supra*, at 232.

The Kentucky court's decision departs from the basic requirement of the Confrontation Clause, opening the door to prosecutorial abuses akin to those perpetrated under the Marian statutes. *See id.*; Kry, *Confrontation Under the Marian Statutes*, *supra*, at 535. It leaves criminal defendants vulnerable to similar gamesmanship by deeming the right vindicated by *any* theoretical opportunity to cross-

examine the witness—despite no notice of the witness's testimony, no discovery, no opportunity for prior investigation, and no real motive for full cross-examination similar to that at trial.[5]

In sum, the founding generation understood the confrontation right to encompass more than the empty opportunity for cross-examination offered here. Consistent with that original understanding, the Kentucky court should have recognized that the witness's testimony was not "taken at a time and under circumstances affording petitioner through counsel an adequate opportunity to cross-examine," *Pointer*, 380 U.S. at 407, and held that introduction of the testimony at trial would violate petitioner's confrontation right. This Court should grant certiorari to correct the Kentucky court's error, to rectify the split petitioner has identified, *see* Pet. at 13–23, and to reinforce its commitment to restoring the Sixth Amendment to its original meaning.

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[5] As Justice Brennan recognized, there are also compelling tactical reasons for counsel not to engage in extensive cross-examination at such an early stage in the prosecution. *See Green*, 399 U.S. at 197 (Brennan, J., dissenting) (noting that "neither defense nor prosecution is eager before trial to disclose its case by extensive examination at the preliminary hearing" and "thorough questioning of a prosecution witness by defense counsel may easily amount to a grant of gratis discovery to the State"); *see also* Huff, *supra*, at 438 (observing that "in practice," defense counsel should "avoid preparing witnesses and government lawyers for what is to come," and that because "witness credibility is considered a trial issue," "efforts to impeach will meet with little success"; "even a persuasive rebuttal is unlikely to preclude a finding of probable cause" (citation omitted)).

II. The Court Should Grant Certiorari And Confirm That The Theoretical Opportunity For Cross-Examination At A Preliminary Hearing Will Seldom Satisfy The Confrontation Clause.

The Confrontation Clause demands that criminal defendants have more than a theoretical opportunity to cross-examine a witness at a preliminary hearing. And the practical realities of those hearings show why they will rarely afford an "adequate opportunity" for cross-examination that is functionally equivalent to the trial right. Indeed, the circumstances and motivations at preliminary hearings are such that it is exceptionally difficult to vindicate a defendant's confrontation right. This Court should grant certiorari to acknowledge these realities and confirm that the Confrontation Clause requires that the prior-testimony exception be narrowly and appropriately construed.

A. Although Prior Cross-Examination May Justify An Exception To The Trial Right Of Confrontation, That Exception Should Be Narrow.

The categorical nature of the confrontation right requires that any departure from the opportunity at trial to cross-examine adverse witnesses be narrowly construed. *See Crawford*, 541 U.S. at 54 (the Sixth Amendment does not permit courts to fashion "open-ended exceptions from the confrontation requirement"). That rule is consistent with the Court's precedents. *See Green*, 399 U.S. at 158 (out-of-court statements "historically" allowed under the Confrontation Clause only where the declarant is

"subject to *full and effective* cross-examination" (emphasis added)); *Pointer*, 380 U.S. at 407 (rejecting admission of crucial witness's preliminary hearing testimony at trial because no "*complete and adequate* opportunity to cross-examine" the witness (emphasis added)). It is also consistent with the Court's view that "only those exceptions [to the confrontation right] established at the time of the founding" can support the admission of testimonial hearsay. *Crawford*, 541 U.S. at 54. And each of those broadly recognized exceptions, as explained above, was strictly circumscribed. *See supra* Section I.B.

As an original matter, then, the exception for prior testimony cannot and should not apply any time there was a theoretical opportunity for cross-examination. Instead, this exception should be confined to instances where the prior opportunity was functionally equivalent to the trial right. To that end, the Confrontation Clause enshrined an indispensable "functional right designed to promote reliability in the truth-finding functions of a criminal trial." *Stincer*, 482 U.S. at 737 (quotation marks omitted). So whenever the circumstances and procedures accompanying cross-examination at a preliminary hearing do not closely track the procedures, circumstances, motivations, and safeguards afforded a criminal defendant at trial, courts should reject prior testimony for failing to satisfy the Confrontation Clause.

B. Cross-Examination At A Preliminary Hearing Will Only Rarely Satisfy The Confrontation Clause.

Instead of examining the original understanding of the Confrontation Clause, the court below rooted its decision primarily in two pre-*Crawford* precedents—*Roberts* and *Green*. *See Shields*, 647 S.W.3d at 155–59. Neither case supports the admission of the preliminary hearing testimony here.

Start with *Roberts*. There, this Court held that "prior testimony at [a] preliminary hearing bore sufficient 'indicia of reliability'" to support admission, because the declarant had been subjected to the "equivalent of significant cross-examination" at the hearing. 448 U.S. at 70. But neither the law nor facts of *Roberts* support the decision below. After all, *Crawford* expressly overruled the "indicia of reliability" test from *Roberts*. *See* 541 U.S. at 60–68. And on the facts, "the cross-examination at bar is more akin to '*de minimis* questioning,'" which *Roberts* specifically "declined to analyze under the Confrontation Clause." *Shields*, 647 S.W.3d at 164–65 (Keller, J., dissenting) (quoting *Roberts*, 448 U.S. at 70).

Green stands even further afield. In *Green*, the Court considered whether to admit, over a Sixth Amendment challenge, testimony from an earlier hearing. The Court held that admitting the testimony would not violate the Sixth Amendment where the witness was both "present to testify" at trial and "subject[] to extensive cross-examination" at the prior hearing. *Id.* at 151, 162; *see Crawford*, 541 U.S. at 59 n.9 ("[W]hen the declarant appears for cross-

examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements."). Here, by contrast, the witness was neither subject to extensive cross-examination nor present at trial.

And that makes all the difference. Dissenting from *Green*, Justice Brennan predicted the kinds of constitutional deprivations patent in the decision below. He posited that introducing preliminary hearing testimony at trial would "unconstitutionally restrict[] the right of the accused to challenge incriminating evidence in the presence of the factfinder who will determine his guilt or innocence." *Green*, 399 U.S. at 191 (Brennan, J., dissenting). Along the way, Justice Brennan cogently explained how the "nature and objectives" of a preliminary hearing and a trial "differ significantly." *Id.* at 195 (citing *Barber*, 390 U.S. 719).

By its very nature, cross-examination at a preliminary hearing "pales beside that which takes place at trial." *Id.* at 197. That is first and foremost because "the objective of the hearing is to establish the presence or absence of probable cause, not guilt or innocence proved beyond a reasonable doubt." *Id.* Thus, "if evidence suffices to establish probable cause, defense counsel has little reason at the preliminary hearing to show that it does not conclusively establish guilt."[6] *Id.* Equally problematic is the fact that "the

[6] Even if evidence does not suffice to establish probable cause, defense counsel in some states might have little motivation to prevail at a preliminary hearing—and certainly not the same motivation as she would at trial. In Virginia, for example, the prosecution may seek an indictment from a grand jury even after

defense and prosecution have generally had inadequate time before the hearing to prepare for extensive examination." *Id.* "In short, it ignores reality to assume that the purposes of the Confrontation Clause are met during a preliminary hearing." *Id.* And it ignores history to believe that the Framers would have thought otherwise.

The Kentucky Supreme Court's contrary rule is not only unconstitutional, it also conflicts with the practical realities of the preliminary hearing. For one thing, "the schedules of neither court nor counsel can easily accommodate lengthy preliminary hearings." *Id.* And the decision below puts defense counsel in an untenable position. Defense counsel has a constitutional "duty to investigate" her client's case. *Strickland v. Washington*, 466 U.S. 668, 690 (1984). That duty "rests on the recognition of pretrial investigation as 'perhaps, the most critical stage of a lawyer's preparation.'" Jenny Roberts, *Too Little, Too Late: Ineffective Assistance of Counsel, the Duty to Investigation, and Pretrial Discovery in Criminal Cases*, 31 FORDHAM URB. L.J. 1097, 1105 (2004) (quoting *House v. Balkcom*, 725 F.2d 608, 618 (11th Cir. 1984)).

But Kentucky's rule unrealistically forces overworked and underfunded defense attorneys to conduct all their investigation before the preliminary

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dismissal of the same charge at a preliminary hearing. *See Commonwealth v. Davis*, 777 S.E.2d 555, 559–60 (Va. 2015). In such cases, defendants may be disadvantaged by having to pay additional bond, losing credit for time served on the dismissed charge, or having their statutory timeline for a speedy trial reset. *See* Va. Code § 19.2-243.

hearing—which generally occurs mere days after arrest—lest they lose the opportunity to meaningfully cross-examine a key witness that may, as here, unexpectedly testify. *See Shields*, 647 S.W.3d at 168 (Keller, J., dissenting). Simply put, "[c]onducting sufficient investigation to cross-examine a witness as one would prepare for trial, especially without discovery provided by the [prosecution] is practically impossible within th[e] short time period" before a preliminary hearing. *Id.*; *see also* Roberts, *supra*, at 1121 ("A right to effective assistance of counsel that truly recognizes the duty to investigate rings hollow without access to discovery."); *cf.* Douglas L. Colbert, *Prosecution Without Representation*, 59 BUFF. L. REV. 333, 387–88 (2011) ("A lawyer's . . . early investigation, and evaluation of the State's case allow[s] a detainee to believe in an assigned counsel's dedication to the case and to consider a trial option.").

These practical realities only underscore the violation of petitioner's confrontation right. Cross-examination may be "one of the most effective tools available to test the reliability of information," yet it is "effective only to the degree that the cross-examining party has access to relevant information and sufficient time with which to prepare to use it." Laura Berend, *Less Reliable Preliminary Hearings and Plea Bargains in Criminal Cases in California: Discovery Before and After Proposition 115*, 48 AM. U. L. REV. 465, 472 (1998).

Here, petitioner received no genuine discovery and no time to prepare. Prior to the preliminary hearing, petitioner's counsel had not received the police notes from the interview of the witness or the medical

examiner's report that contradicted the witness's preliminary hearing testimony. With just a week between arrest and preliminary hearing, and no discovery related to the witness, defense counsel was not, and could never be, prepared to effectively cross-examine the witness. Petitioner thus lacked a constitutionally "adequate opportunity to cross-examine" his accuser. *Crawford*, 541 U.S. at 57. The Kentucky Supreme Court's decision to the contrary was erroneous, and it reflects an uncertainty among lower courts that only this Court may resolve.

CONCLUSION

For the foregoing reasons, *amicus curiae* respectfully urges this Court to grant the petition for certiorari.

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