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 RICHARD D. FRIEDMAN AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

RICHARD D. FRIEDMAN
Counsel of Record
625 South State Street
Ann Arbor, Michigan 48109
(734) 647-1078
rdfrdman@umich.edu

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

SECONDARY SOURCES

OTHER

INTEREST OF *AMICUS CURIAE*[1]

I am a legal academic, and since 1982 I have taught Evidence law; the Evidence Section of the Association of American Law Schools has announced that in January 2023 I will be given the John Henry Wigmore Award for Lifetime Achievement in the Law of Evidence and the Process of Proof. Much of my academic work has dealt with the confrontation right, and since 2004 I have maintained The Confrontation Blog, http://confrontationright.blogspot.com, to report and comment on developments related to that right. In *Crawford v. Washington*, 541 U.S. 36 (2004), I was author of a law professors' *amicus* brief, which was discussed in oral argument. In 2005-06, I successfully represented the petitioner in *Hammon v. Indiana* (decided together with *Davis v. Washington*, 547 U.S. 813 (2006)), and in 2009-10 I successfully represented the petitioners in *Briscoe v. Virginia*, 559 U.S. 32 (2010). I have submitted numerous amicus briefs to this Court on behalf of myself in prior Confrontation Clause cases, both on the prosecution side and on the defense side, often making some points favoring one side and some favoring the other. In accordance with my usual practice, I am submitting this brief on behalf of myself only; I have not asked any other person or

---

[1] *Amicus* has given the parties at least ten days' notice of his intention to file this brief, and the parties have consented to the filing. Part of the cost of preparing and submitting this brief was paid for by research funds provided by the University of Michigan Law School to *amicus* and under his control. The brief does not necessarily reflect the views of that Law School or of any of its faculty other than *amicus*. Except as just noted, no persons or entities other than the *amicus* made any monetary contribution to the preparation or submission of this brief, which was not authored in any part by counsel for either party.

entity to join in it. I am doing this so that I can express my own thoughts, entirely in my own voice. I am entirely neutral in this case, in the sense that my interest is not to promote an outcome good for one party or the other, or for prosecutors or defendants as a class. Rather, my interest, in accordance with my academic work, is to promote a sound understanding of the confrontation right, one that recognizes the importance of the right in our system of criminal justice and at the same time is practical in administration and does not unduly hamper prosecution of crime.

In this brief, I support the petition for *certiorari*, brought by a criminal defendant, because I believe that this is an ideal case for the Court to begin a necessary re-examination of the branch of Confrontation Clause doctrine holding that, when a prosecution witness is unavailable at trial, prior testimony of the witness may be admitted so long as the defendant had an adequate opportunity for cross-examination. This issue arises not only in the context of preliminary hearings, as in this case, but also with depositions and prior trials. I believe that the confusion in this area can be eliminated only by the intercession of this Court, and that enunciation of a rather simple set of basic principles will provide all the protection to which a defendant is entitled without significantly hindering prosecutors.

FACTUAL BACKGROUND

The petitioner, Gregory Shields, Sr., was charged with his uncle's murder. The only eyewitness was the decedent's wife, Maude Murrell. Because she was 82 years old, the prosecutor decided to call her as a witness at the preliminary hearing, with no advance

notice and with an undisclosed purpose to preserve her testimony for trial in case she was then no longer able to testify. Before Ms. Murrell testified, the prosecution did not make the disclosures that would be constitutionally required had she testified at trial. Defense counsel, caught off guard and conscious of the usual limited function of a preliminary hearing, conducted a brief and desultory cross-examination. Although Kentucky Rules of Criminal Procedure, in accordance with traditional practice, allow a prosecutor to take the deposition of a witness for the purpose of preserving her testimony, the prosecution never did so.

Ms. Murrell died before trial, and petitioner moved to exclude her preliminary-hearing testimony. The trial court denied the motion, and petitioner entered a conditional plea of guilty, which allowed him to appeal that denial. The Kentucky Supreme Court affirmed, by a 4-3 vote, and this petition followed.

SUMMARY OF ARGUMENT

Crawford v. Washington, 541 U.S. 36 (2004), reclaimed the meaning of the Confrontation Clause, recognizing that it sets forth not a substantive rule designating certain species of evidence as reliable but a categorical procedural right that prosecution witnesses testify face-to-face with the accused, subject to cross-examination, rather than by any other means. The lower courts are divided in implementing an aspect of *Crawford* that is critical to this case, its holding that if a prosecution witness does not testify at trial then the witness's out-of-court testimonial statements may not be admitted against the accused for the truth of what they assert unless the witness is unavailable and the accused has had an adequate

opportunity to cross-examine. *Id.* at 68. Here, there is no doubt that the witness, Ms. Murrell, is unavailable by reason of death; nor that the statements in question, her preliminary hearing testimony, are testimonial in nature; nor that those statements were admitted against Petitioner for the truth of what they asserted. The only question is whether Petitioner had an adequate opportunity to cross-examine.

The lower courts are badly divided on the question of whether, or when, a preliminary hearing offers an adequate opportunity to cross-examine. Some jurisdictions recognize that the limited function of a preliminary hearing effectively (whether as a formal matter or not) limits the cross-examination that the accused can conduct. At the other extreme, some jurisdictions, including Kentucky, treat the absence of formal limits on cross-examination as virtually *per se* sufficient for the opportunity to be deemed adequate. And yet others make the decision depend on a more complex assessment of a range of factors.

The particular question of this case, involving preliminary hearings, is part of the larger question of the adequacy of prior opportunities for adverse examination. In particular, some states allow defendants to take depositions for discovery, and so the question frequently arises whether such a deposition can satisfy the confrontation right if the witness is unavailable at trial. The states are in irreconcilable conflict on this question as well. The question is much the same in the deposition and preliminary-hearing contexts: The accused may have the formal ability at the earlier proceeding to ask what questions he wants. But the nature of that a discovery deposition, in contrast to one conducted for purpose of preserving testimony, means that almost

inevitably the accused will not conduct an examination anything like the one he would if it occurred at trial.

The issue in this case is thus an important one, both for its immediately practical effect in many cases and for understanding the basic nature of the confrontation right. The confusion in this area cannot be relieved without the participation of this Court. Moreover, this Court could provide that relief by enunciating a simple and easily administrable set of requirements that would allow states to use preliminary hearings to preserve testimony, if they so chose, but would ensure that the accused has a genuine opportunity for cross-examination.

This case is an excellent vehicle for clearing up this important area. It presents the issue cleanly, and Petitioner is represented by superbly qualified counsel. The conflict among the lower courts is a mature one, and nothing would be gained by waiting.

ARGUMENT

I. THE COURTS ARE DIVIDED AS TO WHETHER, OR WHEN, A PRELIMINARY HEARING – AND MORE BROADLY A PRIOR PROCEEDING – OFFERS AN ADEQUATE OPPORTUNITY FOR CROSS-EXAMINATION.

Crawford transformed the law of the Confrontation Clause, properly restoring its place as protecting a central procedural feature of our criminal justice system. The Clause does not attempt to sort out good evidence from bad. Rather, it provides a categorical procedural rule governing how prosecution

witnesses must testify: under oath, subject to cross-examination, in the presence of the accused, and, if reasonably possible, in the presence of the trier of fact as well. Thus, if an out-of-court statement is testimonial in nature – that is, the type of statement that a witness makes – it may not (putting aside cases of forfeiture and of dying declarations) be introduced against an accused unless the witness is unavailable to testify at trial and the accused has had "an adequate opportunity to cross-examine." *Crawford*, 541 U.S. at 57; *see id.* at 68.

Crawford therefore requires re-examination of any earlier statements regarding the Confrontation Clause. *See State v. Stuart*, 695 N.W.2d 259 (Wis. 2005) (reconsidering pre-*Crawford* ruling in same case that preliminary-hearing testimony was properly admitted, and concluding that it was not). Under the prior regime, articulated in *Ohio v. Roberts*, 448 U.S. 56 (1980), an opportunity for cross-examination was a path, not essential, towards the ultimate touchstone, a determination of reliability of the evidence. Under *Crawford* the opportunity for cross-examination is a large part of the essence of the right. (The opportunity to be brought face-to-face with the accused is also part of that essence.)

The question of whether, or when, preliminary-hearing testimony of a prosecution witness who has become unavailable may be introduced at trial arises very often – indeed, there have been hundreds of federal-court opinions, largely unpublished, raising the issue in the habeas context alone. 4 WAYNE R. LAFAVE, JEROLD H. ISRAEL, ET AL., CRIMINAL PROCEDURE (4th ed. Nov. 2022 update) [hereinafter referred to as CRIM. PROC.], § 14.1(d), hardly

surprising given that the vast majority of jurisdictions routinely hold preliminary hearings.[1]

Nor is it surprising that the lower courts have adopted a wide variety of approaches to the question. The Petition ably and extensively demonstrates the split among the jurisdictions, so Amicus will confine himself to making two points.

First, it should not be thought that the split is really a mirage, the product of different judicial responses to different local procedures. Consider first the issue of whether cross-examination was constrained. Courts holding that the opportunity for examination was inadequate will sometimes emphasize that cross-examination at the preliminary hearing is limited, *e.g.*, *People v. Fry*, 92 P.3d 970, 977 (Colo. 2004), *State v. Stuart*, 695 N.W.2d 259, 265-66 (Wis. 2005), and courts holding that the opportunity was adequate will sometimes proclaim that cross was not constrained. *E.g.*, *State v. Richardson*, 328 P.3d 504, 509 (Idaho 2014); *State v. Spano* 159 P.3d 931, 945 (Kans. 2007). But the reality is that the purpose of the preliminary hearing is remarkably consistent across jurisdictions: It is to determine whether there is sufficient evidence to bind the defendant over for trial. *Fry*, *supra*, 92 P.3d at 983 (Coats, J., dissenting) ("Limitations restricting the inquiry to probable cause and excluding questions of witness credibility . . . do not make preliminary hearings in this jurisdiction significantly different from those permitted by many other states or the federal government."). And given this, extensive cross-examination is not ordinarily

[1] *See*, *e.g.*, Paul G. Cassell & Thomas Goodwin, *Protecting Taxpayers and Crime Victims: The Case for Restricting Utah's Preliminary Hearings to Felony Offenses*, 2011 Utah L. Rev. 1377, 1383, 1395-1402.

appropriate, or wise, or welcomed by the court. *See, e.g.*, *State v. Goins*, 423 P.3d 1236, 1243 (Utah 2017) (noting that it would be "rare" for defense counsel to have "the same motive and [be] provided the same opportunity to cross-examine as she would have at trial"). So even if, as in this case, the trial court did not formally impose limitations on cross, the limitations were real.

Now consider the matter of discovery. As the Petition demonstrates, Petition at 7, crucial disclosures were not made to Petitioner before Ms. Murrell testified at the hearing. But it is clear that in some other states this denial would have supported a conclusion that the opportunity for cross was not adequate. *See, e.g.*, *State v. Nofoa*, 349 P.3d 327 (Haw. 2015) (holding that, because of lack of discovery, admission of preliminary-hearing testimony at trial was a Confrontation Clause violation, despite conclusions that motive of cross-examination was the same as it would be at trial and no restrictions were placed on it).

Second, the question of the adequacy of a prior opportunity for cross-examination is not limited to preliminary hearings. About a dozen states allow criminal depositions to be taken for purposes of discovery, *see* 5 CRIM. PROC. § 20.2(e); in some states, discovery depositions are allowed as a matter of course, and in others on a discretionary basis. *Id.* States allowing such depositions are in sharp conflict as to whether they can be used to present the witness's testimony if the witness becomes unavailable.[2] *See, e.g., State v. Lopez*, 974 So.2d 340

[2] This is, of course, precisely the purpose of a deposition to perpetuate, or preserve, testimony, a device that is discussed below.

(Fla. 2008) (holding in the negative); *Berkman v. State*, 976 N.E.2d 68, 78-79 (2012) (holding in the affirmative, and explicitly disagreeing with *Lopez*). The dispute is similar to that in the preliminary-hearing context: Courts holding in the negative emphasize how different the accused's motives are in examining a prosecution witness at trial and at a discovery deposition, *see, e.g., Lopez*, 974 So.2d at 349 ("the purpose of a discovery deposition is at odds with the concept of a meaningful cross-examination"), and courts holding in the affirmative insist that the motives are "close enough," *Berkman*, 976 N.E.2d at 79; *see also, e.g., State v. Allen*, 560 N.W.2d 829, 839 (Neb. 1997) ("adequate opportunity . . . with similar, if not exact, interest and motive"). The latter courts – like the Kentucky Supreme Court in this case and others allowing use of preliminary hearing evidence at trial – also emphasize the lack of formal limits imposed on the questioning. *See, e.g.*, *Berkman*, *supra*, 976 N.E.2d at 77-78.[3]

[3] Occasionally, the question also arises whether a prior trial of the same case afforded an adequate opportunity for cross examination. *E.g.*, *Mattox v. United States*, 156 U.S. 237 (1895); *Mancusi v. Stubbs*, 408 U.S. 204 (1972). Most often, the answer is affirmative, because the functions of the two trials are the same. But occasionally there may be doubt, if significant developments occurred between the two trials. *See* p. 17 n.6 below.

II. THIS COURT SHOULD TAKE THE OPPORTUNITY THIS CASE OFFERS TO SET OUT CLEAR REQUIREMENTS FOR USE OF PRELIMINARY-HEARING TESTIMONY AGAINST AN ACCUSED.

Amicus believes that this Court could, and should, resolve the confusion in this area by setting out a clear, rather simple, and easily administrable set of requirements with which a state should comply if it wants to use at trial preliminary-hearing testimony of a prosecution witness who has since become unavailable.

At the outset, it should be borne in mind that a prosecutor who wants to preserve the testimony of a witness who it fears might not be available at trial has a traditional, clearly constitutional method for achieving that end: That is precisely the service performed by the deposition to preserve, or perpetuate testimony (also sometimes called a *de bene esse* deposition), which is available in the vast majority of American jurisdictions, if not in all. 5 CRIM. PROC. § 20.2(e); *see*, *e.g.*, Fed. R. Crim. P. 15. The prosecutor in this case had ample opportunity to take Ms. Murrell's deposition, but never did.

One might argue that the availability of the preservation deposition weighs decisively against allowing a prosecutor to use preliminary-hearing testimony for the same purpose. But amicus believes that there is no reason why a state cannot provide for such use if it wishes, essentially allowing the hearing to double duty, *so long as* the hearing protects the accused's confrontation rights, as a preservation deposition does. Amicus suggests that, to protect those rights, the following set of requirements is necessary and would always or virtually always be

sufficient (together with the basic requirements that the accused be present at the hearing and represented by counsel, *Coleman v. Alabama*, 399 U.S. 1 (1970), and that the witness be sworn).[4]

First, and in a way the most fundamental requirement, is simply that *the prosecution must give notice that it is taking the witness's testimony for preservation purposes* as well as to demonstrate probable cause. This requirement is essential because the fundamental prerequisite for adequacy of prior testimony is that the issues in the two proceedings are the same. 5 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW (Chadbourn rev. 1974) §§ 1386, 1387, "for otherwise it cannot be supposed that the former statement was sufficiently tested for cross-examination upon the point . . . in issue [at the later trial]." *Id.* § 1387. If the preliminary hearing is only for determination of probable cause, and the trial is for determination of guilt, then the issues are not substantially the same; probable cause can usually be determined rather easily, on the face of the prosecution evidence, much of which (as in this case) would not even be admissible at trial. Thus, as suggested above, and as some courts have observed, the defense does not have the same motive to cross-examine if only probable cause is at issue, *see Fry*, *supra*, 970 P.3d at 977; *Goins*, *supra*, 423 P.3d at 1243; – especially if the court, taking account the limited function of the hearing, imposes limits on cross, *see*, *e.g.*, *Stuart*, *supra*, but even if not.

If, however, the prosecution gives notice that the testimony is being taken in part for preservation purposes, then the accused and the court both know

[4] The "or virtually always" qualifier is included to account for the possibility discussed at p.17 n.6 below.

what is at stake. The accused will be motivated to conduct a full cross-examination, and the court will realize why that should be allowed.

One might ask whether the accused should recognize without notice from the prosecution that the testimony is being taken for preservation purposes, especially if, as in this case, the witness is aged or ill and if testimony by such a witness is unusual. A sufficient answer is that it is not the defense's job to take the steps necessary to perfect the presentation of prosecution testimony; *cf. Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 324 (2009) (asserting that "the Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court"). And a related, and also sufficient, answer is that there is no reason why the matter should be left to guesswork by the defense, or by the trial court, or after-the-fact assessment of the probabilities by an appellate court. The prosecution can take all the doubt out of the matter by the simple act of giving notice.

Doing so would allow for complete cross-examination where the prosecution made a judgment that it needed to take a precaution to preserve the testimony of its witness – without the waste of gratuitous cross where the prosecution made no such judgment. Put very simply: The subject here is prosecution witnesses. If the prosecutor knows there is a risk making preservation of the witness's testimony worthwhile, then there is no burden for it to inform the defense and the court of that fact, and they should be told. And if the prosecutor does not know that there is such a risk, the defense and the court should not have the burden of inferring that there is.

Would prosecutors be tempted to give notice routinely or prophylactically, so that the purpose of requiring notice would be nullified? Not at all. For one thing, doing so would greatly lengthen preliminary hearings, to the detriment of all concerned. Moreover, as discussed below, designating the hearing for preservation purposes would trigger a discovery obligation on the prosecution; prosecutors would therefore have considerable disincentive to make such designations without careful consideration.

In this case, of course, the prosecution gave no notice at the time of the hearing that it was taking the deposition for preservation purposes – even though the prosecutor self-consciously had that intention.

Second, the notice should be given with sufficient time to allow adequate preparation. This Court has made clear that, while the trial court has wide discretion, adequate time for preparation is an essential component of due process. *See*, *e.g.*, *Ungar v. Sarafite*, 376 U.S. 575, 589 (1964) ("There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process."); *United States v. Márquez–Pérez*, 835 F.3d 153, 162 (1st Cir. 2016) (citing *Ungar* for the proposition that "[h]aving adequate time to prepare a defense is implicit in due process and the right to counsel"); *cf.* Fed. R. Crim. P. 15(b)(1) (requiring "reasonable written notice" of a preservation deposition). There is no need to be precise at this point in how much time is adequate; courts have long experience in managing flexible standards in the context of depositions. And giving no notice before the witness is called to testify – which is what happened in this case – is plainly inadequate. Before Ms. Murrell was called to testify, the defense did not even have reason to guess that it

was about to have an opportunity to cross-examine her.

Third, before the witness testifies, the prosecution must make *appropriate disclosures* bearing on the witness's testimony. At least the prosecution must disclose to the defense the materials that it would have to disclose, under the constitutional standards flowing from *Brady v. Maryland*, 373 U.S. 83 (1963), before such time as the witness testified at trial; amicus suggests that it should also be required to disclose any further materials bearing on the witness's testimony that governing law would require be disclosed before such trial testimony. *See Nofoa*, *supra*, 349 P.3d at 327 (holding that defendant "was denied the opportunity for meaningful cross-examination because he did not have access to relevant discovery materials that would have assisted in the cross-examination of [the witness]"); *Commonwealth v. Bazemore*, 614 A.2d 684, 687 (Pa. 1992) ("One is hard pressed to find just how defense counsel was 'not restricted' when the Commonwealth failed to provide [significant impeachment] information to the defense."); *Chavez v. State*, 213 P.3d 476, 483-84 (Nev. 2009) (asserting that "discovery is a component of an effective cross-examination" and that it is a critical factor in determining adequacy of an opportunity for cross); *People v. Torres*, 962 N.E.2d 919 (Ill. 2012) ("Beyond the freedom to fully question the witness . . . , what counsel *knows* while conducting the cross-examination may . . . impact counsel's ability and opportunity to effectively cross-examine the witness at the prior hearing.").

The suggestion, of course, is not that the time for required disclosures be advanced to the preliminary hearing; if the prosecution is not ready to make the

disclosures, it can decide that the time is not yet ripe to preserve the witness's testimony, and it can take her deposition for preservation purposes at a more propitious time.

In this case, at the time of the preliminary hearing the prosecution had disclosed none of the material that it would have been required to had Ms. Murrell testified at trial – most significantly, neither the notes of her interviews with the police, in which she identified a different assailant, nor the medical examiner's preliminary finding, which recited a cause of death inconsistent with her testimony. It did disclose this material two months later, more than a year before the date that was originally set for trial and 14 months before Ms. Murrell died, App. 51, 58; the prosecution had ample opportunity to take a preservation deposition after the time it chose to make the disclosures.

But plainly, given that the information had not been disclosed at the preliminary hearing, the defense could not then, whatever motivation it may have had, have come remotely close to the full cross-examination that it would have conducted had Ms. Murrell testified at trial.

Fourth, and finally, *the court must not impose any limitations on cross-examination beyond those that would apply at trial*. This requirement appears to be universally accepted;[5] as noted above, courts allowing

---

[5] The extent to which proceedings resembling the modern preliminary hearing existed at the time of the Framing, and to which the accused had an opportunity for cross-examination at them, are matters of academic debate. *Compare* Thomas Y. Davies, *What Did the Framers Know, and When Did They Know It? Fictional Originalism in* Crawford v. Washington, 71 Brook. L. Rev. 105 (2005), *with* Robert Kry, *Confrontation Under the*

testimony from a preliminary hearing to be admitted at trial often emphasize as a justification the absence of constraints on cross-examination at the hearing. In this case, there is no way of knowing whether this requirement would have been satisfied had proper conditions prevailed – that is, had the defense had notice, with adequate preparation time, that Ms. Murrell would be testifying and that the hearing was being held in part for preservation purposes, and had appropriate disclosures been made to the defense. What is manifestly apparent, though, is that if these

---

Marian Statutes: A Response to Professor Davies, 72 Brook. L. Rev. 493 (2007). What seems clear is that, though in an earlier era examinations under the so-called Marian statutes were conducted without counsel present and without cross-examination, by the time of the Framing there was a growing sense of the need to provide an opportunity for cross if the hearing testimony was to be used as a substitute for trial testimony. The sense of transition may be captured by a passage from a manual, NEW VIRGINIA JUSTICE, written by William Waller Hening in 1794 and quoted by Prof. Davies, 71 Brook. L. Rev. at 186-87:

> The doctrine laid down in the books, that the *examination of a witness* taken before a magistrate in pursuance of [the Marian statutes], may be read against a criminal in case of the death of a witness, or his inability to attend, is liable to these objections: – that the prisoner may be concluded by evidence however objectionable the witness may be in point of interest, guilt, &c. and that the accused party has not the same advantage of cross examination, which he would posess before a court, with the assistance of counsel.

More broadly, amicus takes the view that Confrontation Clause doctrine should not attempt to replicate a snapshot of procedure as it existed in 1791. Rather, it should recognize that the Clause was meant to enshrine a basic right that had existed for centuries, and that the exact particulars of how the right was applied were in flux as the procedural context evolved.

conditions had been satisfied the cross-examination of Ms. Murrell, the key witness in a murder case, would not have been a perfunctory matter.[6]

In sum, a state should be allowed to use a preliminary hearing for preservation purposes if it wants to. But it is not enough that, as a formal matter, defense counsel was not limited by the court in conducting cross-examination. The absence of formal constraints has no significance unless the state gives the defense notice that it intends, if necessary, to use the hearing for preservation and gives the defense the preparation time and disclosures necessary to create an adequate opportunity for cross-examination. *See Commonwealth v. Harris*, No. 1221 EDA 2015, 2016 WL 5719362 (Pa. Super. Ct. Sept. 30, 2016) (noting that the accused "was informed that the Commonwealth intended to preserve [the witness's] testimony, was provided with [the witness's] statement and criminal extract, and had the opportunity to cross-examine [the witness] at the preliminary hearing on the areas of bias, motive to lie, and lack of credibility," and concluding that "[t]herefore" the accused's confrontation right was satisfied").

---

[6] Amicus believes in addition that if the accused is able to demonstrate that there is a "new and significantly material line of cross-examination," *Mancusi, supra*, 408 U.S. at 215, that could not have been explored, because it reflected recent developments since the witness testified, that might justify a determination that the prior opportunity for examination (whether in a preliminary hearing, deposition, or trial) was inadequate. The burden would be on the accused to demonstrate such developments, and only rarely could that burden be carried. In any event, resolution of this case does not require determination of whether such a possibility should be recognized.

III. THIS IS AN IDEAL CASE TO CREATE CLARITY ON THE ADEQUACY OF A PRIOR OPPORTUNITY FOR CROSS-EXAMINATION.

Crawford fundamentally transformed the law governing the Confrontation Clause, and it made clear that a key part of the doctrine is the adequacy of a prior opportunity for cross-examination of a witness who has become unavailable by the time of trial. But since *Crawford*, the Court has not shed further light on when a prior opportunity should be deemed adequate. This case provides an excellent vehicle to begin that task. Here, the prosecution did not give notice until well after the fact that it was taking Ms. Murrell's testimony at the preliminary hearing at least in part to preserve it for trial; nor did it give any advance notice that she would testify at all; nor did it provide the defense with any discovery. As a result, the cross-examination was perfunctory. It is clear as can be that had the proper conditions prevailed the defense would not have limited itself to an examination remotely similar to the one that occurred. This case therefore offers an excellent opportunity to assess the significance of those conditions.

Moreover, the case presents the issue with great clarity. There were no other issues on appeal. Ms. Murrell's testimony was obviously crucial to the prosecution. The Confrontation Clause objection was properly preserved. The case comes here on direct review. And defense counsel is superbly well qualified.

CONCLUSION

For the foregoing reasons, the Petition should be granted.

Respectfully submitted,

RICHARD D. FRIEDMAN
Counsel of Record
625 South State Street
Ann Arbor, Michigan 48109-1215
(734) 647-1078
rdfrdman@umich.edu

DECEMBER 2022