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 IN OPPOSITION

Office of the Kentucky
Attorney General
700 Capital Avenue
Suite 118
Frankfort, KY 40601
(502) 696-5300
Matt.Kuhn@ky.gov

MATTHEW F. KUHN*
Solicitor General

DANIEL J. GRABOWSKI
Assistant Solicitor General

**Counsel of Record*

January 26, 2023

QUESTION PRESENTED

If a witness is unavailable at trial, when does a preliminary hearing provide a prior adequate opportunity for cross-examination under the Confrontation Clause?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Rules

INTRODUCTION

Gregory Shields asks this Court to review whether his right to confrontation was violated. As he tells it, the Supreme Court of Kentucky got that question wrong. That court affirmed the trial court's decision allowing into evidence an unavailable witness's prior sworn testimony given at a preliminary hearing. Although Shields could—and did—cross-examine the witness at that hearing, according to him that opportunity was inadequate. And as *Crawford v. Washington* suggests, the prior-opportunity exception requires an "adequate opportunity" for cross-examination. 541 U.S. 36, 57 (2004). So Shields asks this Court to grant review to ultimately say that the preliminary hearing offered an inadequate opportunity.

At bottom, he puts forward two main reasons for the Court to grant certiorari. First, Shields says that there is conflict among state courts of last resort on what constitutes an adequate opportunity. And second, he claims that the Supreme Court of Kentucky's decision conflicts with this Court's precedent. There is some truth to the former. State high courts do disagree in some respects yet not nearly as much as Shields suggests. That disagreement centers on the effect of information learned through discovery after a preliminary hearing. Even so, this case does not require resolving it: no matter which side the Court takes, Shields has not shown a confrontation violation. And Shields's latter reason is just plain wrong. The Kentucky high court's decision does not conflict with any decision of this Court.

STATEMENT OF THE CASE

Shields was arrested for murdering his uncle, Samuel Murrell, in February 2017. Pet. App. 2. A week after his arrest, the trial court held a preliminary hearing. *Id.* at 3. At the hearing, the Commonwealth called two witnesses: Maude Murrell, Samuel's wife (and Shields's aunt), and a police detective. *Id.* Maude was at her home with Samuel and Shields the night Samuel was killed. Prelim. Hr'g 2:02–14. And the detective was one of the investigating officers. *Id.* at 22:22–35.

Maude, who was 82 at the time, testified first. Under oath, she explained that Shields came home after midnight (he lived there with Samuel and Maude). *Id.* at 3:15–45. He entered Samuel and Maude's bedroom, pulled the covers off the bed, and complained about the car he had bought from Samuel. *Id.* at 4:43–5:20. "He was mad, and it was like he was taking it out on Sam." *Id.* at 4:58–5:07. Then Shields left the room and came back with two knives. *Id.* at 5:40–55. He cursed at Samuel, called him names, and accused him of killing Shields's mother. *Id.* at 6:53–7:06. Then Shields started cutting Samuel. *Id.* at 8:15–17. He cut him on his arm, then wrist, then chest—all the while ignoring Maude and Samuel telling him to stop. *Id.* at 8:15–9:15. At one point, when Maude said she would call the police, Shields put a knife to Samuel's throat and said he would slit it if she did. *Id.* at 10:25–46.

Then Maude said that she was "not going to sit in here and look at this" and went into the garage to smoke a cigarette. *Id.* at 9:21–31. After a time, Shields came and smoked one too. *Id.* at 9:32–34. When they returned to the house, Samuel was calling for Maude. *Id.* at 9:36–50. So she went to him, and Samuel said he would stand so Maude could change the bloody

sheets. *Id.* at 9:51–10:21. He did, with help from Shields and his walker. *Id.* at 11:22–47. Samuel stood for a couple of minutes but then fell face first—hitting his head on the dresser. *Id.* at 11:46–12:15. Shields helped him get up, but Samuel fell again—backwards this time. *Id.* at 12:15–39. Shields then bandaged Samuel's cuts and checked his pulse twice. *Id.* at 13:15–44. The second time, it was weak and then stopped altogether. *Id.* at 13:49–59. Shields told Maude to call 911, but she had him do it instead. *Id.* at 14:02–20.

Before the police arrived, Shields told Maude to tell them that a person came into the house and "jumped" Samuel, that Shields came in and stopped the person, and that the person got away. *Id.* at 14:49–15:17. So when the police arrived, Maude at first told them that. *Id.* at 15:20–25. But it wasn't the truth. *Id.* at 15:27–31. And she eventually told the police what really happened. *Id.* at 18:29–36.

After Maude finished her direct testimony, Shields's counsel cross-examined her. *Id.* at 19:30–21:10. Shields's counsel confirmed that Shields had lived with the Murrells for almost four years and that he took them to appointments and ran errands for them. *Id.* at 19:40–45, 20:30–40. And Shields's counsel asked how long Maude had known Shields, whether Shields's actions seemed out of character, whether he was acting unusual, and whether it made sense that he was mad or whether Maude understood why he was mad. *Id.* at 19:45–20:30. At no point during the cross-examination did the trial court interrupt Shields's counsel or in any way limit her questioning. Nor did the Commonwealth object or try to limit the questioning in any way.

The detective then testified. *Id.* at 22:10–20. She confirmed that Maude had first told police the intruder story before implicating Shields. *Id.* at 23:15–44. And the detective testified that, according to the preliminary findings from Samuel's medical examination, several things contributed to his death: his old age, the knife wounds, and a broken hyoid bone and fracture in his vertebrae. *Id.* at 27:22–46. Following her testimony, the court found probable cause to refer the case to a grand jury. *Id.* at 29:04–15.

After the preliminary hearing, Maude died in June 2018. Pet. App. 5. That prompted Shields to move to exclude her preliminary-hearing testimony.

At the hearing on that motion, Shields explained why he believed he did not have a sufficient opportunity to cross-examine Maude. Mot. Lim. Hr'g at 4:30–32. That included arguing that the hearing was meant only to determine probable cause, that he was unaware Maude would testify, that judges often limit questions that stray too far from probable cause, and that the Commonwealth had not yet provided discovery. *Id.* at 4:40–7:45. On the limiting-questions point, Shields recognized that it did not happen in this case. *Id.* at 6:08–23. And on the discovery point, he listed some questions that he would have asked if given discovery before the hearing. *Id.* at 8:27–10:25. That included asking about strangulation since the medical examiner's report suggested that as a possible cause of death. *Id.* at 8:45–9:15. It showed that Samuel's hyoid bone was broken, which is often caused by strangulation. *Id.* at 22:13–25. And yet Maude did not testify to seeing any strangulation.

The Commonwealth responded that notice Maude would testify was not required, that it was unsurprising it called the sole eyewitness, that Shields never objected or asked for a continuance, and that it did not provide discovery because none was ready since the case was still in the investigatory stage. *Id.* at 11:40–12:31, 15:30–35, 15:55–16:12, 18:55–19:02. The prosecutor explained that he met with Maude the day before the preliminary hearing and then decided to have her testify. *Id.* at 13:15–40, 14:52–58. His purpose was twofold: to establish probable cause and to preserve her testimony for trial due to her advanced age.[1] *Id.* at 13:22–58.

On probable cause, even though the detective's testimony likely would have established it, the unique situation warranted calling Maude. *Id.* at 13:55–14:22, 18:20–23. It was a small crime scene with only one eyewitness who was articulate and well oriented with the time and place of the crime. *Id.* at 14:00–19. So the prosecutor thought it appropriate to call her to help establish probable cause. *Id.* at 14:20–23. And though not the norm, he had called eyewitnesses to testify before at preliminary hearings. *Id.* at 20:54–21:10.

And on the preserving-testimony point, the prosecutor explained that he called Maude to testify as a precautionary measure out of an abundance of caution. *Id.* at 19:20–24. Maude was elderly but not terminally ill. *Id.* at 19:10–15. There was no evidence of failing health. *Id.* at 46:02–26. The only reason the prosecutor thought to preserve her testimony was her

---

[1] Shields incorrectly says that the prosecutor admitted to calling Maude "only 'to preserve her testimony for trial.'" Pet. 2 (citation omitted).

advanced age and the possibility that she might become unavailable. *Id.* at 19:33–41. In other words, the prosecutor called her to preserve her testimony as a failsafe. He did not expect Maude to become unavailable. And after the preliminary hearing, the prosecutor had no reason to think otherwise. The Commonwealth never learned of any change in her condition or suggestion of failing health until it learned of her passing. *Id.* at 46:45–47:00, 47:25–34.

After the hearing, the trial court denied the motion to exclude. Pet. App. 54. On Shields's discovery argument, the court explained that even if Shields had the benefit of the medical report, which suggested the possibility of strangulation, it would not have much helped asking Maude about whether she had seen any strangulation. *Id.* at 60–61. Maude already did not mention seeing strangulation in her detailed testimony. *Id.* at 60. And the Commonwealth did not attempt to elicit any such testimony from her. *Id.* So asking her about it would likely only confirm what her testimony already showed: that she did not see any strangulation. *Id.* at 61. On top of that, the court noted that Shields could have taken a deposition if he thought any later discovery suggested "an important area for cross-examination." *Id.* at 64.

In short, it was unclear "that proper notice and timely discovery pertinent to [Maude's] testimony would have helped the defendant or his counsel in any significant degree." *Id.* So Shields was not denied a sufficient opportunity for cross-examination. *Id.* at 65.

Shields then entered a conditional guilty plea, allowing him to appeal the trial court's denial of his motion. *Id.* at 9.

On appeal, the Supreme Court of Kentucky affirmed. After examining this Court's case law in detail, it held that Shields was afforded an adequate opportunity to cross-examine Maude at the preliminary hearing. *Id.* at 35. The court noted that the trial court did not limit Shields's cross-examination of Maude in any way: "the defense did not advance any cross-examination which the trial court disallowed." *Id.* at 29. Any limitation was self-imposed. *Id.* And although Shields's counsel may have been caught off guard or not had complete discovery, that did not make the opportunity inadequate. *Id.* Plus, the Kentucky high court noted that the trial court properly found that Shields had not shown how the later discovery would have made a difference in the questioning "in any significant degree." *Id.* at 31.

Three justices dissented. In their view, Shields was denied an adequate opportunity to cross-examine Maude. *Id.* at 35 (Keller, J., dissenting). They focused on the limited nature of the actual cross and detailed how it could have been better. *Id.* at 41, 47. And they highlighted concerns about the differences between a preliminary hearing and a trial, echoing Justice Brennan's dissent in *California v. Green*, 399 U.S. 149 (1970). *Id.* at 43–46.

Shields then petitioned this Court for certiorari.

ARGUMENT

Shields offers two primary reasons why the Court should grant review. First, he argues that there is a conflict between state high courts on what constitutes an adequate opportunity for cross-examination at a preliminary hearing. And second, he says that the decision below conflicts with this Court's decisions. He is somewhat right on the first but altogether wrong on the second. And ultimately, neither reason justifies certiorari.

This case does not require resolving the core of the disagreement among the States. That disagreement is over whether information learned through discovery after a preliminary hearing can make the opportunity inadequate. But even the States that hold that it can require a showing of how the information would have changed things. Yet Shields has not made that showing here. So no matter what the Court might decide as to the discovery issue, he has not shown a confrontation violation. And Shields's second reason fares even worse. Not only is there no conflict with this Court's cases, but those cases support the lower court's decision.

I. There is no conflict with this Court's precedent.

Consider Shields's two reasons for review—but take them in reverse. Shields says that the decision below conflicts with this Court's prior cases. That is incorrect.

1. Start with the basics. The Confrontation Clause guarantees a defendant the right "to be confronted with the witnesses against him." U.S. Const. amend VI. It is a trial right, *Reynolds v. United States*, 98 U.S.

145, 158 (1878), intended at its core to prevent a prosecutor from using ex parte examinations against a defendant at trial, *Crawford*, 541 U.S. at 50. To do that, the right includes several things. First, it ensures that a defendant can confront a witness face to face. *Coy v. Iowa*, 487 U.S. 1012, 1016–19 (1988). Second, it allows him to cross-examine that witness through counsel. *Pointer v. Texas*, 380 U.S. 400, 407 (1965). And third, it allows the triers of fact to see the witness's testimony firsthand. *Mancusi v. Stubbs*, 408 U.S. 204, 211 (1972).

All told, the right generally gives a defendant the opportunity for "testing the recollection and sifting the conscience of the witness" while "compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." *Mattox v. United States*, 156 U.S. 237, 242–43 (1895).

There are, however, some exceptions to this trial right—necessarily limited to those established at the founding. *Hemphill v. New York*, 142 S. Ct. 681, 690 (2022). The Court has recognized three: dying declarations, forfeiture by wrongdoing, and the prior opportunity to cross-examine an unavailable witness. *Giles v. California*, 554 U.S. 353, 358–59 (2008). And it has done so based on the historical recognition that, in certain instances where its core purpose is met, the trial right "must occasionally give way to considerations of public policy and the necessities of the case." *Mattox*, 156 U.S. at 243; *see also Barber v. Page*, 390 U.S. 719, 722 (1968) ("This exception has been explained as arising from necessity and has been justified on the

ground that the right of cross-examination initially afforded provides substantial compliance with the purposes behind the confrontation requirement.").

For example, courts have permitted the admission of dying declarations from "time immemorial." *Mattox*, 156 U.S. at 243. Yet such declarations lack practically all the Confrontation Clause guarantees. They are but rarely made in the defendant's presence, afford no opportunity for cross-examination, and are not given before the triers of fact. *Id.* Still, they are admitted out of necessity and because the "substance of the constitutional protection is preserved" by the perceived effect on the witness of believing he is about to die. *Id.* at 244.

Likewise, the substance is preserved when the prior-opportunity exception is met. *Id.* *Crawford* of course is the starting point for unpacking this exception. There, the Court turned away from the reliability test of *Ohio v. Roberts*, 448 U.S. 56 (1980), and back to the original meaning of the Confrontation Clause and prior-opportunity exception.

The Court explained that the confrontation right was based on English common law, which developed in response to ex parte examinations of witnesses being introduced at trial. *Crawford*, 541 U.S. at 43–46. By at least 1696, the common law required a prior opportunity for cross-examination before such testimony could be admitted. *Id.* at 45–46. And by 1791 when the Sixth Amendment was ratified, English courts were consistently applying the prior-opportunity requirement. *Id.* at 46–47. Likewise, American cases decided shortly after suggest the requirement. *Id.* at 49–50.

Based on that (and other) historical evidence, the Court held that to admit prior testimonial evidence, the Confrontation Clause "demands what the common law required: unavailability and a prior opportunity for cross-examination." *Id.* at 68. And while the Court suggested that such an opportunity should be adequate, it did not define what that means.[2] *Id.* at 57.

The words themselves, however, carry meaning. There must be an *opportunity* to cross-examine. That means the chance or ability to cross—that may or may not be exercised. And the opportunity must be *adequate*. That conveys the opportunity need not be perfect. *See Delaware v. Fensterer*, 474 U.S. 15, 20 (1985) ("Generally speaking, the Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.").

And the Court's pre-*Crawford* cases shed light on what constitutes an adequate opportunity. Four times the Court has considered whether preliminary-hearing testimony could be admitted: in *Pointer*, *Barber*, *Green*, and *Roberts*. *Crawford* approvingly cited *Green* and *Pointer* for requiring a prior adequate opportunity to cross, *Barber* for requiring the witness to be unavailable, and even *Roberts* for its outcome. 541 U.S. at 57–58. All four cases are therefore relevant to determining whether a preliminary hearing provides an adequate opportunity. Consider each.

---

[2] Twice the Court in *Crawford* noted that its past cases require a prior "adequate opportunity" to cross-examine. *See id.* Otherwise, the language throughout just says "prior opportunity."

First, in *Pointer* the Court considered whether a defendant had an adequate opportunity when he was present at the preliminary hearing but without a lawyer. 380 U.S. at 401–02. It held no. The preliminary-hearing testimony was not "taken at a time and under circumstances affording [the defendant] through counsel an adequate opportunity to cross-examine." *Id.* at 407.

Second, in *Barber* the Court again considered preliminary-hearing testimony, this time with the defendant's counsel present. 390 U.S. at 720. But there, the government did not show that the witness was unavailable. It made no effort to secure the witness's presence at trial. *Id.* at 724. And the Court held that a good-faith effort to do so is required. *Id.* at 724–25. But it did not decide whether the testimony otherwise would have been admissible—although the Court suggested the possibility. *Id.* at 725–26. It noted that 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. Still, the Court explained that "there may be some justification for holding that the opportunity for cross-examination of a witness at a preliminary hearing satisfies the demand of the confrontation clause where the witness is shown to be actually unavailable." *Id.* at 725–26.

Third, in *Green* the Court held that there was no confrontation problem from admitting parts of a witness's testimony at a preliminary hearing to refresh his recollection. 399 U.S. at 151–52, 164. But it went further than that. The Court also held that, because the defendant had an opportunity to cross the witness

at the preliminary hearing, the testimony was admissible. *Id.* at 165. It reasoned that the witness gave his preliminary-hearing testimony under oath, the defendant was represented by counsel, and his counsel had "every opportunity to cross-examine." *Id.* Because the statement would be admissible if the witness was unavailable for trial, the Court determined that it should also be admissible when the witness was available and testifying. *Id.*

That first part is key here: if the witness was unavailable for trial, his testimony would have fallen under the prior-opportunity exception. The Court picked up on *Barber*'s acknowledgment that there may be justification for allowing preliminary-hearing testimony even though such a hearing is different from a trial. *Id.* at 166. And it explained that the defendant's counsel did not "appear to have been significantly limited in any way in the scope or nature of his cross-examination." *Id.* So he had a prior opportunity to cross-examine that provided "substantial compliance with the purposes behind the confrontation requirement." *Id.*

Justice Brennan dissented in *Green*. In his view, a preliminary hearing could not "compensate for the absence of confrontation at trial, because the nature and objectives of the two proceedings differ significantly." *Id.* at 195 (Brennan, J., dissenting). He urged that cross at such a hearing "pales beside that which takes place at trial" in part because of the difference of objectives, because the defense generally has "inadequate time before the hearing to prepare for extensive examination," and because the triers of fact do not see it firsthand. *Id.* at 197–98.

And fourth, in *Roberts* the Court also allowed the admission of preliminary-hearing testimony. 448 U.S.

at 73. It declined to decide whether the mere opportunity to cross-examine or a de minimis cross could satisfy the exception. *Id.* at 70. Instead, the Court held that the "equivalent of significant cross-examination" satisfied the exception. *Id.* And that was met: the defendant asked questions without significant limitation on their scope or nature. *Id.* at 70–71. So he had (and made use of) an adequate opportunity to cross-examine. *Id.* at 73.

2. Now, back to Shields. He argues that the lower court's decision conflicts with those cases. He is wrong. Not only is there no conflict, but the cases refute most of his arguments.

None of them say that preliminary hearings cannot provide an adequate opportunity for cross-examination. *Pointer* excluded such testimony because the defendant was not represented by counsel at the hearing. 380 U.S. at 407. *Barber* excluded it because the government had not shown unavailability. 390 U.S. at 724–25. And although *Barber* noted the differences between a preliminary hearing and trial, it expressly stated that if a witness were actually unavailable there might be justification for allowing his prior testimony. *Id.* at 725–26. *Green* picked up on that same point and held that the cross-examination there was adequate because the defendant was not significantly limited in the scope or nature of his cross by the trial court. 399 U.S. at 166. And *Roberts* says the same. 448 U.S. at 71.

True, *Roberts* leaves unaddressed whether no or de minimis cross is enough. *Id.* at 70. But that just proves the point. If the Court left the question open, then even if the cross here qualifies as de minimis, the

lower court's resolving the issue cannot present a conflict. Shields's only argument otherwise is that de minimis cross-examination cannot amount to substantial compliance with the purpose behind the right. Pet. 24. But no case holds that. In other words, Shields is arguing for an extension of this Court's precedent. Indeed, lower courts have denied habeas relief for cases like this. *See, e.g.*, *Williams v. Bauman*, 759 F.3d 630, 635–36 (6th Cir. 2014). There is no conflict with this Court's cases.

In fact, they support the lower court's decision. For starters, the cases expressly allow preliminary-hearing testimony to satisfy the exception (provided counsel is present and the witness is shown to be unavailable). And they identify only one situation that would make the opportunity inadequate: if the trial court were to limit the scope or nature of the questioning. *Green*, 399 U.S. at 166; *Roberts*, 448 U.S. at 71; *see also Fensterer*, 474 U.S. at 19 ("[T]he trial court did not limit the scope or nature of defense counsel's cross-examination in any way."). That did not happen here. At no point did the Commonwealth object during Maude's cross or the trial court prohibit a line of questioning. Shields's counsel herself recognized that. Mot. Lim. Hr'g 6:08–23. As the lower court noted, any limitation was self-imposed. Pet. App. 29.

The four cases also refute Shields's claim that the preliminary hearing cannot provide an adequate opportunity because its purpose is to determine probable cause, not guilt. Pet. 25. *Barber* notes that very point but then leaves open whether a preliminary hearing could still provide an adequate opportunity. 390 U.S. at 725–26. Then *Green* holds just that. 399 U.S. at 166. And it does so with Justice Brennan in dissent making

the same point Shields makes here. *Id.* at 195–97 (Brennan, J., dissenting). Needless to say, if Justice Brennan dissented, the Court disagreed with him—and rightly so.

The prior-opportunity exception is not meant to offer the same opportunity for cross as at trial. As with all the exceptions, it does not guarantee the full scope of the trial right. The key is whether the "substance of the constitutional protection is preserved." *Mattox*, 156 U.S. at 244. That occurs when there is "substantial compliance with the purposes behind the confrontation requirement." *Green*, 399 U.S. at 166. And as this Court has made clear, the primary purpose is to prevent ex parte examinations from being used at trial. *Crawford*, 541 U.S. at 50.

A preliminary hearing with the defendant present is not ex parte. A witness must stand face to face with the person he accuses. That increases the likelihood for truth telling: "It is always more difficult to tell a lie about a person 'to his face' than 'behind his back.'" *Coy*, 487 U.S. at 1019. It ensures the defendant knows the witness did in fact make the statement. And it allows the defendant to challenge any assertions to further the "integrity of the fact-finding process." *Id.* at 1020 (citation omitted).

That's just what occurred here. Maude testified with Shields sitting right there in the courtroom. She gave a detailed account of what happened. At any point during that account, Shields could have turned to his counsel and told her that Maude was wrong, that she was lying. And then Shields's counsel could have crossed Maude on the point and attempted to expose any dishonesty.

It matters not that the focus of the preliminary hearing is finding probable cause rather than guilt. Shields had the same ability to expose Maude as lying and Maude the same pressure to tell the truth.[3] The substance of the right was preserved.

Likewise, the same goes for Shields's lack-of-notice argument. Pet. 25. *Green* resolves that too. Again in dissent, Justice Brennan explained that the defense does not have the same time to prepare for cross-examination at a preliminary hearing as at trial. *Green*, 399 U.S. at 197 (Brennan, J., dissenting). That critique amounts to the same thing as complaining of insufficient notice. But again, it did not persuade the Court in *Green* that a preliminary hearing is inadequate. And again, that makes sense. There is substantial compliance with the purposes of the right even when there is less time to prepare. Shields was still face to face with his accuser and able to cross-examine her without limitation from the trial court.

That leaves just two things: Shields's final argument about not having discovery and what *Roberts* left undecided. Start with the latter.

Roberts left open whether a de minimis cross or no cross can be an adequate opportunity. 448 U.S. at 70. But the answer is straightforward. It's baked into the standard. An *opportunity* to cross is required, not the exercise of the opportunity. The same goes for at

---

[3] For what it's worth, the difference between showing probable cause and proving guilt is one of degree, not kind. Both determinations go to whether the defendant committed a crime, and similar evidence is used for both. Indeed, Kentucky's rules allow a defendant not just to cross-examine witnesses at a preliminary hearing but also to "introduce evidence in his or her own behalf." Ky. R. Crim. P. 3.14(2).

trial—a defendant need not cross-examine a witness then; he just must be able to do so. The Court has already suggested as much. The right "guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective." *Fensterer*, 474 U.S. at 20. So Shields's counsel asking only a few questions at the preliminary hearing and choosing not to raise many of the questions Shields puts forward after the fact does not mean he lacked an adequate opportunity.

Indeed, Shields could have asked most of the questions he now lists: Maude testified to the basis of all but one on direct. Shields says he could have explored Maude's initial statement to the police identifying an intruder as Samuel's attacker, that Shields went and smoked a cigarette with her in the garage, and that Shields helped Samuel after the attacks. Pet. 26. But Maude testified to each. Prelim. Hr'g 9:32–34, 12:15–39, 13:15–44, 15:04–31. So Shields easily could have crossed on them. That his counsel could have asked about them but chose not to is not a confrontation problem.

The only line of questioning that Shields now identifies that he could not have asked about is the suggestion that strangulation could have occurred. Pet. 25–27. The medical report suggested that strangulation was possible because Samuel's hyoid bone was broken, which strangulation often causes. Mot. Lim. Hr'g at 8:45–9:15, 22:13–25. Yet Maude did not testify to seeing any strangulation at the preliminary hearing (the detective testified to Samuel's broken hyoid bone after Maude testified). Prelim. Hr'g at 27:22–46.

Admittedly, this Court's cases do not directly address whether not receiving discovery before a preliminary hearing could make the opportunity inadequate.

But there is still substantial compliance with the right's core purpose even if a defendant does not yet have discovery. Maude still testified in front of Shields, and Shields could and did cross-examine her without limitation. That is all the exception requires to preserve the "substance of the constitutional protection." *Mattox*, 156 U.S. at 244.

3. Besides, even if the Court were to hold that later discovery could make a prior opportunity inadequate, Shields still has not shown a violation. He would still have to show that having the discovery earlier would have changed things. *See Mancusi*, 408 U.S. at 213–15. At the very least, Shields has to show some "new and significantly material line of cross-examination" that he could not have pursued without the information. *Id.* at 215. And he hasn't.

Again, the only thing that Shields could not have asked Maude about was the possibility of strangulation. Yet asking her about that would not have meaningfully changed anything. In giving a detailed account of what happened, Maude never suggested that Shields strangled Samuel. And the prosecutor never tried to elicit any testimony on the point, even while knowing of the medical examiner's report. So all that asking Maude about strangulation would have done would have been to confirm what was already clear: Maude did not see any. The trial court was spot on here. *See* Pet. App. 60–61.

Shields also suggests that he could have asked about how long he was alone with Samuel when Maude went to the garage. Pet. 26. But that hardly gets him anywhere. Maude was clear in her testimony that she went to the garage to smoke a cigarette, then

Shields joined her. Prelim. Hr'g 9:21–34. It makes little difference if it took him moments or minutes. There would still have been time when Shields was alone with Samuel.

And more importantly, at most what Shields could have elicited was that there was little opportunity for strangulation. But how does that meaningfully help him? Does it imply Maude's whole story is inaccurate because Samuel's hyoid bone was broken—an injury not exclusively caused by strangulation? It is just as, or more, likely that he broke it some other way, such as when he fell and hit his head on the dresser. *Id.* at 11:46–12:15. Shields has not shown how asking Maude about strangulation would have helped.

One final point related to Shields's lack-of-discovery argument. He suggests that its effect on his cross (along with the other limitations) was "all by design." Pet. 25. In other words, he suggests that the prosecutor deliberately did not allow the chance for a better examination. The record does not support that.

The prosecutor did not try to pull a fast one. He met with Maude the day before the preliminary hearing. Mot. Lim. Hr'g 13:15–40, 14:52–58. And he decided to call her both to help establish probable cause as the sole eyewitness and to preserve her testimony—only because of her advanced age. *Id.* at 13:22–58. It was a precautionary measure done out of abundance of caution, not a gamesmanship attempt.

The prosecutor did not provide notice to defense counsel because nothing required him to do so and he had only decided to call Maude the day before. *Id.* at 11:40–50, 13:15–40. He did not provide discovery because there was no discovery prepared yet to provide.

Id. 18:55–19:02. And he did not conduct a later deposition because there was never notice of Maude's failing health. *Id.* at 46:45–47:05, 47:25–34.

Finally, it is not as if the Commonwealth was helped by Maude's unavailability. She was the sole eyewitness. She was detailed and articulate. She told clearly what Shields—her nephew—had done to Samuel. If anything, the Commonwealth would have benefited from the triers of fact seeing Maude's live testimony. Having to rely on her preliminary-hearing testimony was a failsafe that unfortunately became necessary. But it is the exact failsafe that the prior-opportunity exception allows for.

II. Any state-high-court split is not as Shields describes it, and this case does not require resolving it.

Now, circle back to the first reason Shields gives for review: that there is a split among state high courts. To be sure, there is something of a split. But it is different than Shields describes. And this case does not require resolving it.

As Shields describes it, there is a three-way split among the States. Pet. 13–21. Some hold that a preliminary hearing can never be a prior adequate opportunity. Others hold that it is case specific, with factors like whether the cross is limited or discovery is lacking being determinative. And still others, Shields says, hold that any mere opportunity to cross is enough.

That is somewhat right. But the devil's in the details. Take his first category. Shields puts Colorado and Wisconsin in it. *Id.* at 13. Colorado does hold that a preliminary hearing cannot provide an adequate opportunity. *People v. Fry*, 92 P.3d 970, 978 (Colo. 2004)

(en banc). But that directly conflicts with this Court's cases (that *Crawford* approved of) admitting such testimony.[4] *See Green*, 399 U.S. at 166; *Roberts*, 448 U.S. at 73. Even if a preliminary hearing might sometimes be inadequate, under binding precedent it cannot always be so. The dissent in *Fry* was right on that. 92 P.3d at 983 (Coats, J., dissenting).

Shields says that Wisconsin is in the same category. Pet. 13. That is incorrect. Wisconsin does not have a bright-line rule that a preliminary hearing is always inadequate. In *State v. Stuart*, the Wisconsin Supreme Court held *in that case* that there was a confrontation problem because the trial judge limited the scope of the cross. 695 N.W.2d 259, 262, 266, 270 (Wis. 2005). So the defendant "did not have the opportunity at the preliminary hearing to question [the witness] about a potential motive to testify falsely." *Id.* at 266–67. Indeed, later Wisconsin cases read *Stuart* that way and allow preliminary-hearing testimony. *See State v. Smogoleski*, 953 N.W.2d 118 (Table), 2020 WL 6750487, at *2 (Wis. Ct. App. 2020). That leaves one case in a category in clear conflict with this Court's precedent. So put this category to the side.

The more important alleged split is between the States in Shields's second two categories. And no doubt, there is some disagreement there—but not quite as Shields casts it. The middle category does do a case-by-case approach. For example, Illinois focuses chiefly on whether a defendant had the ability to question the witness without limitation and on what the

[4] Courts have also noted that *Fry* turned in part on state-specific grounds. *See State v. Stano*, 159 P.3d 931, 945 (Kan. 2007). Unlike some other States, Colorado largely bars credibility questions at preliminary hearings. *Id.*

defendant knew at the time. *People v. Torres*, 962 N.E.2d 919, 933 (Ill. 2012).

Hawaii does similarly. In *State v. Nofoa*, although there was no limitation on the cross, the defendant did not have relevant discovery, which would have mattered. 349 P.3d 327, 340 (Haw. 2015). The defendant could not ask about the "central issue of the defense—[the witness's] credibility." *Id.* So the Hawaii Supreme Court found a confrontation violation.

Then there is the third category—what Shields calls the mere-opportunity States. Pet. 20. He puts three States in it (and would include Kentucky there too): Kansas, California, and Utah. But Kansas also approaches the issue on a case-by-case basis. *State v. Noah*, 162 P.3d 799, 805 (Kan. 2007). And contrary to Shields's label, any mere opportunity is not enough. In *Noah*, the court held that a defendant lacked a sufficient opportunity to cross at a preliminary hearing when it was cut short after the witness became emotional and could not continue testifying. *Id.* at 801, 805–06.

Still, that does not mean Kansas agrees wholly with the alleged middle category of States. Instead, it disagrees on the effect of discovery. Even if a defendant is unaware of certain things at the preliminary hearing, that does not make the opportunity inadequate. *See Stano*, 159 P.3d at 943, 945.

California holds similarly. It agrees that usually "subsequent discovery of material that might have proved useful in cross-examination is not grounds for excluding otherwise admissible prior testimony at trial." *People v. Jurado*, 131 P.3d 400, 429 (Cal. 2006).

And finally, Utah recognizes that the prior-opportunity exception requires the opportunity, not the undertaking of it. *Mackin v. State*, 387 P.3d 986, 999 (Utah 2016). But that does not mean an opportunity is always adequate. And it is unclear in Utah whether later discovery could make the opportunity not so.

All told, there is some disagreement among the States. But it is not as Shields describes. Discounting Colorado (which plainly conflicts with this Court's cases), the States seem to agree that whether a preliminary hearing provides a prior adequate opportunity is determined case by case. They also seem to agree that a court cannot unduly limit the cross-examination. The core of what they disagree on is the effect of information learned later through discovery. Some States, such as Hawaii, hold that if the discovery would have made a meaningful difference, then it makes the opportunity inadequate. Other States, like Kansas, hold that an opportunity is adequate regardless of anything learned later.

The problem for Shields is that, either way the Court might resolve the issue, he loses. If the Court sides with the discovery States, Shields has not shown how the discovery about the possibility of strangulation would have mattered. And if it sides with the other States, then Shields of course loses.

That means this case ultimately does not require the Court to resolve any split. No doubt, if it were to grant review, the Court could do so. But it could in good conscience also leave the question unaddressed, especially given that the States mostly agree that a case-by-case approach governs and that a trial court cannot unduly limit a cross. The States do not need this Court to confirm what they are already doing. And

if the Court wants to resolve the discovery issue, it should wait for a case in which it matters. Here, either way, Shields has not shown that admitting Maude's testimony violated his rights.

* * *

Make no mistake, the question presented is interesting. But that is not enough to warrant review. There must be compelling reasons. And those are largely lacking here. The lower court's decision does not conflict with any of this Court's decisions. On the contrary, the decision below is correct. Add to that, the disagreement between state high courts, though present, is not as great as Shields suggests. And the core of that disagreement does not even need to be resolved here. No matter how the Court might resolve the split, Shields has not shown a confrontation violation.

CONCLUSION

The Court should deny the petition for a writ of certiorari.

Respectfully submitted,

Office of the Kentucky
Attorney General
700 Capital Avenue
Suite 118
Frankfort, KY 40601
(502) 696-5300
Matt.Kuhn@ky.gov

**Counsel of Record*

MATTHEW F. KUHN*
Solicitor General

DANIEL J. GRABOWSKI
Assistant Solicitor General