No. 22-450

IN THE
Supreme Court of the United States

GREGORY SHIELDS,
Petitioner,

v.

COMMONWEALTH OF KENTUCKY,
Respondent.

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

REPLY BRIEF FOR THE PETITIONER

Gregory J. DuBoff
APPELLATE JUSTICE
INITIATIVE AT
MCGUIREWOODS LLP
800 East Canal St.
Richmond, VA 23219

Aaron R. Baker
DEPARTMENT OF PUBLIC
ADVOCACY
5 Mill Creek Park
Frankfort, KY 40601

Jonathan Y. Ellis
Counsel of Record
Francis J. Aul
APPELLATE JUSTICE
INITIATIVE AT
MCGUIREWOODS LLP
888 16th St. N.W.
Suite 500
Washington, D.C. 20006
(202) 828-2887
jellis@mcguirewoods.com

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INTRODUCTION

The court below held that petitioner could be tried for murder based on the testimony of an ambush witness taken at a preliminary hearing one week after his arrest—without notice to his counsel of her appearance, without a shred of discovery, and without any reasonable time for his counsel to prepare. The Commonwealth defends that ruling on the ground that, in the 90 seconds of blind questioning defense counsel managed to conduct of this unexpected witness, the trial judge did not expressly enforce Kentucky's limitations on testing a witness's credibility at a preliminary hearing. In so doing, the Commonwealth—like the court below—takes sides in a deeply entrenched conflict on what constitutes a constitutionally adequate opportunity for cross-examination.

The Commonwealth does not dispute that the Confrontation Clause permits the admission of an unavailable witness's prior testimony only if the defendant previously had an "adequate opportunity" for cross-examination. Opp.11. It acknowledges that this Court has not "define[d] what that means" and that the States disagree. Opp.1, 11. It does not dispute that the question is important to defendants, state prosecutors, and courts alike, *see* Vanho.Amicus.Br. 9-11, or that many States, including those that agree with the Commonwealth, have pleaded for guidance on this issue, *see* Pet.22-23. It agrees there is no obstacle to the Court providing that guidance in this case. Opp.24; *see* Friedman.Amicus.Br.5 ("This case is an excellent vehicle for clearing up this important area.").

The Commonwealth nevertheless opposes certiorari because the disagreement among state courts is

purportedly somewhat different than petitioner has framed it (and, in its view, petitioner should lose under either side) and, in any event, the decision below is correct. But courts and commentators acknowledge and describe the split as petitioner presents it—when, if ever, a preliminary hearing can provide an adequate opportunity for cross-examination. The Commonwealth identifies no one who describes it as limited to the effect of later-produced discovery. And even if the conflict were as narrow as the Commonwealth alleges, it is implicated here. The prosecutor admittedly withheld numerous pieces of constitutionally compelled discovery until after the relevant testimony.

Unsurprisingly, then, the Commonwealth leads with and focuses on the merits. It is wrong there too. But most importantly, even if it were right, that would not provide a persuasive argument against further review. Whether the decision below is ultimately correct, the fact remains that Ms. Murrell's testimony would have been excluded in Colorado, Wisconsin, and likely several other States. The constitutional right to confront the witnesses against you should not turn on where you live. Yet all agree that today it does, and until this Court intervenes, it will.

ARGUMENT

A. This Case Implicates a Deep, Entrenched Conflict Among the States.

As the Commonwealth concedes, the States are openly divided on what constitutes an "adequate opportunity" for cross-examination at a preliminary hearing, such that the testimony may later be admitted without the witness at trial. Opp.21. Two States

hold that a preliminary hearing never provides a constitutionally adequate opportunity for cross-examination; five States apply a case-by-case approach; and four States, including the court below, now hold that the mere opportunity for cross-examination suffices absent express interruption by the court. Pet.13-23. Rather than seriously contest the split, the Commonwealth argues that the conflict is "somewhat" different than petitioner describes it, and that this case does not "require resolving it." Opp.21. The Commonwealth is wrong on both points, and certiorari would be warranted even if it were right.

1. a. The conflict among lower courts concerns the foundational question of what counts as an "adequate opportunity" for cross-examination. *Crawford v. Washington*, 541 U.S. 36, 57 (2004). That is the question that *Crawford* left open. That is how the States themselves understand their disagreement. *See, e.g.*, *People v. Fry*, 92 P.3d 970, 978 (Colo. 2004) (describing the split as "whether a preliminary hearing provides an adequate opportunity for cross-examination."); *State v. Aaron*, 218 S.W.3d 501, 514 (Mo. Ct. App. 2007) ("[S]tates are split as to whether the purpose of a preliminary hearing is so different from the purpose of a trial as to render cross-examination at the preliminary hearing an insufficient substitute for cross-examination at trial."). And that is how commentators describe the conflict. *See* Friedman.Amicus.Br.4 ("The lower courts are badly divided on the question of whether, or when, a preliminary hearing offers an adequate opportunity to cross-examine."). The Commonwealth does not cite a single court or commentator framing the split as concerning solely

the "effect of information learned later through discovery." Opp.24. And its own attempts to narrow the disagreement fail.

As the Commonwealth acknowledges, Colorado has adopted a categorical rule against ever introducing preliminary-hearing testimony from an unavailable witness. Opp.13. The Commonwealth dismisses that approach as in "direct[] conflict[] with this Court's cases." Opp.22. Even if true, that would not eliminate the conflict. But of course, Colorado is not simply ignoring this Court's cases. In Colorado, as in most States, "credibility determinations are not allowed at preliminary hearings." *Fry*, 92 P.3d at 979. And Colorado has determined that the mere opportunity to cross-examine at a hearing where the witness's credibility was off limits is not constitutionally adequate. None of this Court's cases says otherwise. Rather, this Court has only ever held preliminary-hearing testimony admissible at trial when the witness underwent "the equivalent of significant cross-examination," a main focus of which was to "challenge whether the declarant was sincerely telling what he believed to be the truth." *Ohio v. Roberts*, 448 U.S. 56, 70-71 (1980); *see California v. Green*, 399 U.S. 149, 165-66 (1970) (prior testimony given "under circumstances closely approximating those that surround the typical trial" and cross-examination was not "significantly limited in any way").

The Commonwealth's effort to transform Wisconsin's categorical rule into a case-by-case approach is also unpersuasive. It is true that the judge in *State v. Stuart*, 695 N.W.2d 259 (Wis. 2005), "limited the scope of the cross" as to credibility. Opp.22. But the key point was that the judge "*properly* did [so]" because,

under Wisconsin law too, "that kind of attack is off limits in a preliminary hearing." *Stuart*, 695 N.W.2d at 266-67 (emphasis added). It was because of that limitation that *Stuart* adopted a bright-line rule precluding admission of preliminary-hearing testimony at trial. *Id.* at 266.*

Finally, the Commonwealth's efforts to cabin the disagreement in the remaining States to the relevance of "information learned later through discovery" also lack merit. Opp.24. To be sure, the failure to provide discovery in advance of a preliminary hearing is an important factor in many States' analysis of whether the opportunity to cross-examine a witness was adequate. *See* Pet.18-19. But they also expressly consider other factors like "the motive and focus of the cross-examination," *People v. Torres*, 962 N.E.2d 919, 931 (Ill. 2012), or ask more broadly whether the prior opportunity to cross-examine was "full and fair," *Commonwealth v. Bazemore*, 614 A.2d 684, 687 (Pa. 1992). Of the States that disagree with the mere-opportunity approach, none focuses exclusively on the effect of later-produced evidence.

b. The decision below plainly implicates this broader conflict.

The categorical rules in Colorado and Wisconsin present an obvious conflict with the decision below.

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* The unpublished decision in *State v. Smogoleski*, 953 N.W.2d 118 (Table), 2020 WL 6750487 (Wis. Ct. App. 2020), does not prove otherwise. The lower court there expressly affirmed *Stuart*'s holding that when a preliminary-hearing witness cannot be cross-examined on "credibility or general trustworthiness . . . . a Confrontation Clause problem arises." *Id.* at *2. But for several unique and case-specific reasons, the preliminary hearing in *Smogoleski* "was not so restricted." *Id.*

The Commonwealth does not dispute that Kentucky imposes similar restrictions on preliminary hearings, including a prohibition on testing a witness's credibility. *See* Pet.14-15. Had petitioner's counsel delved into Ms. Murrell's credibility, such questions could have "draw[n] a justified objection and the ire of [the] trial court." Pet.App.49. Under the approach in Colorado and Wisconsin, Ms. Murrell's testimony would have been excluded.

The decision below conflicts with the case-by-case approach too. Unlike the Pennsylvania Supreme Court, for example, the court below declined to consider whether petitioner's opportunity to cross-examine was "meaningful." *See* Pet.App.10-12 (contrasting a "meaningful" opportunity with its view of the "constitutional touchstone" of an "adequate opportunity"). And unlike the Illinois Supreme Court, the court below flatly dismissed the relevance of the differences in focus and motive for cross-examination between a preliminary hearing and trial. *See* Pet.App.33 ("Shields's argument that a defendant does not have a similar motive in cross-examination at a preliminary hearing . . . vis-à-vis the trial has been consistently rejected in other jurisdictions."). Under the case-by-case approach, then, several factors would likely also have led these courts to exclude Ms. Murrell's testimony.

2. In any event, even if the conflict were limited to the relevance of later-produced evidence, that issue is squarely presented here. The Commonwealth does not dispute that the prosecutor failed to produce several significant pieces of evidence before Ms. Murrell testified, including Ms. Murrell's prior inconsistent statement to police, in which she identified a different

assailant; petitioner's own recorded statement to police; and the medical examiner's report that determined a cause of death in tension with Ms. Murrell's testimony. *See* PH Vid. 23:15-23:40, 23:45-24:06, 27:20-27:48. The claim that no discovery "was ready" before the preliminary hearing, Opp.5, is code for the prosecutor's admission that he just "did not deem it appropriate at that stage to provide that information," MIL Vid. 15:57-16:12. But the Commonwealth does not dispute that all of the evidence could have been produced. And it does not dispute that the Constitution required its production before Ms. Murrell could have testified at trial.

Instead, all the Commonwealth argues is that the withheld evidence might not have helped. The petition explains why that is wrong. Pet.26-27; *see* pp. 10-12, *infra*. But what matters is that the Kentucky Supreme Court ducked the question. As noted, the court expressly refused to consider whether petitioner's opportunity to cross-examine was "meaningful" given the non-disclosure of Ms. Murrell's and petitioner's prior statements. Pet.App.12. As for the medical report, it asked only whether the trial court "abused its discretion" in determining that it would not have helped petitioner to a "significant degree." Pet.App.31-32. And it suggested that the impact of withheld evidence should not even be considered except in some undefined category of "extraordinary cases." Pet.App.32 n.15.

Even by the Commonwealth's telling, the Kentucky Supreme Court thus squarely aligned itself with Kansas and California. *See* Opp.23 (agreeing that in Kansas and California "subsequent discovery of mate-

rial that might have proved useful in cross-examination is not grounds for excluding . . . prior testimony at trial"). As the Commonwealth concedes, several other States disagree with that approach. Opp.23. If they are right, the decision below should be reversed and, at a minimum, the case remanded for a proper consideration of whether the later-produced evidence—all of it—could have made a difference for cross-examination at trial.

3. Finally, even accepting the Commonwealth's view of the conflict and its assertion that a court *could* find no prejudice under either standard, certiorari would still be warranted. The Commonwealth acknowledges that the possibility of an affirmance on remand poses no obstacle to this Court deciding the question presented and providing the lower courts needed guidance on the proper standard. Opp.24. Its further assertion that the Court could nevertheless "in good conscience" ignore the current confusion in the lower courts cannot be credited. *Id.* There is an admitted conflict in the lower courts on the scope of a bedrock constitutional right that is deeply entrenched, that has been comprehensively explored by the lower courts, that frequently recurs, and that is squarely presented here with no barrier to this Court's review. The Court exists to review and resolve such questions.

B. The Decision Below Is Wrong.

Perhaps because of the acknowledged conflict on the question presented, the Commonwealth leads and focuses on the merits. Opp.8-21. As the petition explained, even if the decision below were correct, the confusion in the lower courts would alone justify review in this case. Pet.24. At this stage, it is enough

to observe that the Commonwealth's merits defense is notably tepid. And its misguided and fact-bound argument that the withheld discovery would not have helped petitioner provides no basis to ignore the purely legal question presented.

1. Most notable is what the Commonwealth does not say about the merits. Across many pages of discussion, it cannot bring itself to argue that the decision below is dictated by this Court's precedents. The most the Commonwealth claims is that the decision below "does not conflict with any of this Court's decisions." Opp.25; *see* Opp.11 (acknowledging that *Crawford* does not define "adequate"). But the Commonwealth does not dispute that this Court has never held that anything resembling the proceedings in this case provided an "adequate opportunity" for cross-examination. Thus, even the Commonwealth's analysis confirms that, were the Court to grant review and affirm, it would be establishing a new floor for what counts as "substantial compliance with the purposes behind the confrontation requirement." *Barber v. Page*, 390 U.S. 719, 722 (1968).

The Commonwealth's proposed standard for "adequate opportunity" reveals this need to break new ground. The Commonwealth suggests an opportunity is inadequate only if the trial court "limit[s] the scope or nature of the questioning"—presumably by express interruptions or restrictions. Opp.15. But this Court has never applied "adequate opportunity" so narrowly. The inquiry has been whether the earlier testimony was "taken at a time and under circumstances affording petitioner . . . an adequate opportunity to cross-examine." *Pointer v. Texas*, 380 U.S. 400, 407

(1965). And when the Court has admitted preliminary-hearing testimony, it has carefully discussed the nature, scope, and circumstances of the examinations. *See Green*, 399 U.S. at 150; *Roberts*, 448 U.S. at 58, 70. If explicit restrictions were all that mattered, those decisions could have been much shorter.

The Commonwealth's argument thus betrays that the decision below can be defended only by adopting a substance-free definition of "adequate opportunity." Unless the trial court's failure to interrupt Ms. Murrell's cross-examination is dispositive, there is no credible argument that petitioner enjoyed an "adequate opportunity." And having not disputed that petitioner's counsel rightly believed that "broad cross-examination would not be permitted" at the preliminary hearing, Pet.25, the Commonwealth effectively embraces the dissenters' lament below that "a defendant's Confrontation Clause right [will] hinge on whether his attorney asks improper questions and whether the trial court prohibits those improper questions." Pet.App.49-50. Nothing in the Court's precedents supports that position.

2. The Commonwealth's argument that the withheld evidence would not have helped petitioner's cross-examination of Ms. Murrell likewise provides no basis to deny review. Opp.18-21. The most remarkable part of this argument is how little it resembles the reasoning of the Court below. *See* p. 7, *supra*. If the Commonwealth wants to argue that any constitutional violation was harmless beyond a reasonable doubt in this case, it can do so. *See Chapman v. California*, 386 U.S. 18, 24 (1967). But some court should apply the proper standard to determine whether there

was a violation, before deciding whether any error was harmless.

In any event, the Commonwealth also fails to refute that petitioner's lack of an "adequate opportunity" to cross-examine Ms. Murrell mattered. The Commonwealth completely ignores the prosecutor's failure to produce petitioner's recorded statement to police. Without that statement, however, defense counsel—with only days on the case and with no notice that Ms. Murrell would testify *until she was called*—would have been foolish to engage in blind questioning that risked devastating her client's credibility.

The Commonwealth does acknowledge the prosecutor's failure to produce *Ms. Murrell's* statements to police identifying another culprit. Opp.18. It then wrongly suggests that petitioner "easily could have crossed on them" anyway. *Id.* But learning at the preliminary hearing that Ms. Murrell gave inconsistent statements is no substitute for proof of what she actually said. This Court has recognized "the value for impeaching purposes" of a statement itself in "the cross-examining process." *Jencks v. United States*, 353 U.S. 657, 667 (1957); *see Bazemore*, 614 A.2d at 687 ("One is hard pressed to find just how defense counsel was 'not restricted' when the Commonwealth failed to provide [a witness's prior inconsistent statement] to the defense."). And the Commonwealth never explains why the Confrontation Clause should be read to permit government-engineered impediments to effective cross-examination.

Finally, the Commonwealth's effort to downplay the medical examiner's report also fails. As reflected in the undisclosed report, the medical examiner "was

going to testify that . . . strangulation caused" Mr. Murrell's death. MIL Vid. 22:10-22. And the Commonwealth concedes that, had the report been disclosed, petitioner "could have elicited" from Ms. Murrell that there "was little opportunity for strangulation." Opp.20.

The Commonwealth suggests that none of that hypothetical questioning matters because it would not show that Ms. Murrell's "whole story [was] inaccurate." Opp.20. But even if so, that does not show harmlessness. Cross-examination can be just as—if not more—effective when used to elicit favorable testimony from an adverse witness. Nothing could have benefitted petitioner more than using Ms. Murrell's cross-examination to show that he could not have killed Mr. Murrell in the way the Commonwealth was going to claim he did.

At bottom, the Commonwealth's speculation about cross-examination that could have occurred underscores that the testimony of the Commonwealth's "sole eyewitness" to an alleged murder was not "taken at a time and under circumstances affording petitioner through counsel an adequate opportunity to cross-examine" her. *Pointer*, 380 U.S. at 407. The Commonwealth's reliance on that testimony to support the conviction in this case "amount[s] to denial of the privilege of confrontation guaranteed by the Sixth Amendment." *Id.* This Court should grant review and say so.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Gregory J. DuBoff
APPELLATE JUSTICE INITIATIVE AT MCGUIREWOODS LLP
800 East Canal St.
Richmond, VA 23219

Aaron R. Baker
DEPARTMENT OF PUBLIC ADVOCACY
5 Mill Creek Park
Frankfort, KY 40601

Jonathan Y. Ellis
Counsel of Record
Francis J. Aul
APPELLATE JUSTICE INITIATIVE AT MCGUIREWOODS LLP
888 16th St. N.W.
Suite 500
Washington, D.C. 20006
(202) 828-2887
jellis@mcguirewoods.com

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