No. _____

IN THE

Supreme Court of the United States

ANTHONY SIMS, JR,
Petitioner

v.

STATE OF NEW JERSEY,
Respondent

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

The petitioner asks leave to file the attached brief in support of her petition for a writ of certiorari without prepayment of costs and to proceed *in forma pauperis*. In support of this motion, petitioner submits:

1. That he has no funds with which to pay the necessary fees and costs of this action.

2. That he was determined to be an indigent in accordance with *N.J.S.A.* 2A:158A-14 and entitled to appointed counsel. The New Jersey Office of the Public Defender was appointed by the New Jersey Superior Court to represent him. He has remained indigent since that time.

Dated: August 1, 2022

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No. _____

IN THE

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ANTHONY SIMS, JR.,
Petitioner

v.

STATE OF NEW JERSEY,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF NEW JERSEY

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QUESTION PRESENTED

The Confrontation Clause bars testimonial hearsay when the defendant has not had the opportunity for cross-examination. At Mr. Sims' trial for attempted murder, in lieu of live testimony from the victim, who was the sole eyewitness to the shooting, the government relied on the victim's hearsay statements from a hospital bed; these statements were embedded in the transcript of a pre-trial hearing introduced at trial. At the pre-trial hearing, the victim denied any recollection of incriminating Mr. Sims, so defense counsel was unable to cross-examine the victim on the substance of the prior statement.

Was the opportunity for cross-examination at the pretrial hearing adequate under the Confrontation Clause?

LIST OF PARTIES

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

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Anthony Sims, Jr. respectfully petitions this Court for a writ of certiorari to review the judgment of the New Jersey Supreme Court.

OPINIONS BELOW

The opinion of the New Jersey Supreme Court is reported at 271 A.3d 288 (N.J. 2022). (Appendix A) The opinion of the New Jersey Appellate Division is reported at 246 A.3d 814 (N.J. Super. Ct. App. Div. 2021). (Appendix B)

JURISDICTION

The judgment of the New Jersey Supreme Court was entered on March 16, 2022. On May 6, 2022, the Supreme Court of New Jersey filed its order denying Petitioner's timely Motion for Reconsideration of the March 16, 2022 judgment. (Appendix C) This Petition for a Writ of Certiorari is filed within ninety days of the Supreme Court of New Jersey's denial of the motion for rehearing. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment of the U.S. Constitution provides in relevant part:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ."

STATEMENT OF THE CASE

At Mr. Sims' trial for attempted murder, the primary evidence against him was the victim's identification from his hospital bed. The Government's theory was that Mr. Sims' brother and the victim were embroiled in a feud and that the shooting was retaliatory. At a *Wade*[1] hearing seeking the suppression of the identification, the victim disclaimed any memory of identifying Mr. Sims. Mr. Sims' trial defense was that the victim did not have a sufficient opportunity to observe the perpetrator during the shooting. In addition, Mr. Sims argued that the victim was biased and motivated to misidentify him as the perpetrator. The victim refused to testify at trial because criminal charges were pending against him for murdering Mr. Sims' brother. Thus, Mr. Sims' sole opportunity for cross-examination was at the *Wade* hearing, an opportunity that was significantly hampered by the victim's alleged memory loss and the limited scope of the proceeding.

A. Factual Background

P.V. was shot multiple times on April 9, 2014. He was sitting in his car, talking on the phone, when he saw a man crouched down by the side of the car. The man started shooting and P.V. jumped into the passenger seat.

At the scene, he told his grandmother that the shooter was "Sims," "B.J.'s brother," but did not specify a first name. Minutes later, when the police arrived and asked who shot him, P.V. told the police that he did not know. There were no other witnesses to the shooting itself, but several people in the neighborhood saw a

[1] *United States v. Wade*, 388 U.S. 218 (1967).

black man dressed in a dark hoodie run from the area. A surveillance camera captured the shooting, but no identification could be made from the video because a hood obscured the suspect's face.

On April 13, 2014, four days after the shooting, the police interviewed P.V. at the hospital. He had suffered nine gunshot wounds and had been intubated. Soon after P.V. had been extubated and was taking opioids for his pain, he agreed to talk to the police. He gave a statement asserting that Anthony Sims shot him and identifying Mr. Sims from a single photo show-up. He recalled that the shooter was wearing a dark sweatshirt and that a hood was pulled tightly over his face. P.V. also told the police that he and Mr. Sims' brother B.J. had a "falling out," and the two were supposed to fight. He speculated that Mr. Sims shot him in retaliation. P.V.'s statement is sparse on details about the falling out.

Armed with P.V.'s statement, the police decided to arrest Mr. Sims for the shooting. Following an interrogation — in which Mr. Sims denied any involvement in the shooting — the police charged him with attempted murder and other offenses.

Pre-trial, Mr. Sims filed a *Wade* motion to suppress P.V.'s identification from the hospital. At the *Wade* hearing, P.V. testified that he had no recollection of the shooting or of giving a statement to police at the hospital. In response to P.V.'s lack of recollection, the prosecutor introduced P.V.'s hospital statement at the hearing. The prosecutor read each question the police posed to P.V. in the hospital; read P.V.'s answer to each question; and inquired whether P.V. recalled providing that

answer. Almost invariably, P.V. responded, "I don't remember" to each question. At the close of the hearing, the prosecutor argued that the defense motion to suppress the identification should be denied because the issue in the case was not the reliability of the identification. According to the prosecutor, this was not a prototypical misidentification case because the victim's and the defendant's family had known each for at least a decade. Rather, the central issue in the case was whether the victim had a motive to misidentify Mr. Sims.

The trial court denied the defense motion to suppress P.V. 's identification. The court ruled that P.V. had feigned memory loss at the pre-trial hearing, and if he maintained his memory loss at trial, then his hospital statement would be admissible as a prior inconsistent statement. Ultimately, the issue of whether P.V. was feigning memory loss was a matter for the jury to resolve, the lower court ruled.

The jury was never able to resolve that issue because P.V. did not testify at trial. In the period between the pretrial hearing and trial, P.V. was accused of murdering Mr. Sims' brother. By the time of Mr. Sims' trial, P.V. had been charged and detained at the county jail awaiting trial. Although the State offered P.V. a grant of immunity and the lower court ordered him to testify, P.V. invoked his Fifth Amendment privilege against self-incrimination, rendering him "unavailable." The State then moved to admit P.V.'s *Wade* hearing testimony into evidence and the defendant objected under the state evidence rules and on Confrontation Clause grounds. The objection was overruled.

The State then admitted P.V.'s *Wade* hearing testimony "by way of the prosecutor reading the questions put to the victim and [a detective] reading the victim's answers." App. 92. Embedded within the *Wade* hearing testimony was the statement that P.V. gave to the police at the hospital. Thus, the testifying detective also read the questions put to P.V. when he was in the hospital, P.V.'s corresponding answers — including his identification of Petitioner — and P.V.'s response at the *Wade* hearing about whether he recalled giving the recorded answers to the police questions in the hospital. "Through that process, the State was able to introduce into evidence at trial the victim's entire statement to police." App. 93.

As part of the final instructions before the jury retired to deliberate on the charge, the judge instructed: "you will be afforded the opportunity to hear [P.V.]'s statement from a prior proceeding that you may now consider as substantive evidence." During deliberations, the jury requested to review a copy of P.V.'s hospital statement. Responding to the jury's question, the lower court clarified that "the statement of the victim at the hospital is subsumed on this record within the testimony of [the detective]."

B. The Appellate Court Rules That the Introduction of the Victim's *Wade* Hearing Testimony Violated Petitioner's Confrontation Rights.

On direct appeal, the Appellate Division found multiple errors, warranting the reversal of defendant's convictions. Relevant to the Confrontation Clause violation, the appellate court ruled that the defendant did not have an adequate

opportunity to cross-examine the victim at the *Wade* hearing. App. 101-102. Because the victim disclaimed memory of making the statement in the hospital, the victim's testimony was lacking substance — "there was nothing to cross-examine the victim about" at the hearing. App. 102.

Before the appellate court, the Government conceded that the hospital statement could not have been introduced independently at trial as a prior inconsistent statement unless P.V. testified. App. 100. The court ruled that, by using the *Wade* hearing testimony as a vehicle for the admission of the hospital statement, the Government accomplished what it conceded was otherwise impermissible. Moreover, although the trial judge had anticipated that the jury would ultimately decide whether the victim was feigning memory loss, the manner in which the testimony was introduced – through the detective's reading – deprived the jury of that opportunity and consequently denied the defendant his right to confrontation. App. 102-103.

C. The New Jersey Supreme Court Reverses the Appellate Court and Finds No Confrontation Clause Violation in Admitting an Out-Of-Court Statement Incriminating Mr. Sims, Where the Declarant Feigned Memory Loss at the Prior Proceeding and Refused to Testify at Trial.

The New Jersey Supreme Court granted the Government's petition for certification on the Confrontation Clause issue. In a 3-2 opinion, the Supreme Court disagreed with Mr. Sims' position that the victim's *Wade* hearing testimony was inadmissible under both the state evidence rules and on Confrontation Clause grounds. App. 44.

The focus of the majority's Confrontation Clause analysis was whether the constitutionally guaranteed opportunity for cross-examination had been satisfied. App. 45. Starting from the premise that the prior opportunity for cross-examination must be "adequate," the majority relied on two strands of cases in its ruling. App. 45. First, it cited several federal circuit court cases holding that a preliminary hearing offers an adequate prior opportunity for cross-examination for Confrontation Clause purposes. App. 42. Second, citing *California v. Green*, 399 U.S. 149 (1970), and *United States v. Owens*, 484 U.S. 554, 559 (1988), the majority concluded that a witness's lack of memory of a prior statement does not frustrate a defendant's opportunity for cross-examination at trial. App. 42-43. Although *Green* and *Owens* addressed the lack of memory of witnesses who were available at trial, the New Jersey Supreme Court did not address the factual distinction between the present case and those precedents. The majority opinion implicitly held that there are no constitutional implications when an unavailable witness's prior statement is admitted at trial even though the defendant could not previously cross-examine on the substance of the statement due to feigned memory loss.

Putting these strands together, the Court concluded that Mr. Sims' opportunity for cross-examination was constitutionally adequate. Its assessment of adequacy was based on Mr. Sims' opportunity to attack the credibility of the statement "identifying" him as the shooter at the *Wade* hearing, and that "[b]y virtue of the direct and cross-examination at the *Wade/Henderson* hearing, the jury was fully informed that P.V. denied any recollection of the shooting or his statement

to police." App. 45. The majority did not address how exactly the jury would have been able to determine whether to credit P.V.'s hospital statement or his implicit denial of the prior statement based on the cold reading of the transcript by an investigating detective at trial.

Two justices of the New Jersey Supreme Court dissented from the majority opinion. The dissent would have excluded from evidence both the hospital statement and the *Wade* hearing testimony under the Confrontation Clause and the state evidence rules.

Starting its analysis with the hospital statement, the dissent had no objection to its introduction at the *Wade* hearing when P.V. claimed lack of memory. App. 58. But, because he failed to testify at trial, "[t]he jury did not have the opportunity to hear from or scrutinize P.V. on the witness stand to determine whether his lack of memory at the *Wade* hearing was feigned or real or whether he gave an honest or accurate account of his identification of Sims as his assailant at the hospital." App. 59. The hospital statement was "laundered" through the *Wade* hearing, and improperly admitted at trial. App. 59.

The dissent also concluded that the opportunity for cross-examination at the *Wade* hearing was not meaningful, as contemplated by *Crawford v. Washington, 541 U.S. 36, 61 (2004)*. A *Wade* hearing and a criminal trial are vastly disparate proceedings with disparate parameters for cross-examination. The former is a pretrial hearing, limited to a narrow inquiry: the suggestiveness and reliability of an identification procedure. Because of its limited nature, cross-examination is

necessarily circumscribed. App. 60. This dissent also observed that as a general matter and especially in the instant case, Mr. Sims' attorney did not have a similar motive for cross-examination at the *Wade* hearing as he would have had at trial. "[A]ttorneys ordinarily do not cross-examine a witness at a *Wade* hearing with the expectation that the witness, when called to the stand at trial, will refuse to testify, disregarding a grant of immunity and the threat of a contempt citation," as the victim did in this case. App. 60-61.

Rejecting the majority's analogy to preliminary hearings and the federal precedents cited, the dissent highlighted that preliminary hearings are far broader in scope than *Wade* hearings. In some states, preliminary hearings constitute mini-trials; the hearings are designed to be used as a tool for discovery and are far more complex and inclusive than a *Wade* hearing. App. 62-63. This dissent criticized the majority's opinion as unprecedented, emphasizing that "no single reported case from any jurisdiction" has permitted the government to introduce at trial "an unavailable witness's testimony from a *Wade* hearing." App. 63.

REASONS FOR GRANTING THE WRIT

In *Crawford*, this Court rejected the existing Confrontation Clause paradigm, which focused on the reliability of a statement as the threshold for admissibility. 541 U.S. at 60. In reaching its conclusion, the Court reviewed the nascency of the common law right to confrontation and the abuses it was designed to prevent. *Id.* at 41-45. From its historical review, the Court reached two conclusions: (1) the clause was targeted at preventing trial by affidavit, wherein the

Government's case was based on a transcribed statement of a witness, who was not present to vouch for the statement or submit to cross-examination; (2) the framers would not have "allowed the admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." Id. at 38. Thus, post-*Crawford*, cross-examination is the focal point of the right to confrontation.

In the almost two decades since *Crawford*, the Court has never provided guidance on when the prior opportunity for cross-examination is adequate so that later admission at trial does not violate the Confrontation Clause. The circumstances implicating this issue arise frequently. In the vast majority of criminal cases brought to trial, a critical witness will testify in a prior proceeding, e.g., a preliminary hearing, or a motion to suppress physical evidence, an interrogation statement, or a pre-trial identification. That witness may then become unavailable at some subsequent point for any number of reasons, including death, refusal to testify, loss of memory, failed service of process, or inability to locate the witness.

Given the recurring nature of the issue and the lack of guidance, there is a conflict between some state courts and federal circuits about whether a pretrial hearing can provide an adequate opportunity for cross-examination. The resolution to that question has direct implications for trial and pre-trial defense strategy. While most defense lawyers think it is better to hold back, and to save the most searching questions for cross-examination at trial, this strategy presumes that there will be a meaningful opportunity for cross-examination at trial. This calculus

would change if the right to confrontation at a subsequent trial were not fully guaranteed. Accordingly, criminal defendants need clear guidance of when, how, and whether to deploy cross-examination – "the greatest legal engine ever invented for the discovery of truth" – at a pre-trial hearing. *California v. Green*, 399 U.S. at 158 (citation omitted).

I. Whether a Pretrial Hearing Provides an Adequate Opportunity for Cross-examination is an Open Question under Federal Law and State Courts have Taken Divergent Approaches to Resolving the Question.

Admitting the prior trial testimony of an unavailable witness does not generally violate the Confrontation Clause. *Mattox v. United States*, 156 U.S. 237, 243-44 (1895). Where the former trial involves the same parties and charges, the content, scope and the motive for cross-examination in the former trial will generally mirror cross-examination in any subsequent proceeding. Thus, the defendant will have an adequate prior opportunity for cross-examination and the Confrontation Clause is not offended by the introduction of the unavailable witness's prior trial testimony.

The more common and the more difficult question arises when the prior testimony of the unavailable witness was elicited, not at trial, but in a pre-trial proceeding, e.g, preliminary hearing, suppression hearing, etc. This Court has never directly ruled on the issue but has referenced those circumstances twice in counterfactual dicta. The opinions take opposing views.

In *Barber v. Page*, 390 U.S. 719, 725 (1968), the Court held that the admission of the witness's preliminary hearing testimony violated the defendant's

Confrontation Clause rights. However, the issue in Barber was not the adequacy of the prior cross-examination, but rather, the witness's unavailability. The witness's incarceration 200 miles away at the time of trial did not render him unavailable, the Court found. *Id.* at 724-25.

In dicta, the Court said that even if there had been thorough cross-examination at the preliminary hearing, the witness's prior testimony would have still been inadmissible. *Id.* at 725. Responding to the Government's argument that the right had been waived at the preliminary hearing, the Court affirmed that the confrontation right is "basically a trial right," which "includes both the opportunity to cross-examine and the occasion for the jury to weigh the demeanor of the witness." *Id.* at 725. Further, the Court reasoned that a preliminary hearing is unlikely to afford an adequate opportunity for cross-examination because it is "ordinarily a much less searching exploration into the merits of a case than a trial," and "its function is the more the more limited one of determining whether probable cause exists to hold the accused for trial." *Id.* at 725. While the Court did concede there may be exceptions to this rule, it did not expound on the circumstances in which a preliminary hearing would satisfy the "the demands of the confrontation clause." *Id.* at 726.

In *California v. Green*, the Court issued dicta retreating from its prior observation about preliminary hearings. Before the Court in *Green* was whether a declarant's prior inconsistent statement may be used as substantive evidence of guilt at trial. *Id.* at 149. The case involved a witness who appeared at trial and had

testified inconsistently with his testimony at a preliminary hearing. After resolving the question about the admissibility of his preliminary hearing testimony as substantive evidence, the Court then considered whether the testimony would have also been admissible had the witness not appeared at trial. In addressing this hypothetical, the Court first found that a preliminary hearing is sufficiently similar in kind to an actual trial. *Id.* at 165. This conclusion, however, ignored the potentially different objectives of the defense at the preliminary hearing and focused merely on the procedural similarities: the witness was under oath; represented by counsel at the hearing and the same counsel at trial; and the proceedings were before a judicial tribunal equipped to provide a recording. *Id.* at 165. The only consideration given to the adequacy of prior cross-examination was that defense counsel was not limited in any manner in cross-examining the witness at the preliminary hearing. *Id.* at 165. Therefore, had the witness been unavailable at trial, admitting his preliminary hearing testimony would not have violated the confrontation clause, the Court opined in dicta.

The *Barber* and *Green* decisions pre-date the Court's watershed decision in *Crawford*. Although the *Crawford* decision did not indicate that it was redefining or altering its jurisprudence on the "prior opportunity for cross-examination," at least two states have interpreted *Crawford* as doing so.

In *People v. Fry*, 92 P.3d 970 (Colo. 2004), Colorado's high court ruled that as a matter of law, the opportunity for cross-examination at a preliminary hearing is inadequate and does not satisfy the Confrontation Clause guarantee. Before the

decision in *Fry,* Colorado courts determined the admissibility of preliminary hearing testimony on a case-by-case basis, focusing on the reliability of the statement under *Ohio v. Roberts,* 448 U.S. 56 (1980). However, after *Crawford*, the Colorado Supreme Court revisited and overturned its jurisprudence. Directing its focus on the opportunity for cross-examination, the Colorado Supreme Court took note of the limited nature of preliminary hearings, which pertain to probable cause determinations. The Court ruled that because of the thrust and nature of the hearings, including the absence of safeguards provided at trial, cross-examination at the hearing is necessarily restricted. Issues of credibility are best reserved for exploration at trial and prudent counsel "may decline to cross-examine witness, understanding that cross-examination would have no bearing on the issue of probable cause and that the judge may limit or prohibit the cross-examination." *Id.* at 977.

Wisconsin courts also changed course after *Crawford.* In *State v. Stuart,* 695 N.W.2d 259 (Wis. 2005), the Wisconsin Supreme Court reversed the defendant's murder conviction because the admission of a witness' preliminary hearing transcript violated the constitutional right to confrontation.

The case had originally come before the Wisconsin Supreme Court when *Ohio v. Roberts* was the prevailing law, and the Court, using the *Robert's* reliability framework, found no error in admitting the statement. However, because the case was still pending on direct appeal when *Crawford* was decided, the Wisconsin Court reconsidered its decision under the *Crawford* framework and found that the

opportunity for cross-examination was insufficient. The decision primarily focused on the truncated nature of preliminary hearings, "a summary proceeding to determine essential or basic facts, relating to probable cause." *Id.* at 266. Cross-examination during the proceedings are "limited to issues of plausibility, not credibility." *Id.* at 266. Although the Court identified a specific line of cross-examination that defense counsel was prohibited from exploring at the preliminary hearing in Stuart's case, the bulk of its reasoning would apply to categorically bar the admission of an unavailable witness's preliminary hearing testimony.

Other states court have a more flexible rule that takes certain enumerated factors into consideration in deciding whether prior cross-examination was adequate. For example, Nevada courts assess the extent to which discovery was complete and whether the judge placed any limitation on the scope of cross-examination at the prior proceeding. *Chavez v. State*, 213 P.3d 476, 484 (Nev. 2009). In *Chavez v. State*, the Supreme Court directly confronted the decisions from Wisconsin and Colorado and held that Nevada's preliminary hearings are different in kind from those two states. "Nevada law is generally more permissive with regard to a defendant's right to discovery and cross-examination at the preliminary hearing"; issues of credibility and motive are ripe for cross-examination during the hearing. Id. at 484.

Massachusetts and Illinois have created rules to assess adequacy that appear to be more protective of the right of confrontation. In those states, the relevant considerations extend beyond those mentioned in *Green* and include not just

procedural safeguards but also factors relevant to the effectiveness of cross-examination, such as the defendant's motive for cross-examination and the completeness of discovery. *See contra United States v. Hargrove*, 382 F. App'x 765, 778 (10th Cir. 2010) (rejecting the "similar motive" requirement as part of the Confrontation Clause analysis and noting that the requirement is only relevant to the analysis under the federal rules of evidence).

In Illinois, courts focus on four different factors: whether the "motive and focus of cross-examination at the time of the initial proceeding" is same or similar to that which guides the cross-examination during the subsequent proceeding; whether defendant had the benefit of unlimited cross-examination; and whether counsel had access to all relevant discovery. *People v. Torres*, 962 N.E.2d 919, 932 (Ill. 2012) (finding preliminary hearing testimony inadmissible at trial where defendant did not have access to witness's inconsistent statements to police at time of prior cross-examination and where trial judge implicitly and explicitly discouraged cross-examination).

Under Massachusetts law, prior cross-examination is adequate when: the declarant is under oath; the defendant was represented by counsel; the proceeding was recorded and before a judicial tribunal; it was "addressed to substantially the same issues as in the current proceeding," and the defendant had "reasonable opportunity and similar motivation on the prior occasion for cross-examination of the declarant." *Commonwealth v. Hurley*, 913 N.E.2d 850, 858 (Mass. 2009). And, in Idaho, the Court has propounded three indicia of an adequate opportunity for

cross-examination: representation by counsel; "no significant limitation in the scope or nature of counsel's cross-examination; and counsel failure to proffer any new and significantly material line of cross-examination. *State v. Richardson*, 328 P.3d 504, 508 (Idaho 2014).

What constitutes an effective or adequate opportunity for cross-examination also remains an open question under federal law. *See Williams v. Bauman*, 759 F.3d 630, 635-36 (6th Cir. 2014) (rejecting habeas claim that preliminary hearing did not offer an adequate opportunity for cross-examination "given the dearth of Supreme Court precedent"); *Al-Timimi v. Jackson*, 379 F. App'x 435, 437 (6th Cir. 2010)("there is some question whether a preliminary hearing necessarily offers an adequate opportunity for cross-examination for Confrontation Clause purposes").

The issue generally comes before federal courts on habeas corpus
And considering the stringent habeas standard of review, it is not surprising that some federal courts have found that the admission of statements subject to cross-examination at pretrial hearing do not run afoul of the Confrontation Clause. *See, e.g., Howell v. Trammell*, 728 F.3d 1202, 1215-18 (10th Cir. 2013); *Maxwell v. Roe*, 628 F.3d 486, 491 n.1 (9th Cir. 2010); *Bauman*, 759 F.3d at 636 (explaining that "[i]f there is room for reasonable debate on the issue, the state court's decision to align itself with one side of the argument is necessarily beyond this court's power to remedy under § 2254, even if it turns out to be wrong").

The Sixth Circuit, however, has expressed reservation about whether a preliminary hearing offers an adequate opportunity of cross-examination. Echoing

the concerns of the Colorado and Wisconsin courts, the Circuit has observed that the purpose of the hearing "is only to determine whether probable cause exists"; "defense counsel may lack adequate motivation to conduct a thorough cross-examination"; and cross-examination may come too early in the proceedings to be useful to the defense. *Al-Timimi v. Jackson*, 379 F. App'x at 438. *See also Vasquez v. Jones*, 496 F.3d 564, 577 (6th Cir. 2007))("we doubt that the opportunity to question a witness at a preliminary examination hearing satisfies the pre-*Crawford* understanding of the Confrontation Clause's guarantee of "an opportunity for effective cross-examination,"); *Gibbs v. Covello*, 996 F.3d 596, 603 (9th Cir. 2021)(noting that, "on the merits," the question of whether defendant was afforded an adequate opportunity for cross-examination at the preliminary hearing is a "close one," and had the case arose outside the habeas context, the outcome may have been different).

II. The New Jersey Supreme Court's decision is incorrect.

The New Jersey Supreme Court erred in concluding that Mr. Sims had an adequate opportunity for cross-examination in a pretrial hearing, where the witness feigned memory loss and the issue was limited to the reliability of the identification. The decision glossed over the difference in the objectives of a *Wade* hearing and a criminal trial; it gave no consideration to how the issues at the *Wade* hearing diverged from the trial defense that the witness had a motive to misidentify Mr. Sims; nor did the decision reckon with the witness's memory loss and its impact on cross-examination strategy before a judge, who was not the ultimate trier of fact.

Moreover, the Court's ruling that the victim's memory loss in the prior proceeding did not infringe on Petitioner' s right of confrontation misapplied United States Supreme Court precedents in *California v. Green* and *United States v. Owens*.

In upholding the cross-examination as constitutionally adequate, the New Jersey Supreme Court reduced the defendant's right to a formality, finding that the mere opportunity to "gaze" upon the witness or "of being gazed upon by him" was satisfactory. *Davis v. Alaska*, 415 U.S. 308, 316 (1974)(citation omitted).

A. A defendant cannot have a constitutionally adequate opportunity for cross-examination at a pre-trial hearing limited to the reliability of an identification, especially where the overarching defense at trial was that the witness had a motive to misidentify defendant.

Mere physical confrontation of a witness is not adequate to satisfy a criminal defendant's fundamental right to confrontation. The right of confrontation ensures "an opportunity for effective cross-examination." *Delaware* v. *Fensterer*, 474 U.S. 15, 20 (1985) (*per curiam*). While the Court has never defined the parameters or specified the circumstances under which the opportunity for cross-examination might be constitutionally adequate, it has affirmed that the right assures "full and effective" cross-examination. *Id.* at 20; *Nelson* v. *O'Neil*, 402 U.S. 622, 629 (1971). Because the mission of the Confrontation Cause is to "advance a practical concern for the accuracy of the truth-determining process in criminal trials," the measure of effectiveness is not the defendant's ultimate success – but whether the trier of fact "had a satisfactory basis for evaluating the truth of the prior statement." *Dutton* v. *Evans*, 400 U.S. 74, 89 (1970). Here, the cross-examination at the *Wade*

hearing provided the jury with little to no basis by which to assess P.V.'s conflicting testimony.

Any evaluation of the adequacy of cross-examination at a prior proceeding must begin with an examination of the purpose of the prior proceeding. The objective of the proceeding necessarily defines the metes and bounds of direct examination and cross-examination. The majority opinion in the New Jersey Supreme Court relied on federal precedents that have found that a preliminary hearing can offer an adequate opportunity for cross-examination. App. At 42. However, preliminary hearings are broader in scope than *Wade* hearings; the former embraces the ultimate issue at trial — whether defendant committed the charged offenses — although it examines that question by a probable cause standard. Whatever doubts may exist about whether a preliminary hearing can offer an adequate opportunity for cross-examinations, those doubts are amplified when the prior proceeding is a *Wade* hearing.

Under New Jersey law, the purpose of a *Wade* hearing is to determine whether the out-of-court identification was made under unduly suggestive circumstances, and if so, whether or not any subsequent in-court identification procedure would be fatally tainted. State v. Henderson, 208 N.J. 208, 218-19 (2011). Therefore, the central issue at the *Wade* hearing was whether P.V.'s identification of Mr. Sims, from a single photo show-up in the hospital was unduly suggestive and whether P.V. had had a sufficient opportunity to observe the shooter to enable him to make the identification.

Related to that issue, defense counsel cross-examined P.V. about his last memory before the shooting, whether he recalled his statement being transcribed, and whether he recalled talking to the police at the hospital. Defense counsel did ask some basic questions about P.V.'s relationship with Mr. Sims' brother and whether P.V. was aware of a rumor that "Anthony Sims was going to kill" him and his brother. P.V. testified, "I don't remember" to most of these questions.

However, because of the limited scope and purpose of the *Wade* hearing, defense counsel did not have an incentive to delve deeper or to ask more probing questions to explore P.V.'s memory loss. See, e.g., *People v. Rosa*, 754 N.Y.S.2d 279, 281 (App. Div. 2003) (finding that the Government did not have an incentive to impeach witness's credibility at suppression hearing because "the witness's testimony was more helpful than harmful," therefore prior testimony was properly excluded at trial).

At trial, this was not a straightforward case of misidentification. Rather, because P.V. had known Petitioner almost his entire life and there was a simmering feud between the Petitioner's brother and P.V., misidentification was presented alongside the defense of bias. In fact, the prosecutor argued at the *Wade* hearing that the misidentification argument was specious and the real issue in the case was P.V.'s bias: "the real argument is not going to be that he didn't know Anthony Sims. They're not going to argue that to the jury. They're going to say that he pinned it on Anthony Sims. . . . But I think, fast forwarding, if this case goes to trial you're going to see something different which is going to be inconsistent with the

arguments that are being made here."

Consequently, cross-examination at trial would have encompassed a much broader purpose than cross-examination at the *Wade* hearing. The objective of trial cross-examination would have been to highlight P.V.'s bias against defendant, which provided the motive to misidentify him as the shooter. Cross-examination would have explored the nature of the dispute between Mr. Sims' brother and P.V.; it would have delved into P.V.'s statement that Mr. Sims would have certainly known about the dispute; it would have probed what Mr. Sims knew of the relationship between P.V. and his brother, and more generally, why Mr. Sims would have committed the offense on behalf of his brother.

While cross-examination at both proceedings would have covered some of the same territory — P.V.'s ability and opportunity to see the shooter — the bias evidence was solely an issue for trial and could not have been developed at the *Wade* hearing. The question before the trial judge at the *Wade* hearing was limited to the suggestiveness of the police identification procedures. P.V.'s bias against Mr. Sims was not a relevant consideration in resolving those issues as the trial judge aptly noted: "Did he in bad faith, shortly after he was shot . . . pretty much immediately after he was shot, identify him with some ulterior motive. Misidentify him. But I don't think that is a reason, at this point, to exclude the statement."

Because his sole opportunity to confront the witnesses occurred in a forum in which bias impeachment was procedurally and substantively improper, Mr. Sims was deprived of the opportunity for effective cross-examination. A defendant has a

clearly established right to impeach a witness through evidence of bias. *United States v. Abel,* 469 U.S. 45, 51 (1984). "[T]he jury, as finder of fact and weigher of credibility, has historically been entitled to assess all evidence which might bear on the accuracy and truth of a witness's testimony." *Id.* at 52. Certain lines of inquiries are essential to effective cross-examination, such as those that "impeach" the witness, or demonstrate the witness's "possible biases, prejudices, or ulterior motives" *Davis*, 415 U.S. at 316 ; *Olden v. Kentucky*, 488 U.S. 227, 231 (1988) ("[T]he exposure of a witness' motivation in testifying is a proper and important function of the . . . right of cross-examination."); *Owens*, 484 U.S. at 559 (the "constitutionally requisite opportunity for cross-examination" includes an opportunity to expose a witness's bias). Naturally, juries draw "negative inferences" from a witness's inconsistent stories and incentives to lie, *Davis v. Bart*, 100 F. App'x 340, 349 (6th Cir. 2004). Therefore, cross-examination along these lines of inquiry "undoubtedly provides valuable aid to the jury in assessing [the witness's] credibility." *Harris v. New York*, 401 U.S. 222, 225 (1971).

As the dissenting opinion before the New Jersey Supreme Court detailed, "the permissible parameters of cross-examination" at the *Wade* hearing excluded prototypical impeachment inquiries. The *Wade* hearing is "not an occasion for attorneys to rummage for discovery that might be useful at trial for impeachment purposes. Judges corral attorneys who wander afield." App. 60. In light of the trial judge's comments at the *Wade* hearing that ill motive was not cause for excluding the identification, there is reason to believe that had defense counsel even

attempted to "wander afield" and probe P.V.'s bias, the judge would have rebuked him.

Moreover, Petition did not have an affirmative obligation to exhaust cross-examination at the pretrial hearing anticipating that "the witness, when called to the stand at trial, will refuse to testify, disregarding a grant of immunity and the threat of a contempt citation" – such as occurred here. App. 60-61. A requirement of pretrial cross-examination exhaustion places an unfair burden on criminal defendants. Moreover, as the Seventh Circuit reasoned, it would waste judicial resources to require a party to treat cross-examination at a pretrial hearing as a dress rehearsal for trial. *See United States ex rel. Bracey v. Fairman*, 712 F.2d 315, 318 (7th Cir. 1983) ("This of course assumes that the State should have foreseen that [the witness] would have unavailable for trial, and should have taken the time of a no doubt busy court to build up a record in anticipation of that possibility.").

A defendant has no obligation to optimize the opportunity for cross-examination at a pretrial hearing, and reasonably prudent counsel may strategically decide to forgo or limit cross-examination to not risk disclosing its theory of defense, especially where the hearing decision is a foregone conclusion. *See Al-Timini v. Jackson*, 379 F. App'x 435 at 438 (questioning whether a probable cause hearing affords an adequate opportunity for cross-examination; defense counsel lacks motivation to conduct a thorough cross-examination and because "it is a less searching exploration into the merits of the case . . . counsel may wish to avoid tipping its hand to the prosecution by revealing the lines of questioning it

plans to pursue"). See also Christopher B. Mueller, *Cross-Examination Earlier Or Later: When Is It Enough To Satisfy Crawford?,* 19 Regent U.L. Rev. 319, 360-361 (explaining that lawyers generally reserve more searching cross-examination for trial because judges will almost invariably find witness's credible at pretrial hearings; thus lawyers find little "point in cross-examining, except to the extent that it might be necessary to clarify testimony in order to be informed about the worst thing that could happen at trial")

Here, defense counsel was confronted with a reluctant witness who claimed to have no memory of his statement identifying Mr. Sims. Few identifications are excluded from evidence under New Jersey's framework for evaluating eyewitness identification evidence and there was no reason to believe that P.V.'s identification would be the exception, especially since he was familiar with Mr. Sims before the shooting. *See State v. Henderson*, 208 N.J. at 219 (revising the framework for assessing reliability, while "anticipat[ing] that identification evidence will continue to be admitted in the vast majority of cases"). Under those circumstances, the utility of further cross-examination was limited – even for those matters properly within the scope of the hearing.

Cross-examination at the *Wade* hearing of the State's central witness — the victim and the sole eyewitness to the crime — was not an adequate substitute for cross-examination at trial.

B. The prior opportunity for cross-examination is constitutionally inadequate when the witness suffers memory loss in the prior proceeding and defendant is unable to cross-examine on the substance of the statement.

Although a witness's memory loss does not result in a per se deprivation of the right to confrontation, when a witness suffers memory loss, feigned or real, the jury's opportunity to observe the witness and assess demeanor is a critical component of the right to confrontation. The majority opinion in the New Jersey Supreme Court treated the decisions in *Owens* and *Green* as dispositive in its ruling that P.V.'s memory loss at the *Wade* hearing did not interfere with Mr. Sim's right to confrontation. App. 43-44. However, in *Green* and *Owens* the witness's prior statements did not violate the Confrontation Clause because both witnesses actually testified at trial. Notwithstanding the witness's memory loss in *Owens,* and the witness's evasiveness in *Green,* the respective defendants had an opportunity to confront the witnesses before the jury on their prior inconsistent statements.

In *Owens*, the victim's memory was impaired by an assault for which the defendant was being tried. 484 U.S. at 556. Shortly after the assault, the victim made an out-of-court identification of the defendant. *Ibid.* In his trial testimony, while the victim recalled making the identification, he could not recall who had assaulted him. Thus, the witness testified to his current belief but could not recall why he possessed that belief. *Ibid.* The Court found no constitutional violation in the admission of the out-of-court identification. Defense counsel's opportunity to confront the memory-impaired victim before the jury was critical to the decision. The Court acknowledged that "the weapons available to impugn the witness's statement when memory loss is asserted will of course not always achieve success." *Id.* at 560. However, in the underlying case, defense counsel deployed "realistic

weapons," "which emphasized [the witness's] memory loss" to undermine his reliability. *Ibid.* Implicit in the *Owen's* decision was the fact that cross-examination was likely very effective: the victim's memory loss was authentic at trial and, at the time of the out-of-court identification, the victim's memory was already self-impaired — a self-impeaching fact.

The principles of *Owens* apply to feigned memory loss. When memory loss is contrived, the witness's out-of-court statement is admissible as a prior inconsistent statement. While out-of-court statements are inherently untrustworthy, the Supreme Court in *Green* held that "there is good reason to conclude that the Confrontation Clause is not violated by admitting a declarant's out-of-court statements," with one significant caveat: "as long as the declarant is testifying as a witness and subject to full and effective cross-examination." 399 U.S. at 157. In so ruling, the Court considered the purposes of the confrontation clause, which includes "forcing the witness to submit to cross-examination" and permitting the jury to "observe the demeanor of the witness in making his statement, thus aiding in assessing his credibility." *Id.* at 158. While the out-of-court statement may have been made under circumstances lacking an indicia of reliability, "if the declarant is present and testifying at trial," the statement "for all practical purposes regains most of the lost protections." *Id.* at 158.

P.V.'s hospital statement never regained the protections lost by its utterance out of court because one of the purposes of the Confrontation Clause was never satisfied – the jury never had the opportunity to observe his demeanor at trial. A

witness claiming memory loss is in effect disavowing his prior testimony or statement. The introduction of the prior inconsistent statement then presents the jury with opposing accounts of the event. But to decide which account to accept and to safeguard the right to confrontation, the jury must observe the witness and make a decision about which version to credit. Confrontation that occurs in another proceeding does nothing to aid in this assessment. Cross-examination of the forgetful witness has little value where it consists of a third-party reading to the jury the witness's repeated refrain of "I don't recall." The value of cross-examination of the forgetful witness lies entirely in the jury observing the witness deny recollection. It is only from this observation that the jury can evaluate the witness's demeanor and assess the credibility of the witness's failure of recollection.

Of course, the lost of the opportunity to observe demeanor is always present when a witness is unavailable and prior testimony is admitted. However, when the witness does not suffer memory loss, defense counsel will be able to cross-examine on the substance of the witness's testimony. That substantive cross-examination retains most of its value even when the witness becomes unavailable at trial. When the witness is claiming memory loss, however, the value of cross-examination is seriously eroded if it does not occur before the trier of fact.

Here, "the jury did not have an opportunity to hear from or scrutinize P.V. on the witness stand to determine whether his lack of memory at the *Wade* hearing was feigned or real or whether he gave an honest or accurate account of his identification of Sims as his assailant at the hospital." App. 59. As the dissent

stated, "P.V.'s hospital statement was "too many steps removed from its source to be credited for Confrontation Clause purposes." App. 59-60.

III. This case presents the ideal opportunity for resolving the question presented.

This case has all of the attributes of an ideal vehicle for addressing the question presented. The federal constitutional question is squarely and cleanly presented: Mr. Sims's challenged the admission of the out-of-court statement at every sequence of the litigation: in the trial court, in the intermediate appellate court, and in the state supreme court.

The New Jersey Supreme Court explicitly decided that the out-of-court statement was admissible and the opportunity for cross-examination was adequate on federal constitutional grounds. Thus, there are no procedural or jurisdictional obstacles preventing the Court from reaching the merits. Moreover, both sides of the question have been aired at length because there was a dissenting opinion in the highest court.

The question is outcome determinative. The out-of-court statement incriminating Mr. Sims was the cornerstone of the Government's case. No argument has ever been raised that the admission of the statement constitutes harmless error.

Finally, the facts of this case place the constitutional violation in stark relief. The jury never presented the damning identification evidence directly from the accuser, neither at trial nor the pre-trial hearing. Rather, the accusation was read into the record by someone other than declarant, at a hearing when the declarant

disclaimed memory of making the statement — and then the hearing transcript was itself read into the record at trial. This trial-by-hearsay is the principal evil against which the confrontation right was directed. In refocusing the right on cross-examination, as opposed to reliability, the *Crawford* Court cited the trial of Sir Walter Raleigh. The evidence against Raleigh consisted of a statement accusing him of treason read out by someone other than the declarant, without him ever being allowed to confront his accusers. *Id.* at 44. The outcry following Raleigh's trial was the impetus for the common law confrontation right. The commonalities between Mr. Sims' trial and Sir Walter Raleigh's are glaring.

This case underscores the necessity of a clear, defined, uniform standard by which to assess the adequacy of the prior opportunity for cross-examination. The cross-examination afforded Mr. Sims reduced his right to nothing more than the physical presence of the witness on the stand. This Court should grant the petition for certiorari to answer this important question.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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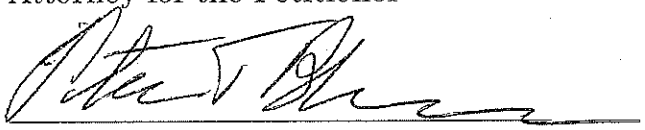

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DATED: August 1, 2022