No. _____

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Crawford v. Washington*, 541 U.S. 36 (2004), this Court explained that, under the Confrontation Clause, an unavailable witness's prior testimony "is admissible only if the defendant had an adequate opportunity to cross-examine." *Id.* at 57. But the Court has provided no further guidance on what an "adequate opportunity" requires. And the States are now openly divided over when, if ever, a preliminary hearing meets the constitutional standard. Some state high courts hold that a preliminary hearing never provides such an adequate opportunity. Others hold that any opportunity to cross-examine at a preliminary hearing is enough. Still others apply a case-by-case approach that falls somewhere in the middle. The question presented is as follows:

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

STATEMENT OF RELATED PROCEEDINGS

The following proceedings are related:

- *Shields v. Commonwealth of Kentucky*, 2020-SC-0060-MR (Ky. 2022) (opinion issued Feb. 24, 2022; petition for rehearing denied June 16, 2022);
- *Shields v. Commonwealth of Kentucky*, Nos. 17-CR-00339 & 17-CR-00340 (Warren Cir. Ct.) (supplemental order denying motion in limine to exclude prior testimony issued May 7, 2019);
- *Shields v. Commonwealth of Kentucky*, Nos. 17-CR-00339 & 17-CR-00340 (Warren Cir. Ct.) (order denying motion in limine to exclude prior testimony issued May 6, 2019).

There are no additional proceedings in any court that are directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

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INTRODUCTION

In *Crawford v. Washington*, 541 U.S. 36 (2004), the Court returned Confrontation Clause jurisprudence to the Clause's original meaning. The Court explained that this "bedrock procedural guarantee" demands that the reliability of testimonial statements against an accused "be assessed in a particular manner: by testing in the crucible of cross-examination." *Id.* at 42, 61. When the prosecution seeks to introduce such statements through anything other than live, in-court testimony, the Sixth Amendment thus requires both "unavailability and a prior opportunity for cross-examination." *Id.* at 68. And the Court confirmed that any prior opportunity must be "adequate" to test the statements. *Id.* at 57.

Since *Crawford*, however, the Court has provided no further explanation of when a prior opportunity for cross-examination is "adequate." State courts of last resort are now openly divided over when, if ever, a particularly common form of prior opportunity for cross-examination—a preliminary hearing—meets that constitutional standard. *See People v. Fry*, 92 P.3d 970, 978 (Colo. 2004) (noting split).

Two States hold that a preliminary hearing never provides a constitutionally adequate opportunity. In those courts' view, the limited purpose and inherent limitations of those proceedings prevents a defendant from receiving a full and fair opportunity for cross-examination. By contrast, three States hold that any opportunity to cross-examine a witness at a preliminary hearing is enough—regardless of the defendant's realistic ability to test the testimony's reliability through cross-examination. At least five States fall somewhere in the middle. Those States apply a case-

by-case approach, considering, for example, the defendant's motive to cross-examine at the preliminary hearing, whether discovery or other information available to the defendant allowed for meaningful cross-examination, and the extent of cross-examination that occurred.

This case provides an excellent opportunity to resolve this conflict and to provide lower courts the guidance they desperately need. *See State v. Contreras*, 979 So.2d 896, 909 (Fla. 2008) ("[W]e have no guidance from the Supreme Court as to [what satisfies] the *Crawford* cross-examination requirement . . . ."). It also illustrates the abuses that flow from the "mere opportunity" approach.

Petitioner Gregory Shields was arrested for his uncle's murder in February 2017. His aunt, Maude Murrell, was the only eyewitness. One week later, Ms. Murrell testified at petitioner's preliminary hearing. The prosecutor would later admit that he called Ms. Murrell only to "preserve her testimony for trial" after realizing that "she was of such an advanced age." MIL Vid. 13:20-13:47.[1] But petitioner received no notice that Ms. Murrell would testify. And the Commonwealth provided no discovery before the hearing because the prosecutor "did not deem it appropriate at that stage." MIL Vid. 15:57-16:12. The discovery withheld at that time included notes from Ms. Murrell's interviews with police (in which she identified a

[1] Kentucky state courts videorecord hearings in lieu of transcripts. References to "PH Vid." and "MIL Vid." refer to timestamps in the videos of petitioner's preliminary hearing and the hearing on his motion in limine to exclude Ms. Murrell's testimony, respectively.

different assailant), the medical examiner's preliminary finding (which listed a cause of death inconsistent with Ms. Murrell's testimony), and petitioner's recorded statement to police. The Constitution would require disclosure of all that evidence before Ms. Murrell could testify at trial. *See Brady v. Maryland*, 373 U.S. 83, 87 (1963); *Giglio v. United States*, 405 U.S. 150, 154 (1972). Defense counsel had none of it at the preliminary hearing.

Ms. Murrell testified on direct examination for about 20 minutes, implicating petitioner in her husband's death. On cross-examination—which lasted under 90 seconds—petitioner's counsel asked six perfunctory questions that "barely touched on the facts of the underlying incident." App., *infra*, 36.

Over the next 16 months, the Commonwealth never sought to preserve the testimony of its key witness by deposition. Instead, after Ms. Murrell died in June 2018, the Commonwealth revealed its intent to rely on the preliminary-hearing testimony. The trial court denied petitioner's motion to exclude her preliminary-hearing testimony. A divided Supreme Court of Kentucky affirmed, holding that "the[se] circumstances cannot be viewed as denying the defense the opportunity to confront the witness." *Id.* at 29.

The Kentucky Supreme Court's decision is wrong. Petitioner never enjoyed an adequate opportunity to cross-examine the State's principal witness against him. And the Kentucky court's decision powerfully demonstrates the need for this Court's guidance on the Confrontation Clause's demands.

Had petitioner been tried in Colorado, Wisconsin, or likely several other States, he could not have been

convicted on the basis of Ms. Murrell's untested testimony. Unlike Kentucky, those States would have found that the Confrontation Clause prohibited the introduction of Ms. Murrell's preliminary-hearing testimony at trial. And yet petitioner faces a 25-year sentence because the Kentucky Supreme Court has adopted a different reading of the Confrontation Clause and this Court's precedents.

A defendant's enjoyment of bedrock Sixth Amendment rights should not turn on the happenstance of geography. The petition for a writ of certiorari should be granted.

OPINIONS BELOW

The opinion of the Supreme Court of Kentucky (App., *infra*, 1-53) is reported at 647 S.W.3d 144. The underlying orders of the Warren Circuit Court (App. *infra*, 54-65) are unreported.

JURISDICTION

The Supreme Court of Kentucky issued its judgment on February 24, 2022. The same court denied a petition for rehearing on June 16, 2022 (App., *infra*, 66). On September 6, 2022, Justice Kavanaugh extended the time to file a petition for a writ of certiorari until November 11, 2022. This Court has jurisdiction under 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL PROVISION

The Sixth Amendment 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

A. Legal Background

The Sixth Amendment guarantees a criminal defendant's right "to be confronted with the witnesses against him." U.S. Const. amend. VI. That protection "commands . . . that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." *Crawford*, 541 U.S. at 61. Thus, an unavailable witness's prior testimony is admissible "only if the defendant had an adequate opportunity to cross-examine" at an earlier proceeding. *Id.* at 57.

The Court has grounded this prior-testimony rule on the notion that "the right of cross-examination having been once exercised, it [is] no hardship upon the defendant" to admit such testimony at a later trial. *Mattox v. United States*, 156 U.S. 237, 243 (1895). In line with that premise, the Court has limited admission of prior testimony to cases when cross-examination at trial would provide only an "incidental benefit . . . to the accused." *Id.* at 243.

Before *Crawford*, the Court had twice held that the admission of preliminary-hearing testimony at trial violated the Confrontation Clause. *See Pointer v. Texas*, 380 U.S. 400, 406 (1965); *Barber v. Page*, 390 U.S. 719, 725 (1970). In both cases, the Court emphasized that a preliminary hearing is not "a full-fledged hearing." *Pointer*, 380 U.S. at 407. And it explained that the confrontation right is satisfied only when the earlier testimony is "taken at a time and under circumstances affording . . . counsel an adequate opportunity to cross-examine." *Id.* In *Barber*, the Court assumed that the defendant had waived his right to cross-examination at the preliminary hearing. 390

U.S. at 722. But that waiver did not extend to "the right of confrontation at a subsequent trial" because "[a] preliminary hearing is ordinarily a much less searching exploration into the merits of a case." *Id.* at 725.

Conversely, the Court has approved the admission of preliminary-hearing testimony at a later trial on only two occasions—both also before *Crawford*. *See California v. Green*, 399 U.S. 149 (1970); *Ohio v. Roberts*, 448 U.S. 56, 73 (1980). Both cases involved thorough cross-examination at the earlier hearing. The witness in *Green* was "subjected to extensive cross-examination" at the preliminary hearing and actually testified at trial. 399 U.S. at 151. And although the witness in *Roberts* was unavailable for trial, defense counsel "tested [the witness's] testimony" at the preliminary hearing "with the equivalent of significant cross-examination." 448 U.S. at 70, 73. The Court admitted the testimony only after concluding, moreover, that the defendant had not been "significantly limited in any way in the scope or nature of his cross-examination." *Id.* at 71.

In *Crawford*, the Court confirmed that prior testimony is admissible "only if the defendant had an adequate opportunity to cross-examine" at the earlier hearing. 541 U.S. at 57. But as many lower courts have observed, "*Crawford* . . . provides no guidance for how much cross-examination is required to afford the defendant an adequate opportunity." *State v. Gleason*, 329 P.3d 1102, 1134 (Kan. 2014) (quotation omitted). And the Court has not addressed the question since.

B. Factual and Procedural History

Petitioner Gregory Shields lived with his uncle and aunt, Samuel and Maude Murrell. App., *infra*, 2. In February 2017, police responded to a report that Mr. Murrell had been murdered in his home. *Id.* Ms. Murrell told police two versions of events that day. *Id.* She first claimed that an unknown intruder killed Mr. Murrell. *Id.* She later accused petitioner of that crime. *Id.* Officers arrested petitioner and charged him with murder. *Id.* One week later, petitioner appeared at a preliminary hearing with appointed counsel. *Id.* at 3.

1. At the time of the preliminary hearing, the Commonwealth had failed to provide defense counsel with any discovery in its possession. As the prosecutor later explained, he "did not deem it appropriate at that stage to provide that information." MIL Vid. 15:57-16:12. As a result, all defense counsel had was an arrest citation with a single-paragraph description of the charged offenses. App., *infra*, 2-3.

The withheld discovery included critical pieces of evidence. There were notes of Ms. Murrell's several interviews with police, in which she at first identified a home intruder as Mr. Murrell's killer. PH Vid. 23:15-23:40. The Commonwealth also had the medical examiner's preliminary findings, which listed strangulation as a cause of death. PH Vid. 27:20-27:48. Finally, the Commonwealth had an audio recording of petitioner's statement to police when they arrived at the house. PH Vid. 23:45-24:06.

With no notice to defense counsel, the prosecutor called Ms. Murrell, then 82 years old, to testify at the

preliminary hearing. MIL Vid. 15:05-15:20. The prosecutor would later admit that it was "unusual" to call a non-police witness at a preliminary hearing, App., *infra*, 57, and defense counsel noted that she had never seen it done in her eight years as a public defender, *id.* at 6. After Ms. Murrell testified, the prosecutor called a detective whose testimony, he acknowledged, would have been enough on its own to establish probable cause. MIL Vid. 18:10-18:21.

Though undisclosed to the trial court or defense at the time, the prosecutor later admitted that his "purpose in calling Ms. Murrell was to preserve her testimony." App., *infra*, 57. After the prosecutor "realized she was of such an advanced age," he "made the decision to call her as a witness at the preliminary hearing . . . . to preserve her testimony for trial." MIL Vid. 13:20-13:47.

2. Ms. Murrell testified for nearly 20 minutes on direct examination. PH Vid. 1:40-19:00. She alleged that petitioner entered the Murrell bedroom after midnight "yelling and complaining" about various grievances. App., *infra*, 3. After petitioner ripped off the bed covers, he allegedly cut Mr. Murrell on the arm and chest with a knife. *Id.*

Ms. Murrell testified that she and petitioner then went to the garage to smoke a cigarette together. *Id.* She stated that, as they reentered the house, Mr. Murrell asked them to change the bedsheets. *Id.* After which, petitioner helped Mr. Murrell to his walker and also treated his cuts. *Id.* at 3-4. Some time later, Mr. Murrell fell forward, hitting his head on a dresser. *Id.* at 47. After petitioner helped Mr. Murrell to his feet, he fell again. *Id.*

Ms. Murrell explained that petitioner then checked Mr. Murrell's pulse, which was strong. *Id.* at 4. But, she stated, when he checked again a few minutes later, Mr. Murrell had died. *Id.* Petitioner then called the police. *Id.*

3. Defense counsel cross-examined Ms. Murrell for less than 90 seconds. PH Vid. 19:40-21:05. Her questions "barely touched on the facts of the underlying incident." App., *infra*, 36. The entire cross-examination consisted of six questions:

(1) Now, you said that [petitioner] had lived with you all for about four years?

(2) How long have you known [petitioner]?

(3) The night that this happened, did this seem out of character for him?

(4) Did he seem like he was acting unusual?

(5) Did it make sense that he was mad? Did you understand why he was mad?

(6) And you told [the prosecutor on direct examination] that [petitioner] took you all to doctors' appointments and ran errands for you, is that correct?

Id. at 35.

Defense counsel later explained that she was "caught off guard" by the prosecutor's decision to have Ms. Murrell testify. MIL Vid. 39:15-39:20. So with no preparation, the cross-examination was "sort of last-minute, just whatever I could think of to ask her at the time." MIL Vid. 5:55-6:05. Defense counsel also

explained that she limited her questioning because a preliminary hearing is "limited in scope to probable cause," and in her experience courts do not allow questions "beyond th[at] scope." MIL Vid. 6:10-6:35.

4. After the preliminary hearing, the Commonwealth served discovery on defense counsel, including notes from Ms. Murrell's interviews with police, the medical examiner's report, and petitioner's recorded statement. MIL Vid. 16:55-17:05. But at no time in the ensuing 16 months did the prosecutor seek to preserve Ms. Murrell's testimony by deposition.

Like most States, Kentucky permits depositions in criminal cases "[i]f it appears that a prospective witness may be unable to attend . . . trial." Ky. R. Crim. P. 7.10(1). Such depositions must "fully protect the rights of personal confrontation and cross-examination of the witness by the defendant." *Id.* at 7.12(1). Among those protections, the defendant must receive adequate notice of the deposition, *id.* at 7.14, and he must be provided any "books, papers, documents or tangible objects" relevant to the witness's testimony, *id.* at 7.10(1). Kentucky declined to invoke those procedures to preserve Ms. Murrell's testimony here.

Ms. Murrell died in June 2018, and petitioner later moved to exclude her testimony. App., *infra*, 5. At the hearing on petitioner's motion, the trial court asked the prosecutor, "Why not provide them discovery and then give them notice that you were preserving trial testimony and [depose her] sometime after the preliminary hearing?" MIL Vid. 18:32-18:54. The prosecutor gave no explanation, other than to note that defense counsel had not objected to Ms. Murrell's testimony at the preliminary hearing. MIL Vid. 19:50-20:07.

The trial court denied petitioner's motion. App., *infra*, 54-65. It noted that it was "risky for the Commonwealth to fail to provide notice and discovery" in this situation. *Id.* at 64. But "[u]nder the facts of this particular case and witness, and in this limited circumstance," the court "d[id] not find that the defendant was denied a meaningful opportunity to cross-examine Ms. Murrell." *Id.*

Petitioner entered a conditional guilty plea to first-degree manslaughter and was sentenced to 25 years in prison. *Id.* at 9. As allowed by his plea agreement, petitioner appealed the trial court's ruling on Ms. Murrell's preliminary-hearing testimony.

5. The Supreme Court of Kentucky affirmed on a divided vote. App., *infra*, 1-53. The majority stressed that cross-examination at the preliminary hearing was "self-limited," even as it acknowledged that this was likely because defense counsel "felt ill prepared due to not having pre-hearing notice that Mrs. Murrell would testify" and "anticipated objections" to any questions going beyond probable cause. *Id.* at 28-29. It also acknowledged that "the paucity of discovery" at the time of the preliminary hearing may have limited defense counsel's ability to cross-examine. *Id.* at 29 & n.13. Even so, the majority found petitioner's argument that "he was not afforded an adequate opportunity to cross-examine Mrs. Murrell . . . of little weight." *Id.* at 29.

Three justices dissented. They disagreed with the majority's holding "that because defense counsel properly confined her questions to the scope of a preliminary hearing—probable cause—[petitioner's] constitutional right to confront the witnesses against him was satisfied." *Id.* at 36. That approach, they said,

would "allow a defendant's Confrontation Clause right to hinge on whether his attorney asks improper questions and whether the trial court prohibits those improper questions." *Id.* at 49-50.

The dissenting justices also emphasized how much more limited the cross-examination of Ms. Murrell was than in cases like *Green* and *Roberts*. *Id.* at 41-42. In that vein, they highlighted areas of Ms. Murrell's testimony "that likely would have become issues at trial but were not explored in defense counsel's cross-examination at the preliminary hearing." *Id.* at 46-47. These included Ms. Murrell's odd claim that she left to smoke a cigarette during petitioner's alleged attack on Mr. Murrell, petitioner's efforts to treat Mr. Murrell's wounds, and the inconsistencies between Ms. Murrell's testimony and the medical examiner's findings. *Id.* 47.

Finally, the dissent insisted that the prosecutor "could have, and should have, moved to conduct [Ms. Murrell's] deposition to preserve her testimony." *Id.* at 51. And that there had been ample time to do so "after the case had been fully investigated and discovery had been provided to defense counsel." *Id.*

REASONS FOR GRANTING THE WRIT

This Court's guidance is desperately needed on the scope of the Confrontation Clause's bedrock guarantee of cross-examination. Since *Crawford* righted the ship on the doctrine, the Court has not returned to what constitutes an "adequate opportunity" to cross-examine an unavailable witness's prior testimonial statements. As a result, the States are deeply and openly divided on the Constitution's demands. The decision below deepens that conflict and cannot be

squared with this Court's precedents. The question is preserved and squarely presented in this case. And the potential approaches have been extensively explored by lower courts. The time to intervene is now.

I. State Courts Are Deeply and Openly Divided on the Question Presented.

This Court should grant review to resolve the competing and irreconcilable interpretations of the Confrontation Clause among state courts of last resort. These courts' divergent approaches lead to different outcomes in factually similar cases. And those outcomes cannot be explained by differences in state law, but only a disagreement among the States over what the Confrontation Clause requires.

A. Colorado and Wisconsin hold that a preliminary hearing never affords an adequate opportunity to cross-examine a witness.

Two state supreme courts hold that the nature of a preliminary hearing *never* affords defendants an "adequate opportunity" to cross-examine witnesses.

1. The leading example is *People v. Fry*, 92 P.3d 970 (Colo. 2004). While acknowledging that "[o]ther states are split on" the question, the Supreme Court of Colorado held categorically that a "preliminary hearing does not provide an adequate opportunity to cross-examine sufficient to satisfy the Confrontation Clause requirements." *Id.* at 978. The court explained that preliminary hearings "are restricted to a determination of probable cause," which is "a low standard." *Id.* at 977. In that setting, a judge cannot even "engage in credibility determinations unless the

testimony is incredible as a matter of law." *Id.* Thus, "once a prima facie case for probable cause is established, there is little defense counsel can do" to show otherwise. *Id.* And so defense counsel may rightly "decline to cross-examine witnesses at the preliminary hearing, understanding that the cross-examination would have no bearing on the issue of probable cause." *Id.*

Wisconsin follows a similar approach, holding that when "the State attempts to use the preliminary hearing testimony at a later trial, a Confrontation Clause problem arises." *State v. Stuart*, 695 N.W.2d 259, 266 (Wis. 2005). As in *Fry*, the Supreme Court of Wisconsin has emphasized that "[t]he preliminary hearing is not the proper forum to debate and determine issues as to credibility . . . once essential facts as to probability have been established." *State ex rel. Huser v. Rasmussen*, 267 N.W.2d 285, 292 (Wis. 1978) (quotation marks and citation omitted). And because that "ingredient of meaningful cross-examination" is missing, the preliminary hearing does not provide an adequate opportunity under the Confrontation Clause. *Stuart*, 695 N.W.2d at 266.

2. Because Colorado and Wisconsin categorically prohibit the introduction of preliminary-hearing testimony at trial, neither would have admitted Ms. Murrell's testimony here. As in those States, "[t]he sole purpose of a preliminary hearing" in Kentucky "is to determine whether there is probable cause." *Commonwealth v. Wortman*, 929 S.W.2d 199, 200 (Ky. Ct. App. 1996). It is "not a mini-trial, nor is it a discovery tool for the defense." *Id.* So once "the prosecution has enough evidence to warrant a trial, the protection to

the defendant is more shadow than substance." *King v. Venters*, 595 S.W.2d 714, 715 (Ky. 1980).

Kentucky also recognizes the same limitations on cross-examination at a preliminary hearing. There was no dispute below that *had* defense counsel asked questions beyond the scope of probable cause, it could have "draw[n] a justified objection and the ire of [the] trial court." App., *infra*, 49. So in practice, the scope of cross-examination at a preliminary hearing depends on whether counsel "asks improper questions and whether the trial court prohibits those improper questions." *Id.* at 49-50. Colorado cited the same dynamic as justification for its categorical rule. It noted that "the opportunity for cross-examination" at a preliminary hearing "exists only to the extent that an attorney persists in asking questions that have no bearing on the issues before the court, and such irrelevant questioning is not prohibited by the court." *Fry*, 92 P.3d at 977. And on that basis it concluded that a preliminary hearing, by its nature, "does not . . . satisfy the Confrontation Clause requirements." *Id.* at 978.

B. Illinois, Hawaii, Idaho, Pennsylvania, and Nevada apply a case-by-case approach to determine whether a defendant had an adequate opportunity to cross-examine at a preliminary hearing.

Several States take a case-by-case approach in deciding whether a preliminary hearing provided an "adequate opportunity" for cross-examination, under which petitioner would have had a constitutional right to exclude Ms. Murrell's preliminary-hearing testimony at trial.

1. Illinois's approach is representative. In determining whether the defendant had an adequate opportunity to cross-examine, Illinois courts consider: (1) "the motive and focus of the cross-examination"; (2) whether the defendant "had the benefit of 'unlimited cross-examination'"; and (3) "what counsel *knows* while conducting the cross-examination." *People v. Torres*, 962 N.E.2d 919, 931-34 (Ill. 2012).

As to the third consideration, the Supreme Court of Illinois noted that "the absence of discovery" and "the limited nature of the evidence which may be introduced at a preliminary hearing" may "impact counsel's ability and opportunity to effectively cross-examine the witness at the prior hearing." *Id.* at 932 (quoting *People v. Horton*, 358 N.E.2d 1121, 1124 (Ill. 1976)). In that context, the adequacy question "may not depend in its entirety on what transpired" at a preliminary hearing. *Id.* at 932-33. Rather, Illinois courts also consider what undisclosed evidence or information "counsel might have used to confront" the witness. *Id.* at 933.

In *State v. Nofoa*, 349 P.3d 327 (Haw. 2015), the Supreme Court of Hawaii expressly adopted the Illinois approach, while rejecting Colorado's categorical rule. *Id.* at 339-40. Hawaii courts thus look to essentially the same considerations: (1) "the motive and purpose of the cross-examination"; (2) "whether any restrictions were placed on . . . cross-examination during the preliminary hearing"; and (3) whether the defendant "had access to sufficient discovery at the preliminary hearing to allow for effective cross-examination." *Id.* at 340.

In *Nofoa*, the Supreme Court of Hawaii found that "[t]he first two questions weigh[ed] in favor of admissibility." *Id.* at 340. Even so, it held preliminary-hearing testimony inadmissible because the defendant "did not have access to relevant discovery materials"—including witness statements—"that would have assisted in the cross-examination." *Id.* Lack of access to that information "denied the opportunity for meaningful cross-examination," which "cannot be full and thorough unless counsel is permitted access to . . . previous statements on matters on which the witness is testifying." *Id.* (quotation omitted).

The Supreme Court of Idaho takes a similar tack. In *State v. Richardson*, 328 P.3d 504 (Idaho 2014), the court noted that "*Crawford* did not specifically address what constitutes an 'adequate' opportunity for cross-examination." *Id.* at 508. But it distilled "three indicators of an adequate opportunity for cross-examination" that it applies "on a case-by-case basis": (1) "representation by counsel"; (2) limitation "in the scope or nature of counsel's cross-examination"; and (3) "any new and significantly material line of cross-examination that was not at least touched upon in the preliminary hearing." *Id.* at 508-09 (quotation omitted). In *Richardson*, the preliminary-hearing witness was "questioned . . . on all relevant issues" and defense counsel offered "nothing more than speculation and conjecture" about other lines of inquiry. *Id.* at 509. On those facts, the court held there was "an adequate opportunity to cross-examine . . . at the preliminary hearing." *Id.*

Other States couch the standard in simpler terms but follow a similar analysis. In Pennsylvania, "the

standard to be applied is that of *full and fair opportunity* to cross-examine." *Commonwealth v. Bazemore*, 614 A.2d 684, 687 (Pa. 1992). The Supreme Court of Pennsylvania excluded preliminary-hearing testimony in *Bazemore*, noting that defense counsel knew neither that the witness "had given a prior *inconsistent* statement to the police," nor of the witness's "prior criminal record." *Id.* It was no answer, therefore, that defense counsel was not formally "*restricted* from delving into" those matters at the preliminary hearing. *Id.* As the court observed, "[o]ne is hard pressed to find just how defense counsel was 'not restricted' when the Commonwealth failed to provide this information to the defense." *Id.*

Nevada considers "the adequacy of the opportunity on a case-by-case basis, taking into consideration such factors as the extent of discovery that was available to the defendant at the time of cross-examination" and whether a "judge allowed the defendant a thorough opportunity to cross-examine the witness." *Chavez v. State*, 213 P.3d 476, 484 (Nev. 2009). The Supreme Court of Nevada emphasizes "the extent of discovery that was available to the defendant at the time of cross-examination" because "discovery is a component of an effective cross-examination." *Id.* at 483-84. And it held preliminary-hearing testimony admissible in *Chavez* because "nearly all the discovery was complete" before the hearing, and most of the 240 cross-examination questions were "based upon statements [the victim] had made . . . to authorities." *Id.* at 485.

2. Petitioner would likely have prevailed in most, if not all, of these jurisdictions. Most importantly, these States view a lack of discovery as an important,

if not dispositive, factor weighing against the adequacy of a preliminary hearing. *See, e.g.*, *Nofoa*, 349 P.3d at 340-41 (lack of access to witness's prior statements meant defense counsel "was unable to engage in effective cross-examination"); *Chavez*, 213 P.3d at 483-84 ("[W]e have explained that discovery is a component of an effective cross-examination."); *Torres*, 962 N.E.2d at 932 ("Beyond the freedom to fully question the witness . . . , what counsel *knows* while conducting the cross-examination may, in a given case, impact counsel's ability and opportunity to effectively cross-examine the witness at the prior hearing."). And yet petitioner's counsel received *no* discovery before the preliminary hearing despite the existence of constitutionally significant material in the State's possession. *See* pp. 7, 10, *supra*.

Petitioner would have likely also prevailed in Pennsylvania, which defines "adequate opportunity" as "a full and fair opportunity to cross-examine" for similar reasons. *Bazemore*, 614 A.2d at 687 (emphasis removed). The majority below did not dispute "the paucity of discovery" provided to defense counsel, including notes from Ms. Murrell's several statements to police. App., *infra*, 29 n.13. Yet it refused to characterize defense counsel's cross-examination as "limited in any way" because there were no questions "which the trial court disallowed." *Id.* at 28-29.

Pennsylvania courts would take the opposite approach. In their view, it blinks reality to say that "defense counsel was 'not restricted' when the Commonwealth failed to provide [relevant] information to the defense." *Bazemore*, 614 A.2d at 687. In that situation, the witness's testimony cannot be "fully tested" and the defendant has not been provided the "full and

fair opportunity" for cross-examination that the Confrontation Clause requires. *Id.*

C. Kansas, California, and Utah hold that the mere opportunity to cross-examine a preliminary-hearing witness satisfies the Confrontation Clause.

Finally, three States hold that the mere opportunity to cross-examine at a preliminary hearing will satisfy the Confrontation Clause, without regard to whether the opportunity was meaningful in any sense.

Kansas holds, for example, that an unavailable witness's preliminary-hearing testimony is admissible if the defendant "was represented by counsel . . . and had an opportunity to cross-examine" the witness. *State v. Young*, 87 P.3d 308, 316 (Kan. 2004). That is true even though, as in Colorado, not only do those judges "not pass on credibility," but "when evidence conflicts, the judge must accept the version of the testimony most favorable to the State." *State v. Rozell*, 508 P.3d 358, 366 (Kan. 2022). Lower courts in Kansas note the "dilemma" this rule creates for a defendant, especially given that a preliminary hearing typically "occur[s] prior to the time the defendant has completed his or her own investigation." *State v. Wilson*, 223 P.3d 838, at *5 (Table) (Kan. Ct. App. 2010). But the mere-opportunity rule "appears to be the law." *Id.*

California courts apply a similar categorical rule. As in Colorado, California judges are generally prohibited from "resolv[ing] questions of credibility or conflicts in the evidence" at a preliminary hearing. *Schmidlin v. City of Palo Alto*, 157 Cal. App. 4th 728,

768 (2007). And because preliminary hearings in California are "limit[ed] . . . to the single issue of the existence of probable cause," the "right to cross-examine witnesses has been significantly restricted." *People v. Duncan*, 78 Cal. App. 4th 765, 775 (2000). Nevertheless, to determine the admissibility of prior testimony, California courts ask only whether a witness "previously testified against the defendant and was subject to cross-examination at that time." *People v. Wilson*, 484 P.3d 36, 59 (Cal. 2021).

California courts' standard "permits an unavailable witness's preliminary hearing testimony to be admitted at trial," with no inquiry into the meaningfulness of the prior opportunity. *Id.* at 60. The fact that "defense counsel did not have access to [the victim's] written statement to the police" at the time of the preliminary hearing is irrelevant. *People v. Andrade*, 238 Cal. App. 4th 1274, 1295 (2015). And even the "subsequent discovery of material that might have proved useful in cross-examination is not grounds for exclu[sion]." *People v. Jurado*, 131 P.3d 400, 429 (Cal. 2006).

Lastly, according to the Supreme Court of Utah, it is "the opportunity to cross-examine the witness, not the actual undertaking of cross-examination, that satisfie[s]" the Confrontation Clause. *Mackin v. State*, 387 P.3d 986, 999 (Utah 2016). Under that rule, Utah courts have admitted preliminary-hearing testimony even when defense counsel made the "logical and routine choice" to conduct no cross-examination. *State v. Garrido*, 314 P.3d 1014, 1022 (Utah Ct. App. 2013).[2]

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[2] As a practical matter, Utah now generally excludes preliminary-hearing testimony at trial, but on evidentiary rather than

D. The decision below deepens the conflict.

The Supreme Court of Kentucky's decision below deepens the conflict among State courts and warrants review.

The Kentucky decision echoes the minimalist approach of mere-opportunity States. The majority expressly declined to consider whether petitioner's opportunity to cross-examine Ms. Murrell was "meaningful." App., *infra*, 12. Instead, it characterized defense counsel's questioning of Ms. Murrell as "self-limited" and emphasized that there was no "cross-examination which the trial court disallowed." *Id.* at 29. On that basis, the court found petitioner's argument "that he was not afforded an adequate opportunity to cross-examine . . . of little weight." *Id.*

Even before the decision below, lower courts recognized the need for this Court's intervention. Several expressly acknowledged the conflict among them. *See, e.g.*, *Fry*, 92 P.3d at 978 ("Other states are split on whether a preliminary hearing provides an adequate opportunity for cross-examination."); *Chavez*, 213

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constitutional grounds. In *States v. Goins*, 423 P.3d 1236, 1241 (Utah 2017), the Supreme Court of Utah considered the admissibility of preliminary-hearing testimony under Utah's identical version of Federal Rule of Evidence 804. That rule admits prior testimony against a party who had "an opportunity and similar motive" for cross-examination. Utah R. Evid. 804(b)(1). *Goins* held that because preliminary hearings in Utah are limited to "determining whether probable cause exists," it would be "rare" for defense counsel to have "the same motive and . . . a full opportunity for cross-examination at the preliminary hearing." 423 P.3d at 1241, 1243. Since *Goins*, however, the Supreme Court of Utah has not revisited its holding that the admission of preliminary-hearing testimony does not violate the Confrontation Clause. *See State v. Ellis*, 417 P.3d 86, 89 (Utah 2018).

P.3d at 484 (rejecting the Colorado and Wisconsin categorical approach); *State v. Aaron*, 218 S.W.3d 501, 514 (Mo. Ct. App. 2007) (acknowledging the "split as to whether . . . cross-examination at the preliminary hearing [is] an insufficient substitute for cross-examination at trial"); *see also Nafoa*, 349 P.3d at 339-40 (similar); *State v. Mantz*, 222 P.3d 471, 477 (Idaho Ct. App. 2009) (similar).

And courts and commentators recognize the need for guidance from this Court on the specific question presented. *See* Christopher B. Mueller, *Cross-Examination Earlier or Later: When Is It Enough to Satisfy Crawford?*, 19 Regent U. L. Rev. 319, 364 (2007) ("It is high time to revisit the meaning of the constitutional standard" because "the doctrine of 'full and effective' cross-examination has not been adequately developed."); *see also, e.g.*, *Richardson*, 328 P.3d at 508 ("*Crawford* did not specifically address what constitutes an 'adequate' opportunity for cross-examination[.]"); *Contreras*, 979 So. 2d at 909 ("[W]e have no guidance from the Supreme Court as to whether the *Crawford* cross-examination requirement would be satisfied [in various scenarios]."); *Gleason*, 329 P.3d at 1134 ("*Crawford* . . . provides no guidance for how much cross-examination is required to afford the defendant an adequate opportunity.").

II. The Decision Below Conflicts with This Court's Precedent.

The deep divisions in the lower courts would warrant review even if Kentucky's approach were correct. But the decision below in fact contravenes this Court's precedent and vitiates the Confrontation Clause's core purpose.

The Sixth Amendment protects a criminal defendant's right "to be confronted with the witnesses against him." U.S. Const. amend. VI. "It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." *Crawford*, 541 U.S. at 61. That method is "the greatest legal engine ever invented for the discovery of truth." *Green*, 399 U.S. at 158.

The Court's prior-testimony rule is linked to the right itself. It has been "justified on the ground that the right of cross-examination initially afforded provides *substantial compliance* with the purposes behind the confrontation requirement." *Barber*, 390 U.S. at 722 (emphasis added). The Court has never admitted prior testimony without that predicate. *See Mattox*, 156 U.S. at 242.

The witnesses in *Pointer* and *Barber* were available for cross-examination at preliminary hearings. *See Pointer*, 380 U.S. at 1066; *Barber*, 390 U.S. at 720. But the Court excluded each witness's testimony because it was not given "at a time and under circumstances affording . . . counsel an adequate opportunity to cross-examine." *Pointer*, 380 U.S. at 407. And the Court has only admitted preliminary-hearing testimony when the witness underwent "extensive cross-examination," *Green*, 399 U.S. at 151, that was not "significantly limited in any way in [its] scope or nature," *Roberts*, 448 U.S. at 71.

This case falls well outside the narrow allowance the Court has previously afforded for prior testimony. *See Crawford*, 541 U.S. at 58 (considering whether the outcome of the Court's prior cases "hew[ed] closely" to the Court's rule). Ms. Murrell was not "subjected to

extensive cross-examination." *Green*, 399 U.S. at 151. Defense counsel asked six perfunctory questions that "barely touched on the facts of the underlying incident." App., *infra*, 36.

Importantly, it could hardly have been otherwise. Defense counsel had no notice that Ms. Murrell would testify. MIL Vid. 15:05-15:20. And she had no discovery or other evidence from which to prepare an effective examination. MIL Vid. 15:57-16:12; *see Nofoa*, 349 P.3d at 340 (noting the impossibility of "meaningful cross-examination" without access to a witness's prior statements).

Beyond that, defense counsel understood that "[t]he sole purpose of a preliminary hearing" in Kentucky "is to determine whether there is probable cause to believe that the defendant committed a felony." *Wortman*, 929 S.W.2d at 200. So even if she were equipped to cross-examine Ms. Murrell at the preliminary hearing, defense counsel's experience informed her that broad cross-examination would not be permitted. MIL Vid. 6:05-6:35; *see Wortman*, 929 S.W.2d at 200 ("The preliminary hearing is not . . . a discovery tool for the defense.").

That was all by design. The prosecutor's unannounced purpose in calling Ms. Murrell was to preserve her testimony for trial. MIL Vid. 13:20-13:47. There is no dispute that the prosecutor could have deposed Ms. Murrell after the preliminary hearing. *See* Ky. R. Crim. P. 7.10(1). That procedure is designed to "fully protect the rights of personal confrontation and cross-examination," *id.* at 7.12(1), by requiring reasonable notice and the production of all relevant evidence, *id.* at 7.10(1), 7.14. Yet the prosecutor did nothing in 16 months following the preliminary hearing to

preserve Ms. Murrell's testimony "in any way that [would] secure confrontation." *Green*, 399 U.S. at 161-62.

As noted by the dissent below, there is no shortage of areas that could have been explored with Ms. Murrell had there been an "adequate opportunity" for cross-examination. App., *infra*, 46-47. Of course, Ms. Murrell's initial statement to police that an intruder killed her husband was highly exculpatory. PH Vid. 23:15-23:40. And several other topics, while perhaps not proving petitioner's innocence, could have been used to rebut the charge against him. Ms. Murrell claimed that she smoked a cigarette with petitioner right after the alleged attack. App., *infra*, 3. That testimony raises questions about the nature of the attack as well as Petitioner's intent. But Ms. Murrell was not asked any questions about why she felt comfortable smoking a cigarette with petitioner just after he allegedly stabbed her husband. Ms. Murrell also testified that petitioner rendered various forms of aid to Mr. Murrell. *Id.* at 47. Defense counsel could have developed that testimony to show that Mr. Murrell's injuries were inflicted accidentally, but no questions were asked.

At the time of Ms. Murrell's testimony, defense counsel was also unaware that the medical examiner had identified strangulation as a cause of Mr. Murrell's death. *Id.* Strangulation provides uniquely powerful evidence of intent. *See Capstraw v. Commonwealth*, 641 S.W.3d 148, 156 (Ky. 2022). Ms. Murrell said nothing about strangulation at the preliminary hearing, but her testimony was ambiguous as to whether (or for how long) petitioner was alone with Mr. Murrell. PH Vid. 9:15-9:35. Had defense counsel

known about the medical examiner's findings, cross-examination could have been used to confirm that petitioner had no opportunity to strangle Mr. Murrell. Defense counsel also could have asked whether Mr. Murrell displayed any signs of strangulation before his death.

Finally, defense counsel was not even provided with petitioner's own statement to police. PH Vid. 23:45-24:06. That fact alone severely hampered her ability to cross-examine Ms. Murrell. Without petitioner's statement, defense counsel did not know whether any testimony she elicited from Ms. Murrell might inadvertently undermine her client's own account of the incident. And it is the rare defense counsel who would dare embark on such a blind cross-examination of a pivotal witness.

The record leaves little doubt that refusing to exclude Ms. Murrell's testimony violated the Confrontation Clause and that error prejudiced petitioner. In short, Ms. Murrell testified "at a time and under circumstances" that foreclosed meaningful questioning. *Pointer*, 380 U.S. at 407. As a result, petitioner was deprived of the "full and fair opportunity" for cross-examination that the Confrontation Clause secures. *Delaware v. Fensterer*, 474 U.S. 15, 22 (1985). Without such an opportunity to exercise that right, it is impossible to determine that it would present "no hardship upon the defendant to allow the testimony" into evidence. *Mattox*, 156 U.S. at 242. The Supreme Court of Kentucky's erroneous conclusion to the contrary provides additional reason for this Court's review.

III. The Question Presented Is Exceptionally Important and Frequently Recurring.

The scope of the Confrontation Clause is vitally important. "There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trail which is this country's constitutional goal." *Pointer*, 380 U.S. at 405. This Court has itself described the right as a "bedrock" constitutional guarantee in all federal and state prosecutions. *Crawford*, 541 U.S. at 42.

The specific contours of the prior-testimony rule, moreover, is an important aspect of that right. The Confrontation Clause, after all, "is basically a trial right," whose intent is to allow "the jury to weigh the demeanor of the witness." *Barber*, 390 U.S. at 725. The admission of prior testimony without a live witness at trial—even if sometimes valid—thus necessarily deprives defendants "of the advantage of that personal presence of the witness . . . which the law has designed for his protection." *Mattox*, 156 U.S. at 243. It is therefore critical for this Court to clarify the scope of the prior-testimony rule so that "[t]he right of confrontation may not be dispensed with . . . lightly." *Barber*, 390 U.S. at 725.

Practitioners, moreover, need this Court's guidance as much as the courts. Prosecutors need to know whether a preliminary hearing will suffice, or whether they must take further steps to preserve vital testimony. After all, "[a]s with other evidentiary proponents, the prosecution bears the burden of establishing" that a defendant had an adequate opportunity to

cross-examine an unavailable witness. *Roberts*, 448 U.S. at 74-75. And defense counsel must understand the stakes when a witness testifies at a preliminary hearing.

The States themselves would benefit from further guidance as they structure their criminal procedures. The majority below, for example, faulted defense counsel for her "self-limited" cross-examination, none of which "the trial court disallowed." App., *infra*, 29. But as with most States, Kentucky law makes clear that "[t]he preliminary hearing is not . . . a discovery tool for the defense." *Wortman*, 929 S.W.2d at 200. Under Kentucky's current procedures, defense counsel could not have properly questioned Ms. Murrell more broadly. If the Confrontation Clause requires certain procedures, the States themselves have an interest in clarity—even apart from their role prosecuting or adjudicating individual cases.

Finally, the admissibility of preliminary-hearing testimony is often litigated. The decision below is at least the seventeenth post-*Crawford* decision in a state court of last resort addressing that precise question. Other lower courts routinely grapple with the same issue, *see, e.g.*, *Tyler v. Commonwealth*, 2022 WL 3031277, at *6 (Va. Ct. App. Aug. 2, 2022); *State v. Jackson*, 2022 WL 1836930, at *13 (Tenn. Ct. Crim. App. June 3, 2022); *State v. Rimmer*, 623 S.W.3d 235, 290-91 (Tenn. 2021); *People v. Draughn*, No. 351688, 2021 WL 1515491, at *3 (Mich. Ct. App. Apr. 15, 2021); *Knapper v. State*, 473 P.3d 1053, 1067-68 (Okla. Ct. Crim. App. 2020), while specifically noting a lack of guidance from this Court on the subject, *see* p. 23, *supra*.

IV. This Case Is an Ideal Vehicle for Resolving the Conflict.

This case is an ideal vehicle to determine when, if ever, a preliminary hearing provides an "adequate opportunity" for cross-examination under the Confrontation Clause.

The question is cleanly presented on direct review. It is the only issue petitioner preserved when he entered a conditional guilty plea. App., *infra*, 9. There can be no plausible claim that the error was harmless, due both to petitioner's conditional guilty plea and because the prosecutor acknowledged that Ms. Murrell was a "pivotal witness" without whom "the Commonwealth's case-in-chief would be difficult." MIL Vid. 45:25-45:42. And the facts provide this Court with a clear opportunity to address the constitutional question. In short, if this was an "adequate opportunity" for cross-examination, then any preliminary-hearing will satisfy the constitutional predicate.

There is no reason for the Court to defer addressing this important constitutional question. More than a dozen state courts of last resort have considered the question presented, and the doctrinal lines are clearly drawn. *See* pp. 13-23, *supra*. The time has come for this Court to answer the question presented and ensure that defendants in every jurisdiction enjoy the full protection of the Confrontation Clause.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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