No. 22-450

In the Supreme Court of the United States

GREGORY SHIELDS, SR.,
PETITIONER

v.

COMMONWEALTH OF KENTUCKY,
RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

BRIEF FOR VANHO LAW AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

ADAM M. VANHO
Counsel of Record
VANHO LAW
37 South Main Street, Suite 3
Munroe Falls, Ohio 44262
adam@vanholaw.com
(330) 653-8511

Counsel for Amicus Curiae

QUESTION PRESENTED

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

Table of Contents

TABLE OF AUTHORITIES

Other Authorities

INTEREST OF *AMICI CURIAE*[1]

VanHo Law is an Ohio law firm that represents families and individuals with a wide variety of legal needs, including but not limited to criminal proceedings in state and federal courts. Its current and future clients will inevitably be impacted by this Court's decision in this case, as will other criminal defendants throughout Ohio and the nation. Undersigned Counsel is also a former assistant county prosecutor in two of Ohio's largest counties and an Assistant Ohio Attorney General with over two decades of experience in criminal litigation at both the trial and appellate levels.

VanHo Law is filing the instant *amicus curiae* brief to highlight concerns with (1) the need for in-person examination of witnesses in criminal proceedings, especially in a criminal trial; (2) the allowance of the government securing testimony before a defendant is allowed to investigate his or her case, undermining the effectiveness of cross-examination obtained at a preliminary hearing; and (3) the result of allowing prior testimony to be admitted at trial serving as a deterrent to the more efficient resolution of cases.

For the reasons contained in this brief, as well as those contained in the briefs of the Petitioner and supporting *amicus curiae* briefs, *Amicus Curiae*

---

[1] Pursuant to this Court's Rule 37.3(A), all parties consent to the filing of this brief. Pursuant to Rule 37.6, *Amicus Curiae* affirms that no counsel for a party authored this brief, in whole or in part, and that no person other than *Amicus Curiae*, its members, and its counsel made a monetary contribution to its preparation or submission.

encourages this Court to reverse the underlying decision of the Supreme Court of Kentucky.

SUMMARY OF ARGUMENT

The most fundamental right of any criminal defendant is the right to confront one's accusers in open court before the trier of fact – whether it be a judge or jury. The skilled and educated cross-examination of an accuser – whether it be a law enforcement officer, expert witness, or civilian – is often the difference between a defendant's wrongful conviction and their exoneration.

In recent decades, there has been an erosion of this basic right to confront one's accusers during criminal proceedings. The erosion has been more centered on convenience of the court and parties than compliance with the Confrontation Clause. This degradation undermines the fundamental purpose of the Confrontation Clause, which is to allow a criminal defendant the ability to fully and effectively flush out a witness' perceptions, biases, and frailties in testimony.

There are heightened concerns of allowing this kind of 'prior testimony' in cases where preliminary hearing testimony is often secured before an attorney can investigate or receive discovery about the witness or underlying case. Further, allowing preliminary hearing testimony to be introduced at trial inadvertently reduces the opportunity resolve cases at the early phases of a case.

This Court should reverse the decision of the Supreme Court of Kentucky and provide greater restrictions on the use of 'prior testimony' in criminal cases. This Court should further give some clarification to lower courts as to when the right to an

in-court confrontation of a witness must be guaranteed absent a waiver by the defendant.

ARGUMENT

As with every aspect of our modern society, advances in technology have made it easier to record, replay, and reenact prior testimony. As with other aspects of society, these advancements were beyond the comprehension or imaginations of our Eighteenth-Century Founding Fathers.

What was not beyond the comprehension of our Founding Fathers was the benefit and brilliance of cross examination. The signatures on both the Declaration of Independence, the Constitution, and state constitutions around Colonial America carry the names of some of this country's earliest and brightest lawyers and legal scholars.

Those men would have understood the benefit of being able to examine a witness in person – as opposed to through affidavits or other sworn declarations – to see the expressions on their faces, to see the twitches in their eyes, to see nervous tapping of feet, and to hear the tone of voices as they raise, drop, squeak, or shiver while answering unanticipated questions.

In many states, the opportunity to conduct a full, fair, educated, and effective cross-examination of a witness or alleged victim does not come until well into a case. Preliminary hearings, which are usually held within days of charging, are conducted before an attorney has had an opportunity to review police reports, interview witnesses, examine evidence, or form a theory of a case.

Further, the purpose of preliminary hearings are to establish probable cause – not to determine if a person is guilty or innocence. They are not conducted

to go head-on into the facts or evidence, but to determine if there is probable cause for the case to proceed.

Preliminary hearings also serve the unofficial function of allowing the parties to see the initial evidence in the case – which often facilitates discussions to resolve a case. By allowing testimony to be later introduced at trial, the net effect would also be to discourage prosecutors and defendants from engaging in plea negotiations that is aided by seeing the results of a preliminary hearing.

I. The use of preliminary hearing testimony violates the Confrontation Clause.

Our Founding Fathers, wanting to eliminate the use of affidavits and unchallengeable documents, enshrined in the Constitution our Sixth Amendment's basic protections, including the right to the assistance of counsel, to confront witnesses against him, and to obtain the testimony of witnesses in his or her favor. U.S. Const. amend. VI (1787). In the decades surrounding the adoption of the Sixth Amendment, many states also enshrined the basic right to confront witnesses in their state constitutions. *See*, *e.g.*, Ohio Const. art. VII, § 11 (1803); 1 Mass. Const. art. XII (1780); 1 Pa. Const. § IX (1776). Ohio's original Constitution specifically stated that it was the right of the accused "to meet the witness face to face." Ohio Constitution of 1803, *supra*.[2]

---

[2] The Ohio Constitution of 1851, which is the current version of the State's Constitution, maintains this requirement. Ohio Const. art. I, § 10 (1912).

In the case of cross-examination, its importance has been understood since the early dates of the Greeks.

> Indeed, to this day, the account given by Plato of Socrates's cross-examination of his accuser, Miletus, while defending himself against the capital charge of corrupting the youth of Athens, may be quoted as a masterpiece in the art of cross-questioning.
>
> Cross-examination is generally considered to be the most difficult branch of the multifarious duties of the advocate. Success in the art, as some one has said, comes often to the happy possessor of a genius for it. Great lawyers have often failed lamentably in it, while marvelous success has crowned the efforts of those who might otherwise have been regarded as of mediocre grade in the profession. Yet personal experience and the emulation of others, trained in the art, are the surest means of obtaining proficiency in this all important prerequisite of a competent trial lawyer.
>
> It requires the greatest ingenuity; a habit of logical thought; clearness of perception in general; a habit of logical thought; clearness of perception in general; infinite patience and self-control; power to read men's minds intuitively, to judge of their characters

by their faces, to appreciate their motives; ability to act with force and precision; a masterful knowledge of the subject-matter itself; an extreme caution; and, above all, the *instinct to discover the weak point* in the witness under examination. One has to deal with a prodigious variety of witnesses testifying under an infinite number of differing circumstances. It involves all shades and complexions of human morals, human passions, and human intelligence. It is a mental duel between counsel and witness.

...

But suppose the witness has testified to material facts against us, and it becomes necessary to break the force of his testimony, or else abandon all hope of a jury verdict. How shall we begin? How shall we tell whether the witness has made an honest mistake, or ha committed perjury? The methods to be use in his cross-examination in the two alternatives would naturally be quite different. There is a marked distinction between discrediting the *testimony* and discrediting the *witness*. It is largely a matter of instinct on the part of the trained examiner. Some people call it the language of the eye, or the tone of the voice, or the countenance of the witness, or his "manner of testifying," or all combined, that betrays the wilful [sic]

> perjurer. It is difficult to say exactly what it is, excepting that constant practice seems to enable a trial lawyer to form a fairly accurate judgement on this point. A skilful [sic] cross-examiner seldom takes his eye from an important witness when he is being examined by his adversary. Every expression of his face, especially his mouth, even every movement of his hands, his manner of expressing himself, his whole bearing – all help the examiner arrive at an accurate estimate of his integrity.

Francis L. Wellman, *The Art of Cross-Examination*, 7-9 (Barnes & Noble 1992) (1903).

As Wellman pointed out, it is not just the words that an attorney uses to gauge the credibility of a witness – and thus guide his or her cross-examination – but the witness' manner in testifying.

Similarly, jurors also use those same non-testimonial cues – none of which show up in a transcript – to determine the integrity and veracity of a witness and their testimony.

While this Court has looked at the introduction of witness' testimony outside of the courtroom, in those instances, the jurors were still able to view the expressions and hear the tone of the witnesses. In *Maryland v. Craig*, this Court reviewed a Maryland case where closed-circuit testimony was used to facilitate a child's testimony in a sex abuse case. 497 U.S. 836 (1990). In *Craig*, the jurors were still able to see the child-witness's expressions, hear her voice's tone, and judge her credibility.

By allowing the introduction of prior testimony at trial, whether played by a recording or read from a

cold transcript, the trier of fact is robbed of the opportunity to view the expressions, mannerisms, vocal tones, eye movements and direction, and other cues used by those same triers of fact in their daily lives when determining the credibility veracity of others. When drafting and ratifying the Confrontation Clause within the Sixth Amendment, our Founders clearly indicated their desire that jurors and judges benefit from those verbal and non-verbal cues when coming to their verdict.

II. The Sixth Amendment requires the opportunity for meaningful cross-examination to the trier of fact.

Further, in *Craig*, the defendant's attorneys were able to cross-examine the child witness *after* they had the opportunity to conduct discovery and investigate the underlying allegations in the case.

It is clear from the text of the Sixth Amendment that the Framers wished defendants to have an effective, and thus educated, form of cross-examination. This is evident by virtue of the fact that the requirements for cross-examination and the effective assistance of counsel are written within in the same sentence.

In the foundational case for determining ineffective assistance of counsel, *Strickland v. Washington*, the Court noted that the defendant's trial counsel had "actively pursued pretrial motions and discovery." 488 U.S. 668, 672 (1984). This discovery would have been after the normal timeframe for preliminary hearings. It was the failure of counsel to investigate for the death penalty mitigation phase that this Court focused on in rendering its ultimate opinion; and even when examining that issue, this Court determined

that counsel had made reasonable efforts to investigate the defendant's background. 488 U.S. at 698-700.

When reviewing Sixth Amendment claims of ineffective assistance of counsel, this Court and lower courts have routinely focused on the pretrial investigations by counsel. The problem is that if trial testimony is 'locked in' at preliminary hearings, the fact that counsel has not had an opportunity to fully investigate and perform an educated cross-examination would be *per se* ineffective.

While such ineffectiveness may not be unduly prejudicial in many cases, in cases like the one at bar it would be. The failure to fully flush out biases, motives, and inaccuracies for critical witnesses would create grounds for ineffective assistance of counsel.

In the case at bar, Counsel did not have the opportunity to conduct an educated and in-depth investigation prior to the preliminary hearing. Had Counsel done so, he would have had the opportunity to elicit answers as to the witness's perceptions, biases, and other factors that would have been asked after discovery and an investigation.

Even if there had been some preliminary discovery, which the Kentucky Supreme Court's decision does not indicate happened, Counsel would not have had an opportunity to investigate the accusations and assertions made in the police paperwork. As such, the cross-examination would have not risen to the level of preparation and skill anticipated by the Founding Fathers.

III. Allowing preliminary hearing transcripts to be used further discourages and hampers early resolution of cases.

Like Kentucky, Ohio allows for preliminary testimony to be introduced at trial. Under the Ohio Rules of Evidence, preliminary hearing testimony can be admitted if the witness is unavailable and if the "[t]estimony given at a preliminary hearing must satisfy the right to confrontation and exhibit indicia of reliability." Ohio Evid. R. 804(B)(1).

As a result of this risk, many attorneys advise their clients to waive their rights to a preliminary hearing.[3] As a result, both prosecutors and defense attorneys often work in a tunnel-visioned vacuum on their cases – focusing on their versions of the case without having the opportunity to view the case from the other side's perspective.

However, in counties where preliminary hearings are still conducted, prosecutors and defense attorneys – sometimes with the informal advise of the court – have the opportunity to have a preview of the pros and cons of the case and the credibility of the witnesses. It also allows law enforcement, witnesses, and victims to also see the problems with the case. This allows all parties the opportunity to begin working on

---

[3] In Ohio, the opportunity to conduct a preliminary hearing is not automatic. In many counties in Ohio, prosecutors have adopted a policy of "direct indictment," where cases proceed to the grand jury before the ten-day period required for a preliminary hearing. In some counties, prosecutors dismiss cases and refile directly with the grand jury. However, in courts and counties where preliminary hearings are conducted, those hearings often allow the parties the opportunity to assess the strengths and weaknesses of a case and work towards an earlier resolution to the case.

resolutions to cases at the early stages of a case – as opposed to allowing the case to go on for months before an accurate assessment can be made into the case and the parties can have discussions about resolution.

If an attorney believes that there is a risk of that preliminary hearing testimony being introduced at trial and if an attorney does not have a full assessment of the underlying facts and biases, there is a significant probability that the attorney will advise his or her client to waive the hearing – eliminating the opportunity to resolve the case in a more efficient manner.

Given the above, there are a number of reasons why this Court should grant the Petition for a Writ of Certiorari and review the impact of allowing prior hearing testimony on the Confrontation Clause.

CONCLUSION

This Court should grant the Petition for a Writ of Certiorari and reverse the below decision of the Supreme Court of Kentucky.

Respectfully submitted,

ADAM M. VANHO
Counsel of Record
VANHO LAW
37 South Main Street, Suite 3
Munroe Falls, Ohio 44262
adam@vanholaw.com
(330) 653-8511

COUNSEL FOR *AMICUS CURIAE* VANHO LAW

DATED: December 15, 2022