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Petitioner**

Utah Supreme Court

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Case No. 20160502-SC

IN THE
UTAH SUPREME COURT

STATE OF UTAH,
Plaintiff/ Respondent

v.

AHN TUAM PHAM,
Defendant/ Petitioner

Reply Brief of Petitioner

On Writ of Certiorari to the Utah Court of Appeals

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ARGUMENT

The court of appeals erred in concluding that Pham failed to demonstrate that his Sixth Amendment rights were violated for two reasons. First, under *Crawford*, preliminary testimony of unavailable witnesses should only be allowed at trial in exceptional circumstances, which did not exist in Pham’s trial. Second, even if preliminary cross-examination in Utah presumptively satisfies *Crawford*’s requirements, introduction of preliminary testimony at Pham’s trial violated Pham’s *Crawford* rights.

A. Under *Crawford*, Preliminary Testimony of Unavailable Witnesses Should Only Be Allowed at Trial in Exceptional Circumstances, Which Did Not Exist in Pham’s Trial.

The States’ responsive brief accurately frames the positions of the parties as mirror images of each other. Pham contends that preliminary testimony of an unavailable witness should only be admitted at trial in exceptional circumstances. The State contends that preliminary testimony of an unavailable witness should always be admitted absent exceptional circumstances. Accordingly, Pham and the State disagree about whether there is a presumption that cross-examination of an unavailable witness satisfies *Crawford*’s procedural requirement, namely, “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. 36, 61, 124 S.Ct. 1354 (2004).

The court of appeals failed to apply a legal standard to determine if Pham's Sixth Amendment rights were violated. The court of appeals determined that Pham's *Crawford* rights were satisfied during his preliminary hearing while declining to determine when preliminary hearings satisfy *Crawford*. The court of appeals merely concluded that cross-examination in Utah's preliminary hearing framework can *sometimes* satisfy *Crawford's* procedural requirements. *Pham*, 2016 UT App at ¶¶12, 17, 18. However, the court refused to determine *when* a defendant has a full opportunity to cross examine a witness during a preliminary hearing. *Id.* at ¶18. The court also explicitly declined to determine whether the holding of *Brookes*, i.e. "cross-examination takes place at preliminary hearing and at trial under the same motive and interest," remains true in the post-*Crawford* context. *State v. Brooks*, 638 P.2d 537, 541 (Utah 1981); *Pham*, UT App at footnote 3.

The court of appeals justified its refusal to apply a legal test to determine whether Pham's constitutional rights were violated by stating that Pham did "not allege that his motivation to cross examine Victim changed between the preliminary hearing and trial" or that "the trial court limited his cross-examination in any way." However, Pham's opening brief alleged that the trial court did limit his cross-examination at preliminary hearing. Opening Brief at 19 ("Pham does not contest that he was given opportunity to cross, but rather that cross examination at a preliminary hearing is limited in scope and opportunity and

therefore inadequate”) (“Pham admits that he was not expressly limited in his cross-examination, but rather the nature of the preliminary hearing necessarily constricts confrontation”). Pham contended that his motivation at preliminary hearing differed from his motivation at trial because credibility was not an issue during preliminary hearing. *Id* at 21. Credibility was a key issue at Pham’s trial.

In *Timmerman*, this Court recognized that the Sixth Amendment right to effective cross-examination of a witness does not exist during a preliminary hearing, but is a trial right. 2015 UT at ¶¶10, 13. This holding makes sense because during a preliminary hearing a magistrate has limited discretion to determine witness credibility, *Schmidt*, 2015 UT at ¶13, and reasonable inferences are to be decided in favor of the prosecution, *Jones*, 2016 UT at ¶27. Thus, defendants lack a motive to cross-examine a witness to both test the “recollection and sifting the conscience of the witness,” and to compel that witness to “stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.” *Mattox v. United States*, 156 U.S. 237, 242-43 (1895).

The only motive for a defendant to conduct such a cross-examination is that the examination may be used at trial. To use this motivation to justify the conclusion that defendants have this same motivation at trial as preliminary

hearing is circular reasoning because without begging the conclusion that preliminary testimony may be used at trial, no such motivation exists.

The State argues for a presumption that cross-examination at preliminary hearings satisfies *Crawford*, absent exceptional circumstances, by citing to pre-*Crawford* case law. At page 10 of the State's responsive brief, the State proposes a test for determining when prior cross-examination satisfies a defendant's Sixth Amendment right to confrontation:

Preliminary hearings in Utah – notwithstanding their limited purpose – retain the relevant attributes that the Supreme Court has held make them “trial-like”: witnesses are placed under oath, testify at a recorded hearing in front of a judge, the defendant is represented by counsel, and he has a rule-based right to cross-examine. And defense counsel is animated by the same motive and interest – to further the defendant's chances of success – at preliminary hearing no less than at trial, notwithstanding a state constitutional amendment permitting the State to present reliable hearsay at preliminary hearings.

The State's proposed test is no longer good law. This test was used in the pre-*Crawford* cases of *California v. Green*, 399 U.S. 149, 165-166 (1970), and in *State v. Brooks*, 638 P.2d at 541. However, as the court of appeals stated, it is “unclear whether *Brooks's* blanket statement that ‘cross-examination takes place at preliminary hearing and at trial under the same motive and interest’ is still true insofar as Confrontation clause rights are concerned.” *Pham*, 2016 UT App at footnote 3. The presumption that preliminary cross-examination satisfies the Sixth Amendment does not represent a “long unbroken line of decisions” because the

prior test assumed reliability as the purpose of the Sixth Amendment's confrontation clause. See Brief of Respondent at p.12. *Crawford* fundamentally altered this assumption, upon which the test from *Green* and *Brooks* relied. *Crawford* 541 U.S. 61-63 (“[a]dmitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation”) (“[d]ispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty”).

Pham respectfully requests that this Court determine what the court of appeals refused to determine, namely, when preliminary cross-examination satisfies *Crawford's* requirements. If it is possible for the cross-examination opportunity at a preliminary hearing to satisfy a defendant's constitutional right of confrontation, when does preliminary cross-examination satisfy this constitutional right? In requesting that this Court use a legal standard to determine whether Pham's constitutional rights were violated, Pham does not request an advisory opinion as the State asserts at page 35 of its brief. Rather, Pham requests that his constitutional rights be adjudicated under the Doctrine of Stare Decisis which is “a cornerstone of the Anglo-American jurisprudence that is crucial to the predictability of the law and the fairness of adjudication.” *State v. Menzies*, 889 P.2d 393, 399 (Utah 1994) (quoting *State v. Thurman*, 846 P.2d 1256 (Utah 1993)).

At least one other State has determined that preliminary cross-examination of an unavailable witness does not presumptively satisfy *Crawford's* requirements. In *People v. Fry*, the Supreme Court of Colorado concluded that due to the limited nature of Colorado's preliminary hearing framework, the opportunity for cross-examination was insufficient to satisfy the Confrontation Clause. 92 P.3d 970, 977 (Colo. 2004). The Colorado Supreme Court reasoned that defense counsel had no motive to engage in credibility inquires during preliminary cross-examination because credibility was not an issue during a preliminary hearing. *Id.* at 977-978 (stating "opportunity for cross-examination regarding the credibility of a witness, as a matter of fact, 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").

This Court should determine that preliminary hearings in Utah do not presumptively satisfy *Crawford's* requirements absent exceptional circumstances. The Colorado Supreme Court's reasoning applies in Utah because credibility is not an issue in Utah preliminary hearings. *Schmidt*, 2015 UT at ¶13; *State v. Droesbeke*, 2010 UT App 275, ¶18, 241 P.3d 772. Exceptional circumstances do not exist in this case because the structural limitations of Utah Preliminary hearings provided Pham no motivation to cross-examine the credibility of his accuser during

preliminary hearing and because the credibility of Pham's accuser was a key issue at Pham's trial.

B. Even if Preliminary Cross-Examination in Utah Presumptively Satisfy *Crawford's* Requirements, Introduction of Preliminary Testimony at Pham's Trial Violated Pham's *Crawford* Rights.

In this case, Pham claimed that he was acting in self-defense when he shot Menchaca. The testimony of Menchaca was directly opposed to this claim. The credibility of each witness at the trial was critical. The jury heard Menchaca's testimony as read by a prosecutor. There was no chance for cross-examination regarding Menchaca's credibility and veracity. The cross-examination of Menchaca done at the preliminary hearing in this case was more akin to discovery than to rigorous trial cross-examination. There was no opportunity for the jury to observe his demeanor as he was cross-examined. Under the circumstances of the trial in this case, such testimony is but a shell of the type of examination needed to protect Pham's Sixth Amendment rights to Confrontation because of the vastly different purposes of a preliminary hearing and trial, as explained above.

The State would have it both ways: a criminal defendant cannot assert *Crawford* rights at a preliminary hearing, yet this hearing does provide the "opportunity" to fully and fairly confront the witness so the State can argue the *Crawford* rights are fulfilled when it so chooses. The purpose of a preliminary

hearing is solely to establish probable cause, the State's argument leaves a defendant to gamble with his rights at a preliminary hearing. See *Timmerman*, 2015 UT at ¶10. Even if the magistrate allows extensive cross at a preliminary hearing, it is questionable whether that sort of "opportunity" satisfies the needs of defense counsel when it comes time to cross-examination of a witness before a jury at trial, because a defendant's *Crawford* rights are trial rights. A preliminary hearing in Utah is not "trial like." The purpose of and the preparation for cross-examination at a preliminary hearing and at trial is vastly different.

This Court recently examined the preliminary hearing process in Utah very thoroughly. As now mandated by this Court the preliminary hearing process does not contemplate nor provide for a defendant's confrontation *Crawford* rights under the Sixth Amendment. The preliminary hearing process has such a low standard of proof and its purpose so limited, that an adequate opportunity for cross-examination as required by *Crawford* does not generally exist under Utah's current preliminary hearing process. Defendant Pham's *Crawford* rights were not met in this case and the prior testimony of the Menchaca should have been excluded.

CONCLUSION

This Court should vacate Defendant's conviction and remand the case for a new trial excluding Menchaca's preliminary hearing testimony if he continues to be unavailable.

Dated this 6 day of February, 2017

/s/ Michael J. Langford
Michael J. Langford
Attorney for the Appellant

CERTIFICATE OF COMPLIANCE

I certify that in compliance with rule 24(f)(1), Utah R. App. P., this brief contains 1, 577 words, excluding the table of contents and table of authorities. I further certify that in compliance with rule 27(b), Utah R. App. P., this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in Book Antiqua 13 point.

Dated this 6 day of February, 2017

/s/ Michael J. Langford
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CERTIFICATE OF SERVICE

I hereby certify that on the 6 day of February, 2017, I filed, with a Clerk of the Court, via e-mail, a copy of the foregoing, and that a copy was emailed to the following:

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