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### State v. Eighth Judicial Dist. Court, 134 Nev. Adv. Op. 13 (Mar. 1, 2018) (en banc)

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## CRIMINAL PROCEDURE: THE CONFRONTATION CLAUSE

### **Summary**

The Court determined that when the State conducts a direct-examination of a witness during a preliminary hearing, and then the defendant waives his right to that preliminary hearing, the defendant is said to have had an “adequate opportunity” to confront that witness as long as adequate discovery was available.

### **Background**

Jeffrey Baker was accused of one count of sexually motivated coercion and eight counts of lewdness with a child under the age of 14. At the preliminary hearing, Baker's cousin, C.J., testified against him regarding two instances in which Baker attempted to engage her in sexual activity.

When C.J. finished testifying, Baker's attorney declined to cross-examine her and instead announced that Baker would unconditionally waive his preliminary hearing. He would then plead guilty to one count of attempted lewdness with a minor. At the district court arraignment, Baker presented his signed guilty plea agreement. After the court questioned Baker as to whether he understood the consequences of pleading guilty, Baker indicated that he did. The court then asked if Baker was pleading guilty because he in fact attempted to commit a lewd act upon C.J. Baker answered no, saying: "It's not true." The court rejected Baker's guilty plea and ordered the State to reinstate the charges.

One week later, C.J. committed suicide. The State moved to admit transcript of C.J.'s testimony at the preliminary hearing for trial. The district court denied the motion finding that Baker did not have an adequate opportunity to cross-examine C.J. at the preliminary hearing. The State then challenged that order in a writ petition.

### **Discussion**

The Confrontation Clause of the Sixth Amendment guarantees that “[I]n all criminal prosecutions, the accused shall enjoy the right. . . to be confronted with the witnesses against him.”<sup>2</sup> Accordingly, prior testimony from a witness unavailable to testify at trial is admissible only if the defendant had “a prior opportunity for cross- examination.”<sup>3</sup>

How adequate a defendant’s opportunity to confront a witness was is determined on a case-by-case basis, turning upon the discovery available to the defendant at the time of cross-examination.<sup>4</sup> In *Chavez v. State*, where a sexual assault victim died after testifying at a preliminary hearing but before trial, the Court noted that “nearly all the discovery was complete” at the time of the hearing, “and the magistrate judge allowed Chavez unrestricted opportunity to confront [the witness] on all the pertinent issues.”<sup>5</sup> Therefore the Court concluded that admitting the witness's

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<sup>1</sup> By Connor Sapphire.

<sup>2</sup> U.S. CONST. amend. VI.

<sup>3</sup> *Crawford v. Washington*, 541 U.S. 36, 68 (2004).

<sup>4</sup> *Chavez v. State*, 125 Nev. 328, 337, 213 P.3d 476, 482 (2009).

<sup>5</sup> *Id.* at 341, 213 P.3d at 485–86.

testimony at trial did not violate Chavez's Confrontation Clause rights.<sup>6</sup>

Comparing *Chavez* to the present case, the Court concluded the facts were very similar. C.J. had testified at the preliminary hearing, and discovery was sufficient at that time for Baker to have conducted an adequate cross-examination. The only significant difference the Court observed was that in this matter, Baker chose not to cross-examine the witness who testified against him at the preliminary hearing. Therefore, he still possessed the opportunity to cross-examine the witness but *chose* not to. Accordingly, the Court found no reason to differentiate between Baker and the defendant in *Chavez*.

The Court did go on to clarify that it had previously recognized three conditions that must be met before testimony from a preliminary hearing may be used at a criminal trial: (1) “the defendant was represented by counsel at the preliminary hearing;” (2) “that counsel cross-examined the witness;” and (3) “the witness is shown to be actually unavailable at the time of trial.”<sup>7</sup> However, U.S. Supreme Court authority<sup>8</sup> found the *opportunity* to cross-examine a witness was sufficient when the defendant did not actually conduct a cross-examination.

### **Conclusion**

When deciding whether a preliminary hearing afforded a defendant “an adequate opportunity to confront witnesses against him,” key factors include the amount of discovery available to the defendant at the time of the hearing and the extent to which the “judge allowed the defendant a thorough opportunity to cross-examine the witness.”<sup>9</sup> Applying this methodology, the Court held that when a defendant declines an opportunity to cross-examine a witness at a preliminary hearing, the defendant was not denied “a thorough opportunity to cross-examine. Because the justice court offered Baker an opportunity to cross-examine C.J., and Baker had all relevant discovery to her testimony, Baker had an adequate opportunity to cross-examine C.J. at the preliminary hearing. Therefore, the Court determined Baker’s Sixth Amendment right was not violated, granted the petition, and ordered the district court to vacate its previous order denying the State’s motion.

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<sup>6</sup> *See id.* at 341–42, 213 P.3d at 486.

<sup>7</sup> *Hernandez v. State*, 124 Nev. 639, 645, 188 P.3d 1126, 1130 (2008) (quoting *Drummond v. State*, 86 Nev. 4, 7, 462 P.2d 1012, 1014 (1970)).

<sup>8</sup> *Crawford*, 541 U.S. at 68.

<sup>9</sup> *Chavez*, 125 Nev. at 337, 339, 213 P.3d at 482, 484.