No. 19-8803

In the Supreme Court of the United States

BENNIE ADAMS,

Petitioner,

v.

STATE OF OHIO,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

KIMBERLY RIGBY
(Ohio Reg. No. 0078245)
Supervising Attorney
Death Penalty Department
Counsel of Record

KIMBERLYN SECCURO
(Ohio Reg. No. 0099232)
Assistant Public Defender

OFFICE OF THE OHIO PUBLIC DEFENDER
250 E. BROAD ST., SUITE 1400
COLUMBUS, OH 43215
PH: (614) 466-5394
FX: (614) 644-0708
kimberly.rigby@opd.ohio.gov
kimberlyn.seccuro@opd.ohio.gov

COUNSEL FOR PETITIONER

PAUL J. GAINS
(Ohio Reg. No. 0020323)
Mahoning County Prosecutor

RALPH M. RIVERA
(Ohio Reg. No. 0082063)
Assistant Prosecutor
Counsel of Record

MAHONING COUNTY PROSECUTOR'S OFFICE
21 W. BOARDMAN ST., 6TH FL.
YOUNGSTOWN, OH 44503
PH: (330) 740-2330
FX: (330) 740-2008
pgains@mahoningcountyoh.gov
rrivera@mahoningcountyoh.gov

COUNSEL FOR RESPONDENT

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I. Trial Phase

The Supreme Court of Ohio previously summarized the facts that established Defendant-Petitioner Bennie L. Adams' guilt beyond a reasonable doubt:

The Burglary and the Murder

> In the autumn of 1985, Gina Tenney was a sophomore at Youngstown State University. She lived alone in a second-floor apartment in a converted house on Ohio Avenue in Youngstown.
>
> Adams lived in the same house in a downstairs apartment with his girlfriend, Adena Fedelia. The duplex had an interior common staircase.
>
> Around 1:00 a.m. on December 25, 1985, Tenney was getting ready for bed when, as she told a friend, she "heard someone at the door with the keys like they were trying to get in." Tenney called her ex-boyfriend, Mark Passarello, who came and stayed with her until about 3:00 a.m. on Christmas morning.
>
> Shortly after Passarello left, Tenney again heard someone at her door. The person knocked over the chair Tenney had placed against the door and entered the apartment. Tenney called the police to report an intruder in her apartment. The responding police officers found footprints in the snow leading from her apartment to 275 West Dennick Avenue in Youngstown.
>
> The investigation was assigned to Detective William Blanchard of the Youngstown Police Department. On December 26, 1985, Blanchard met with Tenney at her apartment. Looking at her apartment door, Blanchard saw "slight" but "noticeable" evidence of a forced entry.
>
> Blanchard followed up on the report of footprints by traveling to 275 West Dennick and interviewing a

resident there, Ed Tragesser. Tragesser claimed to know nothing about the break-in. Blanchard testified that Tragesser was never ruled out as the burglar but that there was no evidence to sustain charging him with any crime. Blanchard, however, suspected that Adams may have been the burglar based on what Tenney had told him.

Tenney's friend, Penny Sergeff, also suspected that Adams was the burglar.

According to Sergeff, the outside door to Tenney's building made a loud screeching noise when it was opened or closed. But Tenney had not heard the door screech the night of the burglary, which suggested to Sergeff that the burglar had not come from outside the apartment building. Sergeff shared the information about the screeching door with the police, but never explicitly communicated her suspicions about Adams at the time she initially spoke to the police.

Less than a week after the break-in, on the morning of December 30, 1985, Tenney's dead body was discovered in the Mahoning River. Upon identifying Tenney's body, homicide detectives called Blanchard into the investigation.

The Investigation and Arrest of Adams

From the outset, Blanchard considered Adams a person of interest in the homicide.

Blanchard and two homicide detectives traveled to the duplex on Ohio Avenue. They knocked on the exterior door for "a number of minutes" until Adams emerged from his apartment and admitted them into the common area.

Upstairs, the police officers found the door to Tenney's apartment locked. They observed no blood on the steps. Blanchard saw no new evidence of forced entry.

The investigators decided to call the building's owner for the key to Tenney's apartment. They then knocked on

Adams's apartment door for permission to use his telephone; Adams let them in.

While one detective placed the call, Blanchard and Lieutenant David Campana talked to Adams, asking him when he had last seen Tenney, whether anything suspicious had been happening lately, whether anybody else was around who might know something, and whether he was alone. Adams indicated that he was alone in the apartment and told detectives that he did not know where Tenney might be.

Just then, the detectives heard a loud bump, a sound like a door hitting a wall. Adams then said, "I never said he wasn't here" or words to that effect. Blanchard and Campana went into a back bedroom, where they found Horace Landers hiding behind a door.

Campana recognized Landers and remembered that there was an outstanding misdemeanor warrant for him. Campana and Blanchard immediately arrested Landers and handcuffed him.

Landers was wearing trousers, but was bare-chested. Knowing that they would have to take him outside into the cold, Blanchard looked around and saw a shirt on the bed, which he draped over Landers's shoulders. But Blanchard thought that he should put something else on Landers. He saw a jacket on the floor three or four feet away, just outside the door to the bedroom where they had found Landers.

As Blanchard searched the jacket for weapons, Landers told him that the jacket belonged to Adams. Simultaneously, Blanchard felt a hard object in the pocket and pulled it out. The object was an ATM card from Dollar Bank bearing the name Gina Tenney. Blanchard testified that he also found a folded Mahoning County welfare card in the name of Bennie Adams in the pocket.

The police officers immediately arrested Adams. When they searched him, they found a blue tissue in his pants pocket with two cigarette butts wrapped up in it.

Fedelia, whose name was on the lease, consented to a search of the apartment she shared with Adams. In a bathroom wastepaper basket, police officers found a ring of ten keys with the letter G on the keychain. One of the keys fit Tenney's apartment door and another key fit her automobile.

In the kitchen, Blanchard found a potholder with hair and dirt on it in a wastebasket. Police officers later found a matching potholder atop the refrigerator in Tenney's apartment.

Police officers also found an unplugged television on a bed in Adams's apartment. The serial number on the television matched the number on an empty television box later discovered in Tenney's apartment. A wall unit in Tenney's apartment contained an empty space for a television, and a cable-television line dangled in the space.

In Tenney's apartment, Blanchard saw no broken glass, broken furniture, or other indication that the home had been ransacked. A plate of food and a beer bottle were on the kitchen table. At trial, Blanchard claimed a "vague recollection" of "some disarray," but he could not recall what he had observed. His contemporaneous investigative notes did not mention disarray or overturned furniture.

Tenney's friends told police investigators that Adams had been bothering Tenney for some time before her death. Sergeff and Marvin Robinson, another one of Tenney's friends, testified that when they visited Tenney, Adams often stood in his doorway watching them or peeked out through the curtains. According to Robinson and Sergeff, Adams started calling Tenney late at night, asking her to invite him up to her apartment. The calls continued even after Tenney asked him to stop, and Tenney eventually changed her telephone number.

Robinson also described an incident in which someone slipped a card in an envelope under Tenney's back door addressed "to a very sweet and confused young lady" and signed "love, Bennie." Police officers found the envelope in Tenney's apartment but did not find the card.

According to her friends, after the Christmas break-in Tenney's emotional state changed from frustration with Adams to fear of him. For the next few nights, she asked a friend to stay over because she was afraid to be alone. Sergeff testified that Tenney specifically had said that she was afraid of Adams, a detail Sergeff did not include in her police statement given shortly after Tenney's death.

At trial, Tenney's friends described their interactions with her during the last two days of her life. Sergeff and Tenney spent the evening of December 28, 1985, watching television in Tenney's apartment. At some point, Passarello, Tenney's ex-boyfriend, came over, and Sergeff asked him to drive her home. Passarello then returned to Tenney's apartment. Passarello testified that Tenney did not feel secure in the apartment. He stayed the night, and the two had sexual relations.

Passarello left the next day after lunch and went home to his apartment. Tenney left separately at the same time to meet a friend, Jeff Thomas, for an early afternoon movie.

After the movie, Thomas and Tenney had dinner near the theater. Thomas testified that they talked about work and school, but Tenney kept bringing the conversation back to "the situation that was going on where she was living." She told Thomas that she was very concerned about "the man downstairs." Thomas described her as "apprehensive" and "borderline fearful." Thomas and Tenney parted around 4:30 or 5:00 p.m.

Tenney's mother, Avalon Tenney, testified that her daughter had called her the day before she died and told her that she was afraid of Adams.

The Identification of Adams

As part of the homicide investigation, detectives obtained Tenney's bank-account records from Dollar Bank. Her account records for December 29, 1985, showed six attempted transactions on her ATM card between 9:24 and 9:34 p.m.: three attempts to withdraw cash (all

denied for insufficient funds), two phony attempted deposits using empty deposit envelopes, and an unsuccessful attempt to transfer funds between accounts.

Police officers questioned other bank customers whose ATM cards were used at the same ATM machine around the same time as the attempted transactions using Tenney's card. One customer, John Allie, told police officers that he saw a man at the ATM on the night in question.

On January 8, 1986, Blanchard brought John Allie and his wife, Sandra Allie, who had also seen the man use the ATM, to the station to view an in-person lineup. There were six men in the lineup, including Adams and Landers. John Allie did not make an identification; Sandra Allie identified Landers as the man she saw at the ATM.

At trial, John Allie testified that he had not identified anyone in the lineup because he was not comfortable with the number of people in the room. He also testified, "I told my wife, don't say anything because we need to talk to detective Blanchard. Don't mention nothing to nobody."

John Allie told the jury that he later telephoned Blanchard and said that the man from the ATM was third from the left, which was the place where Adams had stood in the lineup. John claimed that he returned to the police station the next day, met with Blanchard, viewed a photo array of three pictures, and made an identification of Adams.[1]

Sandra Allie testified at trial that she purposely made a false identification at the lineup. She testified that on the way to the station that day, John had expressed concern about putting her "in harm's way." When they arrived, they were taken to an office with other people present and not to the dark room that Sandra had been expecting. John then told her that "he didn't like the surroundings." "He gave me like the signal," Sandra testified. "When asked if I could identify the person who was in the ATM I was just terrified, went to the extreme opposite and identified a short, light-skinned person."

Like her husband, Sandra Allie testified that she spoke to police officers some time after the lineup to identify "the actual person," but said that the police officers did not request a statement about her misidentification at the first lineup or call her back to view a second lineup.

At trial, the Allies both said that when they arrived at the bank that night,[2] they saw a man in the ATM vestibule who appeared not to know how to use the ATM. The man's face was covered by a hood and scarf, so that only his forehead, eyes, and the bridge of his nose were visible.

Sandra Allie described the man as a little taller than she is. John Allie agreed that the man was "about medium height."[3]

At trial, Sandra Allie viewed a photograph of the six-man lineup and testified that person Number 3 (Adams) was the man at the ATM. John Allie also identified Adams.

John Allie testified that when the man came out of the ATM vestibule, he stood in front of the Allies' car and waved: "He put his hands—palms on the hood of my car and stood back, looked at me. I looked at him. He waved. I waved." John recognized Adams from seeing him around the neighborhood, even though he did not know Adams's name at the time.

When the man started the car he was driving, John Allie heard it make an unusual sound. John testified that the vehicle was a Buick and identified it from photographs as Tenney's car. When John came to the police station, he correctly picked out Tenney's car from the 15 or 20 he was shown. An officer started the engine, and the car made the same sound that John had heard it make at the bank.

The Parole Officer's Interviews with Adams

Adams's former parole officer, William Soccorsy, testified that he interviewed Adams twice after his 1985 arrest. The first time they spoke, on December 30, 1985, Adams denied committing any crime and denied having any knowledge that any crime had been committed.

On January 2, 1986, Soccorsy asked Adams about the ATM card. According to Soccorsy, Adams admitted that the jacket in which the card was found belonged to him. Soccorsy's contemporaneous notes included a statement by Adams to the effect that he found the ATM card outside his building on the front step at around 11:30 a.m. on December 30, 1985. Adams told Soccorsy that he rang Tenney's doorbell to return the card but she was not home, so he put the card in his jacket pocket, intending to return it at some later time.

The Autopsy of Tenney

On December 31, 1985, an autopsy of Tenney's body was performed under the supervision of Mahoning County Coroner Nathan D. Belinky, M.D.

Dr. Belinky reported finding "ligature type contusion(s)" on the neck, as well as "doubletrack ligature type contusions" around both wrists. There were additional contusions and/or abrasions on both wrists, the abdomen and chest, both breasts, and around the nose, lips, and chin. There was blood coming from the right nostril. Dr. Belinky concluded that the cause of death was "traumatic asphyxiation," and he ruled the death a homicide.

Dr. Belinky was deceased when the case first came to trial in 2008, and the state called Dr. Humphrey Germaniuk as its expert forensic pathologist.

Dr. Germaniuk testified that he reviewed Dr. Belinky's autopsy report and the death certificate, as well as the videotape of the autopsy and photographs of the body and the scene. The photographs showed a bruise or contusion on the upper part of Tenney's right lip and abrasions or contusions on her chin, a faint ligature mark on Tenney's

neck (which Dr. Germaniuk described as "superficial"), and ligature marks on her left and right wrists.

Dr. Germaniuk ruled out drowning as a cause of death based on the absence of a "foam cone" around Tenney's mouth. He concluded that the cause of death was asphyxia and the manner of death was homicide. But Dr. Germaniuk took issue with the phrase "traumatic asphyxiation" in the autopsy report, which he characterized as "somewhat inexact, somewhat incorrect." He would have described the cause of death as "asphyxia," which simply means lack of oxygen.

Dr. Germaniuk observed a bruise or contusion on the upper part of Tenney's right lip and abrasions or contusions on her chin. Although Dr. Germaniuk testified that the marks were consistent with smothering by means of a hand or object placed over her face, he also testified that the marks could have been caused by someone hitting her in the face. Dr. Germaniuk said that the evidence of smothering was not significant enough for him to declare that the cause of death with any reasonable medical certainty.

Likewise, Dr. Germaniuk testified that there was evidence of ligature strangulation, including petechial hemorrhaging, but the ligature marks did not break the skin. The injuries could have been caused by strangulation or by being tied up, but Dr. Germaniuk could not say that ligature strangulation caused Tenney's death. Dr. Germaniuk testified that the cause of death was "probably" some combination of smothering and/or ligature strangulation. Ultimately, Dr. Germaniuk was unable to opine as to a cause of death that was more specific than asphyxia.

The autopsy report listed the time of death as 11:15 p.m. on December 29, based on a test of Tenney's vitreous potassium. But according to Dr. Germaniuk, vitreous potassium is an inaccurate indicator of time of death and even in 1985, only the "uninformed" would have used vitreous potassium to determine time of death. Dr. Germaniuk explained that most other tests for time of death could not have been employed, because Tenney's

body had been found in the frigid waters of the Mahoning River. And though the time of death could possibly have been determined based on gastric emptying, i.e., by measuring the contents of the stomach, in order to make a reasonable calculation one has to know the time of the victim's last meal. Assuming that Tenney last ate around 4:00 or 4:30 p.m. (when she and Thomas had dinner after the movie), Dr. Germaniuk estimated the time of death as between 5:00 and 10:30 p.m. But if Tenney had eaten later, his estimate of her time of death would have been different.

The prosecution in questioning Dr. Germaniuk noted several times that police officers had found a telephone type of cord in the trunk of Tenney's car. The cord was one-half centimeter wide and had no weaving pattern. The ligature marks were also one-half centimeter wide and showed no weave pattern. According to Dr. Germaniuk, the cord could have been used to make the ligature marks on Tenney's neck and wrists, but because the cord was not different from thousands of other cords, he was unable to definitively say that the cord in the trunk was used on Tenney.

Dr. Germaniuk testified that the autopsy team did not examine the body for signs of sexual trauma or assault.

DNA and Fingerprint Evidence

When Adams was arrested in late 1985, police officers obtained samples of his pubic hair, saliva, and blood. Samples were also obtained from Landers, Passarello, and Tenney, and semen was found on a vaginal swab taken from Tenney. The samples from Adams, Landers, and Passarello were compared to the samples taken from Tenney.

The semen on the swab came from a "type B nonsecretor." Passarello is a type A secretor, and Landers was a type B secretor. Thus, blood testing in 1986 eliminated Passarello and Landers as the semen source.

Adams, however, is a type B nonsecretor. Four percent of African–Americans are type B nonsecretors. Thus, the

blood evidence at that time did not definitively prove that Adams, an African–American, was the source of the vaginal semen, but it placed him within the population of possible sources.

The potholder in Adams's apartment contained hair from an African–American and from a Caucasian with red hair, as well as pubic hair. Gina Tenney was Caucasian and had red hair. The red hair and pubic hair were consistent with Tenney's. The sample of African–American hair was small fragments and was not sufficient for comparison purposes.

Police officers found fingerprints of evidentiary value only on the television that was in Adams's apartment. Investigators were able to lift nine usable prints from the television. Four prints matched Adams's. The other five could not be matched to Tenney, Adams, or Landers.

Despite the suspicions that Adams may have been involved in Tenney's death, the investigation into Tenney's death went cold in 1986. In January 1986, Adams was charged with one count of receiving stolen property based on the discovery of Tenney's ATM card in his jacket pocket. The grand jury, however, later declined to indict Adams on the stolen-property charge.

Police officers kept Adams in custody because he was a suspect in a rape that had occurred in nearby Boardman, Ohio. In November 1986, Adams was convicted in Mahoning County Common Pleas Court of kidnapping, rape, and aggravated robbery in that case. He served almost 18 years in prison, and he was released on parole on April 21, 2004.

The Investigation Resumes

In 2007, more than 20 years after Tenney's death, the Ohio attorney general invited police departments to submit cold-case evidence to the Ohio Bureau of Criminal Identification and Investigation ("BCI") laboratory for DNA testing. The Youngstown police department submitted evidence from the Tenney case.

The police department submitted Tenney's underwear and vaginal swab for DNA testing and submitted a fresh DNA sample from Passarello. Because Tenney and Landers were both deceased, the department forwarded samples from 1986 that were still on file. Police officers also took a fresh DNA sample from Adams and submitted that to BCI.[4]

Based on the DNA analysis, Adams could not be excluded as the source of the DNA on the vaginal swab or the underwear. The odds that the DNA on the swab came from someone other than Adams were 1 in 38,730,000,000,000. The odds that the DNA on the underwear came from someone other than Adams were 1 in 63,490,000,000,000,000,000.

DNA analysis excluded Landers as the source of the DNA on the swab and the underwear.

Passarello's DNA was found on Tenney's underwear, but his DNA was not found in the vaginal-semen sample.

Procedural History

Almost three and one-half years after he was released on parole for the Boardman rape and related convictions, police officers arrested Adams and charged him with aggravated murder in connection with Tenney's 1985 death.

On October 11, 2007, a grand jury returned a five-count indictment that was later superseded by an indictment returned on October 17, 2007. Count One charged Adams with aggravated felony murder (R.C. 2903.01(B)) with a single death-penalty specification, that Tenney's murder was committed in the course of or immediately after committing or attempting to commit rape, aggravated burglary, aggravated robbery, and kidnapping. R.C. 2929.04(A)(7). Count Two charged Adams with rape (R.C. 2907.02(A)(2)), with a violent-sexual-predator specification under R.C. 2941.148(A). The remaining counts of the indictment set forth charges for aggravated burglary (R.C. 2911.11(A)), aggravated

> robbery (R.C. 2911.01(A)), and kidnapping (R.C. 2905.01(A)).

See State v. Adams, 144 Ohio St.3d 429, 2015 Ohio 3954, 45 N.E.3d 127, ¶¶ 4-71.

Defendant was convicted of Aggravated Murder; and the Capital Specification, being the Principal Offender. (Trial Tr., Vol. IV, at 794; Verdict Form Nos. 1, 1A.) The jurors were polled and each agreed with the verdicts, including each alternate. (Trial Tr., Vol. IV, at 795-796, 803-809.)

II. Sentencing Phase

During the sentencing (mitigation) phase, Defendant presented the testimony of six witnesses. (Sentencing Phase Transcript, October 28, 2008, before the Honorable Timothy E. Franken, at 33-122.) At the conclusion of the evidence, the jury recommended a sentence of death for Defendant. (Sent. Tr., at 189.) Thereafter, the trial court imposed a sentence of death upon Defendant. (Sent. Tr., at 193.)

III. Direct Appeal

This Court affirmed Defendant's conviction and death sentence. *See State v. Adams*, 7th Dist. No. 08 MA 246, 2011 Ohio 5361.

Defendant timely appealed as of right to the Supreme Court of Ohio. *See State v. Adams*, 144 Ohio St.3d 429, 2015 Ohio 3954, 45 N.E.3d 127.

On October 1, 2015, the Supreme Court of Ohio vacated Defendant capital specification, and remanded his case for re-sentencing. *See id.*

IV. *Murnahan* Appeal

On January 12, 2012, Defendant filed an Application for Reopening pursuant to Appellate Rule 26(B) and *State v. Murnahan*, 63 Ohio St.3d 60 (1992). This Court denied Defendant's application because Defendant failed to establish that appellate counsel was constitutionally ineffective. *See State v. Adams*, 7th Dist. 08 MA 246, 2012 Ohio 2719.

On May 19, 2016, the Supreme Court of Ohio affirmed this Court's denial of Defendant's Application for Reopening. *See State v. Adams*, 146 Ohio St.3d 232, 2016 Ohio 3043, 54 N.E.3d 1227.

V. State Postconviction

On June 11, 2012, Defendant-Petitioner Bennie Lee Adams filed a timely Petition for Postconviction Relief pursuant to R.C. 2953.21.

On October 1, 2015, however, the Supreme Court of Ohio vacated Defendant's capital specifications and remanded his case back to the trial court for re-sentencing. Defendant was re-sentenced to 20-years to Life.

On June 5, 2017, Defendant filed a timely subsequent Petition for Postconviction Relief pursuant to R.C. 2953.21.

On July 11, 2017, the State filed a Motion for Summary Judgment. The trial court denied Defendant's post-conviction petition on September 25, 2018.

Defendant timely appealed to the Ohio Court of Appeals for the Seventh Appellate District. The Seventh District affirmed the denial of Defendant's post-conviction petition. *See State v. Adams*, 7th Dist. Mahoning No. 18 MA 116, 2019 Ohio 4090, *discretionary appealed denied, State v. Adams*, 2020 Ohio 122, 137 N.E.3d 1214.

The State of Ohio now responds to Defendant's Petition for a Writ of Certiorari.

REASONS FOR DENYING THE WRIT

II. A Substitute Coroner's Testimony Regarding the Victim's Cause of Death, Which is Based Upon the Substitute Coroner's Observations and Conclusions, Does Not Implicate the Sixth Amendment.

As for Defendant's first question presented, he contends that Dr. Humphrey Germaniuk's testimony and the admission of the autopsy report violated his Sixth Amendment right to confrontation because Dr. Germaniuk did not perform Gina Tenney's autopsy. To the contrary, Dr. Belinky's autopsy report is a non-testimonial business record, and Dr. Germaniuk testified to his own expert opinions and conclusions regarding Gina Tenney's cause of death. Therefore, Dr. Germaniuk's testimony and the admission of Dr. Belinky's autopsy report did not violate Defendant's Sixth Amendment right to confrontation.

A. THE SIXTH AMENDMENT'S CONFRONTATION CLAUSE APPLIES ONLY TO TESTIMONIAL HEARSAY.

The Confrontation Clause of the Sixth Amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him." Sixth Amendment to the U.S. Constitution; *see Pointer v. Texas*, 380 U.S. 400, 403, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965).

In *Crawford v. Washington*, this Court held that the Confrontation Clause bars "admission of testimonial statements of a witness who did not

appear at trial unless he was unavailable to testify, and the defendant had a prior opportunity for cross-examination." *Crawford v. Washington*, 541 U.S. 36, 53-54, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). The subsequent case law attempts to define which statements are "testimonial," because only these statements "cause the declarant to be a 'witness' within the meaning of the Confrontation Clause." *Davis v. Washington*, 547 U.S. 813, 821, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006), quoting *Crawford*, 541 U.S. at 51. And "[i]t is the testimonial character of the statement that separates it from other hearsay that, while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause." *Davis*, 547 U.S. at 821.

The testimonial statements in *Crawford* that this Court narrowed in on were those "interrogations by law enforcement * * * solely directed at establishing the facts of a past crime, in order to identify (or provide evidence to convict) the perpetrator." *Davis*, 547 U.S. at 826, quoting *Crawford*, 541 U.S. at 53.

1. A SUBSTITUTE CORONER'S TESTIMONY DOES NOT VIOLATE THE SIXTH AMENDMENT'S RIGHT TO CONFRONTATION WHEN THE ORIGINAL CORONER IS UNAVAILABLE.

A substitute coroner's testimony regarding the decedent's cause of death does not amount to testimonial hearsay.

a.) *Melendez-Diaz v. Massachusetts* (2009).

In *Melendez-Diaz*, the defendant was charged with distributing and trafficking in cocaine. *See Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 129 S.Ct. 2527, 2530, 174 L.Ed.2d 314 (2009). At trial, the prosecution placed into evidence cocaine seized by police, and three "certificates of analysis" showing the results of the forensic analysis performed on the cocaine. *See id*. at 2531. The certificates reported the weight of the substance, and that the substance found was cocaine. *See Melendez-Diaz*, 129 S.Ct. at 2531. The certificates were signed by the analysts, and sworn to before a notary public pursuant to state law. *See id*., citing Mass. Gen. Laws, ch. 111, §13. The defendant objected to their admission into evidence without the analysts' testimony, because this deprived him the opportunity to cross-examination them. *See id*. The certificates were admitted and the defendant was convicted. *See id*.

This Court was faced with a simple and straight-forward issue—do the "certificates of analysis" fall into the "core class of testimonial statements" previously outlined in *Crawford*? This Court answered in the affirmative, and stated that while Massachusetts law defines them as "certificates," they are nothing more than "affidavits." *See id*. at 2532.

This Court reasoned that "[t]he 'certificates' are functionally identical to live, in-court testimony, doing 'precisely what a witness does on direct examination.'" *See id*., quoting *Davis*, 547 U.S.at 830. "Here, moreover, not only were the affidavits 'made under circumstances which would lead an

objective witness reasonably to believe that the statement would be available for use at a later trial,' but under Massachusetts law the *sole purpose* of the affidavits was to provide 'prima facie evidence of the composition, quality, and the net weight' of the analyzed substance[.]" (Emphasis sic.) (Internal citations omitted.) *Melendez-Diaz*, 129 S.Ct. at 2532.

Thus, under *Crawford*, Melendez-Diaz was entitled to be confronted by the analysts at trial, unless they were "unavailable" and he had a prior opportunity to cross-examination them. *See id*. at 2532, citing *Crawford*, 541 U.S. at 54.

b.) *Bullcoming v. New Mexico* (2011).

Thereafter, this Court revisited the issue of testimonial hearsay in relation to laboratory test results in *Bullcoming v. New Mexico*. There, the defendant was charged and convicted of driving while intoxicated. *See Bullcoming v. New Mexico*, 564 U.S. 647, 131 S.Ct. 2705, 2709, 180 L.Ed.2d 610 (2011). The crux of the state's case against the defendant was a forensic laboratory report certifying that his blood-alcohol concentration was well above the threshold required for an aggravated DWI. *See id*. At trial, the analyst who performed the testing did not testify, but instead, another analyst who was familiar with the laboratory's testing procedures testified. *See id*. The analyst had neither participated in nor observed the testing of the defendant's blood sample. *See id*.

The New Mexico Supreme Court concluded that the analysis was "testimonial,' but the analyst's testimony satisfied the constitutional requirements." *Bullcoming*, 131 S.Ct. at 2709-2710.

This Court granted certiorari to determine "whether the Confrontation Clause permits the prosecution to introduce a forensic laboratory report containing a testimonial certification—made for the purpose of proving a particular fact—through the in-court testimony of a scientist who did not sign the certification or perform or observe the test reported in the certification." *Bullcoming*, 131 S.Ct. at 2710.

This Court held "that surrogate testimony of that order does not meet the constitutional requirement. The accused's right is to be confronted with the analyst who made the certification, unless that analyst is unavailable at trial, and the accused had an opportunity, pretrial, to cross-examine that particular scientist." *Id*.

While Defendant previously argued that *Melendez-Diaz* and *Bullcoming* were determinative here, Justice Sotomayor's concurring opinion clearly demonstrates otherwise:

> Second, ***this is not a case in which the person testifying is*** a supervisor, reviewer, or ***someone else with a personal, albeit limited, connection to the scientific test at issue***. Razatos conceded on cross-examination that he played no role in producing the BAC report and did not observe any portion of Curtis Caylor's conduct of the testing. App. 58. The court below also recognized Razatos' total lack of connection to the test at issue. 226 P.3d, at 6. It would be a different case if, for example, a supervisor who observed an analyst

> conducting a test testified about the results or a report about such results. We need not address what degree of involvement is sufficient because here Razatos had no involvement whatsoever in the relevant test and report.

(Emphasis added.) *Id.* at 2722 (Sotomayor, J., concurring in part). Thus, *Melendez-Diaz* and *Bullcoming* are both distinguishable from the facts here, because Dr. Germaniuk had "a personal, albeit limited, connection" to Gina Tenney's autopsy.

c.) *Williams v. Illinois*, 132 S.Ct. 2221 (2012).

Later in *Williams v. Illinois*, this Court addressed whether a state rule of evidence allowing an expert to testify about DNA results that were performed by another analyst, absent a prior opportunity to cross-examine the analyst, violated the Confrontation Clause. *See Williams v. Illinois*, 567 U.S. 50, 132 S.Ct. 2221, 183 L.Ed.2d 89 (2012). The Supreme Court of Illinois previously found that Williams's right to confrontation was not violated. *See People v. Williams*, 238 Ill.2d 125, 150-151 (2010).

In *Williams*, the victim's rape kit was sent to the Illinois State Police (ISP) Crime Lab for testing and analysis. *See id.* at 129. A state forensic biologist confirmed the presence of semen, then sealed the swabs and placed the evidence in a secure freezer. *See id.* at 130.

The defendant was later arrested on an unrelated matter, and the police obtained a blood sample through a court order. *See id.* Another forensic scientist extracted the defendant's DNA profile and entered it into the ISP Crime Lab database. *See id.* Meanwhile, the samples from the victim's rape

kit were sent for DNA analysis to Cellmark Diagnostic Laboratory in Germantown, Maryland. *See Williams*, 238 Ill.2d at 130-131. Cellmark returned the vaginal swabs and blood standard to the ISP Crime Lab after Cellmark derived a DNA profile for the person whose semen was recovered. *See id.* at 131.

According to ISP forensic biologist Sandra Lambatos, the DNA profile received from Cellmark matched the defendant's DNA profile from the blood sample in the ISP database. The victim identified the defendant in a line up, and he was then arrested. *See Williams*, 238 Ill.2d at 131.

At trial, Lambatos explained polymerase chain reaction (PCR) testing, and stated that it is one of the most modern types of DNA testing available, and is generally accepted in the scientific community. *See id.* Lambatos further testified that it is a commonly accepted practice for one DNA expert to rely on the records of another DNA analyst to complete her work. *See id.* at 132.

Lambatos took the DNA profile from Cellmark and matched that to the defendant's DNA profile. *See id.* Lambatos testified that the DNA profile found in the semen from the vaginal swabs matched the defendant's DNA profile. *See id.* 132-133. In arriving at this conclusion, Lambatos stated that looked at Cellmark's report, and interpreted the data: "I did review their data, and I did make my own interpretations so I looked at what * * * they sent to me and did make my own determination, my own opinion." *Id.* at 133.

Lambatos testified to her conclusion based upon information in Cellmark's report, but the report itself was not introduced into evidence. *Williams*, 238 Ill.2d at 133.

The defendant was convicted after a bench trial of aggravated criminal sexual assault, aggravated kidnapping, and aggravated robbery. *See id.* at 134.

The Supreme Court of Illinois concluded that Williams's right to confrontation was not violated by Lambatos' testimony. *See id.* at 150-151.

This Court affirmed the Supreme Court of Illinois' decision and agreed that Lambatos' testimony did not violate the defendant's rights to confrontation. *See Williams*, 132 S.Ct. at 2223. While a majority of the Court found that the testimony did not violate the defendant's right to Confrontation, this Court was divided over its reasoning. *See Williams*, supra; *accord United States v. Garvey*, 688 F.3d 881 (7th Cir. 2012).

2. THE SUPREME COURT OF OHIO RIGHTFULLY CONCLUDED THAT A SUBSTITUTE CORONER'S TESTIMONY DOES NOT VIOLATE THE CONFRONTATION CLAUSE WHEN THE ORIGINAL CORONER IS UNAVAILABLE.

In *State v. Maxwell*, the Supreme Court of Ohio held that "[a]n autopsy report that is neither prepared for the primary purpose of accusing a targeted individual nor prepared for the primary purpose of providing evidence in a criminal trial is nontestimonial, and its admission into evidence at trial under Evid.R. 803(6) as a business record does not violate a defendant's Sixth

Amendment confrontation rights." *State v. Maxwell*, 139 Ohio St.3d 12, 2014 Ohio 1019, 9 N.E.3d 930, syllabus; *see State v. Craig*, 110 Ohio St.3d 306, 2006 Ohio 4571, 853 N.E.2d 621, ¶¶ 81-88.

First, even before *Maxwell*, supra, the Supreme Court of Ohio previously concluded that an autopsy report is a non-testimonial business record. *See Craig*, supra at ¶¶ 81-88. Further, this Court's decisions in *Melendez-Diaz*, *Bullcoming*, and *Williams* did not undermine the Supreme Court of Ohio's previous analysis in *Craig*. *See id.*

Two years before Defendant was tried and convicted of capital murder, the Supreme Court of Ohio held that "autopsy records are admissible as nontestimonial business records." *Craig*, 110 Ohio St.3d at 322. The Supreme Court of Ohio concluded that the "expert testimony about the autopsy findings, the test results, and her opinion about the cause of death did not violate Craig's confrontation rights." *Id.*

The Supreme Court of Ohio, however, remanded the case to the trial court because the defendant was sentenced under Ohio law that was not yet in effect when the offenses were committed. *Id.* at 327. The defendant pursued a second appeal after the trial court resentenced him. *See State v. Craig*, Case No. 2006-1806. After both parties filed their merit briefs, the Supreme Court of Ohio sua sponte ordered the parties to file supplemental briefs to address two issues:

> 1.) Whether the introduction of the autopsy report completed on Roseanna Davenport violated Donald Craig's Sixth

Amendment right to confrontation under *Melendez-Diaz v. Massachusetts,* 129 S.Ct. 2527 (2009).

2.) Whether Dr. Kohler, a medical examiner who did not conduct the autopsy of Roseanna Davenport, properly testified as to Davenport's cause of death in view of *Melendez-Diaz v. Massachusetts.*

The Supreme Court of Ohio later stayed briefing until this Court decided *Bullcoming v. New Mexico*, and again for *Williams v. Illinois*.

On December 14, 2012, Donald L. Craig passed away; thus, the Supreme Court dismissed the case as being moot on January 11, 2013. The Supreme Court of Ohio's decision in *Craig* remained controlling. In *Craig*, the Ohio Court previously found that the medical examiner's testimony did not deny Craig his right to confrontation, even though the medical examiner did not perform the autopsy. *See Craig*, 110 Ohio St.3d at 320. The Ohio Court reasoned that the autopsy report was admissible pursuant to R.C. 313.10 (certified records of a coroner are public records and shall be received as evidence in any criminal court), and as a business record under Evidence Rule 803(6). *See id.* "An autopsy report, prepared by a medical examiner and documenting objective findings, is the 'quintessential business record.'" *Id.*, quoting *Rollins v. State*, 161 Md.App. 34, 81, 866 A.2d 926 (2005).

The Ohio Court properly reasoned that "[t]he essence of the business record hearsay exception contemplated in *Crawford* is that such records or statements are not testimonial in nature because they are prepared in the ordinary course of regularly conducted business and are 'by their nature' *not*

prepared for litigation." (Emphasis added.) *Craig*, 110 Ohio St.3d at 321, quoting *People v. Durio*, 7 Misc.3d 729, 734, 794 N.Y.S.2d 863 (2005).

Furthermore, autopsy reports are nontestimonial, because their primary purpose is to document a decedent's cause of death for public recordkeeping rather than "for the purpose of establishing or proving some fact at trial." *Melendez-Diaz*, 557 U.S. at 324. By law, Ohio coroners are required to "keep a complete record of an * * * fill in the cause of death on the death certificate, in all cases coming under [their] jurisdiction." R.C. 313.09.

In accordance with *Craig*, the Seventh District Court of Appeals followed *Craig* in *State v. Mitchell*, 7th Dist. Columbiana No. 05 CO 63, 2008 Ohio 1525. In *Mitchell*, the Seventh District concluded that "*Craig* still stands for the proposition that an autopsy is a business record, is not hearsay, and does not violate any right to confront the maker of that record." *Mitchell*, supra at ¶ 104.

In response to Defendant's Application to Reopen his appeal, the Supreme Court of Ohio "specifically concluded that *an autopsy report is non-testimonial evidence* under *Crawford,* as it is not solely made at the behest of police in order to convict the particular defendant." (Emphasis sic.) *Adams*, 2012 Ohio 2719, ¶ 20, citing *Craig*, 110 Ohio St.3d at 321-321; *accord State v. Zimmerman*, 8th Dist. Cuyahoga No. 96210, 2011 Ohio 6156, ¶ 46; *State v. Monroe*, 8th Dist. Cuyahoga No. 94768, 2011 Ohio 3045, ¶ 56; *State v. Hardin*, 4th Dist. Pike No. 10 CA 803, 2010 Ohio 6304, ¶ 20.

Again, nothing in *Melendez-Diaz*, *Bullcoming*, or *Williams* undermined the Supreme Court of Ohio's previous analysis and conclusion in *Craig*.

Nevertheless, in *State v. Maxwell*, the Supreme Court of Ohio held that "[a]n autopsy report that is neither prepared for the primary purpose of accusing a targeted individual nor prepared for the primary purpose of providing evidence in a criminal trial is nontestimonial, and its admission into evidence at trial under Evid.R. 803(6) as a business record does not violate a defendant's Sixth Amendment confrontation rights." *Maxwell*, at syllabus.

Second, Dr. Humphrey Germaniuk's testimony did not violate Defendant's right to confrontation because his opinions were based upon ***his own review*** of the available evidence and records, including a video of the actual autopsy and the coroner's report that was properly admitted (without an objection from Defendant). *See Adams*, 146 Ohio St.3d 232, at ¶¶ 3-7.

Ohio Evidence Rule 803 states that "facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by the expert or admitted in evidence at the hearing." OH. Evid.R. 803. Thus, "[i]t has been long accepted that an expert witness may voice an opinion based on facts concerning the events at issue in a particular case even if the expert lacks first-hand knowledge of those facts." *Williams*, 132 S.Ct. at 2233. Accordingly, an expert may opine about evidence that was generated by someone other than himself.

Here, Dr. Humphrey Germaniuk testified in a similar manner to that in *Craig* and *Mitchell*, supra.

At trial, Dr. Humphrey Germaniuk testified as to Gina Tenney's cause and manner of death even though he did not perform the autopsy, because Dr. Nathan Belinky, the county coroner who had performed Gina Tenney's autopsy, was *deceased*. (Trial Tr., at 402, 445.)

Prior to his testimony, Dr. Germaniuk reviewed "a file including ***photographs*** as well as copies of evidence, the ***autopsy report***, the ***microscopic reports***, and that was basically it. There was a ***narrative from the scene investigators***." (Trial Tr., at 403.) Dr. Germaniuk also reviewed the ***autopsy video***. (Trial Tr., at 404; State's Exhibit No. 91.)

Dr. Germaniuk testified that Gina Tenney suffered a contusion to her upper right lip, and some abrasions or scrapes on the front part of her chin. (Trial Tr., at 406; State's Exhibit Nos. 9, 10.) She also suffered abrasions to the left side of her chin; abrasions on her breast; and a faint line across her neck. (Trial Tr., at 406; State's Exhibit No. 11.)

Dr. Germaniuk ***observed*** a couple of irregularly scrapes or abrasions on her abdomen, faint bruising around her right wrist, scrapes to her abdomen, some scrapes on her breast, and on both the left and right wrists and forearms; two bands of contusion or bruising. (Trial Tr., at 406; State's Exhibit Nos. 12, 13, 14.)

According to the death certificate, Gina Tenney's immediate cause of death was suffocation due to traumatic asphyxiation. (Trial Tr., at 408.) Dr. Germaniuk, however, testified that he would have determined the cause of death to be asphyxia. (Trial Tr., at 408.) Dr. Germaniuk explained that if a person died from drowning, the body would take in an air and water mixture from breathing the water into their lungs, and would see a foam cone. (Trial Tr., at 410.) Here, there was no foam cone detected on Gina Tenney. (Trial Tr., at 411.)

Dr. Germaniuk testified, "we have evidence of smothering. You can take a look at the contusion on the lips. If you take a look at the marks about the chin, this is certainly consistent with a hand or an object placed over the face. We certainly have what appears to be ligature strangulation with that 7-inch band by quarter-inch band about the neck. With that we can exclude mechanical[.]" (Trial Tr., at 417.)

Dr. Germaniuk also ***observed*** blood spots in her eyes (whites of the eyes), (Trial Tr., Vol. II, at 418.) and ligature marks on her wrists that could have been caused from being bound or tied up. (Trial Tr., at 422.)

Dr. Germaniuk stated that the telephone cord recovered from Gina's vehicle could have caused the marks on her neck, and the bruises on her face could have been caused by someone hitting her in the face or trying to smother her. (Trial Tr., at 423-424.)

Dr. Germaniuk concluded that based on the evidence he reviewed, the cause of Gina Tenney's death was likely a combination of smothering (asphyxia) and the ligature. (Trial Tr., at 445.) Dr. Germaniuk further concluded that Gina Tenney's death was a homicide. Trial Tr., at 446.)

Thus, Dr. Germaniuk did not merely summarize Dr. Belinky's original conclusion regarding Gina Tenney's cause of death, but instead offered ***his own conclusions*** based upon ***his review*** of the evidence.

Here, Dr. Germaniuk's conclusions were based upon the nontestimonial materials that he reviewed prior to trial, including "a file including ***photographs*** as well as copies of evidence, the ***autopsy report***, the ***microscopic reports***, and that was basically it. There was a ***narrative from the scene investigators***." (Trial Tr., at 403.) Dr. Germaniuk also reviewed the ***autopsy video***. (Trial Tr., at 404; State's Exhibit No. 91.)

Furthermore, the Supreme Court of Ohio likewise concluded that Dr. Germaniuk's testimony and the admissible of the autopsy report did not violate the Confrontation Clause. *See Adams*, 146 Ohio St.3d at 233-234.

Therefore, Dr. Germaniuk's testimony and the admission of Dr. Belinky's autopsy report did not violate Defendant's Sixth Amendment right to confrontation, because Dr. Germaniuk testified to his own expert opinions and conclusions regarding Gina Tenney's cause of death, and the autopsy report is nontestimonial.

Conclusion

This Court should deny the petition for writ of certiorari.

Respectfully submitted,

/s/ Paul J. Gains
PAUL J. GAINS
(Ohio Reg. No. 0020323)
Mahoning County Prosecutor

/s/ Ralph M. Rivera
RALPH M. RIVERA
(Ohio Reg. No. 0082063)
Assistant Prosecutor
**** Counsel of Record***

Mahoning County Prosecutor's Office
21 W. Boardman Street, 6th Floor
Youngstown, OH 44503
(330) 740-2330
pgain@mahoningcountyoh.gov
rrivera@mahoningcountyoh.gov

COUNSEL FOR RESPONDENT