

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 OHIO SUPREME COURT*

PETITIONER'S REPLY BRIEF

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REPLY

Petitioner Bennie Adams hereby incorporates into this Reply all the facts alleged, and arguments made, in his Petition for Writ of Certiorari. In any instance where Adams does not specifically respond to an argument or allegation, he is not conceding that his arguments lack merit, express or implied; rather, Adams relies upon his initial Petition.

This case turns on testimony about the cause and manner of death given by a coroner, who neither conducted nor attended the autopsy that established the cause and manner of death. The pathologist who actually conducted the autopsy, Dr. Rona, was available to testify, and the State could not—and did not—establish that he was unavailable to testify. Thus, Adams’ constitutional right to confront this witness against him was violated.

The State spends much of its Brief in Opposition discussing the facts and procedural history of this case. These facts should not dissuade this Court from considering the relevant legal issue. Adams' guilt was not pre-determined, the evidence was tenuous and circumstantial, and there were strong alternate suspects. The unconstitutional admission of the autopsy report as evidence against Adams is what made the difference.

The relevant question here is whether an autopsy report is testimonial evidence which demands confrontation under *Crawford v. Washington*, 541 U.S. 36 (2004) and the Sixth Amendment to the United States Constitution. This Court must answer this question in the affirmative. This Court should grant the writ to make it clear to all courts that autopsy reports are testimonial evidence, and thus, criminal defendants have a Sixth Amendment Constitutional Right to confront the author of the autopsy report before the autopsy report is admitted as substantive evidence against them at trial.

In its Brief in Opposition, the State relied on the Ohio Supreme Court's flawed opinion in *State v. Maxwell*. In *Maxwell*, the Ohio Supreme Court held that "an autopsy report was a nontestimonial business record," and was thus not subject to the Confrontation Clause. *State of Ohio v. Maxwell*, 139 Ohio St.3d 12, 2014-Ohio-1019, ¶ 54, citing *State of Ohio v. Craig*, 110 Ohio St.3d 306, 2006-Ohio-4571, ¶¶ 81-88. The Ohio Supreme Court then analyzed this Court's decision in *Williams v. Illinois*, 399 U.S. 235 (2012), and applied the primary purpose test to further conclude that an autopsy is non-testimonial because the "primary purpose" of autopsies is not

“a prosecutorial purpose.” *Maxwell*, 2014-Ohio-1019 at ¶¶ 55, 59. However, as previously argued in Adams’ Petition, the Ohio Supreme Court’s conclusion runs contrary to this Court’s jurisprudence. The primary purpose of autopsy is, in fact, often for future prosecution—particularly when the result of the autopsy is a finding of homicide. In addition, because one can review an autopsy report and ascertain what the declarant who authored the autopsy report would testify to, autopsy reports are also the functional equivalent to live, in-court testimony.

The State also wrongly claimed that the author of the autopsy report was unavailable because he was deceased. *See* State’s Brief in Opposition, pp. 17, 20-21, 28 (*citing*, “...Dr. Nathan Belinky, the county coroner who had performed Gina Tenney’s autopsy, was deceased.” *Id.* at 28.). However, although Dr. Belinky, as the elected Mahoning County Coroner, signed the autopsy report, it is clear that he did not actually perform the autopsy. PC Ex. 1, p. 4 (“The autopsy was performed in a hospital setting (The Youngstown Hospital Association) by a Dr. Rona (no given name listed) who from the autopsy report was a hospital based pathologist, not a forensic pathologist.”).

Dr. Rona, and not Dr. Belinky, conducted the autopsy, and Dr. Rona was able to testify at Adams’ trial. The State contacted and spoke with Dr. Rona pre-trial. *See* 8/13/08 pretrial, Tr. 12; 9/5/08 pretrial, Tr. 23. Post-conviction counsel also verified Dr. Rona’s availability. PC Ex. 2. Instead of calling the pathologist who actually conducted the autopsy, the State called a neighboring county coroner, Dr. Germaniuk,

to testify at trial. Dr. Germaniuk had no ties to the case, he did not author the autopsy report, and he did not witness the autopsy in 1985.

The State next attempted to distinguish this case from *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009) and *Bullcoming v. New Mexico*, 564 U.S. 647 (2011), by claiming that Dr. Germaniuk had a “personal, albeit limited, connection” to Gina Tenney’s autopsy.” *See* State’s Brief in Opposition, p. 21. However, this is just untrue. Despite the fact that Dr. Germaniuk reviewed the autopsy materials, that does not mean that he was somehow personally connected to Tenney’s autopsy. The State did not even attempt to expound on this statement, and there was no connection to draw between Tenney’s autopsy and Dr. Germaniuk, other than his review of the items associated with it.

The State next argued that Dr. Germaniuk’s testimony did not violate Adams’ Confrontation rights because (1) an autopsy report is a public record under Ohio Statute 313.10, (2) an autopsy report is a business record under Ohio Evidence Rule 803(6), and (3) Dr. Germaniuk testified to his own, expert opinions under Ohio Evidence Rule 705. *See* State’s Brief in Opposition, pp. 25-28; *see also* R.C. 313.10; Evid.R. 803(6); Evid.R. 705. These arguments are likewise flawed.

While it is true that an autopsy report is a public record in Ohio, the primary purpose of an autopsy report in a homicide case is not merely “recordkeeping.” And, when used at trial—which is almost certain in a homicide case, and even more certain in a homicide case with an immediate suspect as here—the autopsy is used at trial as a “solemn declaration or affirmation made for the purpose of establishing or

proving some fact.” *Melendez-Diaz*, 577 U.S. at 310, citing *Crawford*, 541 U.S. at 51. The autopsy proves identity, time of death, cause of death, and a plethora of other facts that the State must prove to convict the defendant. The respondent in *Melendez-Diaz* argued that the certificates of analysis were business records and thus, not subject to the Confrontation Clause. *Melendez-Diaz*, 577 U.S. at 321. However, as this Court found there, even if the certificates of analysis were business records, “their authors would be subject to confrontation nonetheless.” *Id.* The same should be said here: even if an autopsy report qualifies as a public record or a business record, the author of that report must be subject to confrontation.

The State’s third argument—that Dr. Germaniuk’s testimony was admissible because he testified to his own, expert opinions under Ohio Evidence Rule 705—is irrelevant to the inquiry here. Although Adams argued below that Dr. Germaniuk’s testimony regarding his own expert opinion was erroneously admitted, that is not the issue before this Court. Dr. Germaniuk did not author the autopsy report; he did not make the findings within it; and he did not make the conclusions as to cause and time of death within it. The fact that defense counsel could cross-examine Dr. Germaniuk does nothing to affect the admissibility (or not) of the autopsy report itself.

Last, it is telling that the State did not, even once, mention this Court’s footnote in *Melendez-Diaz*, where this Court referred to the importance of confrontation to challenge some forensic analyses, such as autopsies... [which] cannot be repeated.” *Melendez-Diaz*, 557 U.S. at 318, n. 5. Contrary to the State’s arguments, this footnote strongly suggests a conclusion that autopsy reports are testimonial.

Confrontation was constitutionally required to challenge the findings and conclusions made within the autopsy report. *Melendez Diaz*, 557 U.S. at 317-18, fn.5. “[S]urrogate testimony ... does not meet the constitutional requirement.” *Bullcoming*, 564 U.S. at 652. Dr. Rona conducted the autopsy, Dr. Rona was available to testify, and the State could not—and did not—establish that he was unavailable to testify. Nor did the State allege, much less establish, that Adams had a prior opportunity to cross-examine Dr. Rona. Thus, Adams’ constitutional right to confront the witnesses against him was violated.

CONCLUSION

For all the aforementioned reasons, Adams was denied his rights to a fair trial and to due process as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution. Adams was denied the right to confront this witness against him. Autopsy reports cannot be repeated, are prepared for use at trial (at least when the finding is probable homicide), are certified records, and are admitted for the truth of the matter asserted (that the victim was murdered and the cause and timing of death).

This Court should declare that autopsy reports are testimonial for Sixth Amendment purposes and thus trigger a Confrontation Clause right. Adams respectfully requests this Court to grant the writ of certiorari, vacate the conviction, and remand the case to state court for a new trial.

Respectfully Submitted,

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