

No. _____

In the
Supreme Court of the United States

GAIL M. RITCHEY,

Petitioner,

v.

STATE OF OHIO,

Respondent.

**On Petition for Writ of Certiorari to the
Eleventh District Court of Appeals of Ohio**

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the admission of an autopsy report and testimony from a doctor who neither participated in the autopsy nor prepared the report violate the Sixth Amendment's Confrontation Clause?

PARTIES TO THE PROCEEDING

Gail M. Ritchey was the defendant in the Geauga County Court of Common Pleas, the appellant in the Eleventh District Court of Appeals of Ohio, and the appellant in the Supreme Court of Ohio.

The State of Ohio was the plaintiff in the Geauga County Court of Common Pleas, the appellee in the Eleventh District Court of Appeals of Ohio, and the appellee in the Supreme Court of Ohio.

No party to the proceeding is a corporation.

STATEMENT OF RELATED PROCEEDINGS

There are no related proceedings.

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OPINIONS BELOW

On May 15, 2023, the Eleventh District Court of Appeal of Ohio decided case number 2022-G-0025, the direct appeal from the judgment of conviction entered by the Court of Common Pleas of Geauga County, Ohio. The Eleventh District's opinion was reported below at 214 N.E.3d 704, 2023-Ohio-1625 (May 15, 2023).

A discretionary appeal was taken to the Ohio Supreme Court, which denied discretionary review without opinion; the order is reported at 171 Ohio St.3d 1422, 216 N.E.3d 690 (Table), 2023-Ohio-3180. A timely motion for reconsideration was filed and denied without opinion on November 29, 2023; the order is reported at 172 Ohio St.3d 1418, 222 N.E.3d 662 (Table), 2023-Ohio-4259.

JURISDICTION

The order of the Ohio Supreme Court denying reconsideration of its denial of the discretionary appeal was entered on November 29, 2023. On February 28, 2024, Justice Kavanaugh extended until April 27, 2024, the time by which this petition for a writ of certiorari must be filed. See No. 23A794. Jurisdiction is conferred on this Court pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in pertinent part that:

In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.”

The Fourteenth Amendment to the United States Constitution provides in relevant part that:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

INTRODUCTION

The narrow issue this case presents is whether the Eleventh District Court of Appeals of Ohio, relying on Supreme Court of Ohio precedent in *State v. Maxwell*, 139 Ohio St.3d 12, 9 N.E.3d 930, 2014-Ohio-1019, improperly applied the “primary purpose” test and then improperly resolved that test when it held that an autopsy report in a murder case was not testimonial.

Accordingly, the court held that Ms. Ritchey’s Sixth Amendment right to confront the witnesses against her was not violated when the pathologist the prosecution called to testify concerning the autopsy results and through which it introduced the autopsy report neither conducted the autopsy nor prepared the autopsy report and was not even present when the autopsy was conducted.

STATEMENT OF THE CASE

More than twenty years after the alleged crime, Gail Ritchey was indicted for an aggravated (i.e. premeditated) murder (Count One) and murder (Count Two) occurring in Geauga County in 1993. The alleged victim was a previously unidentified infant.

A. Pretrial Proceedings Regarding Medical Examiner Testimony

Because of the lapse of time between the alleged homicide and the indictment, the State was required to utilize a medical examiner, Dr. Joseph Felo, who did not perform the original autopsy. Dr. Felo, who was not even employed at the Cuyahoga County Coroner's Office¹ when these procedures were performed, reviewed the autopsy report prepared by Dr. Robert Challener, a Cuyahoga County assistant coroner who performed the original autopsy in 1993. Dr. Challener had opined that there was a live birth followed by homicide.²

¹ Cuyahoga County neighbors Geauga County in northeast Ohio.

² Challener's conclusion regarding live birth was premised upon a floating lung test. In the floating lung test, lung tissue is placed in water to see if it floats. Floatation is interpreted as indicative of live birth because the lung tissue would have to contain gas (presumably air) in order to float. Conversely, lack of floatation would indicate a stillbirth. The defense challenged the scientific validity of the floating lung test in a pretrial *Daubert* motion. Felo subsequently abandoned reliance upon the floating lung test, but, as discussed in the Statement of Facts *infra*, maintained that there was a live birth.

Prior to trial, the defense moved the trial court *in limine* to prevent Dr. Felo from testifying about examinations and testing performed during the original autopsy; about Challener's opinions, including that there was a live birth; and about Felo's own opinion that there was a live birth, which was also based on the previously performed autopsy. The motion was denied by the trial court and Dr. Felo was permitted to testify at trial regarding the autopsy, including the tissue slides taken as part of the autopsy.

B. Trial Proceedings and Sentencing

Trial by jury was commenced in 2022. The jury returned a verdict of not guilty of Count One, aggravated murder, and guilty of Count Two, murder. The defendant was sentenced to fifteen years to life imprisonment.

Timely appeals were taken to the Eleventh District Court of Appeals of Ohio, which affirmed the conviction, and to the Ohio Supreme Court, which declined to exercise jurisdiction over the discretionary appeal.

This petition for a writ of certiorari follows.

STATEMENT OF THE FACTS

On March 25, 1993, a dismembered infant corpse was recovered on a roadside in Geauga County. The body had apparently been ravaged by one or more animals. The left lung, spleen, kidneys, stomach, small intestine, pancreas and colon were missing. There were also injuries to the head, neck, trunk and extremities. The body had apparently been run over

by a vehicle in that it bore a tire track. There was other debris on the body as well.

There was no dispute at trial that Gail Ritchey was the mother of the infant corpse, as determined by DNA. That DNA evidence had led the police to interview Ms. Ritchey shortly before her arrest. The interview, which was videotaped, was played in pertinent part for the jury. In the interview, Ms. Ritchey admitted that she had given birth in the bathroom of a Shaker Heights, Ohio home (*i.e.* in Cuyahoga County) in approximately February, 1993. The delivery had come as a surprise; Ms. Ritchey experienced discomfort, went to the toilet, and the baby was delivered into the toilet. The infant was still and Ms. Ritchey recalls no movement or sound from the infant. Ms. Ritchey placed the infant's body in a garbage bag and put the garbage bag in the trunk of her car. She cleaned up the bathroom and continued to nanny the children in her care until the end of the workday. The bag remained in the trunk of her car for more than a week.

Thereafter, Ms. Ritchey abandoned the bag with the body in Geauga County, in the woods near a youth camp affiliated with her church and at which she served as a counselor. The location of the camp was not far from where the body was found in March.

Climatological data revealed that, in the preceding thirty days, there had been a number of days where the temperature was above freezing. The temperature of the body at the time it was found, as measured by a thermometer placed inside the mouth of the corpse, was approximately 50 degrees Fahrenheit.

A critical issue in the case was whether there was a live birth or whether the infant was stillborn. Dr. Felo testified at trial that, in his opinion, the infant was born alive and that all injuries were post-mortem. According to Dr. Felo, who relied upon the autopsy performed in 1993 by Dr. Robert Challener, this was a live birth. Felo based this conclusion on coloration of the lung tissue that, in his opinion, indicated evidence of breathing in 55% of the tissue in the sample. While Dr. Felo acknowledged that decomposition could occur at above-freezing temperatures, he opined that there was no decomposition in the lungs.

Dr. Felo acknowledged that there was criticism among scientific professionals about relying on lung microscopy to determine if there was a live birth. He nonetheless based his opinion on his own experience as opposed to scientific literature or peer-reviewed studies. Dr. Felo was critical of Dr. Challener's decision at the original autopsy to only take three small lung tissue samples. In this regard, Felo acknowledged that he had no knowledge of the location on the lung from which the three samples were taken during the Challener-conducted autopsy; specifically Felo had no knowledge of whether the three samples constituted representative samples taken from three separate locations or whether they all came from the same area of the lung.

The autopsy file was entered into evidence over defense objection.

Dr. Felo's opinion was disputed by the defense forensic pathology expert, Dr. Kent Harshbarger. Dr. Harshbarger opined that the missing body parts

undercut the scientific reliability of any opinion that there was or was not a live birth in this case. Harshbarger noted that there was evidence of decomposition on the skull, which means that bacteria was present that could have accounted for expansion of the lung tissue. Harshbarger noted that the lungs could have expanded as a result of animal activity having forced air into the lungs, and/or from bacterial decomposition. He noted that the lung expansion present in the slides did not appear to be that of a uniformly-aerated breathing infant. As a result of the unknown information regarding the missing body parts, the evidence of decomposition, and the lack of prenatal care (as admitted by Gail Ritchey in her statement to the police), Harshbarger opined that a determination of live birth was not possible to a reasonable degree of medical certainty.

REASONS FOR GRANTING THE PETITION

I. This is an important issue.

Whether an autopsy report is testimonial under the Sixth Amendment is an important and recurring issue. It begs the obvious that the autopsy yields evidence that can be critical in a homicide prosecution, including in this case on the critical question of whether there was a live birth and thus a homicide. Autopsies are a daily occurrence in the United States, as is murder.

While in this case, the original medical examiner had died, there are other cases where the examining pathologist has moved or retired. Prosecutors, defense counsel and lower courts all need to know whether it is necessary for the prosecution to

secure the testimony of the examining pathologist as opposed to relying on the autopsy report, either without accompanying expert testimony or accompanied by expert testimony of a forensic pathologist who did not participate in the autopsy.

II. This Court has not spoken definitively on the issue.

As this Court has developed its post-*Crawford* jurisprudence, it has yet to squarely and definitively address the question that arises in the instant case. In *Crawford*, this Court recognized that testimonial statements will only be admissible at trial “by testing in the crucible of cross-examination.” *Crawford v. Washington*, 541 U.S. 36, 61, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).

Crawford was applied to forensic reports in *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009), where the Court recognized that laboratory analyses of suspected controlled substances were “within the core class of testimonial statements.” The Court declined to distinguish the drug analyses on the basis that the witnesses were not accusatory and the analyses were not, in and of themselves, inculpatory as to any particular person *Id.*, at 313-14. The Court also declined to treat the analyses as some sort of non-testimonial public record when the drug analyses were prepared by law-enforcement personnel.

In *Bullcoming v. New Mexico*, 564 U.S. 647, 131 S.Ct.2705, 180 L.Ed.2d 610 (2011), this Court reached a conclusion identical to that in *Melendez-Diaz* with respect to a blood-alcohol analysis produced by a state

laboratory legally required to assist in law enforcement investigations. The Court recognized that a “document created solely for an evidentiary purpose . . . made in aid of a police investigation” is testimonial. *Id.*, at 664.

In *Williams v. Illinois*, 567 U.S. 50, 58, 132 S.Ct. 2221, 183 L.Ed.2d 89 (2012) (plurality opinion), this Court addressed whether a DNA profile prepared by an outside laboratory was testimonial. While the plurality opinion concluded that the profile was not testimonial, five members of the Court, relying on *Melendez-Diaz*, disagreed. Compare *id.*, at 57-58 (plurality opinion) with *id.*, at 116 (Thomas, J., concurring in judgment) and at 120 (Kagan, J., dissenting) (“Five Justices specifically rejected every aspect of [the plurality opinion’s] reasoning and every paragraph of its explication”).

At this point, this Court’s jurisprudence is less than definitive when it comes to the admissibility of autopsy reports as documents that are -- or are not -- testimonial. See, *id.*, at 97-98 (Breyer, J., concurring) (recognizing that the plurality’s conclusion is essential to the admissibility of autopsy reports).

III. Courts throughout the United States are divided on the issue.

Ohio is not alone in holding that autopsy reports in homicide cases are not testimonial. See, e.g., *People v. Leach*, 366 Ill.Dec. 477, 980 N.E.2d 570 (Ill. 2012); *Ackerman v. State*, 51 N.E.3d 171 (Ind. 2016).

Other federal circuit and state high courts have found that that autopsy reports prepared in homicide

cases are, indeed, testimonial and that they cannot be admitted in violation of a defendant's confrontation rights. See, e.g., *Garlick v. Lee*, 1 F.4th 122 (2d Cir. 2021); *United States v. Ignasiak*, 667 F.3d 1217, 1231 (11th Cir. 2012); *United States v. Moore*, 651 F.3d 30 (D.C. Cir. 2011); *State v. Locklear*, 363 N.C. 438, 452, 681 S.E.2d 293 (2009); *State v. Kennedy*, 229 W.Va. 756, 735 S.E.2d 905 (2012); *Commonwealth v. Reavis*, 465 Mass. 875, 992 N.E.2d 304 (2013).

The problem, the concern, is recurring. Until this Court steps in to resolve the issue, defendants in different parts of the country will continue to have different Sixth Amendment rights to confront the witnesses against them.

IV. The primary purpose of an autopsy, and therefore an autopsy report, in a murder case is to aid in a criminal investigation and prosecution.

Though an autopsy may serve other purposes as well or instead, an autopsy is integral to criminal prosecution. Despite this, the Eleventh District, relying on the Ohio Supreme Court's controlling precedent in *Maxwell*, held that the autopsy report was admissible. *Maxwell* held that, because the requirement that coroners conduct autopsies and prepare reports in non-criminal situations is the same as the requirement in criminal cases, the primary purpose of doing those things can never be testimonial. The result is a formulaic declaration devoid of any meaningful relationship to the actual purpose of the declarant, instead of an objective determination of the declarant's primary purpose.

Certainly, there are times when a pathologist conducts an autopsy and prepares a report for reasons other than expected trial testimony in a criminal case. Autopsies are conducted in cases of possible medical malpractice. They are conducted when there are public health concerns involving infectious diseases and for epidemiological studies. And an autopsy may have the salutary benefit of helping ease the pain of a grieving family.

But when the pathologist conducting the autopsy in this case began his work, he knew he was dealing with a homicide. It was beyond question that this autopsy was conducted for the primary, the only real purpose, of producing evidence which might help identify, among other things, whether there was a live birth.

This case, then, presents the perfect opportunity to answer the question of how and if the primary purpose of a forensic pathologist's autopsy and autopsy report in a murder case is to be held testimonial and subject to a criminal defendant's Sixth Amendment Confrontation rights.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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