

No. 23-1181

IN THE
Supreme Court of the United States

GAIL M. RITCHEY,

Petitioner,

v.

OHIO,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE ELEVENTH DISTRICT COURT OF
APPEALS OF OHIO, GEAUGA COUNTY

**RESPONDENT STATE OF OHIO'S
OPPOSITION TO PETITION FOR
WRIT OF CERTIORARI**

JAMES R. FLAIZ
Prosecuting Attorney
NICHOLAS A. BURLING
Assistant Prosecuting Attorney
Counsel of Record
GEAUGA COUNTY PROSECUTOR'S OFFICE
231 Main Street, Third Floor
Chardon, OH 44024
(440) 279-2100
nburling@geauga.oh.gov

Counsel for Respondent



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INTRODUCTION

Whether or not a criminal defendant's Sixth Amendment right to confrontation is violated by the admission of an autopsy report in the absence of the author of that report is an unsettled legal issue. Some state and federal courts have ruled that admission of the report under these circumstances is a violation of a defendant's rights (see, e.g., *United States v. Moore*, 651 F.3d 30 (D.C. Cir. 2011); *United States v. Ignasiak*, 667 F.3d 1217 (11th Cir. 2012); *State v. Frazier*, 229 W.Va. 724, 735 S.E.2d 727 (2012); *State v. Navarette*, 294 P.3d 435 (N.M. 2013); *Garlick v. Lee*, 1 F.4th 122, 136 (2d Cir. 2021)), while other state and federal courts have ruled that it is not a violation (see, e.g., *McNeiece v. Lattimore*, 501 Fed.Appx. 632 (9th Cir. 2012); *People v. Dungo*, 55 Cal.4th 608 (2012); *People v. Leach*, 366 Ill.Dec. 477 (2012); *State v. James*, 712 F.3d 79 (2d Cir. 2013); *State v. Medina*, 232 Ariz. 391, 306 P.3d 48 (2013); *State v. Maxwell*, 139 Ohio St.3d 12, 2014-Ohio-1019, 9 N.E.3d 930 (2014)). But while this Honorable Court will likely need to address this issue at a certain point, Petitioner Gail Ritchey's case is not the appropriate vehicle to do so.

This case deals with the use of an autopsy report prepared in 1993 during the prosecution of a defendant for murder in a case that went to trial in 2022. The findings of Dr. Robert Challener, the pathologist who prepared the report, were that the victim in question, a newborn child, had been born alive and had died from an undetermined violent cause. During the several decades that passed while law enforcement worked to identify the perpetrator of the crime, Dr. Challener died.

Dr. Joseph Felo of the Cuyahoga County Medical Examiner's Office was the State of Ohio's expert pathologist at trial. He reviewed the autopsy report and photographs of the victim's body. He also conducted his own analysis of lung tissue slides that had been taken from the body and preserved. Based upon a microscopic examination of the lung tissue, he determined that less than 5% of the tissue was non-expanded, meaning no air had entered that portion. He noted that approximately 40% of the lung tissue was rounded and distended, which is indicative of either air being forced into the lungs (via mouth-to-mouth resuscitation) or gases from bacterial overgrowth. Because he found no evidence of decomposition or bacteria colonies in the slides, he determined the distended portions of the lungs could only have been caused by air being forced into the lungs. Finally, he determined between 55% to 60% of the lung tissue consisted of non-distended, open-air spaces, which occurs by way of normal, passive breathing. These findings led him to conclude the child had taken breaths on his own, and therefore, that the child was born alive. Trial Transcript (TT) pgs. 712-716, Exhibit 15.

Notably, Dr. Challener's report contained only the following statement regarding his microscopic examination of the lung: "Portions are well aerated with scattered squames in alveoli. Some sections demonstrate atelectasis." Exhibit 8. While those findings are consistent with Dr. Felo's findings, they are not as thorough or detailed as Dr. Felo's. Instead, Dr. Felo's findings were made independent of Dr. Challener's report, and they formed the central basis of his opinion as to live birth.

Thus, this case presents a situation much different than the majority of cases in which a witness testifies as to the findings made by a non-testifying witness who conducted an autopsy or provides his or her opinion based solely on the findings made by the non-testifying witness. Dr. Felo himself performed the lung slide analysis upon which he based his opinion of live birth. Therefore, this case is not the appropriate vehicle to address whether introduction of an autopsy report in a case without the testimony of the person performing the autopsy is a violation of a defendant's Confrontation Clause rights.

STATEMENT OF THE CASE

On March 25, 1993, the Geauga County Sheriff's Office received a call regarding a dead baby found in the road in Thompson Township. The child's body had been mutilated, likely by animals, and had been run over. The child was missing his left arm, right leg, a large part of his torso, and his lower abdomen.

No suspect in the child's death was identified until 2019, when detectives used DNA from the child to build a family tree. The investigation then led to Petitioner, who was interviewed and admitting to giving birth to the child, alone, and then immediately placing him in a garbage bag. She said she placed the garbage bag in the trunk of her car, where it remained for several days or a week, and then she dumped it in the woods. During her interview, she said that she did not remember the child making any noises. Therefore, the main issue in the case was whether or not the child had been born alive or was stillborn.

Petitioner was indicted for Aggravated Murder (requiring premeditation), and Murder. Along with other pretrial motions, Ritchey filed challenges to the use of the autopsy report and to Dr. Felo testifying about his own observations on grounds that it violated her Confrontation Clause rights under the Sixth Amendment, given that Dr. Challener, the author of the report, had died. The trial court denied her motion, relying upon Ohio Supreme Court decisions in *State v. Craig*, 110 Ohio St.3d 306, 2006-Ohio-4571, 853 N.E.2d 621; *State v. Maxwell*, 139 Ohio St.3d 12; and *State v. Adams*, 146 Ohio St.3d 232, 2016-Ohio-3043, 54 N.E.3d 232. (The trial court's decisions state "The Court agrees with the analysis of this issue set forth in the State's response." The State's response relied on these cases).

The matter proceeded to trial, at which time the autopsy report was admitted into evidence and Dr. Felo testified to the contents of the report, his own review, and his findings regarding the lung tissue samples. He further testified as to his opinion that the child had been born alive. The jury returned a verdict of not guilty as to Aggravated Murder but guilty as to Murder.

Ritchey's conviction was upheld on appeal to Ohio's Eleventh District Court of Appeals. The Ohio Supreme Court declined to accept jurisdiction in the case.

MISSTATEMENTS AS TO LAW OR FACT

I. Dr. Challener's Basis for Determining Live Birth

Petitioner alleges that Dr. "Challener's conclusion regarding live birth was premised upon a floating lung

test.” Petition, pg. 3, fn. 2. This assertion fails to note that Dr. Challener also performed a microscopic examination of the lung tissue, which would also have been a basis for finding live birth. Exhibit 8. His conclusion as to live birth as listed in the autopsy report did not specify upon what that opinion was based, but for Petitioner to only note the floating lung test while omitting the microscopic examination of the lung tissue is misleading.

II. Dr. Felo’s Basis for Determining Live Birth

Petitioner alleges that Dr. Felo’s conclusion as to live birth was based upon “coloration of the lung tissue that, in his opinion, indicated evidence of breathing in 55% of the tissue in the sample.” Petition, pg. 6. In fact, Dr. Felo’s opinion as to 55% of lung tissue indicating breathing was based upon his microscopic examination of the lung tissue itself, which he noted showed that portion of the alveoli to be expanded but not distended. TT pgs. 712-716, Exhibit 15. It was not the coloration of the lung itself that led him to make that proportional determination. Instead, he indicated during trial that the coloration of the lung tissue was uniform, which would indicate passive breathing. Had the coloration been blotchy, that would have been indicative that the majority of the expanded spaces in the tissue came from air being forced into the lungs. TT pg. 708.

III. Dr. Harshberger’s Opinion Regarding Decomposition

Petitioner notes that Dr. Harshberger, the defense expert, opined that the decomposition in the child’s skull was evidence of bacteria that could have accounted for the expansion of the child’s lungs. Petition, pg. 7. While he did

testify to that, he also admitted on cross examination that “[t]he lung slides are relatively well preserved which I’m surprised actually.” TT pg. 944.

REASONS FOR DENYING THE WRIT

I. This Case is not the Appropriate Vehicle to Address the Issue

This is not a situation in which a substitute pathologist simply testified as to the contents of an autopsy report prepared by another, non-testifying pathologist. See e.g. *Ignasiak*, 667 F.3d 1217, 1225, 1229 (11th Cir. 2012); *Hensley v. Roden*, 755 F.3d 724, 728-729 (1st Cir. 2014); *State v. Bass*, 132 A.3d 1207, 1226-1227 (N.J. 2016).

As noted above, Dr. Felo conducted his own analysis of the lung tissue slides from the child’s body. He then came to his own conclusions as what his findings meant, opining that the child had breathed on his own, and therefore, had been born alive. While his findings were consistent with Dr. Challener’s findings as documented in the autopsy report, they were made independent of the original report.

Because bodies are either cremated or buried and decompose, a second autopsy can never be performed if it becomes evident that the original pathologist will not be able to testify a trial. Examination of a preserved, physical part of a victim’s body in a homicide case is as close to conducting a second autopsy as is possible in such circumstances. When that second examination of the body part provides the new pathologist an independent basis to form an opinion on a key matter in the case, the situation is much more akin to a substitute lab technician rerunning

a test on a suspected controlled substance in a drug case where the original technician is not available to testify.

Dr. Felo's own examination and opinion regarding the child's lung tissue place this case outside the normal situation in which autopsy reports from non-testifying witnesses are presented in trial, and therefore, this case does not address the central Confrontation Clause issue that is being wrestled with in various jurisdictions.

II. The Ohio Supreme Court Did Not Issue an Opinion in this Case

The Ohio Supreme Court has addressed the admissibility of autopsy reports through substitute witnesses, finding no Confrontation Clause violations in *State v. Craig*, 110 Ohio St.3d 306; *State v. Maxwell*, 139 Ohio St.3d 12; and *State v. Adams*, 146 Ohio St.3d 232. This Honorable court denied petitions for writs of certiorari in both *Craig*, cert. denied, 127 S.Ct. 1374 (Feb. 26, 2007) (No. 06-8490); and *Maxwell*, cert. denied, 135 S.Ct. 1400 (Feb. 23, 2015) (No. 14-6882).

The Ohio Supreme Court declined to accept jurisdiction over Petitioner's appeal, leaving the decision of the Eleventh District Court of Appeals in place. While this Court certainly has the power to grant certiorari in such circumstances, it would be better to address a constitutional issue when this Court has a full written opinion from a state's highest court to review, rather than an intermediate appellate court decision. This practice will ensure that the issue raised has been given the greatest chance of being fully fleshed out before coming to the nation's court of last resort.

CONCLUSION

Based upon the foregoing, the petition for writ of certiorari should be denied.

Respectfully submitted,

JAMES R. FLAIZ

Prosecuting Attorney

NICHOLAS A. BURLING

Assistant Prosecuting Attorney

Counsel of Record

GEAUGA COUNTY PROSECUTOR'S OFFICE

231 Main Street, Third Floor

Chardon, OH 44024

(440) 279-2100

nburling@geauga.oh.gov

Counsel for Respondent