No. 23-1181

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 COURT OF APPEALS OF OHIO,
GEAUGA COUNTY

BRIEF OF *AMICUS CURIAE* OFFICE OF THE OHIO PUBLIC DEFENDER IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The Office of the Ohio Public Defender (OPD) is a state agency that represents indigent criminal defendants and coordinates criminal-defense efforts throughout Ohio. A primary focus of the OPD is on the post-trial phase of criminal cases, including direct appeals and collateral attacks on convictions. The mission of the OPD is to protect and defend the rights of indigent persons by providing and supporting superior representation in the criminal and juvenile justice systems.

The OPD has an interest in this case because it involves the fundamental right of a defendant to "be confronted with the witnesses against him." U.S. Const., Amdt. 6. That right can only be satisfied in cases where the prosecution seeks to introduce a forensic pathologist's autopsy report—which the government ultimately enters into the record as a trial exhibit—by presenting at trial the forensic pathologist who authored the report. Simply put, calling to the witness stand the author of the autopsy report is the only way that the accused can meaningfully "be confronted with the witnesses against him." *Id*. The OPD writes separately as an amicus to provide the Court with additional argument about the patent incorrectness of the categorical anti-*Crawford* rule applied in Ohio and several other jurisdictions when autopsy reports are involved in homicide trials, and to highlight

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[1] Consistent with this Court's Rule 37.6, *amicus curiae* states that this brief was not authored in any part by counsel for any party, and no person or entity other than *amicus* made a monetary contribution to the preparation or submission of this brief. Counsel of record for each party were advised 10 days in advance of *amicus curiae*'s intent to file this brief. *See* Rule 37.2.

the ongoing real-world impact of that unconstitutional categorical approach.

SUMMARY OF ARGUMENT

In short, an autopsy report that is created as part of a homicide investigation, that asserts that the death was caused by homicide, and that leads to and is featured prominently in the murder prosecution of an accused must be deemed "testimonial" under the Confrontation Clause framework that this Court established in *Crawford v. Washington*, 541 U.S. 36 (2004), and further developed in its progeny.

Here, the court of appeals noted that there was a "significant issue [] whether the admission of the autopsy reports violate[d] Ritchey's rights of confrontation." Further, that court also observed that "an autopsy in the present case was necessarily prerequisite to the opening of a homicide investigation."

Yet, when tasked with assessing the merits of Ms. Ritchey's claim under the Confrontation Clause, instead of actually attempting to analyze whether the autopsy report in question was testimonial—thus triggering the confrontation right—the appellate court merely looked to a blanket rule created by the Supreme Court of Ohio in *State v. Maxwell*, 9 N.E.3d 930 (Ohio 2014), and rejected Ms. Ritchey's Sixth Amendment claim. The rule established in *Maxwell* is, quite simply, that autopsy reports need not be subjected to Confrontation Clause scrutiny because they are non-testimonial "business records."

But the autopsy report in this case was patently testimonial. It was prepared with the expectation that it would assist in a homicide prosecution. In fact, without the finding that a live birth had occurred, there could have been no homicide prosecution. The report

was certainly a formal statement, as it was issued by one coroner's office at the request of another, and because a state statute requires certification of such reports. And whether it was targeted at a specific accused is not a requirement, as that position was rejected by five members of this Court in *Williams v. Illinois*, 567 U.S. 50 (2012).

Amicus curiae urges this Court to grant certiorari, and, ultimately, to correct the course of Ohio and several other jurisdictions regarding Confrontation Clause jurisprudence when autopsy reports are admitted as evidence by the government in a criminal trial involving a homicide.

ARGUMENT

I. THE "BUSINESS RECORD" RULE CREATED BY THE OHIO SUPREME COURT CONCERNING AUTOPSY REPORTS.

Simply stated, the state appellate court here felt constrained to follow the incorrect guidance of the Ohio Supreme Court in this area. The court of appeals made two important observations before reaching the Sixth Amendment claim raised in Ms. Ritchey's direct appeal. First, that a "significant issue is whether the admission of the autopsy reports violate[d] Ritchey's rights of confrontation." *State v. Ritchey*, 214 N.E.3d 704, 720 (Ohio App. 2023). And second, that "an autopsy in the present case was necessarily prerequisite to the opening of a homicide investigation." *Id*. at 721.

These observations would cause one to expect the state court of appeals to have then analyzed whether the autopsy report was testimonial, and if so, whether a violation of Ms. Ritchey's Confrontation Clause rights occurred at trial, when the report was

admitted into evidence without Ms. Ritchey being able to confront its author, Dr. Robert Challener.

But instead of applying this Court's Confrontation Clause precedents from the past two decades in this area (most notably *Crawford*, *Bullcoming*, *Melendez-Diaz*, and *Williams*), the state appellate court simply looked to and followed *State v. Maxwell*, 9 N.E.3d 930. *See Ritchey* at 721. In *Maxwell*, the state supreme court, purporting to apply *Crawford* and its progeny, concluded that autopsy reports "are not created primarily for a prosecutorial purpose," and thus the admission of an autopsy report "as a business record does not violate a defendant's Sixth Amendment rights." *Maxwell* at 952.

Two separate concurring opinions were issued in *Maxwell*, each disagreeing with the majority's analytical approach on the Confrontation Clause issue, but concluding in that case that any constitutional violation was harmless beyond a reasonable doubt. As characterized by one concurring opinion in *Maxwell*, the majority opinion in that case "states the categorical conclusion that autopsy reports in Ohio in general "are created 'for the primary purpose of documenting cause of death for public records and public health.'" *Id*. at 989 (Pfeifer, J., concurring in part and dissenting in part). And the conclusion of that *Maxwell* concurrence was that "[u]nder the majority opinion, no medical examiner ever creates an autopsy report for the primary purpose of creating a record to be used at trial." *Id*. at 990 (Pfeifer, J., concurring in part and dissenting in part). Significantly, a separate concurrence observed that one of the explicit statutory purposes that an autopsy report is intended to serve in Ohio is the "investigation of homicides." *Id*. at 986 (French, J., concurring).

Numerous other states have arrived at a similar, errant conclusion regarding whether autopsy reports are testimonial. *See*, *e.g.*, *Ackerman v. State*, 51 N.E.3d 171, 187-88 (Ind. 2016) (prosecution relied on business records exception; court found that "we cannot today conclude that the autopsy report in the present case was prepared for the primary purpose of establishing or proving past events for subsequent prosecution" . . . "the autopsy report here still lacked the requisite formality to be considered testimonial."); *State v. Hutchison*, 482 S.W.3d 893, 912 (Tenn. 2016) "Overall, the autopsy report lacks the formality and solemnity of an affidavit, deposition, or prior testimony, as described by Justice Thomas in his Williams concurrence" . . . "we conclude that the autopsy report does not meet the criteria set out in Justice Thomas's Williams concurrence."); *People v. Leach*, 980 N.E.2d 570, 590-94 (Ill. 2012) (an autopsy report created "in the midst of a criminal investigation into a violent death," and determining that the cause of death was homicide, was nontestimonial).

II. THE CORRECT RULE FOLLOWED IN NUMEROUS JURISDICTIONS, RECOGNIZING THAT AUTOPSY REPORTS ARE TESTIMONIAL IN HOMICIDE CASES.

High courts in several states, in contrast with Ohio's business-record approach, have held that autopsy reports in homicide cases are testimonial, and thus their admission must comport with the Confrontation Clause as construed by *Crawford* and its progeny. The West Virginia Supreme Court, for example, after applying the primary purpose test, determined that autopsy reports conducted during "death investigations" are "under all circumstances testimonial."

State v. Kennedy, 735 S.E.2d 905, 916-17 (W. Va. 2012). In Oklahoma, "[a] medical examiner's autopsy report in the case of a violent or suspicious death is indeed testimonial for Sixth Amendment confrontation purposes and [] the medical examiner who conducted the autopsy and authored the report is a witness within the meaning of the Confrontation Clause." *Miller v. State*, 313 P.3d 934, 969 (Ok. Crim. 2013) (internal quotation marks and citation omitted). And in *State v. Navarette*, 294 P.3d 435, 440-42 (N.M. 2013), the New Mexico Supreme Court determined that autopsy reports prepared during homicide investigations are testimonial because "[i]t is axiomatic" that medical examiners create such reports "with the understanding that they may be used in a criminal prosecution."

III. THE BUSINESS-RECORD APPROACH IS INCORRECT UNDER THIS COURT'S PRECEDENTS.

An autopsy report created in furtherance of a homicide investigation and concluding that a death was caused by homicide is the type of formal statement issued by an expert that this Court has already held is testimonial. In *Melendez- Diaz v. Massachusetts*, 557 U.S. 305 (2009), this Court held that formalized forensic reports fall within the "core class of testimonial statements" covered by the Confrontation Clause. *Id.* at 310. Such reports are created "under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Id.* at 311 (quoting *Crawford*, 541 U.S. at 52).

Here, as in *Melendez-Diaz*, the non-testifying expert was "aware of the [report's] evidentiary

purpose" and thus the report in question here must be deemed to be testimonial. *Id*. at 311. This is in accord with *Davis v. Washington*, 547 U.S. 813, 822 (2006), wherein it was held that statements are testimonial when "the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution."

In *Bullcoming v. New Mexico*, 564 U.S. 647 (2011), this Court similarly held that a forensic laboratory report establishing the defendant's blood alcohol content was testimonial. As in *Melendez-Diaz*, this Court stressed that the laboratory was required by state law to assist the police investigation; that the analyst "tested the evidence and prepared a certificate concerning the result of his analysis"; and that the certificate was "formalized" in a signed document. *Bullcoming* at 665.

The holdings in *Melendez-Diaz* and *Bullcoming*, properly construed, dictate that autopsy reports created as part of a homicide investigation and asserting that the death was caused by homicide are testimonial. As in those cases, forensic examiners producing autopsy reports are well aware that their reports will be used for prosecutorial purposes. Indeed, medical examiners under these circumstances are required by Ohio law to "promptly deliver [their reports] to the prosecuting attorney of the county in which such death occurred" if, "in the judgment of the coroner or prosecuting attorney, further investigation is advisable." Ohio Rev. Code § 313.09.

Furthermore, just like the reports in *Melendez-Diaz* and *Bullcoming*, autopsy reports are formalized documents, specially designed and certified for evidentiary use. State law demands that autopsy reports be "certified" and provides that they "shall be received as evidence in any criminal or civil action or

proceeding in a court in this state, as to the facts contained in [them]." *Id.* § 313.10.

In sum, autopsy reports in homicide cases are not mere business records. They are, irrefutably, testimonial statements that can be admitted at trial only in a manner that does not offend the Confrontation Clause.

IV. THIS COURT SHOULD HOLD THAT THE CATEGORICAL BUSINESS-RECORD APPROACH REGARDING AUTOPSY REPORTS IS UNCONSTITUTIONAL.

This case perfectly illustrates how autopsy reports can and do play a truly pivotal role in homicide cases. The conclusion of Dr. Challener, contained in the autopsy report, was that the decedent child was a "[f]ull term live born male infant." At the risk of stating the obvious, had the report found that a stillbirth occurred, or even that a determination on that question could not be made to a reasonable degree of medical certainty, then there would have been no homicide prosecution.

And that conclusion—that a live birth occurred—was admitted into evidence over objection, without counsel for Ms. Ritchey being able to confront Dr. Challenger about his finding. On direct appeal the state intermediate appellate court, constrained as it was to follow the incorrect business-record approach established in *Maxwell*, failed to correct the Confrontation Clause violation that occurred at trial. Thus, the business-record rule fashioned in *Maxwell* continues to thwart the truth-seeking role served by confrontation and cross-examination, as established in the Sixth Amendment and protected by *Crawford* and its progeny.

As to whether the particular autopsy report here was sufficiently formal to be deemed a testimonial statement, the state court did not question that aspect of the report. And the autopsy report was certainly a formal document for Sixth Amendment purposes, as the autopsy was performed by the Cuyahoga County coroner's office at the request of the Geauga County coroner's office, and the autopsy report served as the basis for the "coroner's verdict" in the latter county. Further, as established *supra*, state statutes require certification of such reports, another indicator of formality.

Additionally, it is of no significance that the autopsy report was not targeted at Ms. Ritchey as a suspect. Although the plurality in *Williams* would have required a report to be targeted at a specific individual in order to be deemed testimonial, five justices did not share that view. *See Williams*, 567 U.S. at 135.

Under a proper application of this Court's Confrontation Clause precedents, autopsy reports are testimonial when prepared in order to establish or prove facts to aid a homicide investigation. The autopsy report in this case was patently testimonial, as it was prepared with the anticipation that it would assist in a criminal prosecution for a homicide offense.

CONCLUSION

It has been 20 years since *Crawford* reestablished the proper role of the Confrontation Clause in criminal trials. Yet Ohio and numerous other jurisdictions still fail to extend basic Sixth Amendment protections to criminal defendants when the government seeks to introduce autopsy reports that involve critically important testimonial forensic pathology evidence. Because such forensic evidence is not

meaningfully distinguishable in nature and importance from other forms of forensic-expert testimony that are subject to *Crawford*'s requirements, the incorrectness of Ohio's approach can be readily demonstrated through a straightforward application of this Court's modern precedents. Multiple jurisdictions have arrived at the correct answer to this question, and a course correction should issue from this Court, one which will ensure that all courts in the nation *properly* apply the Sixth Amendment in this context.

Respectfully submitted,

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