No. 23-1181

IN THE

Supreme Court of the United States

GAIL M. RITCHEY,

Petitioner,

v.

THE STATE OF OHIO,

Respondent.

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

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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REPLY IN SUPPORT OF REASONS FOR GRANTING THE WRIT

In its response in opposition to the granting of the petition for a writ of certiorari, Respondent acknowledges that the issue presented – regarding the testimonial nature of an autopsy report and attendant testimony by a non-examining expert – is a source of national conflict and that "this Honorable Court will likely need to address this issue at a certain point." (Response, p. 1). Nonetheless, Respondent contends that this case is the wrong case for this Court to accept because the testifying pathologist, while not participating in the original autopsy, also testified about his own visual analysis of the decades-old tissue slides taken by the original, non-testifying, pathologist.[1] Respectfully, this circumstance, because it will frequently arise in these types of cases, makes this case all the more appropriate for this Court's plenary consideration. More importantly, this circumstance does not affect whether the autopsy report is testimonial.

In this case, Dr. Joseph Felo, the testifying pathologist who did not participate in the autopsy, testified about the autopsy report prepared by the original pathologist, Dr. Robert Challener. Twice, Dr. Felo testified that he

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1. Respondent also argues that the petition should not be granted because the decision below was rendered by an intermediate court of appeals. This Court's most recent Confrontation Clause case, *Smith v. Arizona, ,* 602 U.S. ___, 144 S.Ct. 1785, 1791-92, 219 L.Ed.2d 420 (2024), discussed *infra,* also involved an intermediate court's decision. Moreover, the decision below in this case was controlled by an earlier Ohio Supreme Court decision, *State v. Maxwell*, 9 N.E.3d 930 (Ohio 2014) which had held autopsy reports are not testimonial.

agreed with Dr. Challener's conclusion that this case involved a live birth and thus was a homicide. Dr. Felo's testimony cited to specific pages in the Challener autopsy report, including the observation that portions of the lung were "well aerated." And the Challener-prepared autopsy report was admitted into evidence over objection – thus providing every juror the opportunity to read Dr. Challener's observations and expert conclusions.

As this Court enunciated most recently in *Smith v. Arizona,* 602 U.S. ___, 144 S.Ct. 1785, 1791-92, 219 L.Ed.2d 420 (2024), the Confrontation Clause's concern about testimonial hearsay is a two-part concern. Out-of-court statements made by declarants whose testimony is not subjected to cross-examination only offend the Confrontation Clause when those statements are both testimonial and offered for their truth. The parties in this case filed their respective petition for certiorari and opposition thereto before *Smith* was decided.

The autopsy report admitted into evidence was offered for its truth, and also constituted a hearsay-based foundation for Dr. Felo's testimony. This runs afoul of the holding in *Smith,* which has made clear that the autopsy report in this case would be *hearsay*, both as a standalone document admitted into evidence, and as providing a basis for Dr. Felo's analysis.

But that leaves the question of whether the autopsy report was *testimonial*, an issue that *Smith* was not in a position to address but upon which the decision below hinged. As discussed in Ms. Ritchey's petition and the brief of amicus curiae Office of the Ohio Public Defender, and as acknowledged by Respondent, this issue is one on which

there is a national divide. And because autopsy reports are integral to homicide prosecutions, that national divide concerns the most serious of criminal cases.

CONCLUSION

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

Respectfully submitted,

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