

No. 14-1008

IN THE
Supreme Court of the United States

JEFFREY HARDIN

Petitioner,

v.

OHIO,

Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of Ohio

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The State never disputes that state courts of last resort are intractably divided over whether an autopsy report created as part of a homicide investigation, and concluding that the death was caused by homicide, is testimonial. Instead, the State endeavors to recast this case as not so much about Dr. Sohn's report as about Dr. Gorniak's in-court testimony. This Court should not be distracted. The question presented is whether the autopsy report that the State introduced into evidence is testimonial. That question is outcome-determinative. And the Ohio Supreme Court's decision is incorrect.

A. This Case Is An Excellent Vehicle To Resolve The Conflict Over The Testimonial Status Of Autopsy Reports.

1. The State argues for three reasons that, even if the autopsy report was testimonial, "no Confrontation Clause violation occurred in this case." BIO 19. The State did not make any of these arguments below, and for good reason: none has merit.

a. Concurring in *Bullcoming v. New Mexico*, 131 S. Ct. 2705 (2011), Justice Sotomayor indicated that the Confrontation Clause might allow the prosecution to ask "an expert witness . . . for his independent opinion about underlying testimonial reports that were not themselves admitted into evidence." *Id.* at 2722. The State suggests that this is "largely what occurred in this case." BIO 11; *accord* BIO 18.

There are two problems with this suggestion. First, the State ignores that, in contrast to Justice Sotomayor's hypothetical, the autopsy report here

was admitted into evidence. This fact is critical because the Confrontation Clause forbids the admission of declarants' testimonial statements absent an opportunity to cross-examine them. *Crawford v. Washington*, 541 U.S. 36, 59 (2004). And this rule applies with full force to testimonial forensic reports. *Bullcoming*, 131 S. Ct. at 2710; *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 310-11 (2009); see also *Williams v. Illinois*, 132 S. Ct. 2221, 2260 (2012) (Thomas, J., concurring in the judgment). Accordingly, the admissibility of Dr. Sohn's autopsy report turns solely on whether it is testimonial. See, e.g., *State v. Kennedy*, 735 S.E.2d 905, 917 (W. Va. 2012) (flatly prohibiting introduction of autopsy reports "where the performing pathologist or analyst does not appear at trial" because such reports are testimonial).¹

The State retorts that some of the state courts on petitioner's side of the conflict have suggested that they would allow the prosecution to introduce "raw data" – namely, photographs – to support a testifying coroner's independent opinions. BIO 16 (quoting *State v. Navarette*, 294 P.3d 435, 443 (N.M.), *cert. denied*, 134 S. Ct. 64 (2013)). But this is irrelevant; photographs do not contain statements and thus cannot be testimonial.

¹ In another case after *Bullcoming*, but before *Williams*, a testifying expert "expressed her own independent agreement with the non-testifying medical examiner's conclusions" about an autopsy report. *United States v. Ignasiak*, 667 F.3d 1217, 1234 (11th Cir. 2012). The Eleventh Circuit likewise held that the Confrontation Clause was violated because the report was testimonial and introduced into evidence. *Id.* at 1233.

Second, even if the prosecution had not introduced the autopsy report into evidence, Dr. Gorniak's testimony would still implicate the conflict over whether such reports are testimonial because Dr. Gorniak did more than simply offer "independent" opinions. In *Davis v. Washington*, 547 U.S. 813 (2006), the Court made clear that just as the Confrontation Clause prohibits introducing a document containing a nontestifying witness's testimonial statements, it likewise prevents a testifying witness from orally relaying a nontestifying witness's testimonial statements to the jury. *Id.* at 826; see also *Melendez-Diaz*, 557 U.S. at 334 (Kennedy, J., dissenting) ("The Court made clear in *Davis* that it will not permit the testimonial statement of one witness to enter into evidence through the in-court testimony of a second."). And just like *Crawford's* rule governing the introduction of testimonial documents themselves, this rule regarding oral disclosures of the contents of testimonial documents applies with full force to forensic evidence. See *Bullcoming*, 131 S. Ct. at 2715-16; *Williams*, 132 S. Ct. at 2256-59 (Thomas, J., concurring in the judgment).

Consequently, state courts holding that autopsy reports are testimonial also hold that even if a testifying expert purports to offer an independent opinion, the Confrontation Clause precludes the expert from orally transmitting facts or opinions from the report. See *Commonwealth v. Reavis*, 992 N.E.2d 304, 312 (Mass. 2013) (expert "may not . . . testify to facts in the underlying autopsy report"); *Navarette*, 294 P.3d at 435, 436-37 (violation where expert "repeated [the nontestifying analyst's] assertion[s] in the report"); *Miller v. State*, 313 P.3d 934, 970 (Ok.

Crim. App. 2013) (violation where expert “present[ed] [nontestifying analyst’s] findings and conclusions” and “repeatedly referred” to the autopsy report); *State v. Lui*, 315 P.3d 493, 510-12 (Wash.) (violation because expert “testified to statements taken directly from the autopsy report”), *cert. denied*, 134 S. Ct. 2842 (2014).²

That is what happened here. The prosecution handed Dr. Gorniak a copy of the autopsy report (Tr. 91) and asked her to “describe what was found in the external and internal examinations” performed by Dr. Sohn. Tr. 94. She replied that the report “starts out describing the body . . . [and] he describes the injury that uh, - that he saw on uh, Jeffrey Hardin’s head and arm.” *Id.*; see also Tr. 95 (“what we’re seeing here is what Dr. Sohn is [sic] documented as subdural hemorrhage”). What is more, she told the fact finder that “Dr. Sohn’s conclusion” was that petitioner’s baby died from being shaken. Tr. 125. Dr. Gorniak conceded that she could not have reached her conclusions “[j]ust looking at the pictures” in the autopsy. Tr. 114-15.

In short, this case implicates the conflict over the testimonial status of autopsy reports not only because the prosecution introduced the report at issue (which

² The State notes that in *Miller*, the testifying analyst did not “provid[e] his own independent conclusions.” BIO 17. True enough. But the Oklahoma Court of Criminal Appeals made clear as a general matter that the analyst could not have transmitted the contents of the autopsy report unless the defendant “ha[d] the opportunity to cross-examine the medical examiner *who conducted the autopsy*.” 313 P.3d at 969 (emphasis added).

itself is more than enough to necessitate review), but also because Dr. Gorniak transmitted the report's contents to the jury.

b. Citing another portion of Justice Sotomayor's concurrence in *Bullcoming*, the State argues that Dr. Gorniak's status as a "supervisor" permitted the prosecution to introduce Dr. Sohn's report without putting him on the stand. BIO 19-20; *accord* BIO 28. But Justice Sotomayor never suggested that a supervisor's mere *post hoc* review of another analyst's scientific testing might enable the prosecution to introduce the analyst's testimonial report without putting that analyst on the stand. Rather, Justice Sotomayor indicated only that "a supervisor *who observed an analyst conducting a test*" might be able to testify to the results of that test. *Bullcoming*, 131 S. Ct. at 2722 (emphasis added).

Dr. Gorniak did not observe Dr. Sohn conducting the autopsy. Tr. 107-08. Nor did she play any role in drafting his report. *Id.* Just as in *Bullcoming*, therefore, petitioner's opportunity to cross-examine Dr. Gorniak could not substitute for his right to ask Dr. Sohn questions concerning "the particular test and testing process [Dr. Sohn] employed," nor for petitioner's right to seek to "expose any lapses or lies" on Dr. Sohn's part. 131 S. Ct. at 2715. Nor could Dr. Gorniak's presence on the stand provide petitioner with an opportunity to probe why Dr. Sohn – like the analyst who wrote the report in *Bullcoming* – was no longer working in the office. *Id.*; *see also* Tr. 113-14.

c. The State suggests that the autopsy report was admissible because it merely provided "helpful background information" for Dr. Gorniak and has "no legal effect" apart from Dr. Gorniak's report. BIO 20.

But state law is clear: regardless of whether autopsy reports are introduced on their own or in conjunction with coroner's reports, "autopsy" reports themselves "shall be received as evidence in any criminal or civil action . . . as to the facts contained in those records." Ohio Rev. Code § 313.10. And once it is clear that the autopsy report was introduced for the truth of the matter asserted, it is equally clear that it does not matter how it related to Dr. Gorniak's testimony or her report. All that matters is whether the autopsy report was testimonial. *See Williams*, 132 S. Ct. at 2256-58 (Thomas, J., concurring in the judgment).

2. The State asserts that the Ohio Supreme Court's decision is unsuitable for review because it is a "short, two-sentence decision." BIO 14. But this Court routinely grants certiorari in cases in which state high courts provide no reasoning at all. *See, e.g., Riley v. California*, 134 S. Ct. 2473, 2481 (2014); *Melendez-Diaz*, 557 U.S. at 309. So long as the state high courts have previously decided the question presented, and the state intermediate court issued a reasoned decision in the case, such cases are just as fit for review as any other. And here, the Ohio Court of Appeals explicated the facts of the case and held that the autopsy report at issue was not testimonial. *See* Pet. App. 2a-8a. The Ohio Supreme Court went a step further, expressly affirming "on the authority of" its earlier decision. Pet. App. 1a.

3. Lastly the State argues that any error was harmless. BIO 21-24. The state courts have never addressed that issue, and this Court customarily declines to address harmlessness "in the first instance," leaving it instead for remand. *Melendez-Diaz*, 557 U.S. at 329 n.14; *accord Bullcoming*, 131 S.

Ct. at 2719 n.11. In any event, the State's contentions are hard to take seriously.

a. The State suggests that Dr. Gorniak's testimony rendered Dr. Sohn's autopsy report irrelevant. BIO 22. Yet a doctor that the prosecution itself put on the stand described the autopsy report as "the gold standard" for establishing a child's cause of death. Tr. 359; *see also* Tr. 407-09. And Dr. Gorniak herself admitted that she "had to rely on the facts underlying Dr. Sohn's autopsy report" for many of her opinions. Pet. App. 5a; *see also supra* at 4-5.

Even if Dr. Gorniak had offered an opinion wholly divorced from the information in the report, the report still would have played a pivotal role here by "bolster[ing]" her views. *United States v. Soto*, 720 F.3d 51, 60 (1st Cir. 2013). Particularly when a highly contestable determination such as "shaken baby syndrome" is at stake, the presence of two forensic opinions instead of one is bound to have a significant effect on the fact finder.

b. The State also points to non-forensic evidence supposedly rendering the autopsy report cumulative. BIO 22-24. But the "bruising" the State mentions did not come close to proving how the baby died, much less prove the cause of death so overwhelmingly as to render admission of the autopsy report harmless. The prosecution's witnesses testified that the bruises could have resulted from the child crawling around normally, Tr. 230-31, and they appeared only after extensive resuscitation efforts that required technicians to grip and push on the child's face and abdomen, Tr. 57-61. Even then, one of the State's experts testified that the force that led to these

bruises was insufficient to cause the child's death. Tr. 401-02.

The letter stating that Hardin “shook [his child] a couple of times” (BIO 23-24) is similarly inconclusive. The question here is not whether petitioner shook his child on the couch cushions or otherwise. It is whether any shaking caused the baby to die. Only the autopsy report could try to show that. And given the “fierce debate” about whether or when shaken baby diagnoses are valid, cross-examination of forensic analysts who make such allegations is indispensable. Debbie Cenziper, *Shaken Science: A Disputed Diagnosis Imprisons Parents*, Wash. Post (Mar. 20, 2015); *see also id.* (noting that over 200 “shaken baby” cases have “unraveled” in recent years); Pet. 20-21; Br. of Innocence Network 10-26 (detailing risks of wrongful convictions in this context); Br. of NACDL 3-17 (detailing reasons why cross-examining medical examiners is vital).

B. The Question Presented Warrants This Court's Attention.

Noting that this Court has “repeatedly denied petitions” in recent years that raised the question whether autopsy reports are testimonial, the State asserts that the petition “offers no grounds” why this case warrants different treatment. BIO 11-12. Petitioner, however, has already explained why all but one of those previous cases were inferior vehicles for resolving this issue. *See* Pet. 16-21.

That leaves the State's rather remarkable assertion that if *State v. Maxwell*, 9 N.E.3d 930 (Ohio 2014), *cert. denied*, 135 S. Ct. 1400 (2015), “was not worthy of this Court's attention, there is no reason

why” this case would be. BIO 14. Not so. The Ohio Supreme Court held there that “[e]ven if there was error in admitting the coroner’s testimony and the autopsy report,” any such error was “harmless.” *Maxwell*, 9 N.E.3d at 952. In order to reverse in that case, therefore, this Court would have had to hold not only that the Confrontation Clause was violated but also that the Ohio Supreme Court misapplied well-settled harmless-error principles. By contrast, no such alternative holding exists here. All this Court need determine is whether the autopsy report is testimonial.

At any rate, it is customary for this Court to let issues percolate before granting certiorari. And Confrontation Clause jurisprudence has followed that pattern. Before granting certiorari in *Melendez-Diaz*, this Court rejected at least one petition on the same issue. *See State v. Campbell*, 719 N.W.2d 374 (N.D. 2006), *cert. denied*, 549 U.S. 1180 (2007). Likewise, the Court granted certiorari *Bullcoming* just a few months after denying review in a similar case. *See Pendergrass v. State*, 913 N.E.2d 703 (Ind. 2009), *cert. denied*, 560 U.S. 965 (2010). The time has now come to resolve the conflict over autopsy reports.

C. The Ohio Supreme Court’s Decision Is Incorrect.

In light of the depth of the conflict over the testimonial status of autopsy reports, the State’s arguments on the merits provide no reason to deny certiorari. No matter which side of the conflict is correct, this Court needs to correct a serious misapprehension of constitutional law that is infecting homicide prosecutions in numerous states.

Even on their own terms, however, the State's arguments are unpersuasive. Petitioner has already answered the State's arguments that autopsy reports are "not undertaken to accuse anyone" and that the possibility that medical examiners might become unavailable after writing their reports should somehow render such reports nontestimonial. See Pet. 25-27. Petitioner also has explained that the "primary purpose" of autopsy reports created in furtherance of homicide investigations is to create evidence potentially relevant to later criminal prosecutions. *Id.* at 22-25. The State tries to obscure that reality, suggesting that autopsy reports are really just designed to aid coroners in carrying out their duties. BIO 25. But this narrow function is part and parcel of the overall purpose of facilitating criminal prosecutions – as evidenced by the state laws requiring autopsy reports when necessary to aid "law enforcement officials" and making autopsy reports admissible as substantive evidence at trial. Ohio Rev. Code §§ 313.10, -.12.

All that remains is the State's argument – never previously advanced in this case – that the autopsy report is not "sufficiently solemn" to be testimonial. BIO 27-28. The State is incorrect. Ohio law requires autopsy reports to be "certified" before being introduced as evidence, Ohio Rev. Code § 313.10, and the report here was, in fact, certified in combination with the coroner's report. Pet. App. 14a-16a. The State responds that Dr. Gorniak was the one who certified the report, while "Dr. Sohn merely signed the report at the end." BIO 27. But even if one could parse the report in this manner, Dr. Sohn signed it under a state law rendering it illegal to "knowingly make a false statement" in any "report" that, as here,

“is required or authorized by law.” Ohio Rev. Code § 2921.13(A)(7). That is more than enough to establish formality. *See Williams*, 132 S. Ct. at 2260 (Thomas, J., concurring in the judgment) (undertaking legal obligation to write accurate report satisfies solemnity requirement).

Lest there be any doubt, *Melendez-Diaz*’s formality requirement is intended to ensure that the Confrontation Clause’s application to forensic evidence “comports with history.” *Williams*, 132 S. Ct. at 2260 (Thomas, J., concurring in the judgment). Petitioner has explained that reports declaring the cause and manner of death were historically inadmissible without live testimony from their authors. Pet. 23-24. The State offers no response. It is time, therefore, for this Court to restore that time-honored guarantee to criminal defendants in Ohio and elsewhere.

CONCLUSION

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

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