
No. 14-

IN THE
SUPREME COURT OF THE UNITED STATES

ROGER L. WHEELER,

Cross-Petitioner

v.

RANDY WHITE, WARDEN

Cross-Respondent

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

CAPITAL CASE

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CAPITAL CASE QUESTIONS PRESENTED

Roger Wheeler was not on trial for killing a fetus. He did not even know one of the two victims was pregnant. That victim also did not know she was pregnant. Apparently, no one knew she was pregnant until the medical examiner detected a small embryo as an incidental finding during the autopsy. As no one disputes, the victim's pregnancy was irrelevant to any issue in the case. Yet, over defense objection, the trial judge permitted the prosecutor to introduce to the jury evidence of the victim's pregnancy because even without the victim being aware of her pregnancy, being pregnant defined who she was as a person. With a large amount of the population viewing the murder of a pregnant woman to automatically include the murder of her fetus, the prosecutor jumped at the opportunity to present the irrelevant evidence of the victim's pregnancy. The prosecutor elicited from the medical examiner that one of the victims was pregnant at the time of her death. Then, he emphasized the pregnancy in dramatic fashion at a strategically placed point during his sentencing phase closing argument to inflame the jury's passions. During deliberations, the jury asked the court what would happen if it sentenced the defendant to death for one murder but not for the other. After the judge addressed that, the jury returned with a verdict imposing a death sentence for the murder of the pregnant woman but not for the murder of the non-pregnant victim.

Wheeler continuously argued in state and federal court that the evidence of the victim's pregnancy and the resulting closing argument by the prosecutor violated his federal due process rights. The Sixth Circuit denied relief under 28 U.S.C. §2254(d) because there was no "clearly established" Supreme Court law that references at trial to the murder of a pregnant woman violates due process.

The United States Court of Appeals for the Sixth Circuit's decision gives rise to the following questions presented:

- I. Does the Sixth Circuit's ruling that the lack of Supreme Court case law holding that references to a victim's pregnancy when the pregnancy is not an issue at trial violates due process means no "clearly established" law exists for purposes of 28 U.S.C. §2254(d) conflict with this Court's rulings in *White v. Woodall*, 134 S.Ct. 1697 (2014), *Marshall v. Rodgers*, 133 S.Ct. 1446 (2013); *Panetti v. Quarterman*, 551 U.S. 931 (2007); *Yarborough v. Alvarado*, 541 U.S. 652 (2004), and *Williams (Terry) v. Taylor*, 529 U.S. 362 (2000), that "clearly established" law does not require a case with an identical fact pattern but instead includes legal principles and standards flowing from precedent and general standards designed to apply to a myriad of factual situations?

- II. Is this Court's standard that a state evidentiary ruling can be so egregious as to deny a defendant fundamental fairness and thus violates the federal due process clause sufficiently broad enough to constitute the "clearly established" law that would apply when the prosecution introduces evidence of a victim's pregnancy that is not relevant to an issue in dispute and when both the victim and the defendant were unaware of the victim's pregnancy; and, if so, did the evidence regarding the victim's pregnancy and the prosecutor's ensuing argument rise to the level of a due process violation to the point by which the the state court's decision is "contrary to" or an "unreasonable application of" this "clearly established" law?

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Cross-Petitioner, Roger L. Wheeler, requests that if this Court grants Cross-Respondent's (the Warden) Petition for Writ of Certiorari, it also issue a writ of certiorari to review the United States Court of Appeals for the Sixth Circuit's denial of Wheeler's federal due process claim concerning the admission of irrelevant and inflammatory evidence about one of the victims's pregnancy, even though neither Wheeler nor the victim was aware of the pregnancy and even though the pregnancy had nothing to do with the prosecution's proof at trial or any factual issue in dispute at trial. The Sixth Circuit held that there was no "clearly established" Supreme Court law regarding the admissibility of, or inflammatory nature of, evidence of a

victim's pregnancy when it has nothing to do with the crime for which a defendant had been charged and nothing to do with the prosecution's proof at trial. Whether the Sixth Circuit's narrow interpretation of "clearly established" law and requirement that there must be a Supreme Court case specific to the pregnancy issue for their to be any "clearly established" law conflicts with this Court's opinions on what satisfies the "clearly established" law requirement of 28 U.S.C. §2254(d) and is the subject of this Petition for a Writ of Certiorari.

OPINIONS BELOW

The Sixth Circuit panel's decision in *Wheeler v. Simpson* is published at 779 F.3d 366 (6th Cir. 2015) and appears at pages 1a-77a of the appendix to the Warden's Petition for a Writ of Certiorari in *White v. Wheeler*, No. 14-1372. The District Court, in an unpublished Order, adopted in full the Findings of Fact, Conclusions of Law and Recommendation of the Magistrate Judge. That order appears at pages 78a-79a of the appendix to the Warden's Petition for a Writ of Certiorari in *White v. Wheeler*, No. 14-1372. The portion of the Magistrate Judge's ruling regarding the pregnancy claim was not included as part of the appendix to the Warden's Petition for a Writ of Certiorari and is therefore included as the appendix to this Cross-Petition. The published Kentucky Supreme Court opinion dealing with the pregnancy issue was its opinion affirming Mr. Wheeler's convictions and death sentence on direct appeal. *Wheeler v. Commonwealth*, 121 S.W.3d 173 (Ky. 2013). That opinion appears at pages 88a-119a of the appendix to the Warden's Petition for a Writ of Certiorari in *White v. Wheeler*, No. 14-1372.

Throughout the rest of this Cross-Petition, Wheeler will refer to pages within the appendix to the Warden's Petition for a Writ of Certiorari as Warden's Petition Appendix at __.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Sixth Circuit entered its opinion and judgment granting the writ of habeas corpus with regard to one sentencing phase issue, not reaching the other sentencing phase issues because doing so was unnecessary in light of its grant of relief on the issue for which the Warden has sought certiorari, and denying habeas relief on all of the guilt phase issues, on February 20, 2015. *Wheeler v. Simpson*, 779 F.3d 366 (6th Cir. 2005), Warden's Petition Appendix at 1a-77a. Neither party sought rehearing. The Warden filed a timely Petition for a Writ of Certiorari, *White v. Wheeler*, No. 14-1372. Wheeler's Brief in Opposition was due on June 18, 2015, but he was granted an extension of time through August 17, 2015. Because an extension of time is not possible for a conditional cross-petition for a writ of certiorari, Wheeler's conditional cross-petition is due, under this Court's rules, thirty days after the Warden's Petition for a Writ of Certiorari was docketed (June 18, 2015), or, put another way, on the same date the Brief in Opposition would have been due if an extension of time had not been granted. This conditional cross-petition has been timely filed on June 18, 2015. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in relevant part: "... nor shall any State deprive any person of life, liberty, or property, without due process of law[.]”

28 U.S.C. § 2254 (d)(1) provides:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in the State court proceedings unless the adjudication of the claim resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States[.]

STATEMENT OF THE CASE

It is undisputed that there is no evidence that victim Nairobi Warfield was aware of her pregnancy by the time of her death. It is undisputed that her pregnancy had nothing to do with her murder. It is undisputed that her pregnancy made it neither more nor less likely that she could have survived her injuries. It is undisputed that her pregnancy had nothing to do with the prosecutor's proof at trial. And, it is undisputed that the person who was ultimately charged with the murder, Roger Wheeler, was unaware of Warfield's pregnancy. Simply, Warfield's pregnancy was a surprise to all, including the prosecution. It was an incidental finding at the autopsy where the medical examiner found a small embryo in a little sac with a placenta. Although, it had nothing to do with anything in the case, the prosecution used victim Warfield's pregnancy to his advantage at both the guilt and sentencing phase, the latter of which included a powerfully delivered and emotionally charged comment regarding victim Warfield's pregnancy.¹

During the guilt-phase of Wheeler's capital murder trial for the stabbing deaths of Warfield and Nigel Malone, who lived with her, the prosecutor was permitted, over defense objection, to inform the jury that Warfield was pregnant at the time of her murder. The trial judge permitted the prosecution to do so, not

¹ Wheeler notes that during an election and a re-election for a contested seat on the Kentucky Supreme Court, the candidate who won both times (beating the incumbent the first time around) used the victim's pregnancy in *this case* as a significant part of his campaign and emphasized that his opponent had voted to reverse Wheeler's death sentence because the jury had been informed that one of the two victims was pregnant at the time of her death.

because it was relevant to an issue before the jury but instead because she believed it was who Warfield was as a person even though there is no evidence Warfield had any idea she was pregnant. The jury convicted Wheeler of capital murder, resulting in the case proceeding to the sentencing phase.

At the sentencing phase, Wheeler presented undisputed evidence that he had no criminal convictions until he was well into his 30's, when his drug addiction, for which he had sought help, became uncontrollable. Wheeler also presented undisputed evidence of his strong work record (having successfully held a job at Norton's Hospital for more than a decade), that he had been a model inmate during a prior incarceration, that he was a good father to his son, and that he was a loving person who ran into trouble only while he was addicted to drugs.

Wheeler's mother and son testified that Wheeler was a loving person and a hard-worker who had never been in trouble except when he was addicted to drugs. Wheeler's wife, Kathy, testified that her husband tried very hard to overcome his drug addiction, but had been unsuccessful. Dr. Arthur Meyer, an expert in the diagnosis and treatment of people with chemical dependency, testified that Wheeler was able to avoid lapsing into drug addiction when he was in a controlled environment. Dr. Meyer diagnosed Wheeler as being cocaine dependent, which created the most intense craving of any form of chemical dependency, and which contributed to Wheeler's criminality. Dr. Meyer also testified that several mitigating factors were present, including as follows: 1) Wheeler had no criminal record before the onset of his cocaine addiction; 2) Wheeler's crimes were committed

when his addiction was at its worst; 3) Wheeler posed no threat to society if imprisoned; 4) Wheeler had a generally positive influence on his family when he was not under the influence of cocaine; and, 5) Wheeler had a long history of being a stable, hard worker and a faithful employee. But, this was not all the mitigating evidence Wheeler presented.

Wheeler also presented testimony from five witnesses with knowledge of his adjustment to incarceration, including a correctional officer, a food service manager, an inmate, a chaplain, and a caseworker, all of whom had worked with Wheeler at Luther Lockett Correctional Complex following his prior unrelated conviction for a drug-related crime and during his pretrial detention in this case. These witnesses testified about Wheeler's job in the property room, which demonstrated his reliability and trustworthiness. They also testified that Wheeler never exhibited aggressive or violent behavior while incarcerated, and that Wheeler worked well with staff and inmates, did not pose any disciplinary problems, enrolled in programs, and tried to improve himself, particularly with regard to his drug addiction.

As this demonstrates, this is not a case where the defendant had little to no redeeming values or nothing from which the jury could rely upon as a basis to impose a sentence of less than death. Yet, the mitigating value of any of this evidence was undercut when the prosecutor emphasized victim Warfield's pregnancy during his sentencing phase closing argument. In addition to referring to Wheeler as "stupid," as self-pitying, as making "excuses" for his conduct, and as a

“liar,” during closing argument, the prosecutor called Wheeler’s defense and his attorneys “ridiculous,” accused them of pulling tricks on the jury, and told the jury the defense was trying to “O.J. you.” This emotional appeal came to a crescendo when the prosecutor told the jury that Warfield was “a normal person. She loved a guy named Nigel. He loved her,” and “[s]he was pregnant.”

For all practical purposes as to whether the death penalty should be imposed, only one thing differentiated the murder of Warfield from the murder of Malone – Warfield was pregnant. The jury recognized the difference, as evidence by the jury sending the judge a note during deliberations asking the court what would happen if it imposed a death sentence for killing one victim but not for killing the other victim. After the judge answered the jury’s question, the jury returned a verdict of the death penalty for the murder of pregnant Warfield, but less than death for the murder of Malone.

Wheeler then appealed his convictions and death sentences through the state and federal courts, raising a federal due process claim regarding both the jury being informed that victim Warfield was pregnant and the prosecutor’s reliance on the pregnancy during his sentencing phase closing argument.

HOW THE FEDERAL QUESTION WAS RAISED BELOW

Prior to trial, Wheeler's attorney moved to exclude evidence of Warfield's pregnancy (and any argument related to it) on the ground that it was irrelevant, lacked probative value, and was unduly prejudicial. The trial court denied Wheeler's motion, ruling that being pregnant was who Warfield was - this even though there was no evidence that Warfield was aware she was pregnant.

On direct appeal to the Kentucky Supreme Court, Wheeler raised a federal due process claim that his rights were violated when the the prosecutor was allowed to introduce evidence of the victim's pregnancy. In rejecting this claim, the Kentucky Supreme Court noted that "evidence about whom and what the victim was prior to death was properly admitted" because the victim's pregnancy "related to her physical condition," and thus "the jury was entitled to hear such evidence." *Wheeler v. Commonwealth*, 121 S.W.3d 173 (Ky. 2003), Warden's Petition Appendix at 96a. One justice concurred, concluding that the pregnancy evidence was inadmissible but harmless error. *Id.*, Warden's Petition Appendix at 117a. Another justice dissented, concluding that the evidence was not admissible, was unnecessary to explain to the jury who the victim was, had no bearing on the prosecution's proof at either the guilt or sentencing phases of the trial, and was extremely prejudicial because it would in general, and did here, paint for the jury Wheeler as the "murderer of a mother and her unborn child." *Id.*, Warden's Petition Appendix at 118a-119a.

Having exhausted the claim on direct appeal, Wheeler next raised the claim before the federal district court as part of his federal habeas petition. There, he argued, and cited, federal constitutional principles and United States Supreme Court law for the proposition that federal due process is violated and habeas relief warranted when a state evidentiary ruling is so egregious that it results in a denial of fundamental fairness. Rejecting the Warden's procedural default argument, the magistrate judge (and the district court judge through full and complete adoption of the magistrate judge's findings and recommendation) held that Wheeler exhausted the federal constitutional claim in state court when he argued to the Kentucky Supreme Court that admission of the pregnancy evidence violated his federal due process rights. Appendix at 2.

The magistrate judge (and thus the district court judge) then recognized that there is "clearly established" United States Supreme Court law holding as a general principle that when a state evidentiary ruling is so egregious that it results in a denial of fundamental fairness, due process is violated. Appendix at 6.² Making unmistakably clear that "clearly established" law existed without the need to present a Supreme Court case dealing specifically with the pregnancy issue, the magistrate judge also stated the following: the court "does not suggest *even momentarily* that Wheeler, in order to prevail, must provide a clearly established

² Admittedly, the magistrate judge cited Sixth Circuit cases but those cases dealt with and relied upon this Court's general clearly established law regarding when a state evidentiary ruling violates due process. The magistrate judge therefore did not rely on Sixth Circuit law as the clearly established law but instead cited Sixth Circuit cases articulating the applicable legal standard this Court adopted and has since relied upon over the years.

U.S. Supreme Court decision that favorably deals with pregnancy in the context of a due process challenge to the admission of such evidence at trial.” Appendix at 8, n.8 (emphasis added).

The magistrate judge (and thus the district court judge) then proceeded to determine whether the state court’s adjudication of the claim resulted in a decision that was an “unreasonable application of” that clearly established law, ultimately concluding that the references to victim Warfield’s pregnancy were not significant enough to render Wheeler’s trial fundamentally unfair. Appendix at 6-8.

Recognizing that reasonable jurists could conclude that the state court’s decision that the prosecutor’s usage of the evidence of Warfield’s pregnancy was permissible was an “unreasonable application of” the applicable “clearly established” law, the magistrate judge (and thus the district court judge) granted a certificate of appealability on Wheeler’s pregnancy claim.

Before the Sixth Circuit, the Warden correctly abandoned his erroneous procedural default argument, thereby eliminating any issue of default and thus placing the merits of Wheeler’s pregnancy claim squarely before the Sixth Circuit. That court then addressed the claim solely on its merits, but rejected it after reaching a conclusion opposite that of the district court as to what constitutes “clearly established” law. The district court had recognized, consistent with a long line of cases from this Court, that it is clear that Supreme Court law regarding whether evidence of pregnancy can violate due process was not necessary for applicable “clearly established” law to exist. The Sixth Circuit then held the

opposite, holding that there was no applicable “clearly established” law because no United States Supreme Court decision has held that references to a murder victim’s pregnancy have been held to be so egregious that the due process clause was violated. *Wheeler*, 779 F.3d at 375; Warden’s Petition Appendix at 16a-17a.³ In other words, the Sixth Circuit believed that there had to be a case square on all fours – a United States Supreme Court case dealing specifically with the pregnancy issue – for there to be any “clearly established” law applicable to Wheeler’s claim and thus for him to have any chance to prevail in federal court on his claim. With there being none, the Sixth Circuit rejected Wheeler’s claim.

The Warden has since sought certiorari on the issue on which the Sixth Circuit granted the writ of habeas corpus with regard to the sentencing phase of Wheeler’s trial. Wheeler now files this conditional cross-petition for a writ of certiorari because the Sixth Circuit’s extremely narrow interpretation of what is necessary for there to be “clearly established” law is inconsistent and incompatible with multiple cases from this Court that hold the “clearly established” law requirement of 28 U.S.C. §2254(d) does not require a case to be square on all fours and that a legal principle can be so general that it would constitute the “clearly established” law for a myriad of different factual circumstances.

³The Sixth Circuit failed to consider, or at least did not reference, the fact that neither the victim nor the defendant knew the victim was pregnant.

REASONS FOR GRANTING THE WRIT

That a federal due process violation occurs when a state evidentiary ruling is so egregious that it deprived the defendant of fundamental fairness constitutes the “clearly established” law applicable to Wheeler’s pregnancy claim is so clear that there should be no debate as to whether the Sixth Circuit’s decision conflicts with this Court’s decisions articulating what is sufficient to constitute “clearly established” Supreme Court law. Summary reversal with a remand to the Sixth Circuit to apply the applicable “clearly established” law would therefore be an appropriate action to take with regard to the pregnancy claim if this Court takes the unlikely step of granting the Warden’s Petition for a Writ of Certiorari to address a highly fact-specific issue merely seeking error correction on a matter that quite possibly will never again arise. However, if this Court grants the Warden’s Petition for a Writ of Certiorari and if this Court does not then summarily reverse and remand on the pregnancy claim, plenary review would be appropriate after which this Court should then still reverse and remand for the Sixth Circuit to address the pregnancy claim under the “clearly established” due process law that is designed to apply to a myriad of circumstances. As a final alternative, this Court should address itself whether the pregnancy evidence was so prejudicial in Wheeler’s case that it amounted to a denial of fundamental fairness and thus deprived Wheeler of due process.

The Sixth Circuit's decision that there must be a United States Supreme Court case holding that introduction of evidence of pregnancy that is not relevant to an issue at trial violates due process for there to be any applicable "clearly established" law conflicts with a series of decisions from this Court repeatedly stating with regard to the important federal issue of what constitutes "clearly established" law that there need not be a case square on all fours and that a general legal principle can constitute the applicably "clearly established" law for a myriad of circumstances.

A. The Sixth Circuit's decision conflicts with this Court's decisions.

"The writ of habeas corpus stands as a safeguard against imprisonment of those held in violation of the law. Judges must be vigilant and independent in reviewing petitions for the writ, a commitment that entails substantial judicial resources." *Harrington v. Richter*, 562 U.S. 86, 91 (2011). This safeguard would be nearly eviscerated if federal courts had to await a nearly identical Supreme Court case, or a case on such a narrow issue as evidence of pregnancy in a criminal case in which neither the victim nor the defendant knew the victim was pregnant, for "clearly established" law to exist. Perhaps recognizing this and likely realizing it would be patently unfair for "clearly established" law to exist only if this Court addresses the issue when the issue is rare enough that it would not be worthy of this Court's review, this Court has routinely, repeatedly, and emphatically ruled that a federal court need not wait for a nearly identical case. "Clearly established" Supreme Court law is much broader than that.

The absence of a fact specific statement of a rule is not determinative of whether clearly established Supreme Court law exists. *Panetti v. Quarterman*, 551 U.S. 930, 953 (2007). As recently as last Term, this Court reiterated that §2254(d)(1)

does not require an “identical factual pattern before a legal rule must be applied.” *White v. Woodall*, 134 S.Ct. 1697, 1706 (2014), *quoting Panetti*, 551 U.S. at 953. This Court has repeatedly held the same prior to *Woodall*. *See, e.g., Marshall v. Rodgers*, 133 S.Ct. 1446, 1449 (2013); *Panetti*, 551 U.S. at 953; *Yarborough v. Alvarado*, 541 U.S. 652, 664, 666 (2004). Rather than require a case with an identical fact pattern or a case “square on all fours,” “clearly established” law includes “the legal principles and standards flowing from precedent,” *Panetti*, 551 U.S. at 953, and “a general standard from this Court’s cases can supply such [clearly established] law.” *Rodgers*, 133 S.Ct. at 1449, *quoting Alvarado*, 541 U.S. at 666 (2004).

Legal principles, by definition, apply to diverse factual situations. Those situations can differ in innumerable ways so long as they are analogous on the point to which the legal principle applies. “If the rule in question is one which of necessity requires a case-by-case examination of the evidence, then we can tolerate a number of specific applications without saying that those applications themselves create a new rule . . . Where the beginning point is a rule of this general application, a rule designed for the specific purpose of evaluating a myriad of factual contexts, it will be the infrequent case that yields a result so novel that it forges a new rule, one not dictated by precedent.” *Wright v. West*, 505 U.S. 277, 308-09 (1992) (Kennedy, J., concurring).

In *Williams v. Taylor*, 529 U.S. 362, 391 (2000), this Court adopted this approach as to what constitutes “clearly established” law, and then used it to

recognize that the ineffective assistance of counsel standard is one such broad, general standard that applies to the myriad of factual circumstances that can arise in any individual case. This Court has since applied this approach regularly and has repeatedly reaffirmed its applicability as to what constitutes “clearly established” law, including, as noted above, as late as last Term. It is therefore clear that the “clearly established” law requirement of 28 U.S.C. §2254(d) does not require there to be a Supreme Court case with nearly identical facts, but instead permits reliance on this Court’s general principles and rules that are designed to apply to a myriad of factual circumstances. While this Court’s law in this regard is clear, the Sixth Circuit simply got this significant issue about the meaning of “clearly established” law wrong, resulting in a decision that conflicts with multiple cases from this Court.

The Sixth Circuit correctly recognized that 28 U.S.C. §2254(d) applies to Wheeler’s pregnancy claim and that relief had to therefore be denied unless the state court’s decision “was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.” §2254(d)(1). It was in applying this limitation on relief that the Sixth Circuit veered off path. It never truly reached the “contrary to” or the “unreasonable application of” prong because it got hung up incorrectly on whether there was any “clearly established” law, ultimately concluding that there was not. Noting that no Supreme Court case held that references to pregnancy is egregious enough to violate due process, the Sixth Circuit held that no “clearly established” Supreme Court law directly on the pregnancy issue exists and thus Wheeler’s claim failed

under §2254(d)(1). *Wheeler*, 779 F.3d at 375, Warden’s Petition Appendix at 16a-17a.

In so ruling, the Sixth Circuit failed to recognize that the “clearly established” law requirement does not require a Supreme Court case addressing nearly identical facts but instead includes general legal principles, such as the due process standard regarding state evidentiary rulings that are so egregious that it denied the defendant fundamental fairness. Simply, the Sixth Circuit’s ruling as to what is required for there to be “clearly established” law is incompatible with, and irreconcilable with *Woodall*, *Rodgers*, *Panetti*, *Alvorado*, and *Williams (Terry)*. This Court should therefore reverse the Sixth Circuit’s ruling with regard to the pregnancy issue and remand for further proceedings consistent with this Court’s opinion, to wit, to apply the general due process standard that is applicable to Wheeler’s type of claim to determine whether, under the facts of Wheeler’s case, habeas relief should be granted on the pregnancy claim.

B. The clearly established principle that the federal due process clause is violated when a state evidentiary ruling is so egregious that it denied a defendant fundamental fairness applies to Wheeler’s pregnancy claim.

While this Court could reverse and remand solely because the Sixth Circuit misunderstood the limitations on what constitutes “clearly established” law, reversal and remand is even more appropriate in this case because the Sixth Circuit’s error meant the difference between recognizing that “clearly established”

law exists and that it does not and thus ultimately meant the Sixth Circuit did not actually apply the applicable due process standard to Wheeler's pregnancy claim.

“Certain principles are fundamental enough that when new factual permutations arise, the necessity to apply the earlier rule will be beyond doubt.” *Alvarado*, 541 U.S. at 666. The general principle invoked here - that under the Fourteenth Amendment, a conviction cannot stand, if the application of state law so infused the trial with unfairness as to amount to a denial of due process - is found among the general principles enunciated by the Court repeatedly in its decisions. This Court has long recognized that the Due Process Clause of the Fourteenth Amendment guarantees the fundamental elements of fairness. *See, e.g., Tumey v. Ohio*, 273 U.S. 510, 523 (1927). While states are “free to regulate the procedure of its courts in accordance with [their] own conception of policy and fairness,” where those policies offend a fundamental principles of justice, they violate of due process. *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934), *overruled on other grounds by, Malloy v. Hogan*, 378 U.S. 1 (1964); *see also Buchalter v. New York*, 319 U.S. 427, 429-30 (1943) (holding that where state actions are inconsistent with fundamental principles of justice “this court has not hesitated to exercise its jurisdiction to enforce the constitutional guarantee” of due process).

Whether the admission of prejudicial evidence constitutes a denial of fundamental fairness turns on whether the disputed evidence is material to the case. In *Chambers v. Mississippi*, 410 U.S. 284, 302-03 (1973), the Court addressed the materiality component of a due process claim arising from a state trial court's

evidentiary ruling, a creature of state law. At issue in *Chambers* was the exclusion of hearsay evidence indicating that another person had confessed to the murder for which Chambers was on trial. *Id.* at 299-300. Analyzing the trial court's ruling *excluding* evidence under rules applicable to a state court's improper *admission* of evidence, the Court determined the error denied the defendant "a trial in accord with traditional and fundamental standards of due process," because the evidence was critical and its exclusion "defeat[ed] the ends of justice" upon review of the totality of the trial. *Id.* at 298, 302.

The Court extended this reasoning in *Green v. Georgia*, 442 U.S. 95, 96-97 (1979), to hold that a state court's exclusion of evidence relating to the defendant's moral culpability in a capital murder case – i.e., defendant's lack of direct involvement in the murder – violated due process. "Regardless of whether the proffered testimony comes within Georgia's hearsay rule ... its exclusion constituted a violation of the Due Process Clause of the Fourteenth Amendment." *Id.* at 97. Importantly, although the evidence at issue in *Green* did not negate petitioner's legal culpability and was only offered at sentencing, it nonetheless required reversal because its exclusion "denied petitioner a fair trial on the issue of punishment." *Id.*

The principles discussed in *Chambers* and *Green* –involving the erroneous exclusion of relevant evidence – have also been applied in cases involving the erroneous admission of irrelevant evidence that similarly deprives a defendant of a fundamentally fair trial. *See, e.g., Dawson v. Delaware*, 503 U.S. 159, 167-68 (1992) (admission of evidence of gang affiliation, not relevant to any disputed fact, violated

petitioner's right to due process); *Zant v. Stephens*, 462 U.S. 862, 885 (1983) (“[A] death sentence based on consideration of ‘factors that are unconstitutionally impermissible or totally irrelevant to the sentencing process ... violate the Constitution.”); *see also Estelle v. McGuire*, 502 U.S. 62, 75 (1991) (recognizing that introduction of irrelevant evidence may “so infuse[] the trial with unfairness as to deny due process of law.”); *Donnelly v. DeCristoforo*, 461 U.S. 237 (1974) (recognizing that the federal due process claims guarantees fundamental elements of fairness in criminal trials); *Spencer v. Texas*, 385 U.S. 554, 563-65 (1967) (same); *Lisenba v. California*, 314 U.S. 219, 228 (1941) (recognizing that usage of irrelevant evidence may be so unfair that it results in a denial of due process).

The general legal principle set forth in *Chambers*, *Green*, *Dawson*, *Zant*, and the rest of the cases listed in the preceding paragraphs, and applied in a broad spectrum of factual scenarios, both to the admission and exclusion of evidence under state evidentiary rules, satisfies the “clearly established” standard set forth in 28 U.S.C. § 2254 (d)(1). As stated, the rule on which Wheeler relies is both “clearly established” by this Court’s precedent *and* is the criterion by which Wheeler’s claim shall be analyzed. Indeed, because the question concerning the evidence complained of here is, of necessity, so fact-driven, a reviewing court is left with little choice but to apply such a general rule, as required required by *Williams*, *Yarborough*, *Panetti*, *Rodgers*, and *Woodall*.

C. The introduction of evidence of victim Warfield's pregnancy and the prosecution's emphasis of it during his sentencing phase closing argument, itself and when considered in conjunction with the jury's question about imposing death only for the murder of one of the two victims, prejudiced Wheeler.

Wheeler does *not* contend that the admission of irrelevant evidence, by itself, raises a constitutional question. He acknowledges that it does not. It is "clearly established federal law," however, that under the Constitution, a conviction cannot stand if the jury was allowed to hear evidence that was not only irrelevant, but that infused the trial with such unfairness as to deny due process of law. That is what occurred here. Yet, the Sixth Circuit held that there was no "clearly established federal law" regarding the admissibility and use of evidence that the murder victim was pregnant. As a result, the Sixth Circuit refused to consider Wheeler's contention that such evidence was irrelevant *and* unconstitutionally inflammatory in this case.

First, as to relevance, Wheeler was never charged with killing a fetus nor charged with a similar crime. Nor was there any dispute over intent - clearly, Warfield had been murdered intentionally. The only question for the jury was the perpetrator's identity. Motive would have been admissible to prove identity - *if* Wheeler had known of the pregnancy. He did not. Even victim Warfield did not know she was pregnant. Even the trial court's justification for admission, which provided the basis for the Kentucky Supreme Court's affirmance - that the pregnancy showed "who she was" - is completely without merit. Since Warfield was unaware of her condition, it could not have defined her. Certainly the death of her

fetus did not define her. In short, Warfield's pregnancy and the existence of an unknown embryo had absolutely no bearing on anything at issue in the trial.

Although Warfield's pregnancy was legally irrelevant, it would be hard to deny that such evidence would be highly impactful – albeit inappropriately so – on a jury and would inevitably result in a verdict influenced by excessive emotion. A substantial portion of our population views the murder of a pregnant woman as involving the murder of *two* people, if the fetus also dies.⁴ Prosecutors know this, of course, and often enough, try to introduce evidence of the mother's pregnancy at the time of her death. Such evidence is admissible only when it shows the murderer's motive or some other issue relevant to the crime. Even when evidence of pregnancy and death of the fetus is relevant, it is held to be more prejudicial than probative, and excluded on that ground. When the trial court commits error by admitting such evidence, the result may be reversal. When, as in the context of the facts of the case, the evidence of pregnancy and death of the fetus is not only irrelevant, but “so infuses the trial with unfairness as to deny due process of law,” reversal is required as a matter of law, as occurred in a capital habeas case where §2254(d) applied.

In *White v. Thaler*, 610 F.3d 890 (5th Cir. 2010), a murder case, neither the victim-mother nor the defendant knew of the victim's pregnancy. In habeas

⁴ Many states express this morality in their criminal codes. As of March 2015, a clear majority of states (38) - including Kentucky, see Ky. Rev. Stat. § 507A.010 et seq. - had “Fetal Protection” or “feticide” laws that make it a separate crime to kill a fetus while committing violence against a woman. See National Conference of State Legislatures, Fetal Homicide Laws (March 2015), *Kentucky's Statute Defines "Unborn Child" as a Member of the Species Homo Sapiens in Utero From Conception Onward*. available at, <http://www.ncsl.org/research/health/fetal-homicide-state-laws.aspx> (last visited, June 18, 2015).

proceedings, the United States Court of Appeals for the Fifth Circuit held that introduction of “[the victim’s] pregnancy and the death of the fetus were *irrelevant to the issue of guilt and highly prejudicial*,” *id.* at 907 (emphasis added), and that defense counsel had been ineffective in failing to object to it, granting the writ of habeas corpus accordingly. *Id.* at 912.⁵

As this demonstrates, Warfield’s pregnancy and the death of her fetus were not only irrelevant, but impermissibly inflammatory. That the evidence did, *in fact*, have that effect is further demonstrated by the jury asking the trial judge what would happen if they imposed a death sentence for killing one victim but not for the other murder. They plainly perceived a moral difference between killing Warfield and killing Malone. The glaring moral difference between them was that Warfield’s death also involved the death of what many on the jury may have thought to be a child. Consequently, this evidence so infused the trial with unfairness that Wheeler was denied Due Process. Therefore, recognizing that “clearly established” law applicable to the pregnancy claim exists can lead to only one conclusion, either on remand to the Sixth Circuit or before this Court if it reaches the underlying merits

⁵ State courts have also recognized this. In *Benitez-Saldana v. State*, 67 So.3d 320, 321-25 (Fla. App. 2d. Dist. 2011), a Florida appellate court held that the jury learning that the victim was pregnant at the time of her death was so prejudicial that the conviction had to be reversed. In *Erazo v. State*, 144 S.W.3d 487 (Tex. Crim. App. 2004), a conviction was reversed because the jury was shown a photo of the victim’s unborn child. In *Lewek v. State*, 702 So.2d 527, 534 (Fla. App. 4 Dist. 1997), a Florida appellate court held that introduction of evidence of the victim’s pregnancy “was unduly prejudicial and could only be calculated to play upon the jury’s passions and evoke sympathy for the tragic victims” and thus required reversal because even a curative instruction the trial judge gave could not be sufficient to eliminate the prejudice.

of Wheeler’s pregnancy claim – the state court’s decision was “contrary to” or an “unreasonable application of” clearly established Supreme Court law.

CONCLUSION

For the above reasons, Wheeler requests that this Court grant the petition for a writ of certiorari.

Respectfully submitted,



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June 18, 2015

No. 14-

IN THE
SUPREME COURT OF THE UNITED STATES

ROGER L. WHEELER,

Cross-Petitioner

v.

RANDY WHITE, WARDEN

Cross-Respondent

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

APPENDIX TO

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

CAPITAL CASE

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Document

Appendix page #

Excerpt from findings of fact, conclusions of law,
and recommendation by magistrate judge
in *Wheeler v. Simpson*, No. 3:09-cv-336 (W.D. Ky. 2011)

1-8

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

ROGER L. WHEELER

PETITIONER

v.

CIVIL ACTION NO. 3:09-CV-336-M

THOMAS L. SIMPSON

RESPONDENT

**FINDINGS OF FACT
CONCLUSIONS OF LAW
AND RECOMMENDATION**

INTRODUCTION

On March 1, 2001, a jury seated in Jefferson County, Kentucky found the Petitioner, Roger L. Wheeler, guilty of two counts of intentional murder in the deaths of Nairobi Warfield and Nigel Malone. A relative discovered the bodies of the murdered couple in their Louisville apartment on October 2, 1997. Malone had been stabbed nine times, twice in the chest. Warfield had been beaten, strangled and stabbed with a pair of scissors that were found lodged in her neck. The jury fixed Wheeler's punishment for each murder at death, and he was so sentenced on April 27, 2001. The Supreme Court of Kentucky affirmed Wheeler's conviction and sentence on direct appeal¹ and again on post-conviction appeal five years later.²

Wheeler now has before the Court a petition for a writ of habeas corpus that raises sixteen grounds for relief (DN 1). The warden has filed an answer in response to the petition (DN 19). Wheeler has filed a reply (DN 26). The Court has denied Wheeler's motions for discovery and an evidentiary hearing (DN 38, 40, 48, 50). The warden has moved the Court for summary judgment on all of Wheeler's claims (DN 33). Wheeler has filed a response to the

¹ *Wheeler v. Commonwealth*, 121 S.W.3d 173 (Ky. 2003) (*Wheeler I*).

² *Wheeler v. Commonwealth*, 2008 WL 5051579 (Ky. 2008) (*Wheeler II*).

application of the controlling constitutional standard. Wheeler was not unduly prejudiced by the isolated comments of the prosecutor. Further, given the observation of blood on the floor, walls, furniture and appliances, the prosecutor's characterization of the interior of the Virginia Ave. apartment as a "slaughterhouse" cannot be overly condemned. Both such venues could be correctly described to be bloody, and it was not unreasonable or unfair for the prosecutor to draw attention to the bloody nature of the crime scene.

The phrase "gutted like a pig" is perhaps technically inaccurate in the most narrow sense as neither victim was disemboweled by Wheeler during his rampage. Nevertheless, Wheeler stabbed or cut Nigel Malone nine times, wounding him in the face, head, back, neck and chest. Such repeated and graphic violence obviously was a proper subject for comment by the prosecutor, whose terms perhaps might have been chosen more accurately in this one instance, but nonetheless were not so outrageous, unfair or repetitive in nature so as to come even remotely close to violating due process. The Supreme Court of Kentucky, therefore, was objectively reasonable in its application of the clearly established case law of the U.S. Supreme Court in rejecting Wheeler's second ground for relief based upon prosecutorial misconduct.

3. Evidence of Nairobi Warfield's Pregnancy.

Wheeler maintains in his third argument that the trial court improperly permitted the prosecution to introduce into evidence that victim Warfield was pregnant at the time she was strangled. (DN 8, p. 42-48). The defense argued that such evidence was not relevant under KRE 401 and was unduly prejudicial so as to justify its exclusion under KRE 402 and 403. (V.T. 2,

2/13/01, 11:56:22-58:08, 12:02:58-03:41, 12:07:54-09:18, T.R. Vol. VII, 1001-1003). The trial court ruled that evidence of the victim's pregnancy was admissible to show "who Ms. Warfield was." (V.T. 4, 2/13/01, 11:59:27-02:27, 12:06:13-23, 12:09:18-11:18, T.R. Vol. VII, 104).

At trial, Dr. Burrows, a forensic pathologist, testified that Warfield's pregnancy was discovered during her autopsy. (V.T. 9, 2/23/01, 15:40:16-41:10). The defense immediately objected and moved to prohibit the prosecution from mentioning Warfield's pregnancy in closing argument. The trial court overruled the objection, but granted the defense a continuing objection. (V.T. 12, 3/1/01, 09:33:22-35:03, 09:36:04-39:14). The prosecutor, as anticipated, reminded the jury that Warfield was pregnant at the time she was murdered. (V.T. 12, 3/1/01, 11:13:49-58).

On direct appeal, Wheeler argued that admission of the victim's pregnancy violated both the Kentucky Rules of Evidence and his right to due process under the Fourteenth Amendment. (DN 8, p. 43). He further maintained that admission of the pregnancy rendered Kentucky's aggravating circumstance statute for multiple deaths, KRS 532.025(2)(a)(6), unconstitutionally vague as applied. The Kentucky Supreme Court held that no prejudicial error resulted from the admission of this evidence as Nairobi's pregnancy was only minimally mentioned at trial, and in any event, was directly related to her physical condition at the time of her death, which the jury was entitled to hear. *Wheeler I*, 121 S.W.3d at 181. Accordingly, the Kentucky Supreme Court concluded that Wheeler was not denied a fair trial or due process under the federal or state constitutions. *Id.*

The Kentucky Supreme Court likewise rejected Wheeler's constitutional challenge to KRS 532.025(2)(a)(6) given the jury instructions which referenced only two deaths,

that of Nigel and Nairobi, not the unborn child. *Id.* Justice Stumbo disagreed with the majority and found admission of the victim's pregnancy to be not only error, but prejudicial error.

Wheeler I, 121 S.W.3d at 190. Justice Keller also agreed that admission of evidence concerning the victim's pregnancy was a violation of KRE 403, but found the error to be harmless in light of the overwhelming evidence against the Defendant. *Id.* Wheeler now insists that this alleged violation of state law was so egregious as to deny him fundamental fairness in violation of the due process clause as Nairobi's pregnancy was entirely irrelevant to any element of the charged offenses and was introduced solely to unfairly prejudice the jury with the knowledge that an unborn life also had been lost. (DN 8, pp. 45-47).

The warden again insists based on *Slaughter* that Wheeler's challenge to the trial court's decision to admit testimony about Warfield's pregnancy was not fully and fairly presented in the state courts as a federal constitutional issue. (DN 19, pp. 54-55). Consequently, the warden urges the federal courts to decline to address the merits of the argument on the ground that it is procedurally defaulted below. *See Winston v. Kelly*, 624 F. Supp. 478, 505 (W.D. Va. 2008), *aff'd in part*, 592 F.3d 535 (4th cir. 2008), *cert denied*, ___ S.Ct. ___, 2010 WL 2101896 (U.S. Oct. 4, 2010)(capital habeas petitioner who on appeal below challenged the admission of evidence of the female victim's pregnancy only as a matter of state law was procedurally barred from pursuing the merits of the issue in federal court).

As for Wheeler's void for vagueness challenge to the constitutionality of KRS 532.025(2)(a)(6), the warden concludes that the only federal decision cited by Wheeler on appeal, *Kolender v. Lawson*, 461 U.S. 352, 357-58 (1983), requires merely that the legislature establish minimal guidelines for enforcement of the statute to satisfy the void-for-vagueness

doctrine such that a criminal statute will only violate the doctrine if its creates a “standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.” *Id.* (DN 19, pp. 55-56). The warden insists that the Kentucky Supreme Court in rejecting Wheeler’s constitutional challenge to the statute was not contrary to, nor did it unreasonably apply, the *Kolander* decision, or any other clearly established precedent of the Supreme Court for that matter.

As before, Wheeler in his traverse challenges the notion that he failed to fully and fairly present his arguments as federal constitutional claims. Again, he cites the Court to the *Baldwin* decision along with *McMeans v. Brigano*, 228 F.3d 674, 681 (6th Cir. 2000) to argue that he did in fact fairly present all of the pregnancy-related constitutional arguments in the state court. Wheeler also continues to distinguish the *Slaughter* decision, where the Kentucky Supreme Court in *Slaughter* did not make any reference to federal law, nor did it treat *Slaughter*’s claim as being one brought under federal law. In the alternative, Wheeler argues that should this court consider the claim to be procedurally defaulted, then cause and prejudice is established by the ineffective assistance rendered by counsel on appeal.

The Court upon consideration of the above arguments over procedural default must again agree with Wheeler, based on the contents of his brief on direct appeal in state court. He has adequately raised the current ground as a matter of federal constitutional law. Wheeler in his brief referred to the admission of evidence concerning Nairobi Warfield’s pregnancy as being a violation of due process under the U.S. Constitution. While he initially argued various rules from the Kentucky Rules of Evidence (KRE), his reference to the due process clause of the Federal Constitution is sufficient under *Baldwin*, 541 U.S. at 34 to exhaust his current claim.

See, McMeans v. Brigano, 228 F.3d at 681. Accordingly, the question becomes whether the Supreme Court of Kentucky reasonably concluded that the admission of evidence concerning the pregnancy worked no due process violation so as to render Wheeler's jury trial fundamentally unfair and unreliable in its result.

Wheeler acknowledges in his habeas corpus petition that mere errors of state evidence law ordinarily are not a sufficient basis on which to grant habeas corpus relief, unless they are so egregious as to result in a fundamentally unfair trial. *See, Davie v. Mitchell*, 291 F.Supp.2d 573, 602 n.2 (N.D. Ohio 2003), *affirmed*, 547 F.3d 297 (6th Cir. 2008), *cert. denied*, 130 S. Ct. 503 (2009). *See also, Ege v. Yukins*, 485 F.3d 364, 375 (6th Cir. 2007) ("Due process is violated, and thus habeas relief warranted, only if an evidentiary ruling is 'so egregious that it results in a denial of fundamental fairness.'") (citing *Bugh*, 329 F.3d at 512 (6th Cir. 2003)); *Kelly v. Withrow*, 25 F.3d 363, 370 (6th Cir. 1990) ("Errors by a state court in the admission of evidence are not cognizable in habeas proceedings unless they so perniciously affect the prosecution of a criminal case as to deny the defendant the fundamental right to a fair trial.").

Here, the Court is unaware of any published federal decision in which several brief references to the pregnancy of a murder victim, without more, have been held sufficiently egregious so as to violate the due process clause. Several petitioners have attempted to raise such an issue, but for various reasons have failed to exhaust their argument as a federal claim, rather than as a matter of state law. *See, Winston v. Kelly*, 624 F. Supp.2d at 505-06; *Lugo v. Cuhlmann*, 68 F. Supp.2d 347, 361-62 (S.D. N.Y. 1999). The Court is at best aware of one published federal decision in which a federal district court seated in Massachusetts held that no constitutional violation occurred merely because a state court *refused* to permit a defendant

father to cross-examine his daughter concerning her prior pregnancy and abortion. *See, Domainque v. MacDonald*, 978 F. Supp. 53, 57-58 (D. Mass. 1997).⁷ Thus, no federal court at any level, sitting as a habeas corpus court, has held that the mere introduction of evidence of a victim's pregnancy, when such is not an element of the charged offense, is automatically a violation of the due process clause of the Fourteenth Amendment to the U.S. Constitution. *See gen. Ege v. Yukins*, 380 F. Supp.2d 852, 881-82 (E.D. Mich. 2005)(prosecutor's questioning of murder defendant about her prior pregnancies and abortions did not deprive defendant of a fundamentally fair trial),*aff'd in part and rev'd in part on other grounds*, 485 F.3d 364 (6th Cir. 2007).

Here, the challenged evidence of Nairobi Warfield's pregnancy was introduced into evidence primarily through the testimony of the state's assistant medical examiner, Dr. Amy Burrows, who was testifying concerning her autopsy results of the two victims. Dr. Burrows indicated on the witness stand that during the victim's autopsy she discovered that Nairobi was pregnant at the time of her death when her examination revealed a small embryo in the uterus of the deceased. (VT 9,2/23/01, 15:40:16-41:10). Further, while the prosecutor did make brief reference in closing argument to Nairobi's pregnancy, his reference was exactly that, a passing reference, rather than an entire argument based upon the fact of her maternal status. (VT 12, 3/1/01, 11:13:49-58). At no time did the prosecutor make a "three lives lost" argument to the jury.

The Supreme Court of Kentucky weighted the probative value of this information against its tendency to unduly prejudice the defense under KRE 403 and the majority concluded

⁷ The Court notes that while the *Domainque* decision did address a question concerning the admission or exclusion of evidence of pregnancy, the constitutional issue related to the evidentiary ruling arose primarily under the confrontation clause.

that Wheeler was not unfairly prejudiced. Given the manner in which this information was put before the jury and the limited reference to it by the prosecutor, the Court is compelled to agree. It can find no egregious error of state evidentiary law sufficiently prejudicial as to rise to the level of a constitutional violation by rendering Wheeler's trial fundamentally unfair or unreliable in its result. As the U.S. Supreme Court noted in *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991), "[W]e reemphasize that it is not the province of federal habeas court to reexamine state court determinations on state law questions." *Id.*

The Supreme Court of Kentucky determined, as a matter of state law, that the introduction of highly limited evidence of Nairobi's pregnancy was proper as fair comment to explain her physical condition at the time of her death. *Wheeler I*, 121 S.W.3d at 181 (citing *Templeman v. Commonwealth*, 785 S.W.2d 259 (Ky. 1990); *Campbell v. Commonwealth*, 788 S.W.2d 260 (Ky. 1990)). This determination of state evidentiary law is binding. *Wainwright v. Goode*, 464 U.S. 78, 84 (1983). Given this determination of state law, along with the minimal nature of the manner in which the testimony was used at trial by the prosecution, and the absence of any clearly established precedent of the U.S. Supreme Court prohibiting per se the introduction of such testimony, the Court is compelled to conclude that the opinion of the Kentucky Supreme Court is objectively reasonable in this respect⁸.

The same is true with regard to the state court's determination that Kentucky's

⁸ The court does not suggest even momentarily that Wheeler, in order to prevail, must provide a clearly established U.S. Supreme Court decision that favorably deals with pregnancy in the context of a due process challenge to the admission of such evidence at trial. The Court's focus on the absence of such judicial authority, at all levels of the federal courts, is merely to establish that no federal court appears to automatically equate the introduction of evidence of a victim's pregnancy with a violation of due process in a capital murder prosecution.

