

No. 14-10376

IN THE SUPREME COURT OF THE UNITED STATES

ROGER L. WHEELER

CROSS-PETITIONER

v.

RANDY WHITE, WARDEN

CROSS-RESPONDENT

*ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEAL FOR THE SIXTH CIRCUIT*

**CROSS-RESPONDENT'S BRIEF IN OPPOSITION
TO CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI**

THIS IS A CAPITAL CASE

Respectfully Submitted,

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CAPITAL CASE

QUESTION PRESENTED

Whether the state court's decision was contrary to or involved an unreasonable application of controlling precedent of this Court when this Court has never held that several brief references to a murder victim's pregnancy, without more, violates due process.

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OPINIONS BELOW

Citations to the official and unofficial reports of the opinions below are adequately set forth in the conditional cross-petition for writ of certiorari, as well as in the appendix thereto. The cross-respondent appends to his response relevant trial transcript transcribed from the official video transcript.

JURISDICTION

The cross-petitioner seeks to invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1). The petition was timely filed.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitutional and statutory provisions involved are adequately set forth in the certiorari petition.

STATEMENT OF THE CASE

Nairobi Warfield was pregnant when condemned inmate, Roger Wheeler, strangled her to death, after stabbing Nigel Malone to death. Wheeler has filed a conditional, cross-petition for writ of certiorari on the issue of whether his due process rights were violated when evidence of victim Nairobi Warfield's early-term pregnancy was introduced into evidence through the testimony of Dr. Amy Burrows, Assistant Medical Examiner. Dr. Burrows did not elaborate past telling the jury that, during autopsy, she discovered a placenta and a small fetus. The Kentucky Supreme Court held that evidence of the pregnancy was "minimally presented during trial." Petitioner's Appendix 96a. The United States District Court (hereinafter "District Court") characterized Dr. Burrows reference to the pregnancy as "brief." Cross-Petitioner's Appendix 6. The United States Court of Appeals for the Sixth Circuit (hereinafter "Sixth Circuit") also characterized Dr. Burrow's reference as "brief." Petitioner's Appendix 16a.

Wheeler also complains that his due process rights were violated when, during closing argument, the prosecutor "emphasized the pregnancy in a dramatic fashion at a strategically placed point during his sentencing phase closing argument to inflame the jury's passions." See *Wheeler's "Conditional Cross-Petition for a Writ of Certiorari, at p. I*. Not surprisingly, Wheeler did not append the "dramatic" closing argument.

The prosecutor stated:

And what about Nairobi? They didn't find drugs in her system. Nobody has ever said she was a drug dealer. What about her? What about her life? Autopsy told you (inaudible) she didn't have

any alcohol in there. There's no drugs. She was pregnant. I mean, she's a normal person. She just loved a guy named Nigel. He loved her. They lived together in the west end, and they die because of that. And we're supposed to believe that's okay. Cross-Respondent's Appendix 1a.

The District Court thus characterized this closing statement:

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. Cross-Petitioner's Appendix 7.

Likewise, the Sixth Circuit characterized the prosecutor's closing argument reference to pregnancy as "brief." Petitioner's Appendix 16a.

Wheeler's cross-petition is premised solely upon a gross misstatement of the facts and record. In his "Questions Presented," on page I of his conditional cross-petition, Wheeler states: "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 claims that he was sentenced to death only for the murder of Nairobi Warfield, but was not sentenced to death for the murder of Nigel Malone.

The Opinion of the Kentucky Supreme Court provides otherwise: "Roger Lamont Wheeler was convicted by a jury of the intentional murders of Nigel Malone and Nairobi Warfield. The aggravating circumstance is that Wheeler's acts of killing were intentional and resulted in multiple deaths as described by KRS 532.025(2)(a)(6). **Wheeler was sentenced to death on each conviction.**" *Wheeler v. Commonwealth*, 121 S.W.3d 173, 177-178 (Ky. 2003).

Affirming the District Court, the Sixth Circuit found that neither Dr. Burrow's testimony nor the prosecutor's closing argument violated Wheeler's due process rights.

Wheeler cites no Supreme Court decisions in which several brief references to the pregnancy of the murder victim, without more, have been held sufficiently egregious so as to violate the due process clause. [Footnote omitted.] It stands to reason that a state court cannot rule contrary to established precedent when no such precedent exists. In short, Wheeler has failed to persuade us that the admission of evidence related to Warfield's pregnancy rendered his trial fundamentally unfair. Accordingly, no habeas relief is appropriate on this claim. Petitioner's Appendix 16a - 17a.

REASONS TO DENY THE CONDITIONAL CROSS-PETITION

THE STATE COURT'S DECISION WAS NOT CONTRARY TO NOR DID IT INVOLVE AN UNREASONABLE APPLICATION OF CONTROLLING PRECEDENT OF THIS COURT WHEN THIS COURT HAS NEVER HELD THAT SEVERAL BRIEF REFERENCES TO A MURDER VICTIM'S PREGNANCY, WITHOUT MORE, VIOLATES DUE PROCESS.

The Warden's argument on this issue has remained simple and consistent: the state court's decision to allow evidence of Warfield's pregnancy cannot be contrary to nor involve an unreasonable application of controlling precedent of this Court when this Court has never held that several brief references of the pregnancy of a murder victim, without more, violates due process.

Both the District Court and the Sixth Circuit agreed. The District Court was "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 due process." Cross-Petitioner's App 6. As the District Court noted, the references were brief. "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." Cross-Petitioner's App 7. And, the prosecutor's reference to the pregnancy during closing argument was "a passing reference, rather than an entire argument based upon the fact of her maternal status. Cross-Petitioner's App 7.

The District Court then concluded: "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 respect." Cross-Petitioner's App 8.

The Sixth Circuit affirmed. The Sixth Circuit held:

Wheeler cites not Supreme Court decisions in which several brief references to the pregnancy of the murder victim, without more, have been held sufficiently egregious so as to violated the due process clause [footnote omitted]. It stands to reason that a state court cannot rule contrary to established precedent when no such precedent exists. In short, Wheeler has failed to persuade us that the admission of the evidence related to Warfield's pregnancy rendered his trial fundamentally unfair. Accordingly, no habeas relief is appropriate on this claim.

In his Cross-Petition, Wheeler admits that there exists no precedent from this Court holding that several brief references to a murder victim's pregnancy violates due process. Without using this phrase, Wheeler argues that the District Court and the Sixth Circuit should have extended the rationale of various due process cases and apply that extended rationale to the facts of this case. This Court has made clear that,

"if a habeas court must extend a rationale before it can apply to the facts at hand," then by definition the rationale was not "clearly established at the time of the state-court decision." *White v. Woodall*, 134 S.Ct. 1697, 1706 (2014), *citing Yarborough v. Alvarado*, 541 U.S. 652, 666, 124 S.Ct. 2140, 158 L.Ed.2d 938 (2004). "[T]he difference between applying a rule and extending it is not always clear," but "[c]ertain principles are fundamental enough that when new factual permutations arise, the necessity to apply the earlier rule will be beyond doubt." *Woodall* at 1706, *quoting Yarborough, supra*, at 666, 124 S.Ct. 2140.

"The critical point is that relief is available under § 2254(d)(1)'s unreasonable-application clause if, and only if, it is so obvious that a clearly established rule applies to a given set of facts that there could be no "fairminded disagreement" on the question, *Harrington*, 562 U.S., at —, 131 S.Ct., at 787." *Woodall, supra*, at 1706-07. *See also, Harrington v. Richter*, 562 U.S. 86, 103 (2011).

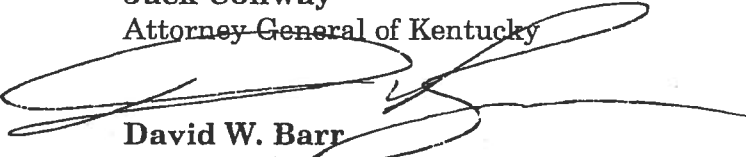
Simply stated, since there is no precedent from this Court holding that several brief references to a murder victim's pregnancy violates due process, Wheeler could obtain relief only if a federal court impermissibly extended the rationale of other non-pregnancy due process cases and extended those cases to the facts of this case. *See, Woodall, supra*, and *Yarborough, supra*. Since fairminded jurists could have fairminded disagreement on the issue of whether due process was violated herein, the District Court properly denied habeas relief. *Harrington, supra*. The Sixth Circuit properly affirmed on this issue. The cross-petition must be denied.

CONCLUSION

WHEREFORE, the Attorney General of the Commonwealth of Kentucky requests that Cross-Petitioner, Roger L. Wheeler's conditional cross-petition for writ of certiorari be denied.

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1 and tell you about the war zone of the west end, how dare
2 her? How dare her say that? It is not a war zone. It is a
3 neighborhood where people live, where they grow. People live
4 in the west end, and they don't deserve to die because they live
5 there. And by God, nobody deserves to die just because they
6 happen to be involved with drugs. You may not like it, you may
7 not like parts of his life, but you know what? It was his life.
8 It was his, and he didn't deserve to die. So you can't just
9 explain it away like that.

10 And what about Nairobi? They didn't find drugs in her
11 system. Nobody has ever said she was a drug dealer. What about
12 her? What about her life? Autopsy told you (inaudible) she
13 didn't have any alcohol in there. There's no drugs. She was
14 pregnant. I mean, she's a normal person. She just loved a guy
15 named Nigel. He loved her. They lived together in the west end,
16 and they die because of that. And we're supposed to believe
17 that's okay.

18 So you either believe that ridiculous story, ladies and
19 gentlemen of the jury, you got to believe all the reason for his
20 lies. You got to believe all that. Okay, you got to believe the
21 reason why he lied four times, five times, six times. You got to
22 believe that his cousin is even wrong about when he was over at
23 her house. You got to believe everybody is wrong (inaudible).
24 (Inaudible), {you're going} to believe that. And you got to
25 believe that everybody involved in this case is out to get him.