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

REPLY TO BRIEF IN OPPOSITION TO CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

CAPITAL CASE

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The Warden ignores the law Wheeler cites and quotes in his conditional cross-petition for a writ of certiorari and misunderstands the issue presented to the Court. The issue is not about the "unreasonable application of" prong of 28 U.S.C. §2254(d)(1), or about whether the court of appeals improperly extended the rationale of separate opinions of the Court, or about whether the court should have extended the rationale of those cases, as the Warden argues. Instead, the question posed to the Court is about whether the court of appeals interpreted the "clearly established" law requirement too narrowly by requiring a Supreme Court case directly on point regarding pregnancy and whether "clearly established" law exists. According to the Warden and the Sixth Circuit, a case from the Court directly dealing with introduction of evidence of pregnancy as a due process violation is required to have any chance of prevailing when such evidence is introduced. But, how often is evidence of a victim's pregnancy used against a defendant at trial when he is not on trial for the murder of a fetus and neither the defendant nor the victim knew the victim was pregnant? It almost never happens, likely for the simple reason that is so clearly inadmissible and so clearly violates due process that it just does not take place. The clarity of that and the rarity of it does not undermine whether applicable law exists. It simply means that it is one of those myriad of circumstances covered by more general due process principles under a legal principle the Court has routinely expressed, most recently last year. *White v. Woodall*, 134 S.Ct. 1697 (2014). Simply, §2254(d)(1) does not require an "identical factual pattern before a legal rule must be applied," but instead includes "the legal

principles and standards flowing from precedent." *Id.* at 1706, *quoting*, *Panetti v. Quarterman*, 551 U.S. 930, 953 (2007). Yet, without addressing this law and mirroring the court of appeals, the Warden essentially asserts that an identical fact pattern is necessary. That argument, and thus the court of appeals ruling, cannot be reconciled with *White* and *Panetti*, thereby giving rise to the issue that is actually before the Court.

Deflecting attention from this while ignoring the law Wheeler relies upon, the Warden would like the Court to jump to the merits and reject the claim on the basis that Wheeler would not prevail on the merits even if "clearly established" law exists. But, that is getting too far-afield at this stage of proceedings. As Wheeler wrote in his brief before the Sixth Circuit and as the relevant state and federal court opinions (contained in the appendix to the Warden's Petition for a Writ of Certiorari and adopted by Wheeler as part of his appendix to the conditional cross-petition – cross-petition at 2-3) note, the Warden is correct that Wheeler was sentenced to death for both murders. Wheeler mistakenly stated in his conditional cross-petition that he was not sentenced to death for the murder of the non-pregnant victim.[1] This mistake, though, does not undermine the questions

[1] Counsel for Petitioner represents death-sentenced inmates in two separate cases with strikingly similar facts surrounding the murders. Both Roger Wheeler and Melvin Parrish were convicted of separate, unrelated murders in which two people were killed. Both cases were tried around the same time, in the same county, before the same judge, with similar defenses. And, in both cases, the pregnancy of one of the victims was discovered on autopsy, with the jury learning of the pregnancy through the testimony of the medical examiner. *See Parrish v. Commonwealth*, 121 S.W.3d 198, 203 (Ky. 2003). Parrish received the death penalty for only one of the two murders. He was *not sentenced to death for the murder of the pregnant woman.* And, like Wheeler, Parrish raised in his habeas petition that his federal due process rights were violated by the introduction of evidence that one of the victims was pregnant at the time of her death. Counsel for Petitioner apologize for the factual mistake in the conditional cross-petition, which counsel did not make in the court below and which

presented to the Court.

Regardless of the fact Wheeler was sentenced to death for both murders, the question remains if the court of appeals interpreted what constitutes "clearly established" law too narrowly and whether "clearly established" law exists. The jury did ask what would happen if it imposed the death penalty for one murder and not the other, making clear that at least one juror was considering whether to impose different sentences for the two murders. One cannot reasonably dispute that a jury learning the victim was pregnant at the time of her murder is an extraordinarily prejudicial fact. And, it is beyond dispute that the pregnancy was discovered on the autopsy with no indication that the victim or the defendant had any awareness of the pregnancy. It is these facts that form the backdrop of the legal issue before the Court that the Warden by and large fails to address.

The temporal scope of the "clearly established" law requirement and whether there can be "clearly established" applicable law here when there is no Supreme Court case dealing directly with the introduction of evidence of pregnancy is worthy of review if and only if the Court takes the unusual and unwarranted step of granting the Warden's Petition for a Writ of Certiorari that raises completely separate issues.

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counsel would have promptly corrected if it had been noticed prior to the Warden pointing it out in his Brief in Opposition.

Respectfully submitted,

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