

IN THE SUPREME COURT OF OHIO

MARK ALBRECHT, et al. : Case No. 2007-507
Plaintiffs : On Appeal From
 : The United States District Court
v. : For The Southern District of Ohio
 : Western Division
BRIAN TREON, M.D., et al. :
Appellees :

BRIEF OF *AMICUS CURIAE*
THE NATIONAL ASSOCIATION OF MEDICAL EXAMINERS
IN SUPPORT OF APPELLEES, BRIAN TREON, M.D., ET AL.

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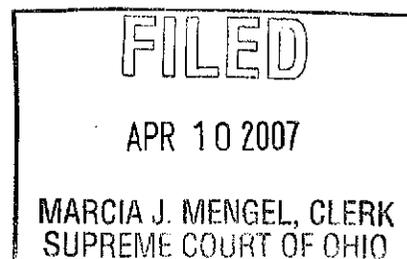


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STATEMENT OF INTEREST OF *AMICUS CURIAE*

The National Association of Medical Examiners (NAME) is the primary professional organization of forensic pathologists and associates in the U.S. Founded in 1966 and it has since expanded to include medical examiners and coroners, medicolegal death investigators and administrators throughout the world. Medicolegal death investigation is performed by coroner and medical examiner offices. Deaths are investigated to explain the occurrence of unexpected, suspicious, and violent deaths and to prevent premature death in the living. Often this requires an autopsy, which is performed by a forensic pathologist. The scientific and medical explanation of the death may be necessary to support criminal or civil litigation, allow for estate settlements, and ensure that insurance companies make appropriate payments. Forensic pathologists may provide key testimony that will permit the incarceration of a murderer and thereby prevent future murders, may recognize the death of a child to be from abuse by a caretaker, may explain the industrial hazard of a death at work, may reveal a previously unrecognized genetic disorder that will affect others in a family and may identify remains of mass disaster and allow closure for the families.

STATEMENT OF THE CASE

In the view of NAME, the litigation poses a direct challenge to the governmental authority of forensic scientists to investigate; it pits the State's right to protect its citizens against the potential veto of next-of-kin. This litigation involves the authority of coroners and medical examiners to conduct their duties under the law and in the public interest as well as the rights of next-of-kin of a decedent upon whom an autopsy is performed under coroner or medical examiner authorization to notification, consent, and return of the

decedent's tissues, organs, blood, or other specimens that have been removed. NAME believes that, in fulfilling its legal mandate of serving the public interest, it is imperative that forensic scientists, including forensic pathologists, apply their professional expertise and judgment, bring the greatest scientific examination to bear on evidence as resources permit, and engage in full and unfettered investigation of sudden and/or unnatural deaths, potential crimes, and possible threats to public health. This professional discretion takes into account the interests of society and those of families. Current practices are appropriate, practical, and ethically responsible. Requirements of notification, consent, or return of tissues and fluids would substantially interfere with and adversely impact medicolegal death investigations and the efficient, impartial, and accurate functioning of the criminal justice system, as well as impacting society's public health, medical, biosecurity, and legal institutions. Specifically:

- Medical Examiners and Coroners should be able to take and examine organs, tissues and fluids as a part of their investigative authority ("police power").
- The collection and preservation of evidence for the prosecution and defense should not be impeded.
- It is routine and optimal practice to take and retain organs, tissues, fluids and evidence in the proper medicolegal investigation of deaths.
- That coroners and medical examiners have a superior interest in the remains and are in the best position to balance the needs of next-of-kin and that of society.
- It is impractical and inappropriate to notify, obtain consent, and return specimens in all cases.

STATEMENT OF FACTS

Medical examiners and coroners are notified of cases that fall under their legal jurisdictions as specified by state law. Cases of death investigated by a coroner's or medical examiner's office may result in a determination that the death does not fall within their statutory jurisdiction, in a death certificate issuing with little or no further investigation, in an external inspection of the body, or in a complete autopsy.

When a body is brought in for an external inspection or for an autopsy, evidence, tissues, and fluids may be retained and may be analyzed. Physical evidence, including trace evidence, may be collected for retention and/or forensic science analysis. Photographs are taken, fingerprints may be obtained, hair may be plucked as reference exemplars, the pubic hair may be combed for loose hair, fingernails may be clipped or scraped for residual tissue or DNA from a perpetrator, swabs may be taken of orifices for evidence of sexual activity, and blood, urine, and eye fluid are generally taken for toxicology. If an autopsy is performed, additional samples of tissues are collected for microscopic examination and saved for further microscopic examination. Whole organs or blocks of tissues may be retained for necessary special examinations; pacemakers and other medical devices may be removed for testing; specimens may be obtained for microbiology or other testing; and further toxicology specimens, such as bile, liver, and gastric contents, may be taken for toxicology. Each of these specimens is collected or retained specifically for evidential and forensic investigative purposes.

A forensic autopsy is not considered complete without a full gross examination of all the internal organs, including the brain. The complete autopsy, at a minimum, requires retention of various body fluids for potential chemical and toxicological analysis

and retention of various organ and tissue biopsies. These fluids and biopsies are retained by the medical examiner or coroner, after the body has been returned to the family. Standards in the forensic pathology community require retention of wet tissues, paraffin blocks and microscopic slides for substantial periods of times. The reason is that it is not uncommon to have to go back to the tissues for re-examination and re-testing. Some issues do not arise until trial preparation, during trial, or upon appeal.

In selected cases, brains, hearts, or other organs and tissues may have to be retained by the forensic pathologist for fixation in formalin for enhanced examination, other special processing, or examination by specialists. This is not only normal practice, it is the standard best practice demanded by the forensic and legal community. The retention of these tissues and their preservation in specialized solutions provides the forensic pathologist the important, necessary, and optimal conditions under which to examine the tissues in order to identify diseases and conditions that are the cause of death. In many instances, these diagnoses and conclusion would be unable to be made in the unpreserved organs. Unfortunately, in the field of forensic medicine, there is usually no second chance, short of disinterment (where the body is not cremated) to look for a lesion that may have been missed.

In cases of natural death, failing to retain and process tissues in a proper medical manner would do a great disservice to the families of the deceased who are often anxious and upset over the death of their family member. Finding the accurate cause of death is vital to the healing and grieving process. If these diagnoses are lost because of inadequate tissue retention and preservation, the cause of death may have to be certified as “undetermined”—leaving questions unanswered and no sense of closure.

In those cases where the cause of death has been ascribed to an injury, but in reality it is due to another more compelling natural event, a specialized examination with careful attention to detail may be the only objective data that spares the innocent who is accused. Likewise, for the family dealing with self-imposed blame in an apparent suicidal or accidental drug overdose, where drug levels are often difficult to evaluate in a vacuum, only a detailed autopsy may shed the light on a reasonable alternative diagnosis.

The evidentiary specimens, tissues, and fluids are removed, retained, and examined either routinely or at the professional discretion of the forensic pathologist from information about the specific case. Generally, the next-of-kin are not notified beforehand, are not given an opportunity to consent, and specimens are not returned to the families. An autopsy report may note that specimens have been taken for histology and toxicology or those whole organs were retained and specially examined. Brains, hearts, or other organs may have to be fixed, frozen, or submitted for laboratory testing, or examined by specialists, rather than merely sectioned and observed and returned to the body, to permit an optimal or more thorough gross or microscopic examination. This is not only normal, routine practice, it is generally agreed to be the best scientific practice for the preparation of specimens.

There is no fundamental or legal conceptual difference between the authority for retention of a whole organ from retention of a portion of an organ or tissues for microscopy, fluids for analysis, or arguably other evidence, such as clothing. Thus, the issue of retention is a broad one that strikes at the basic practice of forensic pathology.

Hainey v. Parrot (2005 WL 2397704) involved the retention and disposal of the whole brain after autopsy. Brain pathology is involved in 60 to 85% of all deaths and is,

of course, often the critical or only pathology in a death. In fact, an autopsy is not considered a complete autopsy without an examination of the brain. While brains can and often are examined fresh, there is often a need to examine them more carefully, given an appropriate history or external finding, and this usually requires two weeks of fixation in formalin fluid. It is, in fact, standard practice to fix brains for neuropathology examination. This requires retention of the whole brain, as bodies are appropriately released to the families shortly after autopsy. Brains are retained and fixed for neuropathology examination in seizure disorders (where the focus of abnormality can be subtle), and some cases of blunt force trauma to the head, gunshot wounds and other penetrating injuries of the head, child abuse, ruptured aneurysms and arteriovenous malformations and other cranial hemorrhages, vitamin deficiencies and metabolic conditions, and suspected parasitic, infectious, cancerous, developmental and congenital disease of the brain. Complications of medical therapy are also among the indications for a formal neuropathology examination. Retention and close examination of these specimens may make the difference between a suicide, accident, homicide, or natural death determination.

Brotherton v. Cleveland (923 F.2d 477) involved the harvesting of corneal tissue, under an implied consent law without express consent of the next-of-kin, by eye bank personnel. There is a significant need for organs and tissues for transplantation purposes and a significant source is from the dead bodies that are not diseased, but are dead from other causes such as motor vehicle accidents. Thus, coroners and medical examiners have jurisdiction over much of the organ and tissue supply. However, the legal analysis may not apply as harvesting of such tissues and organs are not a medicolegal death

investigation function and they are taken for a wholly different public purpose and are based upon different legal authority (State action v. consent). Generally, the forensic investigative purposes have taken precedence over organ and tissue harvesting functions.

ARGUMENT

Issue: *What is the interest of the next-of-kin?*

The predominant concern of family members in the remains of the deceased relative involves sentimental memories, but this is of little legal substance. The legal interest of the next-of-kin in a dead body in many jurisdictions is classified as a “quasi-property”, and not a full property interest, precisely because those interests are limited (22A Am Jur 2d, Dead Bodies). An example of such a limitation may be found in the Uniform Anatomical Gift Act, which confers some discretion to the deceased individuals themselves, despite contrary family wishes. One cannot own a person in life or in death. There is no ownership of bodies and human remains are not to be kept as trophies or for any use that a next-of-kin may desire. Rather, state laws control the disposition of human remains and the next-of-kin have a custodial interest in proper burial. The bodies and body parts cannot be sold. However, there is an interest that a family may have in their right to religious practices, in their family reputation, in access to immunologically-compatible organs and tissues, and in the medical and genetic information which may be derived from the body. In some jurisdictions there may be a limited equitable interest derived from tissues (*Moore v. Regents* 1990). Thus, families may have a variety of interests, not all of which are legally recognized and protected, but they do not have total controlling interests over a dead body.

Issue: *What is the interest of the State in medicolegal death investigation?*

Coroner and medical examiner offices have been created precisely because there is a crucial public interest in medicolegal death investigation. Coroners and medical examiners function as neutral parties who bring professional skills to death investigation. The public good of such investigation is manifest in public policy, criminal justice, homeland security, and public health aspects. The private good of such investigation involves administration of wills and insurance claims and a peace of mind and closure afforded by the explanation of a cause of death to a loved one.

Issue: *Who has the superior interest and in the best position of balancing the interests of the next-of-kin and society?*

Strong public policy interest has resulted in investigative authority (so-called “police power”) given to medicolegal death investigation government agencies. Medical examiners and coroners are authorized to perform medicolegal death investigation and conduct autopsies, despite the potential objection of next-of-kin to protect society from premature deaths.

It is relevant to note that items of interest from death scenes, such as prescription drug containers, drug paraphernalia, and guns and knives, as well as medical appliances, such as pacemakers, are seized by coroner and medical examiner offices. In all these examples, the next-of-kin may have a formal property interest through inheritance, but nonetheless, the interest of the medicolegal death investigation authority supercedes the interest of the next-of-kin. In general, Fourth Amendment search and seizure considerations involve a balance of individual privacy and autonomy rights with societal protection needs.

The coroner, medical examiner, or forensic pathologist is in the best position to balance the interests of families with the interests of society. They should be allowed professional discretion to judge whether to proceed over an objection of the next-of-kin or not. This should include decisions on how to deal with the body, organs, tissues, fluids, and other evidentiary items.

Family members cannot be expected to know or recognize all the issues involved in death investigation and certification. Insurance matters, medical considerations, investigatory concerns, and other considerations are often esoteric and beyond common knowledge. Furthermore, even if next-of-kin were in a position to know all concerns, they have an inherent bias and are in an emotional state which precludes a proper balancing of private and public interests.

Offices attempt to be respectful and accommodate families. Autopsies are conducted in a way to permit embalming and viewing of the bodies after autopsy in funeral homes by family and friends. There is attention paid to prevention of public viewing of operations, and use of unmarked refrigerated trucks during times of mass disasters. However, precisely because of the importance of the work, society permits what might otherwise be considered desecration of bodies in the conducting of autopsies for medicolegal death investigations that further the public good.

In some cases, coroners and medical examiners must rule against family wishes. The most frequent example is suicide, in which the family does not want and will not accept a declaration of suicide, despite overwhelming evidence of such. Other cases involve homicides or child-abuse cases in which the next-of-kin may be considered a suspect. In such cases of disagreements, it is the forensic pathologist, using professional

judgment and taking into account the public interest, who should prevail. Discretion as to the performance and conduct of the forensic autopsy and medicolegal death investigation should be left with the coroner or medical examiner office.

Issue: *What are the specific issues involved?*

NOTICE: NAME recognizes that it may be wise, where possible, to give appropriate notice of routine or intended practice in a given case that organs, tissues, blood or other bodily fluids will be retained, but we do not think that such notice is now mandated nor should be mandated in all cases. Providing notice may inappropriately imply or raise expectations of next-of-kin that consent would be necessary for taking, retaining, examining, and processing organs, tissues, and fluids. Providing notice may undermine a criminal investigation, hamper public health surveillance, and endanger homeland security if it results in notice to someone under suspicion.

Providing notice may result in delays. The burden of tracking down next-of-kin, communicating with next-of-kin, and documenting notification or approval prior to the performance of an autopsy may require significant time. Resolving conflicts among next-of-kin may result in delays. In many cases, the next of kin is not available or known, or may be in dispute. It is not uncommon for different family members and next-of-kin to disagree among themselves, feud, or otherwise give conflicting signals. Delays may result in untimely release to funeral homes. Moreover, the value of the autopsy declines as the body deteriorates, even when refrigerated. Thus, delays may destroy the opportunity to reveal findings important to the investigation of a death. Even if the body has not deteriorated, the delay in determining the cause of death or in documenting other findings such as injury patterns may delay or hamper the overall death investigation.

CONSENT: Consent of the next-of-kin should not be a new requirement for retention of tissues, fluids, and organs, because it could undermine and frustrate medicolegal efforts and objectives. In cases where the death is the fault of a family member, the demands that the organs be returned may result in the failure to appropriately discover and prosecute a crime. The return of the organs or tissues that are necessary for the identification of the type and extent of the trauma to the deceased would terminate the investigation. This would effectively allow the murderer to his crime at his own discretion. A child-abusing parent or homicide suspect should not be able to thwart a proper medicolegal investigation—including full autopsy. This is the reason that forensic autopsies performed under a coroner or medical examiner jurisdiction are authorized by state law, not by the decedent's family, and possibly over family objection. Traditional hospital-based or "private" autopsies in sharp contrast require the explicit consent of the next-of-kin.

Furthermore, family permission would inevitably lead to general restrictions in the retention of tissues, fluids, and other evidence. There would be times that consent would be withheld for little or no apparent reason. It is the common experience of our forensic pathology community that families often declare that they do not want an autopsy, only later to realize the consequences of not performing an autopsy—that questions about the cause of death or other medical issues are not resolved, or an insurance company will not pay for lack of an established cause of death, or that they cannot pursue a legal action without adequate proof. Frequently, family conflicts reach an emotional crescendo around the time of death of a family member. Accusations and acrimony often are hurled against spouses, children, and other caretakers. The purpose of

the forensic autopsy is to dispel or prove these accusations and quell the discord surrounding the death among the family of the deceased. The consent to do an autopsy in this situation is often very difficult to obtain and would prevent the accurate determination of the cause and manner of death. However, being able to provide the definitive answer about the cause of death will often quiet this disharmony and discord.

Lastly, as a practical matter, the process of obtaining consent, would tend to discourage and impede the full investigation of deaths.

DISPOSAL: Coroners and medical examiners have appropriate procedures in place for disposal of organs, tissues, and body fluids once they are no longer needed for the death investigation. This may be days, weeks, or in some cases years after the death. Contacting next-of-kin so long after the death is also likely to cause more pain than it will alleviate. The procedures for the appropriate destruction of these tissues is similar to that used for organs, tissues, and fluids removed from living patients in a hospital or clinic setting. Returning such tissues weeks after examination to the remainder of the body in a buried individual is simply not practical. Likewise, holding a body for burial for weeks, pending the complete examination of such organs, is also not practical. In the end, such attempts may only serve to delay the final closure that grieving families so desire.

The experience of coroners and medical examiners is that in many cases, the next-of-kin would rather not know that the coroner had retained organs of their decedent. In a time of acute and great grief, additional calls from the coroner or medical examiner querying the family about organs and tissues will cause more pain than it will alleviate.

In cases of apparent homicide, retention of specific organs/and or tissues may ensure that the defense has access to the material of interest. Specific examples of this

would be retention of the brain and eyes in purported child abuse, or retention of the larynx and surrounding muscles in alleged strangulation.

The plaintiff's argument, taken to the extreme, would demand the return of every drop of blood. No autopsy or toxicologic analysis could be performed.

It may be tempting to allow collection and retention of organs, tissues, and fluids only when there is a recognition or suspicion of pathology, but this would be wrong. It assumes that the findings at autopsy are known beforehand. They are not. Autopsies often result in unexpected findings. NAME Forensic Autopsy Performance Standards call for the performance of complete autopsies on a routine basis, to permit systematic investigation of all aspects of body examination. Pathology is often not known in advance but may emerge in the examination of tissues after the body has been released to the next-of-kin. Surprises are often revealed during autopsy. Toxicology screens and HIV tests, to name but two examples, are performed because the forensic pathologist cannot always know ahead of time when they will be positive.

Issue: *What are the ethical concerns involved?*

The 1979 Belmont Report discusses out the bioethical principles of human subject dealings and is a foundation of current NIH research regulations. The report focuses on the three basic principles of respect for persons, beneficence, and justice. The first principle of respect for persons involves the concept that individuals should be treated as autonomous agents and forms the basis for informed consent requirements. Clearly, dignity and respect are owed to the deceased individual in handling of the body, but this does not translate into a consent requirement of the next-of-kin. The basis of the consent is grounded in self-determinism and the judgment of the individual himself. This interest

is extinguished at death and is personal and non-transferable. So too does the principle of beneficence, which has to do with the well-being of the individual, extinguish at death. The principle of justice, which involves fairness of distribution, translates in this situation to the utilitarian notion of the greatest good to the greatest number of people. This can be interpreted as balancing the interests of the next-of-kin with that of society. On this basis, public interest of medicolegal death investigation looms large.

Issue: *What are the practical implications for notice, consent, and return?*

As a generality, coroner and medical examiner offices are poorly funded and have difficulty with administrative burdens (Medicolegal Death Investigation System, IOM, 2003). The following is a listing of nearly insurmountable practical difficulties if next-of-kin were to have recognized rights that impinge on current practices:

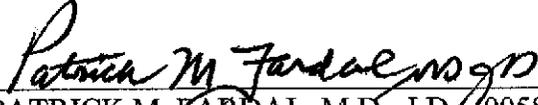
- Locating next-of-kin who may be difficult to find will result in delay of findings useful in the medicolegal death investigation.
- A next-of-kin more closely related to the decedent than the person *initially* identified as next-of-kin may subsequently have a different opinion about the autopsy and/or organ and tissue retention if the choice is theirs.
- Next of kin who have equal claim to the body may have differing and irresolvable opinions about the autopsy and/or organ and tissue retention if the choice is theirs.
- It is simply not practical to allow organ and tissue retention only in “suspicious” cases of death, since the dispositive investigative or laboratory results confirming or refuting the suspicions in the case often come to light days or weeks after the autopsy. It is not feasible for medical examiners and coroners to hold every body

and delay countless funerals (in many cases resulting in decomposition of the body) until the death investigations are complete.

CONCLUSION

For all these reasons, *amicus curiae* respectfully request this Court to rule in a way that preserves the fundamental authority of state-sponsored medicolegal death and other forensic investigations.

Respectfully submitted,


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CERTIFICATE OF SERVICE

I certify a copy of the foregoing document has been served upon the following persons by regular mail on this 9th day of April, 2007:

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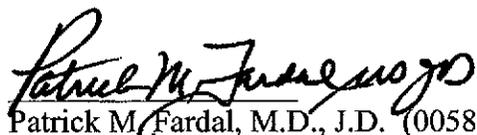
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