

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
	:	Case No. 2011-0122
Plaintiff-Appellee,	:	
	:	On Appeal from the Pike
v.	:	County Court of Appeals
	:	Fourth Appellate District
JEFFREY HARDIN,	:	Case No. 10CA803
	:	
Defendant-Appellant.	:	

JEFFREY HARDIN'S MOTION FOR RECONSIDERATION

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APPELLANT JEFFREY HARDIN'S MOTION FOR RECONSIDERATION

Jeffrey Hardin respectfully requests that this Court reconsider its September 3, 2014 decision to affirm the court of appeals' judgment on the authority of *State v. Maxwell*, 139 Ohio St.3d 12, 2014-Ohio-1019, 9 N.E.3d 930. S.Ct.Prac.R. 18.02. Notably, this case was decided without oral argument. And there are unique, distinguishing features to this case not present in *Maxwell*. Accordingly, reconsideration is warranted because *Maxwell* did not answer the distinct questions posed by this case.

I. Introduction.

At least five aspects of this case warrant independent consideration. First, Mr. Hardin highlighted the dual purpose of coroners and argued that an independent analysis of the specific "homicide" manner-of-death finding contained within the autopsy report is required under this Court's decision in *State v. Arnold*, 126 Ohio St.3d 290, 2010-Ohio-2742, 933 N.E.2d 775. That argument was not presented or considered in *Maxwell*. Indeed, *Arnold* does not appear in the *Maxwell* briefs or opinion.

Second, this Court did not consider or address the history and practice of coroners, or the viewpoint of the forensic-pathology discipline, in *Maxwell*. But Mr. Hardin presented those arguments for this Court's consideration. These realities highlight that the dual purposes served by coroners mirror the dual purposes served by the child advocates in *Arnold*.

Third, because Mr. Hardin was convicted of felony murder, the autopsy report's "homicide" manner-of-death finding is the only evidence that proves the proximate-cause element of the offense. This factor was not present in *Maxwell* because Mr.

Maxwell was not convicted of aggravated murder under R.C. 2903.01(B), which is the aggravated form of felony murder. *Maxwell* at ¶ 22-24 (explaining that the trial court granted Mr. Maxwell's Crim.R. 29 motion on that charge). As such, the *Arnold* analysis is paramount in this case, and the admission of the autopsy report, and the substitute witness testimony providing data from that report, is not harmless beyond a reasonable doubt.

Fourth, in *Maxwell*, this Court highlighted "unique policy interests" surrounding autopsy reports and cold cases to support its decision. *Id.* at ¶61. But Mr. Hardin proposed an easy, practical solution to that problem. That potential solution was not presented to or considered by this Court in *Maxwell*.

Finally, this is a shaken-baby case. The necessity and value of autopsy reports are magnified in such cases because they are the "gold standard" to determine if the child's death was the direct result of abuse. *Tr.* at 359. Moreover, the theory itself is tenuous and controversial. *Maxwell* was not a shaken-baby case.

Accordingly, Mr. Hardin respectfully requests that this Court reconsider its decision in this case so that these distinct issues may be decided on the merits.

II. The dual purpose of coroners implicates this Court's approach in *Arnold*, which was not argued or addressed in *Maxwell*.

In *Arnold*, this Court recognized that public-servant professionals can work in criminal investigations and serve a dual purpose. *Arnold* at ¶ 41. A project funded by the United States Department of Justice determined that coroners serve dual purposes. Natl. Research Council Commt. on Identifying the Needs of the Forensic Sciences

Community, *Strengthening Forensic Science in the United States: A Path Forward* 244 (2009); see also *Maxwell* at ¶ 289 (French, J., concurring). Coroners: (1) investigate crimes, and (2) investigate public-health concerns. *Maxwell* at ¶ 289 (French, J., concurring).

Under *Arnold*, when dual purposes are involved, each statement must be evaluated to determine its primary purpose. *Arnold* at ¶ 42. As this Court confirmed in *Maxwell*, “[t]o determine the primary purpose, a court must ‘objectively evaluat[e] the statements and actions of the parties to the encounter’ giving rise to the statements.” *Maxwell* at ¶ 49, quoting *Michigan v. Bryant*, 562 U.S. ___, 131 S.Ct. 1143, 1162, 179 L.Ed.2d 93 (2011). An autopsy report’s individual statement identifying a death as a “homicide” has no public-health implications. See *Maxwell* at ¶ 289 (French, J., concurring). Thus, as the child-victim statements made to child advocates describing past events of abuse were solely intended for use at a later criminal prosecution, so too are “homicide” manner-of-death findings. See *Arnold* at ¶ 35; see also *Maxwell* at ¶ 289 (French, J., concurring). Even if that is not generally true for this Court, the “homicide” manner-of-death-finding in *Maxwell* did not prove an element of the offense at issue. But here, that finding does provide the only proof of an element of the offense. See Part IV, below. Accordingly, this Court should consider the impact of its holding in *Arnold* on this case.

III. The history and practice of coroners and the viewpoint of the forensic-pathology discipline were not considered in *Maxwell*.

History and practice demonstrate that coroners, at times, operate primarily for the criminal justice system. Initially, there is a deep-rooted historical connection

between coroners, law enforcement, and prosecutors. *Strengthening Forensic Science in the United States* at 241-243. That connection started in England and has remained to this day. *Id.* It is so intertwined that model laws have been drafted “to provide a means whereby greater competence can be assured in determining causes of death where criminal liability may be involved.” (Citation omitted.) *Id.* Thus, the chief objective of coroners, when presented with a suspected-homicide case, is to “serve the criminal justice system as medical detectives by identifying and documenting pathologic findings in suspicious or violent deaths and testifying in courts as expert medical witnesses.” *Id.* at 244. And, in practice, law enforcement personnel frequently attend or observe autopsies while they are performed. Julian L. Burton et al., *The Hospital Autopsy 3d Edition: A Manual of Fundamental Autopsy Practice* 67 (2010).

Further, the coroner who performed the autopsy in *Maxwell*, David Dolinak, authored a textbook on forensic pathology describing how the primary purpose of forensic autopsies is inherently different from non-forensic autopsies. David Dolinak et al., *Forensic Pathology: Principles and Practice* 66 (2005). Forensic autopsies are performed for the court system. *Id.* And, forensic pathologists operate under the premise that “every case should be approached as if the case is to eventually go to trial.” *Id.* at 669. As such, “the forensic pathologist must recognize, collect, and preserve medical evidence” throughout the autopsy to include it in the report “for possible future testimony.” *Id.* These factors, which were not presented to or addressed by this Court in *Maxwell*, demonstrate that the dual purposes served by coroners are

indistinguishable from the dual purposes served by the child advocates in *Arnold*. As such, the “homicide” manner-of-death finding should be assessed under *Arnold*.

IV. The “homicide” manner-of-death finding is the sole piece of evidence proving the proximate-cause element of felony murder, a fact not present in *Maxwell*, which means the admission of the autopsy report is not harmless beyond a reasonable doubt.

The autopsy report and substitute testimony in this case was the only proof establishing that the child’s death was “a proximate result” of Mr. Hardin’s commission of second-degree felony child endangering. “Causing the death as a proximate result” of the child-endangering offense is an element of felony murder under the facts of this case. R.C. 2903.02(B). And, according to the State’s own witness, when a child’s death is suspected to have been caused by abuse, the autopsy report is the “gold standard” for diagnosing, and therefore proving, abuse as the cause of death. Tr. at 359.

Whether a constitutional error was harmless beyond a reasonable doubt depends upon “whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction.” *Chapman v. California*, 386 U.S. 18, 23-24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), quoting *Fahy v. Connecticut*, 375 U.S. 85, 86-87, 84 S.Ct. 229, 11 L.Ed.2d 171 (1963). Because the autopsy report is necessary to prove an element of felony murder, the violation in this case patently contributed to Mr. Hardin’s conviction for felony murder, which was not the case in *Maxwell*. See *Maxwell* at ¶ 64; see also *id.* at ¶ 288 (French, J., concurring); *id.* at ¶ 338 (Pfeifer, J., concurring in part and dissenting in part). Notably, the State did not argue, and the court of appeals did not find, harmless

error beyond a reasonable doubt in this case. *See State v. Hardin*, 193 Ohio App.3d 666, 2010-Ohio-6304, 953 N.E.2d 847, ¶ 11-21 (4th Dist.).

V. Mr. Hardin's proposed solution to the identified policy concerns in *Maxwell* warrant this Court's consideration.

Mr. Hardin argued to this Court that there is an easy, practical solution to the potential problem surrounding the unavailability of a coroner or forensic pathologist. *See* Merit Brief, at 28-29; *see also* Reply Brief, at 19-20. In short, the proposal is that the underlying data and facts of the autopsy report could be provided as a hypothetical, and the testifying witness could generally describe all of the materials that were reviewed before testifying. In tandem, that presentation would demonstrate that the expert witness was fully informed and able to provide an accurate, but independent opinion. *Id.* That proposed solution was not presented or addressed in *Maxwell*. But it is easy, practical, and would ensure that the source of the conclusions presented at trial are those of the witness who is present on the stand, thereby ensuring that the conclusions are tested in the crucible of cross-examination as demanded by the Confrontation Clause. Alternatively, if only the "homicide" manner-of-death finding is inadmissible under *Arnold*, then the "homicide" manner-of-death finding could be redacted and the remainder of the report would be admissible. As such, this Court should consider and address this proposed solution on the merits.

VI. The controversial and tenuous nature of shaken-baby convictions highlights the heightened role of autopsy reports in such cases, which were not at issue in *Maxwell*.

Maxwell was not a shaken-baby case. But such a case prosecuted as a felony murder, as was this case, magnifies the importance of the autopsy report, and particularly, the “homicide” manner-of-death finding. See Part IV, above. Combined with the recent controversy surrounding the science in shaken-baby cases, this amplified significance should be addressed by this Court. See Merit Brief, at 26-28.

VII. Conclusion.

At bottom, *Maxwell* simply did not answer the distinct questions presented in this case. And this Court’s holding in *Maxwell*, which is worded in the negative, suggests that exceptions may exist. *Maxwell* at ¶ 63 (“We hold that an autopsy report that is neither prepared for the primary purpose of accusing a targeted individual nor prepared for the primary purpose of providing evidence in a criminal trial is nontestimonial * * *”). Accordingly, this Court should decide the impact of its *Arnold* decision on this felony-murder, shaken-baby case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The foregoing **Appellant Jeffrey Hardin's Motion for Reconsideration** was sent by regular U.S. mail to Robert Junk, Pike County Prosecuting Attorney, 100 East 2d Street, 1st Floor, Waverly, Ohio 45690, and Michael Hendershot, Chief Deputy Solicitor General, Ohio Attorney General's Office, 30 East Broad Street, 17th Floor, Columbus, Ohio 43215, on this 5th day of September, 2014.



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