IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2015

Christopher L. **Roalson**, Petitioner,

v.

The State of **Wisconsin**, Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE WISCONSIN COURT OF APPEALS

Christopher L. Roalson respectfully petitions for a writ of certiorari to review the judgment of the Wisconsin Court of Appeals in this case.

OPINION BELOW

The opinion of the Wisconsin Court of Appeals is not reported and appears herein as Appendix A.

JURISDICTION

The Wisconsin Supreme Court entered its order denying review on June 12, 2015. This Court's jurisdiction is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED

Amendment VI to the U.S. Constitution provides in pertinent part, "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; . . ."

STATEMENT OF THE CASE

I. Factual Background of the Case

At the preliminary hearing, the State introduced a report of the State Crime

Laboratory, certified by the Attorney General through his designee to be true, describing the items of evidence examined there for DNA. (6 [Exhibit 2])(59:30-33 [prelim transcript]). The DNA analyst, Ryan Gajewski, signed the report and initialed each page of it. (6 [Exhibit 2]). The report's major conclusions, *i.e.*, that Mr. Roalson's DNA was a contributor to DNA found on the handles of both of the knives identified as the murder weapons (6 [Exhibit 2 at 4]), were read into the record by an investigator. (59:32-33).

On June 17, 2010, the State gave its written notice pursuant to §971.23(9), *Wis. Stats.*, of its intent to introduce "DNA identification evidence at trial." (8). (The statute requires advance notice if either party intends to submit DNA "profile evidence at a trial to prove or disprove the identity of a person . . ." §971.23(9)(b), *Wis. Stats.*).

At a motion hearing on January 21, 2011, the State informed the court below it wanted the DNA evidence "to come in because its shows that Mr. Roalson's guilty of this crime." (63:9-10).

On April 21, 2011, the State filed its first witness list. (18). Ryan Gajewski, the DNA analyst, was on that list. (18:1).

On September 7, 2012, the State filed its Motion to Allow Peer Review Testimony, requesting the court below allow peer review analysts from the crime lab to testify instead of the analyst who made the conclusions in the report admitted at the preliminary hearing. (32)(33).

On September 14, 2012, the court below heard the motion and granted it over defense objection. (71:21-22 [complaining, *inter alia*, defense "will no longer get to question the analyst" if motion granted]). The court below specifically found, "The analysts in this case have gone on to other pursuits." and so "the peer review analyst will be allowed to testify in their stead." (71:30-31).

At trial, the prosecutor highlighted the DNA evidence in his opening statement. (73:19-20). The peer review analyst testified the State crime lab developed DNA profiles for Mr. Roalson, the juvenile accomplice, Mr. Davis, and for the victim, Irena Roszak. (74:202). This analyst, Carly Leider, swore to her opinion, making the same conclusions as made by the actual analyst. (74:204-208) Comparing AA 9 ("Conclusions" page of analyst's report) with (74:206-209)(Leider's testimony of her conclusions), the language of her testimony is identical to the language in the report. Comparing (74:206 ["The probability of randomly selecting an individual that could have contributed to this mixture profile is approximately one in 510 individuals."]) with AA 9, 4th ¶ ("The probability of randomly selecting an unrelated individual that could have contributed to this mixture profile is approximately one in 510."). And also comparing (74:208, lines 3-8) with AA 9, 5th ¶ (identical language but for one or

two words). Finally, comparing (74:209, lines 4-9) with AA 9, 6th ¶, the language is nearly identical. Her conclusions were not based on any analysis she herself did. (74:219-220, 230-231). Furthermore, she was not the supervisor of the original analyst. (74:220). The crime lab report was never introduced in evidence at trial. In closing argument, the prosecutor told the jury the DNA evidence on the knives helped "trap[ ] Mr. Roalson" as "the killer." (77:27)(77:28).

II. Proceedings Below

On May 22, 2009, complaint number 09-CF-69 was filed in Sawyer County Circuit Court charging Mr. Roalson with violating §§ 940.01(1)(a)(1st Degree Intentional Homicide) and 943.10(1m)(a), *Wis. Stats.* (Burglary of a Dwelling). (2).

On June 22, 2009, Mr. Roalson appeared with counsel and waived reading of the complaint. (58:3). He also waived time limits for the preliminary hearing. (58:4-5).

On April 6, 2010, preliminary hearing was held. (6)(59). After hearing testimony and considering exhibits, the court ordered Mr. Roalson bound over for trial. (59:53).

On April 16, 2010, an information making the identical charges as in the complaint was filed. (7).

On May 25, 2010, Mr. Roalson was arraigned on the information. (60). By counsel, he entered not guilty pleas to both counts and asked for a speedy trial. (60:3-4). Jury trial was set for August 23, 2010. (60:4-5).

On June 17, 2010, the State filed its demand for discovery and notice of intent to introduce DNA evidence. (8)(9).

On August 9, 2010, Mr. Roalson waived his speedy trial right and, without objection, the defense request for a new trial date was granted. (62). The new date set was February 7, 2011. (62:6).

On February 22, 2011, defense filed a motion asking certain of accomplice Davis' clothing be sent to the State Crime Lab for DNA testing. (14). By stipulation, the court granted the motion on April 6, 2011. (16)(65:3).

On April 21, 2011, the State filed its witness list. (18).

On May 17, 2011, defense filed a motion seeking to introduce evidence of Davis' violent tendency. (19). The court denied the motion. (66:17-19).

On June 6, 2011, defense counsel filed his motion to withdraw. (24). The court granted the motion. (23)(67:7) and took the trial date off calendar. (67:8).

On January 13, 2012, newly appointed counsel filed her discovery demand. (27).

On April 30, 2012, the court heard new counsel's change of venue motion and granted it by ordering a jury from a different county would hear the case. (70:30).

On September 6, 2012, defense filed its witness list and motion *in limine* (29)(30) and, on the following day, filed an amended witness list. (31). On September 7, 2012, the State filed its second witness list (35), a motion *in limine* (34) and a motion to allow peer review testimony with a supporting affidavit. (32)(33).

On September 14, 2012, final pretrial was held. (71). The Court disposed of the State's motions *in limine* to the parties satisfaction, but denied the motion to amend the information. (71:3-19). Over objection (71:20-22), the court granted the State's motion to allow peer reviewers to testify instead of the actual analysts from the crime lab. (71:22-31). The State's motion to introduce autopsy photographs was taken under advisement. (71:71:31-51).

Jury trial began on September 16, 2012 with *voir dire*. (72). A jury was selected and sworn. (72:175-176).

On September 17, 2012, the State began presenting its case. (73:27). The State continued putting on its case on September 18, 2012, presenting the DNA peer reviewer instead of the actual analyst. (74:196-260).

On September 19, 2012, Mr. Davis testified for the State. (75:58-229). The State rested (75:231) and then presented another motion to amend the information. (37)(75:232-233).

On September 20, 2012, defense began presenting its evidence. (76). Defense rested. (76:68). The court found Mr. Roalson's waiver of his right to testify was free and voluntary. (76:69-71). The court denied the State's motion to amend the information, deciding instead it would give the jury party to a crime instructions. (76:81-82).

On September 21, 2012, the case was submitted to the jury after closing arguments. (77). The jury returned its verdict of guilty on both counts. (41)(42)(77:77-79).

On March 4, 2013, the court sentenced Mr. Roalson to life imprisonment without eligibility for extended supervision. (48)(49)(52)(78:43). The burglary sentence was ordered to run concurrent. (73:44). (Amended judgments of conviction, correcting a clerical error, were filed March 18, 2013. (53)

The Wisconsin Court of Appeals affirmed on July 15, 2014. See Appendix A. The

Wisconsin Supreme Court ordered the case held in abeyance pending decision in *State v. Griep*, 2015 WI 40, on September 24, 2014 See Appendix C. That court denied review, with a dissenter, on June 12, 2015. *Id.*

REASONS FOR GRANTING THE WRIT

I. The case provides the opportunity to resolve the issues a majority could not agree on in *Williams v. Illinois*, 567 U.S. ___, 132 S.Ct. 2221, 189 L.Ed.2d 89 (2012).

A. The confusion sown by *Williams, supra,* has prompted the lower courts to ignore it or confine it to its facts.

In *Bullcoming v. New Mexico*, 564 U.S. ___, 131 S.Ct. 2705, 2722 (2011), Justice Sotomayor succinctly identified the question *Williams* sought to resolve, *i.e.*, "the constitutionality of allowing an expert witness to discuss others' testimonial statements if the testimonial statements were not themselves admitted as evidence." (conc. opn.).

But a majority of the Court could not agree on an answer to the Justice's question.

Since the Supreme Court issued the fractured holdings in *Williams*, many other courts have recognized *Williams* as a case of questionable precedential value. See *United States v. Katso*, 73 M.J. 630, 638 (A.F. Ct. Crim. App. 2014) (finding "*Williams* does not provide a definitive test for determining when a statement is to be deemed testimonial" and, accordingly, applying pre-*Williams* confrontation clause law); *State v. Dotson*, 450 S.W.3d 1 (Tenn. 2014) (finding *Williams* provides little guidance and is of uncertain precedential value); *State v. Michaels*, 95 A.3d 648, 666 (N.J. 2014) (finding "*Williams*'s force, as precedent, at best unclear" and, accordingly, applying *pre-Williams* confrontation clause law); *Jenkins v. United States*, 75 A.3d 174, 184 (D.C. 2013) (noting that *Williams* "has not provided any clarity" to confrontation clause jurisprudence); *United States v. Tearman*, 72 M.J. 54, 58 (C.A.A.F. 2013) (recognizing that current state of the law for determining when a particular statement is classified as testimonial is unclear and "far from fixed"); *State v. Ortiz-Zape*, 743 S.E.2d 156, 161 (N.C. 2013) (noting "lack of definitive guidance" provided by *Williams*); *United States v. James*, 712 F.3d 79, 95 (2d Cir. 2013) (finding *Williams* does not provide a controlling rule); *United States v. Duron-Caldera*, 737 F.3d 988, 994 n.4 (5th Cir. 2013) (finding plurality's test in *Williams* not "controlling"); *State v. Kennedy*, 735 S.E.2d 905, 916 (W. Va. 2012) (viewing *Williams*, a fractured plurality opinion, "with caution" as "*Williams* cannot be fairly read to supplant the 'primary purpose' test previously endorsed by the Court").

People v. Barnes, 2015 IL 116949, ¶84, ___ Ill.2d ___, ___N.E.3d ___ (dis.opn. per Kilbride, J.). Wisconsin confines *Williams* to its facts, *State v. Deadwiller*, 2013 WI 75, ¶32, ¶36, 350 Wis.2d 138, 834 N.W.2d 362 as does the Second Circuit. *James, supra, id.*

//

B. The post-*Williams* decisions conflict.

Doubtless the Court already knows several of the post-*Williams* decisions conflict. *Cf., e.g., Jenkins, supra,* 75 A.3d at 189-191 (surrogate DNA expert's testimony unconstitutional); *State v. Navarette*, 2013-NMSC-003, ___ N.M. ___. 294 P.3d 435 (surrogate pathologist's testimony unconstitutional) & *Martin v. State*, 60 A.3d 1100 (Del. 2013)(surrogate blood analyst's testimony unconstitutional) with *State v. Lopez*, 45 A.3d 1 (R.I. 2012)(surrogate DNA analyst testimony permissible); *Michaels, supra*, 95 A.3d 669-678 (surrogate blood analyst testimony permissible) and *Dotson*, *supra,* 450 S.W.2d 62-72 (surrogate pathologist's testimony not plain error.). Since it was the *Williams* decision that prompted this conflict, only this Court can resolve it if it is of a mind to do so.

C. The facts here give the case the potential to begin to resolve the conflict.

Justice Brandeis is remembered, *inter alia*, for his steadfast insistence judgments of this Court must be guided by facts. "The judgment should be based upon a consideration of relevant facts, actual or possible – *Ex facto jus oritur.* That ancient rule must prevail in order that we may have a system of living law." *Adams v. Tanner,* 244 U.S. 590, 600, 37 S.Ct. 662, 666 (1916) (dis. opn. per Brandeis, J.). And see Stephen G. Breyer, J., *Justice Brandeis as Legal Seer,* 41 Brandeis L.J. 711, 717-719 (2004)(finding Brandeis, J.'s use of facts essential to proper constitutional interpretation).

The facts making this case attractive as a vehicle to begin to resolve the post-*Williams* conflict are:

1. The surrogate expert was not the actual analyst's supervisor (74:220) so the Court need not decide whether supervisor status has constitutional significance.

2. The actual analyst worked for the Wisconsin State Crime Laboratory and his report was certified by the Wisconsin Attorney General's designee to be true. See *State v. Luther Williams,* 2002 WI 58, ¶48, 257 Wis.2d 99, 644 N.W.2d 919 (state crime lab reports are prepared to secure convictions). So there is no issue here as to the testimonial character of the report. *Cf. U.S. v. Turner*, 709 F.3d 1187, 1193 (7th Cir.2013)(noting "if the report in *Williams* had been certified Justice Thomas would have voted with the dissenting Justices to reverse the conviction.").

3. Although the actual analyst's report was not admitted at trial, it was admitted at the preliminary hearing and so appears in the record. See Record Document 6 (envelope containing prelim exhibits), Exhibit 2 (crime lab analyst's report). (This report also appears in Appellant's Appendix to his opening brief in the Wisconsin Court of Appeals.)

With the report in the record, the Court can make the same comparison counsel did in the state court of appeals showing the surrogate parroting the language of the report, thereby belying any claim the surrogate made her own independent conclusions.

> If the Court compares AA 9 ("Conclusions" page of analyst's report) with (74:206-209)(Leider's testimony of her conclusions), it will find, as counsel has, that not only are the conclusions to which Ms. Leider testified identical to the conclusions in the report, but also her testimony parrots the phrases in the report. *Cf.* (74:206 ["The probability of randomly selecting an individual that could have contributed to this mixture profile is approximately one in 510 individuals."]) with AA 9, 4th ¶ ("The probability of randomly selecting an unrelated individual that could have contributed to this mixture profile is approximately one in 510."). And also *cf.* (74:208, lines 3-8) with AA 9, 5th ¶ (identical language but for one or two words). Compare also (74:209, lines 4-9) with AA 9, 6th ¶ (nearly identical language). The language is so similar one wonders if Ms. Leider was reading from the report.

Appellant's Reply Brief at 6.

These last facts are most relevant to the "conduit" rule discussed next.

II. A beginning to resolving the post-*Williams* conflict might be a discussion of the "conduit" rule and its application here.

A general rule of evidence provides a testifying expert's "testimony cannot be used as a conduit for the views of non-testifying experts." David H. Kaye, *et al., The New Wigmore: Expert Evidence,* §4.7.1b. (1) (2d ed. 2010)(discussing proper application of F.R.E. 703). And see, *e.g.*, *Linz v. Fossum*, 946 So.2d 1032 (Fla. 2006)(testifying doctors could not act as conduit for non-testifying ones); *State v. Towne*, 142 Vt. 241, 246, 453 A.2d 1133 (1982) (same). Violation of this "conduit" rule has constitutional implications. "Where an expert acts merely as a well-credentialed conduit for testimonial hearsay, however, the cases hold that her testimony violates a criminal defendant's right to confrontation." *U.S. v. Ramos-Gonzalez,* 664 F.3d 1, 5 (1st Cir. 2011)(drug expert reciting conclusion of actual analyst's report not admitted in evidence violated confrontation right); *Towne, supra, id.* (same, insanity doctor).

Wisconsin follows the conduit rule, *Luther Williams, supra,* 2002 WI 58. ¶19 - ¶23 and the burning question in Wisconsin post-*(Sandy) Williams* was whether *Luther Williams* survived *Crawford*. In *State v. Griep*, 2015 WI 40, 361 Wis.2d 657, 863 N.W.2d 567, the Wisconsin Supreme Court held it did. That is, *Griep, supra*, finds that where a surrogate expert makes an independent analysis of data generated by the actual analyst, the Confrontation Clause is satisfied as long as the surrogate is not acting as a conduit by presenting "merely a recitation of another's conclusions." ¶55. (Mr. Griep has petitioned this Court for relief. See Docket No. 15-126.).

Petitioner Roalson's case was held in abeyance by the Wisconsin Supreme Court while *Griep* was being decided. See Appendix C. That Court eventually decided, with a dissenter, not to review petitioner's case. *Id.*

Counsel submits a consideration of the "conduit" rule by the Court, making whatever adjustments to it the Constitution may require, see *The New Wigmore, supra*, §4.10.3 (outlining considerations as to how much involvement in testing process the surrogate should have), may be a way to begin to resolve and reconcile the current conflict over constitutionality of use of forensic evidence in court. Certainly, Mr. Roalson is entitled to relief under whatever version of the "conduit" rule the Court may find constitutional because, as shown above in I.C., the surrogate expert here simply recited the actual analyst's conclusions in the identical language of his report.

CONCLUSION

No one expects the Court could resolve all the issues involved in the constitutionality of use of forensic evidence in court with one decision in one case. The lower courts are only just now beginning to realize it may be appropriate to have different rules for different kinds of experts. See *U.S. v. Boyd,* 686 F.Supp.2d 382, 384 (S.D.N.Y. 2010) summ'y aff'd 401 Fed Appx. 565 (2d Cir.2010)(noting difference between technicians who exercise judgment and those doing only "mechanical or ministerial" tasks). And see Marc D. Ginsberg, *The Confrontation Clause and Forensic Autopsy Reports, etc.*, 74 La. L. Rev. 117, 168-170 (2013)(pointing out medical judgment used to make autopsy reports is categorically different than work of experts who simply record objective data).

But counsel submits petitioner Roalson's case provides the opportunity the Court has been looking for to begin to resolve the current controversy with an opinion which would guide the lower courts through the growing mass of contradictory decisions. It is respectfully submitted the foregoing demonstrates the Court should review petitioner Roalson's case, either as a companion to *Griep* or on its own merits.

Dated: September 7, 2015

Respectfully submitted,

Timothy Alan Provis
123 East Beutel Road
Port Washington, WI 53074
Appointed Counsel for Petitioner
ROALSON