No. 15-6037

In The

Supreme Court of the United States

CHRISTOPHER L. ROALSON,

Petitioner,

v.

STATE OF WISCONSIN,

Respondent.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the Court of Appeals of Wisconsin correctly conclude that a forensic scientist's testimony to her opinion of the results of DNA testing was not a conduit for the conclusions of a non-testifying analyst, and therefore did not violate the Confrontation Clause?

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INTRODUCTION

Christopher L. Roalson has petitioned this court for writ of certiorari to review a decision of the Court of Appeals of Wisconsin affirming his convictions for first-degree intentional homicide and burglary while armed with a dangerous weapon. He asserts that he was denied the right to confront a laboratory analyst who conducted DNA tests on two knives, one of which was used to kill the victim. The testing analyst was unavailable, so another analyst at the same laboratory testified to her opinion of the DNA test results. Roalson asserts that the testifying analyst's testimony was a conduit for testimonial statements by the testing analyst.

This Court should deny the petition for the following reasons.

First, the issues that Roalson sets forth (Pet. at i), are not presented in this case. The expert who testified in this case did not discuss the testimonial statements of the non-testifying analyst. The Court of Appeals of Wisconsin recognized that the expert performed a technical review, reached her own opinion, and testified to that opinion (Pet.-Ap. A:4). Whether an expert can permissibly act as a conduit for an analyst's conclusions is thus not at issue because, as the court of appeals determined, the expert who testified in this case "was not a mere conduit for [the testing analyst's] opinions" (Pet.-Ap. A:4). Review in this case would be simply to determine whether the court of appeals' factual conclusion was correct (Pet. at 6-7).

Second, Roalson asserts that a decision in this case could resolve issues left unresolved by this Court's opinion in *Williams v. Illinois*, 567 U.S. __, 132 S.Ct. 2221, 189 L.Ed.2d 89 (2012). However, Roalson does not identify any Circuit split, or any conflict among courts in applying *Williams*. He also fails to explain how a decision in this case would offer guidance in other cases.

Third, even if this Court were to determine that the expert's testimony in this case violated Roalson's right to confrontation, Roalson would not be entitled to a new trial. The jury had only to find that Roalson was guilty as party to the crime, and the evidence proving Roalson guilty was sufficiently strong that he would have been found guilty even without DNA evidence. Any error in admitting DNA evidence was harmless beyond a reasonable doubt.

STATEMENT OF THE CASE

The defendant-appellant, Christopher L. Roalson, was convicted of first-degree intentional homicide, and burglary while armed with a dangerous weapon, after a jury found him guilty of the charges (Pet.-Ap. A:1).

Roalson and Austin Davis were charged with breaking into a ninety-three year old woman's home and killing her (3; 73:54). The victim suffered eighteen sharp force injuries, and was killed by wounds to her chest, heart, and lung (75:7, 16, 33, 36). Davis, who was fifteen years old, pled guilty to second-degree intentional homicide and burglary while armed (75:58, 61, 184).

Before Roalson's trial, the State filed a motion seeking to present testimony related to DNA testing of two knives that police found hidden in the basement of the residence in which Roalson and Davis stayed on the day of the murder (33). The analyst who performed the DNA testing was in Afghanistan, and unavailable (32:1). The supervisor who performed a formal peer review had retired, and was also unavailable (32:1). The State sought to present the testimony of a forensic scientist at the State of Wisconsin Crime Laboratory who had reviewed the testing analyst's file, analyzed the data, and reached an independent opinion about the results of DNA testing (33). The circuit court granted the State's motion (Pet.-Ap. B:1-2).

At trial, there was no dispute that Roalson and Davis broke into the victim's home while each was armed with a dangerous weapon, or that the victim was killed intentionally. The dispute was whether it was Roalson or Davis who inflicted the fatal stab wound.

Davis testified that he and Roalson broke into the victim's residence intending to steal, and that Roalson killed the victim (75:80, 93, 96). Jacqueline Walczak, Roalson's "very good friend," testified that on the day of the murder Roalson told her that he and Davis had broken into a woman's home, and that he had killed the woman by stabbing her multiple times (73:30-32). Roalson exercised his constitutional right not to testify.

The forensic scientist testified about the DNA results of testing of the two knives. She said that in her opinion, the victim's DNA was found on the blade of

the black-handled knife (74:205), and Roalson and Davis were possible contributors to DNA found on the handle of that knife (74:206). She testified that Davis was a possible contributor to DNA found on the blade of the wood-handled knife (74:208), and that Roalson was a possible contributor to DNA found on the handle of that knife (74:209).

The jury was instructed that it could find Roalson guilty for directly committing the crimes, or as party to the crime for intentionally aiding and abetting the commission of the crimes (77:9). It found Roalson guilty of both first-degree intentional homicide, and burglary while armed with a dangerous weapon (77:77). The circuit court imposed sentence of life in prison with no eligibility for extended supervision (78:43).

Roalson appealed, on the ground that admission of testimony about the DNA testing violated his right to confrontation (*See* Pet.-Ap. A:1). The court of appeals affirmed in an unpublished, per curiam opinion (Pet.-Ap. A:1-4). The court relied on *State v Williams*, 2002 WI 58, 253 Wis. 2d 99, 644 N.W.2d 919, in which the Supreme Court of Wisconsin concluded that the government does not violate the Confrontation Clause when "the person who performed the mechanics of the original tests" does not testify, but the defendant has the opportunity to cross-examine "a highly qualified witness, who is familiar with the procedures at hand, supervises or reviews the work of the testing analyst, and renders her own expert

opinion." *Id.* ¶ 20. The supreme court noted in *State v. Williams* that "one expert cannot act as a mere conduit for the opinion of another," but it concluded that although the expert witness "based part of her opinion on facts and data gathered by someone else, she was not merely a conduit for another expert's opinion." *Id.* ¶¶ 19, 25.

In *State v. Griep*, 2015 WI 40, 361 Wis. 2d 657, 863 N.W.2d 567 *petition for cert. filed*, 84 U.S.L.W. 3080 (U.S. July 22, 105) (No. 15-126), the Supreme Court of Wisconsin affirmed the validity of *State v. Williams*. The court in *Griep* concluded that no decision by the United States Supreme Court has held that the Confrontation Clause is violated "if the expert witness reviewed data created by the non-testifying analyst and formed an independent opinion," and testified to that opinion. *Id.* ¶ 40. The court noted that it had held that "an expert may form an independent opinion based in part on the work of others without acting as a 'conduit.'" *Id.* ¶ 53.

The expert witness conducted a technical review of the laboratory file, examined the data generated by testing, looked at the standards, reached her own conclusions, and testified to those conclusions (Pet.-Ap. A:3). The court determined that the expert's testimony was "not a mere conduit" for the conclusions of the testing analyst, and it concluded that Roalson's right to confrontation was not violated (Pet.-Ap. A:4).

The Supreme Court of Wisconsin denied Roalson's petition for review (Pet.-Ap. C:2).

Roalson petitioned for writ of certiorari, and this Court requested a response from Wisconsin.

REASONS FOR DENYING THE PETITION

I. THE QUESTIONS ROALSON PRESENTS ARE NOT AT ISSUE IN THIS CASE.

Roalson asserts that the questions presented in this case are whether the government violates the Confrontation Clause when an expert witness discusses a non-testifying analyst's testimonial statements, and acts as a conduit for a non-testifying analyst's conclusions (Pet. at i).

However, those issues are not presented in this case. The expert witness in this case did not discuss testimonial statements by the analyst, and did not act as a conduit for the analyst's conclusions. The expert testified that she conducted a technical review by looking at the data and the standards (Pet.-Ap. A:3). She testified that she compared the profiles that the analyst developed from the evidence found at the crime scene with the standards collected from the three individuals, and reached her own opinion (Pet.-Ap. A:3). The Court of Appeals of Wisconsin concluded that the witness "testified her technical review was the same as a peer review; she reviews the file and reaches her own opinions. Thus, she was not a mere conduit for [the analyst's] opinions" (Pet.-Ap. A:4).

In his petition, Roalson argues that the court of appeals was wrong. He points out that the expert witness's conclusions about the DNA testing were the same as those found in the non-testifying analyst's report, and that the expert used language similar to that in the report to describe those conclusions (Pet. at 7). He invites this Court to grant review so that it "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" (Pet. at 7).

But two analysts who are qualified to interpret DNA data should reach the same opinions when they analyze that data. And Roalson's argument that a witness's use of similar language to describe test results shows that the witness is a conduit for a non-testifying analyst's conclusions would mean that whether testimony violates a defendant's right to confrontation depends not on whether the witness relays testimonial statements, but on whether the witness changes the non-testifying analyst's wording.

Roalson further has not identified any case disagreeing with the premise that an expert cannot permissibly act as a conduit for a non-testifying analyst's conclusions. He acknowledges that the Supreme Court of Wisconsin has concluded that a testifying expert cannot permissibly recite a non-testifying analyst's conclusions (Pet. at 7 (citing *Griep*, 361 Wis. 2d 657, ¶ 55)). He notes that the Supreme Court of Wisconsin concluded in *Griep* 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'" (Pet. at 7); *Griep*, 361 Wis. 2d 657, ¶ 55.

Roalson does not assert that the "conduit rule" applied in *Griep* is incorrect, or explain why this Court needs to address whether the rule is correct. In this case, the Court of Appeals of Wisconsin determined that the expert "testified her technical review was the same as a peer review; she reviews the file and reaches her own opinions. Thus, she was not a mere conduit for [the testing analyst's] conclusions" (Pet.-Ap. A:4).

Roalson is seeking only for this Court to review the court of appeals' factual determination, and to instead determine that the witness in this case acted as a conduit for the conclusions of the testing analyst, rather than reaching her own independent opinion about the results of DNA testing (Pet at 7). Determination of this type of factual matter does not warrant review by this Court. *See* Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings"); *see also Tolan v Cotton*, 134 S.Ct. 1861 (2014) (Alito, J., concurring in the judgment) (quoting Sup. Ct. R. 10); S. Shapiro, K. Geller, T. Bishop, E. Hartnett, & D. Himmelfarb, Supreme Court Practice

§ 5.12(c@)(3), at 352 (10th ed. 2013) ("[E]rror correction . . . is outside the mainstream of the Court's functions and . . . not among the 'compelling reasons' . . . that govern the grant of certiorari.").

II. THIS CASE IS NOT AN APPROPRIATE VEHICLE TO RESOLVE ANY ISSUES LEFT UNRESOLVED BY *WILLIAMS V. ILLINOIS*.

Roalson asserts in his petition that this Court's decision in *Williams v. Illinois*, 132 S.Ct. 2221, has prompted a conflict among lower courts, and that this case is an "attractive" vehicle to resolve the "post-*Williams* conflict," because it would afford this Court an opportunity to discuss the rule that an expert "cannot be used as a conduit for the views of non-testifying experts" (Pet. at 5-8).

However, Roalson has failed to identify a split between Federal Circuits, or any conflict among courts in applying *Williams*. He has also failed to identify a split among Circuits or conflict among other courts in deciding the issues that he claims are presented in this case. He does not point to any case holding that an expert witness cannot testify to the expert's opinion reached after examination of raw data, or holding that an expert can permissibly act as a conduit for a non-testifying analyst's conclusions.

The issue in *Williams* was whether *Crawford v. Washington*, 541 U.S. 36, 50 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), "bar[s] an expert from expressing an opinion based on facts about a case that have been made known to the expert but about which the expert is not competent to testify?" *Williams*, 132 S. Ct. at 2227.

In *Williams*, a state crime lab sent vaginal swabs taken from a rape victim to a private laboratory for DNA analysis. *Id.* at 2229. Cellmark tested the swabs, and sent a report to the state crime lab. *Id.* A forensic expert at the state lab compared the profile produced in the lab report to other DNA profiles in the state's DNA database, and confirmed a computer match of the DNA profile in the lab report to a DNA profile produced by the state crime lab from a sample of the defendant's blood. *Id.* at 2229, 2236.

This Court produced four separate opinions, none of which secured a five-vote majority. However, in two opinions, five justices voted to uphold the defendant's conviction. *See Williams*, 132 S. Ct. at 2244 (Alito, J., joined by Roberts, C.J., Kennedy, J., and Breyer, J.); *id.* at 2255 (Thomas, J., concurring). "[T]he Court's 4-1-4 division left no clear guidance about how exactly an expert must phrase its testimony about the results of testing performed by another analyst in order for the testimony to be admissible." *State v. Maxwell*, 724 F.3d 724 (7th Cir. 2013), *cert denied* 134 S.Ct. 2660 (2014) (citing *Williams*, 132 S.Ct. at 2270, 2277 (Kagan, J., dissenting)).

Roalson notes that courts have struggled to apply *Williams*, and that many courts have applied it only to cases with facts similar to those in *Williams* (Pet. at 6). Roalson points to six decisions issued post-*Williams*, asserting that these cases

show conflict between courts in applying *Williams* (Pet. at 6). But he does not identify any split between Federal Circuits, or any conflict between other courts in applying *Williams*.

Roalson cites six cases, but only two of those cases applied *Williams*. In *State v. Navarette*, 294 P.3d 435, 436 (N.M. 2013), *cert. denied*, 134 S.Ct. 64 (2013), a medical investigator who did not perform the autopsy testified about the distance of a gun that fired the fatal shot was from the victim, based in part on observations in the autopsy report. The Supreme Court of New Mexico applied *Williams* and concluded that testimony relaying "out-of-court statements to the jury that provide the basis for his or her opinion," violated the Confrontation Clause. *Id.* at 443. But the court "note[d] that an expert witness may express an independent opinion regarding his or her interpretation of raw data without offending the Confrontation Clause." *Id.*

In *Martin v. State*, 60 A.3d 1100, 1101 (Del. 2013), a blood sample was tested for drugs. A forensic toxicologist who did not test the sample reviewed the results and prepared a report. *Id.* at 1101. The prosecution entered the report into evidence at trial through the forensic toxicologist's testimony. *Id.* The Supreme Court of Delaware applied *Williams* in concluding that admission of the report, which contained "representations and conclusions," violated the Confrontation Clause. *Id.* at 1107-08.

Neither *Navarette* nor *Martin* demonstrates any conflict in applying *Williams*. In *Navarette*, the court concluded that an expert may interpret data from testing and give his or her opinion of the result the tests. *Navarette*, 294 P.3d at 443. In *Martin*, the court did not address whether opinion testimony of non-testing experts is permissible when the report is not admitted.

The other four cases that Roalson cites applied pre-*Williams* law, and obviously do not show a conflict in how courts apply *Williams*.

In *Jenkins v. United States*, 75 A.3d 174, 178 (D.C. 2013), the FBI tested a blood sample and prepared a DNA profile, and compared that profile to known profiles. A forensic examiner who did not perform the tests testified about the DNA results, and "relaying the [lab] findings" to the jury. *Id.* at 191. The District of Columbia Court of Appeals found a Confrontation Clause violation under pre-*Williams* law. Id. at 189, 191.

In *State v. Michaels*, 95 A.3d 648, 651 (N.J. 2014), *cert. denied*, 135 S.Ct. 761 (2014), a lab supervisor reviewed a report showing the results of a test of the defendant's blood for drugs, and signed and certified the lab results. The Supreme Court of New Jersey applied pre-*Williams* law, *id.* at 667, and found no Confrontation Clause violation when a lab supervisor testified at trial and the court admitted the lab report. *Id.* at 673. The court noted that the lab supervisor "was qualified as an expert," and that he "analyzed the machine-generated data and produced the certified report in issue." *Id.*

In *State v. Lopez*, 45 A.3d 1, 10-11 (R.I. 2012), a laboratory supervisor who did not perform tests for DNA testified about the process of DNA testing, prepared a report, and gave his opinion of the test results. The Supreme Court of Rhode Island found no Confrontation Clause violation because the supervisor "personally reviewed and independently analyzed all the raw data, formulated the allele table, and then articulated his own final conclusions concerning the DNA profiles and their corresponding matches." *Id.* at 15. The court concluded that "[t]hose final conclusions are the very statements—the statements of [the supervisor]—at issue in this case." *Id.* at 13. The court applied pre-*Williams* law, *id.* at 14-16, but noted that its conclusion that the expert testimony did not act as a conduit for the testing analyst's opinions, decision was "buttressed" by *Williams*, which had been released four days earlier. *Id.* at 14 n.28.

Finally, in *State v. Dotson*, 450 S.W.3d 1, 62, (Tenn. 2014) *cert. denied*, 135 S.Ct. 1535 (2015) the issue was whether the admission of testimony from police officer witnesses, and autopsy reports prepared by a non-testifying medical examiner, violate the Confrontation Clause. The Supreme Court of Tennessee found no plain error under pre-*Williams* law. *Id.* at 68-69, 72.

Roalson does not explain how any of these cases—which did not apply *Williams*—demonstrate a conflict among courts in applying *Williams*. He further does not explain how a decision in this case would harmonize any conflict. And he

does not assert that the reasoning in any of these cases, if applied to the testimony in this case, would have rendered a different result than that reached by the Court of Appeals of Wisconsin.

III. EVEN IF THE TRIAL COURT ADMITTED ANY TESTIMONY IN VIOLATION OF THE CONFRONTATION CLAUSE, THE ERROR WAS HARMLESS.

Even if Roalson could show that testimony about DNA results was admitted in violation of the Confrontation Clause, he would not be entitled to a new trial. Violations of the Confrontation Clause are subject to harmless error analysis. *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 329 n.14, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009) (citing *Coy v. Iowa*, 487 U.S. 1012, 1021–1022, 108 S.Ct. 2798, 101 L.Ed.2d 857 (1988)). A federal constitutional error is harmless if a reviewing court can "declare a belief that it was harmless beyond a reasonable doubt." *Davis v. Ayala*, __ U.S. __, 135 S.Ct. 2187, 192 L.Ed.2d 323 (2015), (quoting *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)).

In the court of appeals, Wisconsin argued that even if the testimony about DNA test results was not properly admitted, any error was harmless (State's Br. at 25-26). The court of appeals had no need to address Wisconsin's harmless error argument, because the court concluded that the evidence was properly admitted. Review by this Court is unwarranted because even if the court of appeals' decision was incorrect, Roalson would not be entitled to a new trial because any error was harmless beyond a reasonable doubt.

Roalson was charged with first-degree intentional homicide, and burglary while armed with a dangerous weapon (Pet.-Ap. A:1). To prove Roalson guilty of first-degree intentional homicide, Wisconsin had to prove that he intentionally killed the victim. Wis. Stat. § 940.01(1)(a). To prove Roalson guilty of burglary while armed with a dangerous weapon, Wisconsin had to prove that he intentionally entered a dwelling without consent and with intent to steal or commit a felony. Wis. Stat. § 943.10(1m)(a). The trial court instructed the jury that it could find Roalson guilty of both crimes as party to the crime, for aiding and abetting the commission of the crimes (77:8-12).

At trial, it was undisputed that Roalson entered the victim's dwelling, without permission, and with intent to steal. In the defense's opening statement, Roalson's trial counsel acknowledged that Roalson and Davis broke into the victim's home while armed with knives, intending to steal (73:23, 25). In closing argument, Roalson's trial counsel acknowledged that Roalson's fingerprints were on a piece of plastic that Roalson broke off of a window, and said, "He's the one that broke into the house" (77:59). Counsel acknowledged that she could not argue that Roalson did not commit burglary (77:59).

It was also undisputed that the victim, who was stabbed multiple times, was killed intentionally. The only issues were (1) whether it was Roalson or Davis who inflicted the fatal stab wound; and (2) if Davis killed the victim, whether Roalson intentionally aided and abetted him.

The evidence produced at trial, even without the testimony about DNA, was easily sufficient to prove Roalson guilty as party to the crime.

The jury heard Davis testify that he and Roalson were at Davis's house, Roalson asked Davis "if I wanted to kill somebody" (75:71). Davis testified that Roalson took him to the apartment where Roalson had been living, and Roalson went to the kitchen and grabbed two knives, and handed one to Davis (75:71). Davis testified that he and Roalson walked to a nearby house and Roalson jumped over a fence (75:78). The "yard light came on," so they ran away (75:78-79). Davis said he and Roalson walked to another house, and Roalson used the knife he brought to cut a window screen to get inside the house, and then smashed a window with the butt of his knife (75:81-82, 84). Davis testified that Roalson climbed into the house through the broken window, and that he followed (75:85-86).

Davis testified that when they got to the kitchen, he looked for things to steal (75:89-90). He testified that he heard Roalson yelling "about Satan and God's not here today, stuff like that," and then he heard a woman scream (75:90-91). Davis testified that Roalson came out of the bedroom and walked towards Davis with a bloody, bent knife (75:91-92, 100). Davis said that Roalson grabbed the other knife from Davis's hand, and a stool from the kitchen, and returned to the bedroom (75:93). Davis testified that he heard something break, the woman continuing to scream, and Roalson continuing to talk about Satan and God (75:93-94).

Davis testified that Roalson ran from the bedroom, and the two left the residence (75:95). Davis said that as they fled the scene, Roalson told Davis that "he stabbed her a bunch of times and broke the chair over her" (75:96). Davis testified that Roalson returned the black-handled knife to Davis (75:97), and that Roalson said he told the victim that she "would have been saved if God was here," and that "he was Satan's son" (75:98).

The jury also heard testimony from Walczak, Roalson's "very good friend" (73:28), that Roalson told her later that day—before anyone else knew about the murder—that he and Davis had broken into a house and he had killed a woman by stabbing her repeatedly (73:30-32). Walczak testified that Roalson told her the victim had prayed to God, but that he had "told her that God was not in that house tonight" (73:31).

The jury heard no evidence that Roalson did not kill the victim. Even if the jury did not believe Davis's version of events—that Roalson suggested that they kill someone, obtained the knives, chose the victim, and then killed her—but instead believed that Davis killed the victim, it still would have found Roalson guilty as party to the crime.

The testimony about DNA test results was unnecessary for the jury to find Roalson guilty. The expert witness testified that in her opinion, the blade of the black-handled knife contained the victim's DNA, and the handle on that knife had

DNA from four people, at least one of whom was male. The victim, Roalson, and Davis were all possible contributors, and "[t]he probability of randomly selecting an individual that could have contributed to this mixture profile is approximately one in 510 individuals" (74:206).

The witness testified that in her opinion, the blade of the wood-handled knife also contained DNA from four or more individuals, including at least one male. Davis and the victim were possible contributors, but Roalson was excluded as a possible contributor. "The probability of randomly selecting an individual that could have contributed to this DNA mixture is approximately one in 1,000 individuals" (74:208).

The handle of the wood-handled knife also contained DNA from three or more individuals, including at least one male. Roalson and the victim were possible contributors, and Davis was excluded as a possible contributor. "The probability of randomly selecting an individual that could [have] contributed to this DNA mixture is approximately one in 12,000" (74:209).

This evidence did not establish which knife was the murder weapon. Even if it had, it would have made no difference because the medical examiner testified that either knife could have been used to kill the victim (73:247-48). It made no difference which knife was used, or whether it was Roalson or Davis who inflicted the fatal stab wound. Either way, Roalson was guilty as party to the crime.

Even if the testimony about DNA testing was admitted in error, the error was harmless, and Roalson is not entitled to a new trial. Review by this Court is therefore unwarranted.

CONCLUSION

Upon the foregoing, Wisconsin respectfully requests that this Court deny Roalson's petition for writ of certiorari.

Dated at Madison, Wisconsin this 11th day of December, 2015.

Respectfully submitted,

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