No. 15-6037

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2015

Christopher L. Roalson, Petitioner,

v.

The State of Wisconsin, Respondent.

On Petition for a Writ of Certiorari
to the Wisconsin Court of Appeals

REPLY BRIEF SUPPORTING PETITION FOR WRIT OF CERTIORARI

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Roalson v. Wisconsin, No. 15-6037

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Argument in Reply

1. The post-*Williams* conflict

The State of Wisconsin, hereinafter State, claims there is no post-*Williams* conflict in the lower courts. Brief in Opposition at 9-13, hereinafter BIO. Since the conflict is so obvious even law students are aware of it, see Comment, *Surrogate Testimony After Williams: etc.*, 90 Ind. L.J. 441, 448 (Winter 2015) ("The lower courts are divided . . ."), this claim is groundless.

2. The actual analyst's report was testimonial by any standard.

The State repeatedly claims there are no testimonial statements at issue here. BIO at 1, 6.

But the actual analyst's report was initialed on each page and signed by the state crime lab analyst who prepared it and certified to be true by the Wisconsin Attorney General's designee. Cert. Petition at 2, 1st ¶. It is settled in Wisconsin state crime lab reports are prepared for the purpose of securing convictions. *State v. Luther Williams*, 2002 WI 58, ¶48, 257 Wis.2d 99, 644 N.W.2d 919.

Therefore using the test fashioned by the *Williams* plurality, *i.e.* to be testimonial a lab report must have "the primary purpose of accusing a targeted individual of engaging in criminal conduct" and be a "formalized statement[ ], " 567 U.S. ___ , 132 S.Ct. at 2242, the report here was testimonial since, as just noted above, it was prepared for the purpose of convicting Mr. Roalson and was properly certified.

Using the test fashioned by the *Williams* dissenters, *i.e.*, a report is testimonial where it "is, in every conceivable respect, meant to serve as evidence in a potential criminal trial," 132 S.Ct. at 2275, the report here was testimonial since it was by law prepared for the purpose of securing a conviction. 2002 WI 58, ¶48.

Finally, using the test fashioned by Justice Thomas, *i.e.*, to be testimonial a report must have "the solemnity of an affidavit or deposition" which can be supplied by "a certified declaration of fact," 132 S.Ct. at 2260, the report here was testimonial since it was certified by the Wisconsin Attorney General's designee.

So, the State's claim no testimonial statements are at issue here is also groundless.

3. Whether the "conduit" rule is an appropriate constitutional test is an issue of law, not fact.

The State claims the petition is really just challenging a factual determination by the Wisconsin Court of Appeals. BIO 6-7.

Besides the obvious error in this claim, *i.e.*, in Wisconsin, as in all other states, an appeals court cannot make factual determinations, see, *e.g.*, *Thomas v. State*, 92 Wis.2d 372, 381-382, 284 N.W.2d 917 (1979), whether or not the "conduit" rule is an appropriate test for determining constitutional issues regarding expert testimony has never been considered by this Court. Neither has it considered whether Wisconsin's application of its "conduit" rule conforms to the Confrontation Clause.

That is to say, where this Court, or any court for that matter, applies a constitutional test to undisputed facts, this is an issue of law. See, *e.g.*, *U.S. v. Bajakajian*, 524 U.S. 321, n. 10 (whether fine is constitutionally excessive "calls for an application of a constitutional standard to the facts of a particular case, and in this context *de novo* review of that question is appropriate.")

Thus, both whether Wisconsin's version of the "conduit" rule is a proper constitutional test and whether the Wisconsin Court of Appeals applied this test in conformance with the Confrontation Clause are issues of law presented by Mr. Roalson's petition and the State's claim the case is solely about a factual determination is meritless.

4. Whether Confrontation Clause error here is harmless is also an issue of law.

The State claims any Confrontation Clause error here was harmless, making review by this Court unwarranted. BIO 14-19.

The court below did not consider this issue of law which "in a particular case depends on a host of factors . . ." *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986) (listing factors). The court below in that case had not considered the harmless error issue, either, 475 U.S. at 681, but that did not stop this Court from finding Confrontation Clause error and then remanding for harmless error consideration. 475 U.S. at 684. Similarly here, this Court is free to decide the constitutional issues upon determining review will likely help resolve the post-*Williams* conflict and remand for harmless error consideration if appropriate. See 475 U.S. at 684 (court below is best court to determine harmless error issue).

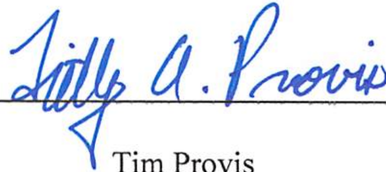
Conclusion

The evidence experts have suggested resolving the constitutional issue of forensic expert testimony is simply a matter of deciding whether a given expert has participated sufficiently in the analysis to trigger the Confrontation Clause. See Cert. Petition at 8, 2d ¶. If this is so, it would be a Holmesian line-drawing question to be decided on a case-by-case basis. See, *e.g.*, *Dominion Hotel v. Arizona*, 249 U.S. 265, 269 (1919) (opn. per Holmes, J.)("the constant business of the law is to draw such lines") & *Schlesinger v. Wisconsin*, 270 U.S. 230, 241 (1926)(dis.opn. per Homes, J.) ("the great body of the law consists in drawing such lines."). Such a legal regime is particularly appropriate since there are different kinds of forensic experts using different analytical skills. See Cert. Petition at 8, 3d ¶ .

Counsel submits the foregoing demonstrates the State has presented no good reason why Mr. Roalson's case, either on its own merits or as a companion case to others, should not be the first in such a line of cases and prays the Court to grant his petition to begin this important work.

Dated: December 13, 2015

Respectfully submitted,



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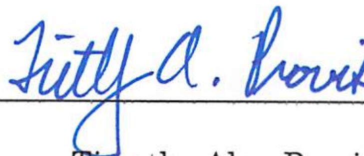
CERTIFICATE OF SERVICE

I, Timothy Alan Provis, a member of the bar of this Court, do declare that on this date, December 14, 2015, as required by Supreme Court Rule 29, I have served the enclosed REPLY BRIEF SUPPORTING PETITION FOR WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid.

The names and addresses of those served are as follows:

Warren Weinstein
Assistant Attorney General
P.O. Box 7857
Madison, Wisconsin 53707

I declare under penalty of perjury that the foregoing is true and correct. Executed this 14th day of December, 2015 at Port Washington, Wisconsin.



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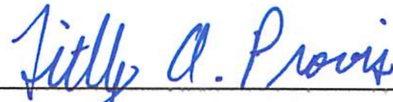
CERTIFICATE OF WORD LENGTH

I, Timothy Alan Provis, a member of the bar of this Court, do declare the enclosed Reply Brief Supporting Petition for Writ of Certiorari contains 973 words.

I declare under penalty of perjury the foregoing is true and correct. Executed this 14th day of December, 2015 at Port Washington, Wisconsin.



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