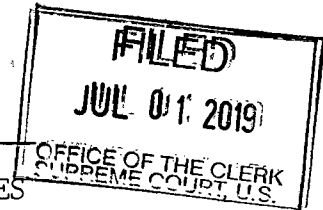


19-5178  
No. \_\_\_\_\_



---

IN THE SUPREME COURT OF THE UNITED STATES

---

HOWARD LESTER, PETITIONER,

vs.

STATE OF OHIO, RESPONDENT.

---

ON PETITION FOR A WRIT OF CERTIORARI TO  
THE EIGHTH DISTRICT COURT OF APPEALS, OHIO.

---

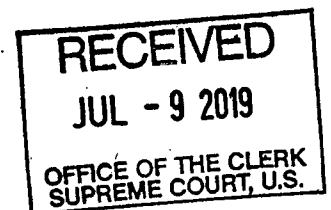
---

Mr. Howard Lester  
Reg. No. A700767  
Lake Erie Correctional Institution  
501 Thompson Road, P.O. Box 8000  
Conneaut, OH 44030

Petitioner Lester, pro-se.

Solicitor General of the United States  
Office of the Solicitor General  
Department of Justice, Room 5614  
950 Pennsylvania Avenue, N.W.  
Washington, DC 20530-0001

Attorney for Respondent, State of Ohio.



### QUESTIONS PRESENTED

- I. Whether the admission of a report authored by a non-testifying firearms examiner, and expert testimony from a substitute analyst concerning the findings of the same, violated Confrontation Clause framework where the report and testimony were offered to establish an essential element of charged offenses; no other evidence was introduced to prove the element; and during summation, the prosecutor referenced the report and testimony for the truth of the matter asserted?
- II. Whether a citizen is seized, within the meaning of the Fourth Amendment, where uniformed officers approach him and tell him that he is being held as a witness; place and lock him in the back of a squad car; and condition release on the making of a requested statement?

#### LIST OF PARTIES

All parties to this proceeding appear in the caption to the cover page.

#### OPINIONS BELOW

A. The opinion of the highest state court to review the merits of each claim presented appears at Appendix A, and is reported at State v. Lester, Cuyahoga App. No. 105992, 2018-Ohio-3041.

B. The opinion of the Ohio Supreme Court declining discretionary review appears at Appendix B, and is unpublished.

C. The opinion of the Ohio Supreme Court declining rehearing appears at Appendix C, and is unpublished.

#### JURISDICTION

This Court's jurisdiction is invoked under Title 28 U.S.C. § 1257(a).

<u>TABLE OF CONTENTS</u>	<u>page</u>
QUESTIONS PRESENTED .....	i
OPINIONS BELOW .....	ii
JURISDICTION .....	ii
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED .....	iv
STATEMENT OF THE CASE .....	1
REASONS WHY THIS PETITION SHOULD BE GRANTED .....	5
CONCLUSION .....	8
RELIEF SOUGHT .....	8
PRAYER FOR RELIEF .....	8

#### INDEX TO APPENDICES

<u>APPENDIX A</u> : opinion of the Eighth District Court of Appeals, ( <u>State v. Lester</u> , Cuyahoga App. No. 105992, 2018-Ohio-3041) .....
<u>APPENDIX B</u> : opinion of the Ohio Supreme Court declining discretionary review, (unreported) .....
<u>APPENDIX C</u> : opinion of the Ohio Supreme Court denying rehearing, (unreported) .....
<u>APPENDIX D</u> : prosecutor's summation excerpt, (trial transcripts at 1093-94) .....
<u>APPENDIX E</u> : jury charge excerpt, (trial transcripts at 1006) .....
<u>APPENDIX F</u> : excerpt of testimony, (trial transcripts at 792-94) ....
<u>APPENDIX G</u> : prosecutor's summation excerpt, (trial transcripts at 1093-94) .....

# TABLE OF AUTHORITIES

page

<u>California v. Hodari D</u> , 499 U.S. 621 (1999) .....	2,3,5,8
<u>Bullcoming v. New Mexico</u> , 554 U.S. 647 (2011) .....	6,8
<u>Melendez-Diaz v. Massachusetts</u> , 557 U.S. 305 (2009) .....	6,8
<u>Stuart v. Alabama</u> , 136 S. Ct. 36 (2018) .....	5,6
<u>United States v. Mendenhall</u> , 446 U.S. 544 (1980) .....	6,8
<u>Williams v. Illinois</u> , 567 U.S. 50 (2012) .....	2,3,5,8

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

### A. Constitutional:

<u>United States Constitution, Amendment V</u> , (No person shall .... be deprived of life, liberty, or property without due process of law) .....	passim
<u>United States Constitution, Amendment VI</u> , (In all criminal prosecutions, the accused shall enjoy the right to ... be confronted with witnesses against him) .....	2,3,5,6
<u>United States Constitution, Amendment XIV</u> , (No State shall deprive any citizen of life, liberty, or property without due process of law; nor deny to person within its jurisdiction the equal protection of the laws) .....	passim

### B. Statutory:

O.R.C. § 2923.11 .....	2
O.R.C. § 2923.12(A)(2) .....	2
O.R.C. § 2923.13(A)(2) .....	2
O.R.C. § 2923.16(B) .....	2

### STATEMENT OF THE CASE

On October 24, 2016, in Cleveland, Ohio, Vernell Jordan was shot while sitting in his car at a stoplight. Petitioner Lester pulled up moments later and noticed Jordan hanging out the car door bleeding. Petitioner Lester stopped, approached Jordan's car, saw Jordan was breathing, and offered to take him to the hospital.

Upon arrival at Metrohealth Hospital, and dropping Jordan off to paramedic officials, Cleveland Police officers stationed at the hospital entrance approached Petitioner Lester and told him that he was being detained as a possible witness; and that until he gave a statement, he had to be placed and locked in the back of a nearby squad car they were escorting him to.

Petitioner Lester was not placed in handcuffs or searched. He was, however, placed and locked in the back of the squad car for nearly an hour. Petitioner Lester did not make a statement.

During the interim, Sonya Cammon, (Petitioner Lester's sister), arrived on the scene. Because Petitioner Lester was only being held as a witness, Cammon was allowed to approach and talk to Petitioner Lester through the rear window of the squad car, which had been left partially open to accomodate Petitioner Lester's claimed claustrophobia.

Through the partially open rear window, Petitioner Lester handed Cammon his cellular phone and other personal items and told Cammon to hold them until he was released and saw her later.

The squad car officer, (namely, Mr. David Price), witnessed the exchange and, acting on what he testified at trial as a "hunch," jumped out the car, ordered Cammon to surrender the items passed, searched the items, found a small handgun hidden in a scarf within the items, and arrested Cammon and Petitioner Lester for weapon and weapon related offenses. See generally,

Appendix A.

After trial by jury, Petitioner Lester was convicted of, inter alia, carrying a concealed weapon, in violation of O.R.C. § 2923.12(A)(2); having weapons under disability, in violation of O.R.C. § 2923.13(A)(2); and improperly handling a firearm in a motor vehicle, in violation of O.R.C. § 2923.16(B).

Under Ohio law, each of these statutes required proof, as an essential element, that the firearm in question was operable, (i.e., capable of expelling or propelling one or more projectiles by the action of an explosive or combustible propellant). O.R.C. § 2923.11(B)(1).

To meet this element, the State admitted Exhibit No. 82, (i.e., a report authored by the non-testifying firearms examiner who tested the firearm in question and concluded it was operable); and the testimony of Kristen Koeth, a firearms expert who did not test or examine the firearm in question, but testified that the firearm was operable based on the conclusions and report of the non-testifying analyst. See Appendix A, ("Kristen Koeth, a scientific examiner with the City of Cleveland Department of Public Safety - Division of Police, testified that the gun recovered by Officer Price was a Ruger .380 (State's exhibit No. 14). Koeth further testified that the testing performed on the gun revealed that it was operable and operates normally. Koeth testified that she did not test the Ruger for its operability. The test results were sent to her by someone else.").

During summation, the State referenced Koeth's testimony for the truth of the essential matter asserted. Namely, that the firearm was operable. See Appendix D, (prosecutor's summation excerpt). The trial court additionally instructed the jury that evidence includes all the testimony from the witness stand. See Appendix E, (jury charge excerpt).

On direct appeal, counsel challenged the constitutionality of Koeth's testimony under Confrontation Clause jurisprudence; and the legality of Petitioner Lester's seizure under Fourth Amendment jurisprudence.

With respect to counsel's claim under Confrontation Clause framework, the court of appeals affirmed reasoning that, under Williams v. Illinois, 567 U.S. 50 (2012), Confrontation Clause precepts did not apply. See Appendix A, supra, ("In Williams v. Illinois, 567 U.S. 50 (2012), the United States Supreme Court found that 'out-of-court statements that are related by an expert solely for the purpose of explaining the assumptions on which his opinion rests are not offered for their truth' and thus fall outside the scope of the Confrontation Clause. Here, Koeth was accepted as an expert witness with no objection by Lester. Koeth's conclusion that the .380 Ruger was operable and functioned normally was based on test results sent to her by someone else. Applying Williams to the instant case, Koeth's testimony does not violate the Confrontation Clause and is admissible.").

With respect to counsel's claim under Fourth Amendment framework, the court of appeals affirmed reasoning that, under the totality of circumstances test enunciated in California v. Hodari D, 499 U.S. 621 (1999), a reasonable person in Petitioner Lester's position would have felt free to refuse the entire encounter; or, for that matter, get out of the back of the squad car and leave at anytime. Appendix A, supra, ("Lester contends that he was under arrest because he submitted to the authority of the police as stated in California v. Hodari D, 499 U.S. 621 (1999). Lester was identified as a witness to a shooting. He was asked to sit in Officer Price's cruiser until a witness statement could be taken. Officer Price told Lester that he was not under arrest, and there is no record of Officer Price searching Lester prior



to entering the cruiser. Lester was not handcuffed, and the back window of the cruiser remained open, per Lester's request. Lester was able to speak with Cammon and voluntarily handed her his phone through the window. Under the totality of the circumstances, a reasonable person would not believe he or she was under arrest.").

The Ohio Supreme Court denied discretionary review. See Appendix B. Counsel's timely petition for rehearing was denied. See Appendix C.

This timely petition for a writ of certiorari follows.

REASONS WHY THIS PETITION SHOULD BE GRANTED

I. This case provides the much needed opportunity to resolve the requirements of the Sixth Amendment right to confront witnesses in the aftermath of Williams v. Illinois, 567 U.S. 50 (2012).

As acknowledged by this Court, the fractured decision in Williams, supra, has wreaked havoc. Courts across the country are struggling to make sense of current Confrontation Clause jurisprudence. Stuart v. Alabama, 136 S. Ct 36 (2018).

This case exemplifies the need for review.

Petitioner Lester was convicted of firearm and firearm related offenses which, under Ohio law, required proof as an essential element that the firearm in question was operable, (i.e., capable of expelling or propelling one or more projectiles by action of an explosive or combustible propellant). See O.R.C. §§§§ 2923.12(A)(2), 2923.13(A)(2), 2923.16(B), 2923.11(B).

To meet this element, the prosecutor introduced into evidence Exhibit No. 82, (i.e., a report authored by a non-testifying firearms examiner who tested the firearm in question and determined that it was operable); and the testimony of Kristen Koeth, a firearms expert who did not test or examine the firerarm in question, but testified that it was operable based on the conclusion and report of the non-testifying analyst. See Appendix A. No other evidence was introduced to prove that the firearm was operable; and during summation, the prosecutor referenced Koeth's testimony for the truth of the essential matter asserted - i.e., that the firearm was operable. See Appendix D, (prosecutor's summation excerpt). No limiting instruction accompanied Koeth's testimony. Instead, the trial court instructed the jury that evidence includes all the testimony, and Exhibit No. 82. See Appendix E, (jury charge excerpt).

The Confrontation Clause violation should have been clear under the unambiguous holdings of Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009), and Bullcoming v. New Mexico, 564 U.S. 647 (2011).

Relying on Williams, supra, however, the Ohio court of appeals affirmed. See Appendix A, supra, ("Here, Koeth was accepted as an expert witness with no objection by Lester. Koeth's conclusion that the .380 Ruger was operable and functioned normally was based on test results sent to her by someone else. Applying Williams to the instant case, Koeth's testimony does not violate the Confrontation Clause and is admissible.").

In light of Melendez-Diaz and Bullcoming, supra, the Ohio court of appeals holding could not have been more troubling.

Because precedent confronting this conflict is nationally needed, this Court should grant this petition for a writ of certiorari. See Stuart, supra, ("To be fair, the problem appears to be largely of our creation. This Court's most recent foray in this field, Williams v. Illinois, 567 U.S. 50 (2012), yielded no majority and its various opinions have sown confusion across the country. Respectfully, I believe we owe lower courts struggling to abide our holdings more clarity than we have afforded them. ... I would grant review.").

II. This case also presents an opportunity to exemplify the test enunciated in California v. Hodari D, 499 U.S. 621 (1999), regarding conduct by police officials which amounts to a seizure, as that term is defined in Fourth Amendment jurisprudence.

A person is seized, within the meaning of the Fourth Amendment, if, "in view of all the circumstances surrounding the incident, a reasonable person would not have felt that he [or she] was not free to leave." Id., quoting United States v. Mendenhall, 446 U.S. 544, 554 (1980).

After taking the victim of a shooting to the hospital for emergency medical treatment, police officials approached Petitioner Lester as he was leaving and told him that he was being detained as a witness; placed and locked him in the back of a squad car; and conditioned his release upon the making of a requested statement.

No reasonable person in Petitioner Lester's position would have felt that he was free to refuse the entire encounter; or, for that matter, simply get out the police car and leave.

The Ohio court of appeals held otherwise. See Appendix A, supra, ("In the instant case, Lester was identified as a witness to a shooting. He was asked to sit in Officer Price's police cruiser until a witness statement could be taken. Officer Price told Lester that he was not under arrest, and there is no record of Officer Price searching Lester prior to entering the cruiser. Lester was not handcuffed, and the back window of the cruiser remained open, per Lester's request. Lester was able to speak with Cammon and voluntarily handed her his phone through the window. Under the totality of these circumstances, a reasonable person would not believe he or she was under arrest. Because Lester was not under arrest at the time Officer Price discovered the gun, trial counsel's decision not to move to suppress [the gun] did not fall below an objective standard of reasonableness.").

Because the Ohio court of appeals got it wrong, clarity and guidance on the test are requested.

The opinion of the court of appeals also involved an unreasonable application of the facts. Officer Price testified that Petitioner Lester communicated an intent not to be detained, and asked on more than one occasion was he free to leave. See Appendix F. Echoing Officer Price's

admission, the prosecutor hammered home a finding of guilt employing Petitioner Lester's repeat request to leave. See Appendix G, (prosecutor's summation; trial transcripts at 1093-94)("You heard [Officer Price's] testimony that Mr. Lester, the entire time that he's in the back of the police car, he's asking to leave, he's asking to leave, he's asking to leave. Why? Because he knows he has a gun on him, and that he doesn't want to be in the back of a police car with a gun. That shows consciousness of guilt. He knows what he's doing is wrong.").

Contrary to the conclusion of the court of appeals, Petitioner Lester's repeat request to leave were not a sign of consciousness of guilt; after all, he supposedly was not under arrest. Petitioner Lester's repeat request to leave plainly establish that he did not feel he was free to leave; and Officer Price's acts of not releasing him upon request and keeping him placed and locked in the back of a squad car made Petitioner Lester's belief objectively reasonable.


#### CONCLUSION

Constitutional questions of paramount importance are presented. Precedent resolving these questions is nationally needed. Cf., Stuart, supra.

#### RELIEF SOUGHT

Petitioner Lester refreshes his prayer for a writ of certiorari, and full review. Alternative, a GVR, (i.e., order vacating the judgment of the Ohio court of appeals and remanding for a decision not inconsistent with Bullcoming and Melendez-Diaz; and Hodari D, are requested.

Respectfully,

  
Mr. Howard Lester