No. 20-7840
CAPITAL CASE

In the SUPREME COURT of the UNITED STATES

THOMAS ROBERT LANE,

Petitioner,

v.

STATE OF ALABAMA,

Respondent.

On Petition for a Writ of Certiorari to the
Alabama Court of Criminal Appeals

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Steve Marshall
Alabama Attorney General

Edmund Gerard LaCour Jr.
Solicitor General

Audrey Jordan
Assistant Attorney General
Counsel of Record *

Office of the Attorney General
501 Washington Avenue
Montgomery, Alabama 36130
Audrey.Jordan@AlabamaAG.gov
(334) 353-8400 Facsimile
(334) 242-7300, 353-4338 *

June 23, 2021

CAPITAL CASE

QUESTION PRESENTED

In 2003, Thomas Robert Lane brutally murdered his estranged wife, Theresa Lane, by drowning her in the bathtub of Pelagia Wilson's home. Evidence showed that the front door of Wilson's home had been pried open with a tool that had left several impressed marks on the door. An analysis conducted by Scott Milroy, a firearms and toolmarks examiner with the Alabama Department of Forensic Science, determined that, based on the distinctive characteristics of a chisel recovered from Lane's truck, there was "not another chisel in the world" that could have made the marks on Wilson's front door.

One question arises from Lane's petition:

Did the Alabama Court of Criminal Appeals plainly err when it found that Scott Milroy was qualified to testify as a firearms-and-toolmarks expert about whether the marks made on the front door were made by a particular tool?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

STATEMENT OF THE CASE

In 2003, Thomas Robert Lane brutally murdered his estranged wife, Theresa Lane, by forcibly drowning her in a bathtub. Marks were found on the wooden front door of the home where Theresa was murdered. An analysis by firearms-and-toolmarks examiner Scott Milroy revealed that those marks matched up with "several grooves, valleys, nicks . . . within the blade of" a metal chisel recovered from Lane's truck. *Lane v. State*, No. CR-15-1087, 2020 WL 2830015, at *7 (Ala. Crim. App. May 29, 2020). Lane argues that the state courts improperly allowed Milroy to provide expert testimony on this subject because it was outside his area of expertise. But Lane never pressed this argument before the trial court. And the record shows that Milroy was experienced in the field of toolmarks and impressions. Thus, the Alabama Court of Criminal Appeals was correct to conclude that there was no plain error when this toolmarks expert was allowed to testify about the marks left by the tool found in Lane's truck. Because Lane's petition presents only a narrow, split-less, and meritless claim, the petition should be denied.

A. The Proceedings Below

In 2003, Thomas Robert Lane murdered his wife, Theresa Lane, by drowning her in a bathtub. He was convicted of capital murder in the course of a burglary under Section 13A-5-40(a)(4) of the Code of Alabama, and capital murder for pecuniary gain under Section 13A-5-40(a)(7) of the Code of Alabama. He was sentenced to death. The Alabama Court of Criminal Appeals reversed and remanded for retrial, holding that Lane had been denied his Sixth Amendment right to counsel of choice. *Lane v. State*, 80 So. 3d 280 (Ala. Crim. App. 2010).

On retrial in 2016, a jury again found Lane guilty of two counts of capital murder. (C. 105-06; R. 2254.)[1] During the penalty phase, the jury unanimously found that Lane committed the murder while "engaged in the commission of, or an attempt to commit, or flight after committing, or attempting to commit a burglary" and that Lane committed the murder for pecuniary gain and recommended that Lane be sentenced to death by a vote of 11-1. (C. 107-08; R. 2544-72.) The Alabama Court of Criminal Appeals affirmed Lane's conviction and death sentence. *Lane v.*

1. "C. ___ " refers to the clerk's record and "R. ___ " refers to the transcript on direct appeal.

State, CR-15-1087, 2020 WL 2830015 (Ala. Crim. App. May 29, 2020). The Alabama Supreme Court subsequently denied Lane's petition for writ of certiorari. (*See* Pet. at App. C.)

B. Statement of the Facts

On October 12, 2003, Lane broke into the home of Pelagia Wilson, the roommate of his estranged wife Theresa Lane, and murdered Theresa by drowning her in the bathtub. The evidence showed that when Wilson returned home that morning after working the previous night, she discovered Theresa dead in the bathtub. (R. 1412-13.) Wilson also discovered that jewelry and $3,600 in cash were missing from her home. (R. 1433.)

An autopsy revealed that the cause of death was drowning (R. 2063), as evidence showed that (1) Theresa had foam around her mouth, indicating the presence of water in her lungs; (2) she suffered petechial hemorrhaging in her lungs, indicating that she had been asphyxiated; (3) she suffered several blunt force impacts to the top and back of her heard that caused subdural hemorrhaging, indicating that her head had been struck against the bathtub several times; (4) she had bruises on her shoulder and chest indicated that she had been held down; and (5) she

had numerous bruises on her forearms, right thigh, and knee, which appeared to be defensive wounds. (R. 2051-72.) In sum, the pattern of injuries indicated that Theresa had been forcibly held underwater while she fought for her life against her assailant until she ultimately drowned. (R. 2064-66.) Evidence further showed that Lane plotted to murder his estranged wife to obtain the proceeds of her life insurance policy[2] and to acquire an alien fiancée visa for a "mail-order bride" from the Philippines. (R. 1287, 1293, 1409-11, 1693-94, 1745-46, 2022-23, 2093-94.)

The investigation further revealed evidence that the front door of Wilson's home had been pried open with a tool that left several impressed marks on the door. An analysis conducted by Scott Milroy, a firearms and toolmarks examiner with the Alabama Department of Forensic Science, determined that, based on the distinctive characteristics of a chisel recovered from Lane's truck pursuant to a valid search warrant, the marks on the front door matched the chisel. (R. 1616-17.)

---

2. Lane attempted to collect on Theresa's life insurance policy the same day her body was discovered. First, he contacted a chaplain with the local sheriff's department and requested assistance with the paperwork required to claim her life insurance. (R. 1803.) Second, he went to her employer and inquired about her life insurance. (R. 2095.) It was only after he returned the following day that he learned that he was no longer the beneficiary on Theresa's policy. (R. 2095.)

Specifically, Milroy testified that the chisel seized from Lane's vehicle had "several grooves, valleys, nicks . . . within the blade of th[e] chisel . . . [that] g[a]ve[] it a very unique quality." (R. 1599.) He also testified that the chisel "was used . . . underneath th[e] moulding (sic) and pressed on th[e] wooden door." (R. 1617.) Milroy explained that, because the wood of the door was "soft" and the chisel was made of metal, it left "an impression of the toolmark on the wood." (R. 1609.) He testified that this was "like a crossover case because [his] experience" allowed him to "us[e] both of [his] skill sets [of impressions and toolmarks] to determine if that tool made that impression." (R. 1609.) He noted that examiners are "taught early" that impressions may be difficult to see initially and to use "side lighting and light it up" to see the toolmarks. (R. 1609-10.) The lighting "adds depth" and allows an examiner to "see the impression pop out[.]" (R. 1611.) After examining the area, he determined that the impression on the door had "the same width of the blade." (R. 1612.) He also determined that the impression had "some really unique characteristics inside," with "little valleys, little nicks." (R. 1613.) After visually inspecting the door, he made a cast of the toolmark on the door.

(R. 1613-14.) Milroy then compared the chisel to the cast of the toolmark from the door. (R. 1617.)

> [Milroy]: Okay. For my analysis, it's my opinion that this chisel made the impression . . . on this door.
>
> [Prosecutor]: And is there another chisel in the world that would have those same marks?
>
> [Milroy]: Well, as part of our training, you know, and our, you know, knowledge and what we learn on doing comparisons is with these unique qualities there's not another chisel in the world. It would be hard to duplicate this chisel.

(R. 1616-17.) He also testified that his findings were reviewed by a second examiner, who concurred with his findings. (R. 1617-18.)

REASONS FOR DENYING THE PETITION

Lane's petition fails to meet this Court's requirement that there be "compelling reasons" for granting certiorari. *See* Sup. Ct. R. 10. First, though Lane challenged the admission of Scott Milroy's expert testimony in the state appellate courts, he did not raise this argument during trial before the trial court. Second, the Alabama Court of Criminal Appeals correctly determined that Milroy was qualified, based on his knowledge and experience in toolmarks, to provide expert testimony about the marks found on Wilson's front door. Accordingly, this Court should deny the writ.

I. Lane's claim that the state court improperly admitted Scott Milroy's expert testimony is not preserved for review.

Because Lane did not raise his current challenge to the admission of Scott Milroy's expert testimony in trial court, *see Lane v. State*, CR-15-1087, 2020 WL 2830015, at *32 (Ala. Crim. App. May 29, 2020) ("Because Lane did not object to Milroy's testimony, this claim is subject to only plain-error review."), the question set forth in his petition is not actually live in his case. Under Alabama law, when a defendant like Lane has not raised an argument before the trial court, the appellate court cannot correct the purported error unless failure to do so would "seriously affect the fairness or integrity of the judicial proceedings." *Ex parte Hodges*, 856 So. 2d 936, 947 (Ala. 2003). Thus, "the plain-error exception to the contemporaneous objection rule is to be used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result." *Id.* (internal quotation marks omitted). And, here, the Alabama Court of Criminal Appeals concluded both that there was (1) no error and (2) there was no plain error in allowing Milroy to offer his expert testimony. *Lane*, 2020 WL 2830015, at *33.

This second holding is an independent and adequate state-law ground for dismissing Lane's late-breaking claim. In *Sochor v. Florida*,

this Court reviewed a Florida Supreme Court decision that rejected a petitioner's claims because (1) "they [were] not preserved for appeal," and (2) they "ha[d] no merit." 504 U.S. 527, 534 (1992). This Court held that the state court decision "indicate[d] with requisite clarity that the rejection of Sochor's claim was based on the alternative state ground that the claim was 'not preserved for appeal,' and Sochor has said nothing in this Court to persuade us that this state ground is either not adequate or not independent." *Id.* The same is true here. While the Alabama Court of Criminal Appeals did consider the merits of Lane's claim and held that the trial court did not err, the appellate court also held that there was no plain error under Alabama law. Consequently, this Court should deny Lane's petition for writ of certiorari.

II. The Alabama Court of Criminal Appeals correctly determined that Scott Milroy's expert testimony was properly admitted.

Like he argued in the state appellate court, Lane asserts that "Milroy's testimony 'concerned "impressed evidence," which was a "crossover" field distinct from firearm and toolmark analysis,' and that Milroy 'performed a chisel-mark analysis for the first time in his career in Lane's case; he had never previously matched a metal instrument to

impressed wood.'" *Lane v. State*, CR-15-1087, 2020 WL 2830015, at *32 (Ala. Crim. App. May 29, 2020). Lane's argument, however, rests on two misconceptions.

First, he draws a disciplinary distinction where none exists. Toolmark analysis examines "the mark[s] left by an instrument or an object composed of a hard substance coming in contact with and leaving some characteristic mark or *impression* on a relatively softer medium." 1 Am. Jur. Trials 555, § 69 (May 2021 update) (emphasis added). Thus, it follows that toolmark analysis encompasses impressed evidence left by tools. *See generally United States v. Natson*, 469 F. Supp. 2d 1253, 1259–60 (M.D. Ga. 2007) ("A 'toolmark' is damage that a hard object inflicts on a soft object during direct physical contact. A "tool" is any object that leaves one or more toolmarks on another object. There are two types of toolmarks : (1) 'impression' toolmarks that are produced by direct pressure of a tool against the surface of another object, applied without lateral motion; and (2) 'striation' toolmarks that are an abrasion-type toolmark produced by sliding a tool across the surface of another object.").

Second, Milroy did not characterize impressed evidence as a "crossover" *field*[3]; rather, he characterized the analysis he conducted as a "crossover *case*" in which he relied on his knowledge of toolmark analysis and other forms of impressed evidence. Specifically, Milroy testified that:

> [T]his is kind [what] I call . . . a crossover case because now my experience . . . in trace evidence kicks in because I do the impression evidence. So now I have a toolmark but it's an impressed toolmark. . . . So now I'm using both of my skill sets to determine if that tool made that impression.

(R. 1609.) Regardless, even assuming impression evidence were a distinct field, Milroy spent his first seven years at the Alabama Department of Forensic Sciences as a trace evidence examiner and worked extensively with impression evidence. (C. 1136-37; R. 1590.) He testified that he worked on "[a]nything that basically wasn't a blood or bullet[,]" such as "shoe print impression evidence tire track impression evidence, glass examination, filament examination, paint analysis, fire debris, hairs, [and] fibers." (R. 1590.) As such, contrary to Lane's assertion otherwise, Milroy had experience well-beyond ballistic toolmark analysis. Further, the fact that Milroy had no prior experience conducting a chisel

3. Lane asserts that "Milroy testified that chisel-mark analysis was a 'cross-ever' field[.]" (Pet. at 7.)

identification[4] did not automatically exclude him from providing expert testimony. If so, taken to its logical conclusion, a forensic expert could never testify about an analysis conducted unless they had previously conducted the same analysis on the same material using the same type of tool.

Lane argues that "multiple other jurisdictions have excluded expert testimony from witnesses on subjects outside their areas of expertise." (Pet. at 14.) He asserts that Milroy's "experience with toolmarks analysis on bullets and cartridges, and 'peripheral' knowledge of impression marks generally, did not qualify him as an expert in analyzing chisel marks against wood[]." (Pet. at 15.) He further asserts that "the fact that

4. Lane asserts that, though Milroy worked with toolmarks and impressed evidence in approximately 600 to 700 cases, the state appellate court "ignored the fact that none of this 'expertise' – not a single one . . . [he] worked on – involved matching marks made by a metal tool, like a chisel, to a wooden door frame. (R. 1624.)" But Milroy was asked how many "*chisels* . . . [he] ha[d] examined and rendered opinions regarding their marks that they may have made on a wooden door[.]" (R. 1624) (emphasis added). He was not asked, however, how many of the cases he had worked involved matching a medal tool to a wooden doorframe. *Cf. Lane*, 2020 WL 2830015, at 33 ("Initially, we note that, although the testimony is unclear, Milroy appears to have testified that the toolmarks analysis he performed in this case was the only 'chisel-mark analysis' he performed *in 2003*, not the only one he had ever performed.").

Mr. Milroy's skill set is closely related to the subject matter about which he testified is not enough to ensure the reliability of his expert opinion regarding an area for which he had no experience." (Pet. at 17.) Again, Lane's arguments ignore Milroy's experience and expertise and presupposes that Milroy was only qualified to testify regarding "typical toolmarks – like those left by a gun on a bullet[.]" (Pet. 11.) But, as the Alabama Court of Criminal Appeals found, "Milroy was qualified to testify as a firearms-and-toolmarks expert and that the marks on Wilson's front door fell within that field of expertise, i.e., were toolmarks." *Lane*, 2020 WL 2830015, at 33. Accordingly, this Court should deny Lane's petition for writ of certiorari.

CONCLUSION

For the reasons set forth above, this Court should deny Lane's petition for writ of certiorari.

Respectfully submitted,

Steve Marshall
Alabama Attorney General

Edmund G. LaCour Jr
Alabama Solicitor General

/s/Audrey Jordan
Audrey Jordan
Assistant Attorney General