In the

United States Court of Appeals

For the Seventh Circuit

No. 22-2833

CHRISTOPHER ROALSON,

Petitioner-Appellant,

v.

JON NOBLE, Warden,

Respondent-Appellee.

Appeal from the United States District Court for the
Eastern District of Wisconsin.
No. 2:18-cv-01831-PP — **Pamela Pepper**, *Chief Judge.*

ARGUED MAY 15, 2024 — DECIDED AUGUST 28, 2024

Before BRENNAN, KIRSCH, and LEE, *Circuit Judges.*

BRENNAN, *Circuit Judge.* Christopher Roalson is serving a life sentence for stabbing and bludgeoning a 93-year-old woman to death. At his trial, a DNA analyst testified about evidence left behind on the two knives and barstool used to commit the murder. The testifying analyst did not swab the items and develop the sample left on the weapons—another analyst performed that work but was unavailable at trial. Instead, the analyst who took the stand testified that Roalson

was a possible contributor after comparing the sample from the weapons to a sample of his DNA. Roalson was convicted and now collaterally challenges that conviction. He argues that the trial court denied his right to confront a witness by allowing the substitute analyst to testify. The district court denied his habeas petition, and he asks us to reverse that decision.

I.

In 2009, Christopher Roalson and Austin Davis broke into the Radisson, Wisconsin home of a 93-year-old woman. Davis was in the kitchen looking for items to steal when Roalson emerged from the woman's bedroom holding a bloody knife. Roalson and Davis had each taken a knife from Davis's cousin's house, their last stop before the break-in. Wordlessly, Roalson grabbed Davis's knife from his hand, picked up a wooden kitchen stool, and went back into the bedroom. Davis heard the woman screaming from the kitchen. Then, he heard something break and saw Roalson running out of the bedroom. Roalson kicked down a screen door and ran from the house, and Davis followed. As the two fled, Roalson broke the silence. He said that he stabbed the woman "a bunch of times" and "broke the chair over her," that "he was Satan's son," and that the woman "would [have] been saved if God was here."

A few days later, Roalson told his friend Jacqueline Walczak that he stabbed a woman. According to Walczak, Roalson said he and Davis set out "to rob a lady," they broke into the house, the "lady ... caught them," "he took a chair and he hit her and he hit her and he hit her," "he stabbed her and he stabbed her and he stabbed her and he stabbed her," "he said hail, Satan" while stabbing her, and "if he got away with it, he'd do it again." When Walczak heard that a woman

had been found murdered and the cause of death was not being disclosed, she contacted police and told them what Roalson had told her.

The state charged Roalson with burglary and first-degree intentional homicide. Davis pleaded guilty to second-degree intentional homicide in exchange for cooperating with law enforcement and testifying at Roalson's trial.

Several witnesses testified at Roalson's trial in Sawyer County, Wisconsin Circuit Court. Davis shared what he saw and what Roalson told him after the murder. Walczak described Roalson's confession to her. And Carly Leider, a DNA analyst at the Wisconsin State Crime Laboratory in Madison, also testified.

Leider's testimony is at issue here. Another analyst, Ryan Gajewski, had swabbed evidence collected from the scene, tested the DNA samples he recovered, and concluded that Roalson's DNA was a possible contributor to some of the samples, including the knives. But Gajewski was unavailable to testify at trial because he was employed elsewhere and was in Afghanistan. So Leider appeared at trial.

Leider testified that she looked at Gajewski's notes and was able "to reach [her] own conclusions based on developed profiles[,]" which she compared to "standards" (that is, a person's DNA sample) to identify potential contributors. She explained her analysis was just like that of a peer reviewer, who examines the principal analyst's work. But in the peer review process, the reviewer does not retest the sample because the initial swab generates "the best collection of that DNA."

During Leider's testimony, counsel for the state presented her with several pieces of evidence—in particular, the two

knives and the barstool—and asked if she was able "to reach an opinion regarding the profile that was developed ... versus the standards that were ... developed." Each time, she testified as to her own conclusions. For example, Leider said she reached a conclusion about the DNA collected from swabbing the handle and the blade of one of the knives. The DNA detected from the handle included four "possible contributors to this DNA mixture profile," including the victim, Roalson, and Davis. And the DNA detected from the blade included "a female DNA profile," of which the victim "was the source."

The jury found Roalson guilty, and he was sentenced to life in prison.

He appealed his state conviction, arguing the trial court violated his right to confront Gajewski by allowing Leider to testify instead. The Wisconsin Court of Appeals affirmed, applying a rule from the Wisconsin Supreme Court's decision in *State v. Luther Williams*, 644 N.W.2d 919 (Wis. 2002). Citing that case, the court explained the Confrontation Clause is not always violated when one analyst testifies to his own conclusions about samples tested by another analyst. When the testifying analyst can provide an independent evaluation of the initial report, the original analyst need not be called.

After the Wisconsin and United States Supreme Courts denied certiorari, Roalson began his collateral attacks on his conviction. The state trial court denied his challenge without a hearing, and the Wisconsin Court of Appeals affirmed without addressing his Confrontation Clause claim.

Roalson then petitioned for habeas corpus in the Eastern District of Wisconsin. The court dismissed the petition. In just a few sentences, the court explained there is no federal law

"clearly holding" that the Confrontation Clause bars a testifying analyst from testifying to "her own independent opinions and conclusions regarding the DNA collected ... ." Roalson was free to confront Leider "about those opinions and conclusions," so the decision of the Wisconsin Court of Appeals was not unreasonable. Roalson appeals.

II.

To grant a writ of habeas corpus, the adjudication of the prisoner's claim must have resulted in a decision that was either: (1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or (2) "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1) & (2). We defer to the state-court decision if it is reasonable and review the district court's decision de novo. *Gonzales v. Eplett*, 77 F.4th 585, 591 (7th Cir. 2023).

Under § 2254(d)(1), an application of federal law is unreasonable if it is "so erroneous that 'there is no possibility fairminded jurists could disagree that the state court's decision conflicts with [the Supreme] Court's precedents.'" *Nevada v. Jackson*, 569 U.S. 505, 508–09 (2013) (quoting *Harrington v. Richter*, 562 U.S. 86, 102 (2011)). The federal law itself must be "clearly established," 28 U.S.C. § 2254(d)(1), which "refers to the holdings, as opposed to the dicta, of [the Supreme] Court's decisions." *Carey v. Musladin*, 549 U.S. 70, 74 (2006) (quotations omitted); *Shirley v. Tegels*, 61 F.4th 542, 545 (7th Cir. 2023); *see also Bland v. Hardy*, 672 F.3d 445, 448 (7th Cir. 2012) ("Until the Supreme Court has made a right *concrete*, it has not been 'clearly established.'"); *White v. Woodall*, 572 U.S. 415, 427 (2014) ("[C]ourts must reasonably apply the rules 'squarely

established' by [the Supreme] Court's holdings to the facts of each case." (quoting *Knowles v. Mirzayance*, 556 U.S. 111, 122 (2009))).

Our first step is to "determin[e] the relevant clearly established law." *Yarborough v. Alvarado*, 541 U.S. 652, 660 (2004). Broadly speaking, the federal law at issue is the Confrontation Clause and the Supreme Court's interpretation of it. That Clause provides "the accused [in a criminal prosecution] shall enjoy the right ... to be confronted with the witnesses against him." U.S. CONST. amend. VI. "Testimonial statements of witnesses absent from trial [may be] admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine." *Crawford v. Washington*, 541 U.S. 36, 59 (2004). The state cannot introduce a report with testimonial conclusions into evidence without producing the analyst who prepared the report. *See Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 308–09 (2009); *Bullcoming v. New Mexico*, 564 U.S. 647, 657–58 (2011). But it is less clear whether a state may allow an analyst to testify to his own conclusions about data another analyst collected.

In *Williams v. Illinois*, 567 U.S. 50 (2012), the Court's most recent and relevant Confrontation Clause decision,[1] the Court

[1] The Supreme Court recently decided another Confrontation Clause case that touches on the question here. *Smith v. Arizona*, 144 S. Ct. 1785 (2024). In that case, an analyst who did not testify collected some samples, tested them, and concluded that they tested positive for certain drugs. Another analyst reviewed this report to reach his own, independent conclusion about what the samples were, but also testified to the substance of the other analyst's report. *Id.* at 1795. The Court held that the testifying analyst testified to the truth of the other analyst's report and remanded for the

held that the Confrontation Clause was not violated when an analyst testified that swabs from a rape victim matched the defendant's DNA. *Id.* at 61–62, 71. Like Leider here, the analyst in *Williams* had not collected the swab, but reviewed the work of the analyst who did collect it. *Id.* at 61–62. From that review, she formed her own conclusion about whether the swab and the defendant's DNA matched. *See id.*

A fragmented Court decided *Williams*. Justice Alito wrote the plurality opinion joined by three other justices. He explained that the original analyst's report "was not to be considered for its truth but only for the distinctive and limited purpose of seeing whether it matched something else." 567 U.S. at 79 (quotations omitted). Justice Thomas, writing alone, agreed that the scheme did not violate the Confrontation Clause, but only as applied to Williams's case. The original report, he explained, "lacked the requisite formality and solemnity to be considered testimonial for purposes of the Confrontation Clause." *Id.* at 104 (Thomas, J., concurring) (quotations omitted). Justice Kagan, in dissent and joined by the remaining justices, saw no difference between introducing an unavailable analyst's report and allowing another analyst

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state court to determine whether the report was testimonial. *Id.* at 1799–1802.

That Supreme Court case does not affect our analysis, as the Wisconsin Court of Appeals issued its decision in 2014. *See Greene v. Fisher*, 565 U.S. 34, 38 (2011) ("[Section] 2254(d)(1) requires federal courts to focu[s] on what a state court knew and did, and to measure state-court decisions against this Court's precedents as of the time the state court renders its decision." (quotations and emphasis omitted) (second alteration in original)).

to read that report and testify to her own conclusions. *Id.* at 125 (Kagan, J., dissenting).

We do not conclude that *Williams* clearly established a rule that helps us decide whether to grant Roalson's petition. "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds[.]'" *Marks v. United States*, 430 U.S. 188, 193 (1977) (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976) (opinion of Stewart, Powell, and Stevens, JJ.)). If "a concurrence that provides the fifth vote necessary to reach a majority does not provide a 'common denominator' for the judgment," the rule set out in *Marks* "does not help to resolve the ultimate question." *United States v. Heron*, 564 F.3d 879, 884 (7th Cir. 2009); *see id.* (listing cases).

Justice Thomas's concurrence and the plurality opinion do not share a "common denominator." *Id.* Justice Thomas focused on the formality of the original report, while the plurality opinion addressed how the report was presented at trial. It is true that Justice Thomas "share[s] the dissent's view of the plurality's flawed analysis." *Williams*, 567 U.S. at 104 (Thomas, J., concurring). But "under *Marks*, the positions of those Justices who *dissented* from the judgment are not counted in trying to discern a governing holding from divided opinions." *Gibson v. Am. Cyanamid Co.*, 760 F.3d 600, 620 (7th Cir. 2014). For one, *Marks* is expressly limited to the justices who "concurred in the judgments." 430 U.S. at 193 (quotations omitted); *see Gibson*, 760 F.3d at 620. Further, as this court explained in *Gibson*, "the dissenters have disagreed with the plurality and the concurrence on *how* the governing

standard applies to the facts and issues at hand []even if there is agreement" on some other issue. 760 F.3d at 620.

We are not the only court scratching its head at *Williams*. Other circuits have applied *Marks* to *Williams* and been left wanting for clarity, *United States v. Duron-Caldera*, 737 F.3d 988, 994 & n.4 (5th Cir. 2013); *Garlick v. Lee*, 1 F.4th 122, 133 (2d Cir. 2021), including in the habeas context, *Washington v. Griffin*, 876 F.3d 395, 409 (2d Cir. 2017).

Marks aside, neither this court nor the Supreme Court has suggested that *Williams* clearly established a rule. This court has applied *Williams* to reach a holding once. *United States v. Maxwell*, 724 F.3d 724, 727–28 (7th Cir. 2013). In that case, the defendant did not object to the Confrontation Clause issue and did not dispute the chemical makeup of the material tested. *Id.* at 727. The other two times this court has been presented with the opportunity to apply *Williams*, it has assumed a Confrontation Clause violation and focused instead on the harmless error question. *United States v. Turner*, 709 F.3d 1187, 1194 (7th Cir. 2013); *United States v. Garvey*, 688 F.3d 881, 885 (7th Cir. 2012).

The Supreme Court has also noted the lack of clarity surrounding *Williams*. Dissenting in *Williams*, Justice Kagan recognized the "uncertainty" of the opinions of the plurality and Justice Thomas and stated that she believes the earlier cases "continu[e] to govern, in every particular, the admission of forensic evidence." 567 U.S. at 141 (Kagan, J., dissenting). Indeed, the Court recognized the "muddle" *Williams* caused in lower courts just over a month after this case was argued, in *Smith*, 144 S. Ct. at 1794.

Recognizing *Williams*'s cloudiness, we are left with *Melendez-Diaz* and *Bullcoming* as the clearly established law governing Roalson's habeas appeal. These cases hold that a state cannot introduce a report with testimonial statements into evidence without producing the analyst who prepared the report. *Melendez-Diaz*, 557 U.S. at 308, 329; *Bullcoming*, 564 U.S. at 658.

Thus, the next question is whether the rule that the Wisconsin Court of Appeals applied is an unreasonable application of clearly established law. That rule, from *Luther Williams*, provides "one expert cannot act as a mere conduit for the opinion of another" and must instead "render[] her own expert opinion." *Luther Williams*, 644 N.W.2d at 926; *see State v. Deadwiller*, 834 N.W.2d 362, 377 (Wis. 2013) (applying rule). The testifying expert cannot be just anyone. The expert must be "highly qualified[,]" "familiar with the procedures at hand[,]" and must have "supervise[d] or review[ed] the work of the testing analyst." *Luther Williams*, 644 N.W.2d at 926.

That rule does not contradict *Melendez-Diaz* or *Bullcoming*.[2] To the contrary, it expressly prohibits a state from introducing an underlying report through testimony and requires that an

[2] The Wisconsin Supreme Court implicitly reached the same conclusion in *State v. Deadwiller* by holding the *Luther Williams* rule does not contradict *Williams*. In *Deadwiller*, an analyst testified at trial to his own conclusion that the defendant's DNA matched a profile another analyst collected from semen from sexual assault victims. 834 N.W.2d at 365. The jury found the defendant guilty. *Id.* at 368. The court in *Deadwiller* discussed *Williams* at length and concluded that the overlap among the facts of *Williams*, *Deadwiller*, and *Luther Williams* meant that the *Luther Williams* rule does not contradict *Williams*. *Deadwiller*, 834 N.W.2d at 375–77.

analyst form an independent opinion and testify to that independent opinion. *See Deadwiller*, 834 N.W.2d at 370 n.7.

So, as he must, Roalson argues that the state broke that rule and *did* introduce Gajewski's report through Leider's testimony. But this is not so. First, Roalson says Leider testified several times that she was "able to look at the ... materials that were prepared by another analyst in the lab to reach [her] own conclusions." A peer reviewer would have to look at the notes to locate the profile and conduct her own comparison. What matters is whether the peer reviewer testified to the original reviewer's conclusions. Leider did not.

Second, Roalson argues Leider testified to Gajewski's process when asked: "[F]rom the review of the notes, does it indicate how the profiles were developed, meaning was there just one or were there ... multiple?" Leider answered "yes" and explained, "[t]he knife was processed by swabbing the blade of the knife and the handle of the knife separately." This is not a case where one analyst testified that another analyst "had followed standard procedures in testing the substances and that he reached the same conclusion based on the resulting data that [the original analyst] had ... ." *Turner*, 709 F.3d at 1191. Further, this case comes to us on habeas review, where we defer to a state court's reasonable application of federal law. The Wisconsin Court of Appeals reasonably concluded, based on Leider's testimony, that "[t]he opinions [she] reached on the basis of the materials she reviewed were her own." *State v. Roalson*, 855 N.W.2d 492 (unpublished table decision) (Wis. Ct. App. July 15, 2014). *Melendez-Diaz* and *Bullcoming* do not establish that this kind of testimonial corollary is problematic.

Even if Roalson were correct that the state court committed an error under § 2254(d) because the state introduced Gajewski's report for its truth via Leider's testimony, ample evidence supported his conviction, so any error did not have a "substantial and injurious effect or influence" on the verdict. *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) (quotations omitted); *Brown v. Davenport*, 596 U.S. 118, 133 (2022). On habeas review, a reversible error must be harmful by more than a reasonable possibility. The court must find that the defendant was "actually prejudiced by the error." *Davis v. Ayala*, 576 U.S. 257, 268 (2015) (quotations omitted); *see Rhodes v. Dittmann*, 903 F.3d 646, 665–66 (7th Cir. 2018). When the error is a deprivation of an opportunity to cross-examine, this court considers several factors:

> [T]he importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case.

Jones v. Basinger, 635 F.3d 1030, 1052 (7th Cir. 2011) (quotations omitted); *see Rhodes*, 903 F.3d at 666.

These factors favor the state. Leider's testimony was not the most important evidence for the state. Far more impactful was Davis's testimony—which placed Roalson at the scene and provided Roalson's statements in the moments following the murder—and Walczak's testimony as to what Roalson confessed to her. Fingerprint evidence corroborated Leider's testimony in part; forensic examiners found a fingerprint

matching Roalson's left pinky finger on one of the knives. And Roalson does not suggest that the court restricted his opportunity to cross-examine Leider. The prosecution supported its charge that Roalson committed the murder by calling Davis and Walczak, who had not spoken to each other and yet testified that Roalson reported the same details to each of them. Therefore, even if the Wisconsin Court of Appeals was incorrect and the Constitution prohibited Leider's testimony, the error did not have a "substantial and injurious effect or influence" on the jury's verdict. *Brecht*, 507 U.S. at 637 (quotations omitted).

III.

The Wisconsin Supreme Court's decision in *Luther Williams* is in line with the United States Supreme Court's holdings in *Melendez-Diaz* and *Bullcoming*. So, the court's rule is a reasonable application of clearly established law. Even if there were an error, it is not substantial enough to justify releasing Roalson. The district court's judgment denying Roalson's petition for a writ of habeas corpus is therefore AFFIRMED.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

CHRISTOPHER ROALSON,

Petitioner,

v. Case No. 18-cv-1831-pp

JON NOBLE,[1]

Respondent.

ORDER DISMISSING *HABEAS* PETITION (DKT. NO. 1), DISMISSING CASE WITH PREJUDICE AND DECLINING TO ISSUE CERTIFICATE OF APPEALABILITY

On November 20, 2018, the petitioner, who is incarcerated at Kettle Moraine Correctional Institution and is representing himself, filed a petition for writ of *habeas corpus* under 28 U.S.C. §2254 challenging his 2013 conviction in Sawyer County Circuit Court for first-degree intentional homicide and armed burglary. Dkt. No. 1. On December 17, Magistrate Judge William E. Duffin screened the petition and ordered the respondent to answer or otherwise respond. Dkt. No. 8. On February 15, 2019, the respondent answered the petition. Dkt. No. 12. The parties have fully briefed the petition.

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[1] Rule 2(a) of the Rules Governing Section 2254 Cases in the United States District Courts says that if someone is currently in custody under as state-court judgment, "the petition must name as respondent the state officer who has custody." The petitioner is in custody at Kettle Moraine Correctional Institution. This order reflects Warden Jon Noble as the respondent.

The petitioner is not entitled to *habeas* relief. This order dismisses the petition, dismisses the case with prejudice and declines to issue a certificate of appealability.

I. Background

A. Underlying State Case

1. *Trial in Sawyer County Circuit Court*

In 2009, the petitioner invaded 93-year-old Irena Roszak's home in the middle of the night, stabbed Ms. Roszak eighteen times and beat Ms. Roszak in the head with a stool. Dkt. No. 12-38 at 10, 32-33. The petitioner's accomplice, fifteen-year-old Austin Davis, pled guilty to second-degree intentional homicide for his participation in the home invasion and murder. Dkt. No. 12-5 at ¶2.

In the ensuing investigation, Wisconsin State Crime Laboratory analyst Ryan Gajewski conducted DNA analysis on items recovered at the scene. Id. at ¶3. Those items included two knives—one with a black handle and one with a wood handle. Id. While Gajewski found no blood on the knives, he recovered DNA from both. Id. On the blade of the black-handled knife, Gajewski found Ms. Roszak's DNA. Id. at ¶4. On the black handle, Gajewski found a mixed DNA profile with four contributors. Id. "Roszak, [the petitioner], and Davis were all possible contributors, and approximately 1 in 510 people could be a contributor." Id. "On the wood-handled knife's blade, Gajewski found a mixed profile from at least four people." Id. at ¶5. "Roszak and Davis were possible contributors, and approximately 1 in 1000 people could be a contributor." Id. On the wooden handle, Gajewski found a mixed DNA profile with three

contributors. Id. Ms. Roszak and the petitioner were possible contributors; "[a]pproximately 1 in 12,000 people could have been a contributor to that profile." Id.

At the time the trial began, neither Gajewski nor "the analyst who did the original peer-review analysis" was available to testify. Id. at ¶6. "Gajewski was employed elsewhere and located in Afghanistan," while the analyst who conducted the original peer-review had retired. Id. Over the petitioner's objection, the circuit court allowed the State to introduce the DNA evidence through a different analyst—Carly Leider. Id.

Leider did a "complete technical review" of Gajewski's work, and her conclusions "matched Gajewski's." Id. In support of its motion to introduce DNA evidence through Leider, the State "presented the following facts":

> Ms. Leider explained a peer review is performed as a [matter] of procedure and completed prior to a report being written. The notes, data and any tests are examined to ensure they coincide with the evidence. Further, the data, notes and test lead the reviewer to a conclusion. The peer review is meant to make sure the conclusions in the report are correct.
>
> Ms. Leider thought it would be possible to do a complete technical review of the tests, notes and supporting materials from analyst Ryan Gajewski's report from October 1, 2009 and reach her own opinion.
>
> Ms. Leider described this procedure of a complete technical review to be essentially the same procedure a peer reviewer would follow but it occurs after the report has been completed.

Dkt. No. 12-5 at ¶13.

Leider's trial testimony stated that an outside agency accredited the crime lab, and each DNA analyst in the lab followed the same authorized

procedures. Id. at ¶14. She explained the process of accreditation and the lab's procedure for analyzing and comparing evidence. Id. She testified to the concept of technical review, stating that it is

> basically a peer review. What I mean by either of those terms is after the analyst that conducts the work in our laboratory, every case that's generated has to go through a peer or technical review where another analyst will proofread the entire file, come to their own conclusions and check the documentation of the file before it goes out the door.

Id.

Leider stated, "I look at the data which is simply the DNA profile that was detected, I can look at that profile that anyone in the laboratory could have generated. I look at the standards and make my conclusions." Id.

Aside from DNA evidence, the State presented testimony from Davis and Jacqueline Walsczak. Dkt. No. 12-5 at ¶7. "Davis testified that he accompanied [the petitioner] into the home, but that [the petitioner] stabbed the victim and beat her with a chair." Id. Ms. Walsczak, "a very good friend" of the petitioner's, testified that the petitioner "confessed the stabbing to her three days before the victim's body was found." Id. "Walsczak also testified to details of the events prior to and during the crime." Id. "The details she provided were consistent with those provided by Davis." Id. Finally, Walsczak testified that the petitioner stated if he was not caught for Ms. Roszak's murder, he would do it again. Dkt. No. 12-38 at 38-39.

2. *Direct appeal*

The petitioner (represented by Attorney Tim Provis) appealed, arguing that "his constitutional confrontation right was violated when the State

introduced DNA evidence but failed to produce at trial Gajewski, the analyst who actually analyzed the DNA evidence and prepared a report." Dkt. No. 12-5 at ¶8; Dkt. No. 3-1 at 7. On July 15, 2014, the Wisconsin Court of Appeals affirmed the circuit court's judgment. Dkt. No. 12-5. In August of 2014, the petitioner filed a petition for review in the Wisconsin Supreme Court. State v. Roalson, Appeal No. 2013AP1693 (available at https://wscca.wicourts.gov). On June 12, 2015, the court denied review. Dkt. No. 12-9.

B. State Postconviction Proceedings

On July 5, 2016, the petitioner filed a *pro se* Wis. Stat. §974.06 postconviction motion for a new trial and an evidentiary hearing in Sawyer County Circuit Court. Dkt. No. 12-10 at 9; Dkt. No. 12-13 at ¶3; State v. Roalson, Case No. 2009CF69 (available at https://wcca.wicourts.gov). The petitioner "challenge[d] the effectiveness of his post-conviction counsel, alleging that [Attorney Provis] failed to raise other appellate issues which [the petitioner] had requested him to address." Dkt. No. 3-1 at 8. Specifically, the petitioner asserted that trial counsel was ineffective for failing to move to dismiss the case based on destruction of evidence, failing to object to a party-to-a-crime instruction and failing to object to allegedly improper argument. Id. The petitioner "also argue[d] that his appellate counsel was ineffective for making the argument which counsel *did* raise on appeal, because the peer review issue was already a matter of settled law." Dkt. No. 3-1 at 8 (emphasis in original). Citing State v. Escalona-Naranjo, 185 Wis. 2d. 168, 181-82 (Wis. 1994), the State responded that the petitioner was not entitled to an evidentiary hearing

because he failed to demonstrate a "sufficient reason" for not raising his ineffective assistance of trial counsel claims on direct appeal. Dkt. No. 12-13 at ¶4.

The circuit court denied the motion three and a half months later. Dkt. No. 3-1 at 7. It declined to consider the petitioner's argument about Attorney Provis's performance as appellate counsel because "the issue regarding peer review which was raised on the appeal was *not* settled law at the time the appeal was filed." Id. at 8-9. Rather, "[i]t was only *after* the appellate courts decided this issue that the decision in [the petitioner's] case was handed down, and those decisions dictated the result of that appeal." Id. at 9. And the court determined that "more importantly, issues regarding the effectiveness of appellate counsel [could] only be addressed by petition for writ of certiorari to the court of appeals which heard the appeal." Id. The circuit court found that it "[did] not have jurisdiction to hear these matters." Id. (citing State v. Starks, 349 Wis. 2d 274, 281, 294 (2013)).

According to the circuit court, the petitioner's other three issues were "normally matters addressed via a post conviction motion with the trial court," and they raised the question of whether Attorney Provis "was ineffective as *post conviction* counsel (as opposed to appellate counsel) for failing to file" a postconviction motion on the petitioner's behalf. Id. It concluded that neither trial nor postconviction counsel was ineffective for failing to seek a dismissal of the case for destruction of evidence. Id. at 10-12. The court reasoned that the evidence was merely "potentially useful"—short of the "apparently exculpatory"

standard. Id. at 11-12. "Since the issue of the [party to a crime] instruction was raised and argued by [the petitioner's] trial counsel in the context of the State's motion to amend the Information to include the [party to a crime] modifier, the court [found] that trial counsel was not ineffective for failing to specifically object to the court giving that instruction to the jury" and Attorney Provis was not ineffective for failing to raise that issue in a postconviction motion. Id. at 13. Last, the court determined that the petitioner's trial counsel was not ineffective for failing to object to several comments the State made during closing argument. Id. at 13-14. The court reasoned that the petitioner read the State's argument too literally and that the State's argument was not unlawful. Id. at 14-15. The court concluded that the petitioner "failed to set forth specific facts to show why his trial counsel was ineffective, which would *ipso facto* demonstrate his post conviction counsel was not ineffective for failing to request a Machner hearing on these issues." Id. at 15-16. For that reason, the court found that the petitioner was not entitled to an evidentiary hearing. Id. at 16.

On January 19, 2017, the petitioner filed a notice of appeal. Roalson, Sawyer County Case No. 2009CF69 (available at https://wcca.wicourts.gov). On appeal, the petitioner "again raise[d] a plethora of issues regarding his trial counsel's performance." Dkt. No. 12-13 at ¶7. He argued counsel was ineffective in failing to move for a mistrial based on destruction of evidence, a failure to object to the inclusion of the party-to-a-crime instruction and a failure to object to statements in the State's closing argument. Id. On June 5,

2018, the court of appeals affirmed the circuit court's denial of postconviction relief without an evidentiary hearing. Dkt. No. 12-13. In July of 2018, the petitioner filed a petition for review in the Wisconsin Supreme Court. State v. Roalson, Appeal No. 2017AP116 (available at https://wscca.wicourts.gov). On September 4, 2018, the court denied review. Dkt. No. 12-16.

C. Federal *Habeas* Petition

On November 20, 2018, the petitioner filed this federal *habeas* petition. Dkt. No. 1. The petition asserted four grounds for relief: (1) ineffective assistance of appellate counsel for failing to "appeal trial counsel's failure to identify and pursue Brady violation," id. at 6; (2) ineffective assistance of appellate counsel for failing to "appeal trial counsel's failure to object to constructively amended jury instructions," id. at 7; (3) ineffective assistance of appellate counsel for failing to "appeal trial counsel's failure to object to false and misleading statements made by the state in it's [sic] closing argument," id. at 8; and (4) the petitioner's "sixth amendment due process right to confrontation was violated when the state did not produce for cross examination the DNA analyst from the state crime lab who actually analyzed the DNA found on items of evidence," id. at 9.

II. Analysis

A. Standard

Under the Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996, a federal court may grant *habeas* relief only if the state court decision was "either (1) 'contrary to, or involved an unreasonable application of, clearly

established Federal law, as determined by the Supreme Court of the United States,' or (2) 'based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.'" Miller v. Smith, 765 F.3d 754, 759-60 (7th Cir. 2014) (quoting 28 U.S.C. §§2254(d)(1), (2)). A federal *habeas* court reviews the decision of the last state court to rule on the merits of the petitioner's claim. Charlton v. Davis, 439 F.3d 369, 374 (7th Cir. 2006).

"'[A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly.'" Renico v. Lett, 559 U.S. 766, 773 (2010) (quoting Williams v. Taylor, 529 U.S. 362, 410 (2000)). "The 'unreasonable application' clause requires the state court decision to be more than incorrect or erroneous. The state court's application of clearly established law must be objectively unreasonable." Lockyer v. Andrade, 538 U.S. 63, 71 (2003) (emphasis added). In other words, §2254(d)(1) allows a court to grant *habeas* relief only where it determines that the state court applied federal law in an "objectively unreasonable" way. Renico, 559 U.S. at 773. "A state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." Harrington v. Richter, 562 U.S. 86, 102 (2011) (quoting Yarborough v. Alvarado, 541 U.S. 652, 664 (2004)). "The standard under §2254(d) is 'difficult to meet' and 'highly deferential.'" Saxon v. Lashbrook, 873 F.3d 982, 987 (7th Cir. 2017) (quoting Cullen v. Pinholster, 563 U.S. 170, 181 (2011)).

B. Procedural Default

The respondent contends that the petitioner procedurally defaulted on his ineffective assistance of counsel claims. Dkt. No. 17 at 6. The respondent explains that the petitioner defaulted on his claims (1) "by not fully and fairly presenting them to the Wisconsin Supreme Court in his petition for review in his collateral challenge to his conviction" and (2) "because the court of appeals relied on independent and adequate state procedural rules when resolving the claims." Id. at 7-8.

1. *Fair presentment*

Under AEDPA, a state prisoner must exhaust available state-court remedies before a federal district court will consider the merits of a constitutional claim in a federal *habeas* petition. 28 U.S.C. §2254(b)(1)(A). The exhaustion requirement gives the state an opportunity to pass upon and correct alleged violations of the federal rights of persons who are incarcerated by the state. Bolton v. Akpore, 730 F.3d 685, 694 (7th Cir. 2013). To exhaust his claims, "[a] petitioner must raise his constitutional claims in state court 'to alert fairly the state court to the federal nature of the claim and to permit that court to adjudicate squarely that federal issue.'" Weddington v. Zatecky, 721 F.3d 456, 465 (7th Cir. 2013) (quoting Villanueva v. Anglin, 719 F.3d 769, 775 (7th Cir. 2013)). To comply with this requirement, the incarcerated person must "fairly present" the claim in each appropriate state court. Bolton, 730 F.3d at 694-95. "The failure to present fairly each habeas claim in state court 'leads to a default of the claim[s] and bar[s] the federal court from reviewing the

claim[s'] merits.'" Weddington, 721 F.3d at 456 (quoting Smith v. McKee, 598 F.3d 374, 382 (7th Cir. 2010)). The courts call this circumstance "procedural default."

The respondent contends that the petition for review in the petitioner's collateral challenge to his conviction "did not present the facts and controlling legal principles for" his ineffective assistance of counsel claims. Dkt. No. 17 at 7. According to the respondent, the petitioner "argued only that the circuit court should have granted him an evidentiary hearing on the Wis. Stat. § 974.06 motion in which he had raised these claims." Id. Conceding that the petition for review "listed the claims that [the petitioner] raised in his Wis. Stat. § 974.06 motion and the constitutional provisions that they are based on," the respondent asserts "this was not enough to preserve the claims for this Court's review." Id. at 8. The respondent concludes that the petitioner "develops no argument at all about any of the claims such that the supreme court could have understood what [the petitioner] was complaining about." Id. (citing Hicks, 871 F.3d at 531-32). Stating that "the petitioner did not describe the withheld evidence or the improper comments," and that "there are no facts or argument that support the rest of the claims," the respondent argues the petitioner procedurally defaulted them. Id.

2. *Adequate and independent state ground doctrine*

One of the ways a criminal defendant can "procedurally default" on a claim—thus losing his right to federal *habeas* review on that claim—is if the last state court that issued judgment "'clearly and expressly' states that its

judgment rests on a state procedural bar." Harris v. Reed, 489 U.S. 255, 263 (1989) (quoting Caldwell v. Mississippi, 472 U.S. 320, 327 (1985)). "Merits review of a habeas claim is foreclosed if the relevant state court's disposition of the claim rests on a state law ground that is adequate and independent of the merits of the federal claim." Triplett v. McDermott, 996 F.3d 825, 829 (7th Cir. 2021). "Federal habeas courts must ascertain for themselves if the petitioner is in custody pursuant to a state court judgment that rests on independent and adequate state grounds." Coleman v. Thompson, 501 U.S. 722, 729 (1991). When considering whether a state court decision rests on a state procedural default, federal courts look to "the last *explained* state-court judgment." Ylst v. Nunnemaker, 501 U.S. 797, 805 (1991) (emphasis in original).

A state ground is independent "when the court actually relied on the procedural bar as an independent basis for its disposition of the case." Thompkins v. Pfister, 698 F.3d 976, 986 (7th Cir. 2012). "The test to avoid procedural default in federal court is whether the state court's decision rests on the substantive claims primarily, that is, whether there is no procedural ruling that is independent of the court's decision on the merits of the claims." Holmes v. Hardy, 608 F.3d 963, 967 (7th Cir. 2010). "If the last state court to be presented with a particular federal claim reaches the merits, it removes any bar to federal-court review that might otherwise have been available." Ylst, 501 U.S. at 801. However, "a state court that separately reaches the merits of a substantive claim may also produce an independent procedural ruling that bars federal habeas review." Holmes, 608 F.3d at 967. The question is whether

the state court's procedural ruling is primary. If it is, then the procedural ruling is independent. Id. As for adequacy, a state law ground is "adequate" "when it is a firmly established and regularly followed state practice at the time it is applied." Thompkins, 698 F.3d at 986. When considering the adequacy of a state law ground, the court does not consider "whether the review by the state court was proper on the merits." Lee v. Foster, 750 F.3d 687, 694 (7th Cir. 2014).

According to the respondent, the court of appeals relied on independent and adequate state procedural rules to reject the petitioner's claims on collateral review. Dkt. No. 17 at 8. The respondent reasons that the court of appeals found that the petitioner had not alleged a "sufficient reason" for not raising the claims in his postconviction motion during his direct appeal "as required by Wis. Stat. § 974.06(4) and" Escalona-Naranjo. Id. at 9. The respondent stresses that the court of appeals concluded that the circuit court properly denied the petitioner's postconviction motion without an evidentiary hearing because the petitioner had not sufficiently alleged his claims. Id. The respondent states that the court of appeals' ruling was "independent because it did not depend on the merits of [the petitioner's] claims." Id. Regarding adequacy, the respondent asserts "the Seventh Circuit has held that Wisconsin's pleading standard for obtaining evidentiary hearings and the application of the 'sufficient reason' requirement of Wis. Stat. § 974.06 are adequate procedural rules." Id. at 9-10 (collecting cases).

The Wisconsin Court of Appeals relied on an adequate and independent state law ground when it affirmed the circuit court's denial of the petitioner's §974.06 postconviction motion without a hearing. Dkt. No. 12-13. The court of appeals relied on the procedural rule set forth in the Wisconsin Supreme Court's decisions in State v. Romero-Georgana, 360 Wis. 2d 522, 539-40 (2014), and State v. Balliette, 336 Wis. 2d 358, 383-84 (2011). Id. at ¶¶6, 8. Those decisions provide the standard governing whether a petitioner is entitled to an evidentiary hearing in connection with a §974.06 motion.

Citing Romero-Georgana, the court of appeals evaluated whether the petitioner's motion "allege[d] facts sufficient to entitle the movant to relief." Dkt. No. 12-13 at ¶6 (citing Romero-Georgana, 360 Wis. 2d at 539-40). It explained that "[i]f the motion [did] not raise sufficient facts, or if the motion present[ed] only conclusory allegations, it [was] within the circuit court's discretion to order a hearing." Id. (citing Romero-Georgana, 360 Wis. 2d at 539-40). Noting the petitioner's burden to show that the claims he presented to the court of appeals were "clearly stronger" than the claims appellate counsel actually raised, the court of appeals determined that the petitioner "merely present[ed] a summary of what occurred in his prior appeal," and "appear[ed] to reason that his present claims [were] clearly stronger merely because he lost the prior appeal." Id. at ¶8 (citing Romero-Georgana, 360 Wis. 2d). The court found this "insufficient," stating that the petitioner had to demonstrate that "appellate counsel's failure to raise the asserted issues fell below an objective standard of reasonableness." Id. (citing Balliette, 336 Wis. 2d at 385). It explained the

presumption that appellate counsel acted reasonably, and the obligation on the petitioner to "overcome that presumption by presenting facts in a who, what, where, when, why and how format." Id. (citing Balliette, 336 Wis. 2d at 373, 385). To the court of appeals, both the petitioner's appellate brief and his §974.06 motion "fail[ed] in this regard." Id.

The court of appeals found that the petitioner "ha[d] not alleged sufficient facts to show that his present ineffective assistance of trial counsel claims [were] clearly stronger than the claims his appellate counsel actually raised." Id. at ¶9. For that reason, the court concluded that the petitioner "ha[d] not demonstrated a sufficient reason for failing to raise those matters in his direct appeal," and he was procedurally barred from raising those issues in his collateral appeal. Id. The court of appeals determined that because of that procedural bar, "the circuit court properly denied [the petitioner's] motion without holding an evidentiary hearing." Id.

The court of appeals clearly relied on the procedural rule set forth in Balliette and Romero-Georgana in concluding that the petitioner's §974.06 postconviction motion did not entitle him to an evidentiary hearing; that rule is an independent state law ground for the court's decision. As for whether that ground is adequate, this court's inquiry "is limited to whether it is a firmly established and regularly followed state practice at the time it is applied." Lee v. Foster, 750 F.3d 687, 694 (7th Cir. 2014). The Seventh Circuit has answered this question affirmatively, stating that this rule "is a well-rooted procedural requirement in Wisconsin and is therefore adequate." Id. (collecting cases).

The Wisconsin Court of Appeals relied on an adequate and independent state law ground to deny relief on the petitioner's ineffective assistance of counsel claims. Those claims are procedurally defaulted. Unless the petitioner can show both cause and prejudice, this court cannot review his procedurally defaulted claims.

3. *Cause and prejudice*

If a federal court determines that a petitioner's claims are procedurally defaulted, it must consider whether to excuse that default. Coleman, 501 U.S. at 750. A court may excuse default if the petitioner can show either (1) cause for the default and resulting prejudice or (2) that the failure to consider the federal claim will result in a fundamental miscarriage of justice. Id. (citations omitted). "[T]he existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the state's procedural rule." Murray v. Carrier, 477 U.S. 478, 488 (1986). "Prejudice means an error which so infected the entire trial that the resulting conviction violates due process." Weddington, 721 F.3d at 465 (quoting McKee, 598 F.3d at 382)). To show that a miscarriage of justice will occur if the court were to deny *habeas* relief, a petitioner must show that he is actually innocent of the offenses of which he was convicted. Hicks v. Hepp, 871 F.3d 513, 531 (7th Cir. 2017). A petitioner asserting actual innocence as a gateway to a defaulted claim "must establish that, in light of new evidence, 'it is more likely than not that no reasonable juror would have found [the] petitioner guilty beyond a reasonable doubt.'"

House v. Bell, 547 U.S. 518, 536-37 (2006) (quoting Schlup v. Delo, 513 U.S. 298, 327 (1995)).

The petitioner has not shown cause and prejudice for his procedural defaults. The petitioner, representing himself, filed the §974.06 postconviction motion underlying his collateral appeal. Dkt. No. 12-10 at 9. *Pro se* status is not cause to excuse procedural default. Harris v. McAdory, 334 F.3d 665, 668 (7th Cir. 2003). The petitioner has not identified any external factor that impeded his ability to comply with Wisconsin's procedural rules. Finally, the petitioner has not demonstrated that a miscarriage of justice will occur if the court does not set aside these procedural defaults. He has not shown that he is actually innocent of the offenses underlying his conviction.

C. Confrontation Clause

"The Confrontation Clause of the Sixth Amendment provides: 'In all criminal prosecutions, the accused shall enjoy the right. . . to be confronted with the witnesses against him.'" Davis, 547 U.S. 813. The Confrontation Clause bars the admission of a witness's testimonial statement when that witness does not appear at trial "unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." Id. (citing Crawford v. Washington, 541 U.S. 36, 53-54 (2004)). Only testimonial statements, however, "cause the declarant to be a 'witness' within the meaning of the Confrontation Clause." Id. (citing Crawford, 541 U.S. at 51). Nontestimonial statements, "while subject to traditional limitations upon hearsay evidence," do not implicate the Confrontation Clause. Id.

The respondent argues that the court of appeals did not unreasonably apply federal law when it concluded that Leider's testimony did not violate the petitioner's right to confrontation. Dkt. No. 17 at 12. He states that the Seventh Circuit has not only held that "testimony like Leider's does not violate the Confrontation Clause," but has "endorse[d] its use." Id. at 18 (citing United States v. Turner, 709 F.3d 1187, 1190-91 (7th Cir. 2013)). The respondent notes that "Leider never mentioned Gajewski or his conclusions during her direct testimony about her findings." Id. Rather, "she testified only about her own conclusion that she reached after reviewing Gajewski's work." Id. at 19. The respondent asserts that the mere fact that Leidner and Gajewski ultimately reached the same conclusion does not show that Leidner failed to conduct her own analysis. Id. at 20.

The petitioner maintains that his "right to confrontation was violated when the state did not present DNA analyst Ryan Gajewski at trial." Dkt. No. 20 at 10. The petitioner stresses that (1) "Ms. Leider did not analyze the DNA evidence on the knives herself," (2) "[s]he simply reviewed the written materials created by Gajewski," (3) "[h]er review did not include a second test on any evidence" and (4) "she was not the peer reviewer of the original analyst." Id. at 13. He says that for these reasons, he was unable to "determine the original analyst's competency, honesty or even if he had simply made mistakes writing his methods and data down." Id. at 13-14. According to the petitioner, "Ms. Leider did not present her own conclusions." Id. at 14. He says that her conclusions are "identical to the conclusions in the report." Id. The petitioner

states that Leider "has no opinion of her own." Id. at 15. Asserting that "[i]t is clear that Ms. Leider was 'acting as a mere conduit' for the actual analyst," the petitioner concludes that "[t]his is a confrontation clause even without considering subsequent U.S. Supreme Court decisions." Id. He says that "[t]herefore, all of the foregoing demonstrates the Bullcoming rule against surrogate testimony, . . . and so [the petitioner's] basic right to confrontation was violated here." Id. To the petitioner, "it seems abundantly clear State v. Williams . . . does not survive Crawford." Id. at 17.

During the petitioner's direct appeal, the Wisconsin Court of Appeals considered his claim that the introduction of DNA evidence analyzed by Gajewski combined with Gajewski's failure to appear at trial violated his rights under the Confrontation Clause. Dkt. No. 12-5 at ¶8. Citing the Wisconsin Supreme Court's decision in State v. Williams, 253 Wis. 2d 99 (Wis. 2002), the court of appeals concluded that Leider's testimony did not violate the petitioner's Confrontation Clause rights. Id. at ¶¶1, 6, 8, 15. The court explained that Williams "essentially holds that a state crime lab peer-review analyst may testify in place of the original analyst." Id. at ¶15 (citing Williams, 253 Wis. 2d at 113). The court of appeals found that Leider had reached her own opinions after "compar[ing] the profiles Gajewski developed from the evidence found at the crime scene with the standards collected from the three individuals." Id. at ¶14. Observing Leider's testimony that "her technical review was the same as a peer review," and that she reviewed the file and reached her own opinions, the court concluded that Leider "was not a mere conduit for

Gajewski's opinions." Id. at ¶15 (citing Williams, 253 Wis. 2d at 113-14). While the court acknowledged the petitioner's argument that Williams was no longer good law due to Crawford v. Washington, it disagreed with the petitioner. Id. at ¶11.

The court of appeals' decision was within the bounds of reasonableness that §2254(d) requires. The petitioner does not raise, and this court is not aware of, any federal law as determined by the United States Supreme Court clearly holding that Leider's testimony violated the Confrontation Clause. As the court of appeals explained, Leider testified that she proofread the entire file and reached her own independent opinions and conclusions regarding the DNA collected in the petitioner's case. Dkt. No. 12-5 at ¶14. At trial, Leider conveyed those opinions and conclusions, and the petitioner had an opportunity to confront her about those opinions and conclusions. "[A]n appropriately credentialed individual may give expert testimony as to the significance of data produced by another analyst." United States v. Maxwell, 724 F.3d 724, 727 (7th Cir. 2013) (quoting United States v. Turner, 709 F.3d 1187, 1190-91 (7th Cir. 2013); Williams v. Illinois, __ U.S. __, 132 S. Ct. 2221, 2233-35 (2012)). An analyst's reliance on another's data to reach a conclusion does not violate the Sixth Amendment. Id. (citing Turner, 709 F.3d at 1190-91).

The court will dismiss the petition and dismiss the case.

III. Certificate of Appealability

Under Rule 11(a) of the Rules Governing Section 2254 Cases, the court must consider whether to issue a certificate of appealability. A court may issue

a certificate of appealability only if the applicant makes a substantial showing of the denial of a constitutional right. See 28 U.S.C. §2253(c)(2). The standard for making a "substantial showing" is whether "reasonable jurists could debate whether (or for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." Slack v. McDaniel, 529 U.S. 473, 484 (2000) (internal quotations omitted). The court declines to issue a certificate of appealability, because reasonable jurists could not debate the petitioner's procedural default or the court's decision to dismiss the petition on the merits.

IV. Conclusion

The court **DISMISSES** the petition for writ of *habeas corpus* under 28 U.S.C. §2254. Dkt. No. 1.

The court **ORDERS** that this case is **DISMISSED WITH PREJUDICE**. The clerk will enter judgment accordingly.

The court **DECLINES TO ISSUE** a certificate of appealability.

Dated in Milwaukee, Wisconsin this 30th day of September, 2022.

BY THE COURT:

HON. PAMELA PEPPER
Chief United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

CHRISTOPHER ROALSON,

Petitioner,

v.

JON NOBLE,

Respondent.

JUDGMENT IN A CIVIL CASE

Case No. 18-cv-1831-pp

☐ **Jury Verdict.** This case came before the court for a trial by jury. The parties have tried the issues, and the jury has rendered its verdict.

☑ **Decision by Court.** This case came before the court, the court has decided the issues, and the court has rendered a decision.

THE COURT ORDERS AND ADJUDGES that the petition for writ of *habeas corpus*, filed under 28 U.S.C. §2254 is **DISMISSED**.

THE COURT DECLINES to issue a certificate of appealability.

THE COURT ORDERS that this case is **DISMISSED**.

Approved and dated in Milwaukee, Wisconsin this 30th day of September, 2022.

BY THE COURT:

HON. PAMELA PEPPER
Chief United States District Judge

GINA M. COLLETTI
Clerk of Court

s/ *Cary Biskupic*
(by) Deputy Clerk

CONFIDENTIAL REPORT OF LABORATORY FINDINGS
DJ-LE-103 (4/92)

Wisconsin State Crime Laboratory
Division of Law Enforcement Services
State Crime Laboratory - Madison
4626 University Avenue
Madison, WI 53705-2174
(608) 266-2031
FAX (608)267-1303

Submitting Agency:

Sheriff James A. Meier
Attn: Gary Gillis
Sawyer County Sheriff's Office
15880 E. Fifth Street
Hayward WI 54843

Date: October 1, 2009

Case No: M09-1146

Agency No: 09-050501

Laboratory Analyst:

Ryan M. Gajewski
(DNA Analysis)

Case Name: Roszak, Irena [V]

I do hereby certify this document, consisting of 5 page(s), to be a true and correct report of the findings of the State Crime Laboratory on the items examined as shown by this report.

J.B. Van Hollen
ATTORNEY GENERAL

DESIGNEE

The following items of evidence were examined in the DNA Analysis Unit of this Crime Laboratory:
Item B - hairs reportedly recovered from Irena Roszak's body
Item D - blue plastic reportedly removed from broken south window
Item F - section of wooden window frame reportedly from ground below broken south window
Item G - glass pieces reportedly from ground below broken south window
Item H - blue plastic reportedly from ground below broken south window (inside)
Item J - wooden barstool reportedly from bedroom
Item M1 - swabs reportedly from top shelf inside broken S window
Item M2 - swabs reportedly from window latches (exterior) on SW window
Item M3 - swabs reportedly from handles on linen closet in laundry room
Item M4 - swabs reportedly from interior surface of SE window frame
Item O - section of plastic bag reportedly from back porch
Item R - sweatshirt reportedly belonging to Christopher Roalson
Item S - T-shirt reportedly belonging to Christopher Roalson
Item T - black socks
Item U - black "APerfect Circle" T-shirt
Item V - black "Shady Ltd" T-shirt
Item W - black "Led Zeppelin" T-shirt
Item X - "G-Unit" button front shirt
Item Y - black mask
Item Z - black cargo shorts
Item AA - black long sleeve T-shirt
Item AB - black pants
Item AC - black "ol' Dirty Bastard" T-shirt
Item AD - blue pieces of plastic
Item AE - blue pillow case
Item AG - black handled knife

Item AH - wood handled "Ekco Eterna" knife
Item AI - yellow rubber gloves reportedly belonging to Austin Davis
Item AJ - buccal standard reportedly recovered from Christopher Roalson
Item AL - buccal standard reportedly recovered from Austin Davis
Item AO1 - fingernails right reportedly recovered from Irena Roszak
Item AO2 - fingernails left reportedly recovered from Irena Roszak
Item AO8 - swabs reportedly recovered from upper lip of Irena Roszak
Item AP1 - buccal standard reportedly recovered from Irena Roszak.

Results

No stains of apparent evidentiary value were observed on the socks (Item T), black T-shirts (Items U, V, and W), shirt (Item X), mask (Item Y), cargo shorts (Item Z), pants (Item AB,) and T-shirt (Item AC).

Blood was not detected on the section of plastic bag (Item O), sweatshirt (Item R), T-shirt (Item S), long sleeve T-shirt (Item AA), blue pieces of plastic (Item AD), pillow case (Item AE), black handled knife (Item AG), wood handled knife (Item AH), or rubber gloves (Item AI).

Chemical analysis indicated the possible presence of blood on the wooden barstool (Item J) and the swabs of the upper lip (Item AO8).

Item B contained two hairs. One hair was determined to be unsuitable for STR (short tandem repeat) DNA (deoxyribonucleic acid) analysis. Apparent root material was observed on the second hair (Item B1).

An apparent hair was recovered from the glass pieces (Item G). No further analysis was performed on the hair.

Human DNA isolation was attempted from a swabbing of the blue plastic (Item D), swabbing (F1) of the board (Item F), swabbing of pieces (G1, G2, and G3) of glass (Item G), swabbing of a stain (J2) on the barstool (Item J), swabs (Items M1 and M2), and a swabbing of the right glove (Item AI1). No DNA was detected; therefore, no further analyses were performed on these items.

Human DNA was isolated from the hair (Item B1), a swabbing (F2) of the board (Item F), swabbing of the blue plastic (Item H), swabbings of stains (J1, J3, and J4) on the barstool (Item J), swabbings (J5, J6, J7, J8, J9, J10, J11, J12) of the barstool (Item J), swabs (M3 and M4), swabbing of blue plastic (Item AD), swabbing of the blade (AG1) and handle (AG2) of the black handled knife (Item AG), swabbing of the blade (AH1) and handle (AH2) of the wood handled knife (Item AH), swabbing of the left glove (Item AI2), swabbings (AO1a, AO1b, AO2a, and AO2b) of the fingernails (Items AO1 and AO2), swabs from upper lip (Item AO8), and the buccal standards (Items AJ, AL, and AP1).

Due to the lack of male DNA detected on the swabbing (F2) of the board (Item F), the swabbing of the blue plastic (Item H), swabbings of stains (J1, J3, and J4) on the barstool (Item J), swabbings (J6, J7, J9, J11, and J12) of the barstool (Item J), swabs (M3 and M4), swabbing of the left glove (Item AI2), swabbings (AO1a, AO1b, AO2a, and AO2b) of the fingernails (Items AO1 and AO2), and

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swabs from upper lip (Item AO8), no further analyses were performed.

The amount of male DNA detected from swabbings (J5, J8, and J10) of the barstool (Item J) was unsuitable for further autosomal DNA testing; however, Y-STR DNA testing was attempted.

Using the Promega PowerPlex® 16 Amplification kit, the DNA obtained from the remaining items was amplified by the polymerase chain reaction (PCR) method and typed for fifteen STR genetic markers and the gender specific marker, amelogenin. The STR markers examined were D3S1358, TH01, D21S11, D18S51, Penta E, D5S818, D13S317, D7S820, D16S539, CSF1PO, Penta D, vWA, D8S1179, TPOX, and FGA.

An incomplete female STR DNA profile was detected from the hair (Item B1). This profile will be used for exclusionary purposes only.

An STR profile that is a mixture of DNA from two or more individuals was detected from the swabbing of the blue plastic (Item AD). This mixture included a major component male STR DNA profile.

A female STR DNA profile was detected from the swabbing of the blade (AG1) of the black handled knife (Item AG).

STR DNA profiles that are mixtures of DNA from four or more individuals were detected from the swabbing of the handle (AG2) of the black handled knife (Item AG) and the swabbing of the blade (AH1) of the wood handled knife (Item AH). These mixtures included at least one male contributor.

An STR DNA profile that is a mixture of DNA from three or more individuals was detected from the swabbing of the handle (AH2) of the wood handled knife (Item AH). This mixture included at least one male contributor.

Complete single source STR DNA profiles were detected from the buccal standards (Items AJ, AL, and AP1).

Using the Promega PowerPlex® Y Amplification kit, the DNA obtained from the swabbings (J5, J8, and J10) of the barstool (Item J) was amplified by the PCR method and typed for twelve short tandem repeat (STR) markers on the Y chromosome. The Y markers analyzed were DYS391, DYS389I, DYS439, DYS389II, DYS438, DYS437, DYS19, DYS392, DYS393, DYS390, and DYS385 (a/b).

Y-STR DNA profiles that are mixtures of DNA from two or more male individuals were detected from the swabbings (J5, J8, and J10) of the barstool (Item J).

Complete Y-STR DNA profiles were detected from the buccal standards (Items AJ and AL).

Conclusions

PowerPlex® 16

Austin Davis, Christopher Roalson, and Irena Roszak are eliminated as a possible source of the STR DNA profile detected from the hair (Item B1)

Christopher Roalson is the source of the major component male STR DNA profile detected from the swabbing of the blue plastic (Item AD). Austin Davis and Irena Roszak are eliminated as possible contributors to this mixture profile.

Irena Roszak is the source of the DNA obtained from the swabbing of blade (AG1) of the black handled knife (Item AG).

Austin Davis, Christopher Roalson, and Irena Roszak are included as possible contributors to the STR DNA mixture profile detected from the swabbing of the handle (AG2) of the black handled knife (Item AG). The probability of randomly selecting an unrelated individual that could have contributed to this mixture profile is approximately one in 510.

Austin Davis and Irena Roszak are included as possible contributors to the STR DNA mixture profile detected from the swabbing of the blade (AH1) of the wood handled knife (Item AH). The probability of randomly selecting an unrelated individual that could have contributed to this mixture profile is approximately one in 1 thousand. Christopher Roalson is eliminated as a possible contributor.

Christopher Roalson and Irena Roszak are included as possible contributors to the STR DNA mixture profile detected from the swabbing of the handle (AH2) of the wood handled knife (Item AH). The probability of randomly selecting an unrelated individual that could have contributed to this mixture profile is approximately one in 12 thousand. Austin Davis is eliminated as a possible contributor.

The above conclusions are based on a statistical analysis that utilizes a database of unrelated African American, Caucasian, and Hispanic individuals obtained from the Federal Bureau of Investigation. The source attribution conclusions are based on the calculated frequency of the STR DNA profile being rarer than 1 in 6 trillion individuals which is approximately one thousand times the world's population. Identical siblings will share the same DNA profile.

PowerPlex® Y

Christopher Roalson cannot be eliminated as a possible contributor to the Y-STR DNA mixture profile detected from a swabbing (J5) of the barstool (Item J). Austin Davis is eliminated as a possible contributor.

Christopher Roalson cannot be eliminated as a possible contributor to the Y-STR DNA mixture profile detected from a swabbing (J8) of the barstool (Item J). Austin Davis is eliminated as a possible contributor.

Austin Davis and Christopher Roalson are eliminated as possible contributors to the Y-STR DNA

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mixture profile detected from a swabbing (J10) of the barstool (Item J).

All paternal male relatives will share the same Y-STR profile. Unrelated male individuals may also share this Y-STR profile.

Evidence Disposition

All items of evidence will be returned to the submitting agency.

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