No. 17-1676

In the
Supreme Court of the United States

VANESSA STUART,
Petitioner,
v.
STATE OF ALABAMA,
Respondent.

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

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

At Petitioner Vanessa Stuart's trial for criminally negligent homicide and driving under the influence of alcohol, the court permitted the introduction of forensic reports regarding Stuart's blood alcohol level several hours after the offense to provide the basis for expert opinion testimony as to her blood alcohol level at the time of the offense. The question in this case is whether the trial court's decision to permit opinion testimony based on these reports was consistent with the Confrontation Clause of the Sixth Amendment.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

STATEMENT OF THE CASE

On the night of April 1, 2015, Petitioner Vanessa Stuart rear-ended Tiffany Howell's vehicle on Interstate 10 just outside Daphne, Alabama causing Howell's vehicle to rotate clockwise and roll several times before striking a tree and coming to a stop. Daphne police officers responding to an emergency 911 call determined that Howell was already dead when they reached the scene. The evidence at trial demonstrated that Stuart was drunk and driving at a speed of approximately ninety to 100 miles per hour when she struck Howell's vehicle and killed her.

Stuart was charged with criminally negligent homicide and driving under the influence of alcohol in violation of Sections 13A-6-4 and 32-5A-191 of the Code of Alabama (1975). She was convicted of both charges after a six-day jury trial. On April 19, 2017, she was sentenced to consecutive terms of imprisonment for one year for each conviction — with three months of each term suspended — and two years of probation. Stuart's conviction and sentence were affirmed by the Alabama Court of Criminal Appeals. The Alabama Supreme Court denied her petition for a writ of certiorari. At present, Stuart has already served twelve months of her eighteen-month jail sentence.

Alongside myriad other evidence that Stuart was drunk when the fatal collision occurred, the State offered the opinion testimony of Jason Hudson, the toxicology section chief at the Alabama Department of Forensic Sciences ("the Department"). To supply the

factual basis for his opinion, the State introduced two toxicology reports prepared by the Department reflecting Stuart's blood alcohol level four hours after the accident occurred. State's Exhibits 184 and 185 (Record on Appeal, C. 329-32.) These reports were prepared using a blood sample taken from Stuart pursuant to a search warrant.

Hudson was not involved in the preparation of these reports, R. 678, and he did not attest to their validity. Instead, Hudson's commentary on the reports themselves was restricted to interpreting their results based on his personal familiarity with the procedures of his lab and the characteristics of its reports. R. 654 to R. 657. With regard to the first report, which was based on a blood sample taken at 2:59 a.m., Hudson attested that "[t]he result for this analysis was 0.174 grams per 100 milliliters of blood." R. 655. The second report, which indicates that it was taken approximately thirty-four minutes later, at approximately 3:33 a.m., indicated a result of 0.158 g/100 mL of blood. R. 657.

The prosecution proceeded to ask Hudson to calculate Stuart's probable blood alcohol level at the time of the accident based on the assumption that these reports accurately reflected her blood alcohol levels at 2:59 a.m. and 3:33 a.m., respectively. R. 657. Hudson indicated that to do so, he would need to make the "assumption" that the individual from whom the samples had been taken had not "consumed any alcohol since the incident," because that would yield a higher blood alcohol level at the time when the samples were taken than that which the individual

would have had when the event occurred. R. 658. He also indicated that, to work backwards from the individual's blood alcohol level at the time when the samples were taken to the time of the accident, he would have to assume that Stuart's body eliminated alcohol from her bloodstream at the average rate for the general population, which he claimed is ".015 grams per 100 milliliters per hour." R. 664.

The prosecution then asked Hudson whether he was "able to, based on the average person, determine what their blood alcohol level would have been at 10:40" p.m., the approximate time at which the accident took place. R. 664. Based on these assumptions and a hypothetical time frame in which a person's blood alcohol level was ".147 at 2:59 a.m. and a collision took place at 10:40 p.m.," R. 664, Hudson determined that the average person's blood alcohol level would have been approximately 0.234 g/100 mL at the time of the accident. R. 665. This level would be well over the legal limit of 0.8 g/100 mL. ALA. CODE § 32-5A-191(a)(1).

Hudson did not characterize his opinion as founded on anything beyond hypothetical assumptions regarding the validity of the test results, the applicable time frame, and Stuart's physiological characteristics. The hypothetical character of his testimony was repeatedly underscored on cross-examination. For instance, Hudson conceded that he had "no knowledge" of whether Stuart had the elimination rate of an average person. R. 669. The same was true with respect to time frame. When defense counsel said, "you really don't know one way

or the other when this *hypothetical situation* started or ended, right?," Hudson answered "I do not." R. 671-72 (emphasis added). For good measure, Hudson agreed with defense counsel when he explained that "again, all these [questions] are prefaced and premised with the average person like we were talking about with the prosecutor." R. 678. Thus, as the record makes plain, all parties present were aware that the opinion offered by Hudson *assumed* the results in the reports were true as a hypothesis, and that he was not *asserting* that they were true.

REASONS FOR DENYING THE PETITION

Stuart contends in his petition for writ of certiorari that the Court should summarily reverse the decision of the Alabama Court of Criminal Appeals on the ground that the introduction of toxicology reports reflecting Stuart's blood alcohol level was inconsistent with *Bullcoming v. New Mexico*, 564 U.S. 647 (2011). *Bullcoming* held that the Confrontation Clause does not permit the introduction of "a forensic laboratory report containing a testimonial certification — made for the purpose of proving a particular fact — through the in-court testimony of a scientist" if he "did not sign the certification or perform or observe the test reported in the certification." 564 U.S. at 652. Per Stuart's logic, the introduction of the toxicology reports in the case at hand was inconsistent with this holding because Hudson did not perform or observe the tests reflected in the reports at issue.

This argument ignores the Court's later decision in *Williams v. Illinois*, 567 U.S. 50 (2012), which

established that *Bullcoming* does not create a categorical prohibition on expert reliance on a forensic report produced by a different scientist. *Williams* did not produce a controlling majority opinion, but under the logic of either the plurality or concurrence, the decision of the Alabama Court of Criminal Appeals below was not in error. Under the rule of the *Williams* plurality, "[o]ut-of-court statements that are related by the expert solely for the purpose of explaining the assumptions on which that opinion rests are not offered for their truth and thus fall outside the scope of the Confrontation Clause." 567 U.S. at 58 (plurality opinion). In his concurring opinion, Justice Thomas adopted a test that would permit the same result if the report in question lacked sufficient "indicia of solemnity" to fall within the class of statements regulated by the Confrontation Clause. *Id.* at 111 (Thomas, J., concurring in the judgment) (citation omitted).

The trial court's decision to permit Hudson to offer an opinion as to Sturt's blood alcohol level at the time of the accident that was based on toxicology reports he did not prepare was consistent with *Williams* under either test. Here, as in *Williams*, the principal purpose of the forensic reports at issue was to provide a basis for Hudson's opinion testimony, and Hudson did not attest to the truth of the results supplied by the reports. And the reports were neither sworn nor certified. Thus, under either approach, the decision below passes muster under *Williams*.

Even if the trial court's decision to permit Hudson to offer opinion testimony based on these reports was

in error, the writ should still be denied. Summary reversal in this case would also be an exercise in futility and a waste of judicial resources because any error resulting from the introduction of the toxicology report into evidence was plainly harmless. Multiple officers testified that they detected the odor of alcohol on Stuart and that she behaved in a manner indicative of an intoxicated state. Stuart admitted to officers that she had consumed alcohol and that it was still in her system when she was taken to the hospital for a blood test. Thus, summary reversal would accomplish nothing, because the Alabama Court of Criminal Appeals can easily reinstate its prior holding on remand based on a harmless error theory.

For these reasons, the Court should deny Stuart's petition for writ of certiorari.

I. Hudson's Reliance on Toxicology Reports Prepared by Another Expert Was Consistent with *Williams v. Illinois*.

The decision of the Alabama Court of Criminal Appeals upholding the trial court's decision to permit Hudson to testify on the basis of toxicology reports conducted by another analyst was consistent with both the approach of the *Williams* plurality and Justice Thomas's concurring opinion. Accordingly, Stuart's petition for writ of certiorari must be denied.

Under the rule of the *Williams* plurality, "[o]ut-of-court statements that are related by the expert solely for the purpose of explaining the assumptions on which that opinion rests are not offered for their truth

and thus fall outside the scope of the Confrontation Clause." 567 U.S. at 58 (plurality opinion). In this case, as in *Williams*, an "expert witness referred to the report not to prove the truth of the matter asserted in the report," *i.e.* that Ms. Stuart's blood alcohol level was 0.174 g/100 mL, but only to establish that *if* that was her blood alcohol level at the time when her blood was tested, *then* her blood alcohol level would have been 0.234 g/100 mL at the time of the accident. 567 U.S. at 79.

The record attests to the fact that the hypothetical character of Hudson's opinion was made plain to the jury. Hudson's testimony was explicitly based on four assumptions. First, and most importantly, Hudson assumed that the toxicology reports reflected Stuart's blood alcohol level at the time when the blood samples were taken. R. 657; R. 664. Indeed, he conceded that he did not know anything about Stuart at all. R. 666. Second, he assumed that Stuart did not consume any alcohol after the accident occurred. R. 658. Third, he assumed that Stuart had the same alcohol elimination rate as an average person. R. 664. Fourth, he assumed that the accident took place at approximately 10:40 p.m. and that the samples were taken at approximately 2:59 a.m. and 3:33 a.m. Only on the basis of these assumptions did Hudson opine that the blood alcohol level of "the *average person*" would be approximately 0.234 g/100 mL at 10:40 p.m., the time when the accident was assumed to have occurred for the purpose of his analysis. R. 664 (emphasis added).

Thus, Hudson relied on the toxicology reports only to indicate the underlying factual information upon which he based his independent expert opinion, and not for the purpose of proving Stuart's blood alcohol level at the time when the samples were taken. Accordingly, his testimony was consistent with the opinion of the *Williams* plurality, and there was no error in permitting him to rely on the toxicology reports in question.

The relevance of Hudson's opinion was established by independent evidence indicating that the reports referenced in Hudson's testimony were based on blood samples taken from Stuart. Nurse Tamika Williams testified that she drew four vials of blood from Stuart, sealed them, and transferred them to Officer Matthew Kilcrease. R. 331-35. Officer Kilcrease delivered the samples in a sealed condition to Sergeant Ken Lassiter, who placed them in sealed kit boxes. R. 428. He maintained possession of the boxes until the next day, when he transferred them to evidence custodian Jim Rivers, who placed them in an evidence closet. R. 428-33. Rivers shipped the sealed kit boxes via FedEx to the Department's Birmingham office on April 7, 2015. R. 614-24. The samples were logged by the Department on April 10, 2015, and subjected to analysis. R. 684. Accordingly, there is no reason to doubt that the reports were developed using samples taken from Stuart. This, in turn, ensures that there was an adequate factual predicate for Hudson's opinion testimony.

But even if there was no competent evidence to establish the basis of Hudson's opinion, that would not

suffice to establish a Confrontation Clause violation. "The question before us is whether petitioner's Sixth Amendment confrontation right was violated, not whether the State offered sufficient foundational evidence to support the admission of [Hudson's] opinion." *Williams*, 567 U.S. at 75. "If there were no proof" that the estimates of Stuart's blood alcohol level given in the forensic reports at issue were accurate, Hudson's testimony "would be irrelevant, but the Confrontation Clause . . . does not bar the admission of irrelevant evidence, only testimonial statements by declarants who are not subject to cross-examination." *Id.* at 76. Accordingly, the fact that Hudson's testimony treated the results in the reports as hypothetically true, rather than asserting that they were actually true, is enough to render the lower court's decision consistent with the opinion of the *Williams* plurality.

The lower court's decision also comports with the approach taken by Justice Thomas in his *Williams* concurrence. Under his rule, "the Confrontation Clause regulates only the use of statements bearing 'indicia of solemnity,'" a category which includes only "'formalized testimonial materials,' such as depositions, affidavits, and prior testimony, or statements resulting from 'formalized dialogue' such as custodial interrogation." *Williams*, 567 U.S. at 111 (Thomas, J., concurring in the judgment) (citation omitted). Here, as in *Williams*, the reports at issue "lack[] the solemnity of an affidavit or deposition," because neither report is "a sworn nor a certified declaration of fact." *Id.* Neither report "attest[s] that its statements accurately reflect the . . . testing

processes used or the results obtained." *Id.* Both reports are signed by Belicia Sutton, who is identified on each as a forensic scientist, but on the reports, she "neither purports to have performed the . . . testing nor certify the accuracy of those who did." *Id.* Moreover, "although the report was produced at the request of law enforcement, it was not the product of any sort of formalized dialogue resembling custodial interrogation." *Id.*

Thus, judged from the standpoint of the "indicia of solemnity" test, this case is undistinguishable from *Williams*. *Bullcoming* is inapposite because in that case, "the report, though unsworn, included a 'Certificate of Analyst' signed by the forensic analyst who tested the defendant's blood sample." *Williams*, 567 U.S. at 112 (opinion of Thomas, J.). No comparable certification accompanied the reports introduced at Stuart's trial, and there is nothing in the record indicating that Sutton, the analyst who signed the reports, was the one who tested Stuart's blood. *See* R. 631 ("No one scientist handles a sample from start to finish."); Thus, under either test propounded by the Justices in the *Williams* majority, the trial court's decision to permit Hudson to offer an opinion as to Stuart's blood alcohol level at the time of the accident did not amount to a violation of her rights under the Confrontation Clause.

True, this case differs from *Williams* in that the forensic report relied upon by the State's expert was nominally introduced into evidence. But this does not make for a legal difference. As *Williams* itself indicates, the introduction of forensic reports does not

constitute a Confrontation Clause violation unless "there is no question that this was done for the purpose of proving the truth of what they asserted." 567 U.S. at 79. In this case, the purpose of introducing the toxicology report was not to prove what Stuart's blood alcohol level was when her blood was taken (*i.e.* the matter asserted by the report), but rather to provide a basis for Hudson's opinion testimony on what Stuart's blood alcohol content was when the accident occurred. Thus, the introduction of these reports is not condemned by *Bullcoming*, as clarified by the *Williams* plurality. Under the approach of Justice Thomas, the fact that a report was introduced into evidence is in itself immaterial. All that matters is whether the report was marked by the characteristic "solemnity of an affidavit or deposition." 567 U.S. at 111. That was not the case here.

To reiterate, *Williams* establishes that there is no categorical bar to the introduction of reports relied upon by expert witnesses in giving opinion testimony. Stuart reaches the opposite conclusion only by ignoring *Williams* and treating *Bullcoming* as the last word on the intersection between the Confrontation Clause and expert testimony. Under Stuart's approach, the nominal "introduction" of a forensic report into evidence would constitute a Confrontation Clause violation unless the analyst who performed the relevant test testified at trial, regardless of the purpose for which the report was used. Adopting this approach would needlessly elevate form over substance and harden *Bullcoming*'s holding into a rigid rule. The Court has already rejected this

approach in *Williams*, and it should do so again here by denying Stuart's petition.

II. Even if the Introduction of the Toxicology Reports Was in Error, That Error Was Harmless Beyond a Reasonable Doubt.

Even assuming that the introduction of the toxicology reports technically constituted a Confrontation Clause violation, granting Stuart's petition for writ of certiorari would be an exercise in futility and a waste of judicial resources because any error resulting from the introduction of those reports was "harmless beyond a reasonable doubt." *Chapman v. California*, 386 U.S. 18, 24 (1967). Where a Confrontation Clause violation occurs, "harmlessness must . . . be determined on the basis of the remaining evidence." *Coy v. Iowa*, 487 U.S. 1012, 1022 (1988). In this case, a wealth of evidence apart from the toxicology reports and Hudson's testimony demonstrated that Stuart was guilty of both driving under the influence of alcohol in violation of Section 32-5A-191(a) of the Code of Alabama (1975) and criminally negligent homicide in violation of Section 13A-6-4 of the Code of Alabama (1975).

Under Alabama law, proof of a defendant's precise blood alcohol level is not required to sustain a conviction for driving under the influence of alcohol in violation of Section 32-5A-191(a). The statute criminalizing driving under the influence provides that proof may be established in two distinct ways: the State may prove that a person drove or was "in actual physical control of any vehicle" while either "(1)

[t]here is 0.08 percent or more by weight of alcohol in his or her blood" or "(2) [u]nder the influence of alcohol." *See Ex parte State*, 528 So. 2d 1159, 1162 (Ala. 1988) (holding that "Section 32-5A-191(a)(1) and (2) are merely two different methods of proving the same offense — driving under the influence."). Under the latter method of proving the offense all that is required is proof "that the defendant was under the influence of alcohol to the extent that it affected his ability to operate his vehicle in a safe manner." *Ex parte Buckner*, 549 So. 2d 451, 453 (Ala. 1989).

There was no genuine dispute at trial that Stuart was intoxicated when she rammed Howell's vehicle and killed her. The fact that Stuart was intoxicated was obvious to virtually everyone who encountered her on the night of the collision. Sergeant Glenn Barr, one of the first officers to arrive on the scene of the accident, testified that he "detected the odor of alcohol coming from her person." R. 165. Four other witnesses made the same observation. *See* R. 172 (Todd Gresham); R. 248 (Reginald Ardis); R. 318 (Matthew Kilcrease); R. 418 (Ken Lassiter). Multiple witnesses testified that Stuart had "glassy eyes" and "slurred speech." R. 292; *see also* R.172; R. 247; R. 418. She manifested consciousness of guilt by verbally refusing to take a breathalyzer test. R. 297.[1]

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[1] The fact that a defendant refuses to submit to a breathalyzer test is admissible evidence of intoxication under Alabama law. *Gibson v. City. of Troy*, 481 So. 2d 463, 465 (Ala. Crim. App. 1985). This Court has held that the use of such a refusal as evidence of intoxication is consistent with the Fifth Amendment right against self-incrimination. *South Dakota v. Neville*, 459

Most significantly, Stuart actually *admitted* that she had been drinking beer on the night of the accident. R. 320. At trial, these admissions were confirmed using a video recording of Stuart being transported from the Daphne City Jail to Thomas Hospital for her blood to be drawn.[2] The video was made using a back-seat camera in the police cruiser of Officer Kilcrease. R. 323. In the video, Stuart explicitly told Officer Kilcrease "beer is in my system and I don't like that." R. 328.

Thus, even if the toxicology reports and Hudson's testimony had been excluded, the jury would have easily concluded that Stuart was intoxicated at the time when the accident occurred. The evidence proving that element of the offense was overwhelming. *Cf. Milton v. Wainwright*, 407 U.S. 371, 373 (1972) ("[O]verwhelming evidence of guilt" is sufficient to render the introduction of challenged evidence "beyond reasonable doubt, harmless.").

The State's evidence that Stuart's intoxication "affected her ability to operate his vehicle in a safe manner" did not depend on the toxicology reports or Hudson's testimony. *Ex parte Buckner*, 549 So. 2d at

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U.S. 553, 564 (1983) (holding "that a refusal to take a blood-alcohol test, after a police officer has lawfully requested it, is not an act coerced by the officer, and thus is not protected by the privilege against self-incrimination.").

[2] Stuart was properly *Mirandized* prior to being transported to the Daphne City Jail. R. 289. Her statement regarding the presence of alcohol in her system was unsolicited and voluntary, and the defense made no attempt to suggest otherwise at trial. R. 328 (Stuart "actually asked if she could speak with" Officer Kilcrease). Nor did Stuart raise any *Miranda* issue on appeal.

453. Stuart admitted that she hit Howell's vehicle. R. 342 ("I mean, obviously, I hit her car."). This fact, taken in conjunction with clear evidence of intoxication, constituted sufficient evidence that her alcohol use adversely affected her driving ability. *Lawrence v. State*, 601 So. 2d 194, 196 (Ala. Crim. App. 1992) ("When considered with the undisputed fact that the appellant had been drinking . . . the fact that an accident occurred while the appellant was driving the vehicle is an 'indication that he could not safely operate his motor vehicle.'") (citation omitted). A crime scene investigation also revealed that, to account for the damage done to Stuart and Howell's respective vehicles and their locations when the officers arrived on the scene, Stuart had to have been driving at between ninety and 100 miles per hour. R. 503. This was well over the speed limit of 70 miles per hour. R. 505. Sergeant Ken Lassiter, who interviewed Stuart after the accident, concluded that she was "impaired to a point where she could not operate her vehicle safely." R. 509. During the interview, Stuart betrayed telltale signs of drunkenness during the course of the interview. Her speech was slurred and Lassiter "smell[ed] the odor of alcohol." R. 418. She could not identify the city she was in and did not know which lane she was in when she attempted to pass Howell and collided with her vehicle. R. 419.

Accordingly, the jury would have reached the same verdict on the driving under the influence charge regardless of whether the toxicology reports and Hudson's testimony had been admitted. *See Hargrove v. City. of Rainbow City*, 619 So. 2d 944, 945 (Ala.

Crim. App. 1993) (smell of alcohol, glassy eyes, confused speech, and driving over the speed limit were sufficient evidence that defendant "was incapable of operating his vehicle safely when he was arrested.").

For analogous reasons, the trial evidence was more than sufficient to support Stuart's conviction for criminally negligent homicide in violation of Section 13A-6-4 even without the toxicology reports or Hudson's testimony. Under Alabama law, "[a] person commits the crime of criminally negligent homicide if he causes the death of another person by criminal negligence." *Id.* § 13A-6-4(a). "A person acts with criminal negligence with respect to a result or to a circumstance which is defined by statute as an offense when he fails to perceive a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation." ALA. CODE § 13A–2–2(4) (1975). The evidence at trial plainly demonstrated that Stuart was driving while palpably and knowingly intoxicated and traveling at approximately twenty to thirty miles per hour over the speed limit. This evidence would all but mandate a guilty verdict on this charge under Alabama law. *See, e.g.*, *Crauswell v. State*, 638 So. 2d 11, 13-14 (Ala. Crim. App. 1993) ("[A]damantly reject[ing]" insufficiency of the evidence challenge to criminally negligent homicide conviction where the defendant "was speeding and exceeding the speed limit by ten miles per hour" and "was intoxicated and driving under the influence of alcohol.").

Any error resulting from the introduction of the toxicology reports at Stuart's trial was minimal, and had "little, if any, likelihood of having changed the result of the trial." *Chapman*, 386 U.S. at 22. Hudson's testimony was at least broadly consistent with the holding of *Williams*. The record attests to the fact that the principal use made of the reports at trial was to provide a factual basis for Hudson's opinion regarding Stuart's blood alcohol content at the time of the accident. Unlike *Bullcoming*, Hudson did not merely take the stand and relate the findings of another scientist verbatim. He used the reports at issue to conduct his own calculation of Stuart's estimated blood alcohol level at the time of the offense. Given that Hudson did not attest to the validity of the results registered in the reports and counsel for both the State and the defense repeatedly emphasized the hypothetical nature of his testimony, it is highly unlikely that the jury was misled by the toxicology reports and Hudson's testimony.

These considerations entail that nothing would be accomplished by a reversal of the decision of the Alabama Court of Criminal Appeals below. That court could and would simply reinstate its prior holding on remand under a harmless error theory that finds ample support in the record. Given that the existence of error here is speculative at best and the alleged error could not have affected the outcome of the trial, the Court should deny Stuart's petition for a writ of certiorari.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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