

IN THE SUPREME COURT OF THE UNITED STATES

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RICK LEE EVANS,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

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On Petition for a Writ of Certiorari to the  
United States Court of Appeals for the Eleventh Circuit

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**PETITIONER'S REPLY TO THE BRIEF IN OPPOSITION**

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### **Question 1**

The first question presented is whether it violates the Federal Rules of Evidence and the Due Process Clause to prohibit a defendant from calling an expert witness to opine about the ability of a child to accurately perceive, recall, and relate the truth. As set out in the initial petition, the circuits are divided over how to answer the first question. While some circuits favor a straightforward application of Federal Rule of Evidence 702, which governs expert testimony, other circuits apply an older common-law standard that requires exclusion of any testimony that concerns credibility on grounds that such testimony invades the province of the jury.

**1. The government minimizes the circuit conflict by mischaracterizing the testimony of Dr. Otto-Lotz.**

Contrary to the government's contentions (Br. in Opp'n, pp. 8–11), Dr. Verena Otto-Lotz would not have testified that any specific statements made by the child witness were false or not credible. As the government acknowledges, Dr. Otto-Lotz specifically stated in her report that she could not say whether the child's allegations were true or false. (Br. in Opp'n, p. 14). What she could say, however, is that the child's statements contained indications that her memories were influenced by significant amnesia, suggestive influence, and source confusion.

Accordingly, the government and the lower court are wrong to suggest that Dr. Otto-Lotz would have testified that the child's allegations were not credible. (Br. in Opp'n, p. 8). To the contrary, her testimony is similar to the expert testimony held admissible in *United States v. Shay*, 57 F.3d 126 (1st Cir. 1995), and *United States v. Hall*, 93 F.3d 1337 (7th Cir. 1996). In *Shay*, the government argued—just as it does in this case—that the common-law rule making credibility the province of the jury required “the wholesale exclusion of expert testimony concerning credibility issues . . . .” 57 F.3d at 131. The First Circuit rejected this argument and held that expert testimony concerning credibility should be evaluated according to Federal Rule of Evidence 702, not according to the old common-law rule. *Id.* Applying Rule 702, the First Circuit held that it was an error to exclude expert testimony that a witness suffered from a mental disorder that caused him to make grandiose false statements. *Id.* at 133. As in this case, the expert in *Shay* did not offer an opinion about whether any particular statement of the witness was true or false. But, like Dr. Otto-Lotz, the

expert was prepared to offer “specialized opinion testimony, grounded in his expertise as a psychiatrist,” that would have assisted the jury in evaluating the credibility of the witness’s statements. *Id.*

The Seventh Circuit reached a similar result in *Hall*, where the defendant sought to introduce expert testimony to support his argument that he had confessed to a crime he did not commit. 93 F.3d at 1341. The experts in *Hall* would have opined that the defendant suffered from mental conditions that made him “susceptible to suggestion and pathologically eager to please.” *Id.* As a result, he “could easily be led to give the type of response he believed the questioner was seeking.” *Id.* The district court excluded the testimony on the basis of the common-law rule that the “testimony would invade the prerogative of the jury” to assess credibility. *Id.* The Seventh Circuit disagreed and held that the proper test, under Rule 702, is “whether the testimony will assist the jury.” *Id.* at 1344. It further held that the proffered testimony met this test because it “would have let the jury know that a phenomenon known as false confession exists, how to recognize it, and how to decide whether it fit the facts of the case being tried.” *Id.* at 1345. Further, the Seventh Circuit held that expert opinion about the defendant’s susceptibility to interrogation techniques and his propensity to give a false confession was admissible. *Id.* at 1345–46.

The approach taken by the First and Seventh Circuits, which is to analyze expert testimony under Rule 702 whether it bears on credibility or not, is in direct conflict with the circuits following the common-law rule that all expert testimony bearing on credibility is inadmissible because it invades the province of the jury. In

the latter circuits, expert testimony concerning credibility is generally inadmissible, notwithstanding Rule 702. *See, e.g., United States v. Beasley*, 72 F.3d 1518, 1528 (11th Cir. 1996) (holding that expert testimony “concerning the truthfulness or credibility of a witness is generally inadmissible because it invades the jury’s province to make credibility determinations”); *Westcott v. Crinklaw*, 68 F.3d 1073, 1075–76 (8th Cir. 1995) (holding that notwithstanding Rule 702, an “expert may not go so far as to usurp the exclusive function of the jury to weigh evidence and determine credibility”).

Because Petitioner Evans’s case was tried in a jurisdiction that follows the common-law rule, Dr. Otto-Lotz’s testimony was excluded solely on the basis that it encroached on the jury’s role as the sole province of credibility determinations. Neither the trial court, nor the Eleventh Circuit cited to Rule 702, much less undertook any kind of Rule 702 analysis. Had he been tried in a jurisdiction that follows Rule 702, there is high likelihood that Dr. Otto-Lotz’s testimony would have been admitted. Like the expert testimony in *Shay* and *Hall*, Dr. Otto-Lotz would not have testified that any specific statements made by the witness were true or false. Dr. Otto-Lotz’s testimony, however, would have assisted the jury by explaining to the jury how to recognize indicators that a child has made a false allegation of sexual abuse and how to decide whether those indicators existed in the facts of Petitioner Evans’s case.

## **2. Petitioner Evans was prejudiced by the lower court’s ruling.**

The government asserts that Petitioner Evans was not prejudiced by the lower court’s ruling, both to support its claim that the exclusion of Dr. Otto-Lotz’s testimony

did not violate the Due Process Clause and to argue that the case is a poor vehicle for review of the question presented. (Br., pp. 12–15). The government is wrong.

At trial, Petitioner Evans was able to present some evidence about false allegations of child sexual abuse through forensic psychologist Phillip Esplin. Prosecutors were able to significantly undermine Dr. Esplin’s credibility on cross-examination, however, because he was a hired defense expert. Dr. Otto-Lotz, by contrast, was retained by German prosecutors to evaluate the child’s allegations against Petitioner Evans. Additionally, while Dr. Esplin was limited to testifying about the causes of false allegations of abuse, generally, Dr. Otto-Lotz would have been able to testify about the child’s specific statements against Petitioner Evans. She could have aided the jury by identifying the specific factors present in this case and in the child’s specific allegations that suggested that the child’s memories were not entirely original, but had some basis in imagination, suggestive influence, and projection. For all of these reasons, Petitioner Evans’s defense was seriously hampered by the exclusion of Dr. Otto-Lotz’s testimony.

**3. This case is a good vehicle for resolving the question presented.**

The record below is clear that the district court relied solely on the old common-law rule to exclude Dr. Otto-Lotz’s testimony and did not undertake any analysis under Rule 702. For the first time in this case, the government argues that the proffered testimony also fails to satisfy Rule 702. (Br. in Opp’n, p. 14). Its argument, however, is that Rule 702 would not permit Dr. Otto-Lotz to opine on the credibility of the child’s specific statements. As clarified above, Dr. Otto-Lotz was not called to

do so and specifically stated that she could not determine which of the child's specific allegations were true or false.

Even if this Court were to find, however, that Dr. Otto-Lotz's testimony could be excluded under Rule 702, it should still grant certiorari to resolve whether the lower courts should even apply Rule 702 to expert opinion on credibility in the first place, or whether all expert opinion bearing on credibility is properly excluded based on the common-law rule that it invades the province of the jury. This case is a good vehicle for resolving that circuit split.

## **Question 2**

The second question presented is whether it violates the Federal Rules of Evidence and the Confrontation Clause to admit (1) the testimony of an expert witness to explain the results of a forensic analysis that was performed by a non-testifying analyst; and (2) a police search report listing items seized from a home, which was drafted and signed by officers who the defendant had no opportunity to confront.

### **1. This case involves more than machine-generated data.**

The government asserts that the petition should not be granted because it involves machine-generated data, which does not implicate the Confrontation Clause. Unlike the cases cited by the government, however, this case does not involve data produced solely by a machine. The government's expert, Jonathan Bridbord, testified that he reviewed the contents of several disks created by German police. Those disks contained data extracted from a computer or other device by a German forensic

examiner using forensic software. Each disk was placed in a sleeve, which was then labeled to identify its contents and signed. Mr. Bridbord testified that he did not perform his own analysis on the original data or devices. Instead, he examined the set of files and data that had been selected by the German examiner and then placed on the disks.

Even if the German analysts used forensic software to generate the data they collected, there was significant human involvement in producing the reports and data that Mr. Bridbord ultimately reviewed. This distinguishes this case from the many cited by the government, which involved data printouts with no human intervention. *See, e.g., United States v. Lizarraga-Tirado*, 789 F.3d 1107, 1110 (9th Cir. 2015) (involving GPS coordinates placed on a map “without any human intervention”); *United States v. Lamons*, 532 F.3d 1251, 1264 (11th Cir. 2008) (involving billing data that was extracted and placed on a disk using “fully automated” process).

**2. This case is very similar to *Williams v. Illinois*, 567 U.S. 50 (2012).**

The facts of this case are similar to those considered in *Williams v. Illinois*, 567 U.S. 50 (2012). In *Williams*, the prosecution called an expert to testify that she matched a DNA profile produced by Cellmark, an outside laboratory, to a DNA profile that she had produced using a sample from the defendant. *Id.* at 56–57. The Cellmark DNA profile was not itself admitted into evidence. *Id.* at 62. The prosecution’s expert had not conducted or observed any of the testing used to produce the Cellmark DNA profile. *Id.* The expert, however, was permitted to testify that she had reviewed the Cellmark DNA profile and matched that profile to a profile from the defendant. *Id.* at 61–62.

Similarly, in this case, a third party, German forensic analysts, produced disks containing forensic reports based on their analysis of computers and hard drives seized from Petitioner Evans's home. The reports themselves were not admitted into evidence. The government expert, Mr. Bridbord, did not conduct or observe any of the analysis performed to produce the disks. He was nevertheless permitted to testify about how the reports were produced and what they purported to show.

**3. This Court should revisit *Williams* because it has created a new wave of conflict and confusion among the lower courts.**

As argued in the petition, the Court's divided opinion in *Williams* resulted in no discernable holding and created a new wave of conflict among the lower courts. (Pet., pp. 11–16). This case presents an opportunity for this Court to revisit *Williams* and to clarify the application of the Confrontation Clause to expert testimony. Because this case is a suitable vehicle to provide that much-needed guidance, the petition should be granted.

**4. In conjunction with reviewing Mr. Bridbord's testimony, this Court should consider whether a police report listing the devices seized from Petitioner Evans's home was properly admitted.**

As stated in the petition, Petitioner Evans challenges the admission of a German search report listing the items seized from his home because it was part of the foundation of Mr. Bridbord's testimony. In *Williams*, the plurality gave weight to the fact that the relevance of the DNA expert's testimony was "established by independent circumstantial evidence showing that the Cellmark report was based on a forensic sample taken from the scene of the crime." 567 U.S. at 79. It stated, "if the prosecution cannot muster any independent admissible evidence to prove the

foundational facts that are essential to the relevance of the expert's testimony, then the expert's testimony cannot be given any weight by the trier of fact." *Id.* at 81. Accordingly, the admissibility of the search report is a foundational fact that is relevant to the Confrontation Clause inquiry.

The government's assertion that the search report is admissible as a public record is wrong. The public records exception to hearsay does not include "in a criminal case, a matter observed by law-enforcement personnel." Fed. R. Evid. 803(8)(A)(ii). Several circuits have recognized a limited exception, as noted in the cases cited by the government, where a police record is prepared in a routine, non-adversarial setting instead of as a result of a criminal investigation. *United States v. Brown*, 9 F.3d 907, 911–12 (11th Cir. 1993); *United States v. Dowdell*, 595 F.3d 50, 71 (1st Cir. 2010) (recognizing exception for "routine observations that are inherently non-adversarial"). That exception does not apply in this case, where the police search report was created during a criminal investigation in which Petitioner Evans had already been identified as a suspect.

The search report was the only evidence that linked the disks examined by the prosecution's expert to Petitioner Evans's home. It was not admitted merely to prove chain of custody, but to establish the relevance of Mr. Bridbord's testimony. Furthermore, it was created by a non-testifying witness. Accordingly, its admission plainly violated the Rules of Evidence and the Confrontation Clause.

#### CONCLUSION

The petition should be granted.

Respectfully Submitted,

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