STATE OF WISCONSIN

IN SUPREME COURT

No. 2020AP32-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

OSCAR C. THOMAS,

Defendant-Appellant-Petitioner.

RESPONSE TO PETITION FOR REVIEW

JOSHUA L. KAUL
Attorney General of Wisconsin

SONYA K. BICE
Assistant Attorney General
State Bar #1058115

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-3935
(608) 294-2907 (Fax)
bicesk@doj.state.wi.us

Oscar C. Thomas asks this Court to review a published court of appeals decision affirming his conviction for homicide and sexual assault and holding that (1) the circuit court erred when it allowed the prosecutor to impeach Thomas's expert witness with unconfronted testimonial hearsay because it violated his right to confrontation; (2) the error was harmless; and (3) a significant fact corroborated Thomas's confession to sexual assault. *State v. Thomas*, 2021 WI App 55. (Pet-App. 101–138.)

The State joins Thomas's request for review. The State asks this Court to affirm the "ultimate result" on a different ground,[1] and to reverse the holding that the circuit court erred when it allowed the prosecutor to impeach Thomas's expert witness with unconfronted testimonial hearsay.

Thomas's petition baldly asserts that he "should not have had to explain or refute the DNA evidence which impaired his defense and supported the prosecutor's theory." (Pet. 23.) He cannot point to any Wisconsin law, aside from the court of appeals decision in this case, that would allow him to present an expert to testify that the forensic evidence was consistent with the defense theory, and then bar the State from impeaching the expert with forensic evidence he reviewed that showed otherwise. It was Thomas's expert witness who testified about the DNA evidence, on cross-examination, when the prosecutor impeached his testimony after he testified to facts inconsistent with the contents of the lab report, which he had reviewed. Wisconsin law permits impeaching a witness with hearsay evidence, and nothing in the United States Supreme Court's Confrontation Clause

[1] An opposing party may, without filing a petition for cross-review, "defend the court of appeals' ultimate result or outcome based on any ground . . . as long as the supreme court's acceptance of that ground would not change the result or outcome below." Wis. Stat. § (Rule) 809.62 (3m)(b)1.

jurisprudence so far has applied *Crawford*'s[2] redefined confrontation rule to impeachment evidence. A divided Court of Appeals took the confrontation rule that governs the prosecution's presentation of evidence and extended it to create a new limit on what a prosecutor can use to impeach an expert witness on cross-examination—upsetting years of well-settled Wisconsin precedent to the contrary.

This Court needs to answer the question of whether in Wisconsin a defendant can use the confrontation right to bar evidence that would otherwise come in under established evidentiary rules (e.g., as hearsay relied on by an expert or after a party opens the door in some way). About a dozen jurisdictions have ruled on it so far, and a case dealing with the interplay of the confrontation right and evidentiary rules is pending in the United States Supreme Court, with argument scheduled for October 5, 2021.[3]

If this Court grants review of this issue, the State does not oppose its also reviewing the issues Thomas raises: whether any error was harmless, and whether the State corroborated Thomas's confession with a "significant fact," as

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[2] *Crawford v. Washington*, 541 U.S. 36, 40 (2004).

[3] Petition for a Writ of Certiorari at i, *Hemphill v. New York*, No. 20-637 (Nov. 6, 2020). Granting review, the Court stated the issue as follows:

> A litigant's argumentation or introduction of evidence at trial is often deemed to "open the door" to the admission of responsive evidence that would otherwise be barred by the rules of evidence. The question presented is: Whether, or under what circumstances, a criminal defendant who opens the door to responsive evidence also forfeits his right to exclude evidence otherwise barred by the Confrontation Clause.

required by the common-law corroboration rule.[4] However, for the reasons given below, those issues do not independently warrant review.

The Confrontation Clause issue is an issue "the court may need to decide if the petition is granted." Wis. Stat. § (Rule) 809.62(3)(e).

As required by Wis. Stat. § (Rule) 809.62(1r)(3)(e), the State here provides the details of the issue this Court should review and its disposition in the court of appeals.

The court of appeals concluded, and it is not disputed, that "[t]he parties have preserved, presented, and argued the question of whether a Confrontation Clause violation occurred . . . ." (Pet-App. 123, ¶ 35 n.15.)

The testimony at issue came in on cross examination of Thomas's expert witness, who testified after reviewing the autopsy report and a lab report including DNA evidence, that "there is insufficient evidence to establish that this is an intentional strangulation." (Pet-App. 131, ¶ 51.) As the concurrence noted,

> [The expert witness] explained that it was important to examine all the facts "in allegations of violence resulting in death" and to look for an "exchange of evidence" between the individuals where there is "evidence of some sort of a physical struggle." He testified that he saw no defensive wounds on Thomas, and he disputed the characterization of the wounds to the victim's face as "scratches." He testified that the abrasions could have been caused by emergency medical personnel during resuscitation attempts or by contact with the floor while facedown during sex.

(Pet-App. 131, ¶ 51.)

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[4] *See State v. Bannister*, 2007 WI 86, ¶ 31, 302 Wis. 2d 158, 734 N.W.2d 892.

After this testimony, the State used a lab report to impeach the witness by eliciting from the witness the fact that Thomas's DNA was found under the victim's fingernail clippings and her DNA was found under his.

The question is whether the Confrontation Clause as interpreted in *Crawford* prevents an adverse party from using unconfronted testimonial hearsay to impeach an expert witness with data that contradicts the expert's opinion. *Crawford* involved the *State's introduction* of an out-of-court testimonial statement by a non-testifying witness. *Crawford v. Washington*, 541 U.S. 36, 40 (2004). It held that the Confrontation Clause prohibits the State from using such statements as it did in that case unless the witness is "unavailable to testify, and the defendant had had a prior opportunity for cross-examination." *Id.* at 54.

In a split decision, the court of appeals decided the issue based on its reading of the United States Supreme Court's post-*Crawford* right of confrontation cases (*Melendez-Diaz*, *Bullcoming*, and *Williams*[5]), this Court's decision in *Watson*,[6] and the court of appeals' analysis in *Heine*.[7] It held that the DNA evidence with which the prosecutor impeached Thomas's expert, "at a minimum, could not be presented to the jury without proper limiting instructions and could not be used by the State as substantive evidence." (Pet-App. 122–23, ¶ 35.)

The concurring opinion considered the question to be, "Was Thomas's confrontation right violated when he opened the door to cross-examination of the expert about the findings

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[5] *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009), and *Bullcoming v. New Mexico*, 564 U.S. 647 (2011), and *Williams v. Illinois*, 567 U.S. 50, 79 (2012).

[6] *State v. Watson*, 227 Wis. 2d 167, 595 N.W.2d 403 (1999).

[7] *State v. Heine*, 2014 WI App 32, 354 Wis. 2d 1, 844 N.W.2d 409.

of the DNA report, and consequently, argument by the State in its closing as to the import of the report?" (Pet-App. 137, ¶ 63.)

The concurrence faulted the majority's analysis for "fail[ing] to address the facts" before the court. (Pet-App. 137, ¶ 63.) First, it noted that the majority "fail[ed] to address Thomas's constitutional challenge based on the fact that the disclosure was made via Thomas's expert whose opinion was impeached through cross-examination, rather than through direct examination of the prosecution's expert." (Pet-App. 131, ¶ 50.) Second, it stated that the majority "fail[ed] to identify legal support for its analysis," noting that "[t]he Majority relie[d] on cases involving direct examination of the prosecutor's expert." (Pet-App. 132, 135, ¶¶ 53 n.3, 59.) It concluded that the majority had erred by "importing and relying upon" rules concerning testimonial hearsay on direct examination because "none of the disclosure issues are presented with impeachment through cross-examination." (Pet-App. 134–35, ¶¶ 57, 58.) Third, it noted that under Wis. Stat. § 805.13(3) and *State v. Trammel*,[8] Thomas's failure to request a limiting instruction for the evidence constituted waiver. (Pet-App. 135, ¶ 58 n.6.)

The concurrence concluded by noting that "[a]rguably, Thomas would have been permitted to affirmatively provide a misleading impression had the State been precluded from addressing a report Thomas's expert reviewed in coming to his opinion." (Pet-App. 137, ¶ 63.)

[8] *State v. Trammel*, 2019 WI 59, ¶ 19, 387 Wis. 2d 156, 928 N.W.2d 564.

The issues in Thomas's petition do not independently warrant review because they satisfy none of the criteria in Wis. Stat. § (Rule) 809.62(1r).

As for the issue of the application of the test for harmless error, the court of appeals stated the standard correctly and applied the test, concluding that the jury would have convicted Thomas on the properly admitted evidence. (Pet-App. 123–25, ¶¶ 36–39.) Thomas cites no law for his assertion that the court of appeals' analysis was flawed. He quotes without context a line from a case where the United States Supreme Court was throwing out a state evidence rule that barred a defendant from introducing at trial proof of third-party guilt "if the prosecution has introduced forensic evidence that, if believed, strongly supports a guilty verdict." *Holmes v. South Carolina*, 547 U.S. 319, 321 (2006). Noting numerous flaws with the rule, not least that "the strength of the prosecution's case cannot be assessed without making the sort of factual findings that have traditionally been reserved for the trier of fact," the Court held that the rule violated the defendant's constitutional right to present a defense. *Id.* at 330. The Court's statement about "evaluating the strength of only one party's evidence" in that context therefore referred to proffered evidence *that had yet to be found as fact by a trier of fact*. It has no meaning for a harmless error analysis and is certainly not a basis for finding error here.

And as for the corroboration rule issue, the court of appeals resolved it with a straightforward application of *State v. Bannister*, 2007 WI 86, 302 Wis. 2d 158, 734 N.W.2d 892. (Pet-App. 103–07, ¶¶ 4–14.) Thomas had argued that the significant facts that corroborated his account of sexually assaulting the victim, which included a neighbor who heard the victim say the things Thomas remembered her saying, were insufficient because they did not corroborate that sexual contact occurred. (Pet-App. 107, ¶ 14.) The court of appeals properly rejected this argument based on *Bannister*'s holding

that it is not necessary for the significant fact "either independently establish the specific elements of the crime or independently link the defendant to the crime." (Pet-App. 107, ¶ 13 (quoting *Bannister*, 302 Wis. 2d 158, ¶ 31).)

In neither case has Thomas shown that the issue presents anything other than the application of settled law to the facts of this case. Neither issue warrants independent review by this Court.

Dated this 23rd day of September 2021.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

SONYA K. BICE
Assistant Attorney General
State Bar #1058115

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-3935
(608) 294-2907 (Fax)
bicesk@doj.state.wi.us

FORM AND LENGTH CERTIFICATION

I hereby certify that this response conforms to the rules contained in Wis. Stat. §§ (Rule) 809.19(8)(b) and 809.62(4) (2019–20) for a response produced with a proportional serif font. The length of this petition is 1,801 words.

Dated this 23rd day of September 2021.

Respectfully submitted,

SONYA K. BICE
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. §§ (RULE) 809.19(12) and 809.62(4)(b) (2019–20)

I hereby certify that:

I have submitted an electronic copy of this response, excluding the appendix, if any, which complies with the requirements of Wis. Stat. §§ (Rule) 809.19(12) and 809.62(4)(b) (2019–20).

I further certify that:

This electronic response is identical in content and format to the printed form of the response filed as of this date.

A copy of this certificate has been served with the paper copies of this response filed with the court and served on all opposing parties.

Dated this 23rd day of September 2021.

Respectfully submitted,

SONYA K. BICE
Assistant Attorney General