STATE OF WISCONSIN

IN SUPREME COURT

Appeal No. 2009AP3073- CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MICHAEL R. GRIEP,

Defendant-Appellant-Petitioner.

ON REVIEW OF A DECISION OF THE COURT OF APPEALS, DISTRICT II, AFFIRMING AN ORDER OF THE CIRCUIT COURT FOR WINNEBAGO COUNTY, THE HON. THOMAS J. GRITTON, PRESIDING

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT-PETITIONER.

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STATEMENT OF ISSUES

1. Does the Confrontation Clause prohibit a surrogate witness, who merely reviewed a nontestifying forensic analyst's certified report, notes, and results and did not personally conduct or observe any of the relevant analyses, from testifying regarding the substance of the report?

   The court of appeals answered NO after certifying the question to this Court, which denied review. Upon return, the court of appeals found the error would not be harmless, but nonetheless affirmed the conviction, noting that because "the law is not clear, [] we must adhere to our binding state court precedents." App. A, ***State v. Griep***, No. 2009 AP 3073-CR, ¶3 (Wis. Ct. App. Feb 19, 2014).

   The trial court answered NO, ruling that under ***State v. Barton***, 2006 WI App 18, 289 Wis. 2d 206, 709 N.W.2d 93, and ***State v. Williams***, 2002 WI 58, 253 Wis. 2d 99, 644 N.W.2d 919, the surrogate expert could not "act as a mere conduit" for another's opinions, but could rely "on things that normally they would use to reach or render an opinion" and permitted the testimony of the surrogate.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

This Court's grant of review reflects that both oral argument and publication are warranted.

STATEMENT OF THE CASE AND FACTS

Facts and Proceedings Leading to Griep's Conviction

On August 25, 2007, Michael Griep was arrested under suspicion of Operating While Intoxicated (38:7-15). Griep consented to providing a blood sample, which was analyzed by Wisconsin State Laboratory of Hygiene Analyst Diane Kalscheur (38:17). In her report dated August 31, 2007, Analyst Kalscheur reported that she received Griep's labeled and sealed blood sample, that Griep's blood was tested for ethanol, and that testing revealed a certain ethanol concentration (App. E). The report regarding Kalscheur's observations about Griep's blood and the testing performed were certified as true and correct by Laboratory of Hygiene Chemist, Thomas Ecker (App. E). Both Kalscheur and Ecker signed multiple sections of the report and associated documentation (App. E).

At Griep's bench trial, Analyst Kalscheur was not available to testify regarding her test or report (38:5-6). Her supervisor, Patrick Harding, was called in her stead to testify that Griep's blood contained a prohibited ethanol concentration (App. F; 38:26-31). Harding had never observed Griep's blood samples, the testing of Griep's blood samples, or any part of Kalscheur's analysis (App. F; 38:46-47). He was unable to answer questions about the integrity of the samples or the testing process in Griep's case (App. F; 38:46-47). Harding nonetheless testified that Griep's blood contained a prohibited ethanol concentration (App. F; 38:31). He based his testimony on Kalscheur's statements in her report and the supporting data she produced, relying in

particular on Kalscheur's statements that the blood was tested for ethanol and that the blood came from Griep (App. F; 38:27-28, 30). Laboratory of Hygiene Chemist Thomas Ecker was not called as a witness. The written report itself was never admitted (39:5). Defense counsel objected to the admission of Harding's testimony regarding the substance of the report on Confrontation Clause grounds, but the objection was overruled (App. F; 38:28-30; 39:6-7).

Griep was convicted of both Operating While Intoxicated and Operating with a Prohibited Alcohol Concentration on July 28, 2009. The court stated that its decision was based at least in part on Harding's testimony (App. D; 39:18-19).

Legal Developments During Griep's Appeal

Griep appealed his conviction to the court of appeals in 2010, stating his right to confront the testing analyst had been violated. During that appeal, the United States Supreme Court accepted a petition in ***Bullcoming v. New Mexico***, 131 S. Ct. 62 (2010) (granting certiorari). The question presented in ***Bullcoming*** was "[w]hether the Confrontation Clause permits the prosecution to introduce testimonial statements of a nontestifying forensic analyst through the in-court testimony of a supervisor or other person who did not perform or observe the laboratory analysis described in the statements." Petition for Writ of Certiorari at i, ***Bullcoming v. New Mexico***, No. 09-10876, 2010 WL 3761875. In ***Bullcoming***, like in Griep's case, the defendant was arrested on charges of driving while intoxicated and his blood drawn and tested to determine his blood-alcohol concentration. Like in Griep's case, an analyst tested the blood and signed a certified report, but did not testify at trial. Instead, in both cases, the evidence was admitted through the testimony of a surrogate witness. Unlike Griep's case, however, the State in ***Bullcoming*** sought to introduce the certified report into evidence. Because the

question presented in ***Bullcoming*** was similar to the question in Griep's appeal, the court of appeals held the case in abeyance pending the United States Supreme Court's decision. That opinion, which found surrogate testimony could not satisfy the confrontation clause for purposes of introducing the report, was delivered in 2011. ***Bullcoming v. New Mexico***, 131 S. Ct. 2705, 180 L. Ed. 2d 610 (2011).

Shortly thereafter, the United States Supreme Court granted certiorari in ***Williams v. Illinois***, 131 S. Ct. 3090 (2011) (granting certiorari), which addressed the question of "[w]hether a state rule of evidence allowing an expert witness to testify about the results of DNA testing performed by non-testifying analysts, where the defendant has no opportunity to confront the actual analysts, violates the Confrontation Clause." Petition for a Writ of Certiorari at i, ***Williams v. Illinois***, No. 10-8505, 2010 WL 6817830. In ***Williams***, the state introduced independent opinion testimony from a state forensic analyst based in part upon DNA testing performed on crime scene evidence by a non-testifying analyst at an out-of-state private lab. 132 S. Ct. 2221, 183 L. Ed. 2d 89 (2012). There, the state analyst testified that she compared the DNA profile developed by the non-testifying out-of-state analyst with the profile of the defendant developed by the in-state lab and concluded the two profiles matched. ***Id***. Again, the court of appeals held Griep's case in abeyance pending the United State Supreme Court's decision in ***Williams***.

In 2012, a four-member plurality of the court in ***Williams***, along with Justice Thomas, who concurred in the judgment only, decided that the portions of an out-of-state report referenced by the testifying state analyst in forming her own independent opinion were not subject to the Confrontation Clause. The Court was sharply split, however, as to rationale. In his concurrence, Justice Thomas agreed with the plurality that the report was not subject to the Confrontation Clause, but reached this conclusion on far

narrower grounds, finding that the form of the report was not sufficiently solemn or formalized to qualify as a testimonial statement. ***Williams***, 132 S. Ct. at 2259-60 (Thomas, J., concurring). In particular, Thomas stressed that the report was not sworn or certified. ***Id.*** at 2260 (Thomas, J., concurring).

Upon delivery of the ***Williams*** opinion, the court of appeals requested supplemental briefing from the parties "addressing ***Bullcoming***, ***Williams v. Illinois***, and ***State v. Barton***, and other issues as contemplated by our September 29 order." Order, ***State v. Griep***, No. 2009AP3073, 2007CT1130 (September 28, 2012). In his supplemental brief, Griep argued that the decisions in Wisconsin cases ***State v. Barton***, 2006 WI App 18, 289 Wis. 2d 206, 709 N.W.2d 93, and ***State v. Williams***, 2002 WI 58, 253 Wis. 2d 99, 644 N.W.2d 919, were overruled by the United States Supreme Court's decision in ***Bullcoming*** "to the extent that those cases allowed the admission of out-of-court testimonial statements through expert testimony": ***Bullcoming*** clearly held the admission of a certified report from a test of a defendant's blood alcohol concentration violated the confrontation clause when the analyst who conducted the testing was unavailable at trial and the testifying expert had not conducted or observed any of the actual testing. Supp. Br. of Def.-App. at 9-11. Griep argued that because of the fragmented nature of the ***Williams*** decision, Justice Thomas's concurrence controlled because he concurred in the judgment on narrower grounds than the four-member plurality. *Id.* In his concurrence, Justice Thomas found that the underlying DNA report was not testimonial because it was not sufficiently solemn or formalized, and thus, Griep argued, the judgment in ***Bullcoming*** still stands. *Id.* The State also relied on the plurality decision in its brief, but asserted that "[n]othing in the judgment of ***Williams*** indicates that the [United States Supreme Court's] decision overrules . . . ***Barton***." Supp. Br. of Pl.-Resp. at 17. Instead, the State

argued that the key takeaway from Thomas concurrence was that the report was not "testimonial" and thus the only "rationale" that can be followed was the judgment that the surrogate witness's testimony was admissible. *Id.* at 16-17.

Because of the fractured opinions of the ***Williams*** decision, and the importance of its application to cases in Wisconsin, the court of appeals certified the case to this Court, asking the following questions about the new United States Supreme Court precedent:

> Do these cases mean that the testing analyst produced a report for the truth of the matter asserted such that the confrontation clause is violated if he or she is not available? One can read ***Bullcoming*** to say so. Or is the testing analyst's report just that—a report—something that is not, by itself, made for the truth of the matter asserted but rather part of the information that a testifying expert uses to form his or her own opinion, which opinion is subject to cross-examination? One can read ***Williams*** to mean that.
>
> … The trial courts, and this court, would benefit from the direction of our supreme court in answering the questions poised in the preceding paragraph. The facts here are markedly different than in the DNA cases but are similar to many, many OWI cases that fill the dockets in this state.

App. C, Certification by Wis. Ct. App., ***State v. Griep***, No. 2009 AP 3073-CR (Wis. Ct. App. May 15, 2013). This Court subsequently issued its opinion in ***State v. Deadwiller***, 2013 WI 75, 350 Wis. 2d 138, 834 N.W.2d 362, two months later on July 16, 2013. In ***Deadwiller***, this Court applied the rationale in ***Williams*** to a similar set of facts, and held that a surrogate analysts independent opinion testimony based in part by a DNA report created by an out of state lab did not trigger the defendant's right to confrontation. ***Id.***

This Court subsequently denied certification in Griep's case on November 20, 2013. App. B, Order Denying Certification, ***State v. Griep***, No. 2009 AP 3073-CR (Wis. Nov. 20, 2013). Upon return to the court of appeals, the court affirmed Griep's conviction, stating that while there was merit to the argument that the report created in Griep's case was testimonial and that such error would not be harmless, because "our [state] supreme court so recently and favorably cit[ed] ***Barton***, *see* [***State v.***] ***Deadwiller***, 350, Wis. 2d 138 37-40, we have no choice but to conclude that ***Barton*** remains the law of our state. Only the state supreme court has the power to overrule our past decisions." App. A, ***State v. Griep***, No. 2009 AP 3073-CR at ¶22 (Wis. Ct. App. Feb 19, 2014).

Griep petitioned this Court for review, which this Court subsequently granted.

ARGUMENT

When the State seeks to admit the substance of a certified, out-of-court forensic report against the defendant, like the blood alcohol content results listed in the ethanol report here, the State must allow the defendant to confront the author of the report at trial. Such certified statements, made specifically to build the State's case against a targeted suspect, have triggered the defendant's Confrontation Clause rights since the United States Supreme Court decided ***Crawford v. Washington***, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). Since ***Crawford***, subsequent federal and state case law has made clear that such formalized declarations amount to testimony against the defendant and therefore exemplify the class of statements that triggers the defendant's right to confrontation under the Sixth Amendment, and Article I, §7 of the Wisconsin Constitution. *See* ***Melendez-Diaz v. Massachusetts,*** 557 U.S. 305, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009)*;* ***Bullcoming v. New***

Mexico, 131 S. Ct. 2705, 180 L. Ed. 2d 610 (2011); ***State v. Deadwiller,*** 2013 WI 75, 350 Wis. 2d 138, 834 N.W.2d 362**.**

The certified statements in Analyst Kalscheur's report regarding the source of the blood and the testing performed were improperly admitted in violation of the Confrontation Clause specifically because they were: 1) testimonial, and 2) introduced for the truth of the matter they asserted. Under ***Crawford***, the Confrontation Clause specifically prohibits out-of-court testimonial statements introduced to establish the truth of the matter asserted unless the witness appears at trial or the defendant had a prior opportunity for cross-examination. 541 U.S. at 53-54, 59-60, n.9 (citing ***Tennessee v. Street***, 471 U.S. 409, 105 S. Ct. 2078, 85 L. Ed.2d 425 (1985)).

Here, Griep was improperly denied his right to confrontation when the contents of a testimonial, out-of-court ethanol report were introduced through a surrogate witness with no personal knowledge as to the substance or creation of its contents. The court of appeals erred when it found that this Court's opinions in ***State v. Deadwiller,*** 2013 WI 75, 350 Wis. 2d 138, 834 N.W.2d 362, and ***State v. Barton,*** 2006 WI App 18, 289 Wis. 2d 206, 709 N.W.2d 93 controlled, rather than the United States Supreme Court's decision in ***Bullcoming vs. New Mexico***. App. A, ***State v. Griep***, No. 2009 AP 3073-CR at ¶22 (Wis. Ct. App. Feb 19, 2014). In deciding ***Deadwiller,*** this Court did not address the issue presented in Griep—whether a surrogate analyst may testify solely about the contents of a certified report containing the results of testing conducted by another analyst—but rather solidified Wisconsin case law surrounding *independent expert opinion testimony* following the United States Supreme Court's decision in ***Williams v. Illinois,*** 132 S. Ct. 2221, 183 L. Ed. 2d 89 (2012). Because ***Deadwiller*** and ***Williams*** do not address the issue present in this case, the court of appeals and

this Court are bound to follow the United States Supreme Court's rationale in ***Bullcoming***.

Moreover, the court of appeal's decision conflicts with this Court's decision in ***State v. Jennings***, which finds that the Supremacy Clause "compels adherence to the United States Supreme Court precedent on matters of federal law, although it means deviating from a conflicting decision from the Wisconsin Supreme Court." 2002 WI 44, ¶43, 252 Wis. 2d 228, 647 N.W.2d 142. In the instant case, the court of appeals found that because of a circuit split regarding the application of ***Williams*,** the federal law is "unclear" in this area, and as a result, it must follow this Court's precedent in ***Barton***. This conflicts with ***Jennings***: The language of ***Bullcoming*** is clear, and to the extent that the scope of ***Williams*** is unclear, it does not overturn the settled federal precedent. Because ***Bullcoming*** is clear federal precedent, the court was compelled to follow it.

The question of whether the admission of evidence violates a defendant's right to confrontation is a question of law subject to de novo review. ***State v. Ballos***, 230 Wis. 2d 495, 504, 602 N.W.2d 117 (Ct. App. 1999).

I. *Bullcoming v. New* Mexico Compels Confrontation of the Analyst in Griep's Case.

At its core, this case is a straightforward application of ***Bullcoming v. New Mexico***, 131 S. Ct. 2705, 180 L. Ed. 2d 610 (2011). Indeed, in its decision, the court of appeals acknowledged that "Griep makes a good argument when he asserts that the surrogate expert testimony in this case was a subterfuge for admitting an unavailable expert's report in violation of ***Bullcoming v. New Mexico*** and ***Williams v. Illinois***." App. A, ***Griep,*** No. 2009 AP 3073-CR at ¶2 (internal citations omitted). The court of appeals nonetheless found that Griep's right to confrontation was not violated

when the State presented the contents of Kalscheur's certified report through the use of surrogate witness Patrick Harding. ***Id.*** This decision conflicts with the clear federal precedent set by the United States Supreme Court in ***Bullcoming***.

In ***Bullcoming***, the United States Supreme Court held that the use of a surrogate witness's testimony to admit a certified forensic report violated the Confrontation Clause in an OWI case. 131 S. Ct. at 2705. At trial, the principal evidence used against defendant Donald Bullcoming was "a forensic laboratory report certifying that Bullcoming's blood-alcohol concentration was well above the threshold for aggravated DWI." ***Id***. at 2709. As in Griep's case, the prosecution did not call the analyst who performed or signed the certifications at trial, but instead called another analyst "who was familiar with the laboratory's testing procedures, but had neither participated in nor observed the test on Bullcoming's blood sample." ***Id***. The United States Supreme Court found that the admission of the report's content through the testimony of a surrogate analyst, even one from the same lab, who did not observe the testing conducted, violated the Confrontation clause and that the live testimony of the authoring analyst was required for admission of the reports. ***Id***. ("The accused's right is to be confronted with the analyst who made the certification, unless that analyst is unavailable at trial, and the accused had an opportunity, pretrial, to cross-exaimine that particular scientist."); *see also* ***Melendez-Diaz***, 557 U.S. 305, 329, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009).

In reaching this decision, the Court found that confrontation was required because the underlying report was testimonial, and introduced for the truth of the matter asserted. ***Bullcoming***, 131 S. Ct. at 2705. Because the facts of Griep's case mirrors those of ***Bullcoming***, the underlying analysis compels the same outcome—that this Court find that confrontation is required and overturn Griep's conviction.

A. The Kalscheuer report was testimonial

"As a rule, if an out-of-court statement is testimonial in nature, it may not be introduced against the accused at trial unless the witness who made the statement is unavailable and the accused has had a prior opportunity to confront that witness." ***Bullcoming***, 131 S. Ct. at 2713. The United States Supreme Court has further clarified that statements are testimonial where the statement (1) has "the primary purpose of accusing a targeted individual of engaging in criminal conduct," ***id***. at 2714, fn. 6 ("To rank as 'testimonial," a statement must have a 'primary purpose' of 'establish[ing] or prov[ing] past events potentially relevant to later criminal prosecution.") (citing ***Davis v. Washington***, 547 U.S. 813, 822, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006)), and (2) "involve[s] formalized statements such as affidavits, depositions, prior testimony, or confessions," ***id.*** at 2717 ("In sum, the formalities attending the 'report of blood alcohol analysis" are more than adequate to qualify Caylor's assertions as testimonial."); *see also* ***Williams***, 131 S. Ct. at 2242 (opinion of Thomas, J. concurring) ("I have concluded that the Confrontation Clause reaches 'formalized testimonial materials' such as depositions, affidavits, and prior testimony, or statements resulting from 'formalized dialogue,' such as custodial interrogations.") (citing ***Michigan v. Bryant***, 131 S. Ct. 1143, 1167, 179 L. Ed. 2d 93 (2011); ***Davis,*** 547 U.S. at 836-37).

In ***Bullcoming***, the Court found that the underlying blood alcohol report was testimonial because it was made solely for an evidentiary purporse and was sufficiently formal. Citing back to its decision in ***Melendez-Diaz v. Massachusetts***, the Court noted that the facts in ***Bullcoming*** were no different, and thus compelled the same result. ***Bullcoming***, 131 S. Ct. at 2716. In ***Melendez-Diaz***, the defendant was charged with distributing and trafficking cocaine. 557 U.S. 305, 129 S. Ct. 2527, 174 L. Ed. 2d 314

(2009). There, police requested that a state forensic laboratory analyze the contents of plastic baggies seized from the defendant and report the analysis to the police. ***Id***. at 363. The analyst who tested the evidence prepared "certificates of analysis," which were introduced at trial through a surrogate analyst's testimony. ***Id***. at 305. Upon review, the United States Supreme Court found:

> In all material respects, the laboratory report in this case resembles those in ***Melendez-Diaz***. Here, as in ***Melendez-Diaz***, a law-enforcement officer provided seized evidence to a state laboratory required by law to assist in police investigations, N.M. Stat. Ann. § 29-3-4 (2004). Like the analysts in ***Melendez-Diaz***, [an] analyst [] tested the evidence and prepared a certificate concerning the result of his analysis. Like the ***Melendez-Diaz*** certificates, [the testing analyst's] certificate is "formalized" in a signed document, ***Davis***, 547 U.S., at 837, n. 2, 126 S. Ct. 2266, 165 L. Ed. 224 (opinion of Thomas, J.), headed a "report," App. 62.

Bullcoming, 131 S. Ct. at 2728.

All of the material facts referenced in both ***Bullcoming*** and ***Melendez-Diaz***—the collection of evidence by law-enforcement, the testing of the evidence at a state laboratory, and the compilation of the analysts' findings in a formal, certified laboratory or certificate—are present here. Here, Griep consented to providing a blood sample at the request of a law-enforcement officer (38:16-7). The sample was collected upon that request and analyzed by Wisconsin State Laboratory of Hygiene Analyst Diane Kalscheur (38:17). Analyst Kalscheur reported receiving and testing Griep's labeled and sealed blood sample, tested the sample for ethanol, and provided the results in a signed and certified report. App. E. Both Analyst Kalscheur and Laboratory of Hygiene Chemist, Thomas Ecker, signed multiple sections of the report and associated documentation. *Id*. The creation of this report—made solely for the purposes of prosecution—as

well as its subsequent certifications place the statements clearly within the class of testimonial statements requiring confrontation. As in ***Bullcoming*** and ***Melendez-Diaz***, the certification of Kalscheur's report signifies that the report is the functional equivalent of live testimony that is subject to the right of confrontation. *Compare* App. E with ***Bullcoming***, 131 S. Ct. at 2717.

For these reasons, the court of appeals erred when it did not find the admission of the substance of the report required confrontation. Indeed, Wisconsin Supreme Court precedent supports Griep's analysis. *See* ***State v. Williams***, 2002 WI 58, ¶41, 253 Wis. 2d 99, 644 N.W.2d 919 ("such [laboratory] reports are prepared primarly to aid in the prosecution of criminal suspects."). This Court has found that "there can be little questions that when state crime labs generate reports like those at issue here, they are acting as an arm of the State in assisting it to prevail in litigation and secure a conviction of the defendant." ***Id.*** at ¶48.

Here, the court of appeals appropriately found "the analysis of Griep's blood was conducted for the very purpose of accusing Griep and creating evidence for use at trial." App. A, ***State v. Griep***, No. 2009 AP 3073-CR at ¶20 (Wis. Ct. App. Feb 19, 2014) (citing ***United States v. Turner***, 709 F.3d 1187, 1192 (7th Cir. 2013)). Nonetheless, the court of appeals found that confrontation was not required because

> with our supreme court so recently and favorably citing ***Barton***, *see* ***Deadwiller***, *350 Wis. 2d 138,* ¶¶37-40, we have no choice but to conclude that ***Barton*** remains the law of our state…Under the reasoning of ***Barton***, the availability of a well qualified expert, testifying as to his independent conclusion about the ethanol testing of Griep's blood as evidenced by a report from another state lab analyst, was sufficient to protect Griep's right to confrontation.

Id. at ¶22. This decision misapplied this court's findings in ***State v. Deadwiller***, which held that confrontation was not required where an expert offered independent opinion testimony based in part upon another expert's work. 2013 WI 75; *see infra* Section II. Here, the contents of the report were introduced not as a partial basis for an independent expert opinion, but solely for the truth of the matter asserted. Harding offered no independent analysis and thus confrontation was required.

B. The contents of the report were introduced for the truth of the matter asserted.

Although Kalschauer's report was not introduced at trial, the contents of the report were still testimonial and introduced through Harding's testimony to prove the contents of those reports—that Griep's blood alcohol content was above the legal limit. Thus, the introduction of the report's contents through a witness, rather than the report itself, still required confrontation of the testing analyst. Wisconsin courts and the United States Supreme Court have consistently held that a surrogate witness cannot act as a conduit to introduce the contents of an otherwise testimonial report. *See* ***State v. Deadwiller***, 2013 WI 75 at ¶37 ("one expert cannot act as a mere conduit for the opinion of another.") (citing ***State v. Williams***, 2002 WI 58 at ¶19); ***State v. Barton***, 2006 WI App 18 at ¶10 ("The critical point. . . is the distinction between an expert who forms an opinion based in part on the work of others and an expert who merely summarized the work of others.") (citing ***State v. Williams***, 2002 WI 58 at ¶19); ***Bullcoming***, 131 S. Ct. at 2716 ("Accordingly, the [Confrontation] Clause does not tolerate dispensing with confrontation simply because the court believes that questioning one witness about another's testimonial statements provides a fair enough opportunity for cross-examination.").

Here, the substance of the Kalscheur report was introduced to establish Griep's blood alcohol content and thus went directly to the findings of that report. The report, just one-page in length, did not detail any of the procedures or steps undertaken by Analyst Kalscheur, but instead stated solely:

Subject

GRIEP,MICHAEL R DOB:3/25/1958 Sex:M

Coll By: DEBRA FRANK
Date Coll: 8/25/2007
Time Coll: 0145
Date Rcvd: 8/30/2007

Spec Type: BLOOD
Spec Condition: Labelled and sealed
Citation No: G388434-4
Ethanol Tested: 8/30/2007

Final Results

ETHANOL 0.152 g/100 mL

Specimen Comments:
Specimen(s) will be retained no longer than six months unless otherwise requested by agency or subject.

ETHANOL ANALYST: Diane Kalscheur
Diane Kalscheur, #AP-497

App. E. Although the report itself was not introduced at trial, the substance of that report still came before the jury through the surrogate's testimony, placing Griep's case still squarely under ***Bullcoming***. Here, Harding testified:

> Q: Reviewing the data you reviewed, did you come to an independent opinion about what the blood alcohol content was of the sample that was shipped to the Lab of Hygiene under Mr. Griep's name:
>
> A: Yes.
>
> Q: And what is that opinion.
>
> Mr. Mishlove: And same objection
>
> The Court: It will be noted.
>
> BY THE WITNESS:

> A: The opinion is that the alcohol concentration of Mr. Griep's sample was 0.152 grams of ethanol per 100 milliliters of blood.

(App. F; 38:31). However, that testimony could *not* have been an independent opinion, as none of the underlying data regarding what steps Analyst Kalscheur took was provided to Harding and Harding himself conducted no analysis or testing of his own. There was no information that Kalschauer followed proper laboratory protocol or what work she performed to obtain these results: There was no description of how the seal was checked, how the name was verified, how the vial appeared, how it was loaded in the gas machine, etc.—nothing that would allow an expert to determine independently that the BAC finding was correct. (*See* App. F; 38:31-51; App. E). Thus, Harding's reference to statements in the report was the equivalent of introducing the written report itself. Harding added nothing.

In short, the substance of the blood-alcohol report in Griep's case—in particular the statements that the blood samples arrived at the lab sealed and labeled with Griep's name, and that ethanol testing produced a certain result—were obviously introduced for their truth. (App. E; App. F; 38:28, 30-31). Here, like in ***Melendez-Diaz*** and ***Bullcoming***, there is no other possible explanation for introducing the substance of the report—the results of Griep's blood ethanol analysis—other than to establish their truth—that the test result was above the legal limit. *See* ***Melendez-Diaz***, 557 U.S. at 311 (finding that lab reports introduced as part of the State's evidence against a defendant clearly contained statements introduced for the truth of the matter asserted); ***Bullcoming***, 131 S. Ct. at 2712 (same). As in ***Bullcoming***, the testimony of the expert would have been irrelevant if these statements had not been accepted as true. Indeed, the entirety of surrogate-analyst Harding's testimony presumed

that the samples Kalscheur received were labeled as Griep's blood, and that she analyzed these same samples for ethanol.

For example, although Harding was qualified to testify about testing generally, (see App. F; 38:26-27), he had no personal knowledge to testify as to what had happened during testing in this case:

> Q: You don't have any personal knowledge as to whether or not this sample was clotted, do you?
>
> A: I did not observe the sample.
>
> Q: You don't have any personal knowledge as to whether this sample had a foul smell when it was opened, do you?
>
> A: No, I don't.
>
> Q: And you don't have any personal knowledge as to whether when this sample was opened there was a pop or a noise on the vial which would indicate there was a vacuum still in the tube, do you?
>
> A: I did not open the sample. I did not observe it.

(App. F; 38:34-35.) Harding also lacked personal knowledge of how and when Kalscheur handled the samples, checked the labels on the vials containing the samples, operated the testing machine and recorded her results (App. F; 38:34-51). He was therefore unable to be cross-examined on any of these issues, thus depriving Griep the opportunity to challenge the reliability the testimonial evidence against him on its reliability.

Indeed, when cross-examined as to whether or not Kalscheur followed the appropriate lab protocols, Harding was again unable to answer:

> Q: You don't have any personal knowledge as to whether Ms. Kalscheur did any of these things, correct?

> A: I did not observe her. I did not observe the samples.
>
> Q: So you don't have any personal knowledge as to whether she did these things or not?
>
> A: That's correct.

(App. F; 38:46.) Had Harding observed Kalschauer's analysis, he may have been able to form his own independent analysis. Without such knowledge, however, his testimony was a mere "conduit" for the contents of the report. *Compare* ***Bullcoming***, 131 S. Ct. at 2716, fn. 8 ("At Bullcoming's trial, Razatos acknowledged that 'you don't know unless you actually observe the analysis that someone else conducts, whether they followed th[e] protocol in every instance."). Thus, all of Harding's testimony was merely a regurgitation of Kalschauer's report.

For this reason, the court of appeals erred when it found that the contents of the report were admissible through Harding's testimony because of this Court's decision in ***State v. Deadwiller***. App. A, ***State v. Griep***, No. 2009 AP 3073-CR at ¶22 (Wis. Ct. App. Feb 19, 2014). This was not a case in which an expert was presented a hypothetical scenario or partial information and asked to form an independent opinion based upon those hypothetical facts or information; the basis of Harding's testimony—the Kalscheur report—was introduced as a fact through Harding's testimony. Despite Harding's assertion that his opinion was independent, the limited information contained within that report made it impossible—Harding added no new analysis and undertook no additional steps of his own.

Contrastingly, in ***Deadwiller***, testimony from a surrogate analyst did not prove the truth of the matter asserted because the testimony was not used to show that the DNA profiles came from the rape kit swabs. 2013 WI 75, at ¶33. As in ***Williams,*** the prosecutor in ***Deadwiller*** used chain of

custody evidence, rather than the surrogate's testimony, to prove that the DNA profiles came from the victim swabs, and instead relied on the surrogate to discuss the results that emerged from work the surrogate himself had performed—that the surrogate had matched the profile to a profile in the database. ***Id***; ***Williams***, 132 S. Ct. at 2237, 2239. Indeed, it was only the surrogate's work that provided the ultimate accusation in the case: that the defendant was the same person who left behind the DNA. In contrast, the court in ***Bullcoming*** determined that the lab testing was performed to prove the truth of the matter asserted, that Bullcoming's BAC exceeded the legal limit. 131 S. Ct. at 2709. In that case, the court determined that a surrogate cannot testify about testing used to prove the truth of the matter asserted. *See* ***Bullcoming***, 131 S. Ct. 2705. Here, Harding's purported review of Kalscheur's report in no way diminishes the fact that Kalscheur's statements regarding Griep's sample were introduced for their truth.

For all these reasons, the statements were offered for the truth of the matter asserted and required confrontation of an analyst who had the personal knowledge to testify and be confronted about the information contained within the report.

II. The Decisions in *Williams v. Illinois* and *State v. Deadwiller* Do Not Control.

The court of appeals erred when it determined that ***State v. Deadwiller*** and ***Williams v. Illinois*** are determinitive. Both ***Deadwiller*** and ***Williams*** are concerned not with the admissibility of the contents of a report without confrontation, as is presented here, but rather with the admissibilty of independent expert opinion testimony formed in part on another expert's report without confrontation of the report's author. In each of those cases, the testifying expert conducted additional steps and independent analysis, using only the report in question as one component in forming their opinion.

In Griep's case, Harding offered no independent opinion, but rather based his entire conclusions on Kalschauer's report. Because those cases discuss an issue not present here, ***Bullcoming*** still controls.

In ***Williams v. Illinois***, the Supreme Court addressed the question of how the Confrontation Clause applies to cases in which an analyst purports to offer expert *opinion* testimony regarding the report of a non-testifying analyst who also performed additional work when the written report itself is not admitted into evidence. 132 S. Ct. 2221. In ***Williams***, the state introduced testimony from a state forensic analyst regarding DNA testing performed on crime scene evidence by a non-testifying analyst at an out-of-state private lab, Cellmark Diagnostics. ***Id.*** at 2229-30. There, the state analyst testified that she independently compared the DNA profile developed by the non-testifying out-of-state analyst with the profile of the defendant developed by the in-state lab and concluded the two profiles matched. ***Id***. This live testimony was permitted at trial as expert opinion. ***Id.*** at 2230-31. No one from Cellmark Diagnostics testified. ***Id.*** A four-member plurality in ***Williams***, along with Justice Thomas who concurred in the judgment only, decided that the portions of the Cellmark report referenced by the testifying state analyst were not subject to the Confrontation Clause. ***Id***. The prosecutor was not asking about the testing at Cellmark, but about "'her own testing based on [DNA] information' that she received from Cellmark.'" ***Id***. at 2230.

In ***State v. Deadwiller***, 2013 WI 75, 350 Wis. 2d 138, 834 N.W.2d 362, this Court applied the precedent set by ***Williams*** to a Wisconsin case with remarkably similar facts. In ***Deadwiller***, the state introduced testimony from a state analyst, Ronald Witucki, who testified that an out-of-state crime lab, Orchid Cellmark, analyzed vaginal and cervical swabs taken from two sexual assault victims. ***Id***. at ¶1. After receiving the DNA profiles from Orchid Cellmark, Witucki

himself entered the DNA profiles into the DNA database, which resulted in a match to the defendant, Richard Deadwiller. ***Id***. No one from Orchid Cellmark testified at Deadwiller's trial. ***Id***. Upon review, this Court found that, under these circumstances, confrontation was not required. ***Id***. Relying on the United State Supreme Court's judgment and rationale in ***Williams***, as well Wisconsin precedent in ***State v. Williams***, 2002 WI 58 at ¶19, and ***State v. Barton***, 2006 WI App 18, this Court found that "Witucki was not merely a conduit for Orchid's DNA profiles, but he independently concluded that Deadwiller was a match to Orchid's DNA profiles." ***Deadwiller***, 2013 WI 75 at ¶40. Notably, Witucki, like the analyst in ***Williams***, undertook his own independent step in forming his conclusion that the profiles matched—he himself entered the profile into the database and was available for cross-examination as to those steps.

This independent opinion analysis is also the issue presented in both ***State v. Williams*** and ***State v. Barton***. In ***State v. Williams***, the defendant was charged with possession of cocaine with the intent to deliver. 2002 WI 58 at ¶1. At trial, the state introduced a state crime lab report showing that the substance collected from the defendant tested positive for cocaine. ***Id***. at ¶2. The original analyst was unavailable to testify, and another analyst, Sandra Koresch, who had performed a peer review of the original analyst's work in her regular course of duties, testified that the substance Williams was charged with possessing was cocaine. ***Id***. at ¶4. The defendant argued that Koresch's testimony violated his right to confrontation, however, this Court concluded that Williams' right to confrontation had not been violated because adequate confrontation was available through Koresch. The Court wrote:

> [T]he presence and availability for cross-examination of a highly qualified witness, who is familiar with the

> procedures at hand, supervises or reviews the work of the testing analyst, and renders her own expert opinion is sufficient to protect a defendant's right to confrontation, despite the fact that the expert was not the person who performed the mechanics of the original tests.

Id. at ¶20. Because Koresch's opinion did not rest solely upon the work of the original analyst, but instead was an independent opinion formed upon her own peer review work, confrontation was satisfied: "although she based part of her opinion on facts and data gathered by someone else, she was not merely a conduit for another expert's opinion." ***Id.*** at ¶25.

In ***State v. Barton***, the defendant was charged with arson. 2006 WI App 18 at ¶3. There, the original analyst, David Lyle, had retired by the time of Barton's trial, and the technical unit leader, Kenneth Olson, testified that there had been ignitable substances found at the scene of the crime ***Id***. at ¶4. Olson had also performed a peer review of Lyle's tests and presented his own conclusions regarding the tests to the jury. ***Id***. Under ***State v. Williams***, the court concluded that Barton's right to confrontation had not been violated:

> Like the unit leader's testimony in [***State v.] Williams***, Olson's testimony was properly admitted because he was a qualified unit leader presenting his individual, expert opinion. Olson not only examined the results of Lyle's tests, but he also performed a peer review of Lyle's tests. He formed his opinion based on his own expertise and his own analysis of the scientific testing. He then presented his conclusions to the jury, and he was available to Barton for cross-examination. Thus, Olson's testimony satisfied Barton's confrontation right and is admissible under the supreme court's decision in ***[State v.] Williams.***

Id. at ¶38. In short, ***Barton*** stands for the proposition that confrontation is satisfied when a defendant is presented with the opportunity to cross-examine an expert witness who has formed *his own independent opinion*, based in part upon

another expert's work that he directly reviewed and supervised.

Importantly, no independent opinion was present in either ***Griep*** or ***Bullcoming***. *See* ***Bullcoming***, 131 S. Ct. at 2716 ("Nor did the State assert that Razatos had and 'independent opinion' concerning Bullcoming's BAC."). Instead, Harding was only able to testify as to the contents of the Kalschauer's report. Moreover, Harding was unable to present any information that may have been available had he observed or reviewed Kalschauer's analysis. *See supra,* Section I. B.

"Accordingly, the [Confrontation] Clause does not tolerate dispensing with confrontation simply because the court believes that questioning one witness about another's testimonial statements provides a fair enough opportunity for cross-examination." ***Bullcoming***, 131 S. Ct. at 2716. Nor do the cases the State relies upon—***Deadwiller***, ***Barton***, or ***State v. Williams***—stand for that proposition. Instead, these cases, along with the United States Supreme Court's decision in ***Williams v. Illinois*** have found that surrogate testimony is permissible where that surrogate is able to form his or her own independent opinion. In ***Griep,*** however, surrogate analyst Harding admitted that his opinion was based on the solely on report and associated documents. (App. F.) He had no personal knowledge of the testing or independent verification that the steps had been followed. (*Id.*) And he did not form an independent opinion regarding Griep's blood-alcohol concentration, unlike the surrogates in ***Deadwiller*** and ***Williams***. Because Harding offered no independent opinion here, and because it was based entirely upon Kalscheur's report, Griep was entitled to confront the report's author.

Finally, the nature of the report in ***Griep*** was different from those in ***Williams*** and ***Deadwiller***. In ***Williams***, Justice

Thomas made clear that his opinion rested on the fact that the underlying report was not a formalized and solemn statement. In ***Griep,*** on the other hand, the analyst's underlying report *was* a formalized statement that contained certified declarations of fact. Here, the report was certified as true and correct by Laboratory of Hygiene Chemist, Thomas Ecker, and both Kalscheur and Ecker signed multiple sections of the report and associated documentation to certify the document App. E. This whole process of certification underscores the nature of the report as conclusory. True scientific papers do not include certified statements that the reader should trust the analysis based upon the scientist's signature alone; instead, the accuracy of the data gathering and validity of the analysis is reflected in the paper itself. *See, e.g.,* The Writing Center, *Scientific Reports*, University of North Carolina at Chapel Hill, available at http://writingcenter.unc.edu/handouts/scientific-reports/ ("In science, it's not sufficient merely to design and carry out an experiment. Ultimately, others must be able to verify your findings, so your experiment must be reproducible, to the extent that other researchers can follow the same procedure and obtain the same (or similar) results."). All of that information must independently verifiable by a peer reviewer.

The importance of repeatability as validation cannot be understated. Here is one real-world example:

> In 1989, physicists Stanley Pons and Martin Fleischman announced that they had discovered "cold fusion," a way of producing excess heat and power without the nuclear radiation that accompanies "hot fusion."…When other scientists tried to duplicate the experiment, however, they didn't achieve the same results, and as a result many wrote off the conclusions as unjustified (or worse, a hoax). To this day, the viability of cold fusion is debated within the scientific community, even though an increasing number of researchers believe it possible.

Id.

When it comes to an individual's guilt and the State's ability to take away that individual's freedom, there is no room for such debate. The Constitution does not allow it. Where another expert cannot independently validate the findings and can offer no independent opinion, confrontation of the testing analyst is required. Here, the Kalscheur report contained no such necessary information, but provided solely the results of the blood alcohol test. App. E. Indeed, Harding himself admitted he had no personal knowledge as to the test procedure. (App. F; 38:46). In this regard, ***Griep*** is more similar to the facts presented in United States Supreme Court case ***Melendez-Diaz***, 557 U.S. 305, than those in ***Williams*** and ***Deadwiller***. In ***Melendez-Diaz,*** the Supreme Court held that the admission of testimonial certificates of analysis, without testimony from the actual reporting analyst, violated the defendant's right to confrontation. ***Id.*** This Court should find the same and overturn Griep's conviction.

III. Even Under *Williams v. Illinois* and *State v. Deadwiller,* Confrontation of the Performing Analyst is Required.

Should this Court find that ***Williams v. Illinois*** and ***State v. Deadwiller*** nonetheless control, confrontation of the testing analyst is still required. Although ***Williams*** resulted in a plurality opinion, this Court found that there was no theoretical overlap between rationales, and thus "the only binding aspect of the fragmented decisions. . . is its 'specific result.'" ***Deadwiller***, 2013 WI 75 at ¶30 (citing ***Berwind Corp. v. Comm'r of Soc. Sec.***, 307 F.3d 222, 234 (3d Cir. 2002)). In applying a rationale, the court noted: "We need not find a legal opinion which a majority joined, but merely 'a legal standard which, when applied, will necessarily produce results with which a majority of the Court from that case would agree.'" ***Deadwiller***, 2013 WI 75 at ¶31. "Applying the rationales of Justice Alito and Justice Thomas 'necessarily produce[s] results with which a majority of the Court from

that case would agree.'" ***Deadwiller***, 2013 WI 75 at ¶33 (citing ***People v. Dungo***, 286 P.3d 442, 455, 147 Cal. Rprtr. 3d 527, 55 Cal. 4th 608 (Cal. 2012) (Chin, J. concurring)). Here, Griep is entitled to confrontation under both Justice Alito's and Justice Thomas's reasonings.

This Court found that Justice Alito gave two rationales to support his conclusion that confrontation was not required. "First, he reasoned that the DNA profile was not used to prove the truth of the matter asserted, namely, 'that the report contained an accurate profile of the perpetrator's DNA.'" ***Deadwiller***, 2013 WI 75 at ¶23 (citing ***Williams***, 132 S. Ct. at 2240). Second, he also found that the report was not testimonial because it did not exhibit two common characteristics of Confrontation Clause violations: (1) it was not prepared for the "primary purpose of accusing a targeted individual of engaging in criminal conduct" and (2) it was not a "formalized statement[]." ***Id***. at ¶25 (citing ***Williams***, 132 S. Ct. at 2242-43).

Even under Justice Alito's rationale in ***Williams,*** confrontation of the testing analyst is required. First, the report in Griep is clearly offered for the truth of the matter asserted—that the results of the tests showed Griep's BAC was above the legal limit. Justice Alito's agreement with this is underscored by his discussion in ***Williams*** itself. In differentiating the circumstances of ***Williams*** from ***Bullcoming*** and ***Melendez-Diaz***, Justice Alito noted that "Bullcoming's BAC exceeded the legal limit and that the substance Melendez-Diaz was charged with was distributing cocaine." ***Deadwiller***, 2013 WI 75 at ¶24 (citing ***Williams***, 132 S. Ct. at 2240). Thus, because the facts in Griep mirror those in ***Bullcoming***, the plurality would agree that the contents of the Kalschauer report were offered for the truth of the matter asserted.

Justice Thomas, in contrast, found no violation simply because the report was not testimonial. ***Williams***, 132 S. Ct. at 2259-60 (Thomas, J., concurring). Thus, five justices—the four dissenters and Justice Thomas—explicitly found that the substance of the Cellmark report as introduced through the surrogate witness was offered for the truth of the matter asserted. ***Id.*** at 2256 (Thomas, J., concurring) (". . . there was no plausible reason for the introduction of Cellmark's statements other than to establish their truth."); ***Id.*** at 2268 (Kagan, J., dissenting) ("But five justices agree. . . Lambatos's statements about Cellmark's report went to its truth, and the State could not rely on her status as an expert to circumvent the Confrontation Clause's requirements.").

Reaching Justice Alito's second rationale, the Kalscheur report is also testimonial under the test proposed by the ***Williams*** plurality. The plurality opined that a report cannot be testimonial if it was not prepared for the primary purpose of accusing a targeted individual. ***Williams***, 132 S. Ct. at 2243. This opinion, consistent in some ways with the primary-purpose test in ***Davis***, 547 U.S. at 822, also supports the conclusion that the Kalscheur report was testimonial. The Kalscheur report was prepared after Griep was arrested, and was authored for the purpose of providing evidence against Griep at trial (*see* App. F; 38:27-28). Similarly, the report is sufficiently formal.

In his concurrence in ***Williams v. Illinois***, Justice Thomas agreed with the plurality that the Cellmark report was not subject to the Confrontation Clause, but reached this conclusion on far narrower grounds, noting that the form of the Cellmark report was not sufficiently solemn or formalized to qualify as a testimonial statement. 132 S. Ct. at 2259-60 (Thomas, J., concurring). In particular, Thomas noted that the report was not sworn or certified. ***Id***. at 2260 (Thomas, J., concurring). This lack of certification was critical as it distinguished the Cellmark report from statements held to be

testimonial in earlier cases such as ***Bullcoming*** and ***Melendez-Diaz***. ***Id***. (noting that what distinguishes the report in ***Bullcoming*** from the Cellmark report is that ". . . Cellmark's report, in substance, certifies nothing.").

Here, like in ***Williams***, the out-of-court statements reported by Analyst Kalscheur were admitted by the court. Unlike in ***Williams***, however, the statements made in the report were certified, formalized statements and thus clearly testimonial. The statements made in the Kalscheur report fall into the core class of testimonial statements considered in ***Crawford*** and ***Davis***, and further meet both the holdings of Justice Alito and the narrower holding of Justice Thomas in ***Williams*** regarding the admission statements made in certified forensic reports.

Thus, even if the holding in ***Williams*** does control, confrontation is still required. Indeed, other courts around the country have found that a surrogate analyst cannot satisfy the Confrontation Clause under similar circumstances. For example, the District of Columbia Court of Appeals reached just such a result in ***Young v. United States***, 63 A.3d 1033, 1047–48 (D.C. 2013). Also unable to reconcile the divergent opinions in ***Williams***, the court formulated an "intermediate" test based on the opinions of Justice Alito and Justice Thomas in which an out-of-court statement is testimonial "if its primary purpose is evidentiary and it is either a targeted accusation or sufficiently formal in character." ***Id***. Applying this test, the court found that a lab supervisor's testimony regarding DNA analyses she did not observe or perform violated the Confrontation Clause. ***Id***. at 1048. Significantly, the court rejected the argument that the supervisor's testimony was permissible simply because the underlying reports were not admitted and the supervisor merely testified to her "independent evaluation of her subordinates' work product." ***Id***. at 1044, 1049.

In ***State v. Navarette***, 294 P.3d 435 (N.M. 2013), the New Mexico Supreme Court reached a similar conclusion, albeit under a different rationale. There, the court considered the admissibility of expert testimony by a forensic pathologist who "neither participated in nor observed the autopsy" at issue but instead relied on a report that a nontestifying pathologist prepared and that "itself was never offered into evidence." ***Id***. at 436-37. Examining ***Williams***, the court rejected the plurality's reasoning and concluded, based on the opinions of Justice Thomas and the dissenting Justices, ***id***. at 438–42, that the admission of such surrogate expert testimony was reversible error, ***id***. at 442–43. The court explained that Federal Rule of Evidence 703 does not permit an expert witness to rely on, and relate, information gleaned from out-of-court testimonial statements, and that such statements are necessarily offered for their truth. ***Id***. at 440 ("Given the viewpoint of a majority of the United States Supreme Court, the Confrontation Clause analysis makes any Rule [703] analysis irrelevant in this case.").

Likewise, in ***Martin v. State***, 60 A.3d 1100, 1108–09 (Del. 2013), the Supreme Court of Delaware found that a lab supervisor's testimony regarding a blood test violated the Confrontation Clause because the supervisor "merely reviewed [a nontestifying analyst's] data and representations about the test, while having knowledge of the laboratory's standard operating procedures, [but] without observing or performing the test herself." ***Id.*** at 1108–09. The nontestifying analyst's data on which the supervisor relied included gas chromatography results similar to Hanson's results and were contained in batch reports that were themselves not admitted into evidence. ***Id***. at 1107. Nevertheless, the court concluded the results were testimonial because "interpreting the results of a gas chromatograph machine involves more than evaluating a machine-generated number." ***Id***. at 1108 (citation omitted). Relying on

Bullcoming and the opinions of Justice Thomas and the dissenting Justices in ***Williams***, the court concluded the supervisor's testimony improperly conveyed the absent analyst's testimonial statements to the jury and that these statements were admitted for their truth. ***Id.*** at 1107

Here, the Confrontation Clause requires the same result. Under the test outlined by this Court in interpreting ***Williams***, formal, solemnized reports, like the certified report in ***Griep***, *are* testimonial and subject to confrontation. In short, even if ***Williams*** and ***Deadwiller*** were to apply, the court of appeal's decision in ***Griep*** would conflict with both of them.

CONCLUSION

For all the reasons stated, Griep requests that this Court find that the admission of surrogate testimony regarding the ethanol report violated his constitutional right to confrontation and reverse his conviction.

Respectfully submitted this 15th day of September, 2014.

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CERTIFICATION AS TO FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (d) for a brief and appendix produced with a proportional serif font, 13 point body text, 11 point for quotes and footnotes, leading of minimum of 2 points and maximum of 60 lines. The length of the brief is 8,736 words.

Tricia J. Bushnell

CERTIFICATION AS TO APPENDICES

I hereby certify that filed with this brief is an appendix that complies with § 809.19(2)(a) and that contains: (1) a table of contents; (2) relevant trial court record entries; (3) the findings or opinion of the trial court; and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues. Further, I certify that I have included a copy of the court of appeals' decision in this case pursuant to Rule 809.62(2)(f)1.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have so reproduced to preserve confidentiality and with appropriate references to the record.

Tricia J. Bushnell

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I hereby certify that the text of the electronic copy of this brief is identical to the text of the paper copy of the brief

Tricia J. Bushnell

STATE OF WISCONSIN

IN SUPREME COURT

No. 2009AP3073-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MICHAEL R. GRIEP,

Defendant-Appellant-Petitioner.

ON REVIEW OF A DECISION OF THE COURT OF APPEALS, DISTRICT II, AFFIRMING A JUDGMENT OF CONVICTION, ENTERED IN THE CIRCUIT COURT FOR WINNEBAGO COUNTY, THE HONORABLE THOMAS J. GRITTON, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

By granting review this court has indicated that oral argument and publication are appropriate.

SUPPLEMENTAL STATEMENT OF THE CASE AND FACTS

The defendant-appellant, Michael R. Griep, was convicted of operating a motor vehicle while under the influence of an intoxicant (OWI), following a bench trial in which the court, the Honorable Thomas J. Gritton, found him guilty (22; 38; 39:19). The court of appeals

confirmed his conviction. *State v. Griep*, 2014 WI App 25, 353 Wis. 2d 252, 845 N.W.2d 24.

Griep was arrested by Village of Winneconne police officer Ben Sauriol on August 25, 2007 (38:7-8, 15). Officer Sauriol took Griep to the hospital, read the informing the accused form to him, and requested a blood sample for testing (38:15-16). Griep refused (38:16), and his blood was taken without his consent (38:17-18).[1]

Griep was charged with OWI and operating with a prohibited alcohol concentration (PAC) (2:1-2). Diane Kalscheur, the lab analyst who tested the blood sample, was unavailable to testify at trial (38:5). Three witnesses testified: Officer Sauriol, the phlebotomist who performed the blood draw, and Patrick Harding, the section chief of the toxicology section of the Wisconsin State Laboratory of Hygiene. The prosecutor asked Harding about the testing process at the Lab of Hygiene, and if he had an opinion as the alcohol concentration of Griep's blood sample (38:28-31). Griep's defense counsel objected, on the grounds that Harding's testimony would violate the Confrontation Clause of the Sixth Amendment because Harding did not personally test the blood (38:28-29, 31). The court allowed Harding's opinion testimony, and determined that it would decide the Confrontation Clause issue when it rendered a verdict (38:29, 64-65). Harding testified that he had peer reviewed Kalscheur's work and examined the chromatograms and other data that were generated by the testing device, and that in his expert opinion, the data showed that the blood sample had an alcohol concentration of .152 (38:30-31). The lab report that included the test result was not introduced at trial (*see* 39:5).

[1] In his brief, Griep asserts that he "consented to providing a blood sample at the request of a law-enforcement officer" (Griep's Br. at 12 (citing 38:16-7)). However, Officer Sauriol testified that Griep refused to provide a blood sample, and that he marked a refusal (38:16). The informing the accused form, offered at trial as Exhibit No. 1, and in the appellate record (20:2), verifies that Griep refused to give a sample.

At the close of trial, the court determined that Harding's testimony did not violate the Confrontation Clause (39:2-7). The court found Griep guilty of both OWI and PAC, and entered judgment of conviction on the OWI charge (39:19; 22).

Griep appealed and the court of appeals certified the case to this court, which denied the certification. The court of appeals than affirmed Griep's conviction, reasoning that Griep's right to confrontation was not violated because under Wisconsin law, "nothing 'prevents a qualified expert from testifying in place of an unavailable expert when the testifying expert presents his or her own opinion.'" *Griep*, 353 Wis. 2d 252, ¶ 19 (quoting *State v. Barton*, 2006 WI App 18, ¶ 20, 289 Wis. 2d 206, 709 N.W.2d 93).

This court then granted Griep's petition for review.

SUMMARY OF ARGUMENT

Griep states the issue in this case as: "Does the Confrontation Clause prohibit a surrogate witness, who merely reviewed a nontestifying forensic analyst's certified report, notes, and results and did not personally conduct or observe any of the relevant analyses, from testifying regarding the substance of the report?" (Griep's Br. at 1).

But that issue is not present in this case. At Griep's bench trial, the court found that the expert who testified reached "an independent decision" and that he was not "being used as a conduit to get the report in" (39:7).

The issue in this case is therefore more appropriately: Does the Confrontation Clause prohibit a highly qualified expert witness, who peer reviewed the work of a laboratory analyst who tested a blood sample, and who analyzed the data produced by the testing, from

testifying to his independent opinion of the blood sample's alcohol concentration?

The trial court concluded that under *State v. Williams*, 2002 WI 58, 253 Wis. 2d 99, 644 N.W.2d 919, admission of the expert's testimony in this case did not violate Griep's right to confrontation (39:4-7).

The court of appeals affirmed, concluding that under *Barton*, 289 Wis. 2d 206, admission of the expert's testimony did not violate Griep's right to confrontation. *Griep*, 353 Wis. 2d 252, ¶¶ 1, 22.

In his brief to this court, Griep does not argue that *Williams* or *Barton* have been overruled, or ask this court to overrule them. He argues that this case is not controlled by *Williams* or *Barton*, but instead, "At its core, this case is a straightforward application of ***Bullcoming v. New Mexico***, 131 S. Ct. 2705, 180 L. Ed. 2d 610 (2011)" (Griep's Br. at 9).

But this case is quite different than *Bullcoming*, which concerned the admission of a lab report by a non-testifying analyst without independent expert testimony about the results demonstrated by test data.

As the court of appeals recognized, this case is a straightforward application of *Barton*, 289 Wis. 2d 206. Like in *Barton*, here the lab report was not introduced into evidence, and the admission of the testimony of a highly qualified expert who had peer reviewed the lab analyst's test, examined the data, and reached an independent opinion as to the alcohol concentration of the tested blood, did not violate the Confrontation Clause. This court should hold that the expert testimony in this case did not violate Griep's right to confrontation, and that *Barton* remains good law. It should therefore affirm the decision of the court of appeals.

STANDARD OF REVIEW

"'[W]hether the admission of evidence violates a defendant's right to confrontation is a question of law subject to independent appellate review.'" *State v. Deadwiller*, 2013 WI 75, ¶ 17, 350 Wis. 2d 138, 834 N.W.2d 362 (quoting *Williams*, 253 Wis. 2d 99, ¶ 7).

ARGUMENT

GRIEP'S RIGHT TO CONFRONTATION WAS NOT VIOLATED WHEN AN EXPERT PEER REVIEWED A LABORATORY ANALYST'S WORK AND TEST OF A BLOOD SAMPLE, ANALYZED DATA PRODUCED BY THE TESTING, AND GAVE HIS INDEPENDENT OPINION OF THE BLOOD SAMPLE'S ALCOHOL CONCENTRATION.

A. Legal principles.

"The Confrontation Clause of the Sixth Amendment provides that '[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.'" *Deadwiller*, 350 Wis. 2d 138, ¶ 20 (quoting U.S. Const. art. VI).

In *Crawford v. Washington*, 541 U.S. 36 (2004), the United States Supreme Court "held that the Confrontation Clause permitted the admission of '[t]estimonial statements of witnesses absent from trial . . . only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine.'" *Deadwiller*, 350 Wis. 2d 138, ¶ 20 (quoting *Crawford*, 541 U.S. at 59). The Court in *Crawford* defined "'witnesses'" against the defendant as "'those who bear testimony,'" and "'testimony'" as "'a solemn declaration or affirmation made for the purpose of establishing or proving some fact.'" *Id.* (citing *Crawford*,

541 U.S. at 51). The Court held that the statements contemplated by the Confrontation Clause are "'a specific type of out-of-court statement,' such as affidavits, depositions, custodial examinations, prior testimony, and 'statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.'" *Id.* (quoting *Crawford*, 541 U.S. at 51-52).

Wisconsin courts addressed the Confrontation Clause in two cases that are particularly relevant to this case, one before *Crawford* and one after. In *Williams*, 253 Wis. 2d 99, the State introduced into evidence a state crime lab report showing that Williams was in possession of a substance that tested positive for cocaine base. *Id.* ¶¶ 3-4. The analyst who conducted the test was unavailable to testify; instead, a state crime lab supervisor provided expert testimony that the substance in Williams' possession tested positive for cocaine. The supervisor did not personally test the cocaine, and "testified in part based on the crime lab report containing the lab test results." *Id.* ¶ 9. Williams argued that his confrontation rights were violated because the analyst who performed the test should have testified and been available for cross-examination. *Id.*

This court held that the defendant's "right to confrontation was not violated when the state crime lab unit leader, rather than the analyst who performed the tests, testified in part based on the crime lab report containing the lab test results." *Id.* ¶ 81. The court emphasized "the distinction between an expert who forms an opinion based in part on the work of others and an expert who merely summarizes the work of others. In short, one expert cannot act as a mere conduit for the opinion of another." *Id.* ¶ 19. It reasoned that where an expert bases "*part* of her opinion on facts and data gathered by someone else, she [is] not merely a conduit for another expert's opinion." *Id.* ¶ 25 (emphasis added).

The *Williams* court set forth the following standard in confrontation cases:

> [T]he presence and availability for cross-examination of a highly qualified witness, who is familiar with the procedures at hand, supervises or reviews the work of the testing analyst, and renders her own expert opinion is sufficient to protect a defendant's right to confrontation, despite the fact that the expert was not the person who performed the mechanics of the original tests.

Id. ¶ 20.

The United States Supreme Court decided *Crawford* in 2004. In *Barton*, 289 Wis. 2d 206, the Wisconsin Court of Appeals addressed the holding of *Williams* in light of *Crawford*.

In *Barton*, a lab analyst at the crime lab tested materials taken from a residence that had started on fire. The tests revealed the presence of ignitable liquid and gasoline-like substances. *Barton*, 289 Wis. 2d 206, ¶ 3.

The analyst was unavailable to testify at trial. *Id.* ¶ 4. Instead, a "technical unit leader at the crime lab" testified. *Id.* ¶ 4. The technical unit leader "had performed a peer review of [the analyst's] tests, and presented his own conclusions regarding the tests to the jury." *Id.*

The technical unit leader testified that in his independent expert opinion, two of the items submitted for testing "had ignitable liquid residues consistent with a weathered gasoline sample," and a third item "contained a 'mid-range petroleum distillate' similar to lighter fluid or mineral spirits." *Id.* ¶¶ 14-15. He also testified that he had examined "'photocopies of three chromatograms of unleaded gasoline in different stages of evaporation,'" and, using those chromatograms, concluded that gasoline was present in the tested samples. *Id.* ¶ 15.

The State did not offer into evidence the lab reports, which detailed the test results. *Id.* ¶ 4.

The court of appeals concluded that the witness's testimony did not violate Barton's right to confrontation. The court explained that the testifying witness "was a highly qualified expert presenting his independent opinion." *Id.* ¶ 13. The court added that the witness "presented to the jury the uniform procedures the crime lab employed to test for ignitable fluids," and "stated that, based on his review of the case file, [the analyst] had followed these procedures in his tests." *Id.* ¶ 14. The witness further testified that he had conducted a peer review of the analyst's work, and he gave his independent expert opinion based on the data he analyzed. *Id.*

The court of appeals concluded that this court's holding in *Williams* remained good law after *Crawford*, stating:

> *Williams* is clear: A defendant's confrontation right is satisfied if a qualified expert testifies as to his or her independent opinion, even if the opinion is based in part on the work of another. We do not see, and Barton fails to explain, how *Crawford* prevents a qualified expert from testifying in place of an unavailable expert when the testifying expert presents his or her own opinion.

Id. ¶ 20 (citation omitted).

The United States Supreme Court has subsequently issued three opinions addressing the parameters of the Confrontation Clause in cases involving laboratory reports. *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009), was a drug case in which the prosecution introduced into evidence notarized certificates—rather than live testimony—by state laboratory analysts to prove that material seized from the defendant was cocaine. The Supreme Court held that

> a forensic laboratory report stating that a suspect substance was cocaine ranked as testimonial for

> purposes of the Sixth Amendment's Confrontation Clause. The report had been created specifically to serve as evidence in a criminal proceeding. Absent stipulation, the Court ruled, the prosecution may not introduce such a report without offering a live witness competent to testify to the truth of the statements made in the report.

Bullcoming, 131 S. Ct. at 2709 (citing *Melendez-Diaz*, 557 U.S. 305).

In 2011, the United States Supreme Court decided another case concerning the admission of a laboratory report, *Bullcoming*, 131 S. Ct. 2705, in which:

> The question presented is whether the Confrontation Clause permits the prosecution to introduce 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 who did not sign the certification or perform or observe the test reported in the certification.

Id. at 2710.

The Supreme Court held that "surrogate testimony of that order does not meet the constitutional requirement. The accused's right is to be confronted with the analyst who made the certification, unless that analyst is unavailable at trial, and the accused had an opportunity, pretrial, to cross-examine that particular scientist." *Id.*

In 2012 the Supreme Court issued an opinion in *Williams v. Illinois*, 132 S. Ct. 2221 (2012). The Court set forth the issue as follows:

> In this case, we decide whether *Crawford v. Washington*, 541 U.S. 36, 50 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), precludes an expert witness from testifying in a manner that has long been allowed under the law of evidence. Specifically, does *Crawford* bar an expert from expressing an opinion based on facts about a case that have been made

> known to the expert but about which the expert is not competent to testify?

Williams, 132 S. Ct. at 2227. The Court added that the issue it addressed was "'the constitutionality of allowing an expert witness to discuss others' testimonial statements if the testimonial statements were not themselves admitted as evidence.'" *Id.* at 2233 (quoting *Bullcoming*, 131 S. Ct. at 2722 (Sotomayor, J., concurring)).

The Supreme Court produced four separate opinions, none of which secured a five-vote majority. However, in two opinions, five justices voted to uphold the defendant's conviction. *See Williams*, 132 S. Ct. at 2244 (Alito, J., joined by Roberts, C.J., Kennedy, J., and Breyer, J.); *id.* at 2255 (Thomas, J., concurring). For different reasons, these justices agreed that a DNA profile report prepared by a private out-of-state laboratory was not testimonial under the Confrontation Clause. *See id.* at 2243-44 (Alito, J.); *id.* at 2259-60 (Thomas, J., concurring).

In *Deadwiller*, this court applied *Williams v. Illinois* in deciding a "factually similar" case. *Deadwiller*, 350 Wis. 2d 138, ¶ 21. This court noted that "'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.'" *Id.* ¶ 30 (citing *Marks v. United States*, 430 U.S. 188, 193 (1977)). The court also noted that "If no theoretical overlap exists between the rationales employed by the plurality and the concurrence, 'the only binding aspect of the fragmented decision . . . is its "specific result."'" *Id.* (quoting *Berwind Corp. v. Comm'r of Soc. Sec.*, 307 F.3d 222, 234 (3d Cir. 2002)).

This court concluded that "the opinions of Justice Alito and Justice Thomas in *Williams* have no theoretical overlap," but applied the decision "because Deadwiller and Williams are in substantially identical positions." *Id.* ¶ 32. This court concluded that, like in *Williams v.*

Illinois, the testimony at issue did not violate the defendant's right to confrontation. *Id.* ¶ 36.

This court explained in *Deadwiller* that its decision was consistent with *State v. Williams* and *Barton*, and that the expert testimony in *Deadwiller*, "was similar to that of the testifying analyst in *State v. Williams* and *Barton*." *Id.* ¶ 40. The court explained that witness, Ronald Witucki, was a highly qualified expert, and that:

> When the victims' swabs first came in, Witucki confirmed the presence of semen. Once Witucki received Orchid's DNA profile, he reviewed the profile to make sure that Orchid followed its procedures and quality control measures and that it obtained acceptable results. Witucki also evaluated the profile to make sure it was of sufficient quality to enter into the DNA database. After the computer showed a match between Deadwiller and the Orchid DNA profiles, Witucki obtained a buccal swab from Deadwiller, developed a DNA profile from that swab, and reconfirmed that Deadwiller was a match. Thus, Witucki was not merely a conduit for Orchid's DNA profiles, but he independently concluded that Deadwiller was a match to Orchid's DNA profiles. *See State v. Williams*, 253 Wis. 2d 99, ¶ 20, 644 N.W.2d 919. Therefore, Witucki's testimony was sufficient to protect Deadwiller's right to confrontation.

Id.

B. The admission of an expert's independent opinion of the alcohol concentration of Griep's blood sample was proper under *State v. Williams* and *State v. Barton*.

A sample of Griep's blood was tested by Diane Kalscheur, a laboratory analyst at the Wisconsin State Laboratory of Hygiene (2:6). Kalscheur prepared a report that included the result of the ethanol test she conducted (20:Exh. 2). An advanced chemist at the lab, Thomas

Ecker, peer reviewed Kalscheur's work, and certified the report (20:Exh. 2).

Kalscheur was unavailable to testify at trial (38:5). The State did not present her testimony or introduce the report she had prepared. Instead, at Griep's bench trial, the State called Patrick Harding as an expert witness (38:26). Harding, the section chief of the toxicology section of the Wisconsin State Laboratory of Hygiene, testified that he had peer reviewed Kalscheur's work, and examined the chromatograms and data produced by the blood test, and the paperwork associated with the tests Kalscheur had run on multiple samples on August 30, 2007 (38:26-27). The prosecutor asked Harding, "Was the blood sample run through your instrumentation in a way that comported with the regulations for the Lab of Hygiene?" (38:28). Griep's counsel objected on Confrontation Clause grounds, and the court overruled the objection, noting that "as long as they put enough information in to comply with what is required in the Barton and Williams cases, it's going to be allowed in" (38:29).

The following exchange then occurred between the prosecutor and Harding:

> Q Okay. Let's see, Mr. Harding, I think my last question was the blood sample that was submitted to the Lab of Hygiene that pertained to Mr. Griep run through your instrumentation in the manner that comported with the rules and regulations of the Lab of Hygiene?
>
> A The procedures, all indications are that the procedures were followed, the instrument was operating properly, properly calibrated. The calibration checks that are analyzed throughout the course of the analytical run read correctly, specifically and importantly, the two known samples that bracketed Mr. Griep's sample read within their accepted range. There was nothing unusual about the chromatograms, the output of the

instrument related to this or any other samples in that run, so I guess the short answer is, yes, it was run correctly.

Q And running the sample correctly through your instruments, does that result in a blood alcohol reading which is, in your expert opinion, reliable?

A Yes.

Q Reviewing the data that you reviewed did you come to an independent opinion about what the blood alcohol content was of the sample that was shipped to the Lab of Hygiene under Mr. Griep's name?

A Yes.

Q And what is that opinion?

[DEFENSE COUNSEL]: And same objection.

[THE COURT]: It will be noted.

A The opinion is that the alcohol concentration of Mr. Griep's sample was 0.152 grams of ethanol per 100 milliliters of blood.

Q And that is your independent opinion?

A Yes.

(38:30-31.)

At the close of the evidentiary portion of the trial, the parties presented argument regarding Griep's Confrontation Clause objection, and the court informed the parties that it would decide the issue and render a verdict, at a later hearing (38:56-64).

At the subsequent hearing, the court relied on *State v. Williams* in denying Griep's Confrontation Clause challenge. The court noted that under *Williams*, an expert can testify about a report made by another person if he or

she gives an independent opinion (39:3). The court concluded that Harding is qualified to give an expert opinion, and that he "testified in regards to his review of information, the protocol of the hygiene laboratory, and his review of . . . the information that was provided in his review of [Kalscheur's] records (39:3-4). The court noted that the lab report was not entered into evidence in (39:5), and that Griep "has the opportunity to cross-examine the expert who is rendering an independent decision" (39:6). The court added:

> And it's always been the law in the State of Wisconsin, and I don't think it is any different in the Supreme Court, that an expert can [rely] on things that normally they would use to reach or render an opinion; and if we move away from that, I think the Williams case quite frankly is still good law even after Melendez-Diaz. . . . But when there is the opportunity to cross-examine a person based upon the opinion that they are rendering in this case I think the confrontation clause has been met . . . . The defendant had the right to confront the person giving his expert opinion and I do think it was an independent decision and I don't think he was strictly being used as a conduit to get the report in which wasn't accepted anyways.

(39:6-7). The court therefore denied Griep's motion, and considered Harding's testimony in finding Griep guilty of OWI and PAC (39:7, 18).

The court of appeals affirmed the circuit court's decision, relying primarily on *Barton*, which had relied heavily on *State v. Williams*. The court noted that "Under the reasoning of *Barton*, the availability of a well qualified expert, testifying as to his independent conclusion about the ethanol testing of Griep's blood as evidenced by a report from another state lab analyst, was sufficient to protect Griep's right to confrontation." *Griep*, 353 Wis. 2d 252, ¶ 22.

The court noted that "Griep argued in his supplemental briefing that *Barton* was overruled by

Williams v. Illinois, because 'five justices . . . explicitly found that the substance of the [underlying] report as introduced through the surrogate witness was offered for the truth of the matter asserted.'" *Id.* ¶ 13.

The court of appeals rejected Griep's argument, concluding that no binding federal precedent had overruled *Barton* or *State v. Williams*. *Id.* ¶ 14. The court also noted that this court cited *Barton* favorably in its opinion in *Deadwiller*. *Id.* ¶ 22 (citing *Deadwiller*, 350 Wis. 2d 138, ¶¶ 37-40). The court of appeals therefore concluded that *Barton* remains good law. *Id.*

C. Griep does not argue that *State v. Williams* and *State v. Barton* have been overruled, or ask this court to overrule them.

The court of appeals relied on *State v. Williams* and *Barton*, and concluded that no binding federal precedent has overruled either case. *Griep*, 353 Wis. 2d 252, ¶ 14.

Now, in his brief to this court, Griep does not ask this court to overrule *State v. Williams* or *Barton*, or assert that they have been overruled, or are incorrect in any respect.

In his brief to this court, Griep asserts that the court of appeals incorrectly relied on *Barton* (Griep's Br. at 8), and that "At its core, this case is a straightforward application of ***Bullcoming v. New Mexico***" (Griep's Br. at 9). He further asserts that in his supplemental brief to the court of appeals, he "argued that the decisions in Wisconsin cases ***State v. Barton*** . . . and ***State v. Williams*** . . . were overruled by the United States Supreme Court's decision in ***Bullcoming*** 'to the extent that those cases allowed the admission of out-of-court testimonial statements through expert testimony'" (Griep's Br. at 5) (citing *Bullcoming*, 131 S. Ct. 2705).

Griep's assertions are puzzling, because in the court of appeals he did not argue that this is a *Bullcoming* case, or that *Barton* and *State v. Williams* were overruled by *Bullcoming*. He argued that *Barton* and *State v. Williams* were overruled by *Williams v. Illinois*. Griep said that:

> the U.S. Supreme Court's decision in *Williams v. Illinois* overrules the Wisconsin Supreme Court's decision in *State v. Williams*, 2002 WI 58, 253 Wis. 2d 99, 644 N.W.2d 919, and this Court's decision in *State v. Barton*, 2006 WI App 18, 289 Wis. 2d 206, 709 N.W.2d 93, to the extent that those cases allowed the admission of out-of-court testimonial statements through expert testimony.

(Griep's Supp. Brief at 9).[2]

The court of appeals recognized that Griep relied on *Williams* stating that "Griep argued in his supplemental briefing that *Barton* was overruled by *Williams v. Illinois*, because 'five justices . . . explicitly found that the substance of the [underlying] report as introduced through the surrogate witness was offered for the truth of the matter asserted.'" *Griep*, 353 Wis. 2d 252, ¶ 13.

Although Griep argued in the court of appeals that *Barton* and *State v. Williams* were overruled by *Williams v. Illinois*, and he now claims that he argued in the court of appeals that they were overruled by *Bullcoming*, in his brief to this court Griep has abandoned his argument that *Barton* and *State v. Williams* have been overruled. He does not argue that either case has been overruled, or is incorrect in any way.

Instead, he argues that *Barton* and *State v. Williams* do not apply to his case because the facts of his case differ from those cases.

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[2] In his petition for review by this court, Griep similarly misrepresented his argument to the court of appeals (Petition at 7-8). In its response the State pointed out the misrepresentation (Pet. Response at 4-6).

Griep argues that this case is not governed by *State v. Williams* because in that case the testifying expert's "opinion did not rest solely upon the work of the original analyst, but instead was an independent opinion formed upon her own peer review work" (Griep's Br. at 22). He notes that in *State v. Williams*, this court concluded that:

> the presence and availability for cross-examination of a highly qualified witness, who is familiar with the procedures at hand, supervises or reviews the work of the testing analyst, and renders her own expert opinion is sufficient to protect a defendant's right to confrontation, despite the fact that the expert was not the person who performed the mechanics of the original tests.

(Griep's Br. at 21-22) (quoting *State v. Williams*, 253 Wis. 2d 99, ¶ 20).

Griep argues that this case is not governed by *Barton* because in that case, the testifying expert had performed a peer review of the analyst's work, and presented his own conclusions about the test (Griep's Br. at 22). He asserts that "***Barton*** stands for the proposition that confrontation is satisfied when a defendant is presented with the opportunity to cross-examine an expert witness who has formed *his own independent opinion*, based in part upon another expert's work that he directly reviewed and supervised" (Griep's Br. at 22-23). He asserts that "no independent opinion was present in . . . ***Griep***" (Griep's Br. at 23).

Griep's attempt to distinguish this case from *State v. Williams* and *Barton* fails because in this case the testifying expert peer reviewed the analyst's work, analyzed the data that resulted from testing, and formed his own independent opinion about the alcohol concentration of Griep's blood sample. As the trial court and court of appeals recognized, this is the same type of factual situation that was presented in *State v. Williams* and *Barton*.

Harding testified that he peer reviewed Kalscheur's work, by examining the data and documents associated with her work. He reviewed "The same data that is available the day after the analysis for the person that reviewed the report when it went out and that is the chromatograms and the paperwork associated with the whole analytical run that Diane did on the 30th of August, 2007" (38:27). Harding testified that he determined that "all indications are that the procedures were followed," that "the instrument was operating properly, properly calibrated," and that "There was nothing unusual about the chromatograms," as they related to any of the samples in the testing run (38:30). Harding then testified that he had reached his own independent opinion, stating "The opinion is that the alcohol concentration of Mr. Griep's sample was 0.152 grams of ethanol per 100 milliliters of blood" (38:31).

Griep asserts that "Harding was only able to testify as to the contents of [] Kalscheur's report" (Griep's Br. at 23), and that he "admitted that his opinion was based [solely on the] report and associated documents" (Griep's Br. at 23).

Griep does not point to any of Harding's testimony that supports his assertions. He points to nothing indicating that Harding testified only as to the contents of Kalscheur's report. The record demonstrates that his testimony on direct-examination was about his analysis of data generated by the testing instrument, not about the contents of Kalscheur's report (38:27, 30-31).

In support of his assertion that Harding "admitted" that his opinion was based only on Kalscheur's report, Griep cites to Harding's testimony generally (Griep's Br. at 23 (citing App. F)). He cannot cite specific testimony supporting his assertion, because Harding made no such admission.

The trial court heard Harding's testimony and evaluated his opinion testimony, stating that "I do think it

was an independent decision and I don't think he was strictly being used as a conduit to get the report in" (39:7). Griep has not demonstrated that the court's finding was clearly erroneous.

Harding was "an expert witness who has formed *his own independent opinion*, based in part upon another expert's work that he directly reviewed and supervised." And Griep had the opportunity to cross-examine him. As Griep acknowledges, this is precisely what satisfies the right to confrontation under *Barton* (Griep's Br. at 22-23).

In a case with circumstances much like those in this case, the Seventh Circuit Court of Appeals concluded that expert testimony by a witness who did not perform the lab testing did not violate the Confrontation Clause. In *United States v. Maxwell*, 724 F.3d 724 (7th Cir. 2013), a case arising from Wisconsin, a scientist at the Wisconsin State Crime Laboratory (John Nied) analyzed a substance that a police officer had seized from Maxwell, concluded that it contained cocaine base, and prepared a report with his findings. *Id.* at 725. Nied was unavailable to testify at trial, so another scientist at the crime lab (Michelle Gee) testified. *Id.* Maxwell was found guilty of possessing cocaine base. *Id.* at 725-26.

The Seventh Circuit Court of Appeals affirmed the conviction, concluding that Maxwell's right to confrontation was not violated by the testimony of the scientist who did not test the substance. The court noted that "'an expert who gives testimony about the nature of a suspected controlled substance may rely on information gathered and produced by an analyst who does not himself testify.'" *Id.* at 726 (citing *United States v. Turner*, 709 F.3d 1187, 1190 (7th Cir. 2013)). The court reasoned that "'the facts or data' on which the expert bases her opinion 'need not be admissible in evidence in order for the [expert's] opinion or inference to be admitted.'" *Id.* (quoting *Untied States v. Moon*, 512 F.3d 359, 361 (7th Cir. 2008)) (in turn citing Fed. R. Evid. 703). The court added that "the raw data from a lab test are not

'statements' in any way that violates the Confrontation Clause." *Id.* at 726-27 (citing *Moon*, 512 F.3d at 362).

The court concluded that the testimony by the scientist who did not test the data did not violate Maxwell's right to confrontation. It distinguished other cases that had found confrontation issues because:

> Gee did not read from Nied's report while testifying (as in [*United States v. Garvey*, 688 F.3d 881 (7th Cir. 2012)]), she did not vouch for whether Nied followed standard testing procedures or state that she reached the same conclusion as Nied about the nature of the substance (as in [*Turner*, 709 F.3d 1187]), and the government did not introduce Nied's report itself or any readings taken from the instruments he used (as in [*Moon*, 512 F.3d 359]).

Maxwell, 724 F.3d at 727.

The court rejected the argument that the forensic analysis was testimonial, stating that:

> Gee never said she relied on Nied's report or his interpretation of the data in reaching her own conclusion. Instead, Gee simply testified (1) about how evidence in the crime lab is typically tested when determining whether it contains a controlled substance, (2) that she had reviewed the data generated for the material in this case, and (3) that she reached an independent conclusion that the substance contained cocaine base after reviewing that data.

Id.

The court considered the Supreme Court's opinion in *Williams v. Illinois*, but noted that "'an appropriately credentialed individual may give expert testimony as to the significance of data produced by another analyst.'" *Id.* (quoting *Turner*, 709 F.3d at 1190-91) (in turn citing *Williams*, 132 S. Ct. at 2233-35). The court concluded that the testimony did not violate Maxwell's right to confrontation "simply by virtue of the fact that Gee relied

on Nied's data in reaching her own conclusions, especially since she never mentioned what conclusions Nied reached about the substance." *Id.* (citing *Turner*, 709 F.2d at 1190-91).

The court's conclusion in *Maxwell* strongly supports the court of appeals' decision in this case. Like the witness in *Maxwell*, here Harding did not say he relied on Kalscheur's report, but instead testified about the Lab of Hygiene's procedures, his review of the data produced by the testing, and his independent conclusion about the results of that testing. Like in *Maxwell*, his testimony did not violate the defendant's right to confrontation.

Griep has not shown that Harding was not telling the truth when he testified that he reviewed the work of the lab analyst, including the machine-generated data, and then gave his own independent opinion of the alcohol concentration of a sample of Griep's blood. He has not shown that the trial court was incorrect in finding that Harding gave an independent opinion, and did not merely read the report into evidence. He therefore has not shown that the trial court and the court of appeals did not properly rely on *Barton* and *State v. Williams* in concluding that his right to confrontation was not violated. Finally, Griep does not argue that either *Barton* or *State v. Williams* has been overruled. This court should therefore affirm the decision of the court of appeals, and conclude that *Barton* and *State v. Williams* remain good law, and that Griep's right to confrontation was not violated.

D. *Bullcoming* does not require that Griep be allowed to confront the analyst in this case.

Griep asserts that "At its core, this case is a straightforward application of ***Bullcoming v. New Mexico***, 131 S. Ct. 2705, 180 L. Ed. 2d 610 (2011)" (Griep's Br. at 9). He argues that the court of appeals' opinion in this case "conflicts with the clear federal

precedent set by the United States Supreme Court in ***Bullcoming***" (Griep's Br. at 10), and that "The court of appeals erred when it found that this Court's opinions in [***Deadwiller*** and ***Barton***] controlled, rather than the United States Supreme Court's decision in [***Bullcoming***]" (Griep's Br. at 8) (citing Griep, 353 Wis. 2d 252, ¶ 22). Griep also argues that "The court of appeals erred when it determined that ***State v. Deadwiller*** and ***Williams v. Illinois*** are determinative" (Griep's Br. at 19).

Griep's arguments fail for a number of reasons. First, the court of appeals did not find that this court's opinion in *Deadwiller* "controlled," or "determine that *Deadwiller* and *Williams v. Illinois* are determinative." The court of appeals relied on *Deadwiller* only to note that this court had cited *Barton* with approval. This court stated "with our supreme court so recently and favorably citing *Barton*, *see Deadwiller*, 350 Wis. 2d 138, ¶¶ 37-40, we have no choice but to conclude that *Barton* remains the law of our state." *Griep*, 353 Wis. 2d 252, ¶ 22.

The court of appeals addressed *Williams v. Illinois*, but did not in any way determine that *Williams* was determinative. Instead, the court concluded that *Williams* had not overruled *Barton*, stating "No binding federal precedent clearly overrules ***Barton***." *Id.* ¶ 22.

Second, Griep can hardly fault the court of appeals for not finding that *Bullcoming* controlled this case, since he did not argue that *Bullcoming* controlled.

Third, and most importantly, this case is not "a straightforward application" of *Bullcoming*. Instead, as the court of appeals recognized, it is a straightforward application of *Barton*.

In support of his argument that this is a *Bullcoming* case, Griep points out that in the petition for writ of certiorari in *Bullcoming*, the "question presented" was "'[w]hether the Confrontation Clause permits the prosecution to introduce testimonial statements of a

nontestifying forensic analyst through the in-court testimony of a supervisor or other person who did not perform or observe the laboratory analysis described in the statements'" (Griep's Br. at 3).

But that is not the question the Supreme Court addressed and answered in *Bullcoming*. The Court defined the issue as "whether the Confrontation Clause permits the prosecution to introduce 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 who did not sign the certification or perform or observe the test reported in the certification." *Bullcoming*, 131 S. Ct. at 2710.

The Court held that "surrogate testimony of that order does not meet the constitutional requirement. The accused's right is to be confronted with the analyst who made the certification, unless that analyst is unavailable at trial, and the accused had an opportunity, pretrial, to cross-examine that particular scientist." *Id.*

The most glaring reason that this case is not controlled by *Bullcoming* is that here the State did not "introduce a forensic laboratory report," but instead presented an expert's independent opinion about the alcohol concentration of a blood sample that had been tested.

In *Bullcoming*, the report prepared by the unavailable analyst was admitted into evidence. At trial, the "Principal evidence against Bullcoming was a forensic laboratory report certifying that Bullcoming's blood-alcohol concentration was well above the threshold for aggravated DWI." *Bullcoming*, 131 S. Ct. at 2709; (Griep's Br. at 10). The State did not call the testing analyst, but instead called another analyst, and introduced the report as a business record. *Bullcoming*, 131 S. Ct. at 2712. The Supreme Court noted that the State did not assert that the scientist who testified "had any

'independent opinion' concerning Bullcoming's BAC." *Id.* at 2716.

The Supreme Court noted that under *Melendez-Diaz*, "the analysts who write reports that the prosecution introduces must be made available for confrontation even if they possess 'the scientific acumen of Mme. Curie and the veracity of Mother Teresa.'" *Bullcoming*, 131 S. Ct. at 2715 (citing *Melendez-Diaz*, 557 U.S. at 319 n.6). The Court concluded that "In short, when the State elected to introduce [the lab analyst's] certification, [the lab analyst] became a witness Bullcoming had a right to confront." *Id.*

The facts of the current case are similar to those in *Bullcoming* only to the extent that the laboratory analyst who tested the blood sample did not testify at trial, and another scientist from the same lab did testify. The other pertinent facts are entirely different.

Unlike in *Bullcoming*, at the trial in this case the State did not introduce the report prepared by the lab analyst, Diane Kalscheur (39:5), or present any evidence about what BAC result Kalscheur determined.

Also unlike in *Bullcoming*, the State did not present the testimony of a fellow scientist who had not reviewed Kalscheur's analysis. It presented the testimony of Harding, the section chief of the toxicology section of the Wisconsin State Laboratory of Hygiene, who had reviewed the data produced by Kalscheur's work (38:26). Harding testified that he had examined the data that resulted from the test of the blood sample, including "the chromatograms and the paperwork associated with the whole analytical run that Diane did on the 30th of August, 2007" (38:31).

Finally, unlike in *Bullcoming*, here the expert witness gave his independent opinion about the alcohol concentration of the blood sample, based on his own analysis. Harding testified that "the opinion is that the

alcohol concentration of Mr. Griep's sample was 0.152 grams of ethanol per 100 milliliters of blood" (38:27).

In a case with similar facts, *State v. Michaels*, 95 A.3d 648 (N.J. 2014), the Supreme Court of New Jersey concluded that *Bullcoming* did not control, and that an expert's testimony to his independent opinion did not violate the Confrontation Clause. In *Michaels*, a defendant's blood sample was analyzed at a private laboratory. *Id.* at 652-53. The testing data was provided to Dr. Edward Barbieri, a forensic toxicologist and pharmacologist. *Id.* at 653. At trial Dr. Barbieri acknowledged that he had not conducted the tests himself, but that he had reviewed the machine-generated data and was satisfied that the testing had been done properly. *Id.* at 654. He testified about the general processes used in testing the blood and the results of the tests. *Id.* He also testified that after his independent review, his opinion was that "at the time of the collision, defendant's concentration, judgment, response time, coordination, and sense of caution would have been impaired by the quantity of alprazolam and cocaine found in her system, and that she would have been unable to drive safely." *Id.*

Defense counsel moved to strike Dr. Barbieri's testimony on Confrontation Clause grounds. *Id.* The trial court denied the motion, and later a motion for a new trial. *Id.*

On appeal, the defendant argued that "the admission of Dr. Barbieri's report and testimony violated the Confrontation Clause because Dr. Barbieri was not the person who performed the tests conducted on her blood sample," and that "the test results, data, and charts contained in the report are testimonial because the testing was done to produce evidence for trial." *Id.* at 655. She asserted that under *Bullcoming*, "the analysts who performed the tests should have been subject to cross-examination because there was a possibility of human error in the testing and their duties involved more than simply transcribing machine-produced data." *Id.* She

noted that "although Dr. Barbieri certified in his report that the samples and seals had maintained their integrity, only the analysts who worked with the samples could have ensured that that was the case." *Id.*

The Supreme Court of New Jersey found no Confrontation Clause violation. The court distinguished *Bullcoming*, stating "If all we had was a co-analyst reciting the findings contained in a report that he had not participated in preparing or evaluated independently, we would be faced with a scenario indistinguishable from *Bullcoming*." *Id.* at 673.

The court concluded that "Reviewed in toto, the machine-generated data provided the basis for Dr. Barbieri to review the test results independently and certify that the results were accurate and not flawed in some way," and that "Defendant's opportunity to cross-examine Dr. Barbieri about the testing and its results provided meaningful confrontation." *Id.* at 675. The court concluded that:

> a truly independent reviewer or supervisor of testing results can testify to those results and to his or her conclusions about those results, without violating a defendant's confrontation rights, if the testifying witness is knowledgeable about the testing process, has independently verified the correctness of the machine-tested processes and results, and has formed an independent conclusion about the results.

Id. at 675-76.

Here too, Harding was an independent reviewer of testing data who was knowledgeable about the testing process, peer reviewed Kalscheur's work and the data her work produced, and reached his own independent conclusion as to the level of alcohol in Griep's blood sample.

That this is not "a straightforward application of *Bullcoming*," is apparent from Justice Sotomayor's

concurring opinion in *Bullcoming* explaining the limited nature of the Court's opinion. *Bullcoming* was a 5-4 decision. Justice Sotamayor, who joined the majority opinion, also filed a concurrence in which she explained the limited nature of the Court's opinion, noting that certain circumstances were not presented in *Bullcoming*, including testimony by "a supervisor, reviewer, or someone else with a personal, albeit limited, connection to the scientific test at issue"; expert testimony in which the expert is "asked for his independent opinion about underlying testimonial reports that were not themselves admitted into evidence"; and "machine-generated results, such as a printout from a gas chromatograph." *Bullcoming*, 131 S. Ct. at 2722 (Sotomayor, J., concurring). Justice Sotomayor wrote that "This case does not present, and thus the Court's opinion does not address, any of these factual scenarios." *Id.* at 2723.

Justice Sotamayor also noted that in *Bullcoming*, "the State offered the BAC report, including [the analyst's] testimonial statements, into evidence." *Id.* at 2722. She added that "We would face a different question if asked to determine the constitutionality of allowing an expert witness to discuss others' testimonial statements if the testimonial statements were not themselves admitted into evidence." *Id.*

In this case, the lab report was not introduced into evidence, the State presented independent opinion testimony by a highly qualified expert who reviewed the data produced by the test and gave an expert opinion about the ethanol concentration in Griep's blood, and the expert did not discuss the analyst's testimonial statements. As the court of appeals recognized, this case is governed by *Barton*, not *Bullcoming*.

Griep acknowledges that unlike in *Bullcoming*, the State did not introduce the report that the analyst prepared (Griep's Br. at 14). He argues, however, that "the substance" of the report was admitted into evidence (Griep's Br. at 15-16).

Griep asserts that the "substance" of the report was "the statements that the blood samples arrived at the lab sealed and labeled with Griep's name, and that ethanol testing produced a certain result" (Griep's Br. at 16).

But Griep does not point to any part of the trial transcript in which either Kalscheur's statement that the blood sample arrived sealed and labeled or her statement that that ethanol testing revealed an ethanol concentration of 0.152, was introduced into evidence.

Harding testified that his independent opinion was that the alcohol concentration was 0.152 grams of ethanol per 100 milliliters (38:31).

Griep argues that this was not really Harding's own independent opinion, but "merely a regurgitation of Kalscheur's report" (Griep's Br. at 18), after a "purported review" of the report (Griep's Br. at 19). He asserts that "Harding offered no independent analysis" (Griep's Br. at 14), "conducted no analysis" of his own, and "added nothing" (Griep's Br. at 16).

However, Harding testified that he examined "The same data that is available the day after the analysis for the person that reviewed the report when it went out and that is the chromatograms and the paperwork associated with the whole analytical run that Diane did on the 30th of August 2007" (38:27). He was referring to the chromatograms that are appended to Griep's brief at A-Ap. 107-23, and the paperwork appended to Griep's brief at A-Ap. 102-06.

Harding was asked "Reviewing the data that you reviewed did you come to an independent opinion about what the blood alcohol content was of the sample that was shipped to the Lab of Hygiene under Mr. Griep's name?" (38:31). Because he had analyzed the data that the testing produced, and had reached his own independent expert opinion about what result the data showed, Harding answered "The opinion is that the alcohol concentration of

Mr. Griep's sample was 0.152 grams of ethanol per 100 milliliters of blood" (38:31).

Harding did not testify that the blood alcohol level Kalscheur had determined "was correct" (Griep's Br. at 16). He did not testify that Kalscheur had determined that the sample showed a blood alcohol concentration of 0.152. He did not testify that he and Kalscheur had reached the same result, or that in his opinion Kalscheur's report was correct. The report was not introduced into evidence, and the finder of fact was not told what result Kalscheur reached. When he offered Exhibit No. 2, the report and work order appended to Griep's Br. at A-Ap. 102-03, the prosecutor explicitly stated that he was not offering the analyst's report and that "Diane Kalscheur's conclusions should not be considered by the Court" (38:53).

The trial court recognized, as finder of fact, that "I don't have a blood test result per se. I have an opinion there was a result" (39:15). The trial court found that Harding's opinion "was an independent decision and I don't think he was strictly being used as a conduit to get the report in, which wasn't accepted anyways" (39:7).

Griep is also wrong in asserting that Harding could not offer an independent opinion about the sample because he was not provided with information regarding the steps Kalscheur took in testing. Griep says that "There was no description of how the seal was checked, how the name was verified, how the vial appeared, how it was loaded in the gas machine, etc.—nothing that would allow an expert to determine independently that the BAC finding was correct" (Griep's Br. at 16).

But Harding did not testify that Kalscheur's BAC finding was correct. Nor did he testify that he had any first-hand knowledge of whether or how Kalscheur checked the vial, verified any label or name on the label, or loaded the sample into the machine. He was not asked those questions on direct examination. He testified that he

was familiar with the policies and procedures of the Lab of Hygiene (38:27), and that, after analyzing the data produced by testing, it was his opinion that the policies and procedures were followed (38:30).

On cross-examination Harding agreed that he was "familiar with the entire process of [] obtaining blood samples for ethanol testing, shipping them to the laboratory, processing them for analysis[,] and analysis" (38:31). He made clear that he was not saying that he had any knowledge of how the samples arrived and whether they were sealed or labeled with Griep's name. Defense counsel asked Harding if he knew whether Kalscheur had looked to see if the labels and seals were in place and he acknowledged that he did not. He said "I did not observe her. I did not observe the samples" (38:46). Defense counsel asked "So you don't have any personal knowledge as to whether she did these things or not?" and Harding answered "That's correct" (38:46).

The court heard testimony from the phlebotomist about how she had drawn Griep's blood, sealed it, and gave it to a police officer to send to the lab (38:20-21). It heard testimony from Officer Sauriol that he signed a work order for the blood and sent it to Madison (38:17). The court also heard testimony from Harding that he was familiar with the State Lab of Hygiene's procedures for testing blood samples (38:27).

But the court did not hear testimony from Harding about whether or how the blood samples were labeled and sealed when they were checked into the lab. As Griep acknowledges, "There was no description of how the seal was checked, [or] how the name was verified" (Griep's Br. at 16).

None of those factors matter in forming an opinion as to results from data produced by testing. Harding did not have to know how the seal was checked, how the names were verified, how the vial appeared, or how it was loaded into the machine to form an opinion of what result

the test of the sample showed. His analysis was of the data produced by the testing, including the operation and calibration of the testing instruments, and the chromatograms (38:30).

Harding's analysis and testimony about the test result was similar to the analysis and testimony that was determined to be proper in *Barton* and *State v. Williams*. He was "a highly qualified witness, who is familiar with the procedures at hand, supervises or reviews the work of the testing analyst, and renders her own expert opinion." *Barton*, 289 Wis. 2d 206, ¶ 10 (quoting *State v. Williams*, 253 Wis. 2d 99, ¶ 20). He therefore could properly give an independent opinion about the sample's alcohol level.

Griep objected to Harding's testimony on confrontation grounds, but he did not object on the basis of Harding's knowledge of how the sample that was sealed and labeled when it was sent to the lab, was sealed and labeled when Kalscheur tested it (38:28-29). Such an objection would have gone to chain of custody, but not to a denial of the right to confront a witness.

In *Melendez-Diaz*, the Supreme Court rejected an assertion in the dissenting opinion that the majority opinion meant "that anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device, must appear in person as part of the prosecution's case." *Melendez-Diaz*, 557 U.S. at 311 n.1. The Court added that the State must establish the chain of custody, but that "this does not mean that everyone who laid hands on the evidence must be called." *Id.* The Court said that "'gaps in the chain [of custody] normally go to the weight of the evidence rather than its admissibility.' It is up to the prosecution to decide what steps in the chain of custody are so crucial as to require evidence; but what testimony *is* introduced must (if the defendant objects) be introduced live." *Id.* (quoting *United States v. Lott*, 854 F.2d 244, 250 (7th Cir. 1988).

In *Bullcoming*, the Court noted that "The State called as witnesses the arresting officer and the nurse who drew Bullcoming's blood," but not the lab "intake employee or the reviewing analyst." *Bullcoming*, 131 S. Ct. at 2712 n.2. The court noted that *Bullcoming* had not objected at trial, and that as it stated in *Melendez-Diaz*, "'It is up to the prosecution . . . to decide what steps in the chain of custody are so crucial as to require evidence; but what testimony *is* introduced must (if the defendant objects) be introduced live.'" *Id.*

In this case, while Griep's defense counsel objected to Harding's testimony about the blood testing generally, he did not object to a lack of evidence regarding the chain of custody of the blood sample (38:28-31). When counsel objected to the question to Harding asking if the blood sample was "run through your instrumentation in a way that comported with the regulations for the Lab of Hygiene" (38:28-29), he explained that the defense's position was that *Melendez-Diaz* "controls this" (38:30-31). *Melendez-Diaz* concerned the admission of testimonial forensic lab reports "without offering a live witness competent to testify to the truth of the statements made in the report." *Bullcoming*, 131 S. Ct. at 2709 (citing *Melendez-Diaz*, 557 U.S. 305). It did not concern chain of custody.

Rather than object on chain of custody grounds, defense counsel cross-examined Harding about whether he had any knowledge of how or whether the sample had been labeled and sealed (38:46). Counsel's questions went to "the authenticity of the sample and the chain of custody." *United States v. Ortega*, 750 F.3d 1020, 1026 (8th Cir. 2014). "'[C]hain of custody alone does not implicate the Confrontation Clause.'" *Id.* at 1025-26 (quoting *United States v. Johnson*, 688 F.3d 494, 505 (8th Cir. 2012)) (in turn citing *Melendez-Diaz*, 557 U.S. at 311 n.1.)

In summary, the two statements in the lab report completed by Kalscheur—that the samples were labeled

and sealed, and that testing gave a result of 0.152—were not introduced at trial, either physically or in substance. The State presented the testimony of an expert who analyzed the test data and reached an independent conclusion about the alcohol concentration of the sample of Griep's blood, and testified to that opinion. This is not governed by *Bullcoming*, and Griep's right to confrontation was not violated.

E. *Williams v. Illinois* and *State v. Deadwiller* do not govern this case, and neither requires that *Griep* be allowed to confront the analyst in this case.

Griep argues that this case is not controlled by *Williams v. Illinois*, or *State v. Deadwiller*, because those cases involve "the admissibility of independent expert opinion testimony" (Griep's Br. at 19). He asserts that in *Williams v. Illinois* and *Deadwiller*, "the testifying expert conducted additional steps and independent analysis, using only the report in question as one component in forming their opinion" (Griep's Br. at 19). He argues that in contrast, "In Griep's case, Harding offered no independent opinion, but rather based his entire conclusions on Kalscheur's report" (Griep's Br. at 20).

Griep also argues that if this court were to determine that *Deadwiller* and *Williams v. Illinois* do control, it should find that confrontation of the testing analyst is required (Griep's Br. at 25-28).

As explained above, Griep is wrong on the facts. Harding analyzed the data produced by testing, and as the trial court found as fact, offered an independent opinion as to the alcohol concentration of Griep's blood sample (39:7).

The State agrees that *Williams v. Illinois* and *Deadwiller* do not govern this case, but not for the reasons

Griep asserts. *Williams v. Illinois* does not govern because in that case the Supreme Court did not issue a binding opinion.

In *Deadwiller*, this court analyzed the multiple opinions in *Williams v. Illinois* and noted that "If no theoretical overlap exists between the rationales employed by the plurality and the concurrence, 'the only binding aspect of the fragmented decision . . . is its "specific result."'" *Deadwiller*, 350 Wis. 2d 138, ¶ 30 (quoting *Berwind Corp.*, 307 F.3d at 234). It further noted that "A fractured opinion mandates a specific result when the parties are in a 'substantially identical position.'" *Id.* (citing *Berwind Corp.*, 307 F.3d at 234).

In *Deadwiller*, both the majority and the concurring opinions concluded that there is "no theoretical overlap" between Justice Alito's plurality opinion and Justice Thomas' concurring opinion. *Id.* ¶¶ 32, 57-60 (Abrahamson, C. J. concurring). But the majority applied the judgment of *Williams* to Deadwiller's case because it determined that Deadwiller and Williams were in "substantially identical positions," and that the facts of the cases were "strikingly similar." *Id.* ¶ 32.

Griep argues that this court should apply the rationales of Justice Alito and Justice Thomas, and conclude that he would be entitled to confrontation under both opinions (Griep's Br. at 25-27). He does not assert that the facts of his case are "substantially identical," and "strikingly similar" to those in *Williams*. Instead, he argues that this court should find overlap between the plurality and concurring opinions in *Williams* and apply *Williams* to his case because the facts of his case "mirror those in ***Bullcoming***" (Griep's Br. at 26).

This court should decline Griep's invitation to find overlap in *Williams* when it has determined that there is "no theoretical overlap." *Deadwiller*, 350 Wis. 2d 138, ¶¶ 32, 57-60. This court should also decline to apply a "specific result" from a "fractured opinion" in *Williams*

because the facts of this case are supposedly similar to those in a separate case. This is not what was contemplated in *Berwind Corp.*, 307 F.3d 222. And, as explained above, the facts of his case do not mirror those in *Bullcoming*, in which a report was introduced at trial without independent expert testimony.

Griep argues that courts outside of Wisconsin have concluded that under the holding of *Williams v Illinois*, confrontation is required in cases like this one (Griep's Br. at 28-29). He cites *Young v. United States*, 63 A.3d 1033, 1047-48 (D.C. 2013); *State v. Navarette*, 294 P.3d 435 (N.M. 2013); and *Martin v. State*, 60 A.3d 1100, 1108-09 (Del. 2013) (Griep's Br. at 28-29).

But in all three cases, the courts have pieced together a concurrence with the dissent to find common ground for at least five justices. In *Deadwiller*, this court applied a different method of interpreting a fractured opinion, stating that "'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.'" *Deadwiller*, 350 Wis. 2d 138, ¶ 30 (quoting *Marks*, 430 U.S. at 193). This court added that "If no theoretical overlap exists between the rationales employed by the plurality and the concurrence, 'the only binding aspect of the fragmented decision . . . is its "specific result."'" *Id.* (quoting *Berwind Corp.*, 307 F.3d at 234). This court required that even to apply the judgment, it had to "'identify and apply a test which satisfies the requirements of both Justice [Alito's] plurality opinion and Justice [Thomas's] concurrence.'" *Id.* ¶ 31 (citing *People v. Dungo*, 286 P.3d 442, 455 (Cal. 2012)).

This court has unanimously concluded that no overlap exists between the plurality and concurrence in *Williams*, and it did not attempt to cobble together a majority opinion from the concurrence and the dissent. In all three cases that Griep cites, the courts have done what

this court declined to do. Griep does not argue that this court should overrule its opinion in *Deadwiller*.

None of the three cases provide any reason for this court to rethink its decision in *Deadwiller*.

In *Navarette*, the court pieced together Justice Thomas' concurring opinion in *Williams*, and Justice Kagan's dissent, which was joined by three other justices, *Navarette*, 294 P.3d at 438-42, and concluded that statements in an autopsy report were testimonial and required confrontation. *Id.* at 441.

But the court in *Navarette* limited its opinion, stating "we note that an expert witness may express an independent opinion regarding his or her interpretation of raw data without offending the Confrontation Clause." *Id.* at 443.

In *Martin*, the court concluded that testimony by a "note-taking laboratory supervisor, . . . who certified the unsworn hearsay testimony of the testing analyst," violated the Confrontation Clause. *Martin*, 60 A.3d at 1108.

Here, Harding did not certify the test results that the analyst determined. He analyzed the data and reached an independent opinion about the alcohol concentration of Griep's blood sample.

In *Young*, the D.C. Circuit Court of Appeals concluded that testimony by an FBI examiner who compared DNA profiles violated the Confrontation Clause. *Young*, 63 A.3d at 1037, 1048. As Griep notes, "the court found that a lab supervisor's testimony regarding DNA analyses she did not observe or perform violated the Confrontation Clause" (Griep's Br. at 28 (citing *Young*, 63 A.3d at 1048)). In *Young*, the witness "relayed testimonial hearsay," 63 A.3d at 1048, when she testified that she had "matched a DNA profile derived

from appellant's buccal swab with male DNA profiles derived from [the victim's] vaginal swabs." *Id.* at 1045.

But in a subsequent case, *Jenkins v. United States*, 75 A.3d 174 (D.C. Cir. 2013) the same court concluded that *Williams* "has not provided any clarity" to Confrontation Clause law, *id.* at 184, analyzed *Williams* under *Marks*, and concluded that *Williams* "produces no new rule of law that we can apply in this case." *Id.* at 188-89.

Other courts have agreed with this court's determination in *Deadwiller* that *Williams* stands only for its judgment. *See e.g.*, *United States v. James*, 712 F.3d 79, 95 (2d. Cir. 2013); *State v. Michaels*, 95 A.3d at 665-66.

Finally, even if there were a legal standard in *Williams* that this court could apply, it would not require confrontation in this case. Griep asserts that confrontation would be required under Justice Alito's opinion, because "the report in Griep is clearly offered for the truth of the matter" (Griep's Br. at 26). But the report in *Griep* was not "offered" at trial. Griep also asserts that confrontation would be required under Justice Thomas' opinion because "Here, like in ***Williams***, the out-of-court statements reported by Analyst Kalscheur were admitted by the court" (Griep's Br. at 28). But as Griep acknowledges, "Kalscheur's report was not introduced at trial" (Griep's Br. at 14).

For all of these reasons, this court should decline to revisit its determination in *Deadwiller* that there is no overlap in *Williams*, and that the case is precedential only in its judgment.

CONCLUSION

Under *Barton*, a qualified expert who has peer review the work of a laboratory analyst, analyzed the resulting test data, and reached an independent opinion, can testify about that opinion without violating the Confrontation Clause. Harding was a highly qualified expert who peer reviewed the lab analyst's work, analyzed data produced by testing of a blood sample, and reached an independent opinion about the blood sample's alcohol concentration. Admission of his testimony at trial, when the report was not introduced, did not violate Griep's right to confront the analyst who performed the test. This court should therefore affirm the decision of the court of appeals which affirmed the judgment convicting Griep of operating a motor vehicle with a prohibited alcohol concentration.

Dated this 17th day of October, 2014.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 10,940 words.

Dated this 17th day of October, 2014.

_____
Michael C. Sanders
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

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

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

Dated this 17th day of October, 2014.

_____
Michael C. Sanders
Assistant Attorney General

STATE OF WISCONSIN

IN SUPREME COURT

Appeal No. 2009AP3073 –CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MICHAEL R. GRIEP,

Defendant-Appellant-Petitioner.

ON REVIEW OF A DECISION OF THE COURT OF APPEALS, DISTRICT II, AFFIRMING AN ORDER OF THE CIRCUIT COURT FOR WINNEBAGO COUNTY, THE HON. THOMAS J. GRITTON, PRESIDING

REPLY BRIEF
OF DEFENDANT-APPELLANT-PETITIONER.

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ARGUMENT

The State's attempts to muddy the waters by asserting facts not in the record and quibbling about the language of the question presented do not make the issue in this case any less clear: Performing analyst Diane Kalscheur made testimonial statements about Michael Griep's blood alcohol content in her report, those testimonial statements were admitted into evidence at trial through surrogate witness Patrick Harding, who did not perform or observe the testing, and the admission of those statements through Harding implicated Griep's constitutional right to confront Kalscheur. No matter how the State attempts to complicate the issue, the fact remains that Griep was entitled to confront an analyst who had personal knowledge as to the creation of those testimonial statements. Because Harding had no such knowledge, Griep's right to confrontation was not satisfied.

I. Harding Did Not Have Personal Knowledge Of The Testing And Thus Could Form No Independent Opinion

In an attempt to circumvent the fact that Harding neither performed or observed the testing conducted in this case, the State asserts—for the first time—that Harding performed a peer review of Kalscheur's work. (State's Response at 2,4-5,12,17-18,26). Notably, the State failed to raise this issue in any of the numerous briefs filed in this case, mainly because it could not: There is no basis in the record for such an assertion. As the State acknowledges, it was actually an "advanced chemist at the lab, Thomas Ecker, [that] peer reviewed Kalscheur's work, and certified the report," not Patrick Harding. (*Id.* at 12.) Although Harding did receive "[t]he same data that is available the day after the analysis for the person that reviewed the report when it went out" (30:27), he did not perform the formal peer review within the time and procedures required by the lab and was not the analyst who certified the report. Thus, although he

was provided the same documentation as the formal peer reviewer, Harding was not qualified to testify as to the peer review. That role was reserved for Thomas Ecker, who the State failed to call at trial.

More importantly, the State's response fails to prove that Harding acted as anything but a conduit for the contents of the Kalscheur report. The State's assertion that Harding offered an "independent opinion" simply because Harding testified that it was independent is not supported by the record and contradicts well-established case law regarding confrontation.[1] At trial Harding testified that he looked at "the chromatograms and the paperwork associated with the whole analytical run that [Kalscheur] did on the 30th of August 2007." (30:27.) However, in reviewing these documents, Harding obtained no personal knowledge necessary to ensure the results were reliable. In short, Harding's conclusion simply mirrored the Kalscheur report, rendering him a mere conduit in violation of the Confrontation Clause. *See* ***State v. Deadwiller***, 2013 WI 75 at ¶37, 350 Wis. 2d 138, 834 N.W.2d 362 ("one expert cannot act as a mere conduit for the opinion of another.")(citing ***State v. Williams***, 2002 WI 58,

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[1] The State asserts that because "Griep has not shown that Harding was not telling the truth when he testified that he reviewed the work of the lab analyst," he has failed to prove his Confrontation rights were violated. (State's Response at 21.) This is not the standard for review. It was the State's burden to prove that Harding had the requisite personal knowledge to satisfy the Confrontation Clause. Cross-examination revealed that he did not.

Similarly, the State's assertion that Harding did not present Kalscheur's conclusion because Harding did not testify that "Kalscheur's BAC finding was correct" is semantics. (*Id* at 29.) It was Kalscheur's actions and analysis that created and determined the results. Simply because Harding did not verbally state that "Kalscheur's BAC finding was correct" does not satisfy confrontation. To allow that standard would be to allow the State to consistently perform an end-run on the Constitution: The State need only provide a report to a surrogate witness, who could look at the information and testify to its contents, provided the surrogate did not mention the original analyst who actually created the result. That directly contradicts ***Bullcoming***.

¶19, 253 Wis.2d 228,647 N.W.2d 142); ***Bullcoming v. Williams***, 131 S.Ct. 2705,2716, 180 L.Ed.2d 610 (2011) ("Accordingly, the [Confrontation] Clause does not tolerate dispensing with confrontation simply because the court believes that questioning one witness about another's testimonial statements provides a fair enough opportunity for crossexamination.").

Harding's lack of personal knowledge, necessary to form an independent opinion, was revealed time and time again upon cross-examination. For example, Harding was unable to testify as to the state of the sample as it was examined by Kalscheur:

> Q You never personally observed this [blood] sample, did you?
>
> A No, I did not.
>
> . . .
>
> Q You do not have any personal knowledge as to whether this sample had a foul smell when it was opened, do you?
>
> A No, I don't.
>
> Q And you don't have any personal knowledge as to whether when this sample was opened there was a pop or a noise on the vial which would indicate there was a vacuum still in the tube, do you?
>
> A I did not open the sample. I did not observe it.

(30:34-35).

Contrary to the State's response, such information does not go simply to chain of custody, but rather to the very reliability of the testing itself. (*See* State's Response at 32-33.) Defense counsel's line of questioning was focused not on who handled the evidence, but rather on information

Kalscheur would have used in performing her analysis and information Griep was entitled to confront—that is, the state of the sample upon Kalscheur's receipt and the state of the sample during the testing. Indeed, Harding's inability to answer questions regarding the steps Kalscheur took to prepare the sample and calibrate the testing equipment only highlight the absolute dependency of Harding's "opinion"—he was wholly without information upon which he could form an independent analysis, relying solely on the report. In short, Harding simply assumed that Kalscheur observed an adequate, unspoiled sample without any personal knowledge as to that fact.

Moreover, confrontation about this process of observing a sample before testing is not inconsequential. Human errors in pre-analysis can cause the testing machine to generate false or misleading data, which in turn result in erroneous reports. Without personal knowledge as to this information, errors in analysis cannot be caught or confronted. The American Board of Forensic Toxicologists (ABFT) recognizes the potential for mistakes in pre-analysis and requires that accredited labs implement special procedures to minimize such mistakes and to ensure the integrity of the sample. *See ABFT Forensic Toxicology Laboratory Accreditation Manual* (2013), *available at* http://www.abft.org/files/ABFT_LAP_Standards_May_31_2013.pdf. According to the ABFT lab accreditation manual, a toxicologist should begin the process of pre-analysis by checking a wide range of factors, including but not limited to: deficiencies in the integrity of external packaging; integrity of seals; amount of specimen and degree of decomposition; or the unusual appearance of a specimen. *Id.* at 12.

However, while Harding described how he reviewed the documents provided to him, he was unable to testify as to how any of the pre-analysis steps occurred and confirm the reliability of Kalscheur's results. Instead, he simply parroted

the report's information and impermissibly bolstered its contents by implying that Kalscheur would never make a mistake, even when he could not know that to be true. For example, during cross-examination, defense counsel asked Harding about the state of the sample during testing. (30:37-51.) Harding admitted that he did not know how the blood drew into the test tube, but opined that it was a good sample because of what he believed Kalscheur's practices to be:

> Q Now, you had earlier said this was a good sample because the test tube drew blood into it, right?
>
> A Right.
>
> Q But you don't know whether this test tube drew 10 milliliters of blood or .5 milliliters of blood, correct?
>
> A It likely did not draw .5 milliliters. If it is that low, that would get noted.
>
> Q Well, is it your procedure that if it is that low, it would get noted, correct?
>
> A I am sorry?
>
> Q You are telling me your procedure is if there is only .5 milliliters of blood in the test tube, that should be noted by the analyst, right?
>
> A Right. Anything much below one milliliter would be noted as a short sample, noted on the form in case there would be additional testing requested, we would know that then there would be a limited sample especially if there would be drug testing.
>
> Q You don't know whether Ms. Kalscheur did that or not, do you?
>
> A I know it is her practice to do so.
>
> Q My question is you don't know whether Ms. Kalscheur did that or not, do you?

> A I don't know. I forgot actually what we did not - - what not we are talking about.

(30:42-43). Even though Harding had no information about what Kalscheur observed in drawing the blood into the tube, he blindly asserted that it must not be below .5 milliliters without so much as even asking Kalscheur herself. Such commentary is not an "independent opinion," but is instead an opinion based solely on Harding's belief in Kalscheur. This does not satisfy confrontation.

Just as Harding did not observe the handling of the sample, he also had no information as to what actually took place during the calibration of a machine, which may also cause it to produce false or misleading data. Gas chromatograph machine are highly sensitive, and variations in the controls can affect results. *See* Fulton G. Kitson, Barbara S. Larsen, & Charles N. McEwen, *Gas Chromatography and Mass Spectrometry: A Practical Guide* 329-34 (Academic Press 1996)(stressing attention to proper temperatures, gas flow rates, and injection procedure); Gerhard Schomburg, *Gas Chromatography* 155-73 (VCH Publishers 1990)(noting injection port temperatures, improper sample introduction and other factors as causes of peak distortion in a chromatogram). Each step required in pre-analysis and calibration represents an opportunity for error, and confrontation requires someone with knowledge as to those steps. Scientists have documented and categorized human error in chromatography for decades, emphasizing errors that analysts frequently make in pre-analysis and calibration. *See, e.g.*, 2 Paul Giannelli & Edward Imwinkelried, *Scientific Evidence* 532-33 (Matthew Bender & Co. 2007)(noting critical errors in gas chromatography/mass spectrometry that will render the analyst's opinion unsound); Dean Rood, *A Practical Guide to the Care, Maintenance, and Troubleshooting of Capillary Gas Chromatograph Systems* 92-93, 148 (Huthig 1991)("Without any doubt, the improper setup, maintenance and use of capillary GC systems is the

major cause of most chromatographic problems."). These errors can include mistreatment of the sample or misuse of the machine, each of which can impact the accuracy of the data generated.

All of these points can be the subject of a robust cross-examination if an informed analyst is present. A testifying witness must be aware of how the sample appeared, how the testing analyst prepared it for testing and how he or she operated the machine in a particular test. The process of testing goes well beyond transcription of the results processed by the machine, and Harding had no knowledge of any of this essential information.

Moreover, the fact that a toxicologist uses a machine in the course of analysis does not cleanse the analysis of human error. The notion that the results produced by machines are not subject to error completely ignores the human role in preparing forensic samples, operating the testing machine, recording results and interpreting them. But this is precisely the information upon which Harding rested his "independent" opinion. Harding testified that "[t]here was nothing unusual about the chromatograms, the output of the instrument related to this or any other samples in that run, so I guess the short answer is, yes, it was run correctly." (38:31.) Plainly put, Harding's "opinion" rested entirely on the output of the chromatograms: because he did not see anything strange in them, he assumed the results to be true. But just because Harding could not see any abnormalities on the chromatograms does not mean he could form an opinion on vial labeling, vial handling and loading, sample appearance and smell, Kalscheur's competence that day, her capacity for fraud, her understanding of the process, and all the other human-driven things that happen before the sample goes into the machine. All of the steps performed in the pre-analysis are what give the blood alcohol content results validity, and it is those procedures that also connect the blood alcohol reading

to Griep. These steps are at the heart of Griep's confrontation rights and confrontation demands a witness who can testify as to these steps. Because Harding had no personal knowledge as to any of this of this pre-analysis—he neither performed nor observed the analysis—he could render no "independent opinion," and was simply a conduit, bringing in Kalscheur's analysis and only her analysis

The importance of cross-examination on these issues is not hyperbolic. Reported cases have demonstrated that a capable defense attorney, through confrontation of the analyst, can expose faulty forensic data or conclusions. In Maryland, for example, a forensic chemist in a pre-trial hearing acknowledged that she did not understand the science behind many of the tests she performed, and that she failed to perform some standard tests on blood samples. Stephanie Hanes, *Chemist Quit Crime Lab Job After Hearing, Papers Show: She Acknowledged Report Was Worthless In 1987*, Balt. Sun, Mar. 19, 2003, at B1, *available at* http://articles.baltimoresun.com/2003-03-19/news/0303190116_1_bedford-baltimore-county-blood. She stated she did not record certain test results, and at the conclusion of cross-exam, she admitted that her "entire analysis [wa]s absolutely worthless." *Id.* Similarly, in ***Ragland v. Kentucky***, a bullet-lead composition analyst conceded during cross-examination that she had lied in earlier statements. 191 S.W.3d 569 (Ky. 2006). The analyst admitted afterward, "It was only after the cross-examination at trial that I knew I had to address the consequences of my actions." *Id.* at 581.

Unfortunately for Griep, such cross-examination never occurred at his trial. It is unknown what Kalscheur would have testified to had she appeared in court. What is certain, however, is that without testimony from a witness who either performed or observed all of the steps of the testing, the contents of Kalscheur's report, including Griep's blood

alcohol content, should not have been admitted under the Confrontation Clause.

II. Griep Has Consistently Presented This Issue

It is unclear why the State is "puzzled" by Griep's arguments (State's Response at 16): Griep has consistently argued his right to confrontation has been violated, he has consistently relied upon the Confrontation Clause, citing first ***Melendez-Diaz v. Massachusetts***, and subsequently, when they came down, ***Bullcoming v. New Mexico*** and ***Williams v. Illinois*** as supporting that conclusion. Indeed, in the multiple supplemental briefs requested by Wisconsin courts, Griep has continually presented the confrontation issue, briefing all the cases requested of him. While Griep's interpretations have changed with the implementation of the cases around the country, Griep's position has remained the same: Griep's right to Confrontation was violated when a non-performing and non-observing analyst testified as to the performing analyst's conclusions.

While the State attempts to insert peer review and independent opinion into this case (State's Response at 3), the facts rests squarely within the boundaries of ***Bullcoming***, which the State accurately describes as concerning "the admission of a lab report by a non-testifying analyst without independent expert testimony about the results demonstrated by the test data." (*Id.* at 4). It makes no difference that "here the State did not 'introduce a forensic laboratory report,'" (*Id.* at 23), as the contents of that report were introduced through Harding, even if the report itself was not entered into evidence. As explained above, Harding acted as a mere conduit for the report, effectively introducing its contents and nothing else.

Further, nothing in the State's assertions about Griep's arguments undermine the reality that ***Bullcoming*** is still good

law, the facts of Griep match those in ***Bullcoming***, and thus it compels the same result. To the extent that this Court may find the facts of ***State v. Williams*** or ***Barton*** are applicable, Griep still asserts that this Court must overrule the portions of those cases that contradict the holding of ***Bullcoming***—i.e., any portions that would permit an expert to simply review a document to form an "independent opinion," as the United States Supreme Court has made clear this does not pass constitutional muster.

But that is precisely what occurred here. The fact that nothing but the results as created by Kalscheur were admitted at trial renders this case no different from ***Bullcoming***. It is not, as the State asserts, the same as the independent testimony contemplated by Sotomayor in her concurrence in ***Bullcoming*** as no independent testimony occurred. (*Id.* at 27.) Nor is it an instance in which an expert discussed another's testimonial statements while performing additional independent analysis, as presented in ***Williams v. Illinois***. Here, Harding presented nothing but the conclusions created by Kalscheur. Because Harding added no additional analysis, he acted solely as a conduit for the testimonial statements of Kalscheur's report.

Despite the State's attempts at obfuscation, the facts are clear: the certified out-of-court statements in the report were introduced at trial without testimony from performing analyst Diane Kalscheur. As a result, Griep's constitutional right to Confrontation was violated and the trial court and court of appeals erred in permitting Hardings' testimony as to the contents of the report. This Court need not touch ***Williams v. Illinois***, or correspondingly ***Barton*** and ***State v. Williams*** to reach that conclusion, but should it do so, it must overturn the portions of ***Barton*** and ***State v. Williams*** that find Harding's testimony to be anything other than a conduit for the contents of the report.

CONCLUSION

For all the reasons stated, Griep requests that this Court find that the admission of surrogate testimony regarding the ethanol report violated his constitutional right to confrontation and reverse his conviction.

Respectfully submitted this 3rd day of November, 2014.

_____

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CERTIFICATION AS TO FORM AND LENGTH

I hereby certify that this petition conforms to the rules contained in s. 809.19(8)(b) and (d) for a brief and appendix produced with a proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum of 2 points and maximum of 60 lines. The length of the petition is 2,995 words.

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Tricia J. Bushnell

STATE OF WISCONSIN

IN SUPREME COURT

Appeal No. 2009AP3073-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MICHAEL R. GRIEP,

Defendant-Appellant-Petitioner.

ON REVIEW OF A DECISION OF THE COURT OF APPEALS, DISTRICT II, AFFIRMING AN ORDER OF THE CIRCUIT COURT FOR WINNEBAGO COUNTY, THE HON. THOMAS J. GRITTON, PRESIDING

BRIEF OF THE INNOCENCE NETWORK AS AMICUS CURIAE IN SUPPORT OF DEFENDANT-APPELLANT-PETITIONER, MICHAEL R. GRIEP

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Though it may come to the courtroom cloaked in an aura of infallibility, "[f]orensic evidence is not uniquely immune from the risk of manipulation," *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 318 (2009), bias or mistake. Forensic science is, rather, a human endeavor, subject to all the prejudice, caprice, and error that human beings are capable of. The interest of criminal defendants facing forensic evidence in exposing such infirmities through cross-examination is not merely obvious; it is also constitutionally protected. As the Supreme Court made clear in *Melendez-Diaz* and later cases, forensic evidence is no exception to the Confrontation Clause; where the state seeks to introduce it, the defendant must be afforded the opportunity to actually confront the witness against him—*not* a surrogate. *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2710 (2011).

In an effort to end-run this Constitutional protection, the State here has styled its surrogate witness an "expert" and produced him to testify to the substance of another analyst's report, without introducing the actual report. But neither the Constitution nor fairness is satisfied by this process of functionally, if not actually, admitting the substance of a non-

testifying analyst's report through expert testimony. *See Bullcoming*, 131 S. Ct. at 2710; *Melendez-Diaz*, 557 U.S. at 310-11 (finding testing certificates testimonial where, *inter alia,* they were "functionally identical to live, in-court testimony"). This clear precedent has remained unchanged by the plurality in *Williams v. Illinois*, 132 S.Ct. 2221 (2011): at a minimum, the majority of the Supreme Court clearly rejects the notion that formalized test results, offered for the truth of the matter, can be implicitly admitted under the guise of expert testimony without confrontation.[1] However *Williams* is read, *Bullcoming* remains good law, and under *Bullcoming,* lab results introduced, whether by surrogate or directly, for the truth of the matter are testimonial and must be confronted. *See Williams,* 132 S.Ct. at 2233 (distinguishing the blood alcohol report in *Bullcoming* from the *Williams* DNA profile because the former "was introduced at trial for the substantive purpose of proving the truth of the matter asserted by its out-of-court author—namely, that the defendant had a blood-alcohol level of 0.21").

[1] *See, e.g., Williams*, 132 S.Ct. at 2233, 2236-37, 2243, 2256-58, 2268-69.

The state and the lower court attempted to evade this clear holding by labeling the proffered testimony as "independent" of the original report. But the analyst's testimony was entirely based on the report; indeed, the analyst had no basis whatsoever other than the report for his opinion that the test was performed and performed properly, and that it generated results which allowed him to echo that Mr. Griep had a certain blood alcohol level. *See infra* Part II. Such conclusions all derived solely from the report. The analyst here was no less a surrogate for the testimonial conclusions of the non-testifying analyst than the analyst in *Bullcoming*.[2] Outside of flat assertions to the contrary, the state does not, and cannot, explain how this testimony was actually independent and thus how it does not run afoul of *Bullcoming*'s clear command.[3]

The state's attempt to evade confrontation is thus not only wrong as a matter of law; it also thwarts the truth-seeking functions of the criminal justice system. As the DNA exonerations and crime lab scandals discussed *infra* demonstrate, forensic testimony is not inherently objective or

[2] It bears note that the testifying analyst in *Bullcoming* also qualified as an expert. *Bullcoming*, 131 S.Ct. at 2713.

[3] Mr. Griep addresses these arguments in more detail; the Network's brief focuses instead on the increased risks of wrongful convictions that would result from permitting such unconfronted testimony.

neutral, but is often the result of a subjective process that may be flawed, fraudulent, biased, or wrong. Surrogate expert testimony of the kind proffered here insulates all of these problems from the "crucible of cross-examination," *Crawford v. Washington*, 541 U.S. 36, 61 (2004), and thus from the jury's scrutiny— a scrutiny that the Network's experience teaches is necessary to ensuring the fair administration of justice.

I. DNA EXONERATIONS AND CRIME LAB SCANDALS TEACH THAT FORENSIC SCIENCE IS NOT IMMUNE FROM ERROR.

1. Unvalidated and Improper Forensic Science is a Leading Cause of Wrongful Conviction

Unvalidated or improper forensic science is a leading cause of wrongful convictions, playing a role in the cases of almost half of the 321 wrongfully convicted people in the United States who have been exonerated by DNA testing.[4] These cases, with flaws running the gamut from incompetence and negligence to outright fraud, demonstrate how critical it is to protect a defendant's right to cross-examine the analyst who

[4] Because DNA exists in only a small percentage of cases, these numbers likely greatly understate the scope of wrongful conviction. *See* The National Registry of Exonerations, University of Michigan Law School & Center on Wrongful Convictions at Northwestern University School of Law, *available at* https://www.law.umich.edu/special/exoneration/Pages/about.aspx (documenting over 1,400 DNA and non-DNA exonerations nationwide).

actually tested the evidence against him.[5] For example, Josiah Sutton became a victim of "significant and pervasive problems with the analysis and reporting of results" in the Houston Police Department Crime Lab[6] when he was wrongfully convicted of rape based in part on an analyst's erroneous testimony that inculpatory DNA was an exact match with Mr. Sutton, such that only 1 person in 694,000 could have contributed. In reality, 1 in 16 black men shared the profile found.[7] Later DNA testing exonerated Mr. Sutton completely.[8]

Outright forensic fraud resulted in Curtis Edward McCarty serving 21 years in prison—including 19 on death row—for a murder he did not commit. A forensic examiner, Joyce Gilchrist, compared hairs from the crime scene with Mr. McCarty's and initially found that they were not similar. After three years of continued police investigation, Gilchrist secretly changed her notes to say that the hairs in fact could have come from Mr. McCarty. She testified to this conclusion at two trials,

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[5] *See, e.g.,* Brandon L. Garrett & Peter J. Neufeld, *Invalid Forensic Science Testimony and Wrongful Convictions*, 95 Va. L. Rev. 1 (2009).
[6] *See* Michael R. Bromwich, *Final Report of the Independent Investigator for the Houston Police Department Crime Laboratory and Property Room* at 4 (June 13, 2007), http://hpdlabinvestigation.org/reports/ 070613report.pdf.
[7] Innocence Project, *Know the Cases: Josiah Sutton*, http://www.innocenceproject.org/Content/Josiah_Sutton.php.
[8] *Id.*

resulting in Mr. McCarty being sentenced to death.[9] DNA evidence ultimately exonerated Mr. McCarty, along with two other innocent people wrongfully convicted on the basis of Gilchrist's false testimony.[10]

These cases and the other exonerations demonstrate that forensic science is subject to error; to present it to a jury without the scrutiny of direct confrontation is to increase the very real risk of wrongful conviction.

2. Crime Lab Scandals Have Led to Miscarriages of Justice

Lessons about the fallibility of forensic sciences and scientists can also be gleaned from the so-called crime lab scandals. As the National Academy of Sciences wrote in its watershed 2009 report on forensic science, "the integrity of crime laboratories increasingly has been called into question, with some highly publicized cases highlighting the sometimes lax standards of laboratories that have generated questionable or fraudulent evidence and that have lacked quality control measures that would have detected the questionable

[9] Innocence Project, *Know the Cases: Curtis McCarty*, http://www.innocenceproject.org/Content/Curtis_McCarty.php.
[10] *Id.*

evidence."[11] In Massachusetts last year, for example, a drug analyst named Annie Dookhan repeatedly engaged in drylabbing (that is, reported results of tests that were never conducted) and evidence tampering, compromising as many as 34,000 cases.[12] Dookhan's fraud went undetected for years, shielded by the pre-*Melendez-Diaz* cases that protected her from confrontation about her work.[13]

In New York, after the New York County District Attorney's Office ("NYCDA") extolled the infallibility of its Office of The Chief Medical Examiner ("OCME") technicians in a *Williams v. Illinois* amicus brief arguing against the right to confront the testing analyst,[14] the OCME was forced to reexamine hundreds of rape cases after a lab technician was found to have mishandled or overlooked critical DNA

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[11] NATIONAL ACADEMY OF SCIENCES, Committee on Identifying the Needs of the Forensic Sciences Community, STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD 44 (2009) ("NAS Report").

[12] Tovia Smith, *Crime Lab Scandal Leaves Mass. Legal System In Turmoil*, NPR, March 14, 2013, *available at* http://www.npr.org/2013/03/14/174269211/mass-crime-lab-scandal-reverberates-across-state.

[13] Sally Jacobs, *Annie Dookhan Pursued Renown Along A Path Of Lies*, BOSTON GLOBE, Feb. 3, 2013, http://www.bostonglobe.com/metro/2013/02/03/chasing-renown-path-paved-with-lies/Axw3AxwmD33lRwXatSvMCL/story.html ("*Melendez-Diaz* was tough at first on [Dookhan]" (italics added)). *Compare Melendez-Diaz*, 557 U.S. at 339 (dissent arguing exposing analysts to confrontation would not result in changed testimony).

[14] Brief of Amici Curiae NYCDA and OCME In Support of Respondent at 12-14, *Williams*, 132 S.Ct. 2221 ("Mandatory quality assurance procedures . . . virtually ensure that the laboratory will detect and correct any error that might occur.").

evidence.[15] The scandal also revealed that the lab's deputy director breached lab protocol and inappropriately reassigned cases, rewrote reports (including changing the report's supposed author), and removed analyses from case files when she disagreed with them on at least two occasions.[16]

Similar misconduct has taken place all over the country,[17] including San Francisco,[18] Detroit,[19] and West Virginia.[20] Investigations of the Houston Crime Lab, for instance, uncovered drylabbing and other serious problems,

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[15] State of New York Office of the Inspector General, *Investigation into the New York City Office of Chief Medical Examiner: Department of Forensic Biology*, Dec. 2013, http://ig.ny.gov/pdfs/OCMEFinal Report. pdf.

[16] *Id.* Such disagreement between analysts is precisely the kind of issue that can be hidden when only an expert surrogate testifies. *See id.* at 32-33 ("Of particular note, the suspect report in the case at issue was rewritten six times; yet, after each revision, the computer . . . overwrote the previous draft and only the most current draft remained. As such, the reader of the final report would be ignorant of the dissension among the criminalists . . . .").

[17] NAS Report at 44-48; Maurice Possley, et al., *Scandal Touches Even Elite Labs*, CHICAGO TRIBUNE, Oct. 21, 2004, *available at* http://articles.chicagotribune.com/2004-10-21/news/0410210285_1_ crime-lab-paul-ferrara-lab-s-director ("[E]vidence of problems ranging from negligence to outright deception has been uncovered at crime labs in at least 17 states.").

[18] Jim Herron Zamora, *Lab Scandal Jeopardizes Integrity Of S.F. Justice Sting Uncovered Bogus Certification*, SAN FRANCISCO EXAMINER, September 16, 1994, at A7.

[19] Nick Bunkley, *Detroit Police Lab Is Closed After Audit Finds Serious Errors in Many Cases*, NY TIMES, September 25, 2008, *available at* http://www.nytimes.com/2008/09/26/us/26detroit.html?_r=0.

[20] *In Re Invest. of W. Virginia State Police Crime Lab., Serology Div.*, 438 S.E.2d 501 (W. Va. 1993).

including the incompetence that led to Josiah Sutton's wrongful conviction.[21]

As with the DNA exonerations, the crime lab scandals demonstrate the necessity of scrutinizing forensic science through the lens of direct cross-examination.

II. SURROGATE TESTIMONY IS INSUFFICIENT TO VINDICATE A DEFENDANT'S CONSTITUTIONAL INTEREST IN CROSS-EXAMINING SCIENTIFIC WITNESSES AGAINST HIM.

The DNA exonerations and crime lab scandals are stark proof of the "threat to fair criminal trials posed by the potential for incompetent or fraudulent prosecution forensics experts." *Hinton v. Alabama*, 134 S. Ct. 1081, 1090 (2014). Ensuring that only valid and reliable science is used against criminal defendants requires vigorous confrontation, which is "designed to weed out not only the fraudulent analyst, but the incompetent one as well." *Melendez-Diaz*, 557 U.S. at 319. The Constitution accordingly "commands . . . that reliability be assessed . . . by testing in the crucible of cross-examination." *Crawford*, 541 U.S. at 61. Cross-examination is, thus, "the principal means by which the believability of a witness and the

[21] Bromwich, *supra* fn.6.

truth of his testimony are tested." *Davis v. Alaska*, 415 U.S. 308, 316-17 (1974). But filtering forensic conclusions through an expert surrogate insulates forensic science from cross-examination, and in so doing, prevents a jury from evaluating that evidence's reliability.

This insulating effect results from the fact that expert surrogate testimony necessarily rests on a series of unproven assumptions—namely, that the original test or tests were actually conducted and that they were conducted properly, competently, and impartially. The testifying analyst in this case, for example, based his conclusion on assumptions that "the procedures were followed, [and that] the instrument was operating properly, properly calibrated," despite having no personal knowledge of these assertions.[22] His testimony also consistently assumed that the tests had, in fact, been performed and performed properly.[23] The Network's experience both with exonerations and with crime lab scandals demonstrates, however, that such assumptions are simply unwarranted. An expert testifying to the substance of Annie Dookhan's reports,

[22] App. F, A-AP146 (Tr. 30-31). His testimony also consistently assumed that the tests had, in fact, been performed and performed properly.
[23] *See id.* at A-AP150 (Tr. 34) (Q. "And so you don't have any personal knowledge as to whether or not this sample was clotted, do you?" A. "That is why we keep laboratory records. The sample did not clot.").

for example, would not know Dookhan had not completed the tests she claimed to have done, and so would appear credible when testifying to Dookhan's conclusions. In the face of such facially credible testimony, no jury could conclude that the proffered results were actually fraudulent. Even innocent defendants—who presumably know they are innocent with more certainty than a jury—have been induced to plead guilty when confronted with apparently 'infallible' laboratory analyses that were, in fact, false.[24]

The difficulty of exposing any misdeeds by the original testing analyst through "expert" confrontation is exacerbated by the fact that even when directly confronted, "juries are likely to consider [forensic sciences] objective and infallible."[25] Preventing the defense from examining the *actual* nature and circumstances of the tests conducted will only

[24] Eric Dexheimer, *Latest Drug Exoneration Displays Familiar Pattern*, STATESMAN, April 23, 2014, http://www.statesman.com/weblogs/investigations/2014/apr/23/latest-drug-exoneration-follows-pattern/.

[25] Keith A. Findley, *Innocents At Risk: Adversary Imbalance, Forensic Science, and the Search for Truth*, 38 Seton Hall L. Rev. 893, 943 (2008); *see also United States v. Frazier*, 387 F.3d 1244, 1263 (11th Cir. 2004) ("Simply put, expert testimony may be assigned talismanic significance in the eyes of lay jurors . . . ."); *United States v. Addison*, 498 F.2d 741, 744 (D.C. Cir. 1974) (expert scientific evidence may "assume a posture of mythic infallibility in the eyes of a jury of laymen").

amplify the tendency of jurors to accept forensic evidence uncritically.

Fraud is not the only problem that surrogate testimony can hide; issues of professional competence, procedural failures, or cognitive bias are also likely to go unexplored where surrogate testimony is permitted. This latter point is particularly significant, as even scrupulous forensic examiners applying well-established scientific assays can be affected by cognitive bias. Research indicates that extraneous contextual information given to examiners can unconsciously compromise objectivity and bias results.[26] *See also Melendez-Diaz* 557 U.S. at 318 ("A forensic analyst responding to a request from a law enforcement official may feel pressure—or have an incentive—to alter the evidence in a manner favorable to the prosecution"); *Davis*, 415 U.S. at 316-17 (confrontation permits cross-examination "directed toward revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand"). A surrogate expert will have no way of knowing what

[26] *See, e.g.,* I.E. Dror, D. Charlton & A.E. Peron, *Contextual Information Renders Experts Vulnerable To Making Erroneous Identifications*, 156 Forensic Sci. Int'l 74-78 (2006).

external pressures or contextual information may have unconsciously affected the testing analyst, and so a defendant will be prevented from exploring this key area on cross-examination.[27]

Functionally admitting the substance of a non-testifying analyst's report through "expert" testimony is patently insufficient to guard against unreliable forensic science. The actual examiner's procedures, biases, mistakes, and even corruption, will all be washed out in the glow of expert testimony that, by its nature, can only discuss idealized practices. For this reason, the Constitution mandates not that a defendant be given the opportunity to examine *any* person with the ability to read a lab report and speak to standard practice,[28] but that he be able to mount a "more particular attack on the

[27] *E.g.,* Joel D. Lieberman et. al., *Gold Versus Platinum: Do Jurors Recognize the Superiority and Limitations of DNA Evidence Compared to Other Types of Forensic Evidence?*, 14 Psychol. Pub. Pol'y & L. 27, 50-51 (2008) ("Without adequate cross-examination, most jurors were not cognizant of the potential for observer effects or the importance of proficiency testing and therefore were unable to accurately assess the reliability of the lab.").

[28] *See Bullcoming*, 131 S. Ct. at 2714-15 ("Suppose a police report recorded an objective fact—. . . [like] the address above the front door of a house or the read-out of a radar gun. Could an officer other than the one who saw the number on the house or gun present the information in court—so long as that officer was equipped to testify about any technology the observing officer deployed and the police department's standard operating procedures? As our precedent makes plain, the answer is emphatically 'No.'" (internal citation omitted)).

witness' credibility . . . by means of cross examination." *Davis*, 415 U.S. at 316-17. When a defendant is forced to accept the sanitized conclusions of a professional witness in lieu of examining the analyst who actually conducted the tests against him, he is denied his right to mount this more "particular attack," the need for which the DNA exonerations and crime lab scandals make plain.

III. CONCLUSION

The right of a defendant to actually confront the forensic witnesses against him is not an empty constitutional formality. Rather, it is vital to ensuring that criminal trials are fair and accurate. Forensic science and scientists can be, and often are, wrong, and wrong in ways that allow the guilty to go free and the innocent to be punished. Insulating forensic testimony from cross-examination prevents a defendant from exposing the flaws that can lead to such unjust results. Using an expert to avoid the import of the Supreme Court's Confrontation Clause precedents is thus not only unconstitutional; it also poses a serious danger to the fair administration of justice. The Decision of the Court of Appeals should be reversed.

Dated this 28th day of October, 2014.

Respectfully submitted,

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CERTIFICATION AS TO FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 2,998 words.

Keith A. Findley

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date. A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Keith A. Findley

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2009AP003073-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MICHAEL R. GRIEP,

Defendant-Appellant-Petitioner.

On Review of a Decision of the Court of Appeals, District II, Affirming a Judgment of Conviction Entered in Winnebago County Circuit Court, Judge Thomas J. Gritton, Presiding

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INTRODUCTION

The court of appeals held that Michael Griep's right to confront the witnesses against him was not violated when a laboratory analyst named Patrick Harding was allowed to testify to his opinion as to the alcohol content of Griep's blood, even though he did not do any of the actual analysis of Griep's blood sample, did not observe any of the analysis being done, and based his opinion solely on his review of the written material generated by another analyst named Diane Kalscheur, who actually performed the analysis. ***State v. Griep***, 2014 WI App 25, 353 Wis. 2d 252, 845 N.W.2d 24.

In reaching its decision the court of appeals concluded it was bound by its decision in ***State v. Barton***, 2006 WI App 18, 289 Wis. 2d 206, 709 N.W.2d 93. But ***Barton***—and the case on which ***Barton*** heavily relied, ***State v. Williams***, 2002 WI 58, 253 Wis. 2d 99, 644 N.W.2d 919—are no longer valid in light of the U.S. Supreme Court decisions issued since ***Barton*** that address confrontation of expert evidence under ***Crawford v. Washington***, 541 U.S. 36 (2004). Accordingly, ***Barton*** and ***Williams*** must be overruled or limited.

ARGUMENT

A Criminal Defendant's Right to Confrontation Is Violated by Allowing Opinion Testimony from a Laboratory Analyst When that Opinion is Based Only on a Review of the Documentation of a Non-testifying Analyst Who Actually Analyzed the Evidence.

Crawford v. Washington jettisoned the Confrontation Clause jurisprudence based on ***Ohio v. Roberts***, 448 U.S. 56 (1980). Under ***Roberts***, an unavailable witness's statement against a criminal defendant was admissible if the statement bore "adequate indicia of reliability" because it was within a "firmly rooted hearsay exception" or bore "particularized guarantees of trustworthiness." ***Roberts***, 448 U.S. at 66.

Crawford "reoriented the focus of Confrontation Clause claims from reliability back to confrontation." ***State v. Savanh***, 2005 WI App 245, ¶19, 287 Wis. 2d 876, 707 N.W.2d 549. It did so by focusing on whether an out-of-court statement is "testimonial." "Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." ***Crawford***, 541 U.S. at 68-69. Regardless of reliability, out-of-court testimonial statements are barred under the Confrontation Clause. ***Id.*** at 68; ***Savanh***, 287 Wis. 2d 876, ¶19.

Crawford did not define "testimonial," though included in its list of the core class of such statements are "[s]tatements made under circumstances which would lead an objective witness to believe that the statement would be available for use at a later trial." ***Id.*** at 51-52. *See also* ***Savanh***, 287 Wis. 2d 876, ¶20. The Court later clarified that a

statement is "testimonial" when its "primary purpose" is "to establish or prove past events potentially relevant to later criminal prosecution." ***Davis v. Washington***, 547 U.S. 813, 822 (2006).

The Court first applied the new rule of ***Crawford*** to the presentation of forensic expert opinion evidence in ***Melendez-Diaz v. Massachusetts***, 557 U.S. 305 (2009). In that case, a state forensic laboratory analyzed evidence seized by police and prepared "certificates of analysis" reporting that the substance was cocaine. ***Id.*** at 308. Because the certificates were prepared in connection with a criminal investigation or prosecution and created specifically to serve as evidence in a criminal proceeding, the certificates were "incontrovertibly ... affirmation[s] made for the purpose of establishing or proving some fact" in a criminal proceeding and were therefore "testimonial." ***Id.*** at 310-11 (internal quotation marks omitted).

The Court next addressed the issue in ***Bullcoming v. New Mexico,*** 564 U.S. ___, 131 S. Ct. 2705 (2011), which held that a certification of a laboratory analyst who tested the defendant's blood sample for alcohol was also "testimonial" because it was a document created solely for an evidentiary purpose and made in aid of a police investigation. In both ***Melendez-Diaz*** and ***Bullcoming***, the laboratory analyst's certificate could not be admitted without the laboratory analyst appearing at trial to be subjected to cross-examination. ***Melendez-Diaz***, 557 U.S. at 311; ***Bullcoming***, 131 S. Ct. at 2714-16.

Melendez-Diaz and ***Bullcoming*** did not directly address the situation presented by cases like Griep's, where no document prepared by the forensic expert is introduced into evidence, but the substance of that expert's analysis is

instead presented through the testimony of a different expert whose opinion is based on a review of material generated by the non-testifying expert. The scenario was addressed in decisions of lower courts, one being ***Barton***, which was decided after ***Crawford*** but before ***Melendez-Diaz*** and ***Bullcoming***.

Barton held that a crime laboratory unit leader's testimony was properly admitted when the analyst who had performed the tests was unavailable. ***Barton,*** 289 Wis. 2d 206, ¶¶4 n.1, 16. The unit leader performed a "peer review" of the unavailable analyst's test results and formed an opinion using those results. He presented his conclusions to the jury and was available for cross-examination. ***Id.***, ¶¶2-4. The court concluded this kind of surrogate testimony did not violate the Confrontation Clause. ***Id.***, ¶¶16.

In so holding, and in rejecting the defendant's claim that ***Crawford*** precluded the admission of the unit leader's testimony, ***Barton*** relied heavily on ***State v. Williams***. 289 Wis. 2d 206, ¶¶17-21. In ***Williams***, a crime laboratory unit leader testified that a particular substance was cocaine, although she was not the person who performed the tests on the substance. 253 Wis. 2d 99, ¶4. The unit leader formed her opinion based on her own training and expertise, her close connection to the tests and procedures involved in the case, and her personal review of the testing records. ***Id.*****,** ¶¶21-22. The court held that allowing the unit leader to testify did not violate the Confrontation Clause because the witness had presented an independent expert opinion. ***Id.***, ¶26.

The Supreme Court was poised to address whether surrogate expert testimony was permissible in ***Williams v. Illinois***, 132 S. Ct. 2221 (2012). That case involved a state crime laboratory analyst who testified that she used a DNA

profile prepared by a private laboratory to compare to the state's DNA database and found a matched with the profile of Williams. 132 S. Ct. at 2229-30. The Court held that the analyst's reliance on the private laboratory's DNA analysis did not violate Williams's confrontation rights, but it failed to produce a majority decision, splitting between a four-Justice plurality, a concurrence by Justice Thomas, and a four-Justice dissent. ***Id.*** at 2227, 2255, 2264-65.

Because no single opinion speaks for the Court, lower courts must try to discern what, if anything, ***Williams v. Illinois*** requires. Generally, when a fragmented Court decides a case and no single rationale explaining the result is joined by five Justices, the holding of the Court is the position taken by the Justices who concurred in the judgment on the narrowest grounds. ***Marks v. United States***, 430 U.S. 188, 193 (1977). In applying this formulation here, the relevant opinions are the plurality and Justice Thomas's concurrence, both of which concluded Williams's conviction should be affirmed.

One opinion can be meaningfully regarded as "narrower" than another only when one opinion is a logical subset of other, broader opinions, or reaches the same result for less sweeping reasons than the others. ***U.S. v. Johnson***, 467 F.3d 56, 63 (1st Cir. 2006). As this court recognized in ***State v. Deadwiller***, 2013 WI 75, ¶32, 350 Wis. 2d 138, 834 N.W.2d 362, there is no overlap or common ground between the plurality and the concurrence because the cases in which Justice Thomas would find an expert opinion (or evidence that is a basis for that opinion) to be non-testimonial are not a logical subset of the cases in which the plurality would find the evidence is non-testimonial.

When a concurrence that provides the fifth vote necessary to reach a majority does not provide a "common denominator" for the judgment, ***Marks*** does not apply. ***U.S. v. Heron***, 564 F.3d 879, 884 (7th Cir. 2009). Thus, instead of extracting a rule from the case using ***Marks***, courts "must continue to work with the authoritative sources that remain available to us." ***Id.*** at 885. Given the lack of any "narrowest grounds" common denominator between the plurality and concurrence in ***Williams v. Illinois***, the decision does not establish a binding standard for deciding this case.* Thus, resolving the confrontation issues raised by surrogate expert testimony like that allowed here requires application of other available authoritative sources—namely, ***Melendez-Diaz*** and ***Bullcoming***. These sources compel the conclusion that ***Barton*** and ***State v. Williams*** are wrong and must be overruled or, at least, limited.

As noted above, ***Barton*** relied heavily on ***State v. Williams***, which found no Confrontation Clause violation in allowing a surrogate expert to testify because the presence and availability for cross-examination of a highly qualified

* Despite the lack of common ground, ***Deadwiller*** properly followed the *judgment* in ***Williams v. Illinois*** because the defendants in the two cases were in "substantially identical positions," meaning the only binding aspect of ***Williams v. Illinois***—its specific result—applied to Deadwiller. 350 Wis. 2d 138, ¶¶30, 32. Cases like Griep's are unlike ***Williams v. Illinois*** and ***Deadwiller***, however. They involve suspects who are immediately identified and arrested, the evidence collected shortly after arrest is submitted for testing for use in the prosecution, and one analyst typically does *all* the testing while a different analyst who did no testing appears at trial. In ***Williams v. Illinois***, 132 S. Ct. at 2229-30, and ***Deadwiller***, 350 Wis. 2d 138, ¶32, the evidence analyzed by the non-testifying expert was only one piece of the forensic evidence, and multiple experts engaged in testing the other evidence were subject to cross-examination.

witness who is familiar with the procedures, supervises or reviews the work of the testing analyst, and renders his or her own expert opinion is sufficient to protect a defendant's right to confrontation, even though the expert was not the person who performed the original tests. ***Williams***, 253 Wis. 2d 99, ¶¶11-20. Crucial to this holding was the court's belief that "there would have been little potential utility" in questioning the analyst who did the laboratory work as opposed to another highly qualified analyst who was familiar with the procedures used by the testing analyst and conducted a peer review of the testing analyst's work. ***Id.***, ¶16. In other words, the ability to cross-examine the peer reviewer—whose job it was to "make sure that conclusions written in a report are correct," ***Williams***, 253 Wis. 2d 99, ¶22—is sufficient to assure the reliability and trustworthiness of the evidence.

Williams was consistent with Confrontation Clause jurisprudence as it existed *before* ***Crawford*** was decided. But *after* ***Crawford***, the focus is not on the reliability or trustworthiness of the evidence; it is on confrontation as the constitutionally-guaranteed mechanism by which reliability and trustworthiness are assessed. ***Crawford***, 541 U.S. at 61. True, there may be other and better ways to challenge or verify the results of a forensic test; "[b]ut the Constitution guarantees one way: confrontation." ***Melendez-Diaz***, 557 U.S. at 318.

Barton, on the other hand, was decided *after* ***Crawford***. While it acknowledged ***Crawford***, 289 Wis. 2d 206, ¶¶17-19, ***Barton*** relied on ***Williams***, saying the latter case "is clear: A defendant's confrontation right is satisfied if a qualified expert testifies to his or her independent opinion, even if the opinion is based in part on the work of another." ***Id.***, ¶20. ***Barton*** made only passing reference to ***Crawford***'s fundamental concept of "testimonial" evidence and failed to

apply the concept. By relying on ***Williams*** instead of engaging in the new confrontation analysis demanded by ***Crawford***, the decision in ***Barton*** failed to take account of the change in Confrontation Clause jurisprudence.

Furthermore, the belief animating ***Williams*** and ***Barton***—that the defendant's confrontation right is satisfied by his opportunity to cross-examine the testifying expert—is inconsistent with ***Melendez-Diaz*** and ***Bullcoming***, which make it clear that an opportunity to cross-examine a surrogate analyst is not enough. In both cases the Court stressed that forensic analysis is neither fool-proof nor immune from manipulation and that the ability of a defendant to test, through cross-examination, the "honesty, proficiency, and methodology" of the analyst who actually produced the evidence is critical to the defendant's right to confrontation. ***Melendez-Diaz***, 557 U.S. at 317-21. *Cf.* ***Bullcoming*** 131 S. Ct. at 2716 ("the [Confrontation] Clause does not tolerate dispensing with confrontation simply because the court believes that questioning one witness about another's testimonial statements provides a fair enough opportunity for cross-examination.").

The argument that ***Barton*** remains valid is premised on two distinctions between the procedure allowed by that case and what is prohibited by ***Melendez-Diaz*** and ***Bullcoming***. First, the notes, documents, or report of the absent analyst are not admitted as evidence; second, the testifying analyst offers an "independent" expert opinion based on the absent analyst's hearsay material, which is permissible under Wis. Stat. § (Rule) 907.03. Put together, the argument goes, these differences prevent the presentation of testimonial hearsay to the fact-finder and avoid any confrontation problem. ***Barton***, 289 Wis. 2d 206, ¶¶16, 20-

22. (*See also* State's brief at 21-33). For the following reasons, this is incorrect.

The fact that a non-testifying analyst's paperwork is not admitted as an exhibit does mean there is no documentary evidence of the kind within the core class of testimonial hearsay, as in ***Melendez-Diaz***, 557 U.S. at 310-11, and ***Bullcoming***, 131 S. Ct. at 2717. Nonetheless, the *substance* of a non-testifying analyst's material is testimonial, for a statement is "testimonial" when its "primary purpose" is "to establish or prove past events potentially relevant to later criminal prosecution." ***Davis***, 547 U.S. at 822. The documentation of a non-testifying analyst like Kalscheur in this case satisfies this test, as its primary purpose is to establish facts demonstrating a defendant's guilt.

Moreover, the substance of the non-testifying analyst's material is presented to the fact-finder when a surrogate expert testifies, even if none of the material is introduced or read verbatim by the surrogate. Formal admission of an out-of-court testimonial statement or a verbatim recitation is not necessary to invoke the Confrontation Clause. The right to confrontation applies with full force even where, instead of admitting the actual statements of the out-of-court declarant, a witness "indirectly, but still unmistakably," recounts the *substance* of an out-of-court statement. ***United States v. Meises***, 645 F.3d 5, 21 (1st Cir. 2011). The opportunity to cross-examine the declarant is no less vital in this situation, for the fact-finder still hears an untested, out-of-court accusation against the defendant. ***Id.*** Indeed, "any other conclusion would permit the government to evade the limitations of the Sixth Amendment and the Rules of Evidence by weaving an unavailable declarant's statements into another witness's testimony by implication." ***Id.*** at 22. *See also* ***Ocampo v. Vail***, 549 F.3d 1098, 1108-13

(9th Cir. 2011); ***State v. Swaney***, 787 N.W.2d 541, 554 (Minn. 2010).

Next, the absent analyst's material is ultimately conveyed for its truth, not just as § 907.03 "basis" evidence. Griep's case demonstrates why. Harding made no personal observations of the sample or its testing. (38:34-35, 43, 46; A-Ap. 150-51, 159, 162). Rather, he looked at the material generated by Kalscheur. (38:27; A-Ap. 143). That means Kalscheur's work was the *only* basis for Harding's opinion. Because an expert opinion must have a foundation, Harding's testimony necessarily conveyed to the fact-finder crucial aspects of the substance of Kalscheur's testimonial statements—namely, that Griep's blood sample was handled and tested in accordance with the laboratory's protocol, from which it follows the sample was not tainted or contaminated in any way that would affect the results, that the testing device was calibrated and functioning properly, and that the test result shown in her documentation was accurate. (38:27-30; A-Ap. 143-46).

Thus, references to the substance of Kalscheur's documentation were necessarily elicited both to demonstrate the basis of Harding's opinion under Wis. Stat. § (Rule) 907.03 *and* for their truth, for if Kalscheur's analysis and conclusions were *not* true, then Harding had no basis for his conclusion and should not have been allowed to testify. The need to provide an evidentiary foundation for Harding's opinion testimony meant Harding would also have to disclose Kalscheur's testimonial hearsay. *See* David H. Kaye, David E. Bernstein & Jennifer Mnookin, ***The New Wigmore: A Treatise on Evidence: Expert Evidence*** §§ 4.10.1, 4.10.2 (2d ed. 2010) and § 4.12.7 (Supp. 2013).

It follows that Harding's opinion cannot be described in any meaningful way as "independent," for his opinion was in fact entirely dependent on and determined by the analysis of the evidence conducted by Kalscheur. For purposes of the Confrontation Clause, an expert reaches an "independent" opinion only when he or she has acquired personal knowledge of the relevant basis evidence by conducting, participating in, or, at a minimum, observing the testing of the evidence. ***The New Wigmore***, § 4.10.3. As noted, Harding lacked that personal knowledge, as will any surrogate expert that conducts what is, finally, a "paper" review—one which, Harding acknowledged, might not detect errors or fraud. (38:46-47; A-Ap. 162-63).

Finally, it cannot be said that a surrogate like Harding reached an independent opinion based on "raw data" that is not testimonial. (State's brief at 28). ***Bullcoming*** rejected any notion that the testing analyst is a "mere scrivener" for the gas chromatograph whose report of the test results makes no assertions about the test itself. That is because operation of the device "requires specialized knowledge and training. Several steps are involved in the gas chromatograph process, and human error can occur at each step." 131 S. Ct. at 2711 & n.1. (*See also* 38:48-52; A-Ap. 164-68). Thus, documentation that directly states (as in ***Bullcoming***) or implies (as here) that the testing protocol was followed are "representations, relating to past events and human actions not revealed in raw, machine-produced data, [and] are meet for cross-examination." ***Id.*** at 2714.

CONCLUSION

Barton and ***Williams*** are inconsistent with ***Melendez-Diaz*** and ***Bullcoming*** and should be overruled. Alternatively, the kind of surrogate expert witness testimony they contemplate should be limited to experts who have personally participated in, assisted with, or observed the testing on which their opinion is based.

Dated this 7th day of November, 2014.

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I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 2,997 words.

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