

Appeal No. 2015AP158-CR

Cir. Ct. No. 2013CF471

**WISCONSIN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROZERICK E. MATTOX,

DEFENDANT-APPELLANT.

FILED

FEB 10, 2016

Diane M. Fremgen
Clerk of Supreme Court

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Neubauer, C.J., Gundrum and Hagedorn, JJ.

Pursuant to WIS. STAT. RULE 809.61 (2013-14),¹ this appeal is certified to the Wisconsin Supreme Court for its review and determination.

ISSUE

Does it violate a defendant's rights under the Confrontation Clause of the Sixth Amendment to the United States Constitution for the State to introduce at trial a toxicology report identifying certain drugs in a deceased victim's system and/or testimony of a medical examiner basing his/her cause-of-death opinion in part on the information set forth in such a report, if the author of

¹ All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

the report does not testify and is not otherwise made available for examination by the defendant?

BACKGROUND

The State charged Rozerick Mattox with first-degree reckless homicide for delivering heroin causing S.L.'s death. During a trial to the court, Waukesha County Associate Medical Examiner Dr. Zelda Okia testified regarding her autopsy of S.L. and determination as to the cause of S.L.'s death. Discussion regarding heroin as the cause began early in Okia's testimony.

State: Have you received specific training in the performance of an autopsy when a heroin overdose is suspected?

Okia: Yes, I have.

State: And have you done that on more than one occasion?

Okia: Yes, I have.

State: Can you estimate how many times?

Okia: I think we get maybe 30 a year, 30, 40.

State: Per year?

Okia: Per year, yeh.

Okia testified as to factors she relied upon in determining that S.L. died from a heroin overdose: (1) her examination of the body and (2) toxicology results from an out-of-state laboratory.

Okia: [A]s I began the autopsy, just looking at the body, I did note various needle puncture marks; and then as I performed the autopsy, some of the noteworthy findings that I listed [in the autopsy protocol admitted into evidence] during the autopsy was the pulmonary edema and the weight of the lungs was elevated, and that's a typical finding in drug overdoses.

Additionally ... cerebral edema, that's also swelling of the brain. That's also a very typical finding in drug overdoses and then also the toxicology results that came back from St. Louis University.

State: [A]re those items that you have used in the past and had received training on significant to heroin intoxication cases?

Okia: The autopsy findings and the toxicology results?

State: Yes.

Okia: Yes, that's correct.

....

State: And nothing else about your autopsy was remarkable as far as potential cause of death?

Okia: No.

Okia testified as to observing thirteen separate needle puncture marks in four "clumps" on the victim's arm and that there was hemorrhaging in each clump, indicating "it was a recent site of injection or puncture," "within maybe 24 hours." She discussed in detail why her autopsy findings of pulmonary edema and cerebral edema are common "in heroin intoxication" cases:

Morphine [which Okia previously explained comes from heroin but can also come from other substances] is what's described as a respiratory depressant. It acts on the receptors in the brain, and it actually slows breathing down; and because it's a depressant, the body would normally respond to low oxygen by causing you to breathe deeper, but because it, the drug, has that effect, the lungs don't respond, you don't breathe, and then because there's not enough oxygen, the heart slows down; and because the heart slows down, then the blood gets backed up, and that's when it—because it's in the lungs and it's meant to be free flowing in the blood vessels of the lungs so the oxygen exchange can occur by osmosis, the fluid that's in the blood vessels will come out into the air spaces, and it fills up the air space.

So, what normally would be full of air now is full of fluid, and that's what makes the lungs very heavy

The cerebral edema is also a response of the brain to the low oxygen levels, and it can only—the brain typically responds to any injury, and hypoxia is also considered an injury by swelling, so that’s what cerebral edema is. It’s a swelling of the brain. It’s due to the same thing. There’s—the blood isn’t moving, and then it goes into the—by osmosis, it will move from an area of high concentration to lower concentration, and it goes out into the tissues.

On cross-examination, Okia agreed that in her estimation “all 13 [of the puncture marks] had been used within 24 hours,” and “possibly even within 18 hours,” “to inject heroin,” and that it was “possible that the heroin could have been not just one injection but a cumulative effect of more than one injection.” She acknowledged that an overdose of “any opiate type of a drug” could also cause the “weight [of the] lungs being elevated,” “cerebral—swelling of the brain,” and “pulmonary edema.” Later, on redirect, Okia also acknowledged that just because there was hemorrhaging of the veins did not necessarily mean the victim had injected heroin.

During her direct examination, Okia further testified:

State: So, everything you observed at the autopsy was consistent with the factual evidence at the scene that heroin had been injected?

Okia: That’s correct.

The court sustained an objection to this testimony, absent the State laying a proper foundation. The State then laid the foundation that the factual evidence “at the scene” to which Okia was referring, i.e., where S.L. was found dead in his bedroom, came from the report of her colleague at the Waukesha county medical examiner’s office, Nichol Wayd, who had been at the scene with law enforcement shortly after S.L. was found dead. Wayd’s report indicates that at the scene she had observed that an officer present there suspected illegal drug use by the victim and that the bedroom contained

[n]eedled syringes ... in a bag on the floor and in a TIDE detergent container. An uncapped needled syringe In addition ... a clear baggy with white cotton balls, and a silver container were located on the chair near the decedent. More silver containers, a blue rubber band, green lighter, and a clear baggy of white cotton balls were located on the floor. A blue rubber band and yellow lighter were located on the mattress near the decedent. Detectives collected the drug paraphernalia.

....

Possible puncture marks were observed on the decedent's right forearm and right antecubital area.

Wayd's report further indicated that Wayd spoke at the scene with S.L.'s roommate, and the roommate indicated he "assumed [the victim] abused drugs due to his occasional 'grogginess.'" Okia reaffirmed in her testimony that "those scene findings were consistent with [her] autopsy findings."

Okia also testified regarding procedures for sending biological samples to a laboratory for testing.

State: [Y]ou're familiar with the procedure for collecting biological samples to be sent to the toxicology lab for analysis in an overdose situation?

Okia: Yes, I am.

State: Is there a set procedure that's recommended ... [o]r followed?

Okia: Yes. I obtain vitreous fluid from the eye. We sometimes will send that for toxicology. When we open the body, then I collect a urine specimen, if there's urine present. Then I also collect a blood sample from the iliac vein.

....

Okia: After we collect them, then they are sent to the toxicology lab....

State: Okay. Is there a certain toxicology lab that you routinely use?

Okia: Yes. We send them to St. Louis University.

Okia testified that the St. Louis University laboratory is accredited, has “a board certified toxicologist present that runs the lab,” and that the Waukesha county medical examiner’s office has been using that lab for several years and has found that the lab provides truthful and accurate results.

Okia testified that she relied in part on the toxicology report she received from the lab in making her ultimate determination that S.L. died of “acute heroin intoxication.” She testified that the results of the laboratory tests identified the presence of “6-MAM” in S.L.’s blood, which is “a breakdown of heroin” that is specific to heroin, indicating the morphine in S.L.’s blood “didn’t come from another substance or from morphine.” Based upon her training and experience, Okia also concluded that the level of morphine in S.L.’s blood, as shown in the report, was a “fatal level.” The substances identified by the report as being in S.L.’s system, and the levels at which they were found, confirmed for Okia that heroin, as opposed to some other opiate, caused S.L.’s death.

During Okia’s direct examination testimony, Mattox’s counsel timely objected on Confrontation Clause grounds to introduction of the toxicology report as well as Okia’s testimony based upon the report. Counsel specifically argued that the report and testimony based thereon were being introduced “for the truth of the matter asserted” and it violated Mattox’s right to confrontation that the author of the report was not there for Mattox’s counsel to confront. The trial court overruled the objection, stating that the report essentially contained “facts or data” “of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject.” The court added that the report was “not being offered to prove any element that’s at issue in this particular case in terms of

what substance was delivered.” The court received the toxicology report “for the limited purpose of being part of the basis upon which Dr. Okia rendered her opinions,” not “for example, to prove that any of the substances were, in fact, heroin.”

The trial court subsequently found Mattox guilty of first-degree reckless homicide by delivery of a Schedule I or II controlled substance. Mattox appeals, contending his Confrontation Clause rights were violated by the trial court admitting the toxicology report into evidence and permitting Okia to testify related to the findings in that report when Mattox had no opportunity to cross-examine the author—or anyone from the laboratory—regarding the report.

LEGAL CONFLICT

Certification of this case stems from significant tension between our recent decisions in *State v. Heine*, 2014 WI App 32, 354 Wis. 2d 1, 844 N.W.2d 409, and *State v. VanDyke*, 2015 WI App 30, 361 Wis. 2d 738, 863 N.W.2d 626—cases that bear substantial similarities to the present case—and decisions of the United States Supreme Court and our state supreme court. Unfortunately, neither *Heine* nor *VanDyke* was appealed to the supreme court. Adding yet a third court of appeals decision on facts similar to *Heine* and *VanDyke* would do little to clarify the law regarding the admission of toxicology reports and related

testimony; however, a supreme court decision could lay this issue to rest for the bench and bar.²

In both *Heine* and *VanDyke*, as in this case, the defendant was convicted at trial of reckless homicide related to the delivery of heroin. *VanDyke*, 361 Wis. 2d 738, ¶1; *Heine*, 354 Wis. 2d 1, ¶1. In all three cases, a medical examiner testified for the State regarding the autopsy the examiner performed on the victim and toxicology test results in a report from a laboratory identifying the substances found in the victim's system; the report itself was received into evidence; and no one who had direct involvement with the testing or analysis of the victim's specimens testified at the trial. See *VanDyke*, 361 Wis. 2d 738, ¶¶3, 8, 27; *Heine*, 354 Wis. 2d 1, ¶1.

In *Heine*, the circuit court received the toxicology report into evidence over Heine's objection, determining that the jury could give the report the weight it deemed appropriate. *Heine*, 354 Wis. 2d 1, ¶4. As we stated in our *Heine* decision, the medical examiner testified for the State that during his autopsy of the victim he observed

“four fresh punctures” in the front of the victim's elbow, as well as scarring from old punctures. He also found “white frothy foam” in the tube that had been used in an attempt to resuscitate the victim, that “the white frothy foam [went] all the way down deep into his airways, his trachea and his bronchi,” and that the victim's lungs were “full of fluid.”

² It is unknown why neither Heine in *State v. Heine*, 2014 WI App 32, 354 Wis. 2d 1, 844 N.W.2d 409, nor the State in *State v. VanDyke*, 2015 WI App 30, 361 Wis. 2d 738, 863 N.W.2d 626, petitioned our supreme court for review. However, if the supreme court does not accept this certification and the losing party in this appeal also declines to seek review by our supreme court, the court will again be deprived of the opportunity to weigh in on this important issue.

[The examiner] also told the jury that the victim had an inordinate amount of urine in his bladder.

Id., ¶6.

The examiner in *Heine* testified he had read the toxicology report and routinely relied on toxicology results to “complet[e] [his] final diagnosis,” and the report indicated a sample of the victim’s blood and/or urine revealed the presence of “quite a lot of morphine” and a “specific metabolite for heroin,” as well as “codeine, which is also a contaminant often used in heroin.” *Id.*, ¶7. The examiner opined that the laboratory findings were “very consistent with a heroin intoxication,” elaborating as to how heroin intoxication causes frothing and an accumulation of urine, with users who overdose “sustain[ing] dangerous anoxic brain injury” and ultimately respiratory failure. *Id.* Based upon his “physical examination” of the victim “combined with the toxicology results,” the examiner opined that the victim died of “acute heroin intoxication.”³ *Id.*

Heine focused his appeal on “the State’s burden to prove that the victim died from a heroin overdose, not that the heroin ingested by the victim was sold to him by Heine.” *Id.*, ¶2. Heine argued the trial court deprived him of his rights under the Confrontation Clause by receiving into evidence “a toxicology report, which analyzed blood and urine the [medical examiner] recovered from the victim’s body, without requiring the testimony of those involved in analyzing the specimens.”⁴ *Id.*, ¶1. We stated, “[s]ignificantly, the report, although it was

³ Heine did not object to the examiner’s opinion and did not challenge it on appeal. *Heine*, 354 Wis. 2d 1, ¶7.

⁴ “Three persons from the toxicology laboratory testified, none of whom had any hands-on testing duties.” *Heine*, 354 Wis. 2d 1, ¶3.

received into evidence, *was neither introduced nor received into evidence to trace or identify the specific heroin* the State said that Heine sold to the victim.” *Id.*, ¶¶1, 8. Citing the United States Supreme Court decisions in *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009), and *Bullcoming v. New Mexico*, 564 U.S. ___, 131 S. Ct. 2705 (2011), we acknowledged that “certifications by a laboratory of tests received as substantive evidence, or the testimony by someone who did not perform the tests received as substantive evidence may violate a defendant’s right to confrontation.” *Heine*, 354 Wis. 2d 1, ¶9. We then noted that the “confrontation issue was revisited in *Williams v. Illinois*, 567 U.S. ___, 132 S. Ct. 2221, 2239-40 ... (2012),

where the lead opinion on behalf of three other justices in support of the judgment determined that an expert could, under Rule 703 of the Federal Rules of Evidence, give an opinion based on a laboratory report even though neither the analysts nor the report’s author testified, and the report could be “disclosed” to the factfinder “to show that the expert’s reasoning was not illogical, and that the weight of the expert’s opinion does not depend on factual premises unsupported by other evidence in the record—not to prove the truth of the underlying facts.”

Heine, 354 Wis. 2d 1, ¶10 (quoting *Williams*, 132 S. Ct. at 2239-40 (plurality opinion)).

Although we at one point stated in *Heine*, “[a]ssuming without deciding that receipt of the toxicology report into evidence was error,” *see Heine*, 354 Wis. 2d 1, ¶14, we also stated:

It was perfectly reasonable and *consistent with* both WIS. STAT. RULE 907.03 and *Heine’s right to confront his accusers*, for [the examiner] *to take into account* the toxicology report in firming up his opinion as to why the victim died. Heine was fully able to confront [the examiner] and challenge his opinion and his supporting reasons.... *Heine was not deprived of his right to confrontation*, and the trial court’s receipt of the toxicology

report into evidence was harmless beyond a reasonable doubt because, as we have already noted, [the examiner] could have given his opinion exactly as he gave it without referring to the report.

Heine, 354 Wis. 2d 1, ¶15 (emphasis added). We further stated that the examiner’s testimony “that he regularly relied on toxicology results in forming his final opinion as to cause of death laid the proper foundation for him to have relied on the toxicology report irrespective of whether that report was admissible into evidence or disclosed to the jury,” *id.*, ¶14, and that “the physician [medical examiner] who performed the autopsy [and] testified at the trial ... could, consistent with *Heine’s* right of confrontation, rely on the report in giving his medical opinion that the victim died from a heroin overdose,” *id.*, ¶1 (emphasis added). We concluded that the medical examiner

was no mere conduit for the toxicology report; rather, he fully explained why *he*, based on his education and experience, honed in on heroin as the cause of the victim’s death: the fresh elbow punctures, the “white frothy foam” that extended “deep down into [the victim’s] airways, his trachea and his bronchi,” that the victim’s lungs were “full of fluid,” and the victim’s inordinate retention of urine.

Id., ¶15.

Just one year later, in *VanDyke*, we approached the confrontation issue from within the context of an ineffective assistance of counsel claim. *VanDyke*, 361 Wis. 2d 738, ¶¶1, 14. At VanDyke’s trial, the toxicology report, which was produced by an out-of-state laboratory,⁵ was introduced as an exhibit. *Id.*, ¶3. As in *Heine* and this case, neither the author of the report nor anyone

⁵ The report was from the same St. Louis University laboratory and was authored by the same nontestifying analyst as the toxicology report in the case now before us. See *VanDyke*, 361 Wis. 2d 738, ¶4.

from the laboratory testified; however, a medical examiner testified regarding the autopsy he performed on the victim as well as the toxicology results. *VanDyke*, 361 Wis. 2d 738, ¶¶3, 8.

The examiner first testified as to his external examination of the victim, including that he found one puncture wound on each arm. *Id.*, ¶5. The examiner was “fairly confident that the puncture wound to the right arm ... is from medical intervention,” but could not say if the wound to the left arm was also from such intervention or was from intravenous drug use. *Id.* The examiner noted from his internal examination

the lungs were heavy, a condition we call pulmonary edema. That’s a ... nonspecific condition in which the air sacs of the lungs fill up with water and it can be found in a lot of different things including medication toxicities, drug toxicities. It can also be found in heart failure and things of that nature.

The brain was a bit swollen which suggested to me it was deprived of oxygen for a period of time and then as a result of the insult to the brain, it swelled up. It took on extra water in other words.

Beyond that there was [sic] no traumatic injuries. There was no other disease stance that was found so I found some supportive evidence on internal examination that supported the cause of death but nothing additional.

Id., ¶6.

Referring to the toxicology results, the examiner testified that numerous drugs were found in the victim’s system, but based upon the levels of each, he concluded the sole cause of death was heroin toxicity. *Id.*, ¶7. The examiner testified he based his conclusion upon the high concentration of morphine in the blood along with the presence of the heroin metabolite 6-MAM in the victim’s urine. *Id.* The examiner stated: “But without any question that morphine is an

extremely high level and so that’s why I came to the conclusion I did that this was a death from opiate toxicity or heroin toxicity.” *Id.* The examiner also testified that he chose the laboratory he did to do the testing because, among other reasons, the lab director was “very experienced” and was “board-certified in forensic toxicology,” and the lab worked cooperatively in getting the examiner results on cases. *Id.*, ¶8. The examiner acknowledged he did not find a cause of death from the autopsy so he waited to see the toxicology report to make his determination as to the cause of death. *Id.*, ¶9.

Postconviction, VanDyke challenged the effectiveness of his trial counsel due to counsel’s failure to object to the introduction of the toxicology report. *Id.*, ¶¶10, 14. Considering VanDyke’s challenge, we noted that at the *Machner*⁶ hearing, VanDyke’s trial counsel “recognized that the State relied on the toxicology report ‘for the purpose of establishing an element of the crime,’ namely that [the victim] ‘had died of a heroin overdose.’” *VanDyke*, 361 Wis. 2d 738, ¶11. Again considering *Melendez-Diaz* and *Bullcoming*, we concluded, contrary to the State’s contention, that the toxicology report containing the victim’s blood and urine test results was testimonial, and therefore subject to the Confrontation Clause. *VanDyke*, 361 Wis. 2d 738, ¶¶16-19.⁷

⁶ *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

⁷ We can see no meaningful difference between the toxicology report admitted into evidence in this case and that admitted in *VanDyke*; thus, based upon *VanDyke*, it would seem the report in this case is similarly testimonial. Since trial counsel failed to object to the admission of the report in *VanDyke*, it appears there was no occasion for the trial court to comment on whether it considered the report to be admitted for the truth of matters asserted therein or solely for the purpose of showing that there was a basis for the medical examiner’s opinions. See *VanDyke*, 361 Wis. 2d 738, ¶¶10-11.

The State in *VanDyke* argued that it should prevail due to our decision in *Heine*. *VanDyke*, 361 Wis. 2d 738, ¶20. While recognizing several similarities between the two cases, we pointed out in *VanDyke* that “the medical examiner in *Heine* did not rely *entirely* on the laboratory results to determine the cause of death” and further noted our observation in *Heine* that the medical examiner in that case “honed in on heroin as the cause of the victim’s death” based upon the examiner’s own education and experience and his personal examination of the deceased. *VanDyke*, 361 Wis. 2d 738, ¶¶21-22 (emphasis added). The State further argued in *VanDyke* that the testimony of the medical examiner in that case was similar to the testimony of the examiner in *Heine* and that the medical examiner in *VanDyke* determined the victim died of a heroin overdose independently from the toxicology report. *VanDyke*, 361 Wis. 2d 738, ¶23. We disagreed, responding in *VanDyke*: “the State’s characterizations of the facts have no basis.” *Id.*, ¶24. We added that the autopsy examination did not lead the examiner in that case to the victim’s cause of death, noting:

[C]ause remained undetermined following the autopsy. While a few of [the examiner’s] examination findings were consistent with the later-determined cause of death, he testified the pulmonary edema was a nonspecific condition that could occur from “a lot of different things.” Further, of the mere two punctures on [the victim’s] arm, [the examiner] was confident one was from medical intervention, and he had no opinion whether the other was from illicit drug use or medical intervention. Importantly, [the examiner] never testified he believed, prior to his review of the toxicology report, that heroin toxicity caused [the victim’s] death. It cannot reasonably be argued that [the examiner’s] cause-of-death opinion was made independently of the toxicology report.

Id. We added:

The toxicology report directly proved [the victim’s] “use,” and was the conclusive basis of [the examiner’s] cause-of-death opinion. Yet, *VanDyke* was afforded no opportunity

to cross-examine anyone from the laboratory, much less someone involved in the testing or the person who signed off on the official report. This violated VanDyke's constitutional rights to confrontation. Further, because [the examiner] served as a mere conduit for the toxicology report and was unable to offer an independent cause-of-death opinion, the violation was prejudicial.

Id., ¶25.

In both *Heine* and *VanDyke*, we appeared to indicate that if a medical examiner, based upon his/her personal experience and direct observations, strongly suspects—without the assistance of a confirming toxicology report—the victim died of a heroin overdose, it would not matter as far as a defendant's Confrontation Clause rights are concerned that the report served as a partial confirming basis for the examiner's final cause-of-death determination, despite the defendant not being afforded an opportunity to cross-examine the author of the report or an appropriate person from the laboratory. *See VanDyke*, 361 Wis. 2d 738, ¶25; *Heine*, 354 Wis. 2d 1, ¶15. If, however, a report “directly proved [a victim's] ‘use,’ and was the conclusive basis of [the examiner's] cause-of-death opinion,” despite physical findings of the examiner consistent with the cause of death, then a defendant *would have* the Confrontation Clause right to cross-examine the author of the report or an appropriate person from the laboratory. *See VanDyke*, 361 Wis. 2d 738, ¶25; *see also Heine*, 354 Wis. 2d 1, ¶¶9, 15. Especially considering we concluded in *VanDyke* that the toxicology report was “testimonial,” we do not see how the extent to which the examiner relied upon the report for his/her ultimate cause-of-death opinion controls whether a defendant has a Confrontation Clause right to cross-examine the author of the report, or an appropriate person from the laboratory, regarding the findings in the report. Significantly, such a position would appear to be at odds with the United States Supreme Court's holdings in *Melendez-Diaz* and *Bullcoming*, and our supreme

court's recent holding in *State v. Griep*, 2015 WI 40, 361 Wis. 2d 657, 863 N.W.2d 567, *cert. denied*, *Griep v. Wisconsin*, No. 15-126, 2016 WL 100365 (U.S. Jan. 11, 2016).

In *Melendez-Diaz*, the Supreme Court concluded that analysts' affidavits admitted into evidence at trial and containing the results of forensic analysis showing that a substance connected to the defendant was cocaine "were testimonial statements, and the analysts were 'witnesses' for purposes of the Sixth Amendment." *Melendez-Diaz*, 557 U.S. at 307, 311. The Court held that "[a]bsent a showing that the analysts were unavailable to testify at trial *and* that petitioner had a prior opportunity to cross-examine them, petitioner was entitled to 'be confronted with' the analysts at trial." *Id.* The Court rebuffed Massachusetts' argument (similar to an argument made by the State in this case) "that the analysts are not subject to confrontation because they are not 'accusatory' witnesses, in that they do not directly accuse petitioner of wrongdoing; rather, their testimony is inculpatory only when taken together with other evidence linking petitioner to the contraband." *Id.* at 313. The Court stated: "This finds no support in the text of the Sixth Amendment or in our case law." *Id.*

The Court also rejected the state's claims "that there is a difference, for Confrontation Clause purposes, between testimony recounting historical events, which is 'prone to distortion or manipulation,' and the testimony at issue here, which is the 'resul[t] of neutral, scientific testing'" and "[r]elatedly, ... that confrontation of forensic analysts would be of little value because 'one would not reasonably expect a laboratory professional ... to feel quite differently about the results of his scientific test by having to look at the defendant.'" *Id.* at 317 (citation omitted). In rejecting these arguments, the Court reiterated its response to a similar argument made in *Crawford v. Washington*, 541 U.S. 36 (2004): "To

be sure, the Clause’s ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.” *Melendez-Diaz*, 557 U.S. at 317 (quoting *Crawford*, 541 U.S. at 61). The *Melendez-Diaz* Court added, “the Constitution guarantees one way [to challenge or verify the results of a forensic test]: confrontation.” *Id.* at 318. “[T]here is little reason to believe that confrontation will be useless in testing analysts’ honesty, proficiency, and methodology—the features that are commonly the focus in the cross-examination of experts.” *Id.* at 321.

In *Bullcoming*, the Court considered whether the Confrontation Clause allows the government “to introduce a forensic laboratory report . . . , made in order to prove a fact at a criminal trial, through the in-court testimony of an analyst who did not sign the certification or personally perform or observe the performance of the test reported in the certification.” *Bullcoming*, 131 S. Ct. at 2713. The report showed Bullcoming’s blood-alcohol concentration to be well above the threshold for aggravated operating while intoxicated. *Id.* at 2709. The Court ultimately found insufficient New Mexico’s attempt to introduce the report not through the analyst who signed the certification but instead through another analyst from the lab who was familiar with the testing procedures at the lab. *Id.* at 2710. The Court held: “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.” *Id.* at 2713. The Court pointed out that in *Melendez-Diaz* it “refused to create a ‘forensic evidence’ exception to this rule.” *Bullcoming*, 131 S. Ct. at 2713.

In rejecting the New Mexico Supreme Court’s decision to allow admission of the certification into evidence through a surrogate witness from the lab, *id.* at 2712-15, the ***Bullcoming*** Court analogized:

Suppose a police report recorded an objective fact—Bullcoming’s counsel posited 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.”

Id. at 2714-15. The Court added:

[T]he comparative reliability of an analyst’s testimonial report drawn from machine-produced data does not overcome the Sixth Amendment bar. This Court settled in ***Crawford*** that the “obviou[s] reliab[ility]” of a testimonial statement does not dispense with the Confrontation Clause.... Accordingly, *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 Theresa.”

Bullcoming, 131 S. Ct. at 2715 (emphasis added; citations omitted). “[S]urrogate testimony ... could not convey what [the analyst who performed the analysis] knew or observed about the events his certification concerned, i.e., the particular test and testing process he employed.” *Id.* “In short, when the State elected to introduce [the] certification [of the analyst who performed the analysis], [that analyst] became a witness Bullcoming had the right to confront. Our precedent cannot sensibly be read any other way.” *Id.* at 2716.

Unfortunately, our supreme court’s recent decision in ***Griep*** does not clear up conflicts between our decisions in ***Heine*** and ***VanDyke*** and those of the Supreme Court in ***Melendez-Diaz*** and ***Bullcoming***. In ***Griep***, our supreme court

considered whether the defendant's confrontation rights were violated when the state's expert witness, the chief of the toxicology section of the Wisconsin State Laboratory, provided testimony establishing the defendant's BAC while operating a motor vehicle where the testimony was based in part on forensic tests conducted by an analyst from the lab who was unavailable for trial. *Griep*, 361 Wis. 2d 657, ¶¶2-3, 8, 10. The section chief had testified at trial that

he had reviewed [the analyst's] work and examined the data produced by [the analyst's] testing, specifically the chromatograms, as well as other records associated with the tests [the analyst] performed. [The section chief] said that he was familiar with the process of obtaining blood samples for ethanol testing, shipping them to the laboratory, processing them for analysis, and the analysis of the samples.

Id., ¶10. The section chief testified that after reviewing and considering all of the available data, he came to the independent conclusion as to the defendant's BAC level, and he further testified it appeared the analyst had followed laboratory procedures and the machines were working properly. *Id.*, ¶11. The court stated "when a non-testifying analyst documents the original tests 'with sufficient detail for another expert to understand, interpret, and evaluate the results,' that expert's testimony does not violate the Confrontation Clause." *Id.*, ¶40 (citations omitted). The court concluded that the testifying expert's "review of Griep's laboratory file, including the forensic test results of [the unavailable analyst], to form an independent opinion to which he testified did not violate Griep's right of confrontation." *Id.*, ¶3. The court added that

[i]t is significant that the laboratory file included not only [the analyst's] report but also raw data, gas chromatograms. This provided "adequate detail for an expert to do his own analysis and reach his own conclusions." In this case, "the expert is exercising a degree of independent judgment using his own substantive expertise rather than relying entirely on the expertise of others."

Id., ¶45, n.21 (citations omitted). The court pointed out that the section chief had reviewed “the chromatograms and the paperwork associated with the whole analytical run” the analyst had previously done, just as a peer reviewer would do. *Id.*, ¶50.

The case before us differs in significant respects from *Griep* in that Okia did not testify about reviewing the St. Louis University laboratory file, raw data or procedures for the lab, but rather appears to have relied on the expertise of analysts at the lab and the final test results obtained from the work of others at that lab, which results identified the presence of morphine and 6-MAM in S.L.’s system. The morphine and 6-MAM test results served as part of the basis for Okia’s ultimate opinion that S.L. died from a heroin overdose. While Okia gave her independent opinion regarding cause of death based upon the autopsy she personally performed, the report of her colleague, and the results from the St. Louis University lab, nothing in the record suggests she was a witness capable of answering questions regarding the testing or analysis that resulted in the report identifying in S.L.’s blood the high level of morphine and presence of 6-MAM. As to the results of the testing identified in the toxicology report, Okia’s testimony appears to have provided “merely a recitation of another’s conclusion.” *See id.*, ¶55 (“[*State v.*] *Williams*[], 2002 WI 58, 253 Wis. 2d 99, 644 N.W.2d 919,] and [*State v.*] *Barton*[], 2006 WI App 18, 289 Wis. 2d 206, 709 N.W.2d 93 (2005),] conclude that an expert witness need not have personal knowledge of the forensic tests, *as long as* the witness’s opinion is reached independently and is not merely a recitation of another’s conclusions.” (emphasis added)). Okia herself was only in a position to, and did, simply assume that those results were correct. This appears, however, to also have been the case with the testifying medical examiners in *Heine* and *VanDyke*; yet *Heine* suggests there was no Confrontation Clause

problem with the medical examiner's testimony relying upon the lab results, and *VanDyke* seems to affirm that view, so long as there is enough other evidence from which an examiner could, independently, strongly suspect heroin overdose as the cause of death. Our view of the Confrontation Clause, as expressed in *Heine* and *VanDyke*, appears to be in conflict with the view of the Supreme Court as expressed in *Melendez-Diaz* and *Bullcoming*.

An additional question of import here is whether the report in this case, as in similar cases, and the testimony of the medical examiner based upon the report, truly were admitted “for the limited purpose of being part of the basis upon which Dr. Okia rendered her opinions,” as the trial court stated, and not for the “truth” of the findings in the report. Okia opined that she relied upon the findings in the toxicology report as a factor she considered in her ultimate cause-of-death determination. She testified that the report showed morphine in the victim's system at a “fatal level.” She further essentially opined that the report finding of “6-MAM” in S.L.'s blood was conclusive for her that heroin was the opiate causing the physical manifestations she observed at the autopsy. Does a defendant not have a Confrontation Clause right to test those findings by cross-examining either the author of those findings or an appropriate person from the laboratory? See *Williams*, 132 S. Ct. at 2268-69 (Kagan, J., dissenting) (disputing the plurality's assertion that the State's expert witness's testimony disclosing underlying facts from a DNA report was admitted not for its truth but to merely show a basis for the expert's opinion, and stating “admission of the out-of-court statement in this context has no purpose separate from its truth; the factfinder can do nothing with it *except* assess its truth and so the credibility of the conclusion it serves to buttress”); see also *Griep*, 361 Wis. 2d 657, ¶¶40, 45-47, 55-56 (holding that it does not violate the Confrontation Clause for an expert to testify to the

results of tests performed by a nontestifying analyst “when [the] non-testifying analyst documents the original tests ‘with sufficient detail for [the testifying] expert to understand, interpret, and evaluate the results’”) (citation omitted). Does a defendant have a Confrontation Clause right to cross-examine an analyst who provides facts and data introduced at trial and relied upon by a medical examiner for a cause of death opinion only if the examiner relies on the facts and data to a significant extent (*VanDyke*) but not if an examiner relies on the facts and data to a more modest extent (*Heine*)? Does a defendant not have a Confrontation Clause right to test the reliability of the facts and data a medical examiner is relying upon, at least in part, as being true and accurate?

Because of the significant issues identified herein, and the fact they will recur in many future cases, we respectfully urge the Wisconsin Supreme Court to accept certification of this appeal, so as to provide a clear, definitive and controlling ruling for our state with regard to the above issues.

