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.

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