STATE OF WISCONSIN

IN SUPREME COURT

No. 2009AP3073-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MICHAEL R. GRIEP,

Defendant-Appellant-Petitioner.

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

BRIEF OF PLAINTIFF-RESPONDENT

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

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

SUPPLEMENTAL STATEMENT OF THE CASE AND FACTS

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

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

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

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

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

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

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

This court then granted Griep's petition for review.

SUMMARY OF ARGUMENT

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

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

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

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

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

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

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

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

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

STANDARD OF REVIEW

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

ARGUMENT

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

A. Legal principles.

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

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

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

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

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

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

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

Id. ¶ 20.

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

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

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

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

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

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

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

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

Id. ¶ 20 (citation omitted).

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

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

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

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

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

> The question presented is whether the Confrontation Clause permits the prosecution to introduce a forensic laboratory report containing a testimonial certification—made for the purpose of proving a particular fact—through the in-court testimony of a scientist who did not sign the certification or perform or observe the test reported in the certification.

Id. at 2710.

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

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

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

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

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

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

In *Deadwiller*, this court applied *Williams v. Illinois* in deciding a "factually similar" case. *Deadwiller*, 350 Wis. 2d 138, ¶ 21. This court noted that "'When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'" *Id.* ¶ 30 (citing *Marks v. United States*, 430 U.S. 188, 193 (1977)). The court also noted that "If no theoretical overlap exists between the rationales employed by the plurality and the concurrence, 'the only binding aspect of the fragmented decision . . . is its "specific result."'" *Id.* (quoting *Berwind Corp. v. Comm'r of Soc. Sec.*, 307 F.3d 222, 234 (3d Cir. 2002)).

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

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

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

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

Id.

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

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

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

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

The following exchange then occurred between the prosecutor and Harding:

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

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

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

A Yes.

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

A Yes.

Q And what is that opinion?

[DEFENSE COUNSEL]: And same objection.

[THE COURT]: It will be noted.

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

Q And that is your independent opinion?

A Yes.

(38:30-31.)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Maxwell, 724 F.3d at 727.

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

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

Id.

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

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

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

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

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

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

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

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

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

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

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

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

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

But that is not the question the Supreme Court addressed and answered in *Bullcoming*. The Court defined the issue as "whether the Confrontation Clause permits the prosecution to introduce a forensic laboratory report containing a testimonial certification—made for the purpose of proving a particular fact—through the in-court testimony of a scientist who did not sign the certification or perform or observe the test reported in the certification." *Bullcoming*, 131 S. Ct. at 2710.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Id. at 675-76.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

Dated this 17th day of October, 2014.

Respectfully submitted,

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CERTIFICATION

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

Dated this 17th day of October, 2014.

_____
Michael C. Sanders
Assistant Attorney General

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I hereby certify that:

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

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

Dated this 17th day of October, 2014.

_____
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