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STATE OF WISCONSIN

IN SUPREME COURT

Appeal No. 2009AP3073 –CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MICHAEL R. GRIEP,

Defendant-Appellant-Petitioner.

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

REPLY BRIEF
OF DEFENDANT-APPELLANT-PETITIONER.

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ARGUMENT

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

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

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

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

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

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

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

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

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

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

(30:34-35).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II. Griep Has Consistently Presented This Issue

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

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

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

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

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

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

CONCLUSION

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

Respectfully submitted this 3rd day of November, 2014.

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CERTIFICATION AS TO FORM AND LENGTH

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

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