STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2009AP003073-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MICHAEL R. GRIEP,

Defendant-Appellant-Petitioner.

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

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AMICUS CURIAE BRIEF OF WISCONSIN STATE PUBLIC DEFENDER

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INTRODUCTION

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

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the case on which ***Barton*** heavily relied, ***State v. Williams***, 2002 WI 58, 253 Wis. 2d 99, 644 N.W.2d 919—are no longer valid in light of the U.S. Supreme Court decisions issued since ***Barton*** that address confrontation of expert evidence under ***Crawford v. Washington***, 541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

ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

Dated this 7th day of November, 2014.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

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

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after 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 7th day of November, 2014.

Signed:

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