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STATE OF WISCONSIN  
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DISTRICT II

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STATE OF WISCONSIN,  
Plaintiff-Respondent,

Case No. 2009AP003073 –CR

v.

MICHAEL GRIEP,  
Defendant-Appellant.

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BRIEF & APPENDIX OF PLAINTIFF-RESPONDENT

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ON NOTICE OF APPEAL FROM THE JUDGMENT OF CONVICTION  
ENTERED JULY 29, 2009 IN THE  
WINNEBAGO COUNTY CIRCUIT COURT  
THE HONORABLE THOMAS GRITTON, PRESIDING

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## **I. Statement of Issue Presented for Review**

Whether the trial court erred in admitting blood alcohol opinion testimony of a hygiene lab supervisor, using data gathered by a different non-testifying hygiene lab employee, in an operating while intoxicated trial.

The trial court ruled it should admit the independent expert testimony of a hygiene lab supervisor and such evidence did not violate the defendant's confrontation clause rights.

## **II. Statement on Oral Argument and Publication**

As a single judge will decide this appeal, the State is requesting neither publication nor oral argument. Wis. Stat. § 809.23(1)(b)4.

## **III. Statement of the Case**

On August 25, 2007, Village of Winneconne Police Officer Ben Sauriol stopped Mr. Griep for speeding. R (Record) 38:P (Page) 7, A (Appendix) 19. Sauriol noticed Mr. Griep had been drinking, and had Mr. Griep undertake several field sobriety tests. R38:PP9-15, A21-27. After the field sobriety tests, Officer Sauriol arrested Mr. Griep for OWI, and took him to Aurora Medical Center in Oshkosh for a forensic blood draw. R38:PP15-16, A27-28.

The blood was submitted to the Wisconsin State Hygiene Lab for analysis. R38:P17, A29. Diane Kalscheur, an analyst at the State Hygiene Lab, analyzed the blood drawn from Mr. Griep. Her report indicated the blood had an alcohol concentration of 0.152g/ethanol/100mL/blood. R2:P6.

Diane Kalscheur was out on leave on the date of the trial, and did not testify at the court trial. R19. Rather, her supervisor, Patrick Harding, testified to his independent opinion of Mr. Griep's blood alcohol concentration using data Ms. Kalscheur created. R38:P31, A43.

After the Court trial, Mr. Griep was found guilty of both Operating while Intoxicated and Operating with a Prohibited Alcohol Concentration. R39:PP18-19, A30-31..

#### **IV. Argument**

Mr. Griep's sole claim of error on review is that Mr. Harding's testimony violated Mr. Griep's sixth amendment confrontation right. 12 Br. of Def.-App. State and Federal law are clear that a "defendant's confrontation right is satisfied if a qualified expert testifies as to his or her independent opinion [on lab results], even if the opinion is based in part on the work of another." *State v. Barton*, 2006 WI App 18, ¶20. Because Mr.

Harding was available for cross-examination, and because it was Mr. Harding's qualified independent opinion of Mr. Griep's blood alcohol level that inculpated Mr. Griep, there was no violation of Mr. Griep's confrontation right.

The line of authority that leads to the trial court's result in Mr. Griep's case begins with *State v. Williams*, 253 Wis. 2d 99 (2002). In *Williams*, the Supreme Court held that a crime lab unit leader could testify that a given substance was cocaine, even though she did not conduct the original analysis. The Court held:

[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. Given [the unit leader's] qualifications and experience, her close connections to the tests and procedures implicating Williams, and her expert opinion that the tested substance contained cocaine, we determine that the admission of her testimony did not violate Williams' right to confrontation.

*Williams*, at ¶114.

In 2004, the United States Supreme Court decided *Crawford v. Washington*, 541 US 36 (2004). *Crawford* held that testimonial statements of a witness could not be admitted against a defendant unless the witness was present and the defendant had the ability to cross-examine the witness. *Crawford*, 541 US at 54.

In 2006, the Wisconsin Court of Appeals addressed the issue of whether the *Williams* rule comported with *Crawford*'s reanimation of confrontation clause jurisprudence. *State v. Barton*, 2006 WI App 18 affirmed the *Williams* rule, holding: "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."

Three weeks before the Court trial in Mr. Griep's case, the US Supreme Court released *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527 (2009). *Melendez-Diaz* held that the defendant's confrontation rights were violated by a Massachusetts statutory scheme allowing notarized lab reports identifying a substance as cocaine to be admitted without any witness. *Melendez-Diaz*, 129 S. Ct. at 2532.

Unlike Mr. Melendez-Diaz, Mr. Griep had a full opportunity to cross examine the evidence against him, and there was no confrontation violation. In *Melendez-Diaz*, the defendant could not cross-examine a witness because there was no witness produced. Rather, a notarized lab report was the incriminating evidence, which violated the defendant's confrontation clause rights. In contrast, in the trial of this matter, Mr. Harding testified only to his own opinion of Mr. Griep's blood alcohol level, and was vigorously cross-examined about that opinion and the reasons for it. R38:PP31-52, A43-64.

When deciding guilt in this case, the trial court detailed Mr. Harding's qualifications, the procedures used in this case, Mr. Harding's familiarity with the hygiene lab processes, and found that the testimony was properly admitted under *Williams*. R39:P5, A85. The Court found there was nothing about *Melendez-Diaz* that barred the evidence as it was developed in Mr. Griep's case – an independent opinion by a qualified expert. R39:P6, A86.

The trial court found Mr. Harding credible and his testimony believable, and used the Court's weight of Mr. Harding's opinion to find the defendant guilty. The Court observed: "[A]nytime anyone testifies,



weight is always an issue, and I am satisfied based on everything that I have heard here that I believe the testimony of Mr. Hardy [sic] in that his opinion is based upon things that he normally would rely upon to reach his opinion; and as a result, I accept his belief that the alcohol concentration was more than .08[.]” R39:P19, A99. The trial court did not refer to Ms. Kalscheur’s opinion to find Mr. Griep guilty – it was Mr. Harding’s testimony that swayed the Court.

There were of course two counts tried to the court – operating while intoxicated in violation of Wis. Stat. § 346.63(1)(a), and operating with a prohibited alcohol concentration in violation of Wis. Stat. § 346.63(1)(b). The State believes that the blood result was integral to the trial court’s guilt finding on each count. Accordingly, the State believes that if this reviewing court finds the blood opinion evidence was admitted in error, such a decision would impact the guilt finding on both counts, not just the prohibited alcohol concentration count. *See* R39:P19, A99.

## **V. Conclusion**

For the reasons set forth above, the trial court did not err in admitting Patrick Harding’s qualified independent opinion of the blood result in this case.

Dated at Oshkosh, Wisconsin this \_\_\_\_ day of August, 2010.

By: \_\_\_\_\_  
Adam J. Levin  
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Winnebago County, Wisconsin  
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## CERTIFICATIONS

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 1134 words.

I further certify pursuant to Wis. Stat. § 809.19(b)(12)(f) that the text of the electronic copy of the brief is identical to the text of the paper copy of the brief, *other than the appendix material is not included in the electronic version.*

I further certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19(2)(a) and that contains, at a minimum: (1) a table of contents, (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written findings or decision showing the circuit court's reasoning regarding these issues.

I further certify that if this appeal is taken from a circuit court order of judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of person, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

I further certify that on the date of signature I routed the enclosed briefs to our office station for first class US Mail Postage to be affixed and mailed to:

**Clerk's Office**  
**Wisconsin Court of Appeals**  
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Dated this \_\_\_ day of August, 2010 at Oshkosh, Wisconsin by:

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## **APPENDIX**

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