STATE OF WISCONSIN
COURT OF APPEALS

DISTRICT II

Appeal No. 2009 AP 003073 CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MICHAEL R. GRIEP,

Defendant-Appellant.

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

SUPPLEMENTAL BRIEF AND APPENDIX OF DEFENDANT-APPELLANT, MICHAEL R. GRIEP

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ISSUE PRESENTED FOR REVIEW

Whether Michael Griep's Sixth Amendment Confrontation Clause rights were violated when a blood-alcohol analyst was permitted to testify at trial regarding the out-of-court statements of a non-testifying analyst.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Given recent United States Supreme Court case precedent on this issue and the need for clarity on this particular point of law, Defendant-Appellant requests oral argument and publication.

STATEMENT OF THE CASE

Michael Griep was arrested under suspicion of Operating While Intoxicated on August 25, 2007 (38:7-15). Griep consented to providing a blood sample, which was analyzed by Wisconsin State Laboratory of Hygiene Analyst Diane Kalscheur (38:17). In her report dated August 31, 2007, Analyst Kalscheur reported receiving Griep's labeled and sealed blood sample (A-AP 102). Kalscheur further reported that Griep's blood was tested for ethanol, and that testing revealed a certain ethanol concentration (A-AP 102). The report regarding Kalscheur's observations about Griep's blood and the testing performed were certified as true and correct by Laboratory of Hygiene Chemist, Thomas Ecker (A-AP 102). Both Kalscheur and Ecker signed multiple sections of the report and associated documentation (A-AP 102-06, 134-35).

At Griep's bench trial, Analyst Kalscheur was not available to testify regarding her test or report (38:5-6). Her supervisor, Patrick Harding, was called in her stead to testify that Mr. Griep's blood contained a prohibited ethanol concentration (A-AP 142-47; 38:26-31). Harding had never

observed Griep's blood samples, the testing of Griep's blood samples, or any part of Kalscheur's analysis (A-AP 162-63; 38:46-47). He was unable to answer questions about the integrity of the samples or the testing process in Griep's case (A-AP 162-63; 38:46-47). Harding nonetheless testified that Griep's blood contained a prohibited ethanol concentration (A-AP 147; 38:31). He based his testimony on Kalscheur's statements in her report and the supporting data she produced, relying in particular on Kalscheur's statements that the blood was tested for ethanol and that the blood came from Griep (A-AP 143-44, 146; 38:27-28, 30). The written report itself was never admitted (A-AP 177; 39:5). Defense counsel objected to admission of Harding's testimony regarding the substance of the report on Confrontation Clause grounds, but the objection was overruled (A-AP 144-46, 178-79; 38:28-30; 39:6-7).

Griep was convicted of both Operating While Intoxicated and Operating with a Prohibited Alcohol Concentration on July 28, 2009. The Court stated that its decision was based at least in part on Harding's testimony (A-AP 190-91; 39:18-19).

ARGUMENT

When the State seeks to admit the substance of a certified, out-of-court forensic report against the defendant, the State must allow the defendant to confront the author of the report at trial. Such certified statements, made specifically to build the State's case against a targeted suspect, have triggered the defendant's Confrontation Clause rights since the U.S. Supreme Court decided *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). Although the scope of the statements subject to confrontation has evolved somewhat since *Crawford*, subsequent case law has made clear that such formalized declarations amount to testimony against the defendant and

therefore exemplify the class of statements that triggers the defendant's right to confrontation under the Sixth Amendment, and Article I, §7 of the Wisconsin Constitution.

The certified statements in Analyst Kalscheur's report regarding the source of the blood and the testing performed were improperly admitted in violation of the Confrontation Clause specifically because they were: 1) testimonial, and 2) introduced for the truth of the matter asserted. Under *Crawford*, the Confrontation Clause specifically prohibits out-of-court testimonial statements introduced to establish the truth of the matter asserted unless the witness appears at trial or the defendant had a prior opportunity for cross-examination. 541 U.S. at 53-54, 59-60, n.9 (citing *Tennessee v. Street*, 471 U.S. 409, 105 S. Ct. 2078, 85 L. Ed.2d 425 (1985)). Here, Griep was improperly denied his right to such confrontation when the contents of a testimonial out-of-court ethanol report were introduced through a surrogate witness with no personal knowledge as to the substance or creation of its contents. This violation of a bedrock Constitutional right is not harmless error and requires this Court to overturn Griep's conviction.

The question of whether the admission of evidence violates a defendant's right to confrontation is a question of law subject to *de novo* review. *State v. Ballos*, 230 Wis. 2d 495, 504, 602 N.W.2d 117 (Ct. App. 1999).

A. The Kalscheur Report Was Certified As a Solemn Declaration of Fact and Was Therefore Testimonial.

In *Crawford*, the United States Supreme Court did not precisely define testimonial statements but provided that the "core class of testimonial statements" includes affidavits, formalized statements, and functional equivalents of live testimony meant to establish some fact. 541 U.S. at 51-52.

The Court further stated in *Davis v. Washington*, that statements are more likely to be testimonial when the primary purpose of the statement is to establish or prove past events potentially relevant to later criminal prosecution. 547 U.S. 813, 822, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006) ("[Statements] are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.").

Since *Crawford* and *Davis*, the U.S. Supreme Court has addressed the application of the Confrontation Clause to forensic testimony in a series of cases. *See Williams v. Illinois*, 132 S. Ct. 2221, 183 L. Ed.2d 89 (2012); *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 180 L. Ed. 2d 610 (2011); *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009). Each of these cases assessed whether admission of a forensic analyst's out-of-court statements ranked as testimonial and whether the defendant had a right to confront the analyst about these statements at trial.

Melendez-Diaz and *Bullcoming* both held that the admission of a written forensic lab report used against the defendant violated the Confrontation Clause when the author of the report was not available at trial. *Melendez-Diaz*, 557 U.S. at 329; *Bullcoming*, 131 S. Ct. at 2713, 2717. In *Melendez-Diaz*, the lab report was improperly admitted at trial without any analyst present to testify. 557 U.S. at 309. In *Bullcoming*, the report was improperly admitted through the testimony of a surrogate analyst from the same lab who did not observe the testing conducted. 131 S. Ct. at 2713. The Court held that the live testimony of the authoring analyst was required for admission of the reports. *Melendez-Diaz*, 557 U.S. at 329; *Bullcoming*, 131 S. Ct. at 2713.

In *Williams v. Illinois*, the Supreme Court subsequently addressed the question of how the Confrontation Clause applies to cases in which an analyst purports to offer expert *opinion* testimony regarding the report of a non-testifying analyst when the written report itself is not admitted into evidence. 132 S. Ct. 2221. In *Williams*, the State introduced testimony from a state forensic analyst regarding DNA testing performed on crime scene evidence by a non-testifying analyst at an out-of-state private lab, Cellmark Diagnostics. 132 S. Ct. at 2229-30. There, the state analyst testified that she compared the DNA profile developed by the non-testifying out-of-state analyst with the profile of the defendant developed by the in-state lab and concluded the two profiles matched. *Id.* This live testimony was permitted at trial—as it was here—as expert opinion. *Id.* at 2230-31. A four-member plurality in *Williams*, along with Justice Thomas who concurred in the judgment only, decided that the portions of the Cellmark report referenced by the testifying state analyst were not subject to the Confrontation Clause. The Court was sharply split, however, as to rationale.

In his concurrence in *Williams v. Illinois*, Justice Thomas agreed with the plurality that the Cellmark report was not subject to the Confrontation Clause, but reached this conclusion on far narrower grounds, noting that the form of the Cellmark report was not sufficiently solemn or formalized to qualify as a testimonial statement. 132 S. Ct. at 2259-60 (Thomas, J., concurring). In particular, Thomas noted that the report was not sworn or certified. *Id.* at 2260 (Thomas, J., concurring). This lack of certification was critical as it distinguished the Cellmark report from statements held to be testimonial in earlier cases such as *Bullcoming* and *Melendez-Diaz*. *Id.* (noting that what distinguishes the report in *Bullcoming* from the Cellmark report is that ". . . Cellmark's report, in substance, certifies nothing.").

Here, like in *Williams*, the out-of-court statements reported by Analyst Kalscheur were admitted by the court. Unlike in *Williams*, however, the statements made in the report were certified, formalized statements and thus clearly testimonial. The statements made in the Kalscheur report fall into the core class of testimonial statements considered in *Crawford* and *Davis*, and further meet the narrower holding of Justice Thomas in *Williams* regarding the admission statements made in certified forensic reports.

Justice Thomas's concurrence in *Williams* controls as to what constitutes a testimonial forensic report because he concurred in the judgment on narrower grounds than the four-member plurality. *See* Jeffrey Fisher, *The holdings and implications of Williams v. Illinois*, SCOTUSblog (Jun. 20, 2012), http://www.scotusblog.com/2012/06/the-holdings-and-implications-of-williams-v-illinois/ (noting the importance of Justice Thomas's opinion). "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 . . . .'" *Marks v. United States*, 430 U.S. 188, 97 S. Ct. 990, 51 L. Ed. 2d 260 (1977) (quoted source omitted, ellipses by *Marks*). In *Williams*, the four-member plurality opined there was no Confrontation Clause violation because the Cellmark report was not testimonial and because the substance of it was not offered for its truth. 132 S. Ct. at 2228. Justice Thomas, in contrast, found no violation simply because the report was not testimonial. 132 S. Ct. at 2259-60 (Thomas, J., concurring).

This court correctly noted that it is bound by *Williams*'s narrowest rationale in *State v. Deadwiller,* 2012 WI App 89, ¶14, 343 Wis. 2d 703, 820 N.W.2d 149 (finding that they must look to "the narrowest holding") (citing *Marks*). *Deadwiller* involved facts similar to those in *Williams*, wherein a state DNA analyst testified as to

information contained in a report created by an out-of-state analyst. In *Deadwiller*, however, the court misapplied *Marks* when it incorrectly determined that the narrowest holding in *Williams* was that "the [DNA] technician's reliance on the outside laboratory report's did not violate Williams's right to confrontation because the report was not 'testimonial' and therefore did not implicate the Confrontation Clause." *Id.* This analysis failed to address Justice Thomas' more narrow discussion of the presence or absence of certification on the report, the intended purpose of the report when it was authored, or other factors that courts must consider when determining the testimonial nature of a statement. *Id.* at ¶¶12-14. Such examination is required under the narrowest holding in *Williams* as well as preceding Supreme Court case law. Although the *Williams* court permitted the contents of the report in that case, it is insufficient to conclude that all outside lab reports relied on by testifying experts are nontestimonial. Indeed, *all nine* justices in *Williams* agreed on one key point: to determine whether a lab report is testimonial, a court must consider the specifics of the report. *See, e.g.*, 132 S. Ct. at 2243-44 (Alito, J., plurality), 2259-60 (Thomas, J., concurring), 2273 (Kagan, J., dissenting).

In short, Thomas' concurrence is not only the narrowest grounds supporting the judgment in *Williams*; it is also the opinion most consistent with the majority opinions in *Bullcoming* and *Melendez-Diaz*. In *Bullcoming*, the Court found the non-testifying analyst's report to be testimonial because it contained a "Certificate of Analyst" describing the condition of the samples upon arrival and the testing process employed by the analyst. 131 S. Ct. at 2717. *Bullcoming* noted that this certificate was similar to the analyst's affidavit erroneously admitted in *Melendez-Diaz* because both bore formalities that brought them into the core class of testimonial statements as defined in *Crawford*. *Id.*

The same formalities are present in this case. Here, Analyst Kalscheur reported receiving and testing Griep's labeled and sealed blood sample for ethanol in a signed and certified report (A-AP 102). Kalscheur further reported that the testing revealed a certain ethanol concentration (A-AP 102). Unlike the report in *Williams*, all of these statements were certified as true as true and correct by Laboratory of Hygiene Chemist, Thomas Ecker (A-AP 102). Indeed, both Kalscheur and Ecker signed multiple sections of the report and associated documentation (A-AP 102-06, 134-35). The creation of these reports—made solely for the purposes of prosecution—as well as their subsequent certification place the statements clearly within the class of testimonial statements requiring confrontation in *Crawford* and its progeny. As in *Bullcoming*, the certification signifies that the report is the functional equivalent of live testimony that is subject to the right of confrontation. *Compare* A-AP 102 *with Bullcoming*, 131 S. Ct. at 2717.

Looking past Thomas' concurrence, the Kalscheur report is also testimonial under the test proposed by the *Williams* plurality. Although its opinion does not control, the plurality opined that a report cannot be testimonial if it was not prepared for the primary purpose of accusing a targeted individual. *Williams*, 132 S. Ct. at 2243. This opinion, consistent in some ways with the primary-purpose test in *Davis*, 547 U.S. at 822, also supports the conclusion that the Kalscheur report was testimonial. The Kalscheur report was prepared after Griep was arrested, and was authored for the purpose of providing evidence against Griep at trial (*see* A-AP 143-44; 38:27-28). Thus, the Kalscheur report is testimonial under all tests proposed by the justices in *Williams* and should have been subject to confrontation.

B. The Substance of the Kalscheur Report Was Offered for Truth of the Matter Asserted.

Here, the substance of the Kalscheur report was introduced to establish Griep's blood alcohol content and thus went directly to the truth of the matter asserted. The United States Supreme Court similarly found that the substance of a report admitted through a surrogate witness was offered for its truth and required confrontation.

In *Williams*, five justices—the four dissenters and Justice Thomas—explicitly found that the substance of the Cellmark report as introduced through the surrogate witness was offered for the truth of the matter asserted. 132 S. Ct. at 2256 (Thomas, J., concurring) (". . . there was no plausible reason for the introduction of Cellmark's statements other than to establish their truth."); 132 S. Ct. at 2268 (Kagan, J., dissenting) ("But five justices agree. . . Lambatos's statements about Cellmark's report went to its truth, and the State could not rely on her status as an expert to circumvent the Confrontation Clause's requirements.") This finding is consistent with earlier cases finding that lab reports introduced as part of the State's evidence against a defendant clearly contained statements introduced for the truth of the matter asserted. *Melendez-Diaz*, 557 U.S. at 311; *Bullcoming*, 131 S. Ct. at 2712; *see* Fisher, *supra* (noting that *Williams* now prohibits introduction of testimonial statements through forensic experts because such statements are introduced for their truth).

Consequently, 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. Both

Barton and *State v. Williams* allowed such statements to be admitted to explain the basis of the expert's opinion under Wis. Stat. § 907.03, and *Barton* cited cases from other states holding that such statements are not admitted for their truth. *Williams*, 2002 WI 58, ¶¶26-28; Barton, 2006 WI App 18, ¶¶20-22. This rationale is no longer permissible under *Williams v. Illinois*.

Indeed, U.S. Supreme Court cases addressing forensic reports directly contradict the reasoning applied in these Wisconsin cases. In *State v. Williams* and *Barton,* Wisconsin courts upheld admission of the statements in part because the testifying analysts performed a review of the non-testifying analyst's work and were not simply parroting the opinion of another. *Williams*, 2002 WI 58, ¶25; *Barton*, 2006 WI App 18, ¶¶16. Such review is inconsequential. Under *Williams v. Illinois*, when a forensic expert relates any out-of-court statements provided by another analyst—including foundational statements about the source of the samples tested and the type of testing conducted—those statements are introduced for their truth and are subject to the Confrontation Clause if testimonial. *See* 132 S. Ct. at 2258 (J. Thomas, concurring) (noting the expert's opinion would have had no relevance unless the fact-finder accepted as true the statements in the report that the sample came from the victim and that testing generated a certain DNA profile).

The substance of the blood-alcohol report in Griep's case—in particular the statements that the blood samples arrived at the lab sealed and labeled with Griep's name, and that ethanol testing produced a certain result—were obviously introduced for their truth. (A-AP 144, 146-47; 38:28, 30-31). Here, like in *Williams v. Illinois*, there is no other possible explanation for introducing the substance of the report—the results of Griep's blood ethanol analysis—other than to establish their truth: that the test result was above the legal limit. As in *Williams v. Illinois,* the testimony of the expert

would have been irrelevant if these statements had not been accepted as true. Indeed, the entirety of surrogate-analyst Harding's testimony presumed that the samples Kalscheur received were labeled as Griep's blood, and that she analyzed these same samples for ethanol. All of Harding's testimony relied on the truth of the matter asserted in the report.

This is not the same as a case in which an expert is presented a hypothetical scenario and thus forms an opinion based upon those hypothetical facts; the basis of Harding's testimony—the Kalscheur report—was introduced as a fact and was relied upon as true in Harding's testimony. Further, Harding's retrospective review of Kalscheur's work in no way diminishes the fact that Kalscheur's statements regarding Griep's sample were introduced for their truth. For all these reasons, the statements were offered for the truth of the matter asserted and required confrontation of an analyst who had the personal knowledge to testify and be confronted about the information contained within the report.

C. Cross-Examination of the Surrogate Analyst, Patrick Harding, Did Not Satisfy Griep's Right to Confront the Authors of the Kalscheur Report.

Despite Harding's knowledge about blood-alcohol testing generally, cross-examination of a surrogate analyst does not satisfy the Confrontation Clause. The United States Supreme Court has repeatedly held that the importance of the confrontation of witnesses cannot be trivialized. In *Crawford*, this Court rejected the theory that unconfronted testimony was admissible as long as it appeared reliable. 541 U.S. at 61-62. *Melendez-Diaz* further emphasized that analysts who prepare forensic reports are subject to confrontation, and that a court's assessment of whether the report is reliable is irrelevant to that issue. 129 S. Ct. at 2537. Most recently, in *Williams v. Illinois*, Justice Thomas highlighted the importance of "the Confrontation Clause's

protection in cases where experts convey the contents of solemn, formalized statements to explain the bases for their opinions. These are the very cases in which the accused *should* 'enjoy the right . . . to be confronted with the witnesses against him.'" 132 S. Ct. at 2264 (Thomas, J., concurring) (emphasis in original; source of internal quotation omitted).

Here, the solemnized reports created by Kalscheur, describing the source of the blood samples and the analysis conducted, were conveyed to the factfinder without any opportunity to cross-examine anyone who knew how that evidence was created. Such confrontation is compelled under *Williams, Bullcoming* and *Melendez-Diaz*, however, as it is essential to effective functioning of the adversary process, particularly in cases that involve scientific testimony that can only be validated by the individual who performed the tests. Although modern forensic analysis has tremendous capacity to reveal truth and bring perpetrators to justice, its reliability is still subject to the problems of human error and misconduct that beset all forensic sciences. *See* National Research Council on the National Academies, *Strengthening Forensic Science in the United States: A Path Forward*, 185 (National Academies Press 2009), *available at http://books.nap.edu/catalog.php?record_id=12589.*

The trial courts' supposition that Harding was closely enough related to Kalscheur's analysis to testify about her report is mistaken (A-AP 176; 39:4). Forensic reports, including those created after blood testing, are the product of multistage analyses and can reflect complicated and subjective interpretations made by the performing analyst. It is not enough to say that an analyst with training can understand the steps that were taken: to satisfy an accused's confrontation rights, meaningful cross-examination must include the ability to ask the analyst about what was *actually* done during the process and whether all diligent care was

taken to establish reliable results. While a surrogate can testify to proper procedure, he is entirely incompetent to speak to implementation of that procedure in a particular case, or to the truth of a testimonial forensic report.

In this case, Harding was unable to testify about issues important to revealing any potential error or fraud on the part of Kalscheur. Although Harding was qualified to testify about testing generally, (*see* A-AP 142-43; 38:26-27), he had no personal knowledge to testify as to what had happened during testing *in this case*:

> Q: You don't have any personal knowledge as to whether or not this sample was clotted, do you?
>
> A: I did not observe the sample.
>
> Q: You don't have any personal knowledge as to whether this sample had a foul smell when it was opened, do you?
>
> A: No, I don't.
>
> Q: And you don't have any personal knowledge as to whether when this sample was opened there was a pop or a noise on the vial which would indicate there was a vacuum still in the tube, do you?
>
> A: I did not open the sample. I did not observe it.

(A-AP 150-51; 38:34-35.)

Harding also lacked personal knowledge of how and when Kalscheur handled the samples, checked the labels on the vials containing the samples, operated the testing machine and recorded her results (A-AP 150-67; 38:34-51). He was therefore unable to be crossed on any of these issues, thus depriving Griep the opportunity to challenge the reliability the testimonial evidence against him.

These reliability concerns are not unfounded. Raw data in toxicological analyses are the products of human effort and are not infallible. Before raw data are generated, the analyst must perform several tasks to prepare the sample and testing equipment. The process, called pre-analysis, is not automatic and requires diligence and judgment to be performed properly. *See* Rolf E. Aderjan, 6 *Handbook of Analytical Separations: Aspects of Quality Assurance in Forensic Toxicology* 773-75 (Elsevier B.V. 2008) (hereinafter "ABFT Lab Manual"). Human errors in pre-analysis can cause the testing machine to generate false or misleading data, which in turn result in erroneous reports.

The American Board of Forensic Toxicologists (ABFT) recognizes the potential for mistakes in pre-analysis and it requires that accredited labs implement special procedures to minimize such mistakes and to ensure the integrity of the sample. *See* ABFT Lab Manual. According to the ABFT lab accreditation manual, the toxicologist should begin the process of pre-analysis by checking a wide range of factors, including but not limited to: the external packaging of the vial that contains the blood sample; the vacuum seal on the vial; whether the vial contains anticoagulants and proper preservatives; the expiration date on the vial; the time that passed between collection of the sample and analysis; whether the sample was properly refrigerated prior to analysis; whether the sample appears decomposed; and the sample weight or volume. *See, e.g.,* ABFT Lab Manual at 10-12. Vial manufacturers warn that imperfect seals, expired or improper vials, improper refrigeration or extended storage prior to analysis can indicate the sample was not properly preserved and could generate a false result if tested. *See, e.g.,* Becton, Dickinson & Co., *Vacutainer Product FAQs, Venous Blood Collection,* http://www.bd.com/vacutainer/faqs/; Harald Schütz et al., *Pitfalls of Toxicological Analysis*, 5 Legal Medicine 6 (2003). Here, Griep's trial attorney

attempted to question Harding about these pivotal steps in analysis, to no avail. Because he had not observed or conducted the testing, Harding could provide no answers to any the questions presented to him. This does not satisfy Griep's right to confrontation.

Similarly, it is not enough for a surrogate witness to simply state that lab technicians follow protocols. We cannot know if those protocols were appropriately followed in Griep's case without testimony from an analyst who conducted or observed the test—surrogate testimony will not reveal this information on cross-examination. This deficiency was demonstrated at Griep's trial. When cross-examined as to whether or not Kalscheur followed the appropriate lab protocols, Harding was again unable to answer:

> Q: You don't have any personal knowledge as to whether Ms. Kalscheur did any of these things, correct?
>
> A: I did not observe her. I did not observe the samples.
>
> Q: So you don't have any personal knowledge as to whether she did these things or not?
>
> A: That's correct.

(A-AP 162; 38:46.)

Scientific literature demonstrates that the gas chromatograph machines used for blood-alcohol analysis are not self-operating and self-correcting creatures. *See, e.g.,* ABFT Lab Manual. They require properly trained, diligent operators to work properly and to generate accurate results. Any errors the analyst makes in pre-analysis or in operation of the machine can cause the machine to generate false data. Unless the data are so false as to appear ridiculous on their face, any colleague who reviews the data may fail to recognize the possibility of error. Because of this,

confrontation and cross-examination are vital to evaluating the reliability of forensic evidence.

Indeed, certain reported cases have demonstrated that a capable defense attorney, through confrontation of the analyst, can expose false forensic data or conclusions. In *State v. Bedford*, 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*, 191 S.W.3d 569 (Ky. 2006), a bullet-lead composition analyst conceded during cross-examination that she had lied in earlier statements. 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. Many more examples undoubtedly exist, but have gone unreported because such cross-examination resulted in acquittal.

Here again, Griep attempted to challenge the substance of the Kalscheur report to ensure that no such problematic analysis had occurred. Because Harding was not the analyst who performed or observed the testing, Griep was unable to cross-examine him regarding any potential bias, error or malfeasance during the processing of Griep's sample. Griep was also unable to question Kalscheur regarding her competence, honesty and experience. Harding himself acknowledged that without questioning the performing analyst under oath, an accused cannot know any short cuts or mistakes she may try to cover up in her report.

Q: And I guess that was my question. If the analyst wanted to do something nefarious, they could, right?

A: Sure.

Q: And that would escape - - that could possibly escape your detection when you review the written reports and materials that you have reviewed, correct?

A: Sure. If I didn't know what went on in the laboratory at all and no other people were in the laboratory, sure someone could possibly do that.

(A-AP 163; 38:47.)

In short, the use of Harding's surrogate testimony allowed the prosecution to bypass confrontation in a manner wholly inconsistent with our adversarial system. *See Barefoot v. Estelle,* 463 U.S. 880, 899, 103 S. Ct. 3383, 77 L. Ed. 2d 1090 (1983) (our "adversary system" is designed to permit the factfinder to "uncover, recognize and take due account" of the "shortcomings" of expert evidence) (abrogated on other grounds); *see also Daubert v. Merrell Dow Pharm., Inc.,* 509 U.S. 579, 596, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993) (endorsing "[v]igorous cross-examination" as a means of attacking scientific evidence). No one, not even the courts, may supersede the Confrontation Clause based upon their own judgment of reliability. *Crawford,* 541 U.S. at 36 ("The Constitution prescribes a procedure for determining the reliability of testimony in criminal trials, and we, no less than the state courts, lack authority to replace it with one of our own devising.") Yet, the trial court's determination that the Kalscheur report was reliable because Harding deemed it reliable did just that—it permitted the testifying analyst's judgment to supplant adversarial testing of the evidence. Thus, the trial court erroneously permitted Harding to usurp the role of factfinder in deciding whether the evidence was trustworthy; upon receiving Kalscheur's analysis and basing

his opinion upon its unconfronted results, he decided what evidence was and was not true.

As established above, the Kalscheur report was testimonial and its substance—specifically that the blood sample came from Griep, and that testing revealed a certain ethanol concentration—was admitted through Harding for its truth. Absent confrontation of Kalscheur or the chemist Ecker who certified the report as true and correct, such admission was error and denied Griep his Sixth Amendment right to confrontation.

D. The Trial Court's Error in Admitting Testimonial Statements Absent Confrontation Was Not Harmless.

The admission of the substance of Kalscheur's report in violation of Griep's constitutional rights constitutes error that prejudiced his case. An error is not harmless if there is a reasonable possibility that the error contributed to the conviction. *State v. Jackson*, 216 Wis. 2d 646, 668, 575 N.W.2d 475 (1998). A reasonable possibility is a possibility sufficient to undermine our confidence in the conviction. *State v. Grant*, 139 Wis. 2d 45, 51, 406 N.W.2d 744 (1987).

In an OWI case, a blood-alcohol report is typically an important piece of evidence, and this case is no different. The trial court noted in its decision that Griep was cooperative with police, which was uncharacteristic of a highly intoxicated driver (A-AP 189; 39:17). The court similarly noted that although Griep failed field sobriety tests, those failures were not egregious (A-AP 189-90; 39:17-18). Instead, the court highlighted that it could find guilt based *on the blood test alone* and devoted considerable attention to the testimony presented regarding the blood draw, testing procedures, the blood-alcohol result, and the testimony of the surrogate analyst, Harding. (A-AP 190-91; 39:18-19). In the

end, the court found Griep guilty based on all the circumstances and testimony, including the improperly admitted testimonial statements regarding the blood analysis (A-AP 191; 39:19). Because the trial court's analysis was inextricably linked to the results of the blood tests, the improper admission of those testimonial statements cannot be deemed harmless.

Had the trial court properly suppressed the testimonial statements in the Kalscheur report that named Griep as the source of the blood samples and noted the results of the testing conducted, it would have had no choice but to exclude Harding's expert testimony as irrelevant. Given the little weight the court gave to the field-sobriety evidence, there is a reasonable probability that Griep would not have been convicted had the substance of the testimonial report been excluded. For all these reasons, Griep is entitled to a new trial.

CONCLUSION

The United States Supreme Court has consistently held that out-of-court testimonial statements offered for the truth of the matter asserted require confrontation. In the case of forensic reports, such confrontation can only come through cross-examination of the performing analyst. Testimony of surrogate analyst cannot satisfy the Confrontation Clause in relation to certified forensic reports. For the above reasons, and for the reasons previously set forth, Griep is entitled to a new trial as admission of the Kalscheur report violated his constitutional right to confrontation.

Respectfully submitted this 21st day of November, 2012.

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CERTIFICATION AS TO FORM

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of the brief is 5,399 words.

Tricia J. Bushnell

ELECTRONIC CERTIFICATION

I hereby certify that the text of the electronic copy of this brief is identical to the text of the amended paper copy of the brief.

Tricia J. Bushnell