STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2009AP3073-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MICHAEL R. GRIEP,

Defendant-Appellant.

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

SUPPLEMENTAL BRIEF OF PLAINTIFF-RESPONDENT

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The plaintiff-respondent, State of Wisconsin, requests neither oral argument nor publication.

SUPPLEMENTAL STATEMENT OF THE CASE AND FACTS

The defendant-appellant, Michael R. Griep, appeals a judgment convicting him of operating a motor vehicle while under the influence of an intoxicant (OWI) (22).

Griep was charged with OWI and operating a motor vehicle with a prohibited alcohol concentration (PAC), for an incident occurring August 25, 2007 (2; 38:7-8). Village of Winneconne police officer Ben Sauriol testified that he observed a vehicle traveling at 38 to 40 miles per hour in a 25 mile per hour zone (38:7). He stopped the vehicle, and determined that Griep was the driver (38:8).

Officer Sauriol noticed an odor of alcohol and asked Griep if he had been drinking (38:9). Griep said he had approximately two beers (38:9). Officer Sauriol asked Griep to perform field sobriety tests, and Griep agreed to do so (38:9). Officer Sauriol testified that he conducted the horizontal gaze nystagmus test, and detected six out of six possible clues, indicating likely alcohol impairment (38:10). He then had Griep perform the walk-and-turn test, and he detected three or four clues (38:10-13). He testified that two clues indicate that a person has failed the test (38:13). Officer Sauriol testified that he then administered the one-leg stand test (38:13-14). He detected two clues, meaning that Griep failed the test (38:14-15).

Officer Sauriol testified that he told Griep that it appeared he had consumed more than two beers (38:15). He asked Griep again how much he had to drink, and Griep said he had approximately three to four beers (38:15).

Officer Sauriol administered a preliminary breath test, and then arrested Griep for OWI (38:15). Officer Sauriol took Griep to the hospital (38:15-16). He testified that he read the informing the accused form to Griep, and

requested a blood test, but that Griep refused (38:16). Griep's blood was drawn (38:17-18), and a test on the blood sample revealed a blood alcohol concentration of 0.152 grams of ethanol per 100 milliliters of blood (2:6; 38:31).

Griep was charged with OWI and PAC (2:1-2). He was tried to the court, the Honorable Thomas J. Gritton (38). At trial, the only witnesses were 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 (38:2). At trial, Griep objected to Harding's giving of an expert opinion as to the alcohol concentration in Griep's blood, as evidenced by the blood test (38:28, 31). Griep argued that the testimony violated the Confrontation Clause because Harding did not personally test the blood (38:28, 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). The lab report that included the test result was not admitted into evidence (*see* 39:5).

The court concluded that Harding's testimony did not violate the Confrontation Clause because Harding gave an opinion, and Griep had an opportunity to confront him (39:3-7). The court then found Griep guilty of both OWI and PAC, and entered judgment of conviction on the OWI charge (39:19; 22).

Griep now appeals the judgment of conviction.

ARGUMENT

THE CIRCUIT COURT CORRECTLY CONCLUDED THAT ADMISSION OF HARDING'S TESTIMONY DID NOT VIOLATE GRIEP'S RIGHT TO CONFRONTATION.

A. Introduction.

Griep asserts that "[t]he 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" (Griep Br. at 3). He argues that he was denied the right to 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" (Griep Br. at 3).

Griep relies on the United States Supreme Court's decision in *Williams v. Illinois*, 132 S.Ct. 2221 (2012). He asserts that the Supreme Court's decision in *Williams* overruled *State v. Williams*, 2002 WI 58, 253 Wis. 2d 99, 644 N.W.2d 919, and *State v. Barton*, 2006 WI App 18, 289 Wis. 2d 206, 709 N.W.2d 93, "to the extent that those case allowed the admission of out-of-court testimonial statements through expert testimony" (Griep Br. at 9).

The State maintains that *State v. Williams* governs this case, and that neither it nor *State v. Barton* was overruled by the Supreme Court's decision in *Illinois v. Williams*. The circuit court relied on *State v. Williams*, and State maintains that the court was correct in doing so, and that under *State v. Williams*, Griep's right to confrontation was not violated in this case.

B. Confrontation Clause law.

1. *State v. Williams* and *State v. Barton*.

In *State v. Williams*, 2002 WI 58, 253 Wis. 2d 99, 644 N.W.2d 919, 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.

The Wisconsin Supreme 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 looked to cases from other jurisdictions, which it summarized as follows: "In each case, the testifying expert was highly qualified and had a close connection with the testing in the case such that the expert's presence at trial satisfied the defendant's rights to confront and cross-examine." *Id.* ¶ 11. The court specifically approved the result and reasoning in *State v. Kennedy*, 7 S.W.3d 58 (Tenn. Ct. App. 1999), in which the testifying witness had '"checked the computations of the technician and verified that the technician would have followed the standard laboratory procedures."' *See Williams*, 253 Wis. 2d 99, ¶ 12.

The *Williams* 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. 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 applicable legal standard as follows:

> [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.

Two years after *Williams*, the United States Supreme Court decided *Crawford v. Washington*, 541 U.S. 36 (2004), which reinvigorated the restrictions on the admissibility of hearsay evidence imposed by the Confrontation Clause of the Sixth Amendment. In *Barton*, 289 Wis. 2d 206, ¶ 17, this court ruled that *Crawford* did not overrule *Williams* in any way.

> The holding in *Crawford* does not undermine our supreme court's decision in *Williams*. *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).

2. *Melendez-Diaz* and *Bullcoming*.

After *Barton*, the United States Supreme Court decided *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527 (2009), 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 v. New Mexico, 131 S.Ct. 2705, 2709 (2011) (citing *Melendez-Diaz*, 129 S.Ct. 2527).

In 2011, the United States Supreme Court again dealt with the admission of a laboratory report, in *Bullcoming*, 131 S.Ct. 2705. The Court set forth the issue in *Bullcoming* as follows:

> 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 a concurring opinion, Justice Sotomayor explained the limited nature of the Court's opinion, noting that the following circumstances were not presented in *Bullcoming*: (1) the testimonial status of a report for which an alternate primary purpose is identified by the State; (2) testimony by "a supervisor, reviewer, or someone else with a personal, albeit limited, connection to the scientific test at issue"; (3) expert testimony in which the expert is "asked for his independent opinion about underlying testimonial reports that were not themselves admitted into evidence"; and (4) "machine-generated results, such as a printout from a gas chromatograph." *Id.* at 2721-23 (Sotomayor, J., concurring). Because, as Justice Sotomayor explained, these issues were not presented in *Bullcoming*, they were not decided by the Court.

3. *Williams v. Illinois*.

The most recent Supreme Court case applying the Confrontation Clause was *Williams v. Illinois*, 132 S.Ct. 2221 (2012). In *Williams*, the Supreme 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. 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).

The defendant in *Williams* was convicted of numerous violent felonies based (in part) on his nonconsensual vaginal penetration of the victim L.J. *Id.* at 2229, 2231 (Alito, J.). After the assault, L.J. contacted the police and was taken to the hospital for examination. A rape kit, including L.J.'s vaginal swabs, was prepared and sent to the Illinois State Police Crime Lab. *Id.* at 2229. The Crime Lab sent L.J.'s samples to Cellmark Diagnostic Laboratories in Germantown, Maryland for DNA testing. Cellmark "sent back a report containing a male DNA profile produced from semen taken from those swabs." *Id.* Illinois forensic analyst Sandra Lambatos entered "the Cellmark profile [into] the state DNA database." *Id.* It matched Williams' DNA profile, which had been developed by Illinois forensic analyst Karen Abbinanti. *Id.* Williams had not previously been a suspect. *Id.*

Abbinanti and Lambatos both testified at Williams' trial. Abbinanti testified that she had developed Williams' DNA profile and entered it into the database. *Id.* Lambatos, testifying as an expert witness in "forensic DNA analysis," explained that "[i]n making a comparison between two DNA profiles, it is a 'commonly accepted' practice within the scientific community for 'one DNA expert to rely on the records of another.'" *Id.* at 2229-30. Accordingly, her own "testimony relied on the DNA profile produced by Cellmark." *Id.* at 2230. Lambatos did not develop any of the relevant DNA profiles. It is unclear to what extent Lambatos personally reviewed

Cellmark's work. *Id.* at 2230. However, "she had not seen any of the calibrations or work that Cellmark had done in deducing a male DNA profile from the vaginal swabs." *Id.* Cellmark's report was not admitted into evidence. *Id.*

Williams objected on Confrontation Clause grounds. The trial court found that Lambatos' testimony "was 'based on her own independent testing of the data received from [Cellmark].'" *Id.* at 2231. The court held that any questions about the foundational facts underlying Lambatos' expert opinion went to the evidentiary weight, not the constitutional admissibility, of her testimony. *Id.* The Illinois Court of Appeals affirmed, stating that the Cellmark report did not violate the Confrontation Clause because it was "not offered into evidence to prove the truth of the matter asserted." *Id.* The Illinois Supreme Court affirmed on the same grounds, noting that "the report was not used to establish its truth, but only 'to show the underlying facts and data Lambatos used before rendering an expert opinion.'" *Id.* at 2232 (quoting *State v. Williams*, 939 N.E.2d 268, 279 (Ill. 2010)).

Justice Alito, and the three justices who joined his opinion, affirmed on two grounds. First, they concluded that the Confrontation Clause was not implicated by Lambatos' testimony because any explicit or implicit reference she made to Cellmark's report was not offered for the truth of the matter asserted and was therefore not hearsay. Second, they concluded that Cellmark's report was not testimonial.

Justice Alito prefaced his not-offered-for-the-truth-of-the-matter-asserted analysis by noting that "[i]t has long been accepted that an expert witness may voice an opinion based on facts concerning the events at issue in a particular case even if the expert lacks first-hand knowledge of those facts." *Id.* at 2233. "[S]uch reliance does not constitute admissible evidence of this underlying information." *Id.* at 2234. This is important because "the Confrontation Clause 'does not bar the use of testimonial

statements for purposes other than establishing the truth of the matter asserted.'" *Id.* at 2235 (quoting *Crawford*, 541 U.S. at 59-60 n.9). In other words, the Confrontation Clause only bars the use of unconfronted hearsay.

Justice Alito identified the following excerpt from Lambatos' testimony as the focal point of the Confrontation Clause challenge:

> "Q Was there a computer match generated of the male DNA profile found in semen from the vaginal swabs of [L.J.] to a male DNA profile that had been identified as having originated form Sandy Williams"
>
> "A Yes, there was."

Williams, 132 S.Ct. at 2236 (Alito, J.) (citations omitted). Justice Alito observed that "the putatively offending phrase" did not purport to prove the truth of the matter asserted, i.e., that the DNA profile developed by Cellmark was in fact derived from semen contained on L.J.'s vaginal swabs. "Rather, that fact was a mere premise of the prosecutor's question, and Lambatos simply assumed that premise to be true when she gave her answer indicating that there was a match between the two DNA profiles." *Id.* That the DNA profile was actually derived from L.J.'s vaginal swabs was a foundational fact established by "ordinary chain-of-custody evidence," not by Lambatos' testimony. *Id.* at 2237 n.6.

Fundamentally, Justice Alito explained, the "truth" of Lambatos' testimony did not depend on the "truth" of her underlying assumptions. *Id.* She testified that the two DNA profiles matched. The correctness of that opinion did not depend on the source of the DNA profiles. But that doesn't mean that the source of the profiles didn't matter. "Lambatos' opinion would have lacked probative value if the prosecution had not introduced other evidence to establish the provenance of the profiles, but that has nothing to do with the truth of her testimony." *Id.* And nothing to do with the Confrontation Clause.

Justice Alito's second rationale was that if the Cellmark report had been introduced for its truth, its admission would not have violated the Confrontation Clause because the report was non-testimonial. He acknowledged that the forensic reports in *Melendez-Diaz*, 557 U.S. 305, and *Bullcoming*, 131 S.Ct. 2705, "qualified as testimonial statements." *Williams*, 132 S.Ct. at 2243 (Alito, J.). However, not "all forensic reports fall into the same category." *Id.* The Confrontation Clause bars the use of unconfronted "out-of-court statements having the primary purpose of accusing a targeted individual," and/or "formalized statements such as affidavits, depositions, prior testimony, or confessions." *Id.* at 2242. The *Melendez-Diaz* and *Bullcoming* reports "ran afoul of the Confrontation Clause because they were the equivalent of affidavits made for the purpose of proving the guilt of a particular criminal defendant at trial." *Id.* at 2243.

In his concurring opinion, Justice Thomas agreed that "the disclosure of Cellmark's out-of-court statements through the expert testimony of Sandra Lambatos did not violate the Confrontation Clause." *Williams*, 132 S.Ct. at 2255 (Thomas, J., concurring). However, he rejected Justice Alito's reasoning. First, he found that "there was no plausible reason for the introduction of Cellmark's statements other than to establish their truth." *Id.* at 2256. Second, he found that the "primary purpose test" enunciated by Justice Alito was unprecedented and illogical. *Id.* at 2262.

Although Justice Thomas did not subscribe to Justice Alito's primary-purpose analysis, he too found that the Cellmark report was non-testimonial:

> Cellmark's report is not a statement by a "witnes[s]" within the meaning of the Confrontation Clause. The Cellmark report lacks the solemnity of an affidavit or deposition, for it is neither a sworn nor a certified declaration of fact…. And, although the report was produced at the request of law enforcement, it was not the product of any sort of formalized dialogue resembling custodial interrogation.

Id. at 2260.

Justice Kagan dissented, in an opinion joined by three other justices. The dissent:

> agreed with Justice Thomas that the outside laboratory's report was used at the trial for its truth, but disagreed with the five justices concurring in ***Williams***'s judgment that this did not violate the defendant's right to confrontation. Thus, Justice Kagan pointed out that the Illinois DNA technician "informed the trier of fact that the testing of [the victim]'s vaginal swabs had produced a male DNA profile implicating Williams," and that this thus "went to its truth.

State v. Deadwiller, 2012 WI App 89, ¶ 11, 343 Wis. 2d 703, 820 N.W.2d 149 (review granted) (citing *Williams*, 132 S.Ct. at 2268-72 (Kagan, J., dissenting)). Justice Kagan "opined that this violated the defendant's right of confrontation because the defendant could not test by cross-examination the verity of the outside laboratory's conclusions." *Id.* (citing *Williams*, 132 S.Ct. at 2268-72 (Kagan, J., dissenting)).

> 4. As this court concluded in *State v. Deadwiller*, the judgment in *Williams v. Illinois* is the controlling opinion in the case.

In *Deadwiller*, the Wisconsin Court of Appeals addressed the meaning of the fragmented *Williams* decision. The court stated:

> We need not parse in any great detail the philosophical underpinnings of the various opinions in ***Williams*** because although they disagreed as to their rationale, five justices agreed at the core that the outside laboratory's report was not testimonial. This conclusion governs this case, and we do not have to delve beyond this core to analyze whether,

> as Justice Alito's lead opinion concludes in part, that the outside laboratory's report was not relied on for its truth (with which five justices disagreed), or whether, as Justice Alito seems to indicate, the analysis might have been more far-ranging if Williams's trial had been to a jury rather than to a judge, although he also notes that he does "not suggest that the Confrontation Clause applies differently depending on the identity of the factfinder.

Deadwiller, 343 Wis. 2d 703, ¶ 12.

The court of appeals added that:

> We are bound in this case by the *judgment* in ***Williams***, and the narrowest holding agreed-to by a majority (albeit with different rationales) is that the Illinois DNA technician's reliance on the outside laboratory's report did not violate Williams's right to confrontation because the report was not "testimonial" and therefore did not implicate the Confrontation Clause. *See* ***Marks v. United States***, 430 U.S. 188, 193 (1977) ("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 ….'") (quoted source omitted, ellipses by ***Marks***). Under the facts here, the Orchid Cellmark report was not "testimonial."

Id., ¶ 14.

On appeal, Griep asserts that this court was incorrect in *Deadwiller* in concluding that this court is bound by the judgment in *Williams v. Illinois* (Griep Br. at 6-7). He argues that Justice Thomas's concurring opinion is the controlling opinion (Griep Br. at 7).

Griep bases his argument on *Marks v. United States*, 430 U.S. 188 (1977), in which the Supreme Court explained how to determine the meaning of cases without a clear majority opinion. The Court stated: "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, 430 U.S. at 193 (citations omitted). This court has followed the *Marks* rule. *See Lounge Mgmt., Ltd. v. Town of Trenton*, 219 Wis. 2d 13, 22, 580 N.W.2d 156 (1998); *State v. Novak*, 107 Wis. 2d 31, 38, 318 N.W.2d 364 (1982).

"[T]he narrowest ground is found when a concurring opinion articulates a legal standard with which a majority of the court from that case would agree." *Fond du Lac Co. v. Mentzel*, 195 Wis. 2d 313, 326, 536 N.W.2d 160 (Ct. App. 1995). The *Marks* standard

> should only be applied "where one opinion can be meaningfully regarded as narrower than another and can represent a common denominator of the Court's reasoning." This standard requires that the narrowest opinion is actually the "logical subset of other, broader opinions," such that it "embod[ies] a position implicitly approved by at least five Justices who support the judgment." If there is no such narrow opinion, "the only binding aspect of a splintered decision is its specific result."

Lair v. Bullock, 697 F.3d 1200, 1205 (9th Cir. 2012) (citations omitted). The "narrowest ground" approach works only when "at least two rationales for the majority disposition fit or nest into each other like Russian dolls. Only then will there be a single narrowest ground that justifies the disposition and would command the assent of at least five Justices." Evan H. Caminker, Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking, 73 TEX. L. REV. 1, 33 n.120 (1994).

In *United States v. Epps*, __ F.3d __, 2013 WL 500241 (D.C. Cir. 2013), the D.C. Circuit Court of Appeals explained that the *Marks* rule means

> that the narrowest opinion "must represent a common denominator of the Court's *reasoning;* it must embody a position implicitly approved by at least five Justices who support the judgment." *King v. Palmer*, 950 F.2d 771, 781 (D.C. Cir. 1991) (*en banc*) (emphasis added). Stated differently, *Marks* applies when, for example, "the concurrence posits a narrow test to which the plurality must *necessarily agree as a logical consequence* of its own, broader position." *Id.* at 782 (emphasis added).

Epps, 2013 WL 500241 at *7.

Griep argues that this court erred in *Deadwiller* in concluding that the narrowest holding in Williams was that the report in that case was not testimonial. He argues that this court "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" (Griep Br. at 7).

However, Marks applies when "the concurrence posits a narrow test to which the plurality must *necessarily agree as a logical consequence* of its own, broader position." *Epps*, 2013 WL 500241 at *7 (citing *King v. Palmer*, 950 F.2d 771, 782 (emphasis added)). Justice Alito's opinion gave no indication that it agreed with Justice Thomas's discussion of the presence or absence of certification.

Therefore, as this court determined in *Deadwiller*, 343 Wis. 2d 703, ¶ 14, under the *Marks* rule, the judgment in *Williams*, rather than the concurring opinion of Justice Thomas, is controlling.

Griep also asserts that five justices in *Williams*, Justice Kagan and the three justices who joined her dissent, and Justice Thomas, agreed that the substance of the report in that case was offered for the truth of the matter asserted (Griep Br. at 9). He argues that "[c]onsequently, the U.S. Supreme Court's decision in

Williams v. Illinois overrules the Wisconsin Supreme Court's decision in *State v. Williams*," and "this court's decision in *State v. Barton*." (Griep Br. at 9).

However, that one justice who concurred in the judgment in *Williams*, and four justices who dissented might have agreed on a certain point does not mean that the point on which they agreed is the law. After all, '"*Marks* talks about those who "concurred in the judgment[ ],"' not those who did not join the judgment." *United States v. Robison*, 505 F.3d 1208, 1221 (11th Cir. 2007) (quoting *Marks*, 430 U.S. at 193). "In our view *Marks* does not direct lower courts interpreting fractured Supreme Court decisions to consider the positions of those who dissented." *Robison*, 505 F.3d at 1221 (citing *King*, 950 F.2d at 783 (*en banc*) ("We do not think we are free to combine a dissent with a concurrence to form a *Marks* majority.").

Only one justice who agreed in the judgment concluded that the report in *Williams* was offered for the truth of the matter asserted. Nothing in the judgment of *Williams* indicates that the Court's decision overrules *State v. Williams*, or *Barton*.

In summary, the controlling judgment in *Williams* held that the report in that case was not testimonial and was not offered for the truth of the matter. This holding does not affect the trial court's determination in this case that the testimony at issue did not violate the Confrontation Clause, and *Williams* did not overrule *State v. Williams* or *Barton*. Similarly, the holdings in *Melendez-Diaz* and *Bullcoming*, which concerned the admission of reports, did not affect the trial court's decision in this case. The issue, then, is whether the trial court's decision was correct under *State v. Williams* and *Barton*. As the State will explain, the trial court properly considered *State v. Williams* and *Barton*, and correctly determined that Harding's testimony did not violate the Confrontation Clause.

C. The circuit court properly concluded that Harding's testimony did not violate Griep's right to confrontation.

At the bench trial in this case, Griep's defense attorney raised Confrontation Clause objections to a few questions by the prosecutor to Harding. The prosecutor asked, "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 grounds, and the trial 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* case, it's going to be allowed in" (38:29).

The following exchange then occurred:

> 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 potion 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 that hearing, the court stated that it was relying primarily on *State v. Williams*, and that under *Williams*, "an expert can testify about if it is their own opinion" regarding a report made by another person's report (39:3). The court concluded that Harding is qualified to give an expert opinion (39:4). The court then noted that in *Williams*, the Wisconsin Supreme Court stated that

> A highly qualified expert employed by the lab who's familiar with the particular lab procedures and performed a peer review in the particular case and then he gave an independent expert opinion, and they said that under the circumstances, as it was found in the Williams case, which quite frankly I think is very close to this case from a factual standpoint, was appropriate. . . .

(39:5).

The court noted that the lab report was not entered into evidence in this case (39:5). It then noted that it had reviewed *Melendez-Diaz*, and believed that the situation in this case would have been found constitutional under Justice Scalia's analysis (39:5-6). The court stated that the defendant

> has the opportunity to cross-examine the expert who is rendering an independent decision, and if they are able to get up and render an independent decision . . . and the defendant has the opportunity to cross-examine that person based upon their testimony, then I think that the confrontation under Scalia's test would be satisfied.

(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 (39:7).

The State maintains that the circuit court's decision was correct. In *Williams*, the Wisconsin Supreme 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." *Williams*, 253 Wis. 2d 99, ¶ 20. Therefore, the admission of the expert testimony did not violate the defendant's right to confrontation. *Id.*

In this case, the circuit court correctly determined that Harding was a highly qualified witness, who reviewed the analysts work, and rendered an expert opinion about the testing. Under *Williams*, admission of the evidence did not violate Griep's right to confrontation. The Supreme Court's opinions subsequent to *Williams*, in *Melendez-Diaz* and *Bullcoming*, concern the admission of a lab analyst's reports. The Supreme Court's opinion in *Williams v. Illinois*, while concerning the admission of expert testimony rather than lab reports, does not overrule *State v. Williams*, because, as this court concluded in *Deadwiller*, the judgment in *Williams v. Illinois*, which binds this court, was that the report in *Williams v. Illinois* was not testimonial. *Deadwiller*, 343 Wis. 2d 703, ¶ 12.

In his brief, Griep does not argue that the trial court's decision was incorrect under *State v. Williams*. He instead argues that *State v. Williams* was overruled by *Williams v. Illinois* (Griep Br. at 9-11). As explained above, Griep is incorrect. The trial court properly applied *State v. Williams*, and its decision was correct, and should be affirmed.

D. If there was any error in admitting evidence in this case, the error was harmless.

Finally, the State maintains that even if this court were to conclude that the trial court erred in allowing Harding's testimony, and that Griep's right to confrontation was violated, any error was harmless.

The supreme court has stated that an error is harmless if the State—the beneficiary of the error—proves

'"beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained."' *State v. Hale*, 2005 WI 7, ¶ 60, 277 Wis. 2d 593, 691 N.W.2d 637 (citing *Chapman v. California*, 386 U.S. 18, 24 (1967)). The supreme court has also used the formulation that an error is harmless if it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *State v. Harvey*, 2002 WI 93, ¶ 49, 254 Wis. 2d 442, 647 N.W.2d 189 (citing *Neder v. United States*, 527 U.S. 1, 18 (1999)). These tests are equivalent in that an error does not contribute to the verdict if the court concludes that beyond a reasonable doubt a rational jury would have reached the same verdict without the error. *Id.*, ¶ 48 n.14. The factors that aid a court in determining whether an error is harmless include:

> [T]he frequency of the error, the importance of the erroneously admitted evidence, the presence or absence of evidence corroborating or contradicting the erroneously admitted evidence, whether the erroneously admitted evidence duplicates untainted evidence, the nature of the defense, the nature of the State's case, and the overall strength of the State's case.

Hale, 277 Wis. 2d 593, ¶ 61.

To determine whether an error contributed to the verdict, reviewing courts must consider the error in the context of the entire trial record. *State v. Patricia A.M.*, 176 Wis. 2d 542, 556-57, 500 N.W.2d 289 (1993).

Griep argues that if the court erred in admitting Harding's testimony, the error was not harmless (Griep Br. at 18-19). He notes that the trial court found that he was cooperative with police, that his failure on the field sobriety tests was not egregious (Griep Br. at 18). He argues that "the court's analysis was inextricably linked to the results of the blood tests," and that admission of Harding's testimony about the test results was erroneous and not harmless (Griep Br. at 19).

The State maintains, however, that the court's explanation of its verdict indicates that the court would have found Griep guilty even if had not considered Harding's testimony about the test results.

In finding Griep guilty of OWI, the trial court first made clear that it was not considering the results of the blood test (39:15). The court noted that the officer observed Griep speeding, and that the officer clocked Griep's vehicle at 13 miles per hour over the limit (39:17). The court added that the officer "made some initial observations regarding breath and his eyes" (39:17).

The court found that the officer asked Griep to perform field sobriety tests, and that Griep agreed to do so (39:17). The court found that Griep failed each of the field sobriety tests (39:17-18). The court then noted Griep's blood was drawn. The court stated that

> Ms. Frank, who is a phlebotomist, indicated that she was authorized by the doctor through the hospital to provide these blood draws. And quite frankly I've had my blood taken enough times to know that, you know, just from personal experience that I don't think it's that complicated of a procedure. I think when you look at the vials that were here, Mr. [Harding] mentioned this, is that there's not a lot that can go wrong with the vials. I mean the blood was there, it was able to be tested. Mr. [Harding] indicated that his review of all of the documentation indicated that there was nothing wrong with any of the blood samples that were provided and based upon his opinion, that review, that there was nothing that would have impacted the confidence in the evaluation that was done by the hygiene lab.

(39:18).

The court then assessed the elements of the charges and the evidence relating to those elements. The court stated:

> So the first element is that the defendant drove the motor vehicle. Now, this is operating

> while under the influence. Clearly that's the case. Nobody is arguing that.
>
> Second part is whether or not he was under the influence, and I've discussed all of the things that are going into my decision here, but one of the parts of the jury instruction indicates that if there is a blood test result, that can be used and from that alone I could make my findings, but I think the failure of the field sobriety tests as well as the alcohol smell and the eyes and all of the surrounding circumstances as I have already put into the record, I believe that at that time Mr. Griep was operating while under the influence of an intoxicant.
>
> As I look at the jury instruction for operating while under the influence, clearly number one is satisfied, again, with the driving and the prohibited alcohol concentration based upon the expert opinion of Mr. [Harding]. And you mention, Mr. Mishlove, that it is a weight issue and I agree with that in many respects. Do I think there's a significant - - any time anybody 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. [Harding] 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 and as a result; will find Mr. Griep guilty of Count No. 2.

(39:18-19.)

The State maintains that the court's decision indicates that the court would have found Griep guilty of operating a motor vehicle while under the influence of an intoxicant, or with a prohibited alcohol concentration, even without the testimony of Harding. The court noted that Officer Sauriol "made some initial observations regarding breath and his eyes" (39:17), and that he testified about Griep smelling of alcohol (38:9). The court found that Griep failed each of the three field sobriety tests (39:17-18). The court noted that Griep was cooperative and that persons who are at a high level of intoxication often are not cooperative (39:17). However, the issue is not whether Griep was highly intoxicated, but

only whether he was under the influence of an intoxicant or had an alcohol concentration above 0.08.

In addition, the court heard undisputed testimony that Griep refused chemical testing (38:16). "In Wisconsin, refusing the test not only violates the consent impliedly given under the statute, it reflects consciousness of guilt by the accused." *State v Crandall*, 133 Wis. 2d 251, 257, 394 N.W.2d 905 (1986).

> A reasonable inference from refusal to take a mandatory breathalyzer test is consciousness of guilt. The person is confronted with a choice of the penalty for refusing a test, or taking a test which constitutes evidence of his sobriety or intoxication. Perhaps the most plausible reason for refusing the test is consciousness of guilt, especially in view of the option to take an alternative test.

Id. at 257-58 (quoting *State v. Albright*, 98 Wis. 2d 663, 668-69, 298 N.W.2d 196 (Ct. App. 1980)).

The trial court also heard undisputed testimony that Griep first admitted to having approximately two beers (38:9), but that when the officer said that it appeared he had more than two, Griep admitted to having three to four beers (38:15).

The court therefore heard that a person who was driving thirteen miles per hour over the speed limit, and who smelled of alcohol, and failed all of the field sobriety tests, and refused chemical testing, admitted to drinking three or four beers. Under these circumstances, the trial court, acting rationally, would have found Griep guilty of OWI and PAC even if it had not considered Harding's expert testimony regarding the blood test.

The court in this case stated that "if there is a blood test result, that can be used and from that alone I could make my findings" (39:19). It then added "but I think the failure of the field sobriety tests as well as the alcohol smell and the eyes and all of the surrounding circumstances as I have already put into the record, I

believe that at that time Mr. Griep was operating while under the influence of an intoxicant" (39:19). It appears from its comments that the court was saying that it could make its finding of guilt without considering Harding's testimony.

For these reasons, if the court erred in admitting Harding's testimony regarding the blood test report, the error was harmless.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment convicting Michael R. Griep of operating a motor vehicle while under the influence of an intoxicant.

Dated this 20th day of March, 2013.

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 7,197 words.

Dated this 20th day of March, 2013.

_____

Michael C. Sanders
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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (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 Wis. Stat. § (Rule) 809.19(12).

I further certify that:

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 20th day of March, 2013.

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