STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT II

Case No. 2015AP158-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

ROZERICK E. MATTOX,

Defendant-Appellant.

On Notice of Appeal from a Judgment of Conviction
Entered in the Circuit Court for Waukesha County,
the Honorable Jennifer Dorow, Presiding

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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TABLE OF CONTENTS

CASES CITED

CONSTITUTIONAL PROVISIONS AND STATUTES CITED

OTHER AUTHORITIES CITED

ISSUE PRESENTED

1. Did the circuit court violate Mattox's constitutional right to confrontation by admitting an out-of-state laboratory's toxicology report and allowing the medical examiner who autopsied the decedent to testify that the report showed that the decedent died as a result of a heroin overdose, without requiring the testimony of anyone from the laboratory who authored the report or performed the tests?

The circuit court admitted the toxicology report and allowed the medical examiner to testify regarding its contents for the purpose of showing that the report "form[ed] part of the basis for" the medical examiner's opinion regarding the decedent's cause of death.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The briefs will adequately address the issue presented; however, Mattox would welcome oral argument if the court would find it helpful. Publication may be appropriate to clarify the scope of the Confrontation Clause in the context of expert testimony in cases involving charges of homicide by delivery of a controlled substance. *See* Wis. Stat. § 940.02(2)(a).

STATEMENT OF THE CASE AND FACTS

On April 18, 2013, the State charged Mattox with first-degree reckless homicide by delivery of heroin, contrary to Wis. Stat. § 940.02(2)(a). (1:2). According to the complaint,

in the early morning hours of February 15, 2013, Samuel Leuck was found dead in his home in Waukesha. A toxicology report later revealed that the cause of death was a heroin overdose. (1:3).

The complaint alleged that Leuck's friend, Terry Tibbits, told police that on February 14, 2013, he spoke to Leuck by phone and agreed to help Leuck purchase heroin. According to Tibbits, he called Mattox and arranged to purchase half a gram of heroin. Tibbits and Leuck then drove to 47th and Hadley in Milwaukee, where Tibbits purchased $75 worth of heroin from Mattox. Tibbits stated that he then gave the heroin to Leuck. (1:3).

The case was tried to the court without a jury beginning on October 15, 2013. (70; 71). On the issue of whether Mattox delivered the heroin allegedly used by Leuck, the case largely came down to a credibility dispute between Tibbits and Mattox. Both men testified that they met at 47th and Hadley on February 14, 2013; however, they offered very different versions of what took place at that meeting.

Tibbits testified that Leuck called him on the morning of February 14th and asked if Tibbits could get heroin for him. (70:22, 23). Tibbits agreed to help Leuck. (70:24). He called Mattox, from whom he had purchased heroin in the past, and made arrangement to meet Mattox to purchase heroin. (70; 24-25, 28, 34-35).

According to Tibbits, he then drove to Waukesha to pick up Leuck, and the two drove to 47th and Hadley in Milwaukee to meet Mattox. (70:37). Tibbits explained this was the usual spot where he and Mattox would meet. (70:37). Tibbits stated that after they arrived, he called Mattox again. (70:38-39). A short time later, Mattox arrived in a blue van, and Tibbits got into the van and did the exchange. According

to Tibbits, he paid Mattox $80 (from money given to him by Leuck) for half a gram of heroin. (70:38-39).

Tibbits further testified that after buying the heroin, he gave the heroin to Leuck and they drove to a park and injected a small amount. (70:40-41). After that, Tibbits drove Leuck back to his home in Waukesha and dropped him off sometime prior to 11:27 a.m. Tibbits stated that Leuck kept the remaining heroin, which was about three-quarters of what had been purchased. (70:41-42).

Mattox denied Tibbits's accusation that he sold heroin to Tibbits on February 14, 2013. He testified that he had sold heroin to Tibbits in the past, but not on February 14th. (71:48, 52-53). Mattox explained that the day before, on February 13th, Tibbits had spoken to him about buying a gram of heroin for $150. However, Tibbits also told Mattox that he and his "guy"[1] wanted to test the quality of the heroin before spending $150. (71:50). Mattox therefore gave Tibbits a small amount of heroin – $20 worth – to try on February 13th. Mattox explained that Tibbits was supposed to call him back later that day to purchase the gram, but never did. Tibbits also failed to return the calls Mattox placed to him later that day. (71:50-51).

Mattox testified that the next day, on February 14th, Tibbits called him in the morning looking to buy heroin again. (71:48). Tibbits asked him if the heroin he had was "the same stuff from yesterday," and Mattox told him that it was. (71:49). Tibbits then told Mattox he would call him back, but again he never did. (71:49).

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[1] Mattox was unaware of the identity of this other individual. (71:66). Throughout his testimony, Mattox referred to this individual simply as Tibbits's "guy." (71:49-51).

After a while, Mattox called Tibbits and asked him if he still wanted to buy the heroin. (71:49). Tibbits told him that he did and that he was going to pick up his guy. (71:49). Mattox told Tibbits to meet him at 47th and Hadley. However, Tibbits later called Mattox back and told him his guy did not like "the stuff from yesterday," and that they were going to buy heroin from someone else. (71:49).

At that point, Mattox became upset and "called [Tibbits] out" for reneging on his offer to buy a gram of heroin. (71:50-51). Tibbits tried to explain that he could not force his guy to buy heroin he did not want, but Mattox demanded that Tibbits pay him $20 for the heroin he had given Tibbits the previous day. (71:51). Mattox stated that he threatened to tell Tibbits's mother about his drug use if he refused. (71:51-52). Tibbits agreed to pay Mattox the $20, and the two met at 47th and Hadley for this purpose. Mattox testified that Tibbits gave him $20 when they met on February 14th, but he maintained that no heroin was exchanged that day. (71:52).

The State introduced extensive cell phone and cell tower mapping records during the testimony of Anthony Hollmaier, a police intelligence analyst. These records listed the calls between Leuck, Tibbits, and Mattox on February 14, 2013, and showed their general whereabouts at the times of the calls. The cell-tower mapping records indicated that Tibbits and Mattox met around 47th and Hadley on the morning on February 14th. (70:226-55, 280; 29 Exs. 2, 24-28).

The State also introduced the testimony of several witnesses to account for Leuck's whereabouts after he parted ways with Tibbits on February 14, 2013. Julie Collins, a friend of Leuck, testified that Leuck called her around 11:30

a.m. on February 14th and asked for a ride to a court hearing in Milwaukee. (70:79). She stated that she picked Leuck up from his house around noon; however, Leuck's sister, Victoria Leuck, called him shortly thereafter and agreed to drive him to court. (70:80-82).

Victoria Leuck testified that she picked Leuck up around 12:50 p.m. and drove him to the Milwaukee County Courthouse where she dropped him off. (70:93-97, 108). She further testified that Leuck called her at 2:38 p.m. after he was done with court. She then returned to the courthouse, picked Leuck up, and drove him home. She testified that she dropped Leuck off at his house shortly before 4:00 p.m. (70:102-04).[2]

Leuck's roommate, Gary Sweezey, testified that he returned home from work around 7:00 p.m. on February 14, 2013. He stated that Leuck was in his bedroom with the door locked that evening. During the early morning hours of February 15th, he found Leuck dead in his bedroom. (70:122-28).

Nichole Ward, a deputy medical examiner/investigator for the Waukesha County Medical Examiner's office, arrived at the scene at 4:02 a.m. on February 15th and examined Leuck's body. Based on her examination, she determined that Leuck had died within the preceding twelve hours. (70:154-79). In Leuck's bedroom, police found multiple syringes, a small tin cooker, and a bottle of Clonazepam. One of the syringes and the tin cooker tested positive for the presence of heroin. (70:283-85; 71:22).

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[2] The following individuals also testified that they had telephone contact with Leuck on February 14, 2013: Carl Gust and Josair Jackson. (70:112-16, 117-21).

To prove that Leuck actually died as a result of a heroin overdose, the State introduced testimony from Dr. Zelda Okia, an associate medical examiner with the Waukesha County Medical Examiner's Office, who performed Leuck's autopsy. (29 Ex. 12; 70:184-85; App. 115-16). Dr. Okia testified that she determined that Leuck's cause of death was "acute heroin intoxication." (70:188-89; App. 119-20). She explained that she relied on the following four factors in making this determination: (1) various needle puncture marks on Leuck's right arm; (2) pulmonary edema (fluid accumulation in the lungs); (3) cerebral edema (swelling of the brain); and (4) the results of the toxicology report from St. Louis University Toxicology Laboratory. (70:189; App. 120; 29 Ex. 17 at 2, 9; App. 106, 113). Dr. Okia stated that pulmonary edema and cerebral edema were typical findings in drug overdose cases. (70:189; App. 120). She also testified that these autopsy findings and toxicology results were factors she "had used in the past and had received training on significant to heroin intoxication cases." (70:189-90; App. 120-21).

Dr. Okia testified that St. Louis University Laboratory was an accredited lab run by a board certified toxicologists. (70:187; App. 118). She further testified that the Waukesha County Medical Examiner's Office had used St. Louis University to test biological samples since at least 2009 when she began working for the Medical Examiner's Office. (70:187; App. 118). She explained that the Medical Examiner's Office did not have the equipment to perform testing on biological samples, so it was their practice to send their samples to St. Louis University. (70:191; App. 122). Dr. Okia stated that she had always found the lab's results to be truthful and accurate. (70:187-88; App. 118-19).

With regard to this case, Dr. Okia testified that she collected biological specimens from Leuck and sent them to the St. Louis University lab for testing. She further testified that the lab, in turn, provided her with a written toxicology report for these samples, which she relied on in forming her ultimate opinion in this case. (70:192; App. 123).

The toxicology report bore the heading "St. Louis University Toxicology Laboratory Report" on all pages. Beneath the heading was the lab's mailing address. All pages of the report also included Leuck's name, age, race, sex, and a file number. The body of the report indicated that the lab tested Leuck's blood, urine, and various vein and fat samples for the presence of numerous substances/drugs. The report stated that certain quantities of various substances (namely morphine, 6-monoacetymorphine, codeine, and hydromorphone) were detected in these samples. It further stated that the samples tested negative for all other substances. On the final page of the report, there was a set-off area that stated: "Requested by: Dr. Biedrzycki" on February 15, 2013, and "report by: Dr. Christopher Long" on March 13, 2013. Beneath this entry was a line containing a handwritten signature. (29 Ex. 22; App. 101-104).

In her written autopsy protocol, Dr. Okia detailed the specific results listed in the toxicology report, along with the other factors she relied on to conclude that Leuck's cause of death was acute heroin intoxication:

FINDINGS

I. Acute heroin Intoxication
   A. Morphine (free) = 0.27 mcg/ml in peripheral blood
   B. Morphine (total) = 0.61 mcg/ml in peripheral blood

C. 6-monoacetyl morphine = less than 0.05 mcg/ml in peripheral blood
D. Pulmonary edema (combined lung weight = 1926 gm)
E. Needle puncture marks identified in the right antecubital and right forearm
F. Cerebral edema

(29 Ex. 17 at 2; App. 106).

When the State introduced the actual toxicology report during Dr. Okia's testimony, defense counsel objected to its introduction, as well as any testimony on the report, on the grounds that this would violate Mattox's right to confrontation. (70:192-93; App. 123-24). The circuit court, however, overruled the objection, ruling that Dr. Okia could testify regarding the information in the report under Wis. Stat. § 907.03,[3] since it was a basis for her expert opinion. The court explained its reasoning as follows:

> [Section] 907.03 provides that if it is of a type reasonably relied upon by experts in the particular field

[3] Section 907.03 provides:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible may not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion or inference substantially outweighs their prejudicial effect.

> in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted.
>
> In this particular case, what is at issue is the cause of death, and this particular witness has identified toxicology reports, and more specifically, toxicology reports utilized by the St. Louis University Lab to be those she finds to be accurate and helpful in reaching a determination. She's used them during her experience as a medical examiner. The reports are not being offered to prove any element that's at issue in this particular case in terms of what substance was delivered. I think that would be a different situation.
>
> So, for the purpose of this being part of the opinion of an expert witness, the Court will overrule the objection and allow the witness to answer.

(70:193-94; App. 124-25). Defense counsel then supplemented his objection.

> Okay. If the witness does get into talking about breakdown of metabolites, things like that, what comes from that, I think then – I think it would be substantive or come in as for the truth of the matter asserted.
>
> ***
>
> I anticipate she's going to testify that there's morphine, some of the breakdown that comes in and that that's a result of heroin, and so I think that that would fly in the face of your – the Court's ruling as to it would come from heroin.

(70:194; App. 125). The court again overruled the objection.

> I think – hold on. I think the objection is premature. So, to that extent, again, I'm overruling the objection.

> She's basing her expert opinion on this information, and to that extent, she may testify regarding that information.

(70:195; App. 126).

Dr. Okia then summarized the contents of the toxicology report and gave her opinion regarding its meaning. According to Dr. Okia, the report indicated that Leuck's blood and urine contained morphine at the time of his death. (70:197, 199, 201; App. 128, 130, 132). She further testified that the level of morphine was fatal. (70:197, 199; App. 128, 130). She noted that the report also stated that codeine was found in Leuck's urine. Dr. Okia explained that codeine is a contaminant often found in heroin. (70:200; App. 131).

In addition, Dr. Okia noted that the report indicated that a metabolite called 6-monoacetymorphine (abbreviated "6-MAM") was detected in Leuck's blood and urine. Dr. Okia testified that 6-MAM is specific for heroin and indicated that the morphine came from heroin, and not some other substance or form of morphine. (70:198, 201; App. 129, 132). According to Dr. Okia, the presence of 6-MAM also indicated that Leuck died within one to three hours after using heroin. (70:208; App. 139).

Finally, she noted that the report indicated that tissue samples taken from the injection sites in Leuck's right arm tested positive for morphine. (70:202-208; App. 133-39). However, the levels were very similar to a control sample taken from an area where no injection site was present. (70:207; App. 138). Dr. Okia explained that this could mean that the morphine detected at the injection sites may have simply been from the blood in circulation. (70:207; App. 138). According to Dr. Okia, there were subcutaneous hemorrhages near all of the injection sites, which indicated that the puncture marks were made recently, within

approximately twenty-four hours. (70:203, 205; App. 134, 136).

On cross-examination, Dr. Okia admitted that pulmonary edema and cerebral edema could be caused by an overdosing on Percocet or any other opiate type of drug, not just heroin. (70:221; App. 152).

At the conclusion of Dr. Okia's testimony, the court, over defense counsel's objection, admitted the toxicology report into evidence "to the extent that it forms part of the basis for Dr. Okia's testimony." (70:225; App. 156).

Neither the author of the toxicology report nor anyone else from St. Louis University Laboratory was produced by the State as a witness. The State also did not present any chain-of-custody evidence regarding the toxicology samples, aside from Dr. Okia's testimony that she sent the samples to the lab and received the results.

After the close of evidence, and after hearing closing arguments from the parties' attorneys, the court made its findings of fact and concluded that the State had met its burden on all the elements of the offense. (71:97-117; App. 158-177). The court thus found Mattox guilty of first-degree reckless homicide by delivery of a controlled substance. (71:117; App. 177). With regard to cause of death, the court accepted the opinion of Dr. Okia. (71:99; App. 160).

> Dr. Okia testified that the cause of death was acute heroin intoxication. She based this on a number of different factors which included puncture sites with evidence of hemorrhaging, pulmonary edema, the weight of the lungs which was consistent with pulmonary edema, swelling of the brain or cerebral edema, the toxicology report showing that the only known type of opiate found in Mr. Leuck's system was heroin.

> She specifically testified about the findings of 6-MAM. . . . She also testified about her knowledge of heroin, the effect on the body, and the difference between the findings in the blood and the urine. She also made her cause of death determination based on her external and internal examination . . . .
>
> She also testified that the death of Leuck would have been rapid which she further described as one hour. Some literature would suggest three at the most, from injection, and the levels of heroin found in Mr. Leuck's blood were fatal levels.

(71:100; App. 161).

On January 2, 2014, the court sentenced Mattox to ten years of initial confinement and ten years of extended supervision. (73:35).

Mattox subsequently filed a Rule 809.30 postconviction motion to vacate the DNA surcharge imposed by the court (52), which was granted by the circuit court. (55).

Mattox now appeals the circuit court's order admitting the toxicology report and allowing testimony about the report at trial. (58).[4]

[4] Mattox initially filed a no-merit notice of appeal, which this court subsequently converted to a merit appeal under Wis. Stat. § 809.30(2)(j) at Mattox's request. (Order 3/13/15).

ARGUMENT

I. Mattox is Entitled to a New Trial Because the State Obtained His Conviction in Violation of the Confrontation Clause.

To prevail in this case, the State was required to prove not only that Mattox supplied the heroin used by Leuck, but that Leuck actually "die[d] as a result of that use." Wis. Stat. § 940.02(2)(a). On this element of the offense, the State's only evidence was the toxicology report and Dr. Okia's opinion, and the report was the conclusive basis for that opinion. While Dr. Okia relied on other nonspecific factors in forming her cause-of-death opinion, there is no indication that she could have offered an independent opinion without the toxicology report. In essence, she served as a mere conduit for the report's conclusions. Mattox was able to cross-examine Dr. Okia, but he was never afforded the opportunity to cross-examine anyone from the laboratory, much less the expert who authored the report or performed the testing. This violated Mattox's right to confrontation.

A. General legal principles and standard of review.

The Sixth Amendment to the United States Constitution provides that, "in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. The Wisconsin Constitution also guarantees the right to confrontation: "In all criminal prosecutions the accused shall enjoy the right . . . to meet the witnesses face to face." Wis. Const. art. 1, § 7. The two clauses are "generally" coterminous. ***State v. King***, 2005 WI App 224, ¶ 4, 287 Wis. 2d 756, 706 N.W.2d 181.

This fundamental protection requires the State to present its witnesses in court to provide live testimony subject to adversarial testing, i.e., cross-examination. ***Crawford v. Washington***, 541 U.S. 36, 43 (2004). Out-of-court testimonial statements are barred by the Confrontation Clause unless the witness is unavailable and the accused had a prior opportunity to confront that witness. ***Id.*** at 68; ***State v. Hale***, 2005 WI 7, ¶ 54, 277 Wis. 2d 593, 691 N.W.2d 637.

Although a circuit court's decision to admit evidence is ordinarily a matter for the court's discretion, whether the admission of evidence violates a defendant's right to confrontation is a question of constitutional law subject to *de novo* appellate review. *See* ***State v. Williams***, 2002 WI 58, ¶ 7, 253 Wis. 2d 99, 644 N.W.2d 919.

B. The Confrontation Clause bars testimonial out-of-court statements unless the defendant has had an opportunity to cross-examine the witness.

Previously, the United States Supreme Court's jurisprudence allowed unavailable witnesses' out-of-court statements so long as they had "adequate indicia of reliability." ***Ohio v. Roberts***, 448 U.S. 56 (1980).

However, in ***Crawford***, the Court overruled ***Roberts***, holding that the ***Roberts*** test was not faithful to the founders' intent and not sufficient to protect a defendant's right of confrontation. ***Crawford***, 541 U.S. at 68. The Court made two changes to its Confrontation Clause jurisprudence. First, it held that the Confrontation Clause only governs "testimonial statements," and that all other out-of-court statements are regulated by hearsay law. ***Id.*** at 61. Second, it

created an absolute bar to statements that are testimonial absent a prior opportunity to cross-examine. ***Id.***[5]

The Court did not define "testimonial" in ***Crawford***, but it identified three formulations of testimonial statements:

> [E]x parte in-court testimony or its functional equivalent – that is, materials such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially.
>
> ***
>
> [E]xtrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions.
>
> ***
>
> [S]tatements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.

Id. at 51-52.

In addition, a statement's formality is also relevant to deciding its testimonial nature. ***Michigan v. Bryant***, 562 U.S. 344, ___, 131 S.Ct. 1143, 1160 (2011); ***State v. Jensen***, 2007 WI 26, ¶ 16, 299 Wis. 2d 267, 727 N.W.2d 518. A casual remark to an acquaintance would not suffice as a solemn declaration. ***Crawford***, 541 U.S. at 51. However, a statement

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[5] ***Crawford*** also indicated that the Confrontation Clause "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." 541 U.S. at 59-60, n.9 (citing ***Tennessee v. Street***, 471 U.S. 409 (1985)).

does not need to be as formal as an affidavit either. ***Bullcoming v. New Mexico***, ___ U.S. ___, ___, 131 S.Ct. 2705, 2717 (2011) (limiting the application of the Confrontation Clause only to sworn statements "would make the right to confrontation easily erasable"). Instead, testimony is typically a solemn declaration such as a formal statement to government officers. ***Crawford***, 541 U.S. at 51.

The Wisconsin Supreme Court similarly recognizes all three formulations of testimonial statements from ***Crawford***. ***Jensen***, 299 Wis. 2d 267, ¶¶ 16-18, (citing ***State v. Manual***, 2005 WI 75, ¶ 39, 281 Wis. 2d 552, 697 N.W.2d 811).

C. The circuit court violated Mattox's constitutional right to confrontation by admitting the toxicology report and allowing the medical examiner to testify about the report.

1. The toxicology report was a testimonial out-of-court statement subject to the Confrontation Clause.

Under both Wisconsin and federal case law, the toxicology report relied on by Dr. Okia was testimonial. For example, in ***Bullcoming***, the United States Supreme Court determined that a laboratory report regarding the alcohol content of the defendant's blood was testimonial, despite the fact it was not sworn. 131 S.Ct. at 2717. The Court found that the report's "formalized" nature was demonstrated by the facts that it was signed and was titled a "report." ***Id.***

Similarly, in ***State v. Heine***, 2014 WI App 32, 354 Wis. 2d 1, 844 N.W.2d 409, the Wisconsin Court of Appeals found that "certifications by a laboratory of tests received as substantive evidence, or the testimony by someone who did not perform the tests as substantive evidence may violate a

defendant's right to confrontation." ***Id.*** ¶ 9 (citing ***Melendez-Diaz v. Massachusetts***, 577 U.S. 305, 308 (2009); ***Bullcoming***, 131 S.Ct. at 2709-10).

Just recently, the court of appeals found that a virtually identical toxicology report from St. Louis University Toxicology Laboratory was testimonial. ***State v. VanDyke***, 2015 WL 868167 (Ct. App. Mar. 3, 2015) (decision recommended for publication) (App. 182-87).[6] The facts from ***VanDyke*** are virtually identical to this case. There, the defendant was also charged with first-degree reckless homicide by delivering heroin. ***Id.*** ¶¶ 1-2. On appeal, he similarly argued that the admission of the toxicology report violated his confrontation rights because nobody involved in the toxicology analysis testified at trial. ***Id.*** ¶ 14. And also similarly, the results came in through the testimony of the medical examiner who performed the decedent's autopsy. ***Id.*** ¶¶ 3-9.

In concluding that the toxicology report was testimonial, the court in ***VanDyke*** distinguished two recent cases relied upon by the State: ***Williams v. Illinois***, ___ U.S. ___, 132 S.Ct. 2221 (2012), and ***State v. Deadwiller***, 2013 WI 75, 350 Wis. 2d 138, 834 N.W.2d 362. ***VanDyke***, 2015 WL 868167, ¶¶ 18-19. First, the court noted that, as ***Deadwiller*** recognized, ***Williams v. Illinois*** was a split case that offers no guidance in most cases, except those where the parties are in a substantially identical position. ***Id.*** ¶ 18 (citing ***Deadwiller***, 350 Wis. 2d 138, ¶¶ 30-32.) In ***Deadwiller***, the Wisconsin Supreme Court explained that, although "the opinions . . . in ***Williams*** have no theoretical overlap, we still apply the case

[6] An unpublished opinion issued on or after July 2009, that is authored by a member of a three-judge panel or by a single judge under Wis. Stat. § 752.31(2) may be cited for its persuasive authority. Wis. Stat. § 809.23(3).

because Deadwiller and Williams are in substantially identical positions. . . . [I]n fact, the facts of this case are strikingly similar to the facts in ***Williams***." ***Id.*** (citing ***Deadwiller***, 350 Wis. 2d 138, ¶ 32).

The ***VanDyke*** court found that the facts from ***Williams*** and ***Deadwiller*** were dissimilar to the facts in the instant case. ***Id.*** ¶ 19. For example, both ***Williams*** and ***Deadwiller*** were sexual assault/DNA cases, the laboratory report "was not introduced into evidence in either case[, and p]rosecutors in both cases introduced inventory reports, evidence receipts, and testimony to prove a chain of custody[.]" ***Id.*** (citing ***Deadwiller***, 350 Wis. 2d 138, ¶ 32). ***VanDyke*** thus held that ***Williams*** and ***Deadwiller*** were narrowly limited to the facts of those cases and inapplicable to the case before it. ***See id.***

The ***VanDyke*** court thus ruled that the toxicology report was testimonial, as it set forth the analyst's findings, was titled as an official report, and contained a handwritten signature. The court further noted that the analyst would have reasonably expected that the document "would be available for use at a later trial." ***Id.*** ¶ 17 (citing ***Crawford***, 541 U.S. at 51-52).

VanDyke therefore clearly establishes that the toxicology report in this case was testimonial, as well. Just like the toxicology report in ***VanDyke***, the report in this case bore indicia of formality. The assertions in the report were not casual remarks to an acquaintance. They were presented in a document that bore the name of the laboratory, was titled an official toxicology report, set forth the analyst's findings, and was hand signed and dated. The information in the report was also not just pure data. The report named and indicated the quantity of substances contained in the blood, urine, and tissue samples, and asserted that those samples belonged to

Leuck, even though no chain of custody evidence was presented.

Moreover, just like in ***VanDyke***, the author of the report would have expected that the report would be available for use at a later trial. The report was commissioned by the Waukesha County Medical Examiner's Office as part of a death investigation that was specifically searching for contraband substances. The toxicology report was therefore a document that the author would reasonably expect would be available to be used in a potential future criminal trial. ***See id.***

In fact, there was no substantive difference between the toxicology report in ***VanDyke*** and the one in this case. The report and the statements within it were, as in ***VanDyke***, thus testimonial hearsay subject to the Confrontation Clause.

2. Cross-examination of the medical examiner did not satisfy Mattox's right to confrontation because she was a "mere conduit" for the report's testimonial statements.

a. The Confrontation Clause bars one expert from serving as a mere conduit for the opinion of another expert.

Wisconsin case law holds that the Confrontation Clause precludes an expert witness from simply summarizing the work or opinions of other experts. ***Williams***, 253 Wis. 2d 99, ¶¶ 19-20; *see also* ***Heine***, 354 Wis. 2d 1, ¶¶ 13-15. In ***Williams***, the defendant challenged the admission of a state crime lab report showing that the substance found in his possession was cocaine. 253 Wis. 2d 99, ¶ 5. The State was

unable to produce the analyst who performed the test. ***Id.*** ¶ 4. Instead, it presented the testimony of a unit leader from the crime lab who had performed a peer review of the tests the analyst conducted. ***Id.*** Based partly on the contents of the lab report, the unit leader testified that in her opinion the substance in the defendant's possession was cocaine. ***Id.*** The court held that the defendant's confrontation rights were not violated by the unit leader's testimony, reasoning 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 test.

Id. ¶¶ 19-20.

However, the court in ***Williams*** recognized that there was a critical "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." ***Id.*** ¶ 19. The court thus stated that the Confrontation Clause bars one expert from simply acting "as a mere conduit for the opinion of another." ***Id.***

Thus, an expert may rely in part on inadmissible facts or data in forming and offering an opinion, but an expert's testimony cannot serve as "a back-door method" of entry for a nontestifying expert's testimonial conclusions. *See* D. Kaye, D. Bernstein, & J. Mnookin, The New Wigmore: A Treatise on Evidence: Expert Evidence § 4.10.2 (2014) (hereinafter "Kaye"); App. 192.

b. The medical examiner served as a mere conduit for the toxicology report.

In ***VanDyke***, the court held that the medical examiner served as a mere conduit for the toxicology report, thereby violating the defendant's right to confrontation. 2015 WL 868167, ¶ 25. The medical examiner in that case testified that during the autopsy, he made the following relevant findings: puncture marks on the decedent's arms, pulmonary edema, and cerebral edema. ***Id.*** ¶¶ 5-6. The medical examiner testified that he determined heroin was the cause of death based on the toxicology report's finding that the decedent's blood contained high concentrations of morphine, along with 6 MAM in the urine. ***Id.*** ¶ 7. On cross-examination, the medical examiner admitted that he did not make a determination regarding cause of death until after he received the results contained in the toxicology report. ***Id.*** ¶ 9.

The court in ***VanDyke*** explained its holding by distinguishing ***Heine***, a homicide by delivery of heroin case in which the court rejected a similar Confrontation Clause challenge. ***Id.*** ¶¶ 20-24. In ***Heine***, a toxicology report was also admitted through the testimony of the medical examiner who autopsied the decedent. ***Id.*** However, as the court in ***VanDyke*** noted, the medical examiner in ***Heine*** did not rely entirely on the laboratory results to determine cause of death. ***Id.*** ¶ 21. Rather, as the ***Heine*** court explained:

> As seen from our extensive review of [the medical examiner's] testimony, he was no mere conduit for the toxicology report; rather, he fully explained why *he*, based on his education and experience, honed in on heroin as the cause of the victim's death: the fresh elbow punctures, the "white frothy foam" that extended "down deep into [the victim's] airways, his trachea and his

> bronchi," that the victim's lungs were "full of fluid," and the victim's inordinate retention of urine. It was perfectly reasonable and consistent with both Wis. Stat. Rule 907.03 and Heine's right to confront his accusers, for [the medical examiner] to take into account the toxicology report in firming up his opinion as to why the victim died. . . . [T]he trial court's receipt of the toxicology report into evidence was harmless beyond a reasonable doubt because, as we have already noted, [the medical examiner] could have given his opinion exactly as he gave it without referring to the report.

354 Wis. 2d 1, ¶ 15 (emphasis in original).

By contrast, the court in ***VanDyke*** noted that the medical examiner's autopsy in that case did not lead him to the decedent's cause of death. 2015 WL 868167, ¶ 24. While a few of the medical examiner's findings were consistent with the later-determined cause of death, the medical examiner testified that the pulmonary edema was a nonspecific condition that could occur from "a lot of different things." ***Id.*** Furthermore, the medical examiner did not opine that the puncture marks were from illicit drug use. ***Id.*** Most importantly, the medical examiner never testified that he believed, prior to his review of the toxicology report, that heroin toxicity caused the decedent's death. ***Id.***

The court in ***VanDyke*** therefore found that it could not "reasonably be argued that [the medical examiner's] cause-of-death opinion was made independently of the toxicology report." ***Id.*** ¶ 24. Thus, the court held that the medical examiner "served as a mere conduit for the toxicology report," in violation of the Confrontation Clause. ***Id.*** ¶ 25.

This case is like ***VanDyke***, and unlike ***Heine***. As shown above, Dr. Okia's autopsy examination did not lead her to Leuck's cause of death. She testified that pulmonary

edema and cerebral edema could be caused by an overdosing on Percocet or any other opiate type of drug, not just heroin. (70:221; App. 152). Furthermore, her autopsy protocol listed three specific results from the toxicology report as factors she relied on to conclude that Leuck died of heroin intoxication.

> A. Morphine (free) = 0.27 mcg/ml in peripheral blood
> B. Morphine (total) = 0.61 mcg/ml in peripheral blood
> C. 6-monoacetyl morphine = less than 0.05 mcg/ml in peripheral blood

(29 Ex. 17 at 2; App. 106). These factors were listed first in her autopsy protocol.

While Dr. Okia testified that she also relied on the various needle puncture marks on Leuck's arm, she never testified that she believed, prior to her review of the toxicology report, that heroin intoxication caused his death. Therefore, as in ***VanDyke***, it "cannot reasonably be argued that [Dr. Okia's] cause-of-death opinion was made independently of the toxicology report." 2015 WL 868167 ¶ 24. The toxicology report was a necessary basis for her opinion.

Significantly, there was no other evidentiary source for any of the facts stated in the toxicology report. The specific contents of Leuck's blood, urine, and other tissue samples, and amounts thereof, came only from the toxicology report. Even the report's assertion that the tested samples belonged to Leuck was not supported by any evidence about chain of custody. The truth of all the statements in the report was essential to Dr. Okia's conclusions regarding Leuck's cause of death. And her conclusion was only as good as the basis it rested on. She therefore served as a mere conduit for the toxicology report and the statements therein.

c. Mattox was denied his right to cross-examine the author of the toxicology report.

In this case, Mattox was never afforded an opportunity to cross-examine anyone from the laboratory, much less anyone involved in the testing or the person who signed off on the report. Cross-examination is vital to protect a defendant's right of confrontation. As Justice Scalia, writing for the majority, asserted in ***Crawford***: "the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. *It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination."* 541 U.S. at 68-69 (emphasis added). Consequently, one of the most critical pieces of evidence in this case was admitted in violation of Mattox's constitutional right to confrontation.

Although the circuit court stated that it admitted the toxicology report under Wis. Stat. § 907.03 for the purpose of showing that it formed part of the basis for Dr. Okia's opinion, this did not cure the Confrontation Clause violation. Section 907.03 does not permit one expert to serve as a mere conduit for the opinion of another. *See* ***Heine***, 354 Wis. 2d 1, ¶¶ 10, 13. If one expert cannot act as a mere conduit for another, certainly an expert cannot act as a mere conduit and also disclose the inadmissible conclusions of the other expert for the purported reason of explaining the basis for his or her opinion.

Thus, regardless of the circuit court's characterization of the reason for admitting the toxicology report, its admission violated the Confrontation Clause because Dr. Okia was a mere conduit for the report. Admitting the

toxicology report to show the basis for her opinion overlooked the fact that her opinion was entirely dependent on the toxicology report. Without the report, she could not have formed her opinion that Leuck died as a result of a heroin overdose. And without that opinion, there would have been insufficient evidence to sustain a guilty verdict.

Moreover, the distinction between disclosing the basis for an expert's opinion to help the factfinder assess that opinion and disclosing it for its truth is "very weak." Kaye § 4.10.1; App. 188; *see also* ***People v. Goldstein***, 843 N.E.2d 727, 732-33 (N.Y. 2005) ("The distinction between a statement offered for its truth and a statement offered to shed light on an expert's opinion is not meaningful").[7] To use the inadmissible information in evaluating the expert's opinion, the factfinder must first make a judgment about whether the information is true. If the factfinder believes the basis evidence is true, it will likely believe the expert's opinion; inversely, if the factfinder doubts the accuracy of the basis evidence, it will likely be skeptical of the expert's conclusion. Kaye § 4.10.1; App. 188. "The factually implausible, formal claim that expert's basis testimony is being introduced only to help in the evaluation of the expert's conclusions, but not for its truth, ought not permit an end-run around a constitutional prohibition." *Id.*

[7] In a number of cases, the court of appeals appears to have allowed the admission of expert basis evidence in part based on the reasoning that the basis evidence was not elicited for the truth of its content. *See* ***Heine***, 354 Wis. 2d 1, ¶ 10; ***State v. Barton***, 2006 WI App 18, ¶ 22, 289 Wis. 2d 206, 709 N.W.2d 93. However, these cases still recognized that an expert "cannot act as a mere conduit" for another's opinion. ***Heine***, 354 Wis. 2d 1, ¶ 13, ***Barton***, 289 Wis. 2d 206, ¶ 11.

Dr. Okia was unable to offer an independent cause-of-death opinion and served as a mere conduit for the toxicology report. The report and her testimony regarding its contents were therefore admitted in violation of Mattox's constitutional right to confrontation. Moreover, the State cannot prove beyond a reasonable doubt that the constitutional error did not contribute to the verdict.[8]

CONCLUSION

For these reasons, Rozerick E. Mattox respectfully requests that this Court reverse the judgment of the circuit court and remand the case for a new trial.

Dated this 22nd day of April 2015.

Respectfully submitted,

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[8] Constitutional error can only be deemed harmless if the "beneficiary of the error proves beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." ***Hale***, 277 Wis. 2d 593, ¶ 60.

CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 6,706 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

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

This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 22nd day of April 2015.

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CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 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 rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or 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.

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