STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2015AP158-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

ROZERICK E. MATTOX,

Defendant-Appellant.

On Certification from the Court of Appeals, District II, Reviewing a Judgment of Conviction Entered in the Waukesha County Circuit Court, the Honorable Jennifer Dorow Presiding

---

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

LEON W. TODD
Assistant State Public Defender
State Bar No. 1050407

Office of the State Public Defender
735 North Water Street, Suite 912
Milwaukee, WI 53202
(414) 227-4805
toddl@opd.wi.gov

Attorney for Defendant-Appellant

TABLE OF CONTENTS

Page

ISSUE PRESENTED 1

STATEMENT ON ORAL ARGUMENT 1

AND PUBLICATION 1

STATEMENT OF THE CASE AND FACTS 1

ARGUMENT 10

I. Admission of a Toxicology Report and Conduit Opinion Testimony Based on that Report, Absent the Testimony of Its Author, Violates a Defendant's Constitutional Right of Confrontation and Mandates a New Trial. 10

A. General legal principles and standard of review. 11

B. The toxicology report was a testimonial out-of-court statement subject to the prohibitions of the Confrontation Clause. 12

1. The Confrontation Clause bars testimonial out-of-court statements unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness. 12

2. The toxicology report was a testimonial statement subject to the Confrontation Clause. 14

C. The circuit court violated Mattox's constitutional right of confrontation by admitting the toxicology report and allowing the medical examiner to offer a cause-of-death opinion based on that report. 18

1. The Confrontation Clause bars one expert from serving as a mere conduit for the opinion of another expert. 18

2. The medical examiner was a "mere conduit" for the toxicology report's testimonial statements, and therefore cross-examination of that witness failed to satisfy Mattox's right of confrontation. 19

3. ***Heine*** was wrongly decided and should be overruled. 23

4. Admitting the toxicology report for the purpose of showing that it formed part the basis for the medical examiner's opinion did not cure the Confrontation Clause violation. 32

CONCLUSION 34

CERTIFICATION AS TO FORM/LENGTH 35

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12) 35

CERTIFICATION AS TO APPENDIX 36

INDEX TO APPENDIX 100

CASES CITED

Bullcoming v. New Mexico,
564 U.S. 647 (2011) ..... passim

Crawford v. Washington,
541 U.S. 36 (2004) ..... passim

Melendez-Diaz v. Massachusetts,
557 U.S. 305 (2009) ..... passim

Michigan v. Bryant,
562 U.S. 344 (2011) 13

Ohio v. Roberts,
448 U.S. 56 (1980) 12

People v. Goldstein,
843 N.E.2d 727 (N.Y. 2005) 32

State v. Barton,
2006 WI App 18,
289 Wis. 2d 206, 709 N.W.2d 93..... 28, 29, 30

State v. Deadwiller,
2013 WI 75,
350 Wis. 2d 138, 834 N.W.2d 362..... 15, 16

State v. Griep,
2015 WI 40,
361 Wis. 2d 657, 863 N.W.2d 567..... passim

State v. Hale,
2005 WI 7,
277 Wis. 2d 593, 691 N.W.2d 637..... 11, 34

State v. Heine,
2014 WI App 32,
354 Wis. 2d 1, 844 N.W.2d 409 ..... passim

State v. Jensen,
2007 WI 26,
299 Wis. 2d 267, 727 N.W.2d 518 13

State v. King,
2005 WI App 224,
287 Wis. 2d 756, 706 N.W.2d 181 11

State v. Manuel,
2005 WI 75,
281 Wis. 2d 554, 697 N.W.2d 811) 13

State v. VanDyke,
2015 WI App 30,
361 Wis. 2d 738, 863 N.W.2d 626 ..... passim

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

Tennessee v. Street,
471 U.S. 409 (1985) 12

Williams v. Illinois,
___ U.S. ___,
132 S. Ct. 2221 (2012) 15, 16, 32, 33

CONSTITUTIONAL PROVISIONS AND STATUTES CITED

United States Constitution
U.S. CONST. amend. VI 11

Wisconsin Constitution
WIS. CONST. art. 1, § 7 11

Wisconsin Statutes
§ 907.03 ..... 5, 20, 31

§ 940.02(2)(a) 1, 10

OTHER AUTHORITIES CITED

D. Kaye, D. Bernstein, & J. Mnookin, The New Wigmore: A Treatise on Evidence: Expert Evidence (2014) 19, 32

WIS. JI-CRIMINAL 1021 10

ISSUE PRESENTED

> Is a defendant's right of confrontation violated by the State's introduction at trial of the toxicology report of a non-testifying laboratory analyst and a medical examiner's testimony that relies on that report to form her cause-of-death opinion?

The circuit court admitted the toxicology report and allowed the medical examiner to testify regarding the report's 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. The court of appeals certified this issue to this Court for determination.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

By granting review, this Court has deemed both oral argument and publication to be appropriate in this case.

STATEMENT OF THE CASE AND FACTS

On April 18, 2013, the State charged Rozerick Mattox with first-degree reckless homicide by delivery of a controlled substance, contrary to WIS. STAT. § 940.02(2)(a). (1:2). The complaint alleged that on 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). According to the complaint, on February 14, 2013, Leuck's friend, Terry Tibbits, agreed to help Leuck buy heroin, and Tibbits contacted Mattox for this purpose. Tibbits subsequently purchased heroin from Mattox, which Tibbits gave to Leuck. (1:3).

The case was tried to the circuit court, without a jury, on October 15-16, 2013. (70; 71). On the issue of whether

Mattox actually 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 on February 14, 2013, but they offered very different versions of what took place at their meeting.

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

According to Tibbits, he picked up Leuck in his car, and the two drove to a prearranged location to meet Mattox. (70:37). Tibbits testified that he purchased half a gram of heroin from Mattox for $80. (70:38-39). After he bought the heroin, Tibbits gave it to Leuck, and they drove to a park and injected a small amount. (70:40-41). Tibbits then drove Leuck back home and dropped him off. Tibbits testified that Leuck kept the remaining heroin, which was about three-quarters of what Tibbits had purchased. (70:41-42).

While Mattox admitted that he had sold heroin to Tibbits in the past, he denied selling it to him on February 14, 2013. (71:48, 52-53). Mattox explained that on February 13, Tibbits had spoken to him about buying a gram of heroin for $150; however, Tibbits said that he and his "guy"[1] wanted to test the heroin before spending $150. (71:50). Mattox testified that as a result, on February 13, he gave Tibbits a small amount of heroin – $20 worth – to sample. According to Mattox, Tibbits was to call him later that day to arrange a purchase of a gram, but he never did. Mattox testified that he

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

tried to reach Tibbits later that day, but Tibbits did not return his calls. (71:50-51).

Mattox testified that the next morning, February 14, Tibbits called him again to buy heroin. (71:48). According to Mattox, Tibbits asked him if the heroin he had was "the same stuff from yesterday," and Mattox confirmed it was. (71:49). Tibbits then told Mattox he would call him back, but again he failed to do so. (71:49). Mattox later called Tibbits and asked if he still wanted to buy a gram of heroin. (71:49). Tibbits told him that he did and that he was going to pick up his "guy." (71:49). Later, however, Tibbits called Mattox and told him his guy did not like "the stuff from yesterday," so they were going to buy heroin from someone else. (71:49).

At that point, Mattox became upset with Tibbits for reneging on the heroin purchase. He demanded that Tibbits pay him $20 for the heroin he had given him the previous day. (71:50-51). Tibbits agreed to pay Mattox the $20, and the two later met up for this purpose. Mattox testified that Tibbits gave him $20 when they met on February 14; however, he maintained that no heroin was exchanged that day. (71:52).

Leuck was subsequently found dead in his home during the early morning hours of February 15. (70:122-28). In Leuck's bedroom, police found multiple syringes, a small tin cooker, other drug paraphernalia, 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).

Dr. Zelda Okia, an associate medical examiner with the Waukesha County Medical Examiner's Office, testified regarding the autopsy she performed on Leuck, and opined that Leuck had died as a result of "acute heroin intoxication." (70:184-89; App. 149-54). She explained that she relied on four factors in forming her opinion: (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 a toxicology report from St. Louis University Toxicology Laboratory. (70:189; App. 154; 29 Ex. 17 at 2, 9; App. 196, 203).

Okia testified that pulmonary edema and cerebral edema were typical findings in drug overdose cases. (70:189; App. 154). She also stated 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. 154-55).

Okia testified that St. Louis University Laboratory was an accredited lab run by a board-certified toxicologist. (70:187; App. 152). 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 office. (70:187; App. 152). Okia stated that she had always found the lab's results to be truthful and accurate. (70:187-88; App. 152-53).

Okia testified that in this case, 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 regarding Leuck's cause of death. (70:192; App. 157).

The toxicology report relied on by Okia 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 concluded that various quantities of certain 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"[2] on February 15, 2013, and "report by: Dr. Christopher Long" on March 13, 2013 at 6:10 a.m. Beneath those entries was a line containing a handwritten signature. (29 Ex. 22; App. 191-93).

In her written autopsy protocol, 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. 196).

Defense counsel objected to the State's introduction of the toxicology report, as well as to Okia's testimony about the report, on the grounds that this would violate Mattox's right of confrontation. (70:192-93; App. 157-58). The circuit court overruled the objection, concluding that Okia could testify about the information contained in the report under WIS. STAT. § 907.03, as it was part of the basis for her expert opinion. The circuit court explained its reasoning as follows:

[2] Dr. Lynda Biedrzycki is the Waukesha County Medical Examiner.

> [Section] 907.03 provides that if it is 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.
>
> 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. 158-59). 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. 159). 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. 160).

Thereafter, Okia summarized the contents of the toxicology report and gave her opinion regarding its meaning. According to Okia, the report indicated that Leuck's blood and urine contained morphine at the time of his death. (70:197, 199, 201; App. 162, 164, 166). She further testified that the level of morphine was fatal. (70:197, 199; App. 162, 164). She noted that the report also stated that codeine was found in Leuck's urine, which she explained is a contaminant often found in heroin. (70:200; App. 165).

In addition, Okia noted that the toxicology report indicated that a metabolite called 6-monoacetymorphine (abbreviated "6-MAM") was detected in Leuck's blood and urine. Okia explained that 6-MAM is specific to heroin, and its presence indicated that the morphine in Leuck's system came from heroin and not some other substance or form of morphine. (70:198, 201; App. 163, 166). According to Okia, the presence of 6-MAM also indicated that Leuck died within one to three hours after using heroin. (70:208; App. 173).

Okia also noted that the toxicology report indicated that tissue samples taken from the injection sites in Leuck's right arm also tested positive for morphine. (70:202-208; App. 167-73). However, the levels were very similar to a control sample taken from an area where no injection site was present. (70:207; App. 172). Okia explained that this might indicate that the morphine detected at the injection sites may have simply been from the blood in circulation. (70:207; App. 172).

Okia further testified that 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. 168, 170). However, she also acknowledged that these hemorrhages did not necessarily mean that Leuck had injected heroin. (70:222-23; App. 187-88).

On cross-examination, Okia acknowledged that pulmonary edema and cerebral edema can also be caused by an overdose of Percocet or any other opiate type of drug, not just heroin. (70:221; App. 186).

At the conclusion of Okia's testimony, the circuit 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. 190). Neither the author of the toxicology report nor any employee of the St. Louis University Laboratory was produced by the State as a witness or otherwise made available for examination in this case. The State also did not present any chain-of-custody evidence regarding the toxicology samples, aside from Okia's testimony that she sent the samples to the lab and received the results. (70:192; App. 157).

The circuit court concluded that the State had met its burden on all the elements of the offense, and found Mattox guilty of first-degree reckless homicide by delivery of a controlled substance. (71:97-117; App. 127-46). With regard to Leuck's cause of death, the court accepted Okia's opinion. (71:99; App. 129). The court elaborated as follows:

> 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. 130).

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

Mattox subsequently appealed the admission into evidence at trial of the toxicology report and Okia's testimony based on that report. (58). After briefing by the parties, the court of appeals certified the following question to this Court for its review:

> Does it violate a defendant's rights under the Confrontation Clause of the Sixth Amendment to the United States Constitution for the State to introduce at trial a toxicology report identifying certain drugs in a deceased victim's system and/or testimony of a medical examiner basing his/her cause-of-death opinion in part on the information set forth in such a report, if the author of the report does not testify and is not otherwise made available for examination by the defendant?

(Ct. App. Op. at 1; App. 101).

In its certification opinion, the court of appeals noted that it certified this case due to "significant tension" between its recent decisions in ***State v. Heine***, 2014 WI App 32, 354 Wis. 2d 1, 844 N.W.2d 409, and ***State v. VanDyke***, 2015 WI App 30, 361 Wis. 2d 738, 863 N.W.2d 626 – two Confrontation Clause cases that bear "substantial similarities" to this one – and decisions of the United States Supreme Court and this Court. (Ct. App. Op. at 7; App. 107). Specifically, the court stated that ***Heine*** and ***VanDyke*** appear

to be at odds with the Supreme Court's rulings in ***Bullcoming v. New Mexico***, 564 U.S. 647 (2011), and ***Melendez-Diaz v. Massachusetts***, 557 U.S. 305 (2009), as well as this Court's recent decision in ***State v. Griep***, 2015 WI 40, 361 Wis. 2d 657, 863 N.W.2d 567. (Ct. App. Op. at 15-21; App. 115-21).

The court of appeals therefore reasoned that "[a]dding yet a third court of appeals decision on facts similar to ***Heine*** and ***VanDyke*** would do little to clarify the law regarding the admission of toxicology reports and related testimony; however, a supreme court decision could lay this issue to rest for the bench and bar." (Ct. App. Op. at 7-8; App. 107-08).

On April 6, 2016, this Court granted the certification, accepting for consideration all issues raised before the court of appeals.

ARGUMENT

I. Admission of a Toxicology Report and Conduit Opinion Testimony Based on that Report, Absent the Testimony of Its Author, Violates a Defendant's Constitutional Right of Confrontation and Mandates a New Trial.

To meet its burden to prove that Rozerick Mattox was guilty of first-degree reckless homicide in the death of Samuel Leuck, the State was required to establish not only that Mattox supplied the heroin used by Leuck, but that Leuck actually "die[d] as a result of that use." *See* WIS. STAT. § 940.02(2)(a); *see also* WIS. JI-CRIMINAL 1021. On this element of the offense, the State's only evidence was the toxicology report and Okia's opinion – and the report was the conclusive basis for her opinion. While Okia relied on other nonspecific factors in forming her cause-of-death opinion, she was not in a position to offer an independent expert opinion. In essence, she served as a mere conduit for the report's testimonial conclusions. While Mattox was able to cross-

examine Okia regarding her opinion, he was never afforded the opportunity to cross-examine anyone from the laboratory that tested Leuck's biological samples and generated the toxicology report on which Okia relied. Consequently, the admission of the toxicology report and Okia's ultimate cause-of-death opinion violated Mattox's constitutional right of 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 of 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 of 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 toxicology report was a testimonial out-of-court statement subject to the prohibitions of the Confrontation Clause.

1. The Confrontation Clause bars testimonial out-of-court statements unless the witness is unavailable and the defendant had a prior 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 intent of the founders of the constitution and was insufficient to protect a criminal 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 governs only "testimonial statements," and that all other out-of-court statements are regulated by hearsay law. ***Id.*** at 61. Second, the Court created an absolute bar to statements that are testimonial, unless the witness is unavailable and the defendant had a prior opportunity to cross-examine that witness. ***Id.*** at 61, 68.[3]

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

[3] ***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." ***Crawford v. Washington***, 541 U.S. 36, 59-60, n.9 (2004) (citing ***Tennessee v. Street***, 471 U.S. 409 (1985)).

> 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, 366 (2011); ***State v. Jensen***, 2007 WI 26, ¶ 16, 299 Wis. 2d 267, 727 N.W.2d 518. For example, a casual remark to an acquaintance would not suffice as a solemn declaration. ***Crawford***, 541 U.S. at 51. However, a statement does not need to be as formal as an affidavit. ***Bullcoming***, 564 U.S. at 664 (limiting the application of the Confrontation Clause only to sworn statements "would make the right to confrontation easily erasable"). Instead, a testimonial statement is typically a solemn declaration such as a formal statement to government officers. ***Crawford***, 541 U.S. at 51.

This Court similarly recognizes all three formulations of testimonial statements from ***Crawford***. ***Jensen***, 299 Wis. 2d 267, ¶¶ 16-18, (citing ***State v. Manuel***, 2005 WI 75, ¶ 39, 281 Wis. 2d 554, 697 N.W.2d 811).

2. The toxicology report was a testimonial statement subject to the Confrontation Clause.

Under both federal and Wisconsin case law, the toxicology report relied on by Okia was testimonial. United States Supreme Court precedent establishes that laboratory reports that document the results of drug and alcohol testing are testimonial. For example, in ***Melendez-Diaz***, the Supreme Court held that affidavits admitted into evidence at trial, which documented the results of forensic analysis showing that a substance seized by police was cocaine, "were testimonial statements, and the analysts were 'witnesses' for purposes of the Sixth Amendment." ***Melendez-Diaz***, 557 U.S. at 307, 311. The Court in ***Melendez-Diaz*** further held that "[a]bsent a showing that the analysts were unavailable to testify at trial *and* that the petitioner had a prior opportunity to cross-examine them, the petitioner was entitled to 'be confronted with' the analysts at trial." ***Id.*** (emphasis in original; citation omitted).

The ***Melendez-Diaz*** Court found no distinction, "for Confrontation Clause purposes, between testimony recounting historical events, which is 'prone to distortion or manipulation,' and the testimony at issue here, which is the 'resul[t] of neutral, scientific testing.'" ***Id.*** at 317. In rejecting the claim that confrontation of forensic analysts would be of little value, the Court instead found that "there is little reason to believe that confrontation will be useless in testing analysts' honesty, proficiency, and methodology – the features that are commonly the focus in the cross-examination of experts." ***Id.*** at 321.

In ***Bullcoming***, the Supreme Court also concluded that a laboratory report concerning the alcohol content of the defendant's blood was testimonial, despite the fact it was not sworn. ***Bullcoming***, 564 U.S. at 664-65. The Court held that the report's "formalized" nature was demonstrated by the fact that it was a signed document and titled a "report." ***Id.***

Based in large part on the rulings in ***Melendez-Diaz*** and ***Bullcoming***, the Wisconsin Court of Appeals recently concluded that a toxicology report that is virtually identical to the report in Mattox's case was testimonial.[4] ***VanDyke***, 361 Wis. 2d 738, ¶¶ 16-17. As the court of appeals noted in its certification opinion, the facts from ***VanDyke*** "bear substantial similarities to this case." (Ct. App. Op. at 7; App. 107). In ***VanDyke***, the defendant was also charged with first-degree reckless homicide by delivery of heroin. ***VanDyke***, 361 Wis. 2d 738, ¶¶ 1-2. He similarly argued on appeal that the admission of the toxicology report violated his confrontation rights because the laboratory personnel involved in the toxicology analysis did not testify at his trial. ***Id.***, ¶ 14. In addition, as in this case, the lab test results were introduced into evidence 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***, 361 Wis. 2d 738, ¶¶ 18-19. First, the ***VanDyke*** court noted that ***Williams v. Illinois*** was a split case that offered no guidance in most cases, except those where the parties are in a "substantially identical position."[5] ***Id.***, ¶ 18 (citing

[4] In fact, the toxicology report in ***VanDyke*** was from the same St. Louis University Laboratory and was authored by the same non-testifying analyst as the toxicology report in this case. *See* ***State v. VanDyke***, 2015 WI App 30, ¶ 4, 361 Wis. 2d 738, 863 N.W.2d 626.

[5] As this Court explained more fully in ***Deadwiller***:

> "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 judgment on the narrowest grounds." This rule is

(continued)

Deadwiller, 350 Wis. 2d 138, ¶¶ 30-32). In ***Deadwiller***, this Court explained that, although the concurring opinions "in ***Williams*** [***v. Illinois***] have no theoretical overlap, we still apply the case because Deadwiller and Williams are in substantially identical positions. . . . [I]n fact, the facts of [***Deadwiller***] are strikingly similar to the facts in ***Williams*** [***v. Illinois***]." ***Deadwiller***, 350 Wis. 2d 138, ¶ 32.

The court of appeals, however, found that the facts in ***VanDyke*** were dissimilar to those in ***Williams v. Illinois*** and ***Deadwiller***. ***VanDyke***, 361 Wis. 2d 738, ¶ 19. For example, the court in ***VanDyke*** noted that both ***Williams v. Illinois*** 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 chain of custody[.]'" ***VanDyke***, 361 Wis. 2d 738, ¶ 19 (citing ***Deadwiller***, 350 Wis. 2d 138, ¶ 32). ***VanDyke*** therefore concluded that ***Williams v. Illinois*** and ***Deadwiller*** were narrowly limited to the facts of those cases and declined to apply them. ***Id.***, ¶ 19.

The ***VanDyke*** court thus held that the toxicology report in that case was testimonial, finding it substantially similar to the report in ***Bullcoming***. ***Id.***, ¶ 17. The court noted that the report set forth the analyst's findings, was titled as an official report from a university lab, and contained a

---

> applicable only when "at least two rationales of the majority disposition fit or nest into each other like Russian dolls." If no theoretical overlap exists between the rationales employed by the plurality and the concurrence, "the only binding aspect of the fragmented decision . . . is its 'specific result.'" A fractured opinion mandates a specific result when the parties are in a "substantially identical position."

State v. Deadwiller, 2013 WI 75, ¶ 30, 350 Wis. 2d 138, 834 N.W.2d 362 (citations omitted).

handwritten signature. ***Id.*** The court also noted that the date and time stamps set forth above the signature further reflected the report's formality. ***Id.*** Finally, the court reasoned that the analyst would have reasonably expected that the document "would be available for use at a later trial." ***Id.*** (citing ***Crawford***, 541 U.S. at 51-52).

VanDyke therefore clearly establishes that the toxicology report in this case is testimonial. The report here, just like the toxicology report in ***VanDyke***, 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 a recognized university laboratory. The report was also titled an official toxicology report, set forth the analyst's findings, and was hand-signed with time and date stamps above the signature. Further, the information in the report was 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 as in ***VanDyke***, the author of the toxicology report in this case would have reasonably 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 for use in a potential future criminal trial.

There is no substantive difference between the toxicology report in ***VanDyke*** and the report in this case. The report and the statements within it, as in ***VanDyke***, were thus testimonial hearsay subject to the Confrontation Clause. As the court of appeals noted in this case, "based upon ***VanDyke***, it would seem the report in this case is similarly testimonial." (Ct. App. Op. at 13, n.7; App. 113).

C. The circuit court violated Mattox's constitutional right of confrontation by admitting the toxicology report and allowing the medical examiner to offer a cause-of-death opinion based on that report.

1. 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. In ***Williams***, the defendant challenged the admission of a state crime lab report showing that the substance found in his possession was cocaine. ***Id.***, ¶ 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 non-testifying 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. 208.

2. The medical examiner was a "mere conduit" for the toxicology report's testimonial statements, and therefore cross-examination of that witness failed to satisfy Mattox's right of confrontation.

In ***VanDyke***, the court of appeals held that the medical examiner served as a mere conduit for the toxicology report, thereby violating the defendant's right of confrontation. ***VanDyke***, 361 Wis. 2d 738, ¶ 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 further testified that he determined heroin was the cause of death based on the toxicology report's findings 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.

In concluding that the medical examiner was a conduit for the toxicology report, the court in ***VanDyke*** distinguished ***Heine***, another homicide by delivery of heroin case in which the court of appeals 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 performed an autopsy on the decedent. ***Heine***, 354 Wis. 2d 1, ¶¶ 1, 5. 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." ***VanDyke***, 361 Wis. 2d 738, ¶ 21. Rather, as the ***Heine*** court explained, the examiner's autopsy led him to believe that the decedent died of heroin intoxication, although he also "testified that he read the toxicology laboratory report, and that he regularly relied on toxicology results for, as phrased by the prosecutor's question, 'purposes of completing [his] final diagnosis.'" ***Heine***, 354 Wis. 2d 1, ¶¶ 6-7; *see also* ***VanDyke***, 361 Wis. 2d 738, ¶ 21 (construing ***Heine***). The court in ***Heine*** elaborated as follows:

> 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.

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

The court of appeals thus concluded in ***Heine*** that a Confrontation Clause violation had not occurred in that case, as the medical examiner there had not been a "mere conduit" for the toxicology report:

> 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. Heine was fully able to confront [the medical examiner] and challenge his opinion and his supporting reasons. . . . Heine was not deprived of his right to confrontation, and the 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.

Heine, 354 Wis. 2d 1, ¶ 15.

In contrast, the court in ***VanDyke*** concluded that the examiner's autopsy in that case "did not lead him to [the decedent's] cause of death; cause remained undetermined following the autopsy." ***VanDyke***, 361 Wis. 2d 738, ¶ 24. The court noted that several of the medical examiner's findings were consistent with the later-determined cause of death; however, the examiner testified that the pulmonary edema was a nonspecific condition that could occur from "a lot of different things." ***Id.*** The medical examiner also did not opine that the puncture marks were from illicit drug use. ***Id.*** And importantly, the medical examiner "never testified he believed, prior to his review of the toxicology report, that heroin toxicity caused [the decedent's] death." ***Id.***

The ***VanDyke*** court therefore determined 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. Instead, the court concluded that "[t]he toxicology report . . . was the conclusive basis of [the medical examiner's] cause-of-death opinion." ***Id.***, ¶ 25. The court thus held that the admission of the toxicology report violated VanDyke's constitutional right of confrontation, as he was never afforded the opportunity to cross-examine anyone from the laboratory, much less the person who performed the testing or signed the report. ***Id***. The court also held that "because [the medical examiner] served as a mere conduit for the toxicology report and was unable to offer an independent opinion, the violation was prejudicial." ***Id.***

This case is like ***VanDyke***, and unlike ***Heine***. The similarities between Okia's testimony and the testimony of the medical examiner in ***VanDyke*** are striking. In both cases, the medical examiners testified that they determined heroin was the cause of death based on the toxicology reports' findings that the decedents' bodily fluids contained high concentrations of morphine and 6-MAM. (70:192, 197-98; App. 157, 162-63; ***VanDyke***, 361 Wis. 2d 738, ¶ 7).

In addition, both here and in ***VanDyke***, the medical examiners testified to the following additional findings during the autopsies: puncture marks on the decedents' arms,[6] pulmonary edema, and cerebral edema. (70:189; App. 154; ***VanDyke***, 361 Wis. 2d 738, ¶ 5-6). Notably, in both cases, these findings did not lead the medical examiners to the decedents' causes of death, as the causes remained undetermined following the autopsies. The medical examiner in ***VanDyke*** testified that pulmonary edema was a nonspecific condition that could occur from "a lot of different things including medication toxicities, drug toxicities[,] . . . heart failure and things of that nature." ***VanDyke***, 361 Wis. 2d 738, ¶ 6. Similarly, Okia testified that pulmonary edema and cerebral edema could be caused by an overdose on Percocet or any other opiate type of drug, not just heroin. (70:203, 205; App. 168, 170).

Furthermore, neither medical examiner ever testified that they believed (or suspected), prior to their review of the toxicology reports, that heroin toxicity caused the decedents' deaths. (*See generally* 70: 184-224; App. 149-89; ***VanDyke***, 361 Wis. 2d 738, ¶ 24). The medical examiner in ***VanDyke*** admitted that he did not make a determination regarding

[6] In ***VanDyke***, there were two puncture marks on the decedent's arm, while in this case there were thirteen. This is not a material difference, however, as Okia never testified that this fact led her to conclude, prior to her review of the toxicology report, that heroin was the specific drug injected by Leuck, much less that heroin intoxication caused his death.

cause of death until after he received the toxicology report. 361 Wis. 2d 738, ¶ 9. In this case, Okia's autopsy protocol, in which she documented her cause-of-death finding, also indicated that her finding came after she reviewed the toxicology report. The autopsy protocol listed three of the specific results from the toxicology report as factors she relied on in making her determination:

> 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. 196). Importantly, Okia's autopsy protocol listed these toxicology results first among the factors she relied upon to determine cause of death.

As in ***VanDyke***, it "cannot reasonably be argued that [Okia's] cause-of-death opinion was made independently of the toxicology report." *See* ***VanDyke***, 361 Wis. 2d 738, ¶ 24. In this case, as in ***VanDyke***, it is clear that the toxicology report was the conclusive basis for Okia's cause-of-death opinion. She therefore served as a mere conduit for the toxicology report and the statements therein.[7]

Accordingly, just as in ***VanDyke***, the admission of the toxicology report and Okia's opinion based on that report violated Mattox's constitutional right of confrontation.

3. ***Heine*** was wrongly decided and should be overruled.

Alternatively, if this Court should conclude that this case is more analogous to ***Heine*** than ***VanDyke***, Mattox is

[7] 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 regarding chain of custody.

still entitled to a new trial. Because ***Heine***'s core reasoning is inconsistent with the United States Supreme Court's holdings in ***Melendez-Diaz*** and ***Bullcoming***, as well as this Court's decision in ***Griep***, ***Heine*** should be overruled.

In its certification opinion in this case, the court of appeals distinguished and summarized ***Heine*** and ***VanDyke*** in the following manner:

> In both ***Heine*** and ***VanDyke***, we appeared to indicate that if a medical examiner, based upon his/her personal experience and direct observations, strongly suspects – without the assistance of a confirming toxicology report – the victim died of a heroin overdose, it would not matter as far as a defendant's Confrontation Clause rights are concerned that the report served as a partial confirming basis for the examiner's final cause-of-death determination, despite the defendant not being afforded an opportunity to cross-examine the author of the report or an appropriate person from the laboratory. If, however, a report "directly proved [a victim's] 'use,' and was the conclusive basis of [the examiner's] cause-of-death opinion," despite physical findings of the examiner consistent with the cause of death, then a defendant *would have* the Confrontation Clause right to cross-examine the author of the report or an appropriate person from the laboratory.

(Ct. App. Op. at 15; App. 115) (emphasis in original; citations omitted).

The court of appeals correctly observed that ***Heine***'s ruling that a medical examiner may, consistently with the Confrontation Clause, rely on out-of-court statements in a toxicology report, so long as the examiner only relies on them to a "modest" extent for purposes of confirming or "firming up" his cause-of-death opinion, is at odds with ***Melendez-***

Diaz and ***Bullcoming***.[8] (Ct. App. Opp. at 15-18, 21; App. 115-18, 121). As the court of appeals astutely noted:

> Especially considering we concluded in ***VanDyke*** that the toxicology report was "testimonial," we do not see how the extent to which the examiner relied upon the report for his/her ultimate cause-of-death opinion controls whether a defendant has a Confrontation Clause right to cross-examine the author of the report or an appropriate person from the laboratory, regarding the findings in the report.

(Ct. App. Op. at 15; App. 115).

Melendez-Diaz and ***Bullcoming*** stand for proposition that, as a rule, once the State chooses to introduce a testimonial forensic report against a defendant in a criminal case, the actual analyst who performed the tests and authored the report must be made available for confrontation. The only exception to this rule is if the analyst is unavailable and the defendant previously had the opportunity to cross-examine the analyst. Again, in ***Melendez-Diaz***, the Supreme Court held that "[a]bsent a showing that the analysts [who determined that a substance was cocaine] were unavailable to testify at trial *and* that the petitioner had a prior opportunity to cross-examine them, petitioner was entitled to 'be confronted with' the analysts at trial." 577 U.S. at 307, 311 (emphasis in original).

In ***Bullcoming***, the Supreme Court rejected the state's attempt to introduce a blood-alcohol report, not through the analyst who performed the test or signed the certification, but through another analyst from the same lab who was familiar with the lab's procedures. ***Bullcoming***, 564 U.S. at 657. The Court held: "As a rule, if an out-of-court statement is

---

[8] All language in ***VanDyke*** that adopts the reasoning in ***Heine*** – i.e., that there is no Confrontation Clause violation if a medical examiner only relies on a toxicology report to a modest extent for purposes of confirming his or her ultimate opinion – should also be withdrawn.

testimonial in nature, it may not be introduced against the accused at trial unless the witness who made the statement is unavailable and the accused has had a prior opportunity to confront that witness." ***Id.*** The Court pointed out that in ***Melendez-Diaz*** it "refused to create a 'forensic evidence' exception to this rule." ***Bullcoming***, 564 U.S. at 658.

In rejecting the argument that the blood-alcohol report should have been allowed into evidence through the surrogate witness from the lab, the ***Bullcoming*** Court offered the following analogy:

> Suppose a police report recorded an objective fact – Bullcoming's counsel posited the address above the front door of a house or the read-out of a radar gun. . . . Could an officer other than the one who saw the number on the house or gun present the information in court – so long as that officer was equipped to testify about any technology the observing officer deployed and the police department's standard operating procedures? As our precedent makes plain, the answer is emphatically "No."

Id. at 660. The Court also added the following warnings:

> [T]he comparative reliability of an analyst's testimonial report drawn from machine-produced data does not overcome the Sixth Amendment bar. This Court settled in ***Crawford*** that the "obviou[s] reliab[ility]" of a testimonial statement does not dispense with the Confrontation Clause. . . . Accordingly, *the analysts who write reports that the prosecution introduces must be made available for confrontation* even if they possess "the scientific acumen of Mme. Curie and the veracity of Mother Theresa."
>
> . . . .
>
> [T]he [Confrontation] Clause does not tolerate dispensing with confrontation simply because the court believes that questioning one witness about another's testimonial statements provides a fair enough opportunity for cross-examination.

Id. at 661-62 (emphasis added; citations omitted). "If a 'particular guarantee of the Sixth Amendment is violated, no substitute procedure can cure the violation, and '[n]o showing of prejudice is required to make the violation complete.'" ***Id.*** at 663. "In short, when the State elected to introduce [the] certification [of the analyst who performed the analysis], [that analyst] became a witness Bullcoming had the right to confront. Our precedent cannot sensibly be ready any other way." ***Id.***

The decisions in ***Melendez-Diaz*** and ***Bullcoming*** do not suggest that a testimonial forensic report (or testimony describing or relying on that report) could be admitted through surrogate testimony, so long as the surrogate only relies on the report to a "modest" or limited extent, as the court of appeals held in ***Heine***. Rather, the Supreme Court plainly held that once the State elects to introduce a testimonial forensic report, it must make the analyst who performed the tests and authored the report available for cross-examination at trial, unless the analyst is unavailable and the defendant had a prior opportunity to cross-examine that analyst. There is no "modest or partial reliance" exception to this rule.

Accordingly, pursuant to ***VanDyke***, because the toxicology report in this case was testimonial, the extent to which Okia relied on it was immaterial. Once the State chose to introduce the report, Mattox had a constitutional right to confront the analyst who authored it, according to ***Melendez-Diaz*** and ***Bullcoming***. ***Heine*** is simply at odds with this rule.[9]

---

[9] The court in ***Heine*** at one point stated that "the trial court's receipt of the toxicology report into evidence was harmless beyond a reasonable doubt because . . . [the medical examiner] could have given his opinion exactly as he gave it without referring to the report." ***State v. Heine***, 2014 WI App 32, ¶15, 354 Wis. 2d 1, 844 N.W.2d 409. However, there is no meaningful difference between admitting the report itself and allowing another witness to summarize its contents and/or base

(continued)

Heine is also contrary to the standards that this Court recently articulated in ***Griep***, 361 Wis. 2d 657, addressing the circumstances under which one expert can offer an opinion based on the work of another expert. In ***Griep***, this Court construed and affirmed its prior Confrontation Clause rulings in ***Williams***, 253 Wis. 2d 99, and ***State v. Barton***, 2006 WI App 18, 289 Wis. 2d 206, 709 N.W.2d 93. As ***Griep*** explained, ***Williams*** and ***Barton*** recognize that an expert can, consistently with the Confrontation Clause, offer an independent opinion based in part on the work of other experts. However, those cases also recognize that the Confrontation Clause prevents one expert from serving as a mere conduit for the opinion of another. ***Griep***, 361 Wis. 2d 657, ¶ 19-20.

Griep, ***Williams*** and ***Barton*** thus establish the following rule:

> [E]xpert testimony based in part on tests conducted by a non-testifying analyst satisfies a defendant's right of confrontation if the expert witness: (1) reviewed the analyst's tests, and (2) formed an independent opinion to which he testified at trial.

Griep, 361 Wis. 2d 657, ¶ 47. However, the Court in ***Griep*** noted that this rule only applies in cases where the State does not offer the actual laboratory report into evidence. ***Id.***, ¶ 33.

Griep elaborated on the specifics of the two requirements in turn. Regarding the review requirement, it noted that in ***Williams*** and ***Barton***, the analysts who conducted the tests were unavailable to testify at trial. ***Id.*** ¶¶ 10, 48. Instead, their supervisors testified regarding

---

his or her ultimate opinion, at least in part, on the report's conclusions. Both practices similarly violate the Confrontation Clause. Moreover, permitting an expert to offer a conduit opinion simply because he or she does not "refer[] to the report" simply pretends that the constitutional violation has not occurred.

independent opinions they had formed based on peer reviews.[10] ***Id.***, ¶¶ 48-50.

In ***Griep***, an operating while intoxicated case, the testifying expert, who was the section chief of the state laboratory where the analyst who authored the blood-alcohol concentration (BAC) report worked, did not perform a formal peer review. Nonetheless, the Court in ***Griep*** found that his review was the functional equivalent of a peer review, because it included a review of the analyst's report, notes, and data (including "the chromatograms and the paperwork associated with the whole analytical run"). ***Id.***, ¶¶ 8-10, 50-52. The Court held that this fulfilled the ***Williams*** review requirement, which it summarized 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.

Id., ¶ 51 (citing ***Williams***, 253 Wis. 2d 99, ¶ 20).

Regarding the independent opinion requirement, the Court in ***Griep*** noted that in both ***Williams*** and ***Barton***, the testifying experts had reviewed the tests done by the other analysts, including the data and notes, and then formed their own opinions. ***Id.***, ¶ 54. Similarly, in ***Griep***, the testifying expert was qualified to present testimony on laboratory procedures and came to an independent opinion regarding Griep's BAC. The Court held that his opinion did not violate the Confrontation Clause because it was reached

---

[10] Peer review generally involves examining the notes taken and data collected in the case to make sure the conclusions written in the report are correct. ***State v. Griep***, 2015 WI 40, ¶ 49, 361 Wis. 2d 657, 863 N.W.2d 567. In ***Williams***, a possession with intent case, the expert also compared the graphical data yielded by the tests and graphs reflecting standard, known values. 2002 WI 58, ¶ 23, 253 Wis. 2d 99, 644 N.W.2d 919. The comparison allowed the expert to conclude that the sample being tested was a controlled substance. ***Id.***

independently by reviewing the data and notes from the analyst and was not merely a recitation of the analyst's conclusions. ***Id.***, ¶¶ 47, n.22, 55-56.

In this case, admitting the medical examiner Okia's cause-of-death opinion, based (at least in part) on the toxicology report of another expert, was contrary to principles described in ***Williams***, ***Barton***, and ***Griep***. As an initial matter, the actual toxicology report was admitted into evidence, so the reasoning and holdings from these cases should not even apply. *See* ***Griep***, 361 Wis. 2d 657, ¶ 33.[11] Instead, ***Melendez-Diaz*** and ***Bullcoming*** should control. Under ***Melendez-Diaz*** and ***Bullcoming***, the admission of the toxicology report violated Mattox's Confrontation Clause rights, because there is no indication the toxicologist who authored the report was unavailable and Mattox never had a prior opportunity to cross-examine that toxicologist.

Moreover, even if the test described in ***Griep*** were applicable here, Okia did not conduct the type of review required by that case, nor did she form an independent opinion. Her testimony and opinion, therefore, still violated the Confrontation Clause because she was a mere conduit for the toxicology report.

---

[11] In ***Griep***, this Court stated as follows regarding the significance of whether the actual report is offered into evidence:

> The Supreme Court provided guidance on when out-of-court testimonial statements are admissible, when statements are testimonial, and under what circumstances testimonial laboratory reports are admissible in ***Crawford***, ***Melendez-Diaz***, and ***Bullcoming***. Wisconsin cases, ***Williams*** and ***Barton***, go a step further and address situations *where the State does not offer the laboratory report into evidence*, but instead offers the independent opinion of an analyst who did not perform the tests.

Griep, 361 Wis. 2d 657, ¶ 33 (emphasis added).

Okia, a medical examiner in Waukesha, was not the supervisor or even a colleague of the laboratory analyst at St. Louis University who performed the laboratory tests and authored the toxicology report. Nor is there any indication in the record that Okia was otherwise familiar with St. Louis University's testing procedures. As such, Okia did not conduct a peer review or any functional equivalent. She did not review the notes, graphical information, raw data, or other records used by St. Louis University to confirm that proper procedures were followed or that the conclusions in the report were correct.

Okia also did not form an independent opinion regarding the presence or levels of morphine or 6-MAM in Leuck's system. This was not a case where one toxicologist reviewed the work of another toxicologist and came to an independent, albeit similar or identical conclusion. Okia simply took the final conclusions contained in the toxicology report, accepted them at face value, and used them to form her cause-of-death opinion. As the court of appeals noted in this case, "nothing in the record suggests that [Okia] was a witness capable of answering questions regarding the testing or analysis that resulted in the report identifying in [Leuck's] blood the high level of morphine or presence of 6-MAM." (Ct. App. Op. at 20; App. 120). "Okia herself was only in a position to, and did, simply assume that those results were correct." (Ct. App. Op. at 20; App. 120).

Thus, even under ***Griep***, Okia served as a mere conduit for the toxicology report. The admission of her testimony describing the results of toxicology report, as well as her ultimate cause-of-death opinion, violated Mattox's confrontation right.

Heine's holding is simply inconsistent with the standards described in ***Griep***. It should therefore be overruled.

4. Admitting the toxicology report for the purpose of showing that it formed part the basis for the medical examiner's opinion did not cure the Confrontation Clause violation.

While 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 Okia's opinion, this reasoning failed to 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* ***Williams***, 253 Wis. 2d 99, ¶ 19. If one expert cannot act as a mere conduit for another expert's opinion, certainly he or she cannot instead then disclose the inadmissible conclusions of the other expert merely 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 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, Okia could not have formed her opinion that Leuck died as a result of a heroin overdose.

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 illusory. *See* ***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"). That is why "the principal modern treatise on evidence" refers to the argument that such "basis evidence" comes in not for its truth, but only to help the factfinder evaluate an expert's opinion, as "very weak," "nonsense," and "fiction." Kaye § 4.10.1; App. 204-05; *see also* ***Williams v. Illinois***, 132 S. Ct. at 2269 (Kagan, J., dissenting)

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. 204. "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.*

In ***Williams v. Illinois***, five of the justices agreed that admitting a forensic report in this context has no purpose other than to prove its truth. *See* ***Williams v. Illinois***, 132 S. Ct. at 2256 (Thomas, J., concurring) ("In my view, however, there was no plausible reason for the introduction of [the laboratory's] statements other than to establish their truth."), at 2269 (Kagan, J., with whom Scalia, Ginsburg, and Sotomayor, JJ. Join, dissenting) ("admission of the out-of-court statement in this context has no purpose separate from its truth; the factfinder can do nothing with it *except* assess its truth and so the credibility of the conclusion it serves to buttress") (emphasis in original).

Accordingly, in this case, the toxicology report was a testimonial out-of-court statement admitted for the truth of its conclusions. As such, the report was admitted into evidence in violation of Mattox's constitutional right of confrontation. In addition, Okia was unable to offer an independent cause-of-death opinion and served as a mere conduit for the report. Her testimony discussing the report's contents and her ultimate opinion therefore violated Mattox's right of confrontation, as well. Moreover, the State cannot prove beyond a reasonable doubt that these constitutional violations

did not contribute to the verdict.[12] As such, Mattox is entitled to a new trial.

CONCLUSION

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

Dated this 13th day of May 2016.

Respectfully submitted,

_____

LEON W. TODD
Assistant State Public Defender
State Bar No. 1050407

Office of the State Public Defender
735 North Water Street, Suite 912
Milwaukee, WI 53202
(414) 227-4805
toddl@opd.wi.gov

Attorney for the Defendant Appellant

[12] 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." ***State v. Hale***, 2005 WI 7, ¶ 60, 277 Wis. 2d 593, 691 N.W.2d 637.

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 9,777 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 parties.

Dated this 13th day of May 2016.

LEON W. TODD
Assistant State Public Defender
State Bar No. 1050407

Office of the State Public Defender
735 North Water Street, Suite 912
Milwaukee, WI 53202
(414) 227-4805
toddl@opd.wi.gov

Attorney for the Defendant-Appellant

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; (3) a copy of any unpublished opinion cited under § 809.23(3)(a) or (b); and (4) 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.

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

Dated this 13th day of May 2016.

Signed:

LEON W. TODD
Assistant State Public Defender
State Bar No. 1050407

Office of the State Public Defender
735 North Water Street, Suite 912
Milwaukee, WI 53202
(414) 227-4805
toddl@opd.wi.gov
Attorney for the Defendant-Appellant

A P P E N D I X

I N D E X
T O
A P P E N D I X

Page

Certification Opinion of the Court of Appeals…….101-122

Judgment of Conviction (R39)…….123-125

Selected Portion of the Transcript of the Court Trial (Day 2 or 2) (Circuit Court's Findings of Fact and Decision) (R71)…….126-147

Selected Portion of the Transcript of the Court Trial (Day 1 or 2) (Testimony of Dr. Zelda Okia) (R70).…….148-190

St. Louis University Toxicology Laboratory Report (R29 Ex. 22)…….191-194

Waukesha County Medical Examiner's Office, Autopsy Protocol (R29 Ex. 17)……...195-203

D. Kaye, D. Bernstein, & J. Mnookin, The New Wigmore: A Treatise on Evidence: Expert Evidence §§ 4.10.1-.2 (2014)……..204-211