No. 15AP158

In The Supreme Court of Wisconsin

STATE OF WISCONSIN,
PLAINTIFF-RESPONDENT,

v.

ROZERICK E. MATTOX,
DEFENDANT-APPELLANT.

On Certification from the Court of Appeals, District II,
On Appeal from a Judgment of Conviction Entered
in the Waukesha County Circuit Court,
The Honorable Jennifer Dorow, Presiding,
Case No. 13CF471

BRIEF OF PLAINTIFF-RESPONDENT STATE OF WISCONSIN

BRAD D. SCHIMEL
Attorney General

MISHA TSEYTLIN
Solicitor General
State Bar #1102199

LUKE N. BERG
Deputy Solicitor General

Wisconsin Department of Justice
17 West Main Street
P.O. Box 7857
Madison, Wisconsin 53707-7857
tseytlinm@doj.state.wi.us
(608) 267-9323

Attorneys for Plaintiff-Respondent State of Wisconsin

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Other Authorities

INTRODUCTION

Samuel Leuck was found dead, alone in his bedroom. The Waukesha County Medical Examiner's Office investigated Leuck's death by performing an autopsy and ordering a toxicology report. In the end, the medical examiner concluded that Leuck died of an acute heroin overdose. Law enforcement investigated separately, eventually learning that Rozerick E. Mattox sold Leuck the heroin that killed him.

Mattox was charged with first-degree reckless homicide by delivery of a controlled substance, Wis. Stat. § 940.02(2)(a), and the State presented substantial evidence proving that Mattox sold the heroin that killed Leuck. The cause of Leuck's death was, as the trial court explained, "uncontroverted." The court then found Mattox guilty, relying primarily on lay testimony and the exhaustive timeline of Leuck's final day that the State had established.

Mattox's only argument on appeal is that the State violated his confrontation rights by introducing both a medical examiner's opinion testimony as to the cause of Leuck's death, which was informed by the toxicology report, and the contents of the report itself. This argument fails because the "primary purpose" of creating the toxicology report was to help determine cause of death, not to produce evidence for trial, which means that the report is not "testimonial" under the Confrontation Clause. *Ohio v. Clark*, 135 S. Ct. 2173, 2180 (2015). Even if the report were testimonial, the medical examiner's

cause-of-death opinion was admissible as an "independent expert opinion." *State v. Griep*, 2015 WI 40, 361 Wis. 2d 657, 863 N.W.2d 567. In any event, any error would have been harmless because Leuck's cause of death was not in dispute and was established by unrebutted evidence unrelated to the report.

ISSUES PRESENTED

1. Whether the toxicology report, generated primarily to determine the cause of Leuck's death, was testimonial.

The circuit court did not address this issue. It held that the report was admitted not for its truth, but to show the basis for the medical examiner's opinion.

2. Whether the medical examiner, who performed the autopsy and interpreted the toxicology report's raw data, formed an independent opinion as to cause of death.

The circuit court answered, yes.

3. If there were any Confrontation Clause errors, whether such errors were harmless.

The circuit court did not address this issue.

ORAL ARGUMENT AND PUBLICATION

By granting review, this Court has indicated that the case is appropriate for oral argument and publication.

STATEMENT OF THE CASE

A. Samuel Leuck's roommate found him dead in his apartment early in the morning on February 15, 2013. R. 70:125–28. The inquiry into Leuck's death occurred on two separate tracks, conducted by two independent entities: The Waukesha County Medical Examiner's Office and the City of Waukesha Police Department.

1. The Waukesha County Medical Examiner is appointed by the county executive and confirmed by the county board, Waukesha Cnty. Ordinances §§ 5-2, 18-20; Wis. Stat. § 59.34(1), and all employees are paid by the county, Wis. Stat. § 59.38(1). The Medical Examiner's Office has broad discretion to order an autopsy in "unexplained or suspicious circumstances," "for the purpose of inquiring how the person died." Wis. Stat. §§ 979.02, .04; *Scarpaci v. Milwaukee Cnty.*, 96 Wis. 2d 663, 684, 292 N.W.2d 816 (1980). The Office investigates over 1,300 deaths per year, less than one percent of which are determined to be homicides. *See* Waukesha County Death Statistics, https://www.waukeshacounty.gov/DeathStats/ (last visited June 27, 2016).

At 4:00 a.m. on February 15, 2013, Assistant Waukesha County Medical Examiner Nichol Wayd arrived at the scene of Leuck's death and conducted an exterior examination of the body. R. 70:160–62. Based on the stage of rigor and livor mortis, Wayd concluded that Leuck had been dead for no more than 8 to 12 hours. R. 70:170, :174. Wayd then transported the body to the Medical Examiner's Office, where Associate

Medical Examiner Dr. Zelda Okia conducted a full autopsy. R. 70:178.

Dr. Okia eventually concluded that Leuck had died from "acute heroin intoxication." App. 154, 195. During the autopsy, she found thirteen needle puncture marks on Leuck's arms, a swollen brain, and fluid filled lungs, symptoms which Dr. Okia recognized were consistent with a heroin overdose. App. 153–54, 167–70, 176–79.

To confirm her initial assessment, Dr. Okia took blood, urine, and several other samples from Leuck's body and sent them to the St. Louis University lab, which the Medical Examiner's Office regularly relies on for chemical analyses. App. 152–53, 191–93. The lab sent the results back to the Office a month later, indicating that Leuck's blood contained 0.61 micrograms per milliliter of morphine, 0.27 micrograms per milliliter of "free" (active) morphine, and less than 0.05 micrograms per milliliter of 6-monoacetylmorphine (6-MAM). App. 191. Morphine was also found in the vein and fat samples taken from the puncture sites on Leuck's arms. App. 192–93. The report contained only raw data as to the amount of each chemical found in the samples. It did not provide any interpretations of the chemical levels or draw any conclusions as to cause of death. App. 191–93. An employee from the lab signed the report, but did not certify the results or make any representations about the procedures followed. App. 193.

2. The City of Waukesha Police Department conducted its own inquiry into Leuck's death. When the police arrived

at the scene, they found a significant amount of drug paraphernalia, including several syringes and a tin cooker that later, in an entirely separate analysis, tested positive for heroin. R. 70:281, :284–85. Officers also found a bottle of the anxiety medication Clonazepam and a Chase Bank receipt showing a one hundred dollar withdrawal the previous day. R. 70:284–85, 71:22.[1] The police interviewed several people, including Leuck's roommate, neighbor, and social worker, and obtained Leuck's bank and cell phone records. R. 70:286–94.

The critical lead ended up being Terry Tibbits. Leuck had called Tibbits on the morning of his death to ask Tibbits to help him acquire heroin. R. 70:56–57. Tibbits then contacted Mattox, who had sold heroin to Tibbits on multiple occasions. R. 70:28, :302; 71:56–57. Cell phone records showed ten calls between 8:30 a.m. and 10:15 a.m., all between Leuck and Tibbits or Tibbits and Mattox. App. 133–34. At 9:55 a.m., Leuck and Tibbits drove up to an ATM in Tibbits' car, and Leuck withdrew $100. App. 133. The two met up with Mattox at around 10:15 a.m., and according to Tibbits, they purchased $80 worth of heroin. App. 134. After the deal was completed, Tibbits and Leuck went to a nearby park and injected a quarter of the heroin. App. 134. Tibbits then drove Leuck back to his apartment in Waukesha and went to work,

[1] While the police briefly spoke with Wayd, they did not ask her to perform a full autopsy and were not involved in Dr. Okia's full autopsy or request for the disputed toxicology report. R. 70:163, :179; *see* App. 153–90.

leaving Leuck with the remaining heroin. App. 135; R. 70:41–42.

The rest of Leuck's day was accounted for. Leuck had a court appointment in the afternoon, so he made multiple calls to arrange a ride. App. 135–36. His sister eventually drove him, dropping him off at around 12:30 p.m. and picking him up around 3 p.m. App. 136. The two stopped briefly at Target, and then she drove him home a little before 4 p.m. App. 137. Leuck made his last call at 3:55 p.m. App. 136–37. Every call after that went unanswered, including three between 5 and 6 p.m. App. 137. Leuck's roommate came home around 7 p.m. and noticed Leuck's door was locked and the light was on. R. 70:124–25. When he woke up and nothing had changed, he broke into Leuck's room and found him dead. R. 70:127–28.

Tibbits agreed to cooperate in a sting operation to catch Mattox, so the police had him schedule another heroin purchase from Mattox on March 8, 2013. R. 70:44–45. Mattox arrived with heroin in his van, and the police arrested him. R. 70:45–47, :296–97.

B. The State charged Mattox with first-degree reckless homicide by delivery of a controlled substance, in violation of Wis. Stat. § 940.02(2)(a). App. 102.

During a two-day bench trial, the State presented powerful evidence of Mattox's guilt. This evidence included testimony from Tibbits, Leuck's roommate, and various relatives and acquaintances to account for Leuck's final day; cell phone records from Leuck, Tibbits, and Mattox; a Target receipt; a

Chase Bank ATM receipt; and an ATM surveillance video. R. 70:283–98. The evidence also included the syringes and tin cooker found in Leuck's bedroom, which tested positive for heroin in a test entirely unconnected to the disputed toxicology report. R. 70:284–85.

Tibbits testified that he and Leuck purchased heroin from Mattox on the morning of February 14, used some of it, and that Leuck kept the rest. Cell phone records and bank records corroborated this story. R. 70:284–91; App. 133–34. The timeline established by Leuck's friends and relatives who interacted with him on his final day did not suggest any cause of death other than heroin overdose. Moreover, Dr. Okia's autopsy revealed thirteen needle puncture marks, along with cerebral and pulmonary edemas, "very typical finding[s] in drug overdose[s]." App. 154, 182. And multiple people testified that Leuck regularly used heroin. R. 70:19–21, :83, :92, :106–07.

In his own testimony, Mattox admitted that he regularly sold heroin to Tibbits, estimating that he had done so about ten or twelve times in the prior month. R. 71:48–53, :56–57. But Mattox claimed that he did not sell any heroin to Tibbits on February 14 and instead only received a twenty dollar payment for a small sample he had delivered to Tibbits on the previous day. R. 71:50–53. Notably, Mattox told this story for the first time at trial; it was not a part of his prior statement to the police. App. 140; R. 70:301–02. Mattox speculated that someone else must have provided the heroin to

Tibbits or Leuck on February 14. R. 71:54–55. As the circuit court aptly put it, the "cause of death" was "uncontroverted." R. 71:115.

While the heroin-induced "cause of death" was, in the circuit court's own words, "uncontroverted" at trial and supported by substantial other evidence, *see infra* p. 10, Dr. Okia made the same point during her testimony. App. 149–188. Dr. Okia testified that her autopsy determined that Leuck's arms had "various needle puncture marks," and Leuck's body had "pulmonary edema" (fluid-filled lungs) and cerebral edema (swelling of the brain), and that these were "very typical finding[s] in drug overdoses." App. 154, 176–77. Then, referring to the toxicology report from St. Louis University, Dr. Okia explained that the amount of morphine found in Leuck's blood was a "fatal" concentration. App. 162. The presence of 6-MAM in the blood was "specific" for heroin alone because it was a "breakdown" of heroin. App. 163–64. Dr. Okia further explained that these determinations were based on her own expert knowledge and experience in the field of forensic pathology. App. 162–63. The State introduced the toxicology report to support Dr. Okia's expert opinion. App. 149, 157–61.

Mattox objected to any discussion or introduction of the toxicology report on Confrontation Clause grounds, but the trial court overruled Mattox's objections. App. 153, 157–59. The court agreed with the State that Dr. Okia had independently concluded that the cause of death was "acute heroin

intoxication" because "[t]he report doesn't say that morphine is a breakdown of heroin. The doctor knows that from her own training." App. 130, 159–60. As to the toxicology report, the court first found that it was admissible under Wis. Stat. § 907.03, "for the limited purpose of being part of the basis upon which Dr. Okia rendered her opinions." App. 157–60, 190.[2] The court rejected the Confrontation Clause argument because "the report[ ] [is] not being offered to prove any element that's at issue in this particular case in terms of what substance was delivered. . . . [T]hat would be a different situation." App. 159.

C. The circuit court found Mattox guilty under Wis. Stat. § 940.02(2)(a). App. 123–25. The court examined each element of the offense and found that the State had proved them beyond a reasonable doubt. The court first determined that Mattox delivered a substance and that the substance was indeed heroin. App. 142–43. The court relied primarily on Tibbits' testimony, which she found credible and "corroborated by . . . cellphone records and mapping." App. 142. She also relied on Tibbits' daily heroin use and frequent purchases from Mattox, and the positive testing for heroin on the paraphernalia found in Leuck's apartment. App. 142–43. The court concluded that Mattox was aware that the substance he delivered was heroin because Mattox was arrested on March

[2] Mattox has never argued that the toxicology report was not properly admitted under Wisconsin's rules of evidence.

8 for selling heroin and admitted that he was a heroin dealer. App. 143–44.

The final element the court examined was whether "Leuck used the [heroin] alleged to have been delivered by Mr. Mattox and died as a result of that use." App. 144. The court found the timeline established by the State "very important," noting that "[n]o other dealer has been identified. No other source of heroin has been testified about or identified." App. 144. The timeline was consistent with the finding that "sometime after 3:55 p.m., Mr. Leuck ingested the remainder of the heroin and died as a result thereof." R. 71:115. The court also emphasized that the "cause of death . . . is uncontroverted in this case," and that the time of death estimates given by Dr. Okia and Ms. Wayd were consistent with the timeline of events. R. 71:115. The court did not otherwise mention the contents of the toxicology report when walking through the elements of the crime. R. 71:112–17. In the end, the Court concluded that Mattox was "the only possible source of heroin this Court could reasonably infer from all of the evidence." App. 145.

The court sentenced Mattox to 10 years in prison followed by 10 years of supervised released. App. 123–25.

D. Mattox appealed, arguing that Dr. Okia's discussion of the toxicology report and the report's introduction into evidence violated his confrontation rights. Def. Ct. App. Br. 13–26. Mattox separately argued that Dr. Okia's ultimate cause-of-death opinion also violated his confrontation rights because

it was not formed "independent[ly]" from the toxicology report. Def. Ct. App. Br. 13, 22–23. Recognizing that two of its recent cases with nearly identical facts had reached opposite conclusions, the Wisconsin Court of Appeals certified the issue to this Court. App. 101–22 (discussing *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). This Court granted review on April 6, 2016.

STANDARD OF REVIEW

Whether an admission of evidence violates the defendant's confrontation rights is subject to *de novo* review. *See State v. Williams*, 2002 WI 58, ¶ 7, 253 Wis. 2d 99, 644 N.W.2d 919.

SUMMARY OF ARGUMENT

Mattox argues that the State violated his confrontation rights by introducing Dr. Okia's cause-of-death opinion and the contents of the toxicology report. His arguments fail for three reasons.

I. The toxicology report at issue is not "testimonial" at all, thus foreclosing any Confrontation Clause challenge.

A. The United States Supreme Court has held that a statement is only testimonial if its "primary purpose" is to "create an out-of-court substitute for trial testimony." *Ohio v. Clark*, 135 S. Ct. 2173, 2180 (2015) (quoting *Michigan v. Bryant*, 562 U.S. 344, 358 (2011)). Applying this rule, the Court

has found various statements not testimonial where the primary purpose was not to create an out-of-court substitute for trial testimony, but was, for example, to address an ongoing emergency. *E.g.*, *Bryant*, 562 U.S. at 370–78.

B. The Supreme Court's cases considering the testimonial nature of forensic reports are consistent with this primary purpose test. Thus, the Court has held that forensic reports testing whether a substance was cocaine or measuring a driver's blood alcohol concentration, created "solely" in preparation for trial, were testimonial. *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 311 (2009); *Bullcoming v. New Mexico*, 564 U.S. 647, 644 (2011).

C. The majority of federal courts of appeals and state supreme courts applying these precedents to autopsy or toxicology reports have held that these reports are not testimonial because their primary purpose is to determine cause of death. *See, e.g.*, *United States v. James*, 712 F.3d 79, 87–102 (2d Cir. 2013); *People v. Leach*, 980 N.E.2d 570, 582–94 (Ill. 2012); *Ackerman v. State*, No. 49S00-1409-CR-770, 2016 WL 1329532, at *4–*15 (Ind. Apr. 5, 2016). Autopsy and toxicology reports have occasionally been found testimonial, but almost exclusively in circumstances leaving little doubt that the report would be used in a criminal trial, for example where law enforcement was directly involved in producing the report or the death was particularly suspicious. *E.g.*, *United States v. Moore*, 651 F.3d 30, 73 (D.C. Cir. 2011); *State v. Frazier*, 735 S.E.2d 727, 729, 731–32 (W. Va. 2012).

D. The toxicology report in this case is not testimonial because it was created with the primary purpose of determining cause of death, not generating evidence. The Waukesha County Medical Examiner's Office, which is independent from law enforcement, ordered the toxicology report to carry out its statutory role of determining the cause of Leuck's death. When the report was ordered, it was not clear that a crime had been committed, and law enforcement was not intimately involved in the process. Unlike the reports in *Melendez-Diaz* and *Bullcoming,* which drew direct conclusions that were solely relevant to establishing an element of a crime (whether a substance was cocaine, blood alcohol concentration), the toxicology report here did not draw any conclusions, but simply measured the presence of various substances in biological samples.

E. None of the indicia of formality that Justice Thomas emphasizes are present in the toxicology report. *Williams v. Illinois*, 132 S. Ct. 2221, 2260 (2012) (Thomas, J., concurring in judgment). Regardless, formality is just one factor in the primary purpose analysis. *Clark*, 135 S. Ct. at 2180.

II. Even if the toxicology report was testimonial, Dr. Okia formed an "independent expert opinion" and therefore her cause-of-death testimony was admissible under this Court's decisions in *State v. Williams*, 2002 WI 58, 253 Wis. 2d 99, 644 N.W.2d 919, and *State v. Griep*, 2015 WI 40, 361 Wis. 2d 657, 863 N.W.2d 567.

A. *Williams* established that the "critical point" for analyzing expert opinion testimony "is the distinction between an expert who forms an opinion based in part on the work of others and an expert who merely summarizes the work of others." 253 Wis. 2d 99, ¶ 19. *Griep* held that *Williams*' framework for analyzing expert opinion testimony remains the proper approach. 361 Wis. 2d 657, ¶¶ 23–40, 47.

B. Dr. Okia formed an "independent opinion" as to the cause of death. She performed the autopsy herself, uncovering "very typical findings in drug overdoses." App. 154. After receiving the "raw data" from the toxicology report, she applied her "own substantive expertise" to conclude that Leuck had died from "acute heroin intoxication." *Griep*, 361 Wis. 2d 657, ¶ 45 n.21; App. 162–63, 195. And her review of the toxicology report was sufficient given that the report contained only raw data. App. 191–93; *Griep*, 361 Wis. 2d 657, ¶¶ 48–52.

C. Mattox's arguments to the contrary fail. Dr. Okia did not rely exclusively on the toxicology report, but applied her "own substantive expertise." *Griep,* 361 Wis. 2d 657, ¶ 45 n.21 (citation omitted). *Griep* and *Williams* apply even though the report itself was admitted because the admissibility of Dr. Okia's ultimate opinion is separate from the admissibility of the report. And Dr. Okia's review of the data generated by the report was appropriate given the report's nature.

III. Any Confrontation Clause errors were harmless in any event because there was no dispute that Leuck died of a heroin overdose. Tibbits explained that he and Leuck purchased heroin from Mattox and that Leuck kept the portion they did not immediately use. The court found this testimony credible and corroborated by other evidence. App. 138–43. Leuck was found alone next to syringes that tested positive for heroin, with thirteen needle puncture marks in his arms, and his body showed other "very typical" signs of overdose. App. 154. The State accounted for almost every moment of Leuck's last day alive, and the court found this timeline, which did not suggest any other cause of death, "very important in finding that Mr. Leuck died as a result of using heroin." App. 144. Finally, the cause of death was "uncontroverted." R. 70:115. Mattox's defense was that someone else must have provided heroin to Leuck. R. 71:54–55, :115. With respect to any errors in discussing or introducing the report itself, these would be harmless based both upon the overwhelming other evidence of Mattox's guilt and Dr. Okia's independent opinion.

ARGUMENT

I. The State Did Not Violate Mattox's Rights Under The Confrontation Clause Because The Toxicology Report Was Not "Testimonial"

The United States Constitution and Wisconsin Constitution both guarantee a criminal defendant the right "to be confronted with the witnesses against him." U.S. Const.

amend. VI; Wis. Const. art. I, § 7 (criminal defendants have the right "to meet the witnesses face to face") (collectively, the "Confrontation Clause"). This Court "generally appl[ies] United States Supreme Court precedents when interpreting" this confrontation right. *State v. Jensen*, 2007 WI 26, ¶ 13, 299 Wis. 2d 267, 727 N.W.2d 518. The Confrontation Clause only applies to "testimonial" statements that are introduced to "establish[ ] the truth of the matter asserted." *Crawford v. Washington*, 541 U.S. 36, 50–59 & n.9 (2004). Specifically, if a statement is testimonial, it can be introduced to establish the truth of the matter asserted only if the witness "[is] unavailable to testify, and the defendant had a prior opportunity for cross-examination." *Id.* at 53–54.

Mattox argues that the State violated his confrontation rights because Dr. Okia based her cause-of-death opinion in part on a toxicology report generated by an employee who was not made available for cross examination, and because the report itself was admitted into evidence. This argument fails as an initial matter because the report is not "testimonial," meaning that the Confrontation Clause is not implicated.

A. A statement is only "testimonial" if, "in light of all the circumstances, viewed objectively, *the 'primary purpose' of the [statement] was to 'creat[e] an out-of-court substitute for trial testimony*.'" *Ohio v. Clark*, 135 S. Ct. 2173, 2180 (2015) (quoting *Michigan v. Bryant*, 562 U.S. 344, 358 (2011)) (emphasis added); *see also id.* at 2185 (Scalia, J., concurring)

("[T]he primary-purpose test sorts out . . . who is acting as a witness and who is not.").

The United States Supreme Court developed this primary purpose test over a series of modern cases. In *Crawford*, the Court established a new approach to the Confrontation Clause, holding that the Clause "applies to 'witnesses' against the accused—in other words, those who 'bear testimony.'" 541 U.S. at 51 (citation omitted). *Crawford* suggested various definitions of "testimonial" statements, but did not adopt any particular formulation. *Id.* at 51–52. Then, in *Davis v. Washington*, 547 U.S. 813 (2006), the Court looked to whether the "primary purpose" of a statement was "to establish or prove past events potentially relevant to later criminal prosecution," while taking care to note that it was not "attempting to produce an exhaustive classification" of testimonial statements. *Id.* at 822. Subsequently, in *Bryant*, the Court treated the *Davis* formulation as controlling. After restating *Davis*' "primary purpose" language regarding "[whether] a statement is [ ] procured with a primary purpose of creating an out-of-court substitute for trial testimony," the Court held that "[w]here no such primary purpose exists, the admissibility of a statement is the concern of state and federal rules of evidence, not the Confrontation Clause." *Bryant*, 562 U.S. at 358–59. Finally, in *Clark*, the Court explicitly held that the language from *Bryant* and *Davis*, which "ha[d] come to be known as the 'primary purpose' test," is the test for determin-

ing whether a statement is testimonial: "In the end, the question is whether, in light of all the circumstances, viewed objectively, the 'primary purpose' of the [statement] was to 'creat[e] an out-of-court substitute for trial testimony.'" 135 S. Ct. at 2179–80 (quoting *Bryant*, 562 U.S. at 358).[3]

The Supreme Court's Confrontation Clause caselaw illustrates the proper application of the primary purpose test. In *Davis*, the Court held that statements made to a 9-1-1 operator during a domestic disturbance were not testimonial because 9-1-1 calls are "designed" to "describe current circumstances requiring police assistance." 547 U.S. at 827. The "primary purpose" of the calls "was to enable police assistance to meet an ongoing emergency," so even though the caller identified her assailant, she "was not acting as a *witness*; she was not *testifying*." 547 U.S. at 828. Similarly, in *Bryant*, the Court held that a dying victim's statements to police identifying who shot him were not testimonial because the "circumstances" "objectively indicate[d] that the primary

[3] In *State v. Jensen*, 299 Wis. 2d 267, ¶¶ 15–25, this Court suggested a somewhat different formulation of testimonial statements: "[A] statement is testimonial if a reasonable person in the position of the declarant would objectively foresee that his statement might be used in the investigation or prosecution of a crime." *Id.* ¶ 25 (quoting *United States v. Summers*, 414 F.3d 1287, 1302 (10th Cir. 2005)). But *Jensen* was decided before *Bryant* and *Clark* clarified that *Davis*' primary purpose test is *the* test for testimonial statements. Although this Court has not extensively discussed what makes a statement testimonial since *Bryant*, it has recognized *Bryant*'s emphasis on the "primary purpose" of a statement. *See State v. Beauchamp*, 2011 WI 27 ¶ 18 n.21, 333 Wis. 2d 1, 796 N.W.2d 780.

purpose of the interrogation" was to address an emergency: the shooter was still at large; the "interaction occurred within the first few minutes of the police officers' arrival and well before they secured the scene of the shooting"; and the questions asked "were the exact type . . . necessary to allow the police to assess the situation, the threat to their own safety, and possible danger to the potential victim," among other things. 562 U.S. at 349, 370–78 (citation omitted). Finally, in *Clark*, the Court held that a 3-year-old's responses to his teacher's questions about who abused him were not testimonial because the "primary purpose" of the conversation was to protect the child. 135 S. Ct. at 2181.

B. The Supreme Court has addressed whether forensic reports are testimonial in three cases. In each case, the Court has emphasized that the inquiry is based upon whether the reports were generated with the primary purpose of creating an out-of-court substitute for trial testimony.

In *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009), the Court held that "affidavits reporting the results of forensic analysis which showed that material seized by the police and connected to the defendant was cocaine" were testimonial. *Id.* at 307. "[U]nder Massachusetts law," the Court emphasized, "the *sole purpose* of the affidavits was to provide . . . evidence." 557 U.S. at 311 (citation omitted). The Court made clear that reports created primarily for other purposes would not be testimonial—for example, "medical reports created for treatment purposes," *id.* at 312 n.2, or "business and

public records" "created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial," *id.* at 324.

Similarly, in *Bullcoming v. New Mexico*, 564 U.S. 647 (2011), the Supreme Court held that a "forensic laboratory report certifying [the defendant's] blood alcohol concentration" was testimonial because it was "created solely for an evidentiary purpose" and "made in aid of a police investigation." *Id.* at 651, 664 (citation omitted). A "law enforcement officer" had requested the test by "provid[ing] seized evidence [drawn blood] to a state laboratory required by law to assist in police investigations." *Id.* at 665. Justice Sotomayor concurred, partly to emphasize that "this is not a case in which the State suggested an alternate purpose, much less an alternate *primary* purpose, for the [blood alcohol] report." *Id.* at 672 (Sotomayor, J., concurring).

Finally, in *Williams v. Illinois*, 132 S. Ct. 2221 (2012), the Court held that a DNA profile generated from swabs taken from a rape victim was not testimonial. The case produced fractured opinions and therefore has no precedential value except on substantially similar facts. *See State v. Deadwiller*, 2013 WI 75, 350 Wis. 2d 138, 834 N.W.2d 362. The four-Justice plurality reasoned that the DNA report was not testimonial because it "was not prepared for the primary purpose of accusing a *targeted individual*." *Williams v. Illinois*, 132 S. Ct. at 2243 (plurality) (emphasis added). In a concurring opinion, Justice Thomas concluded the report was

not testimonial because it lacked the "solemnity of an affidavit or deposition, for it is neither a sworn nor a certified declaration of fact." *Id.* at 2260 (Thomas, J., concurring). The four-Justice dissent argued that the plurality's "accusation test" went too far, because previous cases asked only "whether a statement was made . . . for the purpose of providing evidence," not whether the statement was "meant to accuse a previously identified individual." *Id.* at 2273–74 (Kagan, J., dissenting).[4]

This Court has never had occasion to decide what types of forensic reports are testimonial under the Confrontation Clause. In a pre-*Crawford* case, *State v. Williams*, 2002 WI 58, 253 Wis. 2d 99, 644 N.W.2d 919,[5] this Court held that expert testimony could be based on forensic reports as long as the expert formed an "independent expert opinion" and was not a "mere conduit" for the report. *Id.* ¶¶ 19, 26. In *State v. Griep*, 2015 WI 40, 361 Wis. 2d 657, 863 N.W.2d 567, this Court held that the rule from *Williams* survived *Crawford* and its progeny, and therefore did not analyze whether the blood alcohol report at issue in the case was testimonial. *See id.* ¶ 29 n.12. This Court's only other recent case considering a forensic report applied the outcome from *Williams v. Illinois*

[4] The State also notes that these cases have generated significant confusion in lower courts, and reserves the right to ask the Supreme Court to modify or overrule them.

[5] *State v. Williams*, 2002 WI 58, 253 Wis. 2d 99, 644 N.W.2d 919, will be short-cited as "*Williams*," while *Williams v. Illinois*, 132 S. Ct. 2221 (2012) will be short-cited as "*Williams v. Illinois*."

to similar facts without additional analysis. *Deadwiller*, 350 Wis. 2d 138.

C. The present case involves one kind of forensic report: a toxicology report, which is often conducted in conjunction with an autopsy report. The overwhelming majority of federal courts of appeals and state supreme courts that have considered Confrontation Clause challenges to such reports have concluded that, absent special circumstances, the reports are not "testimonial." *See, e.g.*, *United States v. James*, 712 F.3d 79, 87–102 (2d Cir. 2013); *People v. Leach*, 980 N.E.2d 570, 582–94 (Ill. 2012); *Ackerman v. State*, No. 49S00-1409-CR-770, 2016 WL 1329532, at *4–*15 (Ind. Apr. 5, 2016); *State v. Maxwell*, 9 N.E.3d 930, 949–52 (Ohio 2014); c*f. People v. Dungo*, 286 P.3d 442, 449–50 (Cal. 2012); *State v. Medina*, 306 P.3d 48, 62–64 (Ariz. 2013); *State v. Hutchison*, 482 S.W.3d 893, 905–914 (Tenn. 2016).

For example, in *United States v. James*, 712 F.3d 79 (2d Cir. 2013), the Second Circuit held that the autopsy and toxicology reports at issue were not testimonial because they "[were] not prepared primarily to create a record for use at a criminal trial." *Id.* at 88, 99, 102. The prosecution introduced the reports, along with testimony from medical examiners who did not perform either the autopsy or the toxicology test. *Id.* at 96–97, 100. The court emphasized that the medical examiners who conducted the tests were "independent" from law enforcement, *id.* at 97, that such reports are "routine[ly]" performed to determine the cause of death, *id.* at 98, that the

tests were completed "substantially before any criminal investigation," *id.* at 99, 101, and that the deaths were not particularly "suspicious" or suggestive of "murder in particular," *id.* at 99, 102.

Similarly, in *People v. Leach*, 980 N.E.2d 570 (Ill. 2012), the Illinois Supreme Court held that autopsy reports are usually not testimonial. The defendant confessed to the police that he strangled his wife, but claimed that her death was an accident. *Id.* at 572. The medical examiner, at the time of the autopsy, was aware that the defendant was "in custody and admitted choking his wife." *Id.* at 590. The court found that the autopsy report was "no[t] prepared for the primary purpose of providing evidence in a criminal case." *Id.* at 594. The court emphasized that the medical examiner's office "is not a law enforcement agency," and that its primary "function" is "the determination of the cause and manner of death." *Id.* at 591. Even though the examiner was aware of suspicious circumstances, "his examination could have either incriminated or exonerated [the defendant], depending on what the body revealed about the cause of death." *Leach*, 980 N.E.2d at 591. There was "no evidence that the autopsy was done at the specific request of the police"; rather, it was "prepared in the normal course of operation of the medical examiner's office." *Id.* at 591–92. Finally, the autopsy report "was not certified or sworn in anticipation of its being used as evidence; it was merely signed by the doctor who performed the autopsy." *Id.* at 592. The court noted that there might be "unusual case[s]

in which the police play a direct role . . . and the purpose of the autopsy is clearly to provide evidence for use in prosecution," *id.*, but concluded that "autopsy reports prepared by a medical examiner's office in the normal course of its duties are nontestimonial," *id.* at 593.

And in *Ackerman v. State*, No. 49S00-1409-CR-770, 2016 WL 1329532 (Ind. Apr. 5, 2016), the Indiana Supreme Court held that an autopsy report was not testimonial. The defendant was charged with second degree murder thirty-six years after the death of an infant child. *Id.* at *2. The medical examiner who performed the autopsy had since passed away, so the State introduced the autopsy report along with testimony from a forensic pathologist who reviewed the report. *Id.* The court began by stressing that the primary purpose of autopsies is to "inquir[e] into the cause of death." *Id.* at *11. The court also emphasized the "cooperative, but independent" relationship between coroners and law enforcement in Indiana. *Id.* at *12. With respect to the specific circumstances of the death, "nothing suggest[ed] that the investigating officers communicated with [the medical examiner] that a potential homicide investigation [was] underway," and the report "could have confirmed" the defendant's explanation of the child's death. *Ackerman*, 2016 WL 1329532 at *12. The court noted that it could "conceive a situation in which law enforcement is deep in the midst of a homicide investigation and the circumstances surrounding the death so obviously indicate that the death was a homicide that a pathologist performing

an autopsy would very clearly understand that the purpose of the report would be to aid in the criminal investigation." *Id.* at *13. But based on the circumstances in that case, the court was "not persuaded that [the medical examiner] would have known that the autopsy would primarily serve to aid the investigation and prosecution of a crime." *Id.*

The federal court of appeals and state supreme court cases finding that toxicology or autopsy reports are testimonial typically involve special circumstances suggesting that the reports were, in fact, prepared with the "primary purpose" of "creat[ing] an out-of-court substitute for trial testimony." *Clark*, 135 S. Ct. at 2180 (citation omitted). Such cases involve law enforcement participating in the autopsy or being otherwise closely involved, *see State v. Navarette*, 294 P.3d 435, 440 (N.M. 2013) ("[T]wo police officers attended the autopsy."); *United States v. Moore*, 651 F.3d 30, 73 (D.C. Cir. 2011) ("Law enforcement officers thus not only observed the autopsies, a fact that would have signaled to the medical examiner that the autopsy might bear on a criminal investigation, they participated in the creation of reports."); *State v. Bass*, 132 A.3d 1207, 1225 (N.J. 2016) ("The autopsy was conducted in the presence of two law enforcement officers, one of whom was the lead investigator for the county prosecutor."); *United States v. Ignasiak*, 667 F.3d 1217, 1231–32 (11th Cir. 2012) (relying upon Florida's statutory framework under which "the Medical Examiners Commission was created and

exists within the Department of Law Enforcement"), or circumstances surrounding the death that raise a strong suspicion of criminal activity, *e.g.*, *State v. Locklear*, 681 S.E.2d 293, 299 (N.C. 2009) (autopsy performed on the "skeletal remains" of a missing female student whose car was found "burned down to bare metal"); *State v. Frazier*, 735 S.E.2d 727, 729, 731–32 (W. Va. 2012) (decedent had been "shot [ ] in the face"); *Cuesta-Rodriguez v. State*, 241 P.3d 214, 228–29 (Okla. Crim. App. 2010) (same);[6] *Com. v. Carr*, 986 N.E.2d 380, 399 (Mass. 2013) (same), *abrogated on other grounds by Com. v. Crayton*, 21 N.E.3d 157 (Mass. 2014).

D. The toxicology report in the present case is not testimonial under the primary purpose test, meaning that this case does not implicate the Confrontation Clause.

The Waukesha County Medical Examiner's Office did not request the toxicology lab report with the "primary purpose" of "creat[ing] an out-of-court substitute for trial testimony." *Clark*, 135 S. Ct. at 2180 (citation omitted). Leuck's roommate found him dead in their apartment in Waukesha County. R. 70:125–28. The Waukesha County Medical Examiner's Office investigated the death because it appeared to involve "unexplained or suspicious circumstances." *See* Wis. Stat. §§ 979.02, .04; *Scarpaci*, 96 Wis. 2d at 684. The Medical Examiner's Office ordered the toxicology report to help carry

[6] The Oklahoma Court of Criminal Appeals is the final arbiter of criminal appeals in Oklahoma. Okla. Const. art. 7, § 4; Okla. Stat. tit. 20, § 40.

out that duty, which is not tied to creating a substitute for trial testimony. As the Supreme Court of Illinois explained in *Leach*, in language that applies to the toxicology report in the present case: "[a] finding of accidental death may eventually lead to claims of product liability, medical malpractice, or other tort. A finding of suicide may become evidence in a lawsuit over proceeds of a life insurance policy. Similarly, a finding of homicide may be used in a subsequent prosecution of the accused killer." *Leach*, 980 N.E.2d at 592. The primary purpose of preparing the toxicology report here, just as with the report in *Leach*, was "not to accuse 'a targeted individual of engaging in criminal conduct,' *Williams v. Illinois*, 132 S.Ct. at 2242 [(plurality)], or to provide evidence in a criminal trial, *Davis*, 547 U.S. at 822." *Id.* Indeed, autopsies are often conducted "soon after death" "when it is not yet clear whether there is a particular suspect or whether the facts found in the autopsy will ultimately prove relevant in a criminal trial." *Williams v. Illinois*, 132 S. Ct. at 2251 (Breyer, J., concurring).

Additional considerations support the conclusion that the report in this case was not testimonial. The Medical Examiner's Office, which ordered the toxicology report, "is not a law enforcement agency," *Leach*, 980 N.E.2d at 591, and is "independent" from law enforcement, *James*, 712 F.3d at 97. The county executive appoints the medical examiner, the county board confirms the appointment, and the county pays the employees. *See* Waukesha Cnty. Ordinances §§ 5-2, 18-

20; Wis. Stat. §§ 59.34(1), 59.38(1). Notably, the overwhelming majority of the 1,300 deaths that the Office investigates annually do not result in a finding of homicide. *See* Waukesha County Death Statistics, https://www.waukeshacounty.gov/DeathStats/ (last visited June 27, 2016).

There is no suggestion that law enforcement was involved in the Office's decision to send samples to the toxicology lab. App. 195–96; *see Leach*, 980 N.E.2d at 591; *contra*, *e.g.*, *Moore*, 651 F.3d at 73 (noting that law enforcement officers "not only observed the autopsies, . . . they participated in the creation of reports"). The Office ordered the toxicology test as part of the typical process in carrying out its duties, which are not prosecutorial in nature. App. 150–53. The Office did not even ask the lab to determine the cause of death, but only to test biological samples for substances, including legal ones such as alcohol and antidepressants. App. 191–94; Wis. Stat. §§ 940.02; 961.14; 961.16. And the toxicology report results were sent to the Medical Examiner's Office, rather than law enforcement, making them "much less likely to be testimonial." *Clark*, 135 S. Ct. at 2181. Like the autopsy report itself, the toxicology report was "prepared in the normal course of operation of the medical examiner's office." *Leach*, 980 N.E.2d at 592.

Nor did the condition that Leuck's body was found in lead to the conclusion that the toxicology report was created for the "primary purpose" of "creat[ing] an out-of-court substitute for trial testimony." *Clark*, 135 S. Ct. at 2180 (citation

omitted). Leuck's body was found alone, locked in his bedroom. R. 70:127–28. Although there was drug paraphernalia nearby, the autopsy could have revealed that Leuck died from natural causes. Even after the autopsy suggested a drug overdose, it was still not obvious that a crime had been committed, because Leuck could have injected drugs he manufactured himself or overdosed on some other substance, such as the Clonazepam nearby. *See* R. 70:221; 71:22. The toxicology report in *James* was non-testimonial in part because it could have revealed a "recreational drug overdose or a suicide." 712 F.3d at 99, 102. In *Leach*, the autopsy report was held non-testimonial partly because it "could have . . . exonerated [the defendant], depending on what the body revealed about the cause of death," even though the examiner knew that the defendant "admitted choking his wife." 980 N.E.2d at 590–91. When autopsy reports have been found testimonial, there was often no question that a crime had been committed: for example, the decedent had been "shot [ ] in the face," *Frazier*, 735 S.E.2d at 729, 731–32; *Cuesta-Rodriguez*, 241 P.3d at 228–29; *Carr*, 986 N.E.2d at 399. The circumstances here are similar to those in *James*, less suspicious than in *Leach*, where the autopsy report was held non-testimonial, and *much* less suspicious than the cases finding autopsy reports testimonial.

Finally, Mattox is simply mistaken that the toxicology report is testimonial because *Melendez-Diaz* and *Bullcoming* "establish[ ] that laboratory reports that document the results of drug and alcohol testing are testimonial." Def.-Appellant's

Br. 14–15. Both cases made clear that reports generated primarily for purposes other than an "evidentiary purpose" would not be testimonial. 557 U.S. at 312 n.2, 324; 564 U.S. at 672 (Sotomayor, J., concurring). Unlike the drug-substance test in *Melendez-Diaz*, 557 U.S. at 307, or the blood-alcohol test in *Bullcoming,* 564 U.S. at 651, the toxicology report here was not even directly, much less *solely*, generated for purposes of proving an element of a crime. The lab was not asked to provide any analysis as to cause of death, only to test biological samples for various substances, including some that are not controlled substances, such as alcohol and antidepressants. App. 191–94; Wis. Stat. §§ 940.02; 961.14; 961.16. In *Melendez-Diaz* and *Bullcoming*, the reports were requested by the police, 557 U.S. at 308, 564 U.S. at 652, and the report in *Bullcoming* contained "information filled in by the arresting officer," 564 U.S. at 653 (citation omitted). None of the circumstances in *Melendez-Diaz* or *Bullcoming* are present in this case.[7]

In the present case, because the toxicology report was not ordered with the primary purpose of "provid[ing] . . . evidence" in a criminal proceeding, *Melendez-Diaz*, 557 U.S. at

[7] Mattox also relies heavily on *State v. VanDyke*, 2015 WI App 30, 361 Wis. 2d 738, 863 N.W.2d 626, which held that a nearly identical toxicology report was testimonial. Def.-Appellant's Br. 21–23. But *VanDyke* did not conduct a substantial analysis of the primary purpose test, and therefore wrongly decided this issue for the reasons discussed in this brief. This Court should overrule this portion of *VanDyke*. Pl.-Respt. Ct. App. Br. 31 n.3 (explaining that *VanDyke* should be overruled).

311, or "in aid of a police investigation," *Bullcoming*, 564 U.S. at 664, the report is simply not testimonial.

E. The toxicology report at issue here would also not be testimonial under the approach advocated by Justice Thomas in his separate opinion in *Williams v. Illinois*.

Justice Thomas found that the DNA report in *Williams v. Illinois* was not testimonial because it "lacks the solemnity of an affidavit or deposition, for it is neither a sworn nor a certified declaration of fact." *Williams v. Illinois*, 132 S. Ct. at 2260 (Thomas, J., concurring in judgment). Justice Thomas further noted that although the report was signed by two reviewers, "[n]owhere does the report attest that its statements accurately reflect the DNA testing processes used or the results obtained." *Id.* (Thomas, J., concurring in judgment). In *Leach*, the Illinois Supreme Court concluded that because the autopsy report at issue "was not certified or sworn in anticipation of its being used as evidence" and was "merely signed by the doctor who performed the autopsy," it "would not be deemed testimonial" under Justice Thomas' test. *Leach*, 980 N.E.2d at 592; *see also Hutchison*, 482 S.W.3d at 912; *Medina*, 306 P.3d at 64, ¶ 63.

Just like the reports in *Williams v. Illinois* and *Leach*, the toxicology report in this case was "neither a sworn nor certified declaration of fact." *Williams v. Illinois*, 132 S. Ct. at 2260 (Thomas, J., concurring in judgment). Rather, it was "merely signed by the [employee]" who authored the report. *Leach*, 980 N.E.2d at 592; App. 191–93. The report also does

not "attest that its statements accurately reflect the [toxicology] testing processes used or the results obtained," and therefore lacks the requisite formality and solemnity under Justice Thomas' test. *Williams v. Illinois*, 132 S. Ct. at 2260 (Thomas, J., concurring in judgment). While Mattox emphasizes that the toxicology report "bore the name of a recognized university laboratory," was "titled an official toxicology report," and had "time and date stamps," Def.-Appellant's Br. 17, neither Justice Thomas, nor the courts considering the formality of autopsy reports, relied on these factors. *See Williams v. Illinois*, 132 S. Ct. at 2260; *Leach*, 980 N.E.2d at 592; *Hutchison*, 482 S.W.3d at 912; *Medina*, 306 P.3d at 64, ¶ 63.

In any event, even if this Court concludes that the toxicology report in this case meets Justice Thomas' formality test, "[f]ormality is not the sole touchstone of [the Supreme Court's] primary purpose inquiry," *Bryant*, 562 U.S. at 366, but is simply "[o]ne additional factor" in the primary purpose analysis. *Clark*, 135 S. Ct. at 2180.

II. Dr. Okia's Cause-Of-Death Opinion Was An "Independent Expert Opinion" Under *Williams* And *Griep*

In *State v. Williams*, 253 Wis. 2d 99 and *State v. Griep*, 361 Wis. 2d 657, this Court held that admission of expert testimony does not violate the Confrontation Clause so long as the expert formed an "independent expert opinion" and was not a "mere conduit" for inadmissible testimony. *Williams*, 253 Wis. 2d 99, ¶¶ 18–19, 26; *Griep*, 361 Wis. 2d 657, ¶ 57. To

the extent this Court disagrees with the State's primary submission that the Confrontation Clause is not implicated because the toxicology report is non-testimonial, it will need to decide whether *Williams* and *Griep* permitted Dr. Okia to testify to her expert conclusion that heroin overdose was the cause of death. Dr. Okia's expert opinion was based on the autopsy that she performed herself and her independent expert analysis of the data in a toxicology report. Accordingly, her cause-of-death opinion, which was subject to cross examination by Mattox's counsel, did not violate the Confrontation Clause under *Williams* and *Griep*.

A. In *State v. Williams*, this Court considered a Confrontation Clause challenge to testimony based on "a state crime lab report to prove the presence of cocaine." 253 Wis. 2d 99, ¶ 1. The analyst who conducted the tests was unavailable to testify, so the State introduced the lab report along with testimony from a supervisor who had peer reviewed the tests. *Id.* ¶ 4. This Court determined that the supervisor's testimony did not violate the defendant's confrontation rights because the supervisor "was a highly qualified expert employed by the lab who was familiar with the particular lab procedures and performed the peer review in this particular case, then gave an independent expert opinion." *Id.* ¶ 26. The "critical point," the Court noted, "is the distinction between an expert who forms an opinion based in part on the work of others and an expert who merely summarizes the work of others." *Id.* ¶ 19. In other words, "one expert cannot act as a

mere conduit for the opinion of another." *Id.* Because the expert in *Williams* had formed her own, independent opinion, she was not acting as a "mere conduit," and therefore her testimony did not violate the Confrontation Clause. *Williams*, 253 Wis. 2d 99, ¶ 19. As to the report itself, this Court determined that it was not admissible under the rules of evidence and therefore did not reach the Confrontation Clause issue. This Court concluded that the error was harmless primarily because the supervisor's opinion testimony, on its own, was "compelling and credible evidence" that the substance found on the defendant was cocaine. *Id.* ¶¶ 49–52.

This Court reaffirmed *Williams'* holding in *State v. Griep*. *Griep* considered a Confrontation Clause challenge to testimony based on a state crime lab report establishing the defendant's blood alcohol concentration. 361 Wis. 2d 657, ¶ 1. The analyst who generated the report was unavailable, so the State called a section chief from the same lab. *Id.* ¶ 10. The new expert reviewed the "laboratory file," but unlike in *Williams*, had not peer reviewed the original blood alcohol test. *Id.*, ¶¶ 3, 8, 10.

This Court first exhaustively reviewed the Supreme Court's post-*Williams* decisions and determined that none of them undermined *Williams*' holding. *Id.* ¶¶ 23–40. This Court then explained that *Williams* established a "two-part framework" for analyzing expert testimony based on a forensic test conducted by a non-testifying analyst: the testifying expert must have "(1) reviewed the analyst's tests, and (2)

formed an independent opinion to which he testified at trial." *Id.* ¶ 47. This Court reasoned that the testifying expert's review of the analyst's "report, data, and notes" was the "same examination as occurs in . . . formal peer review." *Griep*, 361 Wis. 2d 657, ¶¶ 50, 52. This Court found it "significant" that the "laboratory file included not only [the] report but also raw data." *Id.* ¶ 45 n.21. In the end, the testifying expert satisfied the review requirement because he "reexamined the data." *Id.* ¶ 52. As to the independent-opinion requirement, this Court emphasized that the expert relied not only on his "review of data," but also on his "own professional expertise." *Id.* ¶ 55. Even though the expert did "not have personal knowledge of the forensic tests," he did not "merely . . . recit[e] . . . another's conclusions." *Id.* Therefore, "his opinion [was] . . . independent." *Griep,* 361 Wis. 2d 657, ¶ 55.

B. In the present case, Dr. Okia formed her own, independent expert opinion as to Leuck's cause of death and was not a "mere conduit" for the toxicology report.

Dr. Okia herself performed an autopsy prior to sending samples for testing, and she could tell "just looking at the body" that the victim likely died of a drug overdose. App. 154. Leuck had "various needle puncture marks" on both arms, a swollen brain, and lungs filled with fluid, which are "very typical finding[s] in drug overdoses." App. 154.

Dr. Okia's reliance on the toxicology report to support this first-hand analysis, and to conclude further that the drug was heroin, was entirely consistent with the requirements of

Williams and *Griep*. The report indicated only that certain substances, in certain quantities, were found in the biological samples Dr. Okia had sent to the lab. The report did not state that the victim had died of a heroin overdose. App. 191–93. It did not state that the substances found were "fatal" quantities, or that one of them was "specific" to a "breakdown of heroin." App. 162–63. It was up to Dr. Okia to interpret the "raw data" in the toxicology report—*e.g.*, 0.61 micrograms per milliliter of morphine, 0.27 micrograms per milliliter of "free" (active) morphine, and less than 0.05 micrograms per milliliter of 6-monoacetylmorphine in Leuck's blood—based on her "training and experience." *Griep*, 361 Wis. 2d 657, ¶ 45 n.21; App. 162–63. In conducting this analysis, she applied her "own substantive expertise rather than relying entirely on the expertise of others." *Griep*, 361 Wis. 2d 657, ¶ 45 n.21. Her testimony could not possibly be labelled a "mere recitation of another analyst's conclusions" because the toxicology report did not contain any cause-of-death conclusions to recite. *Id.* ¶ 54. And Dr. Okia's "review" of the toxicology report, *id.* ¶¶ 48–52, was sufficient under *Griep*, given that the report simply gathered "raw data" that Dr. Okia herself analyzed, *id.* ¶ 45 n.21; *see also supra* p. 33.

In all, Dr. Okia's cause-of-death opinion was her own expert conclusion, based on her own autopsy and her expert review of the toxicology report's "raw data." App. 164.

C. Mattox's arguments to the contrary are incorrect.

First, Mattox argues that Dr. Okia was a mere conduit of the toxicology report because her opinion came "after she reviewed the toxicology report," and because she listed the substances found in Leuck's blood first in her autopsy report. Def.-Appellant's Br. 23. But *Williams* and *Griep* make clear that it is entirely appropriate for an expert to "base[ ] part of her opinion on facts and data gathered by someone else." 253 Wis. 2d 99, ¶ 25; 361 Wis. 2d 657, ¶ 21. Here, Dr. Okia relied on the autopsy that *she performed*, *and* applied her own expertise and training to interpret the raw numbers in the toxicology report. Thus she was not "merely summariz[ing] the work of others," which is the "critical point." *Williams*, 253 Wis. 2d 99, ¶ 19.[8]

Second, Mattox argues that *Williams* and *Griep* do not apply because the toxicology report itself was introduced into evidence. Def.-Appellant's Br. 28, 30. But the admissibility of Dr. Okia's expert opinion is a separate issue from the admissibility of the toxicology report, as illustrated by this

[8] The Court of Appeals' decision in *Van Dyke*, which Mattox also cites for this argument, is wrong for the same reason. In *VanDyke*, the Court of Appeals determined that a medical examiner's opinion was not independent from a toxicology report because the cause of death remained "undetermined" after the autopsy. *VanDyke*, 361 Wis. 2d 738, ¶ 24. But even if an autopsy is inconclusive, the medical examiner must still compare autopsy findings with the toxicology results and interpret the data in the toxicology report. Under *Williams* and *Griep*, this exercise of "substantive expertise" is enough to establish that medical examiners do not merely "summarize" or "recit[e]" the work of others. 253 Wis. 2d 99, ¶ 18; 361 Wis. 2d 657, ¶¶ 45 n.21, 55.

Court's opinion in *Williams*. There, this Court first determined that the expert's opinion was "independent" and therefore did not violate the Confrontation Clause. 253 Wis. 2d 99, ¶¶ 9–31. Only after making this determination did the Court consider whether admitting the report itself violated the Clause. *Id.* ¶¶ 32–55. And in the end, this Court concluded that any error with respect to the report was harmless because the expert's opinion testimony alone was "compelling and credible evidence." *Id.* ¶¶ 49–54.

Mattox's objection to the admission of the toxicology report, apart from Dr. Okia's cause-of-death opinion, provides no basis for setting aside his conviction. The State's primary position, as explained in Part I, is that the admission of the report was entirely proper because the report is non-testimonial (and is otherwise consistent with the rules of evidence, *supra* p. 9 n.2). To the extent this Court disagrees with that argument, admission of the report was harmless beyond a reasonable doubt, just as with the report in *Williams*. *See infra* pp. 39–44.

Third, Mattox asserts that Dr. Okia did not review the toxicology report with the same rigor as did the experts in *Williams* and *Griep* for the reports in those cases. Def.-Appellant's Br. 31. But Dr. Okia's review of the report was sufficient given the report's nature. In *Williams* and *Griep*, the reports directly drew the relevant conclusions—that a substance was cocaine, or that the defendant's blood alcohol concentration was above a certain limit. 253 Wis. 2d 99, ¶ 1; 361

Wis. 2d 657, ¶ 8. The reports spoke for themselves and did not need to be combined with any additional facts or analysis by an expert. Thus, to establish the "critical point"—that the testifying experts were not "merely summariz[ing] the work of others," *Williams*, 253 Wis. 2d 99, ¶ 19—the experts needed to demonstrate that they reviewed the underlying data. Otherwise, there would be no way to know for sure whether the experts were simply "recit[ing]" the reports' conclusions. *Griep*, 361 Wis. 2d 657, ¶ 55. Here, on the other hand, the toxicology report does not directly draw the relevant legal conclusion; i.e., the cause of death. In fact, it does not contain any opinions or conclusions at all, only "raw data." *Griep*, ¶ 45 n.21; App. 162–66. Dr. Okia had to apply her own experience and expertise to interpret the numbers, and combine that with her findings from the autopsy. Her opinion was simply informed by "facts and data gathered by someone else," which is permissible. *Williams*, 253 Wis. 2d 99, ¶ 25.

III. Any Confrontation Clause Error Was Harmless

"[A] determination of a Confrontation Clause violation does not result in automatic reversal, but rather is subject to harmless error analysis." *State v. Williams*, 2002 WI 118, ¶ 2, 256 Wis. 2d 56, 652 N.W.2d 391 (order denying motion for reconsideration); *Deadwiller*, 350 Wis. 2d 138, ¶¶ 41–43. A constitutional error is harmless if the State proves beyond a reasonable doubt that the error did not contribute to the verdict at trial. *See Deadwiller*, 350 Wis. 2d 138, ¶ 41; *see also*

Chapman v. California, 386 U.S. 18, 22–24 (1967). Relevant factors to this analysis include: the "importance of the erroneously admitted evidence," whether there was corroborating or contradictory evidence, "the nature of the defense," and the "overall strength of the State's case." *Deadwiller*, 350 Wis. 2d 138, ¶ 41 (citation omitted).

If this Court disagrees with the State's arguments in Parts I and II and finds that Dr. Okia's cause-of-death opinion and the introduction of the toxicology report violated Mattox's right to confrontation, then the Court would need to consider whether this was harmless. Any such errors were harmless because there was substantial other evidence as to cause of death, Mattox did not challenge Leuck's cause of death at all, and the State's case against Mattox was powerful. *See Deadwiller*, 350 Wis. 2d 138, ¶ 43.

The State's evidence of Mattox's guilt was overwhelming without any reference to Dr. Okia's cause-of-death opinion or the toxicology report. Tibbits testified that Leuck called him looking for heroin and that he and Leuck purchased heroin from Mattox that morning. Cell phone records showed ten calls between Leuck, Tibbits, and Mattox, with Tibbits playing the middle man between Leuck and Mattox. App. 133–34. A bank surveillance video and ATM receipt showed that Leuck withdrew $100 just before meeting with Mattox. App. 133. Tibbits further testified that he and Leuck used a quarter of the heroin they purchased from Mattox and that he left Leuck at his apartment with the remainder. R. 70:36–37.

Mattox admitted to regularly selling heroin to Tibbits and to meeting with him that morning, but claimed he did not sell Tibbits any heroin on that particular day. R. 71:52–57. It is no surprise that the circuit court found that Tibbits' account of what occurred was credible, while Mattox's contrary account (which he told for the first time at trial, App. 140) was not. App. 138–43.[9] Specifically, Tibbits was telling the truth that he had purchased heroin on February 14 from Mattox, and Mattox was lying when he claimed that he did not sell the heroin to Tibbits.

The State also presented powerful evidence that the heroin that Mattox sold to Leuck—and then lied about selling under oath—caused Leuck's death, which evidence was unrelated to, but merely "corroborat[ed]," Dr. Okia's cause-of-death opinion and the report. *See State v. Martin*, 2012 WI 96, ¶ 46, 343 Wis. 2d 278, 816 N.W.2d 270. Leuck was found dead in his room next to a syringe and metal cooker that both tested positive for heroin, in a test unrelated to the toxicology report. R. 70:284–85. There were thirteen puncture marks on Leuck's arms, the identification of which had no connection to the toxicology report. R. 70:178; App. 169–70. Several of

[9] While the circuit court did mention Dr. Okia's cause-of-death opinion to support its conclusion as to Tibbits' credibility, App. 139, this was only one point in a long list of other evidence, including Tibbits' demeanor, corroboration through cell phone and bank records, Tibbits' "statement[s] against his own penal interests," Mattox's "convenient and contrived" story, and Mattox's inability to recall the events of February 14 when initially confronted by the police. App. 138–142.

Leuck's friends and relatives testified that he regularly used heroin. R. 70:19–21, :83, :92, :106–07. Finally, Dr. Okia's testimony that the pulmonary and cerebral edemas she observed during her autopsy of Leuck were "very typical finding[s] in drug overdoses," App. 154, was distinct from her testimony of her ultimate cause-of-death opinion or the toxicology report, and therefore did not present any Confrontation Clause issues.

In addition, the State's evidence accounted for Leuck's final day alive, and there was no "contradict[ory]" evidence suggesting any other cause of death. *Martin*, 343 Wis. 2d 278, ¶ 46; App. 131–37. The circuit court found the timeline that the State established "very important in finding that Mr. Leuck died as a result of using heroin." App. 144. Furthermore, the court "spent a great amount of time on the[ ] phone records," and concluded that Mattox was "the only possible source of heroin this Court could reasonably infer from all of the evidence." App. 145. The circuit court noted that "[n]o other dealer ha[d] been identified. No other source of heroin ha[d] been testified about or identified. No other opportunity for Mr. Leuck to purchase or receive heroin ha[d] been testified about." App. 144.

In all, none of the above-described evidence relied upon Dr. Okia's cause-of-death determination or the toxicology report, and thus "the erroneously admitted evidence" had little "importance" to the State's case. *Martin*, 343 Wis. 2d 278,

¶ 46. Dr. Okia's cause-of-death determination and the toxicology report were relevant *only* to whether Leuck died from a heroin overdose, and that cause-of-death conclusion was supported by substantial undisputed evidence. Indeed, as the circuit court explained, the "cause of death" was "uncontroverted." R. 71:115.

As to "the nature of the defense," *Martin*, 343 Wis. 2d 278, ¶ 46, Mattox's entire defense was that someone else provided the heroin that killed Leuck, not that Leuck had died from something other than a heroin overdose. R. 71:54–55. Therefore, Dr. Okia's testimony was entirely "irrelevant to [Mattox's] defense," since she offered no testimony as to the source of the heroin. *Deadwiller*, 350 Wis. 2d 138, ¶ 43.

Finally, assuming this Court disagrees with the State's argument in Part I that the report is not testimonial, but agrees with the State's argument in Part II that Dr. Okia formed an independent expert opinion as to cause of death, any error related to admitting the *report* would also be unquestionably harmless. Given that admission of *both* Dr. Okia's cause-of-death opinion and the toxicology report was harmless, the inclusion of just the report would clearly be harmless. In addition, since Dr. Okia could have offered her cause-of-death conclusion under *Williams* and *Griep* without admission of the actual report, the admission of the report is harmless for the same reason as in *Williams*. Dr. Okia could have offered the same opinion as to cause-of-death without mentioning or introducing the report. *Williams*, 253 Wis. 2d

99, ¶ 52; *see also Heine*, 354 Wis. 2d 1, ¶ 15. Being that Dr. Okia is "highly qualified to render an expert opinion based on the information before her," *Williams*, 253 Wis. 2d 99, ¶ 21, her opinion would still have been "compelling and credible evidence" that Leuck died of a heroin overdose even without the toxicology report. *Id.* ¶ 52. The report itself was not an "importan[t]" piece of evidence, so its introduction was harmless error. *Martin*, 343 Wis. 2d 278, ¶ 46.

CONCLUSION

The judgment of conviction should be affirmed.

Dated this 27th day of June, 2016.

Respectfully submitted,

BRAD D. SCHIMEL
Attorney General

MISHA TSEYTLIN
Solicitor General
State Bar #1102199

LUKE N. BERG
Deputy Solicitor General

Wisconsin Department of Justice
17 W. Main Street
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-9323
(608) 261-7206 (Fax)
tseytlinm@doj.state.wi.us

Attorneys for Plaintiff-Respondent State of Wisconsin

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (c) for a brief produced with a proportional serif font. The length of this brief is 10,568 words.

Dated this 27th day of June, 2016.

_____

MISHA TSEYTLIN
Solicitor General

CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

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

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

Dated this 27th day of June, 2016.

_____

MISHA TSEYTLIN
Solicitor General