STATE OF WISCONSIN

IN SUPREME COURT

No. 2021AP72-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

DARRELL K. SMITH,

Defendant-Appellant.

PETITION FOR REVIEW AND APPENDIX

JOSHUA L. KAUL
Attorney General of Wisconsin

NICHOLAS S. DESANTIS
Assistant Attorney General
State Bar #1101447

Attorneys for Plaintiff-Respondent-Petitioner

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-8556
(608) 294-2907 (Fax)
desantisns@doj.state.wi.us

TABLE OF CONTENTS

ISSUE PRESENTED

Alice[1] arrived at a concert in Milwaukee, then woke up in the hospital bleeding from her vagina with no memory of the past several hours. She was examined in the emergency room. She was then examined by a Sexual Assault Nurse Examiner (SANE) less than 24 hours later. Vaginal and cervical swabs were sent to the crime lab. A crime lab analyst identified semen on both swabs and created a DNA profile. The DNA profile was entered into the CODIS database and matched with Darrell K. Smith, whom Alice did not know.

Smith was charged with, and found guilty by a jury of, second-degree sexual assault based largely on this DNA evidence. While the SANE did not testify at trial, the crime lab analyst who examined the DNA testified and was subject to cross-examination. Smith argued that his counsel was ineffective for not objecting to the admission of the SANE report—including the origin of the DNA evidence—on Confrontation Clause grounds. The circuit court denied the motion without a hearing, but the court of appeals concluded that the entire SANE report was testimonial hearsay and that if counsel had objected, the DNA evidence would have been excluded.

Is the SANE's statement that she swabbed Alice for DNA testimonial hearsay under the Confrontation Clause?

CRITERIA FOR REVIEW

This case presents a real and significant question of federal and state constitutional law that this Court has not yet resolved. Wis. Stat. § (Rule) 809.62(1r)(a). SANE examinations, and the physical evidence collected therefrom, present a unique Confrontation Clause challenge that has

[1] Alice is a pseudonym. The State uses only initials or pseudonyms to refer to victims. Wis. Stat. § (Rule) 809.86(4).

arisen in multiple court of appeals cases in recent years, but which this Court has not yet addressed. Litigants and judges throughout the state would benefit from a decision by this Court on whether, or under what circumstances, a SANE nurse's collection of evidence from a sexual assault victim may be viewed as a testimonial statement under the Confrontation Clause.

Additionally, review is warranted because the court of appeals' decision conflicts with decisions of the United States Supreme Court and this Court. Wis. Stat. § (Rule) 809.62(1r)(d). As set forth below, the decision is contrary to the United States Supreme Court's decisions in *Williams v. Illinois*, 567 U.S. 50 (2012) and *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009), as well as with this Court's decision in *State v. Deadwiller*, 2013 WI 75, 350 Wis. 2d 138, 834 N.W.2d 362. The court of appeals also failed to apply the four-factor test this Court set forth in *State v. Mattox*, 2017 WI 9, ¶ 32, 373 Wis. 2d 122, 890 N.W.2d 256, for determining whether a statement is testimonial.

STATEMENT OF THE CASE

On the night of February 6, 2016, Alice went to a bar in Milwaukee with several friends. (R. 1:1.) She was intoxicated. (R. 1:1.) The next thing she remembered was waking up in Columbia St. Mary's Hospital bleeding from her vagina. (R. 1:1–2; 37:11.) Alice became concerned that someone may have had sexual intercourse with her without her consent. (R. 1:2.)

Alice arrived at Columbia St. Mary's at 12:35 a.m. on February 7, 2016. (R. 37:5.) She was discharged at 4:18 a.m. and referred to Aurora Sinai Medical Center for a SANE exam and further evaluation. (R. 37:11, 23–24.) Alice then arrived at Aurora at 4:51 a.m. (R. 38:4.) There, she received treatments such as emergency contraception and STI medication. (R. 38:26, 37.) She was discharged at 6:38 a.m. (R.

38:6.) She then returned to Aurora at 8:56 p.m. for a SANE exam. (R. 38:36–37.) There, she had a "full head to toe" examination for injuries, was swabbed for DNA, had a blood sample collected, and was instructed by the nurse on her medications. (R. 38:37, 41, 43.)

The DNA swabs were sent to the crime lab, where semen was located on Alice's vaginal and cervical swabs. (R. 1:2; 109:92.) The DNA profile was entered into the Combined DNA Index System (CODIS) database and was determined to match Smith's DNA profile. (R. 1:2.) Smith was charged with second-degree sexual assault. (R. 1:1.) The case proceeded to a jury trial beginning on March 6, 2018. (R. 106.)

At trial, Alice's sorority sister Mary explained that she and Alice were students at the University of Wisconsin-Milwaukee. (R. 108:26.) On the night of February 6, 2016, Alice, Mary, and their friends Tammy and Ellen planned to attend a concert at The Rave in Milwaukee. (R. 108:27–28.) They gathered at a friend's apartment before the concert and drank alcohol. (R. 108:28.) Another sorority sister then drove the four friends to the concert. (R. 108:30.) After they arrived at the concert, all four of them went to the coat check together. (R. 108:32.) After that, however, Mary and Ellen went into the concert venue. (R. 108:32.) Alice and Tammy stayed behind together. (R. 108:32.) Mary turned around to look for them but saw a security guard talking to them, so she and Ellen continued inside. (R. 108:32.)

Mary did not see Alice for the remainder of the night. (R. 108:33.) She saw Tammy at approximately midnight, however, after she returned to her dorm room. (R. 108:33.) She explained that Tammy was "acting really different" and that she appeared to be "more than drunk." (R. 108:33.) Tammy "wasn't all there" and could not remember anything from that night. (R. 108:33–34.)

Ellen explained that the four friends were drinking alcohol before the concert. (R. 108:43–44.) She confirmed that after the coat check, she and Mary went into the venue while Alice and Tammy stayed behind. (R. 108:47.) Ellen also saw Tammy later that night; she explained that Tammy's condition was "scary" because Tammy was uttering incomprehensible statements that were not "logical." (R. 108:49–50.) Tammy also appeared to be having trouble using her arms and legs, and Ellen saw her attempt to stand up but fall down. (R. 108:50–51.)

Tammy testified that after getting into the car to go to the concert, the next thing she could remember was looking up at the ceiling of her dorm room; she had no memory of how she got there. (R. 108:60–62.)

A friend of Alice's, David, explained that he was walking home on the night of February 6 when he saw a car "peel off to the side of the road" and stop abruptly. (R. 108:74.) The stop occurred "swiftly for the purpose of the people getting out of the car . . . right away." (R. 108:75.) Two females got out of the car; the first stumbled, and the second "literally fell out of the car." (R. 108:76–77.) David recognized Alice as the person who fell out of the car. (R. 108:80.) The car left quickly after Alice fell out. (R. 108:80.) David brought Alice back to his house—which at times required him to physically carry her because she was unable to walk on her own—and called Alice's former boyfriend, Ryan. (R. 108:85–87, 89.) Alice appeared to have been crying shortly before getting out of the car. (R. 108:93–94.)

Ryan arrived to find Alice "pretty unresponsive" and believed that she "had been given something or taken something" aside from alcohol. (R. 108:107.) Alice was unable to formulate sentences, was unable to stand up, and had scratches and vomit on her body. (R. 108:107.) She also appeared to be "terrified." (R. 108:108.) Ryan drove Alice to

the hospital because he believed she had been drugged. (R. 108:109.)

Alice testified that she remembered leaving for the concert and feeling "buzzed" but not "blackout drunk." (R. 109:11.) She remembered getting tickets from will call, but the next thing she remembered after that was waking up in the hospital. (R. 109:12–13.) After waking up in the hospital, Alice noticed blood on her underwear. (R. 109:15.) She explained that "the only time that [she] ever bleed[s] is after sex," so she immediately began crying because she had no memory of having sexual intercourse that night before ending up in the hospital. (R. 109:15.) Alice was transferred to another hospital because the first hospital did not conduct sexual assault examinations. (R. 109:16.)

LK, a registered nurse who has performed over 500 sexual assault examinations, testified that she was the manager of the Sexual Assault Treatment Center program at Aurora Hospital in Milwaukee. (R. 109:44–46.) She explained to the jury how sexual assault examinations are conducted. (R. 109:46–48.) For suspected vaginal assaults, a vaginal and cervical swab are collected. (R. 109:49–50.)

LK explained that she reviewed the medical report of another Sexual Assault Nurse Examiner (SANE), CH, who no longer worked at the hospital. (R. 109:55–56.) Alice had reported that she went to a concert with friends and did not remember anything else until waking up in the hospital. (R. 109:62–63.) Alice consented to a collection of evidence and of blood. (R. 109:64.)

LK was shown the chain of custody evidence report, which was entered into the record, and confirmed that it showed a sexual assault kit was taken. (R. 109:64.) Officer James Henry was presented with the same chain of custody form and confirmed that he personally received the sexual

assault kit in undamaged and sealed condition and brought it from the hospital to a secure evidence room. (R. 109:36–37.)

Crime lab analyst Michelle Burns testified that she examined the vaginal and cervical swabs from Alice's sexual assault kit. (R. 109:91–92.) Semen was identified on both swabs. (R. 109:92.) Burns explained that the DNA profile from the semen was entered into the Combined DNA Index System (CODIS), a nationwide DNA testing system where laboratories upload "unidentified profiles from crimes as well as profiles from convicted offenders or other individuals based on state law." (R. 109:96.) The CODIS system revealed that the semen found on Alice's cervical swabs belonged to Smith. (R. 109:99.) This result was confirmed through a buccal swab taken from Smith. (R. 110:9.)

Alice was shown a photograph of Smith and explained that she had never seen him before, did not know him, and had no memory of having sex with him. (R. 109:23–24.) Detective Jon Charles confirmed that he showed Alice a "Wisconsin Department of Corrections photo of the defendant" (R. 111:17), and Detective Jolene Del Moral additionally explained that she obtained a Department of Corrections photograph of Smith to show to Alice because Smith was not on file in the police department's database (R. 111:30).

Alice's urine initially screened positive for Rohypnol, a "date rape" drug. (R. 110:55.) However, a follow-up test did not confirm this result. (R. 110:56.) A toxicologist explained that this could mean it was a false positive, or it could mean the Rohypnol was present only in a small quantity at the time of the test, as the follow-up test was less sensitive than the original screening test. (R. 110:56–57.) Additionally, she explained that they did not test for the date rape drug "GHB" because sufficient time had passed before the test that it would no longer have been detectable. (R. 110:68.) Finally,

Detective Del Moral explained that Alice's medical record from her hospital visit said, "admits to taking molly." (R. 111:39.)

On April 12, Smith was interviewed by a police detective. (R. 111:22.) Smith was asked whether he had sexual intercourse with "a young, white female" on February 6 or 7, and he claimed he had not. (R. 111:23.) He went on to deny several more times that he had sexual intercourse with Alice. (R. 111:24.)

The jury found Smith guilty of second-degree sexual assault. (R. 64:1.) He was sentenced to eight years of initial confinement and 12 years of extended supervision. (R. 64:1.)

Smith filed a postconviction motion alleging that his trial counsel was ineffective for two different reasons. (R. 76.) First, he alleged that counsel was ineffective for not objecting on Confrontation Clause grounds to LK's testimony about the sexual assault exam conducted by CH. (R. 76:7–8.) He asked the circuit court to conclude that a SANE examination report is testimonial hearsay, and that counsel was therefore ineffective for not objecting. (R. 76:8.) Second, he argued that the Department of Corrections photograph constituted impermissible "other acts" evidence because it hinted to the jury that he was convicted of a crime in the past, and that counsel was therefore ineffective for not objecting to its admission. (R. 76:1–2.)

The circuit court denied Smith's motion without a *Machner* hearing. Regarding the Confrontation Clause claim, the circuit court explained that "[w]here the law is unsettled, counsel does not perform deficiently by failing to challenge it." (R. 87:4.) The circuit court held that because the law is unsettled as to whether a SANE examination produces testimonial hearsay, counsel did not perform deficiently by not objecting. (R. 87:4.) The circuit court then went on to conclude that the SANE report was not testimonial and that

its admission therefore did not violate the Confrontation Clause. (R. 87:5.) Finally, regarding Smith's other acts argument, the circuit court found there was no reasonable probability that the admission of the photograph affected the verdict. (R. 87:6.)

Smith appealed. The Wisconsin Court of Appeals reversed the decision of the circuit court on both issues and remanded the case for a *Machner* hearing. *State v. Smith*, 2021AP72-CR (Ct. App. Sept. 20, 2022) (Pet-App. 3–20.) Regarding the confrontation clause issue, the court of appeals held that the SANE report was testimonial hearsay because the primary purpose of Alice's return to Aurora for the SANE exam was "the collection of evidence to be used in a criminal prosecution." (Pet-App. 12.) The court of appeals based this conclusion primarily on the statement in the SANE report, "[p]atient reports that she has returned to have evidence collected and report to police." (Pet-App. 12–13 (alteration in original).) The court also relied on the SANE consent form which, according to the court, showed that SANE exams are for the purpose of evidence collection and therefore not primarily medical in nature. (Pet-App. 13.)

The court of appeals also held that there was no ongoing medical emergency because Alice and the SANE "could not have known whether a crime had actually been committed." (Pet-App. 13–14.) The court further held that, despite the fact that the crime lab analyst who tested the DNA testified at trial, the DNA evidence could not be introduced absent the SANE report because the SANE report "established the origin of the swab samples from which Smith's DNA profile was developed." (Pet-App. 15.)

Finally, the court of appeals rejected the State's argument that counsel's performance was not deficient because counsel did not fail to raise an issue of settled law. (Pet-App. 14.) The court acknowledged that there was no

binding law addressing the Confrontation Clause implications of SANE examinations, but held that counsel would be expected to object because the general principles regarding the right to confrontation were well-established. (Pet-App. 14.)

Regarding the other acts issue, the court of appeals held that counsel's performance was deficient because there was no legitimate reason for the repeated references to the "DOC" photograph other than to show Smith had a criminal record. (Pet-App. 17.) The court also held that even assuming the DNA evidence would not be excluded, the record did not conclusively show that Smith could not prove prejudice. (Pet-App. 18.) The court concluded that there was not overwhelming evidence Alice was intoxicated to a degree that rendered her incapable of giving consent, so it could not say the record conclusively showed Smith was not prejudiced by the references to the DOC photograph. (Pet-App. 18.) On both issues, however, the court of appeals clarified that it was leaving the issue of prejudice for the circuit court to decide on remand—it simply could not say, at this point in the proceedings, that the record conclusively showed Smith could not prove prejudice. (Pet-App. 19.)

ARGUMENT

I. This Court should grant review to address a novel question of law regarding the Confrontation Clause implications of SANE examinations.

A. This Court has not addressed the Confrontation Clause implications of a SANE nurse's collection of physical evidence during an examination.

The Confrontation Clause of the Sixth Amendment to the United States Constitution guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to

be confronted with the witnesses against him." U.S. Const. amend. VI. The purpose of the Confrontation Clause "is to ensure the reliability of testimony by allowing the accused to challenge a witness's statements 'in the crucible of cross-examination.'" *State v. Reinwand*, 2019 WI 25, ¶ 21, 385 Wis. 2d 700, 924 N.W.2d 184 (citation omitted). The Confrontation Clause bars the admission of testimonial hearsay statements unless 1) the declarant is unavailable, and 2) the defendant had a prior opportunity to cross-examine the declarant. *Crawford v. Washington*, 541 U.S. 36, 54–55 (2004).

In contrast, hearsay statements that are not testimonial do not implicate the Confrontation Clause. *Reinwand*, 385 Wis. 2d 700, ¶ 23; *Michigan v. Bryant*, 562 U.S. 344, 354 (2011). Nontestimonial hearsay statements "are admissible so long as the rules of evidence permit their admission." *Reinwand*, 385 Wis. 2d 700, ¶ 23. A hearsay statement is testimonial only if "in light of all the circumstances, viewed objectively, the 'primary purpose' of the conversation was to 'creat[e] an out-of-court substitute for trial testimony.'" *Ohio v. Clark*, 576 U.S. 237, 245 (2015) (alteration in original) (citation omitted).

This Court has recently addressed the Confrontation Clause generally. *See, e.g., Mattox*, 373 Wis. 2d 122; *Reinwand*, 385 Wis. 2d 700. However, this Court has not yet addressed the Confrontation Clause implications of SANE examinations. One published court of appeals decision, *State v. Nelson*, 2021 WI App 2, ¶¶ 44–45, 63–64, 395 Wis. 2d 585, 954 N.W.2d 11, has waded into this topic and suggested in dicta that SANE exams may be viewed differently for Confrontation Clause purposes than other types of medical exams. Other states' supreme courts have also suggested that SANE examinations present unique Confrontation Clause challenges. *See, e.g., State v. Burke*, 478 P.3d 1096, 1109

(Wash. 2021) (explaining that SANEs "receive specialized training in forensic evidence collection, sexual assault trauma response, forensic techniques using special equipment, expert-witness testimony, assessment and documentation of injuries, identifying patterned injury, and maintenance of chain of evidence," while at the same time providing medical care "regardless of whether or not the patient wishes to report the crime to police"); *State v. Tsosie*, 516 P.3d 1116 (N.M. 2022).

In Wisconsin, lower courts have been left to address this unique evidentiary issue without this Court's guidance, which has sometimes led to inconsistent results. Compare, for example, the court of appeals' decision in this case with its decision in *State v. McDowell*, 2022AP164-CR, 2022 WL 4372780 (Ct. App. Sept. 22, 2022) (not recommended for publication) (Pet-App. 27–32), issued just two days after the court of appeals' decision in this case. In *McDowell*, the circuit court had excluded the victim's statements to a SANE nurse as testimonial and therefore inadmissible under the Confrontation Clause. *Id.* ¶ 1; (Pet-App. 27). The court of appeals concluded that the United States Supreme Court requires courts to determine whether individual statements, as opposed to entire conversations or series of statements, are testimonial. *Id.* ¶¶ 8–10; (Pet-App. 28). The court of appeals therefore remanded with instructions to consider separately whether each challenged statement was testimonial. *Id.* ¶ 25; (Pet-App. 31). This stands in stark contrast to this case, in which the court of appeals held that the SANE report in its entirety was testimonial. Courts and litigants would benefit from a decision by this Court regarding the Confrontation Clause implications of SANE examinations and the evidence derived therefrom.

B. The United States Supreme Court has established a statement-by-statement approach to analyzing the Confrontation Clause.

In addition to lower courts and litigants' need for guidance on this issue, this Court should accept review to ensure that Wisconsin law regarding the Confrontation Clause remains in harmony with the United States Supreme Court. This Court generally interprets Article 1, Section 7, of the Wisconsin Constitution as coextensive with the federal Sixth Amendment. *See, e.g., Reinwand*, 385 Wis. 2d 700, ¶ 17. While this Court has not yet addressed this issue, the United States Supreme Court provided a helpful framework in *Davis v. Washington*, 547 U.S. 813 (2006). The *Davis* court recognized that conversations will often contain some statements that are testimonial and some statements that are nontestimonial. *Id.* at 829. The *Davis* court explained that "[t]hrough *in limine* procedure, [trial courts] should redact or exclude the portions of any statement that have become testimonial, as they do, for example, with unduly prejudicial portions of otherwise admissible evidence." *Id.* This, rather than excluding the entirety of a conversation based on some statements potentially being testimonial, is the proper approach.

The Washington Supreme Court has recently recognized that *Davis* requires this approach in the SANE context. In *Burke*, 478 P.3d 1096, the issue was whether the admission of several statements made by a victim to a SANE nurse violated the Confrontation Clause. The Washington Supreme Court held that one of the victim's statements (her description of the assailant) was testimonial, while the rest of her statements were not. *Id.* at 1112–13. Thus, rather than excluding the entire conversation, the Washington Supreme Court held that the one testimonial statement should have been excluded, but that the error in admitting this one

statement was harmless. *Id.* at 1113. In doing so, the court reiterated *Davis*'s holding that conversations often contain both testimonial and nontestimonial statements, and that trial courts presented with such conversations should, through in limine procedure, "redact or exclude the portions of any statement that have become testimonial." *Burke*, 478 P.3d at 1112 (quoting *Davis*, 547 U.S. at 829).

Here, in contrast to *Davis* and *Burke*, the court of appeals used a sledgehammer instead of a scalpel. The court of appeals held that the entirety of the SANE examination report and all the evidence derived therefrom should have been excluded because the primary purpose of the SANE exam was to "collect evidence." (Pet-App. 13.) Because the court of appeals concluded that the SANE exam's primary purpose was to collect evidence, the court of appeals excluded all statements made during the SANE examination and all statements *derived from* the SANE examination. Further, the court of appeals focused primarily on the fact that *Alice's* subjective purpose in returning for the SANE exam was to provide evidence. But the statement at issue is the *SANE's* statement that the DNA swabs she collected came from Alice, which was not uttered by Alice or even to Alice. Instead, it was simply written down by the SANE in her medical report. (R. 38:41.) This Court should clarify that in accordance with *Davis*, courts analyzing Confrontation Clause issues must analyze whether individual statements, rather than entire conversations, are testimonial or nontestimonial.

Smith may argue that the State forfeited its request for a statement-by-statement analysis because the State did not rely on *Davis* and *Burke* in the circuit court. But while the State of course has the burden to prove that its proffered evidence is admissible, *State v. Jenkins*, 168 Wis. 2d 175, 187–88, 483 N.W.2d 262 (Ct. App. 1992), there is no requirement that the State cite certain specific case law in support of the

admission of its proffered evidence. The State has argued throughout the entirety of these proceedings that the statement regarding the origin of the DNA evidence was not testimonial hearsay—the State's position that the entire report was admissible along with it was, if anything, simply overly broad.

II. This Court should grant review because the court of appeals' decision is in conflict with controlling United States and Wisconsin Supreme Court precedent.

In addition to the need to guide lower courts and litigants, this Court should accept review because the court of appeals' decision is in conflict with decisions of this Court and the United States Supreme Court. First, the court of appeals essentially applied the "fruit of the poisonous tree" doctrine to exclude the origin of the DNA swab as testimonial hearsay, contrary to the United States Supreme Court's decisions in *Williams*, 567 U.S. 50, and *Melendez-Diaz*, 557 U.S. 305, and this Court's decision in *Deadwiller*, 350 Wis. 2d 138. Second, the court of appeals failed to apply the four-factor test from *Clark*, 576 U.S. 237, that this Court adopted in *Mattox*, 373 Wis. 2d 122.

A. Physical evidence and chain-of-custody evidence relied upon by expert witnesses is not testimonial hearsay under United States Supreme Court precedent.

As discussed above, "[the] 'primary purpose' test is an objective test." *Reinwand*, 385 Wis. 2d 700, ¶ 24 (citing *Clark*, 576 U.S. at 244). "[T]he relevant inquiry is not the subjective or actual purpose of the individuals involved in a particular encounter, but rather the purpose that reasonable participants would have had, as ascertained from the individuals' statements and actions and the circumstances in

which the encounter occurred." *Bryant*, 562 U.S. at 360. Courts look to four factors to determine whether a statement is testimonial: "(1) the formality/informality of the situation producing the out-of-court statement; (2) whether the statement is given to law enforcement or a non-law enforcement individual; (3) the age of the declarant and (4) the context in which the statement was given." *Mattox*, 373 Wis. 2d 122, ¶ 32 (footnote omitted) (citing *Clark*, 576 U.S. at 244–48).

The United States Supreme Court's decision in *Williams*, 567 U.S. 50, is instructive on the Confrontation Clause implications of physical evidence. In *Williams*, a DNA analyst testified that business records showed vaginal swabs taken from a sexual assault victim were sent to an outside laboratory, Cellmark, and returned. The analyst then matched the DNA profile created by Cellmark to the profile she created using a sample of the defendant's blood. The defendant argued that the analyst's testimony violated the Confrontation Clause because she said Cellmark's DNA profile was created using semen found in a vaginal swab from the victim. *Id.* at 56.

In a fractured opinion, the U.S. Supreme Court held that the analyst's testimony did not violate the Confrontation Clause. The plurality opinion, joined by four justices, held that the Cellmark DNA report was not testimonial because it was "very different from the sort of extrajudicial statements, such as affidavits, depositions, prior testimony, and confessions, that the Confrontation Clause was originally understood to reach." *Id.* at 58. This was because "[t]he report was produced before any suspect was identified. The report was sought not for the purpose of obtaining evidence to be used against petitioner, who was not even under suspicion at the time, but for the purpose of finding a rapist who was on the loose." *Id.* The critical point was that the statement at

issue was not "prepared for the primary purpose of accusing a *targeted individual*." *Id.* at 84 (emphasis added). Justice Thomas, who provided the fifth vote, wrote that the report was nontestimonial solely because it lacked the "solemnity of an affidavit or deposition" and was unsworn. *Id.* at 111–12.

While the plurality and concurrence do not share much in the way of an underlying rationale, the decision shows that if the statement in question 1) does not tend to target or incriminate any particular suspect, and 2) lacks the "solemnity" of an affidavit or deposition, then it is not testimonial. This is the conclusion the Wisconsin Supreme Court reached in *Deadwiller*, 350 Wis. 2d 138, a case with substantively identical facts to *Williams*. This Court has also acknowledged that under *Williams* and *Deadwiller*, "an expert witness does not violate the Confrontation Clause when his or her opinion is based in part on data created by a non-testifying analyst if the witness 'was not merely a conduit'" for the non-testifying analyst's opinion, but instead formed an independent opinion based on the data. *State v. Griep*, 2015 WI 40, ¶ 40, 361 Wis. 2d 657, 863 N.W.2d 567.

Similarly, when the admission of physical evidence is at issue, the Confrontation Clause does not require that everyone involved in the chain of custody must testify. *See Melendez-Diaz*, 557 U.S. at 311 n.1. Questions regarding the chain of custody of the evidence go to the weight of evidence, not its admissibility. *Id.*; *United States v. Ortega*, 750 F.3d 1020, 1026 (8th Cir. 2014).

In *Ortega*, for example, suspected cocaine was seized from Ortega's co-conspirator and sent to a lab for testing. Analyst A created and tested two composite samples of the seized cocaine. She was unable to testify at trial. *Ortega*, 750 F.3d at 1023. The government had Analyst B retest the composite samples created by Analyst A and confirm that they were, in fact, cocaine. *Id.* Only Analyst B testified at

trial. *Id.* Ortega argued that Analyst B's testimony violated the Confrontation Clause because Analyst A, who was not available, created the sample that Analyst B tested. *Id.* at 1025.

The Eighth Circuit rejected this argument and held that "Ortega had the opportunity to cross examine [Analyst B] on the issue of whether or not the samples he tested in fact came from the eleven packages seized from Lopez–Rico's car." *Id.* at 1026. The question of whether the samples in fact came from Lopez's car "goes to the authenticity of the sample and the chain of custody, and as the Court acknowledged in *Melendez–Diaz* such questions bear on the weight of the evidence." *Id.* This was true even though the analyst who created the composite sample—i.e., the person responsible for its origin—did not testify. *Id.*

B. The court of appeals' holding excluding the DNA evidence derived from the SANE examination is contrary to *Williams*, *Deadwiller*, and *Melendez-Diaz*.

Here, the court of appeals held that if counsel had objected on Confrontation Clause grounds, the DNA evidence would have needed to be excluded because the SANE who swabbed Alice for DNA did not testify. (Pet-App. 15–16.) This analysis is incorrect for two reasons. It is contrary to *Williams* and *Deadwiller*, which instruct that the origin of a DNA swab is not testimonial hearsay. It is also contrary to *Melendez-Diaz*, which held that chain-of-custody evidence goes to weight rather than admissibility and does not implicate the Confrontation Clause.

First, the court of appeals' holding is contrary to *Williams* and *Deadwiller*. As discussed above, *Williams* and *Deadwiller* stand for the proposition that when a statement 1) does not tend to target or incriminate any particular suspect, and 2) lacks the "solemnity" of an affidavit or

deposition, then it is not testimonial for the purpose of the Confrontation Clause.

In this case, the entire SANE report—but especially the statement about the origin of the DNA swab—satisfies both of these criteria. First, the mere fact that Alice was swabbed for DNA does not tend to incriminate anyone in general, much less Smith in particular. At the time of the swab, no one could have possibly had any idea who the suspect(s) could be, and no one could even be certain that there would be any suspect at all. (Pet-App. 13–14.) Thus, the SANE's statement that she swabbed Alice for DNA does not tend to target any particular suspect, or even to incriminate anyone at all.

Second, the SANE's statement in her report lacks the solemnity of an affidavit or deposition. The report is simply a patient's medical record. (R. 38.) It does not remotely resemble the "'formalized testimonial materials,' such as depositions, affidavits, and prior testimony, or statements resulting from 'formalized dialogue,' such as custodial interrogation," that Justice Thomas's concurrence would place under the umbrella of the Confrontation Clause. *Williams*, 567 U.S. at 111 (Thomas, J., concurring). The medical report was "not the product of any sort of formalized dialogue resembling custodial interrogation." *Id.* (Thomas, J., concurring). Thus, under *Williams*, the SANE's statement regarding the origin of the DNA swab is not testimonial hearsay.

The court of appeals' decision that the DNA evidence would not be admissible without the SANE report's admission is also incorrect for a second reason: it is contrary to *Melendez-Diaz* and its progeny. Under *Melendez-Diaz*, "it is not the case, that anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device, must appear in person as part of the prosecution's case." 557 U.S. at 311 n.1. Rather, gaps in the

chain of custody "normally go to the weight of the evidence rather than its admissibility." *Id.* (quoting *United States v. Lott*, 854 F.2d 244, 250 (7th Cir. 1988)). That is why in *Ortega*, Analyst B (who tested composite samples of cocaine seized from the defendant's car that were created by analyst A) was allowed to testify as to the origin of the samples without running afoul of the Confrontation Clause. *Ortega*, 750 F.3d at 1023; *see also Griep*, 361 Wis. 2d 657, ¶ 40.

This case is similar. Here, crime lab analyst Michelle Burns, who actually tested the DNA from Alice's sexual assault kit, testified and was subjected to cross-examination. (R. 109:82; 110:17.) She used the report and materials generated by the SANE to test the DNA samples and develop her own conclusions. (R. 109:91–99; 110:4–17.)

The court of appeals, however, concluded that there was no foundation to introduce the DNA evidence without the SANE report. (Pet-App. 113.) This was incorrect. DNA Analyst Burns's report, which was admitted as evidence, stated that the DNA swabs she examined were collected from Alice. (R. 44:1.) Another report admitted as evidence stated that a DNA profile developed from Alice's cervical swab was linked to Smith. (R. 45.) Analyst Burns also testified as to the origin of the DNA swabs. (R. 109:91.) All this laid the foundation for her testimony that the DNA from Alice's sexual assault kit came from Smith.

The court of appeals' holding appears to have been based on the mistaken view that the State was required to call the SANE as a chain of custody witness to testify as to the origin of the DNA swab. (Pet-App. 15.) This is contrary to *Melendez-Diaz*. This Court should accept review and clarify that under *Melendez-Diaz* (and as recognized by this Court in *Griep*), chain of custody evidence goes to weight, not admissibility. Thus, even in the absence of the SANE report,

the DNA test results would have still been admissible without violating the Confrontation Clause.

C. The court of appeals failed to apply the established four-factor *Mattox /Clark* test in analyzing the Confrontation Clause issue.

In addition to wrongly applying a "fruit of the poisonous tree" analysis to DNA evidence contrary to *Williams*, *Deadwiller*, and *Melendez-Diaz*, the court of appeals also failed to apply the established four-factor *Mattox/Clark* test when it held that the SANE report was testimonial hearsay. The court of appeals did cite and acknowledge the four non-exclusive factors that courts consider in determining whether hearsay is testimonial. (Pet-App. 10.) When it came time for the actual analysis, however, the court of appeals focused exclusively on one factor—the context in which the statement was made—to the exclusion of all others. (Pet-App. 12–14.)

Specifically, the court of appeals completely failed to analyze factors one (the formality or informality of the situation producing the out-of-court statement), and two (whether the statement was made to a law enforcement officer), or to explain how either of these factors fit into its overall analysis of whether the statements in question were testimonial. (Pet-App. 12–14.) Thus, this Court should also accept review to clarify that courts must apply the *Mattox/Clark* test to determine whether out-of-court statements are testimonial.

III. The other-acts issue should not deter this Court from accepting review.

As discussed above, the court of appeals remanded this case for a *Machner* hearing on two independent issues: the Confrontation Clause issue and the other-acts issue involving the discussion of the DOC photograph. However, that should not deter this Court from accepting review because the

admission or exclusion of the DNA evidence will likely determine the outcome on remand. If this Court concludes that the DNA evidence would not have been admitted but for counsel's error, then Smith will receive a new trial. But if this Court concludes that an objection to the DNA evidence would have failed, then Smith was almost certainly not prejudiced by the alleged error[2] in not objecting to the mentions of the DOC photograph.

It is true that the court of appeals held it could not say the record conclusively showed Smith could not prove prejudice due to the State's need to prove Alice was intoxicated. (Pet-App. 18.) This decision was made solely on the basis that there "was evidence supporting that [Alice] was not so intoxicated that she lacked capacity to consent," such as her testimony that she drank a "medium amount" and the absence of definitive proof she was given a date rape drug. (Pet-App. 18.) But the court of appeals explicitly clarified that it was *not* deciding the issue of prejudice—only that it could not say, at that time, that the record conclusively showed Smith was not prejudiced. (Pet-App. 19.)

The circuit court would almost certainly conclude on remand that Smith was not prejudiced. Alice herself testified that she remembered nothing at all between arriving at the concert and waking up in the hospital. (R. 109:13.) Two separate eyewitnesses who helped Alice return to her apartment testified that she was not even capable of walking on her own and could not formulate coherent sentences. (R. 108:85–87, 107–08.) Additionally, Alice's friend Tammy—who stayed behind with Alice while their other friends entered the venue—was also falling down, speaking incoherently, and had no memory of the night before. (R. 108:49–51, 60–61.) And

[2] Of course, counsel may also have had a strategic reason for not objecting to the mentions of the DOC photograph, such as not wanting to draw extra attention to the issue.

while the result was not subsequently confirmed by a less sensitive follow-up test, Alice's urine did initially screen positive for Rohypnol, a date rape drug. (R. 110:55–57.)

The evidence presented at trial overwhelmingly proved that Alice was intoxicated to a degree that she was incapable of giving consent. Therefore, this case turns entirely on the admission of the DNA evidence. The existence of the other-acts issue should not deter this Court from accepting review.

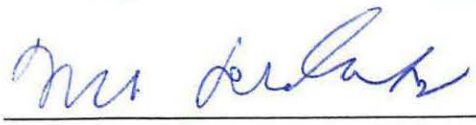
CONCLUSION

The State respectfully requests that this Court grant this petition for review.

Dated this 19th day of October 2022.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin



NICHOLAS S. DESANTIS
Assistant Attorney General
State Bar #1101447

Attorneys for Plaintiff-Respondent-Petitioner

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-8556
(608) 294-2907 (Fax)
desantisns@doj.state.wi.us

FORM AND LENGTH CERTIFICATION

I hereby certify that this petition conforms to the rules contained in Wis. Stat. §§ (Rules) 809.19(8)(b), (bm), and 809.62(4) for a petition produced with a proportional serif font. The length of this petition is 6,431 words.

Dated this 19th day of October 2022.

NICHOLAS S. DESANTIS
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. §§ (RULES) 809.19(12) and 809.62(4)(b) (2019-20)

I hereby certify that:

I have submitted an electronic copy of this petition, excluding the appendix, if any, which complies with the requirements of Wis. Stat. §§ (Rules) 809.19(12) and 809.62(4)(b) (2019-20).

I further certify that:

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

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

Dated this 19th day of October 2022.

NICHOLAS S. DESANTIS
Assistant Attorney General