No. 15-126

In The
Supreme Court of the United States

MICHAEL R. GRIEP

Petitioner,

v.

WISCONSIN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF WISCONSIN

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Is the Confrontation Clause violated when an expert analyzes data and test results produced by a non-testifying laboratory analyst's testing of a blood sample and testifies to his independent opinion of the alcohol concentration of the sample, the non-testifying analyst's report is not introduced into evidence at a bench trial, and the expert does not testify as to any testimonial statement in the report?

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INTRODUCTION

Petitioner Michael R. Griep has asked this Court to grant his petition for writ of certiorari in this case. This Court should deny the petition for several reasons.

First, and most fundamentally, the issue that Griep sets forth is not presented in this case. The expert who testified in this case did not merely review and restate the laboratory report without conducting analysis or peer review. The Supreme Court of Wisconsin recognized that the expert who testified in this case "reexamined the data" that resulted from testing (Pet. App. 30a-31a), considered the data along with "other records compiled at the laboratory, and his own expertise," and "testified as to his independent opinion" (Pet. App. 32a-33a). The court concluded that while the expert did not conduct a formal peer review, he "completed the same examination as occurs in the formal peer review" (Pet. App. 30a). And the report prepared by the non-testifying analyst was not admitted or considered by the court at Griep's bench trial (Pet. App. 78a).

Griep asserts that the issue in this case is whether the government may "introduce testimonial statements of a nontestifying forensic analyst through the in-court testimony of another forensic analyst who did not perform, observe, or add to the laboratory analysis" (Petition at 17). But Griep does not identify a single testimonial statement in the report to which a witness testified.

Second, Griep misstates and overstates any conflict among state and federal courts applying this Court's Confrontation Clause cases. Griep asserts that cases fall into three conflicting categories, in which courts accept testimony because (1) "the testifying analyst has some limited relationship to the report and the analyst is a formal peer reviewer," or (2) the testifying analyst "testifies to her 'independent opinion' from her reading of the report with no additional work done by the surrogate analyst," or (3) "rejects testimony from surrogate analysts who did no testing or reporting" (Petition at 19-20).

But Griep fails to account for fundamental differences in the cases he cites, most notably whether a report containing testimonial statements is admitted at trial. Many of the cases Griep cites stand for the proposition that such a report may be admitted only if there is a relationship between the witness and the report. That proposition is not at issue in *Griep*, because the report was not admitted in this case.

Griep is also incorrect in asserting that any court in any case he cites has categorically rejected testimony from an analyst who did no testing or reporting. Finally, Griep does not point to a single decision under which the testimony in this case would violate a defendant's right to confrontation.

Third, contrary to Griep's assertion, the Supreme Court of Wisconsin's decision in this case is

not "in direct conflict" with *Bullcoming v. New Mexico*, 131 S.Ct. 2705 (2011). In *Bullcoming*, a report was introduced, and the testimony regarding the report was by an analyst who did not give an independent opinion. *Id.* at 2709, 2716. Here, the report was not admitted, and the expert testified to his independent opinion, not to any testimonial statement on the report.

STATEMENT OF THE CASE

The defendant-appellant, Michael R. Griep, was convicted of operating a motor vehicle while under the influence of an intoxicant (OWI), following a bench trial in which the court found him guilty (Pet. App. 2a, 6a).

Griep was arrested for OWI on August 25, 2007, and his blood was withdrawn without his consent (Pet. App. 3a).[1] Diane Kalscheur, a laboratory analyst at the Wisconsin State Lab of Hygiene tested Griep's blood sample, and prepared a report stating that: "(1) she received Griep's labeled and sealed blood sample, and (2) Griep's blood was tested for ethanol and that testing revealed a certain ethanol concentration" (Pet. App. 4a). Thomas Ecker, an Advanced Chemist at the laboratory, peer

[1] Griep's blood was drawn before this Court issued its decision in *Missouri v. McNeely*, 569 U.S. __, 133 S.Ct. 1552 (2013), and Griep has not challenged the constitutionality of the blood draw (Pet. App. 3a-4a).

reviewed Kalscheur's report and signed and certified the laboratory report (Pet. App. 4a).[2]

Kalscheur was on leave from work and was unavailable to testify at Griep's trial (4a & n.5). Instead, the State called Patrick Harding, the section chief of the toxicology section of the Wisconsin State Laboratory of Hygiene, as an expert witness (Pet. App. 4a). Harding testified that he reviewed Kalscheur's work and examined the data produced by her testing (Pet. App. 4a).[3] He said he was familiar with the process involved in testing blood samples, including obtaining the samples, shipping them to the laboratory, and then processing the samples and analyzing the results (Pet. App. 5a).

Harding testified that the data, including calibration checks run throughout the course of the testing, indicated that Kalscheur followed the laboratory procedures, that the instrument was working properly, and that the results were reliable (Pet. App. 5a). He said that after reviewing the available data, he reached an independent opinion that the alcohol concentration in Griep's blood was

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[2] The "Laboratory Report" that Griep has appended to his petition at 82a mistakenly states that it was certified by Thomas "Baker."

[3] Although the question Griep presents concerns whether Harding relayed testimonial statements at trial, Griep has not appended a transcript of Harding's testimony to his petition for writ of certiorari.

0.152 grams of ethanol per 100 milliliters of blood (Pet. App. 5a).

The lab report was not introduced into evidence, and Harding did not testify about the result contained in the lab report, or compare the result he reached with the result in the report (Pet. App. 78a).

The trial court determined that Harding's[4] testimony did not violate the Confrontation Clause (Pet. App. 76a-80a). The court found as fact that the report "was never received" (Pet. App. 78a), and that Harding gave an independent opinion and was not "being used as a conduit to get the report in" (Pet. App. 80a). The court found Griep guilty of OWI and entered judgment of conviction (Pet. App. 6a).

Griep appealed and the court of appeals certified the case to the Supreme Court of Wisconsin (Pet. App. 67a-74a), which denied the certification (Pet. App. 66a). The court of appeals then affirmed Griep's conviction (Pet. App. 53a-65a).

The Supreme Court of Wisconsin granted Griep's petition for review, and affirmed the court of appeals' decision affirming Griep's conviction (Pet. App. 1a-52a). The court determined that this case does not present the same question as this court addressed in *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009), or *Bullcoming*, 131 S.Ct. 2705,

[4] The trial judge mistakenly referred to Harding as "Hardy."

because in this case the laboratory report was not admitted into evidence, and the expert who testified at trial gave his own independent opinion (Pet. App. 14a-17a).

The court also concluded that "*Williams v. Illinois* [132 S.Ct. 2221 (2012)] does not govern this case because it does not contain a 'narrowest opinion,'" and thereof "is binding only as to its 'specific result'" (Pet. App. 21a-22a). The court noted that "Griep is not in a substantially identical position to the parties in *Williams v. Illinois*" (Pet. App. 22a).

The court concluded that "Harding's review of Griep's laboratory file, including the forensic test results of an analyst who was unavailable for trial, to form an independent opinion to which he testified did not violate Griep's right of confrontation" (Pet. App. 2a). It determined that Harding's testimony did not violate Griep's right to confrontation because Harding examined the chromatograms and other data produced by testing, conducted his own analysis and reached an independent opinion that Griep's BAC was 0.152 (Pet. App. 28a, 32a). The court noted that neither the non-testifying analyst's report nor the test results recorded in the report were admitted at trial (Pet App. 12a). The court concluded that Harding ultimately reached the same result as the non-testifying analyst because his "interpretation of raw data using his expertise merely yielded the same

independent opinion reached by Kalscheur." (Pet. App. 28a-29a, n.22).

A concurring opinion concluded that Harding's testimony was not to his independent opinion of the alcohol concentration of Griep's blood sample. The concurrence noted that Harding had no knowledge about the labeling or loading of the blood sample and did not observe the testing (Pet. App. 41a-42a). The concurrence concluded that "Harding served as a conduit for the opinion of the analyst who performed the forensic testing at issue" and "the analyst's out-of-court testimonial statement was introduced—albeit indirectly—through Harding's testimony" (Pet. App. 38a-39a).

Although the concurring opinion found that Harding did not give an independent opinion, it concluded that Harding's testimony satisfied the Confrontation Clause because: the testing analyst was unavailable; re-testing is impossible; the analyst recorded the results near the time of testing and would be unlikely to have an independent memory of the testing; the results were recorded in a way another analyst would understand; and the testifying witness was qualified to interpret and discuss the results (Pet. App. 50a-51a).

Griep petitioned this Court for writ of certiorari, and this Court requested a response from Wisconsin.

REASONS FOR DENYING THE PETITION

I. THE QUESTION THAT GRIEP PRESENTS IS NOT AT ISSUE IN THIS CASE.

Griep asserts that this Court should grant review because state and federal courts "are deeply and intractably divided over whether the Confrontation Clause . . . allows the government to introduce testimonial statements of a non-testifying forensic analyst through the in-court testimony of another forensic analyst who did not perform, observe, or add to the laboratory analysis" (Petition at 17).

But just as in his brief and oral argument to the Supreme Court of Wisconsin, Griep fails to point to a single testimonial statement by the testing analyst that was introduced through the testimony of the expert witness in this case. The testing analyst, Diane Kalscheur, prepared a laboratory report that contained only two testimonial statements—that the blood specimens were labeled and sealed, and that testing indicated an alcohol concentration of 0.152 grams per 100 milliliters of blood (Pet. App. 4a). The report was not admitted at Griep's bench trial (Pet. App. 78a), and neither testimonial statement was relayed to the jury through the testimony of Patrick Harding.

Harding, the section Chief of the Toxicology section of the Wisconsin State Laboratory of Hygiene, did not testify that the sample of Griep's

blood was labeled or sealed when it arrived at the lab (Pet. App. 83).

Harding testified that he examined the data produced by testing and reached an independent opinion that the blood that was tested had an alcohol concentration of 0.152 grams/100 milliliters of blood (Pet. App. 5a, 30a-31a). He did not testify that the report indicated a test result of 0.152, or that he reached the same result as the testing analyst, or that he agreed with the testing analyst's result (Pet. App. 12a, 28a-29a). He testified only to his own opinion.

Griep acknowledges that the lab report was not admitted (Petition at 4, 36), and he fails to point to any testimonial statement by Kalscheur to which Harding testified. The Confrontation Clause is concerned with testimonial statements of absent witnesses. *Bullcoming*, 131 S.Ct. at 2713 (citing *Crawford v. Washington*, 541 U.S. 36, 59 (2004). Because no testimonial statement of an absent witness was relayed to the court in this bench trial, the question that Griep claims is presented is not at issue in this case.

II. GRIEP DOES NOT IDENTIFY A TRUE CONFLICT BETWEEN COURTS APPLYING THIS COURT'S CONFRONTATION CLAUSE CASES THAT A DECISION IN THIS CASE WOULD RESOLVE.

Griep argues that courts have interpreted this Court's Confrontation Clause cases in "three very different ways" in regard to "the constitutionality of allowing an expert witness to discuss others' testimonial statements if the testimonial statements were not themselves admitted as evidence" (Petition at 18, 28).

However, Griep has not identified three meaningfully different interpretations of this Court's Confrontation Clause cases. Griep cites eighteen cases. But in seven of those cases the report was admitted. The decisions have no bearing on the issues in this case because they concern the involvement with the report a testifying expert must have for admission of the report without testimony from the testing analyst not to violate a defendant's right to confrontation.

The Supreme Court of Mississippi found no Confrontation Clause violation when reports were admitted when a technical reviewer "personally analyzed the data generated by each test conducted by [the testing analyst] and signed the report," *Galloway v. State*, 122 So.3d 614, 638 (Miss. 2013), *cert denied*, 134 S.Ct. 2661 (2014), and when a

laboratory supervisor who reviewed a crime lab report reached his own independent conclusion that a tested substance was cocaine. *Grim v. State*, 102 So.3d 1073, 1081 (Miss. 2012), *cert. denied,* 133 S.Ct. 2856 (2013).

The Supreme Court of New Jersey found no Confrontation Clause violation when a lab supervisor reviewed a report showing the results of a test of the defendant's blood for drugs, and signed and certified the lab results, and the report was admitted at trial. *State v. Michaels*, 95 A.3d 648 (N.J. 2014), *cert. denied*, 135 S.Ct. 761 (2014).

The Supreme Court of Alabama found no Confrontation Clause violation when a DNA-profile report was admitted at trial because the expert signed each page of the case file, and reviewed the analyses "to determine that they were done according to standard operating procedures and that the conclusions drawn were accurate and appropriate." *Ware v. State*, __ So.3d __ , at *6, 2014 WL 210106 (Ala. Jan. 17, 2014), *cert. denied*, 134 S.Ct. 2848 (2014).

The Supreme Court of Colorado found no Confrontation Clause violation when a lab report showing the presence of methamphetamine was admitted at trial through the testimony of a supervisor who independently reviewed scientific data, drew the conclusion that the data indicated the positive presence of methamphetamine, and signed

the report. *Marshall v. People*, 309 P.3d 943, 947 (Colo. 2013), *cert. denied*, 134 S.Ct. 2661 (2014).

The Supreme Court of Pennsylvania found no Confrontation Clause violation when a toxicology report was admitted at trial, because the supervisor examined the data, formed his own independent expert opinion, and expressed that opinion, in the report and his testimony. *Commonwealth v. Yohe*, 79 A.3d 520, 539 (Pa. 2013), *cert. denied*, 134 S.Ct. 2662 (2014).

The Supreme Court of Delaware found a Confrontation Clause violation when a laboratory report containing blood test results was admitted into evidence, but the court did not address whether testimony of non-testing experts was permissible. *Martin v. State*, 60 A.3d 1100, 1101, 1108-09 (Del. 2013).

All of these cases concern whether expert testing is sufficient to properly admit a report. None of these cases have any bearing on the issue in *Griep*, in which the lab report was not admitted.

The remaining eleven cases that Griep cites concern whether expert testimony is properly admitted when the report is not admitted. But none of those cases rejects entirely testimony by an expert who did not conduct a test or write a report upon which the expert relies. Griep has not pointed to a single case in which a court has held that testimony by an expert, who examines raw data and reaches an

independent opinion about the results of a test, and who does not relay testimonial statements from the testing analyst, violates the Confrontation Clause.

Even if Griep had identified a dispute in interpretation of this court's Confrontation Clause cases, this case would still not be an appropriate vehicle for resolving such a dispute. Griep has not identified a single case in which a court's holding indicates that it would disagree with the holding of the Supreme Court of Wisconsin that Griep's right to confrontation was not violated in this case.

Griep cites four cases for the proposition that "supervisors who are knowledgeable about the individual cases and laboratory procedures and who testify about the work they reviewed and certified but did not perform are not merely parroting the conclusions and analyses of others because they have participated in . . . some part of the testing process" (Petition at 22).

But the cases instead stand for the proposition that the Confrontation Clause is not violated when an expert understands the laboratory's procedures, analyzes data produced by testing conducted by another analyst, reaches an independent opinion and testifies to that opinion. That is precisely what occurred in *Griep*.

The Supreme Court of Georgia found no Confrontation Clause violation when a laboratory supervisor testified to the results of a DNA test,

because the supervisor selected the strains to be tested, interpreted the data, performed the statistical analysis, and prepared the test report. *Leger v. State*, 732 S.E.2d 53, 60 (Ga. 2012).

The Supreme Court of Rhode Island found no Confrontation Clause violation when a laboratory supervisor testified about the process of DNA testing because the supervisor "personally reviewed and independently analyzed all the raw data, formulated the allele table, and then articulated his own final conclusions concerning the DNA profiles and their corresponding matches." *State v. Lopez*, 45 A.3d 1, 15 (R.I. 2012). The court concluded that "[t]hose final conclusions are the very statements—the statements of [the supervisor]—at issue in this case." *Id.* at 13.

The Supreme Court of Mississippi found no Confrontation Clause violation when a drug analyst testified that he reviewed the results of tests conducted by another analyst, reached an independent opinion about the results of the tests, signed a report containing those results, and testified to his opinion of the results. *Hingle v. State*, 153 So.3d 659, 661, 664 (Miss. 2015), *cert. denied,* 135 S.Ct. 2300 (2015).

The Supreme Court of North Carolina found no Confrontation Clause violation when an agent who relied on the lab notes and report of another agent testified that the tested substance was cocaine, because the lab notes were not admitted,

and the testifying agent "presented an independent opinion formed as a result of her own analysis, not mere surrogate testimony." *State v. Brewington*, 743 S.E.2d 626, 628 (N.C. 2013), *cert. denied*, 134 S.Ct. 2660 (2014).

In each of these cases—like in *Griep*—the expert understood the laboratory's procedures, analyzed data produced by testing conducted by another analyst, reached an independent opinion and testified to that opinion. In each case, the court found no Confrontation Clause violation.

Griep cites five cases for the proposition that "merely reviewing the data produced by other analysts in preparation for trial and qualifying it as an 'independent opinion' satisfies the Confrontation Clause" (Petition at 23).

But in each case, the expert analyzed raw data generated by tests conducted by a non-testifying analyst, reached an independent opinion about the results shown by the data, and did not testify to testimonial statements contained in a report.

The Seventh Circuit Court of Appeals found no Confrontation Clause violation when an expert analyzed the data generated by testing, and testified that in her independent opinion, the substance was cocaine. *United States v. Maxwell*, 724 F.3d 724 (7th Circ. 2013), *cert. denied*, 134 S.Ct. 2660 (2014). The court noted that the expert did not read from

the report prepared by the testing analyst or say she reached the same conclusion as the testing analyst, and the report was not introduced. *Id.* at 727. The expert "simply testified (1) about how evidence in the crime lab is typically tested when determining whether it contains a controlled substance, (2) that she had reviewed the data generated for the material in this case, and (3) that she reached an independent conclusion that the substance contained cocaine base after reviewing the data." *Id.*

The Supreme Court of Ohio found no Confrontation Clause violation when an expert testified about the cause of death based in part on an autopsy report he did not prepare, because the expert testified to his independent judgment about cause of death, and "provided some opinions that were not included in the autopsy report." *State v. Maxwell*, 9 N.E.3d 930, 949 (Ohio 2014), *cert. denied*, 135 S.Ct. 1400 (2015).

The Supreme Court of California found no confrontation violation when a forensic pathologist testified about objective facts in the autopsy and photographs, and based on those facts, gave his independent opinion about the cause of death. *People v. Dungo*, 286 P.3d 442, 444 (Cal. 2012). The court reasoned that the forensic pathologist testified to his own independent opinion, and he never described the conclusions in the autopsy report as to the cause of death. *Id.* at 448-49.

The Supreme Court of Arizona found no confrontation violation when a medical expert reviewed an autopsy report and testified at trial to his own independent conclusions, because the expert testified to his own conclusions, and did not testify to any conclusions in the report, and "no testimonial 'statement'" by the doctor who conducted the autopsy was admitted into evidence. *State v. Joseph*, 283 P.3d 27, 30 (Ariz. 2012), *cert. denied*, 133 S.Ct. 936 (2013).

The State agrees with Griep that the Supreme Court of Wisconsin's decision in this case is similar to those in *United States v. Maxwell*, *State v. Maxwell*, *Dungo*, and *Joseph*. In each case, the expert analyzed raw data generated by tests conducted by a non-testifying analyst, reached an independent opinion about the results shown by the data, and did not relay to the jury testimonial statements contained in a report. These cases all hold that when an expert uses a report to form an independent opinion, and testifies to that opinion, but not to any testimonial statement contained in the report, there is no confrontation violation.

Finally, Griep asserts that courts in three cases "have rejected surrogate testimony entirely, regardless of whether it fits into the categories discussed above, finding that such evidence is testimonial hearsay that runs afoul of the Confrontation Clause" (Petition at 26).

None of the three decisions Griep cites reject entirely testimony by a non-testing analyst.

The Supreme Court of West Virginia found a Confrontation Clause violation when an expert who did not conduct the autopsy testified that his conclusion about cause of death "[i]s exactly the same as [the testing doctor]," and the autopsy report was admitted at trial. *State v. Kennedy*, 735 S.E.2d 905, 910, 920 (W.V. 2012). But the court did not categorically reject testimony by a non-testing expert. It stated, "'The question is whether the expert is, in essence, giving an independent judgment or merely acting as a transmitter for testimonial hearsay. As long as he is applying his training and experience to the sources before him and reaching an independent judgment, there will typically be no *Crawford* problem. The expert's opinion will be an original product that can be tested through cross-examination.'" *Id.* (quoting *United States v. Johnson*, 587 F.3d 625, 635 (4th Cir. 2009)).

The Supreme Court of New Mexico concluded that testimony relating "out-of-court statements to the jury that provide the basis for his or her opinion," violated the Confrontation Clause, but it "note[d] that an expert witness may express an independent opinion regarding his or her interpretation of raw data without offending the Confrontation Clause." *State v. Navarette*, 294 P.3d 435, 443 (2013) (citation omitted), *cert. denied*, 134 S.Ct. 64 (2013).

And as explained above, in *Martin v. State*, 60 A.3d 1100 (Del. 2013), the court did not address testimony by a non-testing expert when the report is not admitted.

Griep has not demonstrated any split between courts in applying this Court's Confrontation Clause cases. He has pointed to cases in which a report was admitted, but those cases have nothing to do with the issue in this case. Every court in the other cases Gripe cites has reached the same conclusion—when an expert understands the laboratory's procedures, analyzes data produced by testing conducted by another analyst, reaches an independent opinion, and testifies to that opinion but not to any testimonial statements in a report, there is no Confrontation Clause violation.

III. THE SUPREME COURT OF WISCONSIN'S DECISION IS NOT "IN DIRECT CONFLICT" WITH *BULLCOMING*.

Griep asserts that the Wisconsin Supreme Court's decision in this case is directly contrary to *Bullcoming* (Petition at 28-30).

Griep is plainly wrong. As both the majority and concurring opinions in this case recognized, this is not a *Bullcoming* case (Pet. App. 16a-17a).

In *Bullcoming*, a forensic laboratory report "certifying that [Bullcoming's] blood-alcohol concentration was well above the threshold for

aggravated DWI," was admitted into evidence. The analyst who prepared the report was unavailable at trial. *Bullcoming*, 131 S. Ct. at 2707. The State called another analyst, and introduced the report as a business record. *Id.* at 2712. The State did not assert that the scientist who testified "had any 'independent opinion' concerning Bullcoming's BAC." *Id.* at 2716.

The facts of this case are very different from those in *Bullcoming*. Here, the State did not introduce the report prepared by the lab analyst, Diane Kalscheur (Pet. App. 78a), or present any evidence about what BAC result Kalscheur determined. The State did not present the testimony of a fellow scientist who had not reviewed Kalscheur's analysis. It presented the testimony of Harding, the section chief of the toxicology section of the Wisconsin State Laboratory of Hygiene, who had reviewed the data produced by Kalscheur's work (Pet. App. 28a). Harding testified that he examined the data that resulted from the test of the blood sample, including the chromatograms and the paperwork associated with the samples Kalscheur tested (Pet. App. 27a-28a).

Unlike in *Bullcoming*, here the expert witness gave his independent opinion about the alcohol concentration of the blood sample, based on his own analysis of raw data (Pet. App. 28a-29a). Harding said nothing about what result Kalscheur reached, or about how the result he reached compared to the result Kalscheur reached.

As the Wisconsin Supreme court recognized, "*Bullcoming* do[es] not address a situation where a non-testifying analyst's testimonial statements do not come into evidence, i.e., where the testimonial forensic report is not admitted and the expert witness who testifies at trial gives his or her independent opinion after review of laboratory data created [by] another analyst" (Pet. App. 24a-25a). Because that is precisely what occurred in this case, the Wisconsin Supreme Court was correct in concluding that *Bullcoming* does not apply.

Griep points out that the concurring opinion in this case noted that "Harding was unable to say whether the blood sample was received intact or whether the blood alcohol content [testing] was performed according to protocol" (Petition at 14; Pet. Ap. 41a-42a). The concurring opinion concluded that under *Bullcoming*, Harding's inability to testify about these topics violated Griep's right to confrontation.

But in *Bullcoming*, the lab report contained a certification that the "'[t]he seal of th[e] sample was received intact and broken in the laboratory,'" that "'the statements in [the analyst's block of the report] are correct,'" and that he had "'followed the procedures set out on the reverse of th[e] report.'" *Bullcoming*, 131 S.Ct. at 2710. This Court concluded that the defendant's right to confrontation was violated because the expert who testified could not testify "about the events his certification confirmed." *Id.* at 2715.

The situation in this case is entirely different. In *Bullcoming*, the certified report was admitted, *id.* at 2712, and the testimonial statements it contained were presented to the jury. Here, the statements regarding the blood sample being labeled and sealed were not presented to the court in a bench trial. Griep's confrontation rights were not violated becaseu he was not entitled to cross-examine a witness about statements that were not admitted or relayed to the court.

Griep next argues that *Williams v. Illinois*, rather than *Bullcoming*, requires the right to confront the testing analyst. He asserts that the Wisconsin Supreme Court should have concluded that *Williams* did not overrule *Bullcoming* (Petition at 31).

However, the Supreme Court of Wisconsin did not address whether admission of the underlying report violated Griep's constitutional rights under *Williams*, because it recognized that the report was not admitted, and that Harding did not testify about any testimonial statements in the report (Pet. App. 12a). The Wisconsin Supreme Court said absolutely nothing about *Williams* overruling *Bullcoming*.

Finally, Griep argues that the concurring opinion in *Griep* ignored *Bullcoming* and *Williams* and proposed an unprecedented and unconstitutional test (Petition at 31).

However, the concurring opinion is not the opinion of the Supreme Court of Wisconsin and it is not binding in Wisconsin or in any other jurisdiction. And the crux of the concurring opinion is simply disagreement over whether the expert who testified was telling the truth about reexamining the data generated by testing and reaching an independent opinion about the results of the testing, rather than simply relaying the results written in the report. Whether the majority opinion or concurring opinion is correct is a factual matter not appropriate for determination by this Court.

CONCLUSION

Upon the foregoing, Wisconsin respectfully requests that this Court deny Griep's petition for writ of certiorari.

Dated at Madison, Wisconsin this 12th day of November, 2015.

Respectfully submitted,

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