NO. 15-126

# In the Supreme Court of the United States

MICHAEL R. GRIEP,

*Petitioner,*

—v—

WISCONSIN,

*Respondent.*

On Petition for Writ of Certiorari to the Supreme Court of Wisconsin

## REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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The State's Brief-In-Opposition only highlights the ever growing divide regarding the admission of the contents of a report through surrogate testimony. The State argues that there is no divide because there is no testimonial statement in Griep's case. (Opp.8-9). However, the State's confusion as to what constitutes a testimonial statement is yet another layer in the Confrontation Clause analysis upon which courts are divided. In an attempt to find clarity about whether or not confrontation of a performing analyst is required, courts have struggled with what constitutes a testimonial statement when the contents of a report are admitted without the admission of the physical report itself.

Although the State's opposition to Griep's Petition for Certiorari presumes that the contents of the Kalscheur report are not testimonial because the report itself was not admitted (Opp.8-9, 13), case law does not support that presumption. Indeed, the Wisconsin Supreme Court itself was split as to the issue. At least two of the justices in *Griep* found that the information contained in the report was testimonial and that it was improperly presented to the court. Justice Abrahamson, joined by Justice Bradley, wrote: the "analysts's out-of-court testimonial statement was introduced—albeit indirectly—through Harding's testimony." (Pet.App.39a); *State v. Griep*, 2015 WI 40 at ¶ 72, 361 Wis. 2d 657, 863 N.W.2d 567. Although the majority of justices did not address

whether the contents of the report were testimonial, it is indisputable that Justices Abrahamson and Bradley found that not only were the contents testimonial statements, they were admitted and thus subject to confrontation. As Justice Abrahamson wrote: "Harding was, in essence, a conduit through which the State entered another analyst's otherwise inadmissible opinion into evidence." (Pet.App.42a); *Griep*, 2015 WI 40 at ¶ 86.

Other courts are similarly befuddled. As noted in Griep's petition, this Court sought to address "the constitutionality of allowing an expert witness to discuss others' testimonial statements if the testimonial statements were not themselves admitted as evidence." *Williams v. Illinois*, 132 S. Ct. 2221, 2333, 183 L. Ed. 2d 89 (2012) (Alito, J.) (quoting *Bullcoming*, 131 S. Ct. at 2722 (Sotomayor, J. concurring)). Yet, the resulting 4-1-4 decision has left lower courts with little guidance for what to do in these circumstances.

As a result, courts are divided on what to do when a performing analyst is unavailable. In some circumstances, the courts have found that the underlying statement was testimonial regardless of whether the report was admitted, requiring confrontation of the performing analyst. *See e.g., Martin v. State*, 60 A.3d 1100 (Del. 2013) (underlying report not admitted); *State v. Kennedy*, 735 S.E.2d 905 (W.V. 2012) (underlying report admitted). In others, courts have found that the underlying statement is not testimonial in order to allow the surrogate to testify. In those cases, the courts have stretched their jurisprudence to argue that the underlying report or opinion is not testimonial

because either 1) the testifying analyst was sufficiently close to the analysis to satisfy confrontation, *see e.g., State v. Michaels*, 95 A.3d 648 (N.J. 2014) (underlying report admitted); *Hingle v. State*, 153 So. 3d 659 (Miss. 2014) (underlying report not admitted), or 2) the testifying analyst's opinion was independent of the underlying opinion, *see e.g., People v. Dungo*, 286 P.3d 442 (Cal. 2012) (underlying report not admitted); *United States v. Maxwell*, 724 F.3d 724 (7th Cir. 2013) (underlying report not admitted). All three of these conclusions are merely efforts to determine when the findings of forensic analysis can come in without the performing analyst. In attempting to discern whether such testimony is permissible, courts have attempted to determine whether the report was physically admitted, rather than looking to the introduction of the contents of the report itself, and whether or not the contents of those reports were testimonial. Thus, attempts to characterize testimony as an "independent opinion" are actually attempts to circumvent the analysis required by *Crawford* and its progeny. In this regard, the State has mistaken the courts' confusion for conclusion.

The crux of this division lies in courts' interpretation of *Williams v. Illinois* and Justice Thomas' concurrence. In his concurrence, Justice Thomas agreed with the plurality that the contents of the underlying but non-admitted report was not subject to the Confrontation Clause, but did so on narrow grounds, noting that the form of the report was not sufficiently solemn or formalized to qualify as a testimonial statement. 132 S. Ct. at 2259-60 (Thomas, J., concurring). In particular, Thomas noted

that the report was not sworn or certified. *Id.* at 2260 (Thomas, J., concurring). This lack of certification was critical as it distinguished the report from statements held to be testimonial in earlier cases such as *Bullcoming* and *Melendez-Diaz*. *Id.* (noting that what distinguishes the report in *Bullcoming* from the *Williams* report is that the *Williams* ". . . report, in substance, certifies nothing.").

Here, like in *Williams*, the out-of-court statements reported by Analyst Kalscheur were admitted by the court. Unlike in *Williams*, however, the statements made in the report were certified, formalized statements and thus clearly testimonial. The statements made in the Kalscheur report fall into the core class of testimonial statements considered in *Crawford*, and further meet the narrower holding of Justice Thomas in *Williams* regarding the admission statements made in certified forensic reports.

Because courts continue to struggle with interpreting the testimonial nature of these critical forensic reports whose contents are introduced without the report's physical introduction, this Court should grant review.

Respectfully submitted this 18th day of November, 2015.

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