15-126

No. 15-_____

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

PETITION FOR WRIT OF CERTIORARI

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JULY 22, 2015

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QUESTION PRESENTED

Is the testimony of a surrogate analyst, who merely reviews and restates the certified report of a nontestifying forensic analyst without performing any additional testing or analysis, and who did not supervise or peer-review the testing, merely a conduit for the contents of the non-testifying analyst's report, in violation of the Confrontation Clause?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

CONSTITUTIONAL PROVISIONS

STATUTES

TABLE OF AUTHORITIES—Continued

Page

OTHER AUTHORITIES

PETITION FOR A WRIT OF CERTIORARI

Petitioner Michael Griep respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Wisconsin.

OPINIONS BELOW

This petition seeks review of the decision of the Wisconsin Supreme Court, published at *State v. Griep*, 2015 WI 40, 361 Wis. 2d 657, 863 N.W.2d 567. (App.1a) The court of appeals' decision affirming the circuit court's decision is published at *State v. Griep*, 2014 WI App 25, 353 Wis. 2d 252, 845 N.W.2d 24. (App.53a) The court of appeals' request for certification from the Wisconsin Supreme Court (App.67a), which was denied (App.66a), and the relevant proceedings and order from the trial court are unpublished. (App.75a)

JURISDICTION

The judgment of the Wisconsin Supreme Court was entered on April 23, 2015. (App.1a) This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . .

STATEMENT OF THE CASE AND FACTS

This case presents a fundamental and recurring question over which state courts of last resort are intractably divided: whether the holding of *Bullcoming* still applies to instances where the contents of a certified report are introduced—without the report itself—through surrogate testimony, or whether such testimony is permissible as "independent expert testimony."

The Wisconsin Supreme Court held that it does not, relying on pre-*Crawford v. Washington* state precedent, and further, proposing and applying a new test not previously contemplated by this Court, thereby deepening the conflict on the issue.

Absent narrow exceptions, the Confrontation Clause forbids the prosecution in a criminal case from introducing out-of-court "testimonial" statements unless the declarants are unavailable and the defendants have had a prior opportunity to cross-examine them. *Crawford v. Washington*, 541 U.S. 36,

68 (2004). In *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009), this Court held that formalized forensic analysis reports created for use in criminal prosecutions fall within the "core class of testimonial statements" described in *Crawford*. *Id.* at 310. This Court upheld that understanding in *Bullcoming v. New Mexico*, 131 S.Ct. 2705, 180 L. Ed. 2d 610 (2011), when it found that the admission of testimonial blood-alcohol reports through the use of a surrogate analyst's testimony—who neither performed nor peer-reviewed the reports—did not satisfy confrontation. *Id.* Shortly thereafter, in a plurality decision, this Court decided *Williams v. Illinois*, 132 S.Ct. 2221 (2012), again examining the contours of the permissibility of surrogate analyst testimony. There, this Court found that an analyst may testify to her own conclusions in comparing the result of testing she performed on a biological sample to the results developed by a non-testifying analyst on a different biological sample.

A. Facts and Proceedings Leading to Griep's Conviction

On August 25, 2007, Michael Griep was arrested under suspicion of Operating While Intoxicated. (App.3a) Griep provided a blood sample, which was analyzed by Wisconsin State Laboratory of Hygiene Analyst Diane Kalscheur. (App.4a) In her report dated August 31, 2007, Analyst Kalscheur reported that she received Griep's labeled and sealed blood sample, that Griep's blood was tested for ethanol, and that testing revealed a certain ethanol concentration. (App.82a) The report regarding Kalscheur's observations about Griep's blood and the testing

performed were certified as true and correct by Laboratory of Hygiene Chemist, Thomas Ecker, who performed a peer review. (*Id.*)

At Griep's bench trial, Analyst Kalscheur was not available to testify regarding her test or report. (App.4a) Her supervisor, Patrick Harding, was called in her stead to testify that Griep's blood contained a prohibited ethanol concentration. (App.38a) Harding had never observed Griep's blood samples, the testing of Griep's blood samples, or any part of Kalscheur's analysis. (App.41a) He was unable to answer questions about the integrity of the samples or the testing process in Griep's case. (*Id.*) He could not testify about whether human error occurred in the process of testing. (*Id.*) Harding nonetheless testified that Griep's blood contained a prohibited ethanol concentration. (App.5a) He based his testimony on Kalscheur's statements in her report and the supporting data she produced, relying in particular on Kalscheur's statements that the blood was tested for ethanol and that the blood came from Griep. (App.42a) Harding nonetheless testified that his testimony constituted his "independent opinion." (App.41a) Laboratory of Hygiene Chemist Thomas Ecker was not called as a witness. The written report itself was never admitted. (App.60a, App.78a) Defense counsel filed a motion in limine to preclude Harding's testimony and further objected to admission of Harding's testimony regarding the substance of Kalscheur's report on Confrontation Clause grounds at trial, but the objection was overruled. (App.75a-81a, App.6a)

Griep was convicted of both Operating While Intoxicated and Operating with a Prohibited Alcohol

Concentration on July 28, 2009. The court stated that its decision was based at least in part on Harding's testimony. (App.63a)

B. Legal Developments During Griep's Appeal

Griep appealed his conviction to the court of appeals in 2010. During that appeal, the United States Supreme Court accepted a petition in *Bullcoming v. New Mexico*. The question presented in *Bullcoming* was "[w]hether the Confrontation Clause permits the prosecution to introduce testimonial statements of a nontestifying forensic analyst through the in-court testimony of a supervisor or other person who did not perform or observe the laboratory analysis described in the statements." Pet. for Writ of Cert. at i, *Bullcoming v. New Mexico*, No. 09-10876, 2010 WL 3761875. In *Bullcoming*, like in Griep's case, the defendant was arrested on charges of driving while intoxicated and his blood was drawn and tested to determine his blood-alcohol concentration. Like in Griep's case, an analyst tested the blood and signed a certified report, but did not testify at trial. Instead, the evidence was admitted through the testimony of a surrogate witness. Unlike Griep's case, however, the State in *Bullcoming* sought to introduce the certified report into evidence. Because the question presented in *Bullcoming* was similar to the question in Griep's appeal, the court of appeals held the case in abeyance pending this Court's decision. That opinion, which found such testimony inadmissible, was delivered in 2011. *Bullcoming*, 131 S.Ct. 2705 (2011).

Shortly thereafter, the United States Supreme Court granted certiorari in yet another relevant case,

Williams v. Illinois, 131 S.Ct. 3090 (2011) (granting certiorari). In *Williams*, the court addressed the question of "[w]hether a state rule of evidence allowing an expert witness to testify about the results of DNA testing performed by non-testifying analysts, where the defendant has no opportunity to confront the actual analysts, violates the Confrontation Clause." Pet. for Writ of Cert. at i, *Williams v. Illinois* No. 10-8505, 2010 WL 6817830. In *Williams*, the state introduced testimony from a state forensic analyst regarding DNA testing performed on crime scene evidence by a non-testifying analyst at an out-of-state private lab. 132 S.Ct. 2221 (2012). There, the state analyst testified that she compared the DNA profile developed by the non-testifying out-of-state analyst with the profile of the defendant developed by the in-state lab, and concluded the two profiles matched. *Id.* Again, the court of appeals held Griep's case in abeyance pending the United States Supreme Court's decision in *Williams.*

In 2012, a four-member plurality of this Court in *Williams*, along with Justice Thomas who concurred in the judgment only, decided that the portions of the out-of-state report referenced by the testifying state analyst were not subject to the Confrontation Clause. The Court was sharply split, however, as to rationale. In his concurrence, Justice Thomas agreed with the plurality that the report was not subject to the Confrontation Clause, but reached this conclusion on far narrower grounds, noting that the form of the report was not sufficiently solemn or formalized to qualify as a testimonial statement. *Williams*, at 2259-60 (Thomas, J., concurring). In particular,

Thomas noted that the report was not sworn or certified. *Id.* at 2260 (Thomas, J., concurring).

Upon delivery of the *Williams* opinion, the court of appeals requested additional briefing from the parties regarding the ramifications of the new United States Supreme Court precedent. In particular, the court requested interpretations of how *Williams* affected Wisconsin cases *State v. Williams*, 2002 WI 58, 253 Wis. 2d 99, 644 N.W.2d 919, and *State v. Barton*, 2006 WI App 18, 289 Wis. 2d 206, 709 N.W.2d 93.

In *State v. Williams*[1], the defendant was charged with possession of cocaine with the intent to deliver. 2002 WI 58 at ¶1. At trial, the prosecution introduced a state crime lab report showing that the substance collected from the defendant tested positive for cocaine. *Id.* at ¶2. The original analyst was unavailable to testify, and another analyst, Sandra Koresch, who had performed a peer review of the original analyst's work in her regular course of duties, testified that the substance Williams was charged with possessing was cocaine. *Id.* at ¶4. The defendant argued that Koresch's testimony violated his right to confrontation. The Wisconsin Supreme Court, however, concluded that Williams' right had not been violated because adequate confrontation was available through Koresch. It wrote:

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[1] There are two cases involving defendants named "Williams" cited in this case. For clarity, all references to the U.S. Supreme Court case *Williams v. Illinois* will be cited as "*Williams*." Citations to the Wisconsin case *State v. Williams* will be noted as "*State v. Williams*."

> [T]he presence and availability for cross-examination of a highly qualified witness, who is familiar with the procedures at hand, supervises or reviews the work of the testing analyst, and renders her own expert opinion is sufficient to protect a defendant's right to confrontation, despite the fact that the expert was not the person who performed the mechanics of the original tests.

Id. at ¶20. Because Koresch's testimony did not rest solely upon the work of the original analyst, but instead was an "independent opinion" formed upon her own peer review work, confrontation was satisfied: "although she based part of her opinion on facts and data gathered by someone else, she was not merely a conduit for another expert's opinion." *Id.* at ¶25.

In *State v. Barton*, the defendant was charged with arson. 2006 WI App 18 at ¶3. There, original analyst David Lyle had retired by the time of Barton's trial, and technical unit leader Kenneth Olson testified that ignitable substances were found at the scene of the crime. *Id.* at ¶4. Olson had performed a peer review of Lyle's tests and presented his own conclusions regarding the tests to the jury. *Id.* Under *State v. Williams*, the court concluded that Barton's right to confrontation had not been violated:

> Like the unit leader's testimony in [*State v.*] *Williams*, Olson's testimony was properly admitted because he was a qualified unit leader presenting his individual, expert opinion. Olson not only examined the results of Lyle's tests, but he also performed a peer review of Lyle's tests. He formed his opinion

> based on his own expertise and his own analysis of the scientific testing. He then presented his conclusions to the jury, and he was available to Barton for cross-examination. Thus, Olson's testimony satisfied Barton's confrontation right and is admissible under the supreme court's decision in [*State v.*] *Williams.*

Id. at ¶38. In short, *Barton* stands for the proposition that confrontation is satisfied when a defendant is presented with the opportunity to cross-examine an expert witness who has formed his own independent opinion, based in part upon another expert's work that he directly reviewed and supervised. The court found that "[t]he critical point . . . is the distinction between an expert who forms an opinion based in part on the work of others and an expert who merely summarized the work of others." *Id.* at ¶10.

In his supplemental brief to the court of appeals, Griep argued that *Bullcoming* superseded *Barton* and *State v. Williams* "to the extent that those cases allowed the admission of out-of-court testimonial statements through expert testimony": *Bullcoming* clearly held the admission of the content of a certified report from a test of a defendant's blood-alcohol concentration violated the Confrontation Clause when the analyst who conducted the testing was unavailable at trial and the testifying expert had not conducted or observed any of the actual testing. Supp. Br. of Def-App. at 9-11. Because the facts in Griep's case so closely mirrored *Bullcoming*—the contents of the report created by the performing analyst who tested the blood and signed a certified

report were admitted through a surrogate witness—it should control. Griep also argued that because of the fragmented nature of the *Williams* decision, if *Williams* rather than *Bullcoming* controlled, Justice Thomas's concurrence was determinative because he concurred in the judgment on narrower grounds than the four-member plurality. *Id.* The State also relied on the plurality decision in its brief and asserted that "[n]othing in the judgment of *Williams* indicates that the [United States Supreme Court's] decision overrules . . . *Barton.*" Supp. Br. of Pl.-Resp. at 17. Instead, the State argued that the key takeaway from Thomas's concurrence was that the report was not "testimonial" and thus the only rationale that can be followed was the judgment. *Id.* at 16-17.

Because of the fractured nature of this Court's decision in *Williams*, and the importance of its application to cases in Wisconsin, the court of appeals certified Griep's case to the Wisconsin Supreme Court, asking the following questions about the new United States Supreme Court precedent:

> Do these cases mean that the testing analyst produced a report for the truth of the matter asserted such that the confrontation clause is violated if he or she is not available? One can read *Bullcoming* to say so. Or is the testing analyst's report just that—a report—something that is not, by itself, made for the truth of the matter asserted but rather part of the information that a testifying expert uses to form his or her own opinion, which opinion is subject to cross-examination? One can read *Williams* to mean that.

> . . . The trial courts, and this court, would benefit from the direction of our supreme court in answering the questions poised in the preceding paragraph. The facts here are markedly different than in the DNA cases but are similar to many, many OWI cases that fill the dockets in this state.

(App.73a); Certification by Wis.Ct.App., *State v. Griep*, No.2009 AP 3073-CR (Wis.Ct.App. May 15, 2013). Despite the confusion expressed by the lower court, the Wisconsin Supreme Court denied review on November 20, 2013. (App.66a); Order Denying Certification, *State v. Griep*, No.2009 AP 3073-CR (Wis. Nov. 20, 2013). Upon return to the court of appeals, the court affirmed Griep's conviction, stating that while there was merit to the argument that the report created in Griep's case was testimonial and that such error would not be harmless, because "our [state] supreme court so recently and favorably cit[ed pre-*Crawford* decision] *Barton*, *see* [*State v.*] *Deadwiller*, 350, Wis.2d 138 37-40, we have no choice but to conclude that *Barton* remains the law of our state." (App.64a); *State v. Griep*, 2014 WI APP 25 at ¶22, 353 Wis. 2d 252, 845 N.W.2d 24 (Wis.Ct.App. 2014).

C. Opinion of the Wisconsin Supreme Court

Griep timely petitioned the Wisconsin Supreme Court for review, which it granted on August 5, 2014. Griep again argued that his case falls squarely under *Bullcoming*, and that unlike the analysts in *Williams*, *Barton*, and *State v. Williams*, Harding added no additional steps or independent analysis to the results provided by Kalscheur and thus he acted as a

mere conduit for the contents of Kalscheur's testimonial report. *See* Br. of Def-App-Pet. at 15-19.

The Wisconsin State Public Defender and the Innocence Network filed amicus briefs in support of Griep. In its brief, the Wisconsin Public Defender tracked the history of Confrontation Clause cases in the United States and Wisconsin and supported Griep's interpretation that confrontation of the performing analyst was required. The Innocence Network similarly argued that confrontation of a performing analyst is required as mistakes and malfeasance in the sciences are possible and have indeed resulted in the wrongful convictions of innocent defendants.

The State argued that surrogate analyst Harding had provided an independent expert opinion when he reviewed the materials that would have been provided to a peer reviewer, and that confrontation of the testing analyst was not required. *See* Br. of Pltf-Resp. at 17.

Oral argument was held on November 12, 2014. On March 2, 2015, Justice Prosser recused himself after the Department of Justice filed a letter indicating that someone identifying himself as Prosser contacted the Laboratory of Hygiene and asked questions that could be construed as relating to the case. *See* Patrick Marley, *David Prosser Turned Sleuth in OWI Case Before High Court*, MILWAUKEE-WISCONSIN JOURNAL SENTINEL, April 3, 2015, available at http://www.jsonline.com/news/statepolitics/david-prosser-turned-sleuth-in-owi-case-before-high-court-b99474570z1-298602081.html. In addition to the phone call, the lab also received an email from the state law library asking detailed questions, such as the analyst's resume, how often she testified at trial, and what the

financial effect would be of having analysts testify more often. *Id.*

On April 23, 2015, the Court affirmed Griep's conviction. (App.1a); *State v. Griep*, 2015 WI 40, 361 Wis. 2d 657, 863 N.W.2d 567. Justice Roggensack, writing for the court, concluded that "Harding's review of Griep's laboratory file, including the forensic test results of an analyst that was unavailable for trial, to form an independent opinion to which he testified did not violate Griep's right of confrontation." (App.2a) The court reiterated throughout its opinion that Harding had only "based his opinion in part" on Kalscheur's work and forensic reports, and that his testimony was his own independent opinion. S*ee* (App.2a, App.3a, App.9a, App.11a-15a) (emphasis added). In making this decision, the court found that *Bullcoming* did not apply, as "[t]he testimony in *Bullcoming* is not the independent opinion of an expert." (App.16a) *Williams* also did not apply, the court further reasoned, because, under its interpretation of *Marks v. United States*, 430 U.S. 188 (1977), there was no narrowly tailored opinion in *Williams*, and thus it is binding only in its result. (App.22a)

Chief Justice Shirley Abrahamson, joined by Justice Ann Bradley, filed a separate opinion, agreeing with the result, but finding that "[i]t is a stretch . . . to call Harding's opinion independent." (App.38a) (Abrahamson, J., concurring). She wrote:

> In the present case, Harding testified that he was offering an independent opinion. Harding's characterization of his testimony

is not binding on the court and is not supported by the record.

Harding stated at trial that he reviewed the analyst's "report when it went out and that is the chromatograms and the paperwork associated with the whole analytical run that [the analyst] did."

[. . .]

Harding did not, however, have any first-hand knowledge that the procedures were followed in the present case. Harding was unable to testify about the handling of the defendant's blood sample or the steps that preceded the chromatographs machine's analysis of that sample. Harding had no knowledge of the labeling or loading of the defendant's blood sample and had no knowledge of the sample's appearance or odor upon arrival at the laboratory. Harding made no direct observations of the sample or its testing. Harding could not testify about whether there was human error in the process of testing the defendant's blood sample.

In sum, Harding was unable to say whether the blood sample was received intact or whether the blood alcohol content was performed according to protocol. These are the kinds of facts that mattered to the *Bullcoming* court.

Harding's <u>only</u> basis for determining the defendant's blood alcohol content was the

> analyst's report and supporting documentation. Harding did not, and could not, offer any different or additional analysis beyond that contained in the forensic report and attached materials.

(App.41a-42a)

As a result, Justice Abrahamson wrote, the "analysts' out-of-court testimonial statement was introduced—albeit indirectly—through Harding's testimony." (App.39a) "Harding was, in essence, a conduit through which the State entered another analyst's otherwise inadmissible opinion into evidence." (App.42a) In order to be independent, Abrahamson reasoned, "a substitute expert witness must do more than merely recite or summarize the work of another." (App.40a) "Under a strict reading of *Crawford*, Harding's testimony violated the defendant's Confrontation Clause rights because the analyst whose out-of-court testimonial statement Harding indirectly introduced had not previously been cross-examined by the defendant." (App.39a)

In support of her interpretation, Justice Abrahamson relied on *Bullcoming*, stating that "*Bullcoming* makes clear that the analyst who tested the defendant's blood sample has valuable information about the test results beyond the information set forth in the materials produced by the gas chromatograph machine." (App.43a)

Nonetheless, despite finding this violation, Justice Abrahamson concurred with the result, finding that the Constitution did not apply to Wisconsin because current standards under *Crawford* and its progeny are too stringent and impractical. (App.46a) ("a

defendant's Confrontation Clause rights must be balanced against the practical reality that cross-examining the forensic analyst who performed the testing at issue will not always be possible or necessary.") Justice Abrahamson focused her concerns on cases in which calling the original analyst may not be possible: "If *Crawford* imposes a rigid, wholesale ban on non-independent substitute expert testimony about forensic test results when an unavailable forensic analysts has not previously been cross-examined, how could the results be introduced? In short, they could not." (App.47a)

To address this concern, Justice Abrahamson, joined by Justice Bradley, proposed a new test to identify instances in which "cross-examination of a substitute expert witness who fails to provide an independent opinion constitutes a permissible alternative to cross-examination of the analyst who performed the forensic testing at issue." (App.50a) According to Justice Abrahamson, such testimony is permissible when the following conditions are met:

1. The analyst is unavailable for cross-examination, through no fault of the parties;
2. Re-testing is not possible;
3. The analyst recorded the forensic test results at or near the time of testing in the course of a regularly conducted activity and would be unlikely to have an independent memory of the test performed (because, for example, the analyst processed many such tests within a short period);

4. The analyst recorded the results in a way that another expert in the field could understand and interpret; and

5. The substitute expert witness is qualified to discuss and interpret the original results and is subject to cross-examination.

(App.50a-51a) Disregarding the Constitution and this Court's precedent thereon, Justice Abrahamson affirmed Griep's conviction "[b]ecause these conditions appear to have been met in the present case." (App.51a)

This petition follows.

REASONS FOR GRANTING THE WRIT

State high courts and federal circuit courts are deeply and intractably divided over whether the Confrontation Clause, as explicated in *Crawford v. Washington*, 541 U.S. 36, *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527 (2009), *Bullcoming v. New Mexico*, 131 S.Ct. 2705 (2011), and *Williams v. Illinois*, 132 S.Ct. 2221, 183 L. Ed. 2d 89 (2012), allows the government to 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, or whether such testimony can constitute an independent expert opinion. This case offers the Court an opportunity to resolve this escalating conflict. Forensic evidence plays a central role in many criminal prosecutions. Allowing a

surrogate analyst to regurgitate the work of another prevents scrutiny of the actual analyst's "honesty, proficiency, and methodology," *Melendez-Diaz*, at 2538, in the form guaranteed by the Sixth Amendment "by testing in the crucible of cross-examination." *Crawford*, at 61. As such, the Wisconsin Supreme Court's holding—that the Confrontation Clause was satisfied by allowing the defendant to cross-examine someone other than the author of the report, who was not a formal peer reviewer, and who did not perform any additional analytical steps, satisfies confrontation because the surrogate analyst's review of the report constituted an "independent expert opinion"—is incorrect.

I. THE WISCONSIN SUPREME COURT'S DECISION REFLECTS AND DEEPENS THE CONFLICT OVER THE QUESTION PRESENTED

In *Williams v. Illinois*, 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," 132 S.Ct. at 2333 (Alito, J.) (quoting *Bullcoming*, 131 S.Ct. at 2722 (Sotomayor, J., concurring)), but this Court's fractured 4-1-4 decision has left lower courts befuddled. Courts have openly stated their confusion over the contours of the Confrontation Clause following *Williams* and that they find the decision unhelpful in resolving the Question Presented. *See State v. Ortiz-Zape*, 743 S.E.2d 156, 161 (N.C. 2013) *cert. denied*, 134 S.Ct. 2660 (2014)(noting that under *Williams* the court lacked guidance on the issue);*State v. Michaels*, 95 A.3d 648, 651 (N.J. 2014), *cert. denied*, 135 S.Ct. 761

(2014)("*Williams*'s force, as precedent, is at best unclear."); *People v. Lopez*, 286 P.3d 469, 483 (Cal. 2013), *cert denied*, 133 S.Ct. 1501(2013)("Given the array of possible doctrinal approaches left open by *Williams*, one can only surmise the high court will soon weigh in again."); *see also Griep*, 2015 WI 40 at ¶64 ("Ambiguity remains regarding the precise circumstances under which the Confrontation Clause permits the introduction of substitute expert testimony about forensic test results when the forensic report itself is not introduced.")

The confusion over *Williams* presents itself most clearly in the disparate results regarding the testimony of surrogate analysts alleging that they are testifying to an "independent opinion." High courts throughout the country have come to different conclusions about the level of a surrogate witness's involvement required to testify regarding a report prepared by another analyst or pathologist. *Compare State v. Maxwell*, 9 N.E.3d 930, 952 (Ohio 2014), *cert. denied*, 135 S.Ct. 1400 (2015)(finding no Confrontation Clause violation when expert, who did not participate in testing, writing, or peer review of report, testified directly to admitted report and authoring analyst's conclusions), *with Martin v. State*, 60 A.3d 1100, 1108-09 (Del. 2013)(holding that defendant had right to confront analyst who performed test if testing and certifying analyst are not same individual). Generally, the decisions of these courts fall into three conflicting categories: 1) the court accepts the testimony because the testifying analyst has some limited relationship to the report and the analyst is a formal peer reviewer; 2) the court accepts the testimony because the testifying surrogate analyst

has no role in the testing or creation of the report but instead testifies to her "independent opinion" from her reading of the report with no additional work done by the surrogate analyst; and 3) the court rejects testimony from surrogate analysts who did no testing or reporting. The Wisconsin Supreme Court's decision below, affirming Griep's conviction, but splitting the justices on whether Harding's testimony violated Griep's right to confrontation, only adds to this growing and well-established conflict. As a result, the right of confrontation is enforced geographically.

1. Similar to Justice Abrahamson's opinion in Wisconsin, eight state high courts have determined that some level of involvement in the testing process is sufficient for a surrogate to testify as to another analyst's report, regardless of whether or not the testifying analyst performed any independent analytical steps. In arriving at this decision, courts have relied on the testifying analyst's position as a supervisor or co-analyst rather than the underlying testimonial nature of the report discussed. According to these courts, the intimate knowledge of the testing process and information in the report attributed to supervisors and reviewers distinguish them from other impermissible surrogates, allowing them to testify to the report as if from their own personal knowledge, rather than knowledge gleaned from a review of the report post-production solely for purpose of testifying at trial. However, even these courts differ as to what amount of participation is necessary to satisfy confrontation.

The Mississippi Supreme Court, for example, held that surrogate analyst testimony is permissible if the analyst has "intimate knowledge" of the report and if the witness was "actively involved in the production of the report." *Galloway v. State*, 122 So.3d 614, 636-37 (Miss. 2013), *cert. denied*, 134 S.Ct. 2661 (2014)(quoting *Grim v. State*, 102 So.3d 1073, 1079 (Miss. 2012))(internal quotation marks omitted). Similarly, in *State v. Michaels*, the New Jersey Supreme Court ruled that the testimony of a lab supervisor satisfied the Confrontation Clause because the supervisor "was knowledgeable about the testing process that he was responsible for supervising" and the supervisor had reviewed the data and certified the report admitted at trial. *Michaels*, at 651.

Five other state high courts have chosen to allow supervisor and technical reviewer testimony as to tests conducted by other analysts because of their involvement with writing, signing, or certifying the report rather than the actual performance of the testing. *See Ware v. State*, ___So.3d___, 2014 WL 210106, at *6 (Ala. Jan. 17, 2014) *cert. denied*, 134 S.Ct. 2848 (2014) (Confrontation Clause satisfied because defendant had opportunity to cross-examine testifying supervisor about standard operating procedures, conclusions drawn, and potential errors); *Marshall v. People*, 309 P.3d 943, 947 (Colo. 2013), *cert. denied*, 134 S.Ct. 2661 (2014)(when testifying supervisor "independently reviews scientific data, draws the conclusion" and "signs a report to that effect" the Confrontation Clause is satisfied.); *Commonwealth v. Yohe*, 79 A.3d 520, 541 (Pa. 2013), *cert. denied*, 134 S.Ct. 2662 (2014)(testimony from

reviewing analyst satisfied Confrontation Clause because analyst was "involved to a sufficient degree" in analysis and certified the report); *Leger v. State*, 732 S.E.2d 53, 60 (Ga. 2012)(testifying supervisor, who analyzed data and wrote report, satisfied Confrontation Clause when testified as to report's results); *State v. Lopez*, 45 A.3d 1, 16 (R.I. 2012) (reviewing analyst who authored and certified report, but did not conduct actual tests, satisfied Confrontation Clause); *see also Hingle v. State*, 153 So. 3d 659, 664-65 (Miss. 2014), *cert. denied*, 135 S.Ct. 2388 (2015) (allowing "technical and administrative reviewer" to testify about contents of non-admitted report because he "had intimate knowledge of the testing" and signed report).

At least one state, however, does not require the certification or signature of the testifying analyst and permits testimony from an analyst who was only involved in the formal peer review process. *See State v. Brewington*, 743 S.E.2d 626, 627-28 (N.C. 2013) *cert. denied*, 134 S.Ct. 2660 (2014)(testimony of analyst who conducted reviews of other analyst's work in the regular course of duties satisfied the Confrontation Clause).

These cases highlight one interpretation of surrogate testimony post-*Williams*: 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 the some part of the testing process. Notably, in Griep's case, it was Thomas Ecker who peer reviewed and certified

the report, making him the individual who would have had intimate knowledge of the process and the case. However, he was not called to testify.

2. In contrast, the Seventh Circuit and four state high courts have held that merely reviewing the data produced by other analysts in preparation for trial and qualifying it as an "independent opinion" satisfies the Confrontation Clause; in doing so, these courts have found that it is not the close relation of the testifying analyst to the performing analyst (like the cases in section one above), but rather their independence from the performing analyst's work that satisfies the Confrontation Clause. Notably, the courts' criteria for what make such opinions "independent" are merely that they were formed by the testifying analyst herself even if the opinion was based solely upon the work of someone else. Even among these courts, what is considered testimonial varies. In the Seventh Circuit, the court found that the underlying report was testimonial, while state courts have all found that the underlying reports reviewed by the testifying analysts were not testimonial, even though the information created and contained in those reports, such as electropherograms created through a non-testifying analyst's work or descriptions of an autopsy a non-testifying witness conducted, relies solely on the work performed by the testing analysts.

The Seventh Circuit, for example, held that surrogate witnesses may testify to independent opinions formed on the basis of "raw data" produced by machines through the work of a different analyst. Specifically, the court found there was no Confrontation

Clause error when surrogate analyst Michelle Gee testified to her own conclusions, formed from the testimonial data produced by testing analyst John Nied, which was not admitted and with which the surrogate had no prior connection. *United States v. Maxwell*, 724 F.3d 724, 727-28 (7th Cir. 2013) *cert. denied*, 134 S.Ct. 2660 (2014). The Court stated:

> Maxwell argues that Nied's forensic analysis is testimonial, but Gee never said she relied on Nied's report or his interpretation of the data in reaching her own conclusions. Instead, Gee 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 substance contained cocaine base after reviewing that data.

Id. at 727. In rendering its decision, the court also found: "There is little question about Gee's interpretation of Nied's data in this case is testimonial in nature—its sole purpose was to prove that the seized substance was cocaine base." *Id.* Nonetheless, the court found that the surrogate testimony was permissible under *Williams* because the defendant never objected to Gee's testimony at trial and did not dispute the substance was cocaine. *Id.* It did not, however, address the importance of the fact that the underlying work used to form the independent opinion was testimonial itself.

On the state level, however, Wisconsin, Ohio, California, and Arizona have allowed the testimony

of surrogate analysts who base their opinions on finished reports that were never admitted into evidence because they found the reports to be non-testimonial.

In Griep's case, the Wisconsin court found that surrogate analyst Harding's testimony did not violate confrontation because it was his "independent opinion," even though that opinion relied solely on the work of Kalscheur. (App.2a); *Griep*, 2015 WI 40 at ¶3. Harding's opinion regarding the readings of the gas chromatograph data is based solely upon the work performed by Kalscheur, both before and during testing, as the output of the machine was entirely dependent on her actions. For those reasons, two justices—Justice Abrahamson and Justice Bradley—found that Harding's "independent opinion" was in fact merely an introduction of Kalscheur's testimonial work and violated the Confrontation Clause. (App.39a); *Griep*, 2015 WI 40 at ¶73.

Similarly, in *State v. Maxwell*, the Ohio Supreme Court determined autopsies to be business records and therefore not testimonial nor subject to the Confrontation Clause. 9 N.E.3d 930, 952 (Ohio 2013). As a result, the court found that a surrogate expert witness who did not perform the autopsy or write the report could testify as to his own conclusions and could refer directly to the conclusions of the other analyst laid out in the admitted report without violating the Confrontation Clause. *Id.* at 948, 952. Like in Griep's case, the conclusions and work of the performing analyst were thus permitted to be testified to, performing an end-run around the right to confrontation.

Finally, two state courts have found that surrogate analysts' opinions are in fact independent because they rest on "objective" data, such as descriptions and photographs. In *People v. Dungo*, the California Supreme Court permitted testimony from a witness who was not at all involved in the creation of an autopsy report, because he only testified as to his opinion based upon the "objective" facts laid out in the report. *People v. Dungo*, 286 P.3d 442, 448-49 (Cal. 2012) (finding testimony of "objective" facts about condition of victim's body derived from another's autopsy report and photographs did not give defendant right to confront and cross-examine.). The Arizona Supreme Court also held in *State v. Joseph* that there was no violation of the Confrontation Clause where a witness based his opinion solely on the autopsy and related photos, because the court held the witness did not offer anything from the report for the truth of the matter asserted but only as a basis of opinion. 283 P.3d 27, 29-30 (Ariz. 2012).

3. Yet another set of high courts 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. West Virginia, Delaware, and Nevada have all found that the cross-examination of a surrogate analyst regarding the reports and work of a non-testifying analyst did not satisfy the Confrontation Clause.

In *State v. Kennedy*, the West Virginia Supreme Court held that the Confrontation Clause was violated when an autopsy report, which it found

testimonial under *Crawford*, was admitted. 735 S.E.2d 905, 918 (W.V. 2012). There, the testifying witness was found to have acted as a conduit for the pathologist who authored the report's opinions because he merely stated what the report concluded and that he concurred with the conclusions laid out in the report. *Id.* at 920-21.

Even in instances where a report itself was not physically admitted, but, like in Griep's case, the report's contents were admitted through the surrogate testimony, these courts have similarly found surrogate testimony did not pass constitutional muster. In *Martin v. State*, the Delaware Supreme Court held that under the Confrontation Clause, when the testing and certifying analysts are not the same, a defendant has a right to confront the testifying analysis to determine "her proficiency, care, and veracity." *Martin*, 60 A.3d 1100, 1108-09 (Del. 2013). There, the testifying analyst had written and certified the report—which was not admitted into evidence—but had not observed or participated in the actual testing of the blood sample determined to contain PCP. *Id.* at 1101. In reaching its decision, the *Martin* court relied on this Court's decision in *Williams*, where five Justices found that the Cellmark report was admitted for the truth of the matter asserted through the testifying analyst's statements. The Delaware court found that the same improper reliance had occurred in *Martin* as in *Williams* when the testifying analyst relied on the testing analyst's reports to form her conclusions. *Id.* at 1107.

Similarly, in *State v. Navarette*, the Nevada Supreme Court rejected surrogate testimony by a pathologist who did not perform the autopsy, even though the autopsy report itself was not admitted. 294 P.3d 435, 436 (2013), *cert. denied*, 134 S.Ct. 64 (2013). The court held that Confrontation Clause precludes a pathologist who did not perform the autopsy or write the report from relating the subjective opinions in the report as a basis for the testifying pathologist's opinion at trial, where only the autopsy photographs were admitted. *Id.* at 436.

It has been three years since this Court's decision in *Williams*. The conflict over surrogate testimony and the relevance of *Bullcoming* is now firmly entrenched and ripe for resolution. The split among state high courts and the federal courts of appeals now includes 16 courts interpreting the Confrontation Clause requirements in three very different ways. There is no prospect that this split will resolve itself, nor any reason to believe that further percolation will reveal any new arguments or considerations relevant to the dispute.

II. THE WISCONSIN SUPREME COURT'S DECISION IS IN DIRECT CONFLICT WITH *BULLCOMING*

At its core, this case is a straightforward application of *Bullcoming v. New Mexico*. In *Bullcoming*, this Court held that the use of a surrogate witness's testimony to admit a certified forensic report and its contents violates the Confrontation Clause in an OWI case. 131 S.Ct. 2705. That is precisely what occurred here and thus *Bullcoming* controls. Indeed, in its decision, the court of appeals acknowledges that "Griep makes a good

argument when he asserts that the surrogate expert testimony in this case was a subterfuge for admitting an unavailable expert's report in violation of *Bullcoming v. New Mexico* and *Williams v. Illinois*." (App.54a); *Griep*, 2014 WI APP 25 at ¶2 (internal citations omitted). Nonetheless, the Wisconsin Supreme Court disregarded this Court's precedent and found that *Bullcoming* did not apply because "[t]he testimony in *Bullcoming* is not the independent opinion of an expert," (App.16a); *Griep*, 2015 WI 40 at ¶31, despite the fact that the witness in *Bullcoming*, like the witness in *Griep*, "was familiar with the laboratory's testing procedures, but did not participate in, observe, or review the testing of the defendant's blood sample." (App.15a); *Griep*, 2015 WI 40 at ¶30.

In arriving at this erroneous opinion, the Wisconsin Supreme Court found that its pre-*Crawford* decision in *State v. Williams* (rather than *Bullcoming*) set the relevant precedent. In *State v. Williams*, the defendant was charged with possession of cocaine with the intent to deliver. 2002 WI 58 at ¶1. At trial, the state introduced a state crime lab report showing that the substance collected from the defendant tested positive for cocaine. *Id.* at ¶2. The original analyst was unavailable to testify, and another analyst, Sandra Koresch, who had performed a peer review of the original analyst's work in her regular course of duties, testified that the substance Williams was charged with possessing was cocaine. *Id.* at ¶4. There, the court concluded that Williams' right to confrontation had not been violated because "the presence and availability for cross-examination of a highly qualified witness, who is familiar with the

procedures at hand, supervises or reviews the work of the testing analyst, and renders her own expert opinion is sufficient to protect a defendant's right to confrontation, despite the fact that the expert was not the person who performed the mechanics of the original tests." *Id.* at ¶20. Because Koresch's opinion did not rest solely upon the work of the original analyst, but instead was an independent opinion formed upon her own peer review work performed in the line of her normal duties, confrontation was satisfied: "although she based part of her opinion on facts and data gathered by someone else, she was not merely a conduit for another expert's opinion." *Id.* at ¶25. However, the court's analysis and application of *State v. Williams* to Griep's case fails to acknowledge that, unlike the analyst in *State v. Williams*, surrogate analyst Harding did no formal peer review in the course of his normal duties. As a result, the Wisconsin Supreme Court improperly ignored *Bullcoming* in favor of overturned Wisconsin precedent.

Additionally, despite the fact that the underlying report in Griep's case was certified and thus testimonial, the Wisconsin Supreme Court found that admission of the report through Harding's testimony did not violate Griep's constitutional rights under *Williams*. If that court had found that this was not a direct application of *Bullcoming*, but rather an extension of this Court's analysis in *Williams*, than the court should have still found confrontation of the testing analyst was required. This Court clarified in *Marks v. United States* that in plurality opinions, only the narrowest decision concurring in the judgment sets precedent. 430 U.S. 188 (1977) (finding that the holding of the Court in a

fragmented decision may be viewed as "that position taken by those Members who concurred in the judgments on the narrowest grounds"). In *Williams*, that opinion belongs to Justice Thomas. Had the Wisconsin Supreme Court properly applied *Marks*, it would have found that the narrowest opinion in *Williams* does not overrule *Bullcoming*, but instead addresses the issues of how to deal with non-certified reports that are used to form the basis of expert opinion testimony. Such opinion testimony required an additional step and did not go directly to the element of a crime, like the formalized reports used in both *Bullcoming* and Griep's cases. Further, the narrowest decision in *Williams*—again, Justice Thomas's decision—finds that formal, solemnized reports, like the certified report in Griep's case, are testimonial and subject to confrontation. In short, even if *Williams* were to apply, the Wisconsin Supreme Court's decision in *Griep* would still conflict, as it ignores Justice Thomas's controlling opinion in violation of *Marks.*

Finally, while Justice Abrahamson was correct in finding that Harding's opinion was not independent and that Griep's right to confrontation was violated "because the analyst whose out-of-court testimonial statement Harding indirectly introduced had not previously been cross-examined by the defendant," her proposed new test is unprecedented and cannot pass constitutional muster. (App.39a); *Griep*, 2015 WI 40 at ¶73. The Wisconsin Supreme Court cannot ignore this Court's precedent in *Bullcoming* and *Williams* because it finds confrontation inconvenient.

III. THIS ISSUE IS IMPORTANT TO THE PROPER ADMINISTRATION OF CRIMINAL TRIALS

The differing implementation of the Confrontation Clause's requirements affects millions and must be resolved. In Wisconsin alone, there were over 25,000 drunken driving convictions in just 2012. *Drunken driving arrests and convictions*, State of Wisconsin Department of Transportation, http://wisconsindot.gov/Pages/safety/education/drunk-drv/ddarrests.aspx. Nationally, that number reaches over 1.4 million. CDC, *Impaired Driving: Get the Facts,* http://www.cdc.gov/motorvehiclesafety/impaired_driving/impaired-drv_factsheet.html. A conflict in the states regarding the admissibility of surrogate testimony means that the results of factually similar criminal trials vary widely by jurisdiction.

Moreover, the question presented implicates not only the results in impaired driving cases, but all criminal trials involving the admission of scientific or forensic analysis through a non-participant analyst. Crime laboratory analyses play a central evidentiary role in a large number of criminal trials and prosecutors in numerous jurisdictions rely on surrogate witnesses to present the analyses of non-testifying analysts in trials. This is particularly true of cold case units. It is imperative that prosecutors, defense lawyers, and judges in all jurisdictions receive guidance on whether surrogate testimony satisfies the Confrontation Clause.

Indeed, Wisconsin Supreme Court Justice Abrahamson noted the importance of this area of jurisprudence in her opinion below, finding that a decision upholding *Crawford* and its progeny would

"improperly ignore[] the values underlying the Confrontation Clause and the practical realities the State and the courts face in cases that rely on forensic evidence." (App.39a); *Griep*, 2015 WI 40 at ¶73 (Abrahamson, J., concurring). As courts around the country grapple with new science and fields of study, guidance on the admissibility of surrogate analysts' testimony regarding the work of another is all the more vital.

Similarly, the Wisconsin court of appeals noted:

> Should a court higher than ours eventually decide the issue in a manner favorable to Griep, we recognize the imposition such an opinion might well place on prosecutors and the state crime laboratory. Some might call it an inconvenience and others might call it disturbing. It is the proverbial elephant in the room. All we can say is that the United States Supreme Court saw the same elephant and said this:
>
> > . . . The constitutional requirement, we reiterate, may not be disregarded at our convenience, and the predictions of dire consequences, we again observe, are dubious.

(App.65a); *Griep*, No. 2009 AP 3073-CR at ¶23, FN6, (internal citations omitted).

Further, the significance of confrontation in cases involving analytical or forensic science is not overstated. Lab scandals around the country have highlighted the importance of confrontation of a performing analyst, as only those analysts can know

of any malfeasance they may have taken. As Justice Abrahamson and Harding themselves noted in Griep's case, an analyst could tamper with evidence or alter results without detection by others if they so choose:

> Harding appears to have recognized the dangers posed by admitting his testimony in lieu of testimony by the analyst who performed the forensic testing in question. On cross-examination, defense counsel asked Harding whether the analyst who tested the defendant's blood sample could have tampered with the sample had she "had a mind to do it." Harding responded: "[I]f the analyst wanted to do something nefarious, sure, that's correct, that could happen." Defense counsel then asked whether an analyst's tampering with a blood sample "could possibly escape your detection when you review the written reports and materials." Harding replied: "Sure."

(App.44a-45a); *Griep*, 2015 WI 40 at ¶93. Concerns about bad acts on the part of analysts are not unwarranted; such actions have occurred around the country, most recently in Boston, where an analyst may have tainted over 10,000 cases between 2004 and 2013. Evan Allen & John Ellement, *State Chemist May Have Affected More Drug Cases Than Previously Known*, THE BOSTON GLOBE, July 2, 2015, available at https://www.bostonglobe.com/metro/2015/07/02/state-chemist-drug-thefts-may-have-affected-thousands-cases/h6b7vvPYoNCsAJTLMGbrBK/story.html (describing case of analyst who confessed to

pilfering samples of drugs for own use and of second analyst previously convicted for falsifying test results).

Finally, were the Wisconsin Supreme Court's decision in *Griep* to stand, it would mean this Court's cases interpreting the Confrontation Clause will not preserve a defendant's right to confrontation, but perversely would entirely eliminate it: Rather than presenting lab results and testifying analysts, prosecutors would be encouraged to set up assembly-line mouthpieces at crime labs who present "raw" or unsynthesized data and provide "independent" expert opinions. Prosecutors would be permitted to enter all damning evidence of a scientific or forensic nature—already believed to be more credible by juries—with no opportunity for cross-examination to expose flaws in the result. Because of the importance of forensic science to criminal trials and the ability of analysts to err undetected, this Court should grant review to ensure that the right to confrontation is properly protected in criminal trials.

IV. THIS CASE PRESENTS AN EXCELLENT VEHICLE TO CONSIDER THE QUESTION PRESENTED

This case raises the question presented free from any waiver or collateral review complications. It comes to this Court on direct review, and petitioner clearly and unambiguously objected at trial, arguing that the introduction of the forensic report through the testimony of a witness other than the one who authored the report violated the Confrontation Clause. Petitioner also preserved this issue by contending at each level of the Wisconsin appellate courts that the admission of the analyst's reports violated the Sixth

Amendment, and the Wisconsin courts resolved this issue on the merits.

Second, this case clearly and cleanly presents the question of whether a surrogate analyst's review of the performing analyst's report and supporting materials is enough to constitute an "independent opinion" for purposes of the Confrontation Clause. The testifying analyst in Griep's case testified that he performed no additional analysis and the courts found as much. Nonetheless, four of the Wisconsin Supreme Court justices found that because he was "highly qualified," his opinion was "independent." Two justices, however, found that Harding's testimony was not independent and that he instead acted as a mere conduit for the contents of Kalscheur's report. Thus, the split and controversy regarding what does and does not constitute an "independent opinion" is clearly encapsulated in this case.

Additionally, the forensic report, while not itself admitted, is unquestionably testimonial under *Melendez-Diaz*, *Bullcoming*, and *Williams*, and the statements in the report were unquestionably relayed to the jury. As considered by Justice Thomas in *Williams*, the report in this case was formally certified by Kalscheur and peer-reviewing analyst Thomas Eckhert. Yet, it was not a certifying analyst, nor was it a peer-reviewer who testified. Although the testifying witness stated that he did have access to the "same materials" a peer review would use, he did not perform the peer review or undertake any additional steps. (App.27a); *Griep*, 2015 WI 40 at ¶45. Moreover, the shortcomings of using a surrogate

witness were perfectly displayed in this case because the witness himself testified that errors could have occurred without his knowledge. (App.44a-45a); *Griep*, 2015 WI 40 at ¶93.

Importantly, the forensic report and testimony regarding Griep's blood-alcohol level at issue played a central role at trial. If this Court concludes that petitioner's confrontation rights were violated, he would be entitled to a new trial. The trial court stated that its decision was based at least in part on Harding's testimony, (39:18-19), and the court of appeals found that such an error would not be harmless. (App.63); *Griep*, 2014 WI APP 25 at ¶21 FN 5 ("We note that based upon this record, if we were to conclude that Harding's testimony was admitted in error, that error was not harmless.").

Further, Justice Shirley Abrahamson's concurrence proposes a new test for admitting testimonial statements, making this decision all the more ripe for review. In proposing her new test, Justice Abrahamson noted the importance of forensic reports in the criminal justice system and the number of reports used in criminal trials, as well the United States Supreme Court's limited experience and familiarity with state trial processes in making evidentiary rules. (App.47a); *Griep*, 2015 WI 40 at ¶99.

Finally, although the facts and reasoning in *Bullcoming* are relevant to the facts and application in Griep's case, the question of whether testimony from a surrogate witness about the contents of a certified report created by a non-testifying analyst <u>who performed no additional testing or analysis</u>

satisfies the Confrontation Clause has not been addressed by the United States Supreme Court. If this Court finds that *Bullcoming* does not control, it should grant review to address the real and significant question presented here: how does the Confrontation Clause apply to surrogate witnesses testifying about testimonial laboratory reports where those reports are 1) formalized, testimonial statements, 2) used to prove an element of the offense, 3) offered for the truth of the matter asserted, and/or 4) offered by a surrogate who does not use them to form the basis of an independent opinion? This evidentiary issue is one that trial courts grapple with frequently. Review of Griep's case is necessary to clarify the rule and ensure that the Confrontation Clause is applied uniformly and properly around the country.

CONCLUSION

For all the foregoing reasons, this Court should grant the petition for writ of certiorari.

Respectfully submitted this 22nd day of July, 2015.

Respectfully submitted,

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