ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO	:	CASE NO. 2011-0686
Plaintiff-Appellee	:	On Appeal from the Washington County Court of Appeals Fourth Appellate District
vs.	:	
DANIEL ARDEN KECK, II	:	Court of Appeals Case No. 09 CA 50
Defendant-Appellant	:	

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STATEMENT OF THE CASE AND FACTS

The Appellee submits the following additional Statement of the Case and Facts: The DNA which is the subject of controversy in this case does not relate to all of the criminal charges on which Appellant was convicted after his jury trial. The DNA of victim J.D. and Appellant were the subject of the testimony in question. Count 1 in Washington County Common Pleas Court Case Number 09 CR 12 and Count 1 in Case Number 09 CR 48 alleged that Appellant committed rape against J.D. [Date of Birth March 1994] at Appellant's residence at 407 Edgewood Drive, Marietta, Ohio. There were two additional counts of rape involving J.D., based on acts of oral intercourse at the Edgewood Drive residence in Case Number 09 CR 48 (Counts 3 and 4).

The evidence presented at trial showed that J.D. was born on March 16, 1994. His mother, C. K. testified at appellant's trial. She said that she and her son had met Appellant around 2005, through another boy in the neighborhood. Ms. K. said that although she was concerned at first about her son's relationship with Appellant, she spoke with other parents whose sons spent time with him and eventually, she let her son take trips with Appellant. [TR 826-835] "...I started letting the reigns out, and away he went. Weekends, trips.... "to Dan's [Appellant's] cabin, to his house. They went for a week to—camping in the Carolinas and went up to his house on Lake Erie...[TR 835-836] She also gave Appellant permission to take her son to Honduras in December 2006. [TR 840-844]

J.D. testified as well. He talked about going to Morgan County, to Appellant's cabin. "It was a little cabin, in the middle of nowhere" ... "like thick woods"... [TR 911-913] J.D.

testified that he had a pretty good time with the Appellant, taking trips, going boating, playing X box, and staying at Appellant's house. [TR 922]

J.D. also testified that Appellant took pictures of him when he didn't have any clothes on. [TR 917] And, J.D. testified that on one trip with Appellant to the Morgan County cabin for an overnight visit, he awoke to find that Appellant was on his (J.D.'s) mattress with no clothes on and that he (Appellant) had inserted his (Appellant's) penis into J.D's anus.

J.D. said that this happened again, mostly at the cabin in Morgan County but also when he stayed all night at Appellant's house on Edgewood Drive in Marietta. J.D. said that Appellant would pick him (and sometimes other boys) up and take him to the cabin in Morgan County. [TR 947] He said that Appellant would lay down beside him after he (J.D.) had gone to bed and although he wouldn't always wake up, he'd awaken with the Appellant in bed with him, with his (J.D.'s) boxers around his ankles, and with Vaseline on his thighs around his "butt" [TR 923-929] J.D. said that he would eventually make deals with Appellant to allow sex, for example, if Appellant would pay for his Runescape account. (This was substantiated by credit card records for Runescape in Appellant's financial records). [TR 930, 1573]

Appellant also had oral sex with J.D. in the hot tub at his home and in the waterbed at his home. [TR 930-931] J.D. said Appellant had oral and anal sex with him when Appellant took J.D. to Honduras . [TR 932-934, 948] Appellant picked him up before the trip to Honduras and paid for J.D. to go (by plane). [Id.]

J.D. identified State's Exhibits 39-1 and 40-9 through 40-14, depicting images taken by Appellant of J.D. when he was nude. Appellant took these pictures. He said that Appellant took some of these pictures when the two went to the farm in Sandusky. Detective Hawkins found a receipt for a camera battery dated the day the two left for the trip to Sandusky and a receipt from

a Wal-Mart in Sandusky dated the following day. FBI Special Agent David Barnes found these nude pictures of J.D. on Appellant's Hewlett Packard computer. [TR 932-937, 1574-1576, 1669]

J.D. also testified that he saw Appellant engage in anal sex with "Little" G. L. in the same way. [TR 938] Appellant's own witness, R. J. provided additional evidence to substantiate this, testifying that G. L. had told him that Appellant had touched him [G. L.]. "He just said he had been sexually abused by Dan, but he didn't put in any detail." [TR 2264-2265]

Det. T.A. Hawkins testified regarding how his investigation developed. He testified about J.D.'s detailed statements to him regarding the circumstances of these rapes and the photos which J.D. said Appellant took. Hawkins obtained these statements before the execution of the search warrant at Appellant's residence. [TR 1519-1523] Hawkins then testified about the evidence he gathered by means of the search warrant and by other means which corroborated the statements and other information provided by J.D. and the other victims regarding Appellant's sexual assaults. [TR 1551-1563]

Hawkins found State's Exhibit 27 in Appellant's home when he executed the search warrant. State's Exhibit 27 is a Playboy magazine, dated October 2006. J.D. had previously told Hawkins that Appellant had purchased Playboy magazines for the boys to look at in Appellant's home. J.D. said that the Playboy would be hidden in a back bedroom "between some mattresses". Hawkins found the magazine in a bedroom underneath the headboard of the waterbed. The October 2006 date corresponded to the time frame within which J.D. would have been spending time at Appellant's house. [TR 1552-1554]

Officers also found an (adult) pornographic videotape in the VCR in Appellant's living room when they executed the search warrant. Hawkins said this finding corroborated J.D.'s statement regarding other adult pornography in the Apellant's house. After finding the tape,

Hawkins asked J.D. if he would be able to describe the content of the videotape he had previously seen at Appellant's house and J.D. said that from what he could remember, there was a woman in a red jeep who picked up a hitchhiker and then engaged in sex. Hawkins watched the tape and confirmed that this was accurate. [TR 1553-1555]

G. L. was 14 at the time of trial. He was born on February 7, 1995. [TR 1195] He took trips with Appellant, stayed overnight at his home, played games, used Appellant's computer (to look at adult pornography), and went boating with Appellant. He went to Florida, South Carolina, Disneyland [sic], Cedar Point, Lake Erie, and Appellant's farm and cabin with Appellant.

G.L. said that when he spent the night at Appellant's house, he would awaken to find Vaseline between his legs, "up where my private spot is" "... toward the back". G.L. would find his boxers off and Appellant was beside him "moving back and forth, ". G.L. said "He's humping me,". [TR 1194- 1222] The night the search warrant was executed, G.L. was at Appellant's residence. At that time, he told Det. Hawkins about finding "stuff" between his inner thighs which he then confirmed was Vaseline. [TR 1547]

There was no scientific evidence introduced at trial establishing that G.L.'s DNA was found at Appellant's residence. Appellant was found guilty of Rape for acts committed against G.L. in Count 6 of Case Number 09 CR 48 and Gross Sexual Imposition for acts committed against G.L. in Count 7 of Case Number 09 CR 48. These acts were both alleged to have been committed at Appellant's residence at 407 Edgewood Drive, Marietta. [TR 3148-3149, Indictment, Case Number 09 CR 48]

A. B. testified as well. He was born on September 23, 1991. [TR 1020-1021] He met Appellant when he was 9 and began staying all night with Appellant when he was 11. A. B. said

that when he stayed with Appellant, he would awaken to find his boxers off, Vaseline around his anus, and Appellant in bed with him. On one occasion, A. B. acknowledged that Appellant was behind him, nude, and "humping" him, touching A. B. with his [Appellant's] penis. A.B. confirmed that Appellant took video of him. [TR 1020-1038]

The State introduced Exhibit 5, which was a videotape found by Sgt. Wright. Sgt. Wright found the tape in a bedroom closet in Appellant's house when he was helping to execute the search warrant. Sgt. Wright played the tape. [TR 808-809, State's Exhibit 5] The tape depicted Appellant, nude, with a nude 12-year old boy. Both were in Appellant's bathroom. At one point, while Appellant was apparently holding the camera, the child depicted in the video displayed his buttocks or rectum and asked Appellant if he was "horny." Det. Hawkins later watched the tape and was able to identify the child in the video as A.B.

There was no scientific evidence introduced to establish that A.B.'s DNA was found at Appellant's residence. The jury found Appellant guilty of two counts of Gross Sexual Imposition for acts committed against A.B. in Counts 30 and 31 of Case Number 09 CR 48. Both of those acts were alleged to have been committed at Appellant's residence at 407 Edgewood Drive in Marietta. [TR 3155-3156, Indictment, Case Number 09 CR 48]

Seven-year old J. L. testified. He is G. L.'s little brother. He said he had stayed overnight with Appellant once. He said there was one game other boys played with Appellant at Appellant's home. He called it"Raper Snaper." He explained that "Raper Snaper" is "where you take off all your clothes running around trying to hump people." J. L. said he did play a game with Appellant at Appellant's house that he called "Flash" and that they played it with the camera. J.L. said he ran around without his clothes on and Appellant took "a lot of pictures".

[TR 1292-1300] Various nude photos of J.L. and nude video of J.L. was found at Appellant's home. [TR 1782-1801]

"[S]" L. is J. L.'s mother and G. L.'s mother. She said she had let J. L. stay at Appellant's home in January 2009, with his cousin, C. L. [TR 1305-1311]

Detective Hawkins was able to identify nude images of J.D., J. L., C. L., and the Appellant in images found by Special Agent Barnes on Appellant's computer. For images which did not include facial features, Hawkins was able to identify the children and the Appellant by means of moles and body hair. Hawkins was also able to identify the interior of Appellant's home, as shown in the "Raper Snaper" or "Flash" pictures of J. L. and the videos. And, he was able to identify Appellants voice in the background of nude videos which included J. L., C. L., J.D., and G. L., all of which were taken in Appellant's home. [TR 1782- 1801]

The State introduced another video which Appellant provided to the State just before trial, claiming that he found it about a week before the trial, after some unknown person or persons allegedly left it outside his home. That video depicts J.D. and G.L. nude and masturbating in a bed in Appellant's home. At the beginning of the video, Appellant is heard saying to J.D. "It's Crisco but it's still slippery." Appellant acknowledged that he had handed Crisco to J.D. through a bedroom door and made the comment but claimed that he didn't know J.D. was nude or filming anything. He said he thought that J.D. was going to use the Crisco for a racecar track he recalled he had played with. This Exhibit was introduced as evidence in the State's case in chief. However this video was not the subject of any of the child pornography convictions.

[State's Exhibit 49, TR 1597-1605, TR 2687-2689, 2694-2700] Appellant's witness, A. M. (age 14), was staying all night at Appellant's house with G. L. the night officers arrived to

execute the search warrant. A.M. said that Appellant was playing a pornographic movie for them while they were in the hot tub. A.M. said Appellant had slept in bed with him and other boys. A. M. said that he recalled G. L. telling him that Appellant had "gotten" him and that he should watch out because he might try to get A.M. too. At trial, A. M. denied that Appellant had sexually abused him. [TR 2299-2316, 2321, 2324]

Because J.D. and G.L. and A.B. testified about finding Vaseline on their thighs and buttocks when they awoke nude with or without Appellant in bed with them, Detective Hawkins noted a receipt among Appellant's papers showing the purchase of Vaseline from the local Giant Eagle store. He had also found Appellant's Giant Eagle frequent buyer card in Appellant's wallet when Appellant was arrested. As a result, Giant Eagle records were subpoenaed and showed that in 26 months, from April 2006 to January 2009, Appellant bought 19 (nineteen) 3.75- ounce jars of Vaseline. The last purchase was on January 7, 2009, two days before the search warrant was executed at Appellant's house. [TR 1576-1587, State's Exhibit 50]

BCI forensic scientist Kristen Slaper was qualified, without objection, as an expert witness. [TR 1443]. She testified that to compare DNA for purposes of identification, a DNA profile or "graph readout" is generated and then compared, by looking at 16 different places on "the DNA" [sic]. [TR 1446] Ms. Slaper identified the DNA report that she generated in this case. Her report was admitted in evidence [TR 1448, State's Exhibit 48-B]

Ms. Slaper began testifying regarding her report, then as to the cuttings she had taken from a comforter from Appellant's home that was submitted to BCI&I for analysis. She testified as to how she selected cuttings from the comforter for analysis. She then began to testify about the "known samples" of DNA which, pursuant to the lab procedure, had been run previously and

separately by another agent (for quality control purposes, to ensure that the known samples and the crime scene evidence samples do not get mingled together).

> [Prosecutor] Q: ...well, first of all, you had all of the – the swabs from the – the known samples to compare to, is that right?
>
> [Slaper] A: Yes.
>
> Q: What do you do with those? I mean, are those kept off to the side and kept separate from this?
>
> A: Yes, those actually – they were run previous to my analysis. And they are run at a separate time in a separate place by a separate analyst, and they're kept off to the side, so the DNA profile gets generated from them and then we keep that profile and we know what that profile would be. [TR 1447-1450]

Analyst Slaper then proceeded to talk about the cuttings from which she worked and how they were selected (by analyst Peoples who had testified previously). The Defense then began its objection to the fact that Ms. Slaper was about to testify as to the analysis she did, i.e., the comparison of known and crime scene DNA samples, based upon work done by another BCI&I DNA analyst (who was not testifying) in extracting the DNA profile from the known samples. [TR 1450-1481]

Arguments and testimony as to the admissibility of Ms. Slaper's testimony were adduced outside the presence of the jury. [TR 1452-1481] During this time, Ms. Slaper testified that it was standard practice to test the known DNA samples separately from crime scene evidence samples to avoid cross-contamination. She also testified that samples used for comparison are put through the "extraction process, the quantification process, and then instrumentation" by a qualified analyst and that a chain of custody is documented and maintained. [TR 1450, 1453-1455] She testified regarding the standard procedures and process by which DNA is extracted and a profile is generated and by which comparisons are made.

Ms. Slaper received a fax from BCI&I during the time that the parties were arguing as to the admissibility of her testimony, still outside the presence of the jury. The fax she received specified the chain of custody for the known DNA samples which were the basis of the Defense objection. The fax she described stated that analyst Mark Losko prepared the samples. Again, **outside the presence of the jury**, She testified that:

> [Slaper] A: Based on the chain of custody, he would have taken—for example, Item 2.1 into his custody on March 4th of 2009, performed his analysis and returned it to the vault on March 5th of 2009.
>
> [Prosecutor] Q: So he just simply – what does he do, actually, when you perform these or create these—what's the word I'm looking for?
>
> A:Profiles.
>
> Q: When he creates the profile.
>
> A: He takes the evidence into his custody. He takes it through a series of scientific steps and a profile, a piece of paper readout, printout is generated at the end.
>
> Q: It's like a graph?
>
> A: It's a graph, and at the end when that graph comes out, he gives the standards to the casework analyst; the casework analyst then compares any profile generated from any evidence to the profile generated from any evidence to the profile that's generated from the standard. **He doesn't actually do an interpretation of the standard; he just simply prints it out and hands it to the casework analyst.**
>
> Q: So, it's essentially just putting it in the machine and letting it make its graph and then we're done? He's done with it at that point?
>
> A: He's done with it at that point, yes.
>
> Q: You then take the graph and do the analysis and comparison?
>
> A: **I do the analysis on the DNA items of evidence so the—or, the samples of evidence and then when I generate a profile from that, I compare it to the profile that was generated from the standard.** [TR 1468-1469]

Ms. Slaper also testified that in all of the dozens of times that she has testified as a DNA expert, the person who had done these preliminary steps with respect to the samples had only testified once, i.e. that it has not been commonly required in order for her to be able to testify regarding her findings as to the comparisons. [TR 1455].

The Court overruled the Defense objection. When the jury returned and the proceedings resumed, Ms. Slaper identified the known samples of DNA and testified that they were analyzed at BCI and a DNA profile was generated. [TR 1483-1485]

Kristen Slaper then testified as to what she did with the profiles generated from the known samples. She testified that she examined DNA which she had extracted from crime scene evidence and compared it with the DNA profiles obtained from known samples. She compared the two DNA profiles and, in her professional opinion, they matched. She explained the means by which she examined the profiles and by which she reached her conclusion as to the match. Her analysis and findings were summarized in her report, which was admitted as State's Exhibit 48-B. [TR 1485-1485, 1447, 1500]

The Defense had previously stipulated to a report generated by BCI analyst Mark Losko, permitting Kristen Slaper to testify regarding a DNA comparison done by Mr. Losko with respect to a different item of evidence (a bed sheet), identifying a likely contributor of DNA as D.H. [State's Exhibit 48-A; TR 1495-1498, TR 1465-1466] This report did include a statement that Losko had tested known samples of Appellant and the other victims and generated a profile but Losko's conclusion and findings related to the fact that D.H.'s DNA matched DNA from a bed sheet and that none of the other samples did. [State's Exhibit 48-A]

Appellant was not charged with any crimes for which D.H. was alleged to be the victim.

On cross examination, the defense asked Slaper about her assumptions regarding the profile generated by Losko and she acknowledged that she was not present when the profiles were generated but relied on them as accurate. [TR 1500-1501]

The State admitted State's Exhibit 52 which was a copy of the recording of the first telephone call made by Appellant after he was arrested. He told his parents he was sorry but never denied committing the crimes for which he had been arrested. [TR 1583-1597]

LAW AND ARGUMENT

DEFENDANT APPELLANT'S PROPOSITION OF LAW: THE CONFRONTATION CLAUSE PROHIBITS THE STATE FROM INTRODUCING TESTIMONIAL STATEMENTS OF A NONTESTIFYING FORENSIC ANALYST THROUGH THE IN-COURT TESTIMONY OF A THIRD PARTY WHO DID NOT PERFORM OR OBSERVE THE LABORATORY ANALYSIS ON WHICH THE STATEMENTS ARE BASED.

Response Introduction

Appellant cites three of the U.S. Supreme Court's recent decisions involving expert testimony and the Confrontation Clause for the Proposition that the Confrontation Clause prohibits the State from introducing testimonial statements of a non-testifying forensic analyst through the in-court testimony of a third party who did not perform or observe the laboratory analysis on which the statements are based. Appellant cites various portions of the holdings in a number of confrontation clause cases, including Melendez-Diaz v. Massachusetts (2009), 129 S.Ct. 2527 and Bullcoming v. New Mexico (2011), 131 S.Ct. 2705. Appellant then argues that the testimony of BCI analyst Kristen Slaper is different from the expert's testimony in Williams v. Illinois (2012), 132 S.Ct. 2221 and cites reasoning from two of the various opinions issued in that case. Appellant then distinguishes certain facts in this case from Williams.

Appellant has not established that there were "testimonial statements of a non-testifying forensic analyst" admitted in this case under this authority. Analyst Slaper's testimony did not violate the holdings of any of these cases or opinions. According to these rulings, Slaper did not introduce "testimonial statements" of a non-testifying witness by testifying regarding her findings and opinion as to the comparison of data generated by another analyst with data she generated. The Appellant's rights to confront the witnesses against him were not violated under the U.S. or Ohio Constitution.

Regardless, any potential error in the admission of the Analyst Slaper's testimony was harmless because of the other evidence introduced to establish Appellant's guilt.

A. Response to Appellant's Argument Regarding the Right to Confrontation after Melendez-Diaz, Bullcoming, and Williams; and

B. Response to Appellant's Argument Regarding Melendez-Diaz, Bullcoming, and Williams' Effect on Slaper's Testimony

Melendez-Diaz is distinguishable from this case. That was a drug case in which the State sought to prove the scientific analysis and weight of a substance purported to be cocaine, solely by submission of notarized affidavits of analysts who did not testify. The U.S. Supreme Court held that "The Sixth Amendment does not permit the prosecution to prove its case via *ex parte* out-of-court affidavits and the admission of such evidence against Melendez-Diaz was error." Melendez-Diaz, supra, at 2542. The State in this case did not seek to prove its case via an *ex parte* out-of-court affidavit by which scientists expressed their analytical conclusions.

Instead, the State established the presence of J.D.'s DNA and Appellant's DNA on a comforter from Appellant's home by means of the testimony of the expert forensic scientist (Slaper) who reviewed and analyzed the underlying scientific data and made an independent scientific conclusion regarding that data. The fact that a portion of the data upon which she relied was generated by another scientist doesn't require exclusion of her testimony under the rule set forth in Melendez-Diaz.

The nature of the affidavits or certificates submitted in Melendez-Diaz which were admitted was critical to the Supreme Court's ruling. See Id. Justice Scalia, author of the opinion, began the opinion by stating: "The question presented is whether those affidavits are 'testimonial, rendering the affiants 'witnesses' subject to the defendant's right of confrontation under the Sixth Amendment." Id, at 2530. "The Court then found that they were testimonial, and

thus firmly within the class of testimonial statements which must be offered by live testimony subject to cross examination:

> There is little doubt that the documents at issue in this case fall within the "core class of testimonial statements" thus described. Our description of that category mentions affidavits twice. See also White v. Illinois, 502 U.S. 346, 365, 112 S.Ct. 736, 116 L.Ed.2d 848 (1992) (THOMAS, J., concurring in part and concurring in judgment) ("[T]he Confrontation Clause is implicated by extrajudicial statements only insofar as they are contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions")... The fact in question is that the substance found in the possession of Melendez-Diaz and his codefendants was, as the prosecution claimed, cocaine-the precise testimony the analysts would be expected to provide if called at trial. The "certificates" are functionally identical to live, in-court testimony, doing "precisely what a witness does on direct examination." Davis v. Washington, 547 U.S. 813, 830, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006) (emphasis deleted).
>
> Here, moreover, not only were the affidavits " 'made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial,' " Crawford, supra, at 52, 124 S.Ct. 1354, but under Massachusetts law the *sole purpose* of the affidavits was to provide "prima facie evidence of the composition, quality, and the net weight" of the analyzed substance, Mass. Gen. Laws, Ch. 111, § 13. We can safely assume that the analysts were aware of the affidavits' evidentiary purpose, since that purpose-as stated in the relevant state-law provision-was reprinted on the affidavits themselves....Melendez-Diaz, supra. 2532.

Contrast the analysis of the affidavits or certificates in Melendez-Diaz with the testimony offered by Kristen Slaper. She testified and her report was admitted as an exhibit. Her report was not admitted as a substitute for her live testimony. She testified at trial regarding her own conclusions as to the fact that the known samples of J.D. and Appellant's DNA matched DNA she had extracted and profiled from a comforter. She did testify regarding the report and conclusions made by another scientist as to DNA found on another item of evidence, *but only with defense stipulation* that she could do so for purposes of that expert's determination by comparison identifying the DNA of D.H. on the bed sheet. [TR 1485, 1496-1497] And, *there were no criminal charges filed with respect to any acts committed against D.H.*

Even after the trial court's ruling permitting her testimony to continue (in front of the jury), Ms. Slaper only identified the known swabs of DNA from Appellant and J.D. (and others) and only said, with respect to the profiles generated:

> Q: Okay. Now, you didn't actually deal with those swabs; is that right?
>
> A: That's correct.
>
> Q: But those were analyzed at BCI?
>
> A: Yes, that's correct.
>
> Q: And was a profile generated at BCI, using those swabs?
>
> A: Yes.
>
> Q: And what did you do, then, with the profiles that were generated from those swabs?
>
> A: With the profiles generated from these swabs, I can compare those profiles to profiles that I generate from the items of evidence, on which I perform DNA analysis. [TR 1485-1486]

Ms. Slaper's use of the data generated by Mark Losko is not prohibited by Melendez-Diaz. The Melendez-Diaz Court did not rule that the Confrontation Clause prevents expert witnesses from testifying regarding predicate findings of technicians or even other experts. The Court specifically noted the limitations of its ruling:

> Contrary to the dissent's suggestion… we do not hold, and it is not the case, that anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device, must appear in person as part of the prosecution's case. While the dissent is correct that "[i]t is the obligation of the prosecution to establish the chain of custody," *post,* at 2546, this does not mean that everyone who laid hands on the evidence must be called. Melendez-Diaz, supra, FN 1.

Thus, the Court preempted and rejected the expansive interpretation of its ruling which Appellant urges. They did not hold and it is not the case that Mark Losko, as someone who *could* testify about the authenticity of the profile of the known DNA samples or the accuracy of the device which generated the profile, had to appear in person.

In Melendez-Diaz, Justice Scalia reiterated that deciding whether or not a statement is testimonial for purposes of the confrontation clause includes consideration as to whether the statements "were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." Melendez-Diaz, supra, citing Crawford v. Washington (2004), 541 U.S. 36, 51-52. Given the standard procedure employed for DNA analysis and comparison, and Ohio Evid. R. 703[1], an objective expert witness in Ohio would not reasonably believe that a scientist who extracts the DNA and generates the profile for purposes of comparison would thereby be making a testimonial statement available for use at a later trial if another expert has analyzed the DNA and reported conclusions regarding comparison of the profiles. Kristen Slaper's testimony regarding her expectations and prior experience on this issue supports this argument. [TR 1455] Under Melendez- Diaz, supra, this expectation further demonstrates that the generation of the underlying DNA profile does not constitute a testimonial statement.

Kristen Slaper conducted the actual analysis in this case and gave her own conclusion, identifying (among other things) the DNA of J.D., and DNA from sperm of the Appellant in the same stain of the comforter from a bed in Appellant's residence. [TR 1490] She was not a mere conduit for admission of Mark Losko's testimonial certification or report. She was subject to cross examination regarding the work she did, and she was entitled to rely on the profile generated by Losko in rendering her ultimate opinion as to the facts to which she testified.

[1] The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by the expert or admitted in evidence at the hearing. Ohio Evid. R. 703

Bullcoming v. New Mexico (2011), 131 S.Ct. 2705, is also distinguishable. The U.S. Supreme Court ruled in that case that "surrogate" testimony is prohibited and that signed reports can be testimonial, even if they are not affidavits.

> The question presented is whether the Confrontation Clause permits the prosecution to introduce a forensic laboratory report containing a testimonial certification—made for the purpose of proving a particular fact—through the in-court testimony of a scientist who did not sign the certification or perform or observe the test reported in the certification. We hold that surrogate testimony of that order does not meet the constitutional requirement. The accused's right is to be confronted with the analyst who made the certification, unless that analyst is unavailable at trial, and the accused had an opportunity, pretrial, to cross-examine that particular scientist. Id., 2710.

The purpose of the evidence presented by Kristen Slaper was to establish that DNA from Appellant and J.D. was found on the comforter in Appellant's home. The laboratory report introduced as to this DNA match was the report of Kristen Slaper – the witness who testified at trial and was subject to cross-examination. Kristen Slaper did not introduce a report or certification by Mark Losko that this DNA matched so she did not serve as a surrogate witness to establish the operative point as to the comparison of the DNA of J.D. and Appellant. The State did admit a report prepared by Mark Losko, by stipulation of the defense (without Mr. Losko's testimony) and Ms. Slaper did testify regarding that report. However Losko's expert opinion and conclusions in that report related to DNA comparison of another child (D.H.) from another piece of evidence (a bed sheet).

It should be noted that this report cited the fact that Losko received known DNA samples from various victims for purposes of this comparison and extracted DNA prior to reaching this conclusion, however the report was not testified to by Slaper for that purpose or admitted for that purpose. Instead, the report stated that Losko's profiling resulted "in a single DNA profile consistent with [DH]" and explained that he could not be excluded as the source of the sperm

found. The report also stated that the other individuals were not the source of DNA from the bed sheet. [State's Exhibit 48-A]

Kristen Slaper did testify and she testified as to her own independent expert opinion. Kristen Slaper's report, with her opinion or conclusion was admitted into evidence. As to the match of the DNA of J.D. and Appellant, she did not merely serve as surrogate witness to testify as to the opinions and report of a nontestifying witness.

Williams v. Illinois does not support Appellant's arguments. It is a collection of opinions by which the U.S. Supreme Court ultimately upheld the admission of a DNA analyst's testimony, finding no Confrontation Clause violation by admission of statements the DNA analyst made regarding a DNA profile extracted from a victim/crime scene sample by Cellmark, with no testimony from the Cellmark profile generator. The testifying analyst in that case compared the Cellmark samples with the known samples the testifying analyst had and gave the opinion that they matched.

Appellant distinguishes the plurality opinion in Williams. Appellant acknowledges that the facts in this case "would seem to be most similar" to those in Williams v. Illinois. But, he urges an examination of a "number of factual differences," relying on the factual differences cited in the plurality opinion. He also offers an argument from Justice Kagan's dissent. Then, he reverts to the claim that Slaper was a "surrogate" witness, and suggests that Slaper's testimony is more like that stricken in Bullcoming than the testimony described in Williams. He does not cite or specify testimony or evidence: he summarizes and characterizes it. And, although he acknowledges that *Slaper's* report details the "items tested," and "her conclusions, and relevant statistical information," he intimates that it should not have been admitted because her testimony was "testimonial."

The facts Appellant has selected from Williams must be placed in the proper context. The factual differences cannot fairly be characterized as general black- letter law which disposes of Appellant's case. The facts and analysis cited by Appellant do not support his argument that Kristen Slaper introduced testimonial statements of Mark Losko in violation of the Confrontation Clause, especially given the unique facts and holdings in Williams.

For example, Appellant claims "great emphasis" on the fact that Williams was a bench trial. However, the plurality opinion specifically rejects the idea that the Confrontation Clause applies differently, depending on the identity of the fact-finder: "We do not suggest that the Confrontation Clause applies differently depending on the identity of the fact finder." Williams, supra, 2244, FN 4. Appellant also claims that the fact that tests were conducted after he was arrested and charged "differs from the second independent basis" in Williams. However, the second "independent basis" cited by the plurality was that the Cellmark report was not testimonial. That plurality conclusion was based on facts other than simply that the suspect in Williams was unidentified. That conclusion included facts about DNA testing in general which the opinion noted apply before and after a suspect is identified or charged and prosecuted. Id., 2244.

The plurality opinion in Williams begins by ruling that "Out-of-court statements that are related by the expert solely for the purpose of explaining the assumptions on which that opinion rests are not offered for their truth and thus fall outside the scope of the Confrontation Clause." Williams, supra. 2228. As a "second, independent basis", the plurality held that even if the Cellmark report in question in that case had been admitted into evidence, it would not have constituted a testimonial statement under Crawford v. Washington (2004), 541 U.S. 36. The Court emphasized that these reasons why the testimony of the DNA analyst did not violate the

Confrontation Clause were "independent" reasons . Williams, supra, 2244. Both of these general rules demonstrate that Kristen Slaper's evidence did not violate the Confrontation Clause.

The Williams plurality very carefully conducted an "inventory" of precisely what the testifying expert said about Cellmark, specifically finding that the expert "testified to the truth" of certain matters including that Cellmark was an accredited lab, that the crime lab occasionally sent samples to Cellmark for testing, that the lab had sent samples from the victim to Cellmark and later received them back and finally, that the Cellmark profile matched the known sample of the defendant's blood. Williams, supra. 2235.

The plurality went on to quote the portion which concerned the dissent:

> Q: Was there a computer match generated of the male DNA profile found in semen from the vaginal swabs of [L.J.] to a male DNA profile that had been identified as having originated from Sandy Williams?
>
> A: Yes, there was. Williams, supra. 2236.

After this discussion the plurality noted that under Illinois and federal evidence rules, the phrase regarding the semen found in the vaginal swabs would have been inadmissible[2]. The plurality then commented that the case involved a bench trial and that the Judge would thus have known that the phrase was not introduced to prove the truth of the matter asserted. Id.

Thus, the distinction between a bench trial and a jury trial was important in part in Williams because of the Illinois Rule of Evidence regarding expert testimony. It was not deemed a litmus test for a Confrontation Clause violation. In fact, the plurality specifically rejected the

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2 Unlike Ohio Evid. R. 703, the comparable federal rule and the Illinois rule state that if facts or data on which an expert relies would otherwise be inadmissible, the proponent may not disclose them to the jury unless the probative value in helping the jury outweighs their prejudicial effect.

notion that the Confrontation Clause would apply differently in a jury trial than a bench trial. Id., FN 4.

Finally, the Williams plurality noted that other than the phrase described above about the Cellmark profile, "no specific passage in the trial record has been identified as violating the Confrontation Clause, but it is nevertheless suggested that the State somehow introduced 'the substance of Cellmark's report into evidence.'" Williams, supra. 2238.

The "inventory" of Kristen Slaper's testimony as introduced in evidence and as the jury heard it is different from the testimony of the analyst in Williams. On direct, Slaper did not affirm the source or validity of the known samples by responding to a leading question about the sources of the known samples or the identity of the person who generated the profile and did not offer any comment as to their origin, chain of custody, or authenticity. She began to testify about the "known samples" of DNA which, pursuant to the lab procedure, had been run previously and separately by another agent (for quality control purposes, to ensure that the known samples and the crime scene evidence samples do not get mingled together).

> Q: ...well, first of all, you had all of the – the swabs from the – the known samples to compare to, is that right?
>
> A: Yes.
>
> Q: What do you do with those? I mean, are those kept off to the side and kept separate from this?
>
> A: Yes, those actually – they were run previous to my analysis. And they are run at a separate time in a separate place by a separate analyst, and they're kept off to the side, so the DNA profile gets generated from them and then we keep that profile and we know what that profile would be. [TR 1447-1450]

After the discussion of BCI procedures and chain of custody which occurred outside the presence of the jury, Slaper only identified the known samples of DNA and testified that they were analyzed at BCI and a DNA profile was generated. She then testified as to what **she** did

with the profiles generated from the known samples. She testified that **she** examined DNA which **she** had extracted from crime scene evidence and compared it with the DNA profiles obtained from known samples. **She** compared the two DNA profiles and, in **her** professional opinion, they matched. **She** explained the means by which **she** examined the profiles and by which **she** reached **her** conclusion as to the match. Her analysis and findings were summarized in her report, State's Exhibit 48-B. [TR 1485-1485, 1447, 1500]

This is different from the testimony in Williams but it illustrates clearly the same deficiencies in the generalized argument Appellant has made in this case as was criticized and distinguished in Williams. That opinion criticized the lack of a "specific passage ...identified as violating the Confrontation Clause." Id., 2238. Williams also highlights the difference between a Confrontation Clause violation and an evidentiary deficiency based on an inadequate foundation or relevance. Williams, supra, 2238-2239.

> As to legal relevance, the question before us is whether petitioner's Sixth Amendment confrontation right was violated, not whether the State offered sufficient foundational evidence to support the admission of Lambatos' opinion about the DNA match. In order to prove these underlying facts, the prosecution relied on circumstantial evidence, and the Illinois courts found that this evidence was sufficient to satisfy state-law requirements regarding proof of foundational facts. [citations omitted] We cannot review that interpretation and application of Illinois law. Thus, even if the record did not contain any evidence that could rationally support a finding that Cellmark produced a scientifically reliable DNA profile based on L.J.'s vaginal swab, that would not establish a Confrontation Clause violation. Thus, even if the record did not contain any evidence that could rationally support a finding that Cellmark produced a scientifically reliable DNA profile based on L.J.'s vaginal swab, that would not establish a Confrontation Clause violation. If there were no proof that Cellmark produced an accurate profile based on that sample, Lambatos' testimony regarding the match would be irrelevant, but the Confrontation Clause, as interpreted in Crawford, does not bar the admission of irrelevant evidence, only testimonial statements by declarants who are not subject to cross-examination Id., 2238.

Similarly in this case, the question presented is not whether Kristen Slaper's testimony regarding the "known samples" from which "another analyst" at BCI generated the profile she

reviewed may have been an inadequate foundation on which her opinion could be based. Even if Appellant had objected and could have established that her testimony did not have a sufficient foundation under the Ohio Rule of Evidence, he cannot establish that this is the equivalent of a Confrontation Clause violation.

Appellant also seeks support from the Williams plurality by arguing that in this case, the DNA profiles were prepared after he was identified as a suspect. A full and fair reading of the opinion shows that this was only one component of the unique factual basis for the Court's determination in the Williams case that the Cellmark profile was not testimonial. The Court held that "the profile that Cellmark provided was not inherently inculpatory." Williams, supra, 2228. There were other factors which are common to this case that also supported the Court's opinion that the primary purpose of the disputed Cellmark report was not to accuse the defendant or create evidence for use at trial. The plurality did not rule that only DNA profiles generated from unidentified suspects are nontestimonial. Williams, supra. 2243-2245.

The Court did note that at the time the Cellmark report was generated, no one could have known that the profile would turn out to incriminate Williams or anyone else, thus, "there was no incentive to produce anything other than a scientifically sound and reliable profile." Williams, supra. 2244 citing Michigan v. Bryant,131 S.Ct. 1143, at 1157. Arguably, the same type of rationale applies in this case because the profiles generated by the non-testifying analyst were the known samples of the Appellant and the victims, not the crime scene samples. The known sample profiles in this case were not "inherently inculpatory" because they were simply samples of DNA from certain individuals. They were not inculpatory until Slaper, the testifying witness, found that they matched the crime scene samples. When Losko generated those profiles, Losko could not have known whether the known profiles would incriminate Appellant or provide non-

incriminating or even exculpatory evidence by failing to match the crime scene profiles. In fact, most of the known samples were not matched to DNA at the crime scene in this case, according to Slaper's opinion. No DNA profiles from A.B. or G.L. or J.L. or C.L. were found to match at the crime scene.

In determining that the Cellmark DNA profile generation information was not testimonial, the Williams plurality explained further why DNA profiles in general are not primarily for the purpose of accusing an individual or to create evidence at trial and specifically did not distinguish between profiles generated before or after an investigation or trial:

> When lab technicians are asked to work on the production of a DNA profile, they often have no idea what the consequences of their work will be. In some cases, a DNA profile may provide powerful incriminating evidence against a person **who is identified either before or after the profile is completed. But in others, the primary effect of the profile is to exonerate a suspect who has been charged or is under investigation**. The technicians who prepare a DNA profile generally have no way of knowing whether it will turn out to be incriminating or exonerating or both. Williams, supra. 2244 [emphasis supplied]

In this case, the profiles generated by Losko from the known samples were in part incriminating and arguably in part exonerating or immaterial.

The Williams plurality also noted that the common practice in DNA labs by which numerous technicians work on each profile indicates that generation of DNA profiles is not primarily to accuse a person or create evidence for trial: "When the work of a lab is divided up in such a way, it is likely that the sole purpose of each technician is simply to perform his or her task in accordance with accepted procedures." Id.

Justice Alito considered these factors and made clear that the DNA profile generated by Cellmark was not testimonial, and that it would not have violated the Confrontation Clause even if their report had been admitted into evidence. Id. The same is true in this case. The timing of a DNA profile generation does not determine whether it is testimonial. Nor does the fact that a

preliminary scientific test or measurement identifies a particular individual make it testimonial. The Sixth Amendment right to confront witnesses is not outcome determinative. It is the nature of a statement which governs.

Appellant has not shown that Kristen Slaper was a surrogate witness for Mark Losko. With respect to the DNA matches of J.D. and Appellant, Slaper did not introduce a statement or conclusion of Mark Losko. She did not explain what the results of the profiles were and did not explain to the jury how they were obtained. She said that known samples of DNA were tested and that she analyzed them and compared them to the profiles she obtained and that based on her analysis, they matched.

In this case, to be sure, on cross examination, the defense asked Slaper about her assumptions regarding the profile generated by Losko and she acknowledged that she was not present when the profiles were generated but **relied** on them as accurate. [TR 1500-1501] This does not amount to surrogate testimony regarding another person's report or conclusions. While she was testifying in front of the jury regarding the DNA from the comforter, Slaper did not elaborate on the process that Losko used to generate the profiles and she did not state his opinions or conclusions regarding the profiles he generated.

C. Lower Court Opinions Since Williams v. Illinois

Since Williams, various state courts have addressed this issue, demonstrating a reluctance to expand the class of "testimonial" statements to include data or reports relied upon by experts to form and testify as to opinions. In State v. Bolden (La., 2012), __ So.3d __, 2012 WL 5275488, the Louisiana Supreme Court found no Confrontation Clause violation in a case in which the "state's DNA expert testified, over defendant's objection that the DNA profile developed from a blood sample taken from the defendant matched the DNA profile developed by

other technicians who did not testify at trial from biological samples taken from the victims after they were sexually assaulted." Id. [page number not available]

A New York Supreme Court held that the People of the State of New York could introduce the testimony of a criminalist "who reviewed photographs of fingerprints and a report by a colleague, also a criminalist in the same lab, who [would be] unavailable to testify at trial and who did the actual lifting of fingerprints" from the evidence. People v. Doe (N.Y. Sup., 2012), __ N.Y.S. 2d __, 2012 WL 6195223 [page number not available].

Additionally, A California Court of Appeal reviewed a case similar to this case in People v. Holmes (2012), 212 Cal. App. 4th 431. In that case, an analyst testified as to his opinion that DNA samples taken from crime scene evidence matched the defendant's DNA profile. Id. Although this analyst personally collected crime scene samples and performed tests on the known sample and one scene sample, he also relied on tests from other samples which were performed by Cellmark. Id. The California Court noted that the primary purpose of the DNA materials did "pertain to criminal prosecution" and that some of the analysis was undertaken after the defendant was identified as a suspect. The Court also noted that the reports did not consist of "solely machine generated data". Nonetheless, the Holmes Court found that they lacked formality and were not testimonial. "The forensic data and reports in this case lack 'formality.' They are unsworn, uncertified records of objective fact." Id. [page number not available]

The State submits that this Court should also be reluctant to classify facts relied upon by expert witnesses as testimonial statements which would then require admission of live testimony as a predicate to admissibility of an expert's testimony regarding their own analysis and opinion.

D. Response to Claim of Additional Protection Under the Ohio Constitution

Appellant suggests that the Ohio Constitution must provide greater protection with respect to the right of confrontation than articulated by the U.S. Supreme Court in Williams. This Court, however, has previously ruled that "Section 10, Article I provides no greater right of confrontation than the Sixth Amendment..." State v. Self (1990), 56 Ohio St. 3d 73, 79.

Appellant correctly notes that, when there is a persuasive reason for a different interpretation, Ohio's Constitution can be held to offer greater protection. State v. Robinette (1997), 80 Ohio St. 3d 234. Appellee cites Justice Kagan's dissent in Williams to attempt to provide that persuasive reason. However the citation to Justice Kagan's dissent does not fairly represent the facts presented by this case.

This case does not present an example of surrogate testimony. This case presents an example of opinion evidence presented by an expert witness who has based her opinion in part, on facts or data supplied by another witness. This is permitted by Ohio Evid. R. 703. This is the type of expert testimony introduced and relied upon every day in criminal and civil trials in this State. Provided that the expert has participated in the process and has contributed independent work and opinion as a basis for in-court testimony, the defendant's right to confront the witnesses against him under the U.S. Constitution is satisfied and Appellee offers no persuasive reason for this Court to require more stringent rights to confrontation under the Ohio Constitution.

A more persuasive reason *not* to expand Ohio's Confrontation Clause is also illustrated in Justice Breyer's concurring opinion in Williams:

> Once one abandons the traditional rule, there would seem often to be no logical stopping place between requiring the prosecution to call as a witness one of the laboratory experts who worked on the matter and requiring the prosecution to call *all* [emphasis in original] of the laboratory experts who did so. Experts – especially laboratory experts – regularly

> rely on the technical statements and results of other experts to form their own opinions. The reality of the matter is that the introduction of a laboratory report involves layer upon layer of technical statements (express or implied) made by one expert and relied upon by another. Williams, supra, 2246.

Aside from the implications in DNA cases, broadening the Ohio Confrontation Clause rule could affect numerous other types of expert testimony. It could affect whether a physician testifying as an expert could testify about an X-ray which is the basis of the medical opinion without also admitting the testimony of the X-ray technician who took the X-ray, or the radiologist who read it. Expert medical testimony regarding blood work or other laboratory results could require that nurses and lab technicians who generate that data testify before a doctor could render an expert opinion.

Expanding the Ohio Confrontation Clause to require in-person testimony of predicate DNA profile generation could also affect the State's ability to investigate and prosecute old or "cold" cases. In cases in which a DNA profile has been generated from crime scene evidence but which years later may be insufficient or unavailable for new testing, expanding the Confrontation Clause would make this evidence unavailable for presentation in Court when the old profile was matched with current known samples by a qualified expert.

It would also increase the cost of DNA evidence dramatically and affect the availability of DNA evidence. Government crime labs would be required to expend additional resources in terms of personnel and hours worked to make additional personnel available for extremely limited testimony. The Williams plurality also expressed this concern, and the concern that the result would limit the availability of DNA evidence in prosecutions:

> If DNA profiles could not be introduced without calling the technicians who participated in the preparation of the profile, economic pressures would encourage prosecutors to forgo DNA testing and rely instead on older forms of evidence, such as eyewitness identification, that are less reliable. See Perry v. New Hampshire, 565 U.S. ___, 132 S.Ct.

716, 181 L.Ed.2d 694 (2012). The Confrontation Clause does not mandate such an undesirable development. Williams, supra, 2228.

The plurality also pre-empted the concern about limiting the ability of a defendant to test the reliability of the underlying profile: "This conclusion will not prejudice any defendant who really wishes to probe the reliability of the DNA testing done in a particular case because those who participated in the testing may always be subpoenaed by the defense and questioned at trial. " Id.

E. The Admission of the DNA Evidence Regarding J.D. and Appellant would be Harmless Error

Even if this Court were to reject the authority cited above and find that the admission of Kristen Slaper's testimony was error, it was harmless because of all of the other evidence admitted against Appellant as to all of the crimes charged. Merely finding a violation of the Sixth Amendment Right to Confrontation does not "automatically" require reversal of a criminal conviction. State v. Moritz (1980), 63 Ohio St. 2d 150. This Court has recently affirmed that the erroneous admission of testimonial statements in violation of the Confrontation Clause was harmless beyond a reasonable doubt, based on the other evidence admitted. State v. Jones ___ N.E. 2d ___, 2012 WL 6553401, (Ohio), 2012-Ohio-5677, *P177.

First, it must be recalled that the DNA comparison evidence presented by Kristen Slaper did not relate to all of the charges of which Appellant was convicted. It did not even relate to all of the rapes of which Appellant was convicted. He was convicted of raping A.B. and G.L., but there was no DNA evidence introduced from them.

Second, even with respect to the charges relating to J.D., there was sufficient evidence to prove Appellant's guilt beyond a reasonable doubt. J.D. testified about the repeated acts of anal rape and rape by oral sex committed against him by Appellant. Det. Hawkins found evidence at Appellant's residence corroborating J.D.'s statements about the circumstances of his history with

Appellant. Search and examination of Appellant's computer and camera provided that Appellant had nude photos of J.D. which Appellant took and which remained in Appellant's possession. These photos specifically substantiated testimony J.D. gave regarding one of his trips with Appellant.

The video which the State introduced depicting J.D. and G.L. nude and masturbating at Appellant's home which included Appellant's comments "It's Crisco but it's still slippery, " also substantiated J.D.'s testimony and provided further compelling circumstantial evidence of the sexual assaults and other crimes. [State's Exhibit 49, TR 1597-1605, TR 2687-2689, 2694-2700]

Appellant also had nude photos of himself with J.L. and a photo of Appellant's own nude penis with ejaculate. This photo was co-mingled with nude photos of his victims. Appellant had a videotape with himself and A.B., at age 12, both nude and in Appellant's bathroom. Appellant admitted participating in the video and said that it was done at the behest of the 12-year old victim. Appellant said that making the video crossed a boundary and that it was "embarrassing." [TR 2680-2685]

The testimony of the other victims about the sexual assaults that they experienced was consistent with the statements and testimony of J.D. and with the photographic and other physical evidence found at Appellant's home. The jury found Appellant guilty of those sexual assaults, even though there was no DNA evidence or opinion introduced relative to those assaults.

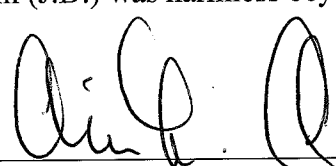
Given the totality of the other evidence, even if this Court were to find that all or part of Kristen Slaper's testimony was erroneously admitted, there was sufficient evidence of

Appellant's guilt which was properly admitted to make such an error harmless beyond a reasonable doubt.

CONCLUSION

The Appellant's Proposition of Law should be rejected. DNA profiles generated by a non-testifying witness for comparison by an expert who testifies regarding the comparison at trial are not testimonial statements under Crawford v. Washington. Expert witnesses who testify to an opinion based on data generated by other experts do not deprive a criminal defendant of his Constitutional right to confront the witnesses against him. Admission of the testimony and report of the expert in this case did not violate the Appellant's State or Federal Constitutional rights.

Regardless, this Court should affirm the Appellant's conviction because the admission of the DNA evidence of which he complains was harmless as to all of the charges on which he was convicted, including those charges which related to the DNA evidence which is the subject of his argument. The victim whose DNA was matched testified that Appellant raped him. The testimony of the other victims and the other evidence regarding the crimes against Appellant shows that the DNA evidence as to the one victim (J.D.) was harmless beyond a reasonable doubt..



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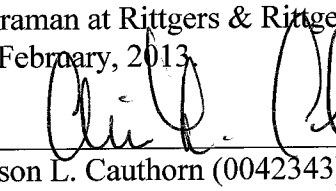
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Brief was regular U. S. mailed to Charles H. Rittgers and Nicholas D. Graman at Rittgers & Rittgers, 12 East Warren Street, Lebanon, Ohio 45036 on this 8th day of February, 2013.



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APPENDIX

Evid. R. Rule 703

Baldwin's Ohio Revised Code Annotated Currentness
Ohio Rules of Evidence (Refs & Annos)
Article VII. Opinions and Expert Testimony
Evid R 703 Bases of opinion testimony by experts

The facts or data in the particular case upon which an **expert bases** an opinion or inference may be those perceived by the expert or admitted in evidence at the hearing.

CREDIT(S)

(Adopted eff. 7-1-80; amended eff. 7-1-07)

Federal Rules of Evidence Rule 703, 28 U.S.C.A.

United States Code Annotated Currentness
Federal Rules of Evidence (Refs & Annos)
Article VII. Opinions and Expert Testimony
Rule 703. Bases of an Expert's Opinion Testimony

An **expert** may **base** an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.

CREDIT(S)

(Pub.L. 93-595, § 1, Jan. 2, 1975, 88 Stat.1937; Mar. 2, 1987, eff. Oct. 1, 1987; Apr. 17, 2000, eff. Dec. 1, 2000; Apr. 26, 2011, eff. Dec. 1, 2011.)

Evid. Rule 703

West's Smith-Hurd Illinois Compiled Statutes Annotated Currentness
Court Rules
Illinois Rules of Evidence (Refs & Annos)
Article VII. Opinions and Expert Testimony
Rule 703. Bases of Opinion Testimony by Experts

The facts or data in the particular case upon which an **expert bases** an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

CREDIT(S)

Adopted September 27, 2010, eff. January 1, 2011.