

In the
Supreme Court of Ohio

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| STATE OF OHIO, | : | Case No. 2011-0686 |
| | : | |
| Plaintiff-Appellee, | : | On Appeal from the |
| | : | Washington County |
| v. | : | Court of Appeals, |
| | : | Fourth District |
| DANIEL ARDEN KECK II, | : | |
| | : | Court of Appeals |
| Defendant-Appellant. | : | Case No. 09CA50 |
| | : | |

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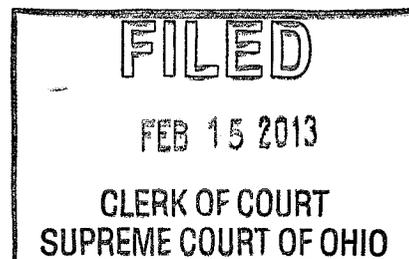


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INTRODUCTION

Daniel Keck was convicted on numerous felony counts arising from his sexual exploitation and abuse of young boys. On appeal, Keck says that DNA evidence admitted during his trial violated his confrontation rights under the federal and state constitutions. He says that a confrontation violation occurred when a scientific expert testified about data she did not generate, but that was generated instead by a non-testifying DNA analyst. Keck's argument fails for three reasons.

First, Keck's confrontation argument is foreclosed by the United States Supreme Court's decision in *Williams v. Illinois*, 132 S. Ct. 2221 (2012). In that case, five justices concluded that the admission of expert testimony about the results of DNA testing performed by non-testifying analysts did not amount to a confrontation violation. Because the facts underlying Keck's claim are materially indistinguishable from those in *Williams*, the same conclusion is compelled. There was no confrontation violation.

Second, the Ohio Constitution's confrontation clause offers no greater protection than its federal counterpart, and Keck offers no persuasive reason to change that. If anything, *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009), and its progeny have already made confrontation rights more protective than before. And given that this Court was comfortable with the regime in place before *Melendez-Diaz*, there is no basis for raising the bar *beyond* the new standards now.

Finally, even if Keck could establish a confrontation violation, any error was harmless beyond a reasonable doubt, as detailed in the State's brief.

The Court should therefore affirm the judgment below rejecting Keck's confrontation challenge.

STATEMENT OF AMICUS INTEREST

As Ohio's chief law officer, R.C. 109.02, the Ohio Attorney General has an interest in the proper interpretation and enforcement of Ohio's criminal procedures, as well as the proper application and protection of defendants' constitutional rights. The Attorney General also has a strong interest in ensuring that law enforcement officials have the tools necessary to investigate and prosecute crimes. Those tools include the type of forensic evidence and testimony at issue in this case.

STATEMENT OF THE CASE AND FACTS

A. **A jury convicted Daniel Keck of numerous felonies involving sexual exploitation and abuse of young boys.**

In 1993, Daniel Keck joined a local church group known as the "Royal Rangers." *State v. Keck*, No. 09CA50, 2011-Ohio-1643, ¶ 3 (4th Dist. Mar. 30) ("App. Op."). Through that group, Keck came into contact with a number of teen and pre-teen boys, many of whom were from disadvantaged backgrounds and lacked significant father figures. *Id.*

In 2009, one of the boys, J.D., told his mother that Keck had molested him. *Id.* ¶ 4. The mother contacted the police, who commenced an investigation and obtained a search warrant for Keck's home. *Id.* When they executed the warrant, police found Keck in his home with two boys. *Id.* ¶ 5. One of the two, G.L., reported that Keck had sexually abused him. *Id.* Police also uncovered "videos and computer images of underage nude boys, either by themselves or engaged in some form of sexual activity." *Id.*

Keck was indicted on numerous felony counts, *id.* ¶ 6, and after a two-and-a-half week trial the jury convicted him of (1) six counts of the illegal use of a minor in nudity-oriented materials in violation of R.C. 2907.323(A)(3); (2) five counts of the illegal use of a minor in nudity-oriented materials in violation of R.C. 2907.323(A)(1); (3) five counts of gross sexual

imposition in violation of R.C. 2907.05(A)(4) & (C)(2); (4) five counts of pandering sexual matter involving a minor in violation of R.C. 2907.322(A)(5); (5) four counts of rape in violation of R.C. 2907.02(A)(1)(b); (6) two counts of kidnapping in violation of R.C. 2905.01(A)(2); (7) one count of pandering obscenity in violation of R.C. 2907.321(A)(5); and (8) one count of pandering obscenity in violation of R.C. 2907.321(A)(1). *Id.* ¶ 1.

B. At trial, Keck objected to the admission of certain DNA evidence on confrontation grounds; the trial court overruled that objection, and the Fourth District affirmed.

In addition to testimony from the victims and physical evidence seized from Keck's home, the prosecution presented DNA evidence to corroborate the victims' allegations. App. Op. ¶¶ 7-9. Police took DNA samples from six individuals—Keck and five victims (the "known samples."). App. Op. ¶ 15. Police also extracted DNA evidence from bedding seized from the guest bedroom in Keck's home. *Id.* ¶ 15 & n.5. Two DNA analysts from Ohio's Bureau of Criminal Investigation ("BCI") processed these samples and prepared DNA profiles that could be used to determine if any of the evidence matched these individuals. *Id.* However, only one of the two analysts testified at trial. *Id.*

The testifying analyst, Kristen Slaper, analyzed the bulk of the evidence from the bedding seized from Keck's home. After detailing her credentials and qualifying as an expert, Slaper explained to the jury the significance of DNA evidence, noting that everyone has a unique genetic profile and that scientists can determine through DNA analysis whether genetic material came from a particular individual. Trial Transcript (Tr.) 1441-44. She explained that forensic scientists extract DNA from substances such as blood or semen and generate a DNA profile ("a graph readout") that they can then compare with a DNA profile generated from another sample. Tr. 1444-46. Slaper then described the quality-assurance procedures BCI uses to ensure the reliability of its DNA testing. Tr. 1446-47.

Slaper next discussed her findings. She explained that she used cuttings from the materials seized from Keck's home to extract DNA evidence and prepare DNA profiles that she could then compare with the known samples from Keck and the victims. Tr. 1448-51. She also explained that BCI's quality-assurance procedures require that reference DNA samples (like the suspect and victim samples here) be processed separate and apart from other DNA evidence in order to avoid the possibility of cross-contamination. Tr. 1449-50.

At defense counsel's request, the judge then excused the jury. Tr. 1451-52. With the jury absent, counsel for both sides examined Slaper about her DNA analysis. She testified that, although she generated the DNA profiles from the evidence collected from Keck's home, another BCI analyst, Mark Losko, prepared the known profiles that she used for comparison. Tr. 1452-81. Defense counsel objected to Slaper's testimony, claiming that he was entitled to cross-examine Losko about the preparation of the known profiles because they reflect an "expert opinion" upon which Slaper's testimony relied. Tr. 1480-81. The prosecution argued that Losko's work preparing the known profiles reflected not "expert opinion" but merely the preparation of technical data that another expert (Slaper) then analyzed. Tr. 1481. The trial court agreed with the prosecutor and overruled the objection. *Id.*

After the jury returned, Slaper continued her testimony. She explained that she compared the DNA profiles she generated from the crime-scene items to the known profiles, and concluded that several of the items taken from Keck's home contained DNA that matched some of the known samples. Tr. 1483-95. Specifically, she found semen from several of the young boys. *Id.* And in one sample, she found semen from Keck mixed with other non-semen DNA from J.D. *Id.* These findings were also summarized in Slaper's expert report, which was admitted as Exhibit 48B. Tr. 1447-48, 1500.

The prosecution also examined Slaper about the conclusions in a report drafted by Mark Losko. Tr. 1495-1500. That report detailed Losko's conclusions based on his comparison of DNA evidence collected from an additional piece of bedding taken from Keck's home to the known profiles. *Id.* The parties stipulated to the admission of the report, Tr. 1380-82, and it was admitted into evidence as Exhibit 48A, Tr. 1495-96, 1500. Keck does not appear to challenge the admission of this report or its findings.

On appeal, Keck argued, among other things, that the admission of Slaper's DNA testimony violated his confrontation rights because he was denied the opportunity to cross-examine Losko. App. Op. ¶¶ 2, 21. The Fourth District Court of Appeals ruled that no confrontation violation occurred because "Slaper's analysis provided the nexus between the accused and the crimes. Slaper, not Losko, tested the semen and other samples found on the bedding [And] Slaper testified at trial and was thoroughly cross-examined." App. Op. ¶ 25. Although mindful of Losko's involvement, the court found no confrontation violation because Losko did "no actual 'analysis'" and instead merely generated the "raw data" that Slaper—who did testify—analyzed. *Id.* ¶ 28. The court rejected Keck's other assignments of error and affirmed his conviction and sentence. *Id.* ¶ 70.

Keck sought discretionary review in this Court, raising solely the confrontation challenge. This Court accepted jurisdiction but held Keck's case for its decision in *State v. Estrada-Lopez*. *State v. Keck*, 128 Ohio St. 3d 1556, 2011-Ohio-2905. Because *Estrada-Lopez* was then dismissed as improvidently accepted, the Court ordered briefing in this case. *See State v. Keck*, No. 2011-0686 (Order, Nov. 28, 2012).

ARGUMENT

Amicus Curiae Attorney General's Proposition of Law:

No confrontation violation occurs when a qualified expert testifies to her own independent opinion that two DNA profiles match, even if the underlying profiles were prepared by a non-testifying analyst.

No confrontation violation occurs where, as here, an expert testifies about her own opinions—formed, in part, after reviewing data generated by another individual—and that expert is available for cross-examination.

A. *Williams v. Illinois* resolved the question raised in this case.

The Sixth Amendment guarantees that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.” U.S. Const. 6th Amend; *see also* Ohio Const. Art. 1, Section 10. But not every out-of-court statement triggers that right. Instead, confrontation rights apply only to *testimonial* statements.

The testimonial/non-testimonial question is a relatively new addition to confrontation jurisprudence. Before 2004, the U.S. Supreme Court read the Confrontation Clause to permit “the admission of an out-of-court statement that fell within a firmly rooted exception to the hearsay rule.” *Williams*, 132 S. Ct. at 2232 (plurality op. of Alito, J.) (citing *Ohio v. Roberts*, 448 U.S. 56, 66 (1980)). But the Court ushered in a new interpretation of the confrontation right in *Crawford v. Washington*, 541 U.S. 36 (2004). Under *Crawford*, the Confrontation Clause bars the admission of any “*testimonial* statements of a witness who did not appear at trial” unless that witness is unavailable and the defendant had a prior opportunity to cross-examine her. *Id.* at 53-54, 59 (emphasis added).

What qualifies as “testimonial” has been developed in a series of subsequent confrontation cases. *See, e.g., Williams*, 132 S. Ct. 2221; *Bullcoming v. New Mexico*, 131 S. Ct. 2705 (2011); *Michigan v. Bryant*, 131 S. Ct. 1143 (2011); *Melendez-Diaz*, 547 U.S. 305; *Davis*

v. *Washington*, 547 U.S. 813 (2006). It is now clear that “[t]o rank as ‘testimonial,’ a statement must have a ‘primary purpose’ of ‘establish[ing] or prov[ing] past events potentially relevant to later criminal prosecution.” *Bullcoming*, 131 S. Ct. at 2714 n.6 (alteration in original) (quoting *Davis*, 547 U.S. at 822). If a statement’s primary purpose is anything else, it is non-testimonial, and its admissibility “is the concern of state and federal rules of evidence, not the Confrontation Clause.” *Bryant*, 131 S. Ct. at 1155.

Where forensic evidence is concerned, the Court has explained that scientific reports created for the purpose of providing evidence against a defendant that are “functionally identical to live, in-court testimony” are testimonial. *Melendez-Diaz*, 557 U.S. at 310-11; *see also Bullcoming*, 131 S. Ct. at 2716-17 (certification of alcohol concentration in blood sample is testimonial). Such reports are admissible only if accompanied by a “live witness competent to testify to the truth of the statements made in the report,” unless that witness is unavailable and the defendant had a prior opportunity for cross-examination. *Id.* at 2709-10.

Most recently, in *Williams*, the Court addressed a question left unanswered by *Melendez-Diaz* and *Bullcoming*—the question in Keck’s case: whether the Confrontation Clause permits “an expert witness to discuss others’ testimonial statements if the testimonial statements were not themselves admitted as evidence.” *Williams*, 132 S. Ct. at 2233 (plurality op. of Alito, J.) (internal quotation marks omitted). Five justices concluded that expert testimony concerning a DNA match does not violate the Confrontation Clause simply because the expert bases her opinion on profiles prepared by a non-testifying analyst. *Id.* at 2227-44; *id.* at 2255-64 (Thomas, J., concurring in the judgment).

Although the five justices who found no confrontation violation differed somewhat in their rationales, courts have recognized that “where the facts before” them “are not materially

distinguishable from those presented to the Supreme Court in *Williams*, it must follow from the judgment in that case” that no confrontation violation occurred. *Commonwealth v. Tassone*, No. 10-P-1923, 2013 Mass. App. LEXIS 15, at *2-*5 (Mass. Ct. App. Jan. 29) (finding that the reasoning of the plurality and Justice Thomas foreclosed the defendant’s argument that expert testimony concerning a DNA match violates the Confrontation Clause even though the individuals who prepared the underlying DNA profiles did not testify); *cf. also United States v. Pablo*, 696 F.3d 1280, 1291 (10th Cir. 2012) (finding no plain error in the trial court’s admission of DNA expert’s testimony where “it appears that five Justices would affirm the district court in this case, albeit with different Justices relying on different rationales as they did in *Williams*”).

In short, *Williams* resolved the question here: Whether a confrontation violation occurs when an expert testifies about her own opinions formed after reviewing raw DNA data generated by another person.

B. Because the facts here are materially the same as in *Williams*, the outcome is the same.

Williams involved a rape investigation and prosecution. 132 S. Ct. at 2229 (plurality op. of Alito, J.). After completing a rape kit on the alleged victim, Illinois police obtained a semen sample, which they sent to Cellmark—an out-of-state lab. *Id.* Cellmark created a DNA profile from that sample (the “Cellmark profile”), and the police matched the Cellmark profile to one derived from a blood sample taken from the defendant following an earlier arrest. *Id.* At trial, the prosecution put on testimony from Sandra Lambatos—a DNA expert—who, among other things, testified that the Cellmark profile matched the one from the defendant’s blood sample. *Id.* at 2229-30. The analyst who created the profile from the defendant’s blood sample testified at trial, but no one from Cellmark testified. *Id.* And the Cellmark profile itself was never admitted into evidence or shown to the factfinder. *Id.*

The defendant in *Williams* objected to Lambatos's testimony on confrontation grounds, arguing that the state was required to present testimony from the Cellmark technician who generated the DNA profile. *Id.* at 2230. The Illinois trial and appellate courts rejected those arguments, and the U.S. Supreme Court affirmed, with five justices concluding that Lambatos's testimony posed no confrontation problem.

The four-justice plurality found no confrontation violation for two independent reasons. *Id.* at 2232-44. One: Because the Cellmark profile was never offered for its truth, Lambatos's testimony did not implicate the defendant's confrontation rights. *Id.* at 2232-41. Her statement about the Cellmark profile merely reflected one of the assumptions upon which she based her opinion regarding the DNA match. *Id.* Two: The Cellmark profile was non-testimonial such that even if it had been admitted for its truth, no confrontation violation occurred. *Id.* at 2242-44.

Justice Thomas, providing the fifth vote to affirm, found no confrontation violation for a third reason: The Confrontation Clause reaches only those out-of-court statements that bear "indicia of solemnity," *id.* at 2259-60 (Thomas, J., concurring in the judgment), and because the Cellmark profile bore no such indicia (in contrast to the reports in *Melendez-Diaz* and *Bullcoming*), it was non-testimonial and therefore did not implicate the defendant's confrontation rights. *Id.* at 2259-61.

The parallels between Slaper's and Lambatos's testimony are indisputable:

- Lambatos was called as an expert on DNA analysis. *Williams*, 132 S. Ct. at 2229-30 (plurality op. of Alito, J.). So was Slaper. Tr. 1441-43.
- Lambatos testified that after comparing the relevant DNA profiles, she concluded that there was a DNA match. *Williams*, 132 S. Ct. at 2230. So did Slaper. Tr. 1483-95.
- In forming her opinion, Lambatos relied in part on data—the Cellmark profile—prepared by a non-testifying analyst. *Williams*, 132 S. Ct. at 2230. So did Slaper. Tr. 1485.

- Lambatos confirmed that she had no personal knowledge of the process by which the non-testifying analyst prepared the profile and could say only that she had no reason to doubt its accuracy. *Williams*, 132 S. Ct. at 23230. So too with Slaper. Tr. 1485, 1500-01.
- And in neither case were the underlying DNA profiles admitted into evidence or shown to the trier of fact. *Williams*, 132 S. Ct. at 2230; App. Op. ¶ 23.

In short, the facts surrounding Slaper’s testimony are materially indistinguishable from those surrounding the expert’s testimony in *Williams*. As the *Williams* plurality explained, “Lambatos did not testify to the truth of any” matter concerning Cellmark about which she lacked personal knowledge. 132 S. Ct. at 2235. “She made no other reference to the Cellmark report, which was not admitted into evidence and was not seen by the trier of fact. Nor did she testify to anything that was done at the Cellmark lab, and she did not vouch for the quality of Cellmark’s work.” *Id.* Slaper likewise never purported to vouch for the reliability of Losko’s work, nor did she claim personal knowledge of what Losko did to create the known profiles. Tr. 1485, 1500-01. Like Lambatos, Slaper’s reference to Losko’s work reflects merely one of the bases upon which her expert opinion was premised. The four-justice plurality found no confrontation violation in *Williams* and would therefore find no violation here.

The same outcome follows under the rationale of Justice Thomas, the fifth vote in *Williams*. The known profiles here—like the Cellmark profile in *Williams*—“lack the solemnity of an affidavit or deposition” and contain no certification purporting to “accurately reflect the DNA testing processes used or the results obtained.” *Id.* at 2260 (Thomas, J., concurring in the judgment). As Slaper explained, a DNA profile is simply a “graph readout” that is a machine-generated representation of DNA evidence. Tr. 1446. Such raw data, as Justice Thomas observed, stand in sharp contrast to the formal reports at issue in *Melendez-Diaz* and *Bullcoming*. *Williams*, 132 S. Ct. at 2260 (“In *Melendez-Diaz*, the reports in question were sworn to before a notary public by the analysts who tested a substance for cocaine.”) (internal quotation marks

omitted)); *see also id.* (noting that the report in *Bullcoming*, though unsworn, included a certification that “affirmed that the seal of the sample was received intact and broken in the laboratory, that the statements in the analyst’s block of the report are correct, and that he had followed the procedures set out on the reverse of the report”) (internal quotation marks and alteration omitted)). The known profiles here have no such formal trappings; they are graph readouts that “in substance, certif[y] nothing.” *Id.*

Other courts have read *Williams* to bar arguments like Keck’s. *See, e.g., Tassone*, 2013 Mass. App. LEXIS 15 at *2-*5 (*Williams* foreclosed defendant’s argument that expert testimony concerning a DNA match violates the confrontation clause even though the individuals who prepared the underlying DNA profiles did not testify); *State v. Huettl*, No. 31,141, 2012 N.M. App. LEXIS 139, at *23-*24 (N.M. Ct. App. Dec. 27) (no confrontation violation where “no inculpatory report of the testing process or conclusions of a non-testifying analyst were offered or admitted into evidence” and “the testifying analyst assumed the accuracy of a result that was not in evidence, but testified only to his or her independent conclusion when determining whether the test result matched another test result”); *State v. Dennis*, No. A-2956-10T2, 2012 N.J. Super. Unpub. LEXIS 2598, at *24 (N.J. Super. Ct. App. Div. Nov. 29) (“In *Williams*, the Supreme Court held that a defendant’s right of confrontation is not violated by the testimony of a forensic scientist who although she herself neither conducted nor observed any of the testing, relies upon the DNA profile found in a report written by another individual.”).

In sum, on these facts, *Williams* controls, and this Court should conclude that Slaper’s testimony did not implicate Keck’s confrontation rights.

C. Keck's attempt to distinguish his case from *Williams* fails.

Seeming to recognize that *Williams* forecloses his confrontation claim, Keck strains to argue that factual distinctions render *Williams* inapposite. But the distinctions he identifies do nothing to change the analysis above.

First, Keck says, “[u]nlike in *Williams*, nothing in Slaper’s testimony indicates that she was making an assumption or considering a hypothesis as part of her expert opinion. Instead, she was asserting as fact that the DNA samples tested by Losko represented what he claimed they represent”—the known profiles. Keck. Br. 16. Not so. Slaper was clear that, while she had “no reason to think [Losko] didn’t follow proper procedure,” she could only assume he did so. Tr. 1500-01. Nor did Slaper ever claim that she created the known profiles, or that she had personal knowledge about Losko’s work in creating them. Tr. 1485, 1500-01.

Slaper’s testimony is virtually indistinguishable from that of Lambatos. “Lambatos confirmed that she did not conduct or observe any of the [Cellmark] testing . . . and that her testimony relied on the DNA profile produced by Cellmark.” *Williams*, 132 S. Ct. at 2230 (plurality op. of Alito, J.) Lambatos explained that she “trusted Cellmark to do reliable work because it was an accredited lab, but she admitted she had not seen any of the calibrations or work that Cellmark had done.” *Id.* Likewise, Slaper offered an expert opinion based on an independent review of the relevant data, and nothing in her testimony suggests that she “vouch[ed]” for the reliability of the data. *See id.* at 2235.

Keck’s observation that “Slaper’s report, which relied heavily on Losko’s findings, was submitted into evidence” changes nothing. *See* Keck Br. 16. Slaper’s report simply summarizes the same conclusions she testified to at trial. *Compare* Tr. 1483-95 *with* Ex. 48B. And while the report indicates that Slaper compared the profiles she prepared to the known profiles, the jury was well-acquainted with the fact that Slaper did not prepare those known profiles herself and

only assumed their reliability. Tr. 1485, 1500-01. On this record, Keck's assertion that Slaper somehow became "a surrogate witness" for Losko does not hold up. Keck Br. 16.

Second, Keck says that *Williams* is inapposite because his was a jury trial and *Williams* involved a bench trial. Keck Br. 16-17. To be sure, the *Williams* plurality advised courts to ensure that juries do not mistake statements reflecting the bases or assumptions underlying an expert's opinion for substantive evidence. Keck Br. 16 (quoting *Williams*, 132 S. Ct. at 2236). But the plurality also rejected the very distinction Keck urges: "We do not suggest that the Confrontation Clause applies differently depending on the identity of the factfinder. Instead, our point is that the identity of the factfinder makes a big difference in evaluating the likelihood that the factfinder mistakenly based its decision on inadmissible evidence." 132 S. Ct. at 2237 n.4 (internal citation omitted).

Here, the concern expressed by the *Williams* plurality simply does not come into play. Keck says, "[w]ithout any sort of qualification or limiting instruction, the impression left upon the jurors in this case was undoubtedly that Losko's, and therefore Slaper's, analysis was correct." Keck Br. 16-17. As explained above, Slaper's own testimony belies that claim. See Tr. 1485, 1500-01. As important, Keck's trial strategy rendered any "qualification or limiting instruction" unnecessary because Keck focused not on challenging the reliability of the DNA results but on minimizing their impact. Defense counsel thoroughly cross-examined Slaper, eliciting testimony about the limits of DNA evidence. Tr. 1500-11. During cross and at closing, defense counsel focused on the fact that Slaper could determine only that DNA was present, not the timing of its placement. Tr. 1501-03, 2993. And rather than question the reliability of the DNA results, defense counsel argued that the DNA evidence was meaningless. Tr. 2993 (noting that it was entirely unsurprising that the police found semen from both Keck and several teenage

boys on the bedding taken from Keck's home). Whatever the need generally to ensure that jurors do not mistake basis evidence for substantive evidence, Keck's chosen trial strategy obviated any need to do so here.

Third, Keck points to the fact that at the time Losko prepared the known profiles, the police were not "trying to catch an unknown assailant." Rather, Keck had already been arrested and charged. Keck Br. 17; *see also id.* at 18. While the *Williams* plurality did note the fact that the Cellmark profile was created before the defendant had been identified as a suspect, that changes nothing. *See* 132 S. Ct. at 2243. For one thing, the plurality pointed to several considerations supporting its conclusion that the Cellmark profile was non-testimonial, giving particular attention to several of the unique characteristics of DNA analysis. *Id.* at 2243-44. Also, the plurality's finding of no confrontation violation rested on *two* independent rationales. So even if Keck were correct that the plurality's reasoning leaves no room for a finding that the known profiles here were non-testimonial (by no means a foregone conclusion), the plurality's not-for-its-truth rationale would still apply.

Fourth, Keck's assertion that "numerous formalities in Slaper's seven-page report . . . qualify it as testimonial" is simply beside the point. Keck Br. at 17. After all, Slaper—the report's author—testified at trial and was thoroughly cross-examined. That is all the Confrontation Clause requires. *Bullcoming*, 131 S. Ct. 2709-10; *Melendez-Diaz*, 557 U.S. at 311. And to the extent Keck means to suggest that Justice Thomas's reasoning applies less forcefully here than in *Williams*, that is wrong. The relevant question, from Justice Thomas's perspective at least, would be whether the known profiles—*not Slaper's report*—bear "indicia of solemnity." *Williams*, 132 S. Ct. at 2259-60 (Thomas, J., concurring in the judgment). They do not. As Slaper explained, the known profiles were little more than machine-generated graph

readouts. Tr. 1446. Like the Cellmark profile in *Williams*, the known profiles here “in substance, certif[y] nothing” and would not, in Justice Thomas’s view, implicate the Confrontation Clause. *Williams*, 132 S. Ct. at 2260.

Simply stated, nothing Keck says changes the fact that, as in *Williams*, five justices would find no confrontation violation on the facts of this case. *Williams* therefore precludes Keck’s confrontation challenge.

Finally, Keck is wrong in asserting that *Bullcoming*, not *Williams*, dictates the outcome here. In *Bullcoming*, the prosecution offered a forensic report to establish that the defendant’s blood-alcohol level was above the legal limit. 131 S. Ct. at 2709. That report contained a certification from its author stating that he “received Bullcoming’s blood sample intact with the seal unbroken, that he checked to make sure that the forensic report number and the sample number corresponded, and that he performed on Bullcoming’s sample a particular test, adhering to a precise protocol.” *Id.* at 2714 (internal quotation marks omitted). At trial, the prosecution did not call the author as a witness and instead called another witness “qualified as an expert witness with respect to” the relevant testing and laboratory procedures. *Id.* at 2715 (internal quotation marks omitted). The Court explained that this type of “surrogate” testimony does not satisfy the Confrontation Clause because a surrogate “could not convey what [the non-testifying author] knew or observed about the events his certification concerned, *i.e.*, the particular test and testing process he employed.” *Id.* Moreover, the Court observed, the surrogate did not purport to offer any “independent opinion” based on a review of the underlying data. *Id.* at 2716.

This case is far different. The known profiles are little more than raw data. They do not purport to certify anything, let alone that certain procedures were performed or certain results were obtained. And unlike in *Bullcoming*, the known profiles were never admitted into

evidence. App. Op. ¶ 23. Nor do they contain representations “relat[ed] to past events and human actions not revealed in raw, machine-produced data.” *Bullcoming*, 131 S. Ct. at 2714. Just as important, Slaper was not a mere conduit for another’s conclusions. She conveyed *her conclusions* based on *her review* of the relevant data. Unlike the *Bullcoming* surrogate, then, she offered an “independent opinion.” *Id.* at 2715. These distinctions are critical because they are the very distinctions deemed significant by both the plurality and Justice Thomas in *Williams*. See 132 S. Ct. at 2240-41 (distinguishing *Bullcoming* and *Melendez-Diaz*); *id.* at 2260 (same). Keck’s reliance on *Bullcoming* is simply misplaced. *Williams* controls here and requires a finding that no confrontation violation occurred.

D. The Ohio Constitution provides no greater confrontation rights than the U.S. Constitution, and Keck offers no sound reason why it should.

As an alternative to his federal constitutional argument, Keck urges the Court to adopt a higher confrontation requirement under the Ohio Constitution, in effect requiring live testimony from anyone involved in the analysis of DNA evidence. Keck Br. 19-21. The Court should decline that invitation for two reasons.

First, for decades this Court has held that the Ohio Constitution “provides no greater right of confrontation than the Sixth Amendment.” *State v. Self*, 56 Ohio St. 3d 73, 79 (1990). The Court reaffirmed that principle just three years ago. *State v. Arnold*, 126 Ohio St. 3d 290, 2010-Ohio-2742, ¶ 12. Besides intoning that the Court is free to adopt stricter requirements under state law, Keck offers no persuasive reason why the Court should.

If anything, as explained above, the U.S. Supreme Court has already made confrontation rights more protective than they were before *Crawford*. This Court saw no reason for interpreting the Ohio Constitution to provide greater protection during that pre-*Crawford* era.

See Self, 56 Ohio St. 3d at 79. And Keck offers no sound basis for raising the bar *beyond* the new standards now.

Keck argues, unpersuasively, that the dissenting Justices in *Williams* offer the necessary justification for this Court to depart from *Self* and *Arnold*. He points to the dissenters' concern that, absent the confrontation right he advocates, prosecutors would be free to use expert testimony to introduce the wolf of substantive evidence in the sheep's clothing of basis or assumption evidence. *See* Keck Br. at 20-21 (quoting *Williams*, 132 S. Ct. at 2272 (Kagan, J., dissenting)). But even if the dissenters' concerns were valid, the *Williams* plurality rightly observed that such concerns are better left to the rules of evidence and trial practice, not the Confrontation Clause. *See* 132 S. Ct. at 2241. After all, "trial courts can screen out experts who would act as mere conduits for hearsay by strictly enforcing the requirement that experts display some genuine scientific, technical, or other specialized knowledge." *Id.* (internal quotation marks omitted). Trial courts are effective gatekeepers, ensuring that where "the prosecution cannot muster any independent admissible evidence to prove the foundational facts . . . essential to the relevance of the expert's testimony, . . . the expert's testimony cannot be given any weight by the trier of fact." *Id.*

Second, an all-technicians-must-testify rule, like the one Keck essentially urges, would have severe consequences for the benefits of DNA analysis—benefits that serve defendants and prosecutors alike. Such a rule ignores the fact that often *many* analysts are involved in the DNA testing process. Requiring testimony from each will burden law enforcement and the courts, all while doing little to aid in testing the reliability of DNA procedures and the conclusions drawn from them.

At BCI, for instance, there are multiple stages of DNA testing, involving multiple BCI scientists. Upon receiving crime-scene evidence, a BCI analyst examines the evidence and identifies potential sources of DNA. Another analyst extracts and purifies any DNA identified. A third, assisted by robots, processes the sample through a genetic analyzer to create the DNA profile. A fourth analyst then reviews the entire analysis record to verify that the testing was done according to protocol. She then interprets these DNA profiles to determine whether there is a match between DNA extracted from the crime scene and any known DNA sources from a victim or suspect; she then reports her findings. A different analyst (not involved with the previous testing) then conducts a thorough “technical review.” The technical reviewer examines the entire case file—including the tests performed, methodology used, and the data generated—verifies the methodology, ensures that the correct information was entered into the genetic analyzer, and interprets the profile to confirm the DNA identification. The reviewer then independently verifies the interpretative and statistical analyses related to any DNA matches identified during the testing. Last, a supervisor reviews the draft report to ensure that it complies with BCI procedures and standards. *Cf.* “DNA Evidence: Basics of Analyzing,” National Institute of Justice, available at <http://www.nij.gov/topics/forensics/evidence/dna/basics/analyzing.htm> (last visited Feb. 13, 2013) (outlining federal-government labs’ steps for DNA analysis).

At one time, it was typical for a single forensic scientist, working with a small number of samples, to perform every step of DNA testing and analysis. But as demand for DNA testing has increased, this generalist model is no longer feasible for most labs. (At BCI, for example, annual DNA case submissions rose from 1,058 in 2004 to 2,885 in 2008 and 5,869 in 2012). Therefore, like other high-processing state and private labs, BCI has increased its efficiency by using teams

of analysts, instead of just one, to process samples. These specialization and assembly-line processes have been instrumental in increasing lab efficiency without sacrificing accuracy.

Moreover, forensic DNA analysis usually involves the comparison of DNA obtained from a crime scene with DNA from what is known as an “exemplar” (a known individual, such as a victim or suspect). To ensure the integrity of the testing process and to avoid contamination, crime-scene evidence and exemplar evidence are processed separately, and often, with entirely different technicians. Therefore, in many instances, the DNA-testing process for a case will involve the participation of yet additional analysts.

An all-technicians-must-testify rule therefore risks serious negative consequences for all stakeholders within the criminal justice system. A defendant could paralyze the BCI lab for days by requiring that all technicians on his case appear in court. The impact on “cold” cases would be even worse. If an original testing analyst were no longer available—the technician has died, or moved out of Ohio—the State either would have to attempt prosecution without key evidence, or retest the evidence. But retesting years later is impossible in many cases, especially with DNA, where the initial analysis may destroy most or all of a sample. And, of course, these are not just prosecutorial concerns; an approach that inhibits DNA testing is just as detrimental to those whom DNA analysis exonerates.

Perhaps these practical concerns could be brushed aside if having an all-technicians-must-testify rule would meaningfully advance the truth-seeking process. But it would not. Lab analysts perform thousands of repetitive tests each year, and the reality is that they have little or no memory of any one particular test. At most, a technician would be able to say “this is what I generally do when assigned this particular testing job.” Cross-examination is unlikely to be

consequential in these circumstances. Accordingly, the Court should not require a brigade of testers to march into court who would provide no real assistance to the jury.

In sum, given that each case involves numerous steps and the participation of multiple technicians, the all-technicians-must-testify rule Keck proposes would seriously threaten the use of DNA testing in criminal cases.

E. Even if there were a confrontation violation here, any error was harmless beyond a reasonable doubt.

Even if the admission of the DNA evidence violated Keck's confrontation rights here (and it did not), that error was harmless beyond a reasonable doubt. *See Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986) (applying several factors to determine whether a confrontation violation was harmless); *see also Bullcoming*, 131 S. Ct. at 2719 n.11 (noting that "nothing in this opinion impedes a harmless-error inquiry on remand"); *State v. Madrigal*, 87 Ohio St. 3d 378, 388 (2000) (finding confrontation violation harmless beyond a reasonable doubt).

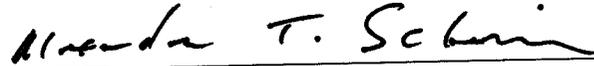
First, this DNA was relevant to only a narrow subset of the charges Keck faced—those involving sexual contact. State Br. 29. And as to each sexual-contact charge (gross sexual imposition, rape, and the related kidnapping charges), there was victim testimony as well as other non-DNA evidence. State Br. 28-29. Also, the remaining physical evidence seized from Keck's home (the videos and computer images) provide strong evidence of Keck's guilt on the remaining child-pornography counts. *See* Tr. 2940-50 (summarizing the pornography-related charges and supporting evidence). Whatever marginal effect the DNA evidence may have had, it is clear beyond a reasonable doubt that a rational jury would have found Keck guilty even absent the alleged confrontation error.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the Fourth District Court of Appeals.

Respectfully submitted,

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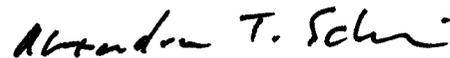
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