

ORIGINAL

IN THE SUPREME COURT OF OHIO

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

REPLY BRIEF OF APPELLANT DANIEL ARDEN KECK II

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## ARGUMENT

### Proposition of Law No. I

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.

A. *The State's response fails to address the totality of Melendez-Diaz, Bullcoming, and Williams' effect on the Right to Confrontation*

When read in concert, *Melendez-Diaz v. Massachusetts* (2009), 129 S.Ct. 2527; *Bullcoming v. New Mexico* (2011), 131 S.Ct. 2705; and *Williams v. Illinois* (2012), 132 S.Ct. 2221, indicate that Kristen Slaper's testimony regarding Mark Losko's findings violated Appellant's right to Confrontation under the Sixth Amendment to the United States Constitution and Article I, Section 10 of the Ohio Constitution.

While *Williams* may be most factually akin to the case at hand, its impact is limited due to the fractured majority. Although there were five votes in favor of allowing the admission of the Cellmark report, there was not a majority view as to why it should be admitted. Four of the Justices (hereinafter "the plurality") found in *Williams* that the Cellmark report was not offered for its truth and that the report was not the kind of statement triggering the Confrontation Clause's protection. Justice Thomas concurred only with the result of the plurality and held that the Cellmark report was nontestimonial under a rationale different from the plurality. See e.g. *Williams*, 132 S.Ct. at 2255-256 (Thomas, J. concurring in judgment)("I share the dissent's view of the plurality's flawed analysis").

Thus, when the case at hand is analyzed with an eye towards the issues raised in *Williams* but also in keeping with the Supreme Court's holdings in *Melendez-Diaz* and

*Bullcoming*, it is clear that Losko's statements were testimonial and their admission violated Appellant's right to Confrontation.

1. Losko's findings were offered for their truth

It cannot be said that Losko's findings in this case were not offered for the truth of the matter asserted. While the State has framed the issue as an expert (Slaper) utilizing data (Losko's findings) for the limited purpose of creating the foundation of her expert opinion, her limited purpose inherently requires an evaluation of whether the underlying findings are true. Slaper's testimony gave no indication that her conclusion was based on the assumption that Losko's findings were accurate. Instead, she presented Losko's results as irrefutable fact, demonstrated by the following examples from her testimony:

Q. Okay. Now, is this semen, then from [J.D.]?

A. Yes.

T.p. at 1488

And then with respect to the comforter found at Appellant's house:

Q. So, you have Daniel Keck's sperm and [J.D.]'s skin cell or some other DNA cell, not a sperm cell?

A. Correct

T.p. at 1490.

\*\*\*

Q. So, if I understand right, we have the Defendant's semen with other skin cells, non-semen DNA, from [JD]; is that right?

A. Yes, that's correct.

T.p. at 1491.

\*\*\*

A. The result of this was the differential extraction resulted in a single DNA profile, consistent with Daniel Keck.

T.p. at 1491-492.

These portions of testimony show Slaper operating a surrogate witness as outlined in *Bullcoming*. She testified regarding the results but knew nothing of the process for testing the known samples. The trier of fact was left with the impression that the DNA results were clearly and irrefutably what she claimed them to be. Although the State is correct that the Confrontation Clause does not apply differently based on whether the trier of fact is a judge or a jury, it is important in this case because the trial judge in *Williams* was presumed to disregard any impropriety in the way the questions were presented to the witness whereas a similar presumption cannot be made of the jurors in this case. Thus, deficiencies in the manner of questioning that may not have been significant in *Williams* because of the trier of fact have greater importance in this case because the jury, unlike the judge, cannot be presumed to disregard any inadmissible evidence.

Slaper did not testify that her results matched the results Losko generated with respect to the known samples, i.e. “my testing matched the DNA sample generated by Mark Losko for Daniel Keck.” Instead, her testimony offered Losko’s findings for their truth—that certain individuals’ DNA was found in various locations.

2. Losko’s findings were testimonial

Furthermore, Slaper’s testimony triggers the Confrontation Clause because she introduced testimonial statements of a nontestifying forensic analyst. Losko undoubtedly performed his testing (and the DNA evidence as a whole was collected) in order to serve as

evidence in Appellant's criminal trial. There was no ongoing emergency when the DNA samples were obtained. This was not a situation similar to *Williams* where an unidentified alleged criminal was on the loose. Appellant had already been arrested.

Additionally, the State's contends that this forensic evidence was not testimonial because its inculpatory value was not immediately apparent and it could have potentially cleared Appellant.. It cannot be reasonably believed, however, that law enforcement collected and tested this evidence in hopes that it may clear Appellant. It was done for the sole purpose of strengthening the State's case against him. Thus, with respect to the issues raised by the plurality in *Williams* regarding whether Losko's statements would be testimonial, the case at hand is sufficiently distinguishable to find that Slaper's testimony regarding Losko's findings implicated the right to Confrontation.

Additionally, Justice Thomas effectively placed form over substance in his concurrence in *Williams*. The issue he raised concerning whether similar findings/statements were testimonial based on the presence of sufficient indicia of reliability was by and large rejected by the Court in *Bullcoming* when a similar argument was raised concerning the differences between the affidavits in *Melendez-Diaz* and the report in *Bullcoming*. Losko's findings, regardless of their final form, are effectively no different in nature than the scientific findings contained in the Cellmark report in *Williams*, the "certificates of analysis" in *Melendez-Diaz*, and the "certificate of analyst" in *Bullcoming*.

*B. The State's argument demonstrates why this Court must afford Ohio citizens greater protection under the Ohio Constitution*

The State argued in its response that Justice Kagan's dissent in *Williams* does not fairly represent the facts presented by this case, nor does this case present an example of surrogate

testimony. It is clear, however, that Slaper testified in lieu of Losko with regards to his results. She compared her results to his results and presented those findings to the jury. She was available for cross-examination regarding whether she had tested the wrong vial, inverted the labels on the samples, committed some more technical error, or simply made up the results; Losko was not. Thus, Appellant was burdened with the assumption that Losko's results were absolutely valid and accurate—an assumption on which Slaper's finding was built. This is exactly the situation and concern Justice Kagan raised in her dissent.

The State warned in its response that broadening the Ohio Confrontation Clause could affect numerous other types of expert testimony. Requiring confrontation, however, is the only way to weed out incompetence and irregularities—to determine whether that X-ray raised by the State in its hypothetical is what it purports to be. To otherwise accept the evidence at face value invites the possibility for error.

The State further cautioned that expanding Ohio's Confrontation Clause could affect the State's ability to investigate cold cases. The State's argument essentially is that if the lab technician who initially generated a DNA profile (whether known or unknown) could not be located then the State could not later present evidence at trial that the profile matched another sample. What this argument fails to consider, though, is that it gives a free pass to a lab technician who cannot be located, regardless of how old the case is, because they were terminated for tampering with results, incompetence, or any other reason that would call into question the validity of his or her work—essentially the dangers Justice Kagan warned of in her *Williams* dissent. The dangers of an incompetent, dishonorable, or fraudulent lab technician far outweigh any danger outlined by the State's hypothetical.

The importance of this case can be demonstrated by expanding upon its facts. Under the State's position, a third, completely unrelated, lab technician would be permitted to testify that Slaper's results matched Losko's results. Thus, if Losko and Slaper were terminated for incompetence while the case was pending then the State could bring in an expert with impeccable credentials who could testify that he or she read the report that was generated and that the samples are a match. This expert would be permitted to do so without knowing anything about the underlying testing except that the individuals who performed the test were certified to do so. Even though the expert's testimony would be based on shaky ground the manner in which it would be presented would make it difficult to rebut or refute. This Court must protect Ohio citizens from this unjust scenario.

Finally, the State's concern regarding the cost to crime labs if additional protection were to be afforded under the Ohio Constitution is not a valid basis to forego adopting Appellant's position. A defendant's constitutional rights should not be cast aside in order to save the State a dollar.

*C. The admission of the DNA evidence would not be harmless error*

The State asserted in its response that if the admission of the DNA evidence in question is found to be a Confrontation Clause violation then it would have been harmless error. This Court has held that "[a] constitutional error can be held harmless if we determine that it was harmless beyond a reasonable doubt." *State v. Conway* (2006), 108 Ohio St.3d 214, 2006-Ohio-791, ¶ 78, citing *Chapman v. California* (1967), 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705.

The admission of the DNA evidence in this case was not harmless beyond a reasonable doubt. The State repeatedly stressed the importance and significance of the DNA evidence during closing argument. T.p. 2933, 2937. It argued to the jury that Appellant's semen was "literally all over the waterbed" where the boys slept when staying over and that the presence of Appellant's semen and DNA from the boys was due to sexual activity between them. T.p. 2933, 2937.

The State utilized the DNA's presence to undoubtedly sway the jury with respect to the charges dealing with sexual conduct. Why else, essentially the State posed to the jury, would this evidence be there if not for some sexual impropriety between these individuals? Clearly the State valued this evidence and, as was clear from its closing argument, stressed this importance upon the jury. Additionally, there was no smoking gun in this case—the alleged victims slept through the alleged sexual conduct and only later concluded, based on supposed circumstantial evidence, something occurred. T.p. 988, 1219-222. Thus the DNA was critical to the State's case.

Further, the State notes in the first sentence of its reply that "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 evidence, however, permeated every aspect of the trial. As such, it cannot be shown beyond a reasonable doubt that the admission of the DNA evidence did not impact the jury's verdict on all charges. The DNA evidence was vital to the State's convictions on the sexual conduct charges which, in turn, influenced the jury's decision on all other charges.

Because of the importance placed on the DNA by the State in its closing argument and by the undeniable impact such evidence would have on a jury it cannot be said that admission

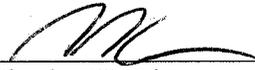
of the DNA evidence would be harmless error with respect to any of the charges of which Appellant was convicted.

### CONCLUSION

For all of the reasons stated above, Daniel Keck requests this Court find that 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. Therefore, Daniel Keck asks this Court to reverse the judgment of the Fourth District Court of Appeals and remand this matter for trial.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

The undersigned certifies that he has served a copy of the foregoing upon James Schneider, Washington County Prosecuting Attorney, and Allison Cauthorn and Kevin Rings, Assistant Prosecuting Attorneys, Attorneys for Appellee, 205 Putnam Street, Marietta, Ohio 45750, by ordinary mail this 25<sup>th</sup> day of February, 2013.



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