2014 IL App (2d) 121204-U
No. 2-12-1204
Order filed August 25, 2014

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. CARLTON D. MAYNOR, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of McHenry County. No. 08-CF-586 Honorable Sharon L. Prather, Judge, Presiding.

PRESIDING JUSTICE BURKE delivered the judgment of the court.
Justices Schostok and Birkett concurred in the judgment.

ORDER

¶ 1 *Held*: Postconviction counsel provided defendant with reasonable assistance: that counsel presented a meritless "actual innocence" claim did not mean that counsel could have presented a meritorious one; that counsel might have thought that only the "gist" of a claim was necessary at the second stage was irrelevant inasmuch as counsel purported to articulate the required "substantial showing"; and counsel was not required to raise a meritless confrontation claim.

¶ 2 Defendant, Carlton D. Maynor, appeals from an order of the circuit court of McHenry County granting the State's motion to dismiss his petition under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2010)), which sought relief from his conviction of drug-induced homicide (720 ILCS 5/9-3.3(a) (West 2008)). Defendant argues that he did not receive

a reasonable level of assistance from the attorneys he retained to represent him in the proceedings on the petition. We affirm.

¶ 3 Defendant's conviction stemmed from the death of Laura Johnson. During the relevant time frame, the statutory provision under which defendant was charged provided, in pertinent part, that "a person who violates Section 401 of the Illinois Controlled Substances Act *** by unlawfully delivering a controlled substance to another, and any person's death is caused by the injection, inhalation or ingestion of any amount of that controlled substance, commits the offense of drug-induced homicide." 720 ILCS 5/9-3.3(a) (West 2008). The case was tried before a jury.

¶ 4 At trial, the State presented evidence that, on the afternoon of March 2, 2008, Johnson drove from McHenry County to Chicago with Jeffrey Mikell, Heather Schultz, and Ryan Stout, to purchase heroin. Mikell and Schultz testified at trial. (In exchange for Schultz's truthful testimony, the State agreed not to charge her with a crime.) According to their testimony, Johnson withdrew $100 from an ATM, and Schultz telephoned a man listed in her cell phone directory as "D." Schultz did not know the man's name. The group arrived in Chicago and Schultz exchanged the money for a "jab" of heroin. Schultz testified that a "jab" is 12 bags of heroin. Mikell testified that he was "pretty intoxicated" when the sale took place, but the following day he identified defendant from a photo lineup as the man who had sold the heroin. He also identified defendant in court. Johnson split the heroin evenly with her companions. Johnson started snorting the heroin in the backseat of the car.

¶ 5 The group later drove to Bull Valley, where they spent the night at Mikell's parents' guest house. At about 5 p.m. Schultz observed Johnson and Stout using heroin in the living room. Schultz prepared dinner, but Johnson did not eat; she was watching television and appeared to be half asleep on a couch. Schultz went to bed at about 8 p.m. At that time, Johnson

and Stout were lying on the floor watching television. At about 4 a.m., Schultz tried to wake Johnson. Johnson was cold and her skin was blue. Schultz summoned Mikell and called 911. Mikell testified that Johnson was "lifeless." She appeared purple and had "stuff" coming out of her nose and mouth.

¶ 6 Michelle Stevens, a detective with the McHenry County sheriff's office who investigated Johnson's death, testified that she recovered a tinfoil packet near Johnson's body. Forensic analysis of a residue found on the packet tested positive for the presence of heroin. A small amount of cannabis was discovered in Johnson's purse.

¶ 7 Stevens met with Schultz on March 4, 2008, to set up a controlled purchase of heroin from "D." Schultz called "D" on her cell phone and arranged a meeting in Chicago. Schultz and Stevens drove to Chicago, and Schultz purchased 12 bags of heroin for $100. According to Schultz, she purchased the heroin from the same man who had sold heroin to her two days earlier. Stevens, who observed the transaction, identified defendant as the individual who sold heroin to Schultz on March 4, 2008. Defendant was arrested following another controlled purchase that took place on March 7, 2008.

¶ 8 Forensic pathologist Mark Peters performed an autopsy on Johnson on the afternoon of March 3, 2008. He observed a "very vivid purple discoloration" of Johnson's face, indicating a lack of oxygen. Peters testified that opiates such as heroin affect the part of the brain that controls an individual's breathing and heart rate. According to Peters, "The opiates prevent that part of the brain from sending signals to a person to increase their breathing if they're not breathing enough." Death resulting from heroin use is gradual. In contrast, cocaine can cause an increased heart rate or cardiac arrhythmias, or can simply cause the heart to stop beating. Death as a result of cocaine use is a sudden event.

¶ 9 Peters found that Johnson's lungs "were moderately heavy with vascular congestion and edema." The finding was consistent with death as a result of the use of heroin. Johnson also had an enlarged heart. Peters collected blood, urine, and vitreous-fluid samples for laboratory testing to determine the presence of drugs or alcohol. Peters considered the test results along with the autopsy findings in forming an opinion as to Johnson's cause of death. Peters testified that it was his opinion, to a reasonable degree of medical certainty, that Johnson "died of adverse effects of drugs."

¶ 10 Michael Evans, the founder and president of AIT Laboratories (AIT), testified as an expert in forensic toxicology. AIT had performed toxicology testing on the samples of Johnson's blood, urine, and vitreous fluid. Evans had not been personally involved in the testing process, but he testified about the general procedures that AIT employed to document the chain of custody and maintain the integrity of specimens submitted for testing. With respect to the testing process, Evans testified that a chemist performs the initial tests and that the results are then reviewed by AIT's certification department to ensure that the testing was performed properly. After certification, if the testing yielded a positive result, the sample would then be retested by a different chemist using a different methodology, and the data would be reviewed by the certification department. Thereafter, the data would be reviewed by a toxicologist. Evans testified that AIT's final toxicology reports are generated by AIT's computer system, "but it's only after [the toxicologist] reviews it and releases it by a series of key strokes that that report goes out." Scott Krieger, Ph.D., was the toxicologist who reviewed the toxicology report in this case.

¶ 11 Prior to testifying, Evans had reviewed the "internal case file" pertaining to the testing performed on Johnson's blood, urine, and vitreous fluid. Using the toxicology report to refresh

his memory, Evans testified that Johnson's blood sample was found to contain a morphine concentration of 16 nanograms per milliliter (ng/ml). Evans explained that heroin is a synthetic product that breaks down very quickly in the form of morphine. From the blood test alone, Evans could not say whether Johnson had taken heroin or morphine, but she had taken one or the other within 24 hours before her death.

¶ 12 Johnson's blood also contained a small amount—3.6 ng/ml—of a metabolite of tetrahydrocannabinol (THC) (which is the active component of marijuana) as well as nicotine and cotinine (which is a byproduct of nicotine). No cocaine or "cocaine breakdown products" were found in Johnson's blood.

¶ 13 Johnson's urine contained 180 ng/ml of a metabolite of THC. Benzoylecgonine, a breakdown product from cocaine, was also found in Johnson's urine. The presence of that substance in Johnson's urine, but not in her blood, indicated that Johnson had used cocaine within 24 to 36 hours prior to her death *but not* within the last 6 to 8 hours.

¶ 14 Additionally, Johnson's urine contained 40,074 ng/ml of morphine and a compound called 6-monoacetylmorphine (6-MAM). Johnson explained that, when an individual uses heroin, it quickly breaks down in the body to form 6-MAM, which continues to break down to form morphine. Thus, the presence of 6-MAM indicated that Johnson had used heroin.

¶ 15 Evans testified that cocaine, taken in high doses, causes convulsions that can result in death. In lower doses, cocaine can basically cause a fatal heart attack. In either case, however, death occurs quickly, not over a period of hours. In contrast, heroin, morphine, and other narcotics, cause death by impairing respiratory function. Evans explained:

> "[Y]ou take heroin, you kind of go on the nod; and if you take an overdose of it, you kind of fall asleep and gradually your breathing slows down. And you go into a slowly—you

> slowly stop breathing over a period of time. It may take a couple of hours before death occurs. And as your breathing slows down, you're unconscious; and it's not only does [*sic*] your frequency of breathing slows down, but your depth of breathing—normally we breathe pretty deeply, good lung air; but it becomes very shallow breath and basically the person just kind of expires due to respiratory depression."

On cross-examination, Evans indicated that death could occur hours after using heroin; one might use heroin in the afternoon and succumb to its effects in the early hours of the following morning.

¶ 16 Ed Maldonado, a detective with the McHenry County sheriff's office, testified for the defense that he interviewed Mikell and Schultz. Schultz told Maldonado that she believed that all of the heroin she had purchased on March 2, 2008, was consumed while she and her companions were in Chicago. Schultz also told Maldonado that Johnson knew people in McHenry County from whom she could purchase narcotics. Maldonado testified that Mikell was unable to give a specific description of the individual who had sold the heroin to Schultz on March 2, 2008. Mikell indicated that the individual was African-American and that African-Americans all looked the same to Mikell.

¶ 17 The jury found defendant guilty of drug-induced homicide, and on February 6, 2009, the trial court sentenced defendant to an 18-year prison term. Defendant appealed. The only issue raised on appeal was whether, in imposing sentence, the trial court acted under a misapprehension of the law governing good-conduct credit. On September 30, 2010, we issued a summary order affirming the trial court's judgment. *People v. Maynor*, No. 2-09-0158 (2010) (unpublished order under Supreme Court Rule 23). We concluded that defendant had forfeited the sentencing issue. *Id.* We issued our mandate on November 12, 2010.

¶ 18 On July 23, 2012, two attorneys retained by defendant filed the postconviction petition giving rise to this appeal. The petition claimed (1) that defendant did not receive the effective assistance of counsel on appeal and (2) defendant's "actual innocence." The petition asserted that appellate counsel's performance was deficient because counsel did not argue that the State had failed to prove defendant's guilt beyond a reasonable doubt. According to the petition, "[t]he witnesses' identifications of [defendant] were insufficient to support his conviction." The petition also asserted that the State's evidence left a reasonable doubt as to whether (1) the heroin purchased in Chicago was the only heroin that Johnson used on March 2, 2008, and (2) Johnson's death was caused by heroin use. Additionally, the petition asserted that appellate counsel should have argued that, in light of certain mitigating factors, defendant's 18-year sentence was excessive. The "actual innocence" claim consisted of the following two sentences:

> "[Defendant] also claims actual innocence. He hereby incorporates the arguments made above with respect to the sufficiency of the evidence with regard to this argument."

¶ 19 The petition asserted that it was filed within the limitations period set forth in the Act (see 725 ILCS 5/122-1(c) (West 2010)), but alternatively argued, *inter alia*, that the limitations period did not apply, because defendant was asserting a claim of actual innocence (see *id.*).

¶ 20 On July 30, 2012, the trial court granted the State 21 days "to respond or otherwise plead." On August 10, 2012, the State moved to dismiss the petition on the grounds that: (1) it was not timely filed; (2) it did not make a substantial showing that defendant did not receive the effective assistance of counsel on appeal; and (3) defendant failed to identify newly discovered evidence in support of his "actual innocence" claim. The trial court granted the State's motion, and this appeal followed.

¶ 21 Under the Act, a person imprisoned for a crime may mount a collateral attack on his conviction and sentence based on violations of his constitutional rights. *People v. Erickson*, 183 Ill. 2d 213, 222 (1998). As pertinent here, section 122-1(c) of the Act provides as follows:

> "When a defendant has a sentence other than death, no proceedings under this Article shall be commenced more than 6 months after the conclusion of proceedings in the United States Supreme Court, unless the petitioner alleges facts showing that the delay was not due to his or her culpable negligence. If a petition for certiorari is not filed, no proceedings under this Article shall be commenced more than 6 months from the date for filing a certiorari petition, unless the petitioner alleges facts showing that the delay was not due to his or her culpable negligence. If a defendant does not file a direct appeal, the post-conviction petition shall be filed no later than 3 years from the date of conviction, unless the petitioner alleges facts showing that the delay was not due to his or her culpable negligence.
>
> This limitation does not apply to a petition advancing a claim of actual innocence." 725 ILCS 5/122-1(c) (West 2010).

¶ 22 Proceedings under the Act are divided into three stages. *People v. Gaultney*, 174 Ill. 2d 410, 418 (1996). During the first stage, the trial court independently examines the petition within 90 days after it is filed and docketed. 725 ILCS 5/122-2.1(a) (West 2010). If the petition is frivolous or patently without merit, it will be summarily dismissed. 725 ILCS 5/122-2.1(a)(2) (West 2010). If the petition is not dismissed at the first stage, it proceeds to the second stage, at which an indigent defendant is entitled to appointed counsel, the petition may be amended, and the State may answer or move to dismiss the petition. *Gaultney*, 174 Ill. 2d at 418. A petition

that is not dismissed at the first or second stage advances to the third stage, at which an evidentiary hearing is held. *Id.*

¶ 23 Section 122-2 of the Act provides that the petition "shall have attached thereto affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached." 725 ILCS 5/122-2 (West 2010). An evidentiary hearing is required only where the petition's allegations are properly substantiated in accordance with section 122-2 and make a substantial showing that the defendant's constitutional rights have been violated. *People v. Johnson*, 154 Ill. 2d 227, 239 (1993). Thus, "[a] post-conviction petition which is not supported by affidavits or other supporting documents is generally dismissed without an evidentiary hearing unless the petitioner's allegations stand uncontradicted and are clearly supported by the record." *Id.* at 240.

¶ 24 The right to counsel in a postconviction proceeding is statutory, not constitutional. *People v. Davis*, 382 Ill. App. 3d 701, 709 (2008). Under the Act, "defendants are entitled to a reasonable level of assistance, but are not assured of receiving the same level of assistance constitutionally guaranteed to criminal defendants at trial." *People v. Kegel*, 392 Ill. App. 3d 538, 541 (2009). This is true whether the defendant is represented by appointed counsel or by a privately retained attorney. However, in cases where the petition was initially filed *pro se*, counsel (whether appointed or retained) has certain specific duties under Illinois Supreme Court Rule 651(c) (eff. Dec. 1, 1984). See *Davis*, 382 Ill. App. 3d at 711. In such cases "[t]he record [on appeal] shall contain a showing, which may be made by the certificate of petitioner's attorney, that the attorney has consulted with petitioner either by mail or in person to ascertain his contentions of deprivation of constitutional rights, has examined the record of the proceedings at the trial, and has made any amendments to the petitions filed *pro se* that are

necessary for an adequate presentation of petitioner's contentions." Ill. S. Ct. R. 651(c) (eff. Dec. 1, 1984). Here, because defendant's initial petition was filed by counsel, this rule does not apply. *People v. Richmond*, 188 Ill. 2d 376, 382-83 (1999); *People v. Anguiano*, 2013 IL App (1st) 113458, ¶¶ 24-25; *People v. Bennett*, 394 Ill. App. 3d 350, 354 (2009).

¶ 25 It is undisputed that defendant's petition was not filed within six months from the date for filing a petition for *certiorari*[1] after the disposition of his direct appeal and that it was therefore time-barred unless defendant raised a cognizable claim of actual innocence or he could establish that the delay in filing the petition was not due to his culpable negligence. 725 ILCS 5/122-1(c) (West 2010). In order to fulfill his or her obligation to provide a reasonable level of assistance, postconviction counsel, whether appointed or retained, must attempt to overcome procedural bars, including, *inter alia*, the Act's limitations provisions. *Anguiano*, 2013 IL App (1st) 113458, ¶ 44. Defendant argues that counsel failed to fulfill this duty, inasmuch as he failed to present defendant's claim of actual innocence in the proper legal form. Defendant correctly observes that an actual-innocence claim cognizable under the Act must be supported by evidence that is "new, material, noncumulative and, most importantly, ' "of such conclusive character" ' as would ' "probably change the result on retrial." ' [Citation.]" *People v. Washington*, 171 Ill. 2d 475, 489 (1996). Here, however, counsel identified no new evidence that would likely result in acquittal if defendant were to receive a new trial. Counsel's theory of "actual innocence" was simply that the evidence presented at trial was insufficient to prove *defendant's guilt beyond a reasonable doubt*. However, " 'actual innocence' is not within the rubric of whether a defendant

[1] If the defendant does not file a petition for leave to appeal to the Illinois Supreme Court, the six-month period commences upon the expiration of the time for filing such a petition. *People v. Wallace*, 406 Ill. App. 3d 172, 177 (2010).

has been proved guilty beyond a reasonable doubt. [Citation.] Rather, the hallmark of 'actual innocence' means 'total vindication,' or 'exoneration.' " *People v. Collier*, 387 Ill. App. 3d 630, 636 (2008).

¶ 26 Though the "actual innocence" claim, as counsel presented it, was meritless, it does not necessarily follow that counsel's assistance was inadequate. *People v. Perkins*, 229 Ill. 2d 34, 51 (2007). Unless the record discloses some other basis for excusing the failure to timely file the petition, we may presume that the theory of "actual innocence" based on the trial evidence was "the best option available based on the facts." *Id.* Defendant contends that "[b]y specifically raising a claim of actual innocence, post-conviction counsel indicated that he believed that evidence existed which could exonerate [defendant]." Of course, that argument assumes that postconviction counsel used the term correctly. It is reasonably clear, however, that counsel simply equated "actual innocence" with "reasonable doubt." There is no reason to believe that counsel was aware of any additional evidence that would exonerate defendant.

¶ 27 Hedging his bets, defendant contends that, if there was, in fact, no other evidence to exonerate him, then counsel's argument must reflect ignorance of the nature of the elements of an "actual innocence" claim. We disagree. Inasmuch as "[i]t is the nature of a defense lawyer's job that he or she must make the best of what may turn out to be hopeless facts" (*People v. Perkins*, 367 Ill. App. 3d 895, 907 (2006), *rev'd on other grounds*, 229 Ill. 2d 34 (2007)), an attorney's zealous advocacy of his client's interests can be turned against the attorney as the basis for a spurious argument that counsel's understanding of the law was deficient. Accord *Perkins*, 229 Ill. 2d at 50-51 (postconviction counsel's insistence that the Act's limitations period was flexible and subject to equitable considerations did not demonstrate ignorance of the law). We decline to presume that defendant's attorneys were ignorant of the law.

¶ 28 In a further effort to establish postconviction counsel's ignorance of postconviction jurisprudence, defendant notes that, in the written response to the State's motion to dismiss, counsel indicated that the petition "sufficiently presented the gist of a constitutional claim" that defendant did not receive the effective assistance of counsel on appeal. Defendant correctly notes that, to survive a motion to dismiss by the State, a petition must make a substantial showing that the defendant's constitutional rights were violated. See, *e.g.*, *People v. Graham*, 2012 IL App (1st) 102351, ¶ 31. The State contends that other portions of the response to the motion to dismiss indicated that counsel understood the proper test.

¶ 29 Even assuming, *arguendo*, that counsel actually believed that it was necessary to present only the gist of a constitutional claim, our concern is not with the abstract question of how well counsel understood the law, but rather with the extent to which any misconception impaired counsel's performance. An attorney who drafts a petition making a substantial showing of a constitutional claim has provided reasonable assistance, even if the attorney actually believed that presenting the "gist" of a claim would have sufficed. The "gist" standard "is a low threshold" that requires a limited amount of detail about the petitioner's claims. *Gaultney*, 174 Ill. 2d at 418. The petition need not contain legal arguments or citation to legal authority. *Id.* Here, the petition drafted by counsel contained ample detail, as well as legal argument and authority. It is therefore apparent that, even if counsel believed that only the gist of a constitutional claim was required, counsel actually endeavored to make the requisite substantial showing. The petition failed to do so, however, because, whether or not it made a substantial showing that the evidence at trial was constitutionally insufficient, such a claim is not cognizable as a claim of "actual innocence" under the Act.

¶ 30 In this regard, this case is readily distinguishable from *People v. Waldrop*, 353 Ill. App. 3d 244 (2004), which defendant cites in support of his argument. In *Waldrop*, the basis for dismissal of the petition was directly related to counsel's apparent misunderstanding of the Act's requirements. The petition was dismissed because it was unsupported by affidavits; counsel indicated, incorrectly, that he did not think that any evidentiary support was necessary. *Id.* at 250. We observed:

> " 'In the ordinary case, a trial court ruling upon a motion to dismiss a post-conviction petition which is not supported by affidavits or other documents may reasonably presume that post-conviction counsel made a concerted effort to obtain affidavits in support of the post-conviction claims, but was unable to do so.' [Citation.] However, in this case, that presumption is flatly contradicted by the record. Postconviction counsel mistakenly believed that he did not have a duty to seek an affidavit from the witness specifically identified in defendant's *pro se* petition. Therefore, we must conclude that postconviction counsel's representation fell below a reasonable level of assistance***." *Id.*

Thus, in *Waldrop*, counsel's misunderstanding of the law affected how he carried out his duty to assist the defendant. If the record in *Waldrop* had shown that counsel had made a concerted effort to obtain evidentiary support for the petition, it would not have mattered whether counsel believed that the Act required him to do so.

¶ 31 Another decision cited by defendant—*People v. Kelly*, 2012 IL App (1st) 101521—is inapposite. In *Kelly*, counsel's argument—which reflected a misunderstanding of the different stages of a postconviction proceeding and ignorance of the more rigorous pleading requirements

at the second stage—was just one of several factors that collectively led the court to conclude that counsel had not provided a reasonable level of assistance. *Id.* ¶ 40.

¶ 32 Finally, defendant argues that postconviction counsel should have raised a claim of ineffective assistance of appellate counsel based on appellate counsel's failure to argue that, because Evans did not participate in the toxicology tests performed of Johnson's blood, urine, and vitreous fluid, Evans's testimony about the results of those tests violated defendant's constitutional right to confront the witnesses against him. As explained below, such a claim would have been meritless, so postconviction counsel's failure to raise it does not reflect a failure to provide reasonable assistance.

¶ 33 A defendant claiming ineffective assistance of counsel must show that his counsel's performance "fell below an objective standard of reasonableness" and that the deficient performance was prejudicial in that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984). "As applied to claims involving the failure of appellate counsel to raise a particular issue, the defendant must show that 'the failure to raise that issue was objectively unreasonable, as well as a reasonable probability that, but for this failure, his sentence or conviction would have been reversed.' " *People v. Mack*, 167 Ill. 2d 525, 532 (1995) (quoting *People v. Caballero*, 126 Ill. 2d 248, 270 (1989)). Here, defendant has not shown that raising an issue on appeal based on the constitutional right to confront witnesses would have led to the reversal of defendant's conviction.

¶ 34 Defendant's argument is based on the United States Supreme Court's decision in *Bullcoming v. New Mexico*, 564 U.S. ___, 131 S. Ct. 2705 (2011). The issue before the Court and the Court's holding were as follows:

> "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.* at ___, 131 S. Ct. at 2710.

In *Bullcoming*, one forensic scientist, Gerasimos Razatos, testified as a surrogate for a colleague, Curtis Caylor, who had tested a sample of the defendant's blood to determine the blood-alcohol concentration (BAC).

¶ 35 Defendant contends that Evans similarly acted as a surrogate for the toxicologist who was actually responsible for the issuance of the toxicology report. Thus, according to defendant, Evans's testimony violated the rule announced in *Bullcoming*. We disagree.

¶ 36 Justice Ginsburg delivered the majority opinion in *Bullcoming*. Justice Scalia joined the majority opinion in full and Justices Thomas, Kagan, and Sotomayor joined the portion of the majority opinion in which the holding quoted above is found. Justice Kennedy dissented. Chief Justice Roberts and Justices Breyer and Alito joined Justice Kennedy's dissenting opinion. Justice Sotomayor's position is of critical importance here. Although she joined the relevant portion of the majority holding, she wrote a separate opinion in which she "highlight[ed] some of the factual circumstances that this case does *not* present." (Emphasis added.) *Id.* at 2721-22 (Sotomayor, J., concurring). Of particular significance is the following observation:

> "[T]his is not a case in which an expert witness was asked for his independent opinion about underlying testimonial reports that were not themselves admitted into evidence. See Fed. Rule Evid. 703 (explaining that facts or data of a type upon which experts in the field would reasonably rely in forming an opinion need not be admissible in order for the expert's opinion based on the facts and data to be admitted).[2] As the Court notes, *ante* [at 2715-16], the State does not assert that Razatos offered an independent, expert opinion about Bullcoming's blood alcohol concentration. Rather, the State explains, '[a]side from reading a report that was introduced as an exhibit, Mr. Razatos offered no opinion about Petitioner's blood alcohol content ... .' [Citation.] Here the State offered the BAC report, including Caylor's testimonial statements, into evidence. We would face a different question if asked to determine the constitutionality of allowing an expert witness to discuss others' testimonial statements if the testimonial statements were not themselves admitted as evidence." *Id.* at ___, 131 S. Ct. at 2722 (Sotomayor, J., concurring).

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[2] We note that Illinois Rule of Evidence 703 (eff. Jan. 1, 2011), which took effect after defendant's trial, provides:

> "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."

The rule codifies the holding of *Wilson v. Clark*, 84 Ill. 2d 186 (1981), which adopted Federal Rule of Evidence 703.

¶ 37 The scenario that Justice Sotomayor described, is essentially what occurred here. The State did not offer the toxicology report into evidence. Evans discussed the report's findings regarding levels of morphine, 6-MAM, and benzoylecgonine in connection with his independent opinions about when Johnson used cocaine and when she used heroin in relation to the time of her death. The Court's opinion in *Bullcoming* did not address this scenario. *Id.* at 2723 (Sotomayor, J., concurring.)

¶ 38 For the foregoing reasons, the judgment of the circuit court of McHenry County is affirmed.

¶ 39 Affirmed.