No. 12-1809

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

United States of America, Plaintiff-Appellee, v. Maurice L. Maxwell, Defendant-Appellant.	Appeal from the United States District Court for the Western District of Wisconsin Case No. 11-CR-25-WMC The Honorable Chief Judge William M. Conley

BRIEF AND REQUIRED SHORT APPENDIX OF DEFENDANT-APPELLANT MAURICE L. MAXWELL

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DISCLOSURE STATEMENT

I, the undersigned counsel for the Plaintiff-Appellant, Maurice L. Maxwell, furnish the following list in compliance with Fed. R. App. P. 26.1 and Cir. R. 26.1:

1. The full name of every party or amicus the attorney represents in the case: Maurice L. Maxwell

2. Said party is not a corporation.

3. The names of all law firms whose partners or associates are expected to appear for the party before this Court:

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JURISDICTIONAL STATEMENT

The United States District Court for the Western District of Wisconsin had jurisdiction over Maurice L. Maxwell's prosecution pursuant to 18 U.S.C. § 3231, which states that "[t]he district courts of the United States shall have original jurisdiction . . . of all offenses against the laws of the United States." This jurisdiction was based on a one-count indictment charging Maxwell with a violation of 21 U.S.C. § 841(a)(1). (App. at 26a.)[1]

The government indicted Maxwell on March 2, 2011, and he was eventually tried before a jury. (App. at 26a.) After a two-day trial, the jury returned a verdict of guilty on December 6, 2011. (App. at 27a.) Maxwell filed a motion for acquittal and new trial, which the district court denied. (App. at 17a; R. 112.)

The district court entered judgment on the verdict on March 22, 2012, and sentenced Maxwell to 144 months in prison followed by five years of supervised release with credit for time served and to run concurrently with his state sentence. (App. at 1a–3a.) Maxwell filed a timely notice of appeal on April 4, 2012. (R. 131.) This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291, which grants jurisdiction over "all final decisions of the district courts of the United States" to its courts of appeals.

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[1] References to material in the Appendices are denoted as (App. at __). References to the Record are denoted with the appropriate docket number as (R. __).

STATEMENT OF THE ISSUES

1. Whether the government waived a possible forfeiture defense in opposing the defendant's motion for acquittal or a new trial when it addressed the defendant's arguments on the merits, never objected to the timeliness of the defendant's claim, and deliberately declined to ask for plain-error review.

2. Whether the district court erred in overlooking the government's waiver and *sua sponte* applying a plain-error standard of review to deny the defendant's motion for acquittal or a new trial.

3. Whether, under the Sixth Amendment's Confrontation Clause, the district court erred in admitting the testimony of a witness who testified about forensic laboratory analysis that she did not conduct.

4. Whether the defendant is entitled to resentencing under the Fair Sentencing Act of 2010 following the Supreme Court's decision in *Dorsey v. United States*.

STATEMENT OF THE CASE

Defendant-Appellant Maurice L. Maxwell respectfully appeals his conviction for possession with intent to distribute five grams or more of a mixture containing cocaine base (specifically, crack cocaine) in violation of 21 U.S.C. § 841(a)(1). A federal grand jury from the Western District of Wisconsin returned the single-count indictment against Maxwell on March 2, 2011. (App. at 26a.) Wisconsin state police had arrested Maxwell on July 29, 2010, after executing a series of controlled drug buys from him; state prosecutors later dropped all charges against Maxwell, leaving only the federal charge stemming from the substance that Maxwell was carrying when he was arrested. (R.40-1; R.40-2; R. 78 at 1; R. 111 at 8; R. 148 at 11–12.)

Over several months of pre-trial proceedings before a magistrate judge, Maxwell terminated three court-appointed lawyers in succession and eventually proceeded to trial pro se with the third attorney as standby counsel. (R. 45.) Following a two-day trial held December 5–6, 2011, a jury found Maxwell guilty and, in a special verdict, found that he possessed more than five grams of crack cocaine. (App. at 27a.) Following the verdict, the district court appointed Maxwell's standby counsel to represent him in post-trial briefing. (R. 106.)

On December 19, 2011, Maxwell moved for acquittal or, in the alternative, a new trial, arguing that prosecutors violated his Sixth Amendment right of confrontation by putting on the stand a lab analyst who did not personally analyze the substance that Maxwell was carrying. (R. 112.) At the February 29, 2012 sentencing hearing, the district court heard argument on Maxwell's motion, which had been fully briefed

by both parties. Without ruling on the motion, (R. 136 at 36–39), the district court entered judgment on March 22, 2012, sentencing Maxwell to twelve years' imprisonment followed by five years of supervised release, with credit for time served (nineteen months) and to run concurrently with his state sentence. (App. at 1a–3a.) Five days after entering judgment, the district court issued a written opinion denying Maxwell's motion for acquittal or a new trial. (App. at 7a–17a.) Maxwell filed a timely notice of appeal on April 4, 2012. (R. 131.)

STATEMENT OF THE FACTS

Arrest and pre-trial events

In July 2010, Defendant-Appellant Maurice L. Maxwell, a recovering drug addict, had been living and working at a manufacturing company in Eau Claire, Wisconsin for nearly a year. (R. 94 at 1–3, 7; R. 111 at 39, 45.) On July 12, a confidential informant alerted police that Maxwell was allegedly using drugs again. Members of the Eau Claire County Sheriff's Department who served on the West Central Drug Task Force sprang into action; under Task Force supervision, the informant executed two controlled buys from Maxwell, purchasing 2.9 grams of crack on July 14 and 2.8 grams of cocaine and five ecstasy pills on July 20. (R. 40-1; R. 40-2.) On July 29, Task Force officers arrested Maxwell at work and raided two apartments where Maxwell had been living. (R. 40-3; R. 111 at 8.)

Arresting officer Jeff Wilson found two straws and a bag hidden in Maxwell's underwear. (App. at 28a–30a, 35a.) The bag contained an off-white substance, most of it loose within the bag but some of it in four smaller "baggie corners." (App. at 31a–33a.) Wilson "field tested" and weighed the substance and concluded that it was 13 grams of what he believed to be crack cocaine. (App. at 34a–35a.) (The substance actually weighed 10.26 grams, not 13 grams. (R. 116 at 4.)) Wilson entered the bag into evidence at the Eau Claire Police Department, (App. at 34a), and another officer submitted it to the Wisconsin State Crime Laboratory for further testing, (R. 111 at 91–92).

After initially charging Maxwell with various offenses stemming from the controlled buys and subsequent arrest, state prosecutors eventually dropped all charges. (R. 78 at 1; R. 148 at 11–12.) A federal grand jury in the Western District of Wisconsin later indicted Maxwell on a single count of "knowingly and intentionally possess[ing] with the intent to distribute five grams or more of a mixture or substance containing cocaine base" in violation of 21 U.S.C. § 841(a)(1), based on the substance he was carrying when arrested. (App. at 26a.) Meanwhile, because of disagreements over trial strategy with his appointed counsel, Maxwell proceeded to trial pro se (with an appointed lawyer as standby counsel). (R. 45.)

Maxwell's trial and post-trial motions

Maxwell's indictment specifically identified cocaine base (that is, crack) as an element of the charge and the government sought to prove this fact by presenting forensic laboratory results. John Nied of the Wisconsin State Crime Laboratory analyzed the substance that Wilson seized from Maxwell. (App. at 44a.) But Nied, who had since retired from the laboratory, never testified at trial. Instead, the government called Michelle Gee, a co-worker, to testify as a surrogate. Gee had not personally analyzed the substance, but she concluded that it contained cocaine base adulterated with levamisole based on her independent review of Nied's testing data. (App. at 43a–44a, 46a–48a.) Having listed Gee as an expert witness in pre-trial disclosures, (R. 48 at 1), the government on direct examination solicited her opinion based on Nied's data without admitting the data itself into evidence. The jury (which was never given a limiting instruction regarding Gee's testimony, *see* (R. 101 at 1–2)) found Maxwell guilty and the district court reappointed Maxwell's standby

counsel to represent him for post-trial briefing and sentencing. (App. at 27a; R. 106.)

After trial, Maxwell moved for acquittal or, alternatively, a new trial because Gee's testimony violated his Sixth Amendment right of confrontation. (R. 112.) Although Maxwell did not contemporaneously object to Gee's testimony, the government did not mention this in its twenty-page brief. (R. 115.) Instead, the government addressed the Confrontation Clause issue on the merits, largely borrowing from the Solicitor General's arguments in *Williams v. Illinois*, 132 S. Ct. 2221 (2012), which was then still pending before the United States Supreme Court. (R. 115 at 4–19 & n.3.) At the sentencing hearing, the district court asked why the government did not argue for the plain-error review that would normally apply to a forfeited issue:

> THE COURT: Or you didn't raise plain error because [you copied your brief from] the brief made to the United States Supreme Court where plain error wasn't being addressed?
>
> [UNITED STATES]: No. *I thought about plain error*, . . . [but] I couldn't find a case that applied plain error to [a post-trial motion] and that is why I did not make a plain error argument.

(App. at 51a–52a) (emphasis added). Despite the government's omission, the district court *sua sponte* invoked plain-error review to deny Maxwell's motion. (App. at 14a–17a, 50a–52a.)

Predicting that, based on "the tenor of recent oral argument," the United States Supreme Court was likely to reverse the conviction in *Williams*, the district court nevertheless did not feel "free to ignore still binding Seventh Circuit precedent approving the admission of similar expert testimony." (App. at 8a–9a, 12a–14a.) As

a result, the court found that "the admissibility of Gee's testimony was not even error, much less error that was 'clear and obvious' at the time admitted." (App. at 14a.) The court further found that, under plain-error review, Maxwell could not meet his burden to show that Gee's testimony violated his "substantial rights" because "the identity of the substance discovered on Maxwell's person was never a disputed issue at trial." (App. at 16a–17a.)

To support this conclusion, the court said that Maxwell "strategically concentrated his efforts on showing that he lacked the intent to *distribute* the drugs in his possession." (App. at 15a–16a) (emphasis in original). Maxwell did not testify, but in his closing argument he claimed that he was a heavy user and "functional" addict who could consume thirteen grams of cocaine himself. (R. 146 at 37, 43–44.) He further said in closing argument that he "was in possession of crack cocaine and I'm not denyin[g] that. But the government didn't have one person, one witness . . . to testify and say that I sold these drugs." (R. 146 at 40.) In rebuttal, the government's attorney reiterated to the jury that "even though the defendant is acting as his own attorney, nothing that he stood up here and said to you, other than what came out of the mouths of someone sitting in that chair or that you physically saw, is evidence." (R. 146 at 57.)

The district court also denied Maxwell's motion because arresting officer Jeff Wilson "independently established Maxwell's possession of crack cocaine." (App. at 17a.) At trial, Wilson said that his "field test" was positive for cocaine. (App. at 34a–35a.) When the government suggested that he meant crack, not cocaine, Wilson

agreed, although he did not clarify whether he relied on the field test or whether he relied on his own observation of the substance's "rocky form as opposed to a powder form or a compressed form." (App. at 30a, 34a–35a); *see also* (App. at 53a) (government attorney saying that Wilson relied on his visual observation, not the field test, to establish that it was crack). DEA Agent Craig Grywalsky also testified that, based on his visual observation, the substance "appears to be what appears like crack." (R. 111 at 110.) Neither Wilson nor any other witness testified about the field test's capabilities or reliability.

Although the court denied Maxwell's motion under plain-error review, it said in a footnote that it "would engage in a similar analysis, and come to the same conclusion" were it to evaluate Maxwell's claim under "the standard set forth in Fed. R. Crim. P. 33(a), which allows for a new trial where there exists 'a reasonable probability that a trial error had a prejudicial effect upon the jury's verdict.'" (App. at 14a n.4.)

Sentencing

The district court sentenced Maxwell to twelve years' imprisonment followed by five years' supervised release. (App. at 2a–3a.) Maxwell's July 29, 2010 arrest came five days before the Fair Sentencing Act of 2010 (the "FSA"), Pub. L. 111-120, 124 Stat. 2372, took effect on August 3. The FSA, which aimed to lessen the disparities in sentencing between crack and powder cocaine, eliminated the mandatory five-year minimum sentence for simple possession of crack, *see* FSA § 3 (amending 21 U.S.C. § 844(a)), and also effectively lowered the mandatory minimums for other

crack-related offenses by increasing the amount of crack needed to trigger those minimums, *see* FSA § 2 (amending 21 U.S.C. § 841(b)(1)).

At the time of Maxwell's trial and sentencing, the Seventh Circuit did not apply the FSA retroactively to defendants arrested before August 3, 2010. *See United States v. Fisher*, 635 F.3d 336 (7th Cir. 2011), *vacated and remanded sub nom. Dorsey v. United States*, 132 S. Ct. 2321 (2012). Consistent with circuit precedent, the district court sentenced Maxwell under the old statute. Subsequently, the United States Supreme Court held that the FSA applies retroactively to all sentences imposed after August 3, 2010, even if the underlying crime predated the FSA's enactment. *See Dorsey v. United States*, 132 S. Ct. 2321, 2335 (2012).

As summarized in the chart below, under pre-FSA law, someone convicted of possessing 13 grams of crack, such as Maxwell, would be sentenced under 21 U.S.C. § 841(b)(1)(B), which provides for a statutory range of 5–40 years. (Although Maxwell has a prior felony drug conviction, (R. 136 at 5), and thus could have been subject to a higher statutory range, the government never filed the pre-trial information required by 21 U.S.C. § 851 to seek this increased penalty). Under the FSA, someone convicted of this level of possession is sentenced under § 841(b)(1)(C), which provides for a statutory range of 0–20 years.

Relevant sentencing ranges applicable to Maxwell

	Statutory section applicable to possession of 13 grams	Statutory sentencing range (years)	Relevant Guidelines range (months)	Minimum supervised release (years)
Pre-FSA	§ 841(b)(1)(B) (5–50 grams)	5–40	262–327	4
Post-FSA	§ 841(b)(1)(C) (0–28 grams)	0–20	210–240	3

The district court sentenced Maxwell under the pre-FSA law, assuming a statutory range of 5–40 years. (R. 116 at 23; R. 136 at 6.) Because Maxwell had at least two qualifying offenses, the court sentenced him as a career offender. Using the Career Offender table in U.S. Sentencing Guidelines Manual § 4B1.1(b) (Nov. 2011), the court determined that the 40-year statutory maximum resulted in an Offense Level of 34. (R. 136 at 6.) Combined with Maxwell's Criminal History Category, this Offense Level leads to a suggested Guidelines range of 262–327 months. (R. 116 at 23; R. 136 at 7.) The court ultimately imposed a below-Guidelines sentence of 144 months. (App. at 2a.)

Under the FSA, a career offender convicted of possessing 13 grams of crack cocaine would be subject to a statutory range of 0–20 years and a corresponding Offense Level of 32. *See* USSG § 4B1.1(b)(3). For Maxwell, this leads to a suggested Guidelines range of 210–262 months, *see* Sentencing Table, USSG § 5A, although the upper end would be truncated at 240 months because of the 20-year statutory maximum.

SUMMARY OF THE ARGUMENT

The district court made two errors in denying Maxwell's motion for acquittal or a new trial, each of which independently warrants reversal. In addition, Maxwell is entitled to resentencing under *Dorsey v. United States*, 132 S. Ct. 2321 (2012).

First, the district court erred in *sua sponte* invoking and applying a plain-error standard of review to deny Maxwell's motion. Although Maxwell did not contemporaneously object to Gee's testimony, the government filed a response brief opposing Maxwell's motion that solely addressed the merits of his claim. Never once did the government raise the timeliness of Maxwell's objection, invoke a forfeiture defense, or ask for a plain-error standard of review. In addition, the government explicitly acknowledged to the court that it deliberately chose not to ask for plain-error review. That was a waiver, and the district court lacked the authority to overlook it. Instead, it should have reviewed Maxwell's motion de novo and on the merits, without the screen of plain error.

Second, the district court erred in denying Maxwell's motion on the grounds that Gee's testimony did not violate the Confrontation Clause. Five Justices in *Williams v. Illinois*, 132 S. Ct. 2221 (2012), unequivocally said that testimonial hearsay cannot be effectively introduced at trial through the back door of expert testimony. The forensic analysis here is testimonial and Gee's testimony thus violated the Confrontation Clause. This violation was not harmless because Gee's testimony affected the jury's ability to evaluate fairly the remaining evidence, none of which

objectively established an essential element of the indictment: that Maxwell indeed possessed crack.

Finally, Maxwell is entitled to resentencing under *Dorsey* because the district court sentenced Maxwell against the backdrop of what are now incorrect statutory and Guidelines ranges. At the time of his sentencing, Maxwell was subject to a statutory range of 5–40 years and a Guidelines range of 262–327 months. After the district court sentenced Maxwell, the United States Supreme Court held in *Dorsey* that the Fair Sentencing Act's modified crack-cocaine quantities apply retroactively to all sentences imposed after the Act's enactment. 132 S. Ct. at 2335. As a result, Maxwell is now subject to a statutory range of 0–20 years and a Guidelines range of 210–240 months. The use of an incorrect Guidelines range constitutes plain error and so Maxwell is entitled to resentencing.

ARGUMENT

I. The district court's *sua sponte* application of plain-error review warrants reversal

In denying Maxwell's motion for acquittal or, alternatively, a new trial, the district court reviewed Maxwell's Confrontation Clause challenge for plain error because it thought that Maxwell had forfeited the issue. But the government waived any forfeiture defense by choosing to address Maxwell's challenge on the merits, and the district court wrongly ignored that waiver. Accordingly, this Court should reverse the district court's denial of Maxwell's motion. Whether the district court applied the wrong legal standard (here, plain error) to resolve Maxwell's motion is a pure question of law that this Court reviews de novo. *United States v. Van Eyl*, 468 F.3d 428, 436 (7th Cir. 2006); *United States v. Aldaco*, 201 F.3d 979, 987 (7th Cir. 2000).

A. The government waived its forfeiture defense by choosing to address Maxwell's claim on the merits

The government waived its forfeiture defense when it knowingly decided not to raise it in its brief opposing Maxwell's motion for a new trial. This Court has long recognized that the government can forfeit or waive a forfeiture defense. *See, e.g.*, *United States v. Blagojevich*, 612 F.3d 558, 560 (7th Cir. 2010) ("[T]he United States forfeited the benefit of appellants' forfeiture. . . . The possibility of forfeiture thus has been waived, and as the subject is not jurisdictional the prosecutor's waiver is conclusive."); *United States v. Paredes*, 87 F.3d 921, 924 (7th Cir. 1996) ("However, because the government failed to assert that Paredes forfeited her objection to the

alleged error, the government has waived Paredes's forfeiture, and we will review the alleged error as if she had made a proper objection."). In those instances, this Court then "assess[es] the defendant['s] argument on the merits 'without the screen of the plain error standard.'" *United States v. Johnson*, 26 F.3d 669, 679 (7th Cir. 1994) (quoting *United States v. Leichtnam*, 948 F.2d 370, 375 (7th Cir. 1991)); *accord United States v. Cotnam*, 88 F.3d 487, 498 n.12 (7th Cir. 1996) ("[T]he government has not argued for the plain error standard of review. Thus the government has waived the right to invoke this standard[.]").

Maxwell's motion raised a single argument: that Gee's testimony violated his right of confrontation. (R. 112.) In response, the government filed a brief fully devoted to disputing the merits of the Confrontation Clause argument. (R. 115.) Nowhere in its twenty-page brief did the government argue that Maxwell forfeited his challenge, or that his objection was untimely, or that a plain-error standard of review should apply. In fact, the government considered but then deliberately declined to make a plain-error argument. (App. at 14a n.4, 52a.) That is a waiver. *See United States v. Staples*, 202 F.3d 992, 995 (7th Cir. 2000) (stating that while "forfeiture comes about through neglect," "waiver is accomplished by intent"); *United States v. Rodriguez*, 888 F.2d 519, 524 (7th Cir. 1989) (holding that the government had already waived a waiver defense before oral argument by "meet[ing] the argument on the merits" with no mention of the defendant's waiver in its response brief); *see also United States v. Westbrook*, 125 F.3d 996, 1005 (7th

Cir. 1997) ("[B]ecause the government did not raise the defense of waiver, it has waived the waiver and we shall address the issue.").

When the district court heard argument on Maxwell's new-trial motion, the government confirmed its opinion that "plain error is not at work" and that the government "thought about plain error" but chose not to raise it. (App. 51a–52a.) Not surprisingly, the government agreed with the district court that it would have preferred plain-error review, (App. at 51a–52a), but it was too late: the government had already waived its forfeiture defense by failing to raise it in its response brief. *See Rodriguez*, 888 F.2d at 524 (holding that the government could not raise a waiver defense at oral argument because that defense had been waived in its response brief); *see also Ryan v. United States*, 688 F.3d 845, 848 (7th Cir. 2012) ("[A] mistake in reaching a decision to withhold a known defense does not make that decision less a waiver.").

B. The district court lacked the authority to overlook the government's waiver

Overlooking a government waiver constitutes reversible error. *Wood v. Milyard*, 132 S. Ct. 1826, 1835 (2012). Although a *forfeited* defense may be raised *sua sponte* if "extraordinary circumstances so warrant," federal courts may not resurrect *waived* ones. *Id.* at 1832–33 & n.5, 1835; *see also Ryan*, 688 F.3d at 848 ("The opinion in *Wood* articulates several conclusions[, including] that the power to decide an appeal on a forfeited ground should be used only in exceptional cases; and . . . that a prosecutor's considered decision to refrain from raising a known procedural issue is waiver.").

In our adversary system, a court must give effect to the knowing decision of a party to waive a non-jurisdictional defense. *See Wood*, 132 S. Ct. at 1833 ("[A] federal court does not have *carte blanche* to depart from the principle of party presentation basic to our adversary system."); *United States v. Richardson*, 238 F.3d 837, 841 (7th Cir. 2001) ("The distinction between waiver and forfeiture is important to the operation of an adversary system . . . . It is one thing to require judges to be alert to oversights that may affect substantial rights, and another to require them to override the clearly expressed wish of a party or his lawyer . . . not to invoke a particular right.").

Consistent with *Wood*, this Court has long held that a "[w]aiver extinguishes any error and precludes appellate review." *United States v. Jacques*, 345 F.3d 960, 962 (7th Cir. 2003). Here, the "error" was that Maxwell did not contemporaneously object to Gee's testimony, thereby subjecting him to plain-error review; the government's waiver then extinguished that error and thus precluded the district court from applying the plain-error standard. Accordingly, the district court should have "review[ed] the alleged [Confrontation Clause violation] as if [Maxwell] had made a proper objection" at trial. *United States v. Paredes*, 87 F.3d at 924. And the government's waiver remains operational in this Court, too. *See Wood*, 132 S. Ct. at 1834–35 (holding that a defense waived before the district court could not provide the basis for the decision on appeal); *cf. United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991) (reasoning that "claims of waiver that had been forfeited in the Supreme Court" could not be revived on remand). The contrary position would

require courts and parties to argue an issue on the merits until the government decides to pull out the trump card of a defendant's prior forfeiture or waiver.

II. This Court should grant Maxwell's Motion for Acquittal or a New Trial because Michelle Gee's testimony violated the Confrontation Clause

Five Justices in *Williams v. Illinois*, 132 S. Ct. 2221 (2012), unequivocally said that expert testimony (such as Michelle Gee's) based on someone else's testimonial statements (such as John Nied's) runs afoul of the Confrontation Clause. Because the government's waiver acted to preserve Maxwell's Confrontation Clause challenge to Gee's testimony, this Court reviews the issue de novo. *See United States v. Burgos*, 539 F.3d 641, 643 (7th Cir. 2008) ("We review evidentiary rulings implicating a defendant's Sixth Amendment right to confrontation de novo.").

A. Under *Williams v. Illinois*, an expert may not discuss testimonial hearsay

The Sixth Amendment's Confrontation Clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. For that reason, "[t]estimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine." *Crawford v. Washington*, 541 U.S. 36, 59 (2004) (abrogating *Ohio v. Roberts*, 448 U.S. 56, 66 (1980), which allowed confrontation-free evidence as long as it bore sufficient "indicia of reliability"); *accord Jones v. Basinger*, 635 F.3d 1030, 1041 (7th Cir. 2011). Here, Nied's forensic analysis is testimonial and thus within

the Confrontation Clause's scope. Accordingly, Gee's testimony falls within the proscription on expert testimony endorsed by five Justices in *Williams*.

Nied's forensic analysis is testimonial because its "primary purpose" was evidentiary, to be used against a defendant in a criminal trial. *See Davis v. Washington*, 547 U.S. 813, 822 (2006). At a minimum, a statement is "testimonial" if its "primary purpose . . . is to establish or prove past events potentially relevant to later criminal prosecution." *Id.* Such statements are not limited to verbal utterances; forensic analysis results also fall within the "core class of testimonial statements" covered by the Confrontation Clause. *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 310 (2009). One reason is that forensic analysis provides evidence "*against* [the defendant], proving one fact necessary for his conviction—[for example,] that the substance he possessed was cocaine." *Id.* at 313 (emphasis in original). What is more, conducting and analyzing forensic tests "requires the exercise of judgment and presents a risk of error that might be explored on cross-examination." *Id.* at 320. That is why the person who performs the analysis must testify at trial. "Confrontation is one means of assuring accurate forensic analysis" and "is designed to weed out not only the fraudulent analyst, but the incompetent one as well." *Id.* at 318–19.

Just as in *Melendez-Diaz*, Nied's forensic analysis identified the substance seized from the defendant as crack. *Id.* at 310. And unlike in *Williams*, where a DNA profile was created "to catch a dangerous rapist who was still at large, not to obtain evidence for use against petitioner," 132 S. Ct. at 2243 (plurality opinion of Alito,

J.), the forensic analysis here was "prepared specifically for use at [Maxwell's] trial," *Melendez-Diaz*, 557 U.S. at 324. Indeed, every single page of the transmittal report accompanying the sample is captioned with the footnote "U.S. v. Maurice L. Maxwell." (App. at 58a–60a.) And unlike the non-testimonial DNA profile in *Williams*, Nied's forensic analysis, like that in *Melendez-Diaz*, had "the primary purpose of accusing a targeted individual of engaging in criminal conduct"—which even the *Williams* plurality conceded is sufficient to meet the testimonial requirements. 132 S. Ct. at 2242–43 (opinion of Alito, J.); *id.* at 2251 (Breyer, J., concurring).

Under these circumstances, Gee's testimony violated Maxwell's confrontation rights because prosecutors may not introduce inadmissible testimonial evidence through the back door of expert testimony. Confrontation is a strict requirement; even a knowledgeable co-worker's "surrogate testimony" is unacceptable no matter how "fair enough [an] opportunity" it provides the defendant for cross-examination. *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2714, 2716 (2011). Furthermore, five Justices in *Williams* agreed that experts may not testify about testimonial evidence (including forensic analysis data) that someone else created.

In *Williams*, police sent a rape victim's vaginal swab to Cellmark, an external forensics laboratory, which then prepared a male DNA profile based on semen that was on the swab. 132 S. Ct. at 2229 (opinion of Alito, J.). Police then computer-matched the DNA profile to the defendant's DNA profile, which police had taken when he was arrested on unrelated charges. *Id.* Nobody from Cellmark testified at

the defendant's bench trial; instead, an expert witness testified that the two profiles matched. *Id.* at 2229–31. A four-Justice plurality said that this alone does not violate the Confrontation Clause because the Cellmark report was not offered for the truth of the matter asserted. Justice Thomas concurred only in the judgment and agreed that there was no Confrontation Clause violation—but "solely because Cellmark's statements lacked the requisite 'formality and solemnity' to be considered 'testimonial' for purposes of the Confrontation Clause." *Id.* at 2255 (Thomas, J., concurring in the judgment).

Importantly, Justice Thomas explicitly "share[d] the dissent's view of the plurality's flawed analysis" of whether experts may testify about someone else's testimonial evidence. *Id.* Those four dissenting Justices called *Williams* "an open-and-shut case." *Id.* at 2265 (Kagan, J., dissenting). As Justice Kagan lamented: "Have we not already decided this case? Lambatos's testimony is functionally identical to the 'surrogate testimony' that New Mexico proffered in *Bullcoming*, which did nothing to cure the problem identified in *Melendez-Diaz* (which, for its part, straightforwardly applied our decision in *Crawford*)." *Id.* at 2267.

The reasons were straightforward. For example, Williams "could not ask questions about th[e] analyst's 'proficiency, the care he took in performing his work, and his veracity.'" *Id.* (quoting *Bullcoming*, 131 S. Ct. at 2715 n.7). Nor could he "probe whether the analyst had tested the wrong vial, inverted the labels on the samples, committed some more technical error, or simply made up the results." *Id.* In the four dissenters' view—shared by Justice Thomas—"the State c[an]not rely on

[the witness's] status as an expert to circumvent the Confrontation Clause's requirements." *Id.* at 2268. Indeed, "in all except its disposition, [the plurality] opinion is a dissent: Five Justices specifically reject every aspect of its reasoning and every paragraph of its explication." *Id.* at 2265.

Substitute "Maxwell" for "Williams" and the case is nearly indistinguishable. Maxwell, too, could not question Nied about his proficiency, care, or veracity. Nor could he probe Nied's methodology or possible animus. True, Gee actually worked at the same laboratory as Nied and was familiar with its procedures, unlike the expert in *Williams*. But that is of no moment—the analyst in *Bullcoming* also worked at the same laboratory, and that did "nothing to cure" the Confrontation Clause violation there. *See Bullcoming*, 131 S. Ct. at 2716. As the Supreme Court has said, "the Clause does not tolerate dispensing with confrontation simply because the court believes that questioning one witness about another's testimonial statements provides a fair enough opportunity for cross-examination." *Id.* That holds particular force where a jury, not a judge, is the fact-finder, as even the *Williams* plurality conceded. *See Williams*, 132 S. Ct. at 2242 n.11 (opinion of Alito, J.).

B. The Confrontation Clause error was not harmless

The government cannot meet its burden to prove beyond a reasonable doubt that violating Maxwell's confrontation rights was harmless. In fact, reversal is warranted whether or not the error was harmless. That is because in addition to waiving plain error, the government forfeited harmless error as well—and a court may overlook a government forfeiture only under "extraordinary circumstances."

See Wood v. Milyard, 132 S. Ct. 1826, 1833 (2012). That said, Maxwell recognizes that this Court has loosely construed that test as applied to the government's forfeiture of harmless error. *See United States v. Ford*, 683 F.3d 761 (7th Cir. 2012), *reh'g denied*, No. 11-2034 (7th Cir. Sept. 21, 2012) (cert. pet. due Dec. 20, 2012). *But see Wood*, 132 S. Ct. at 1836 (Thomas, J., concurring in the judgment) (stating that "there is no principled reason to distinguish between forfeited and waived" defenses). In any case, even if harmless error applies, the government cannot prove harmlessness because Gee's testimony contributed to Maxwell's conviction and had a prejudicial effect on the jury's ability to evaluate fairly the remaining evidence.

This Court reviews Confrontation Clause violations for harmless error, *United States v. Walker*, 673 F.3d 649, 658 (7th Cir. 2012), and the government bears the burden of proving harmlessness beyond a reasonable doubt, *Arizona v. Fulminante*, 499 U.S. 279, 296 (1991); *Chapman v. California*, 386 U.S. 18, 24 (1967). This is a difficult burden that requires the government to do more than simply point to the legal sufficiency of the remaining evidence. *Jones v. Basinger*, 635 F.3d 1030, 1053 (7th Cir. 2011) (holding that courts must not "simply imagine[] what the record would have shown without [the offending] statement and ask[] whether the remaining evidence was legally sufficient to sustain a finding of guilt").

Instead, the government must prove beyond a reasonable doubt that the offending testimony did *not* have a substantial influence on the jury, *id.*, or that there is *no* "reasonable possibility that the evidence complained of might have contributed to the conviction," *Chapman*, 386 U.S. at 23 (internal quotation marks

omitted) (quoting *Fahy v. Connecticut*, 375 U.S. 85, 86–87 (1963)). Factors relevant to evaluating whether the government has met its burden include "the importance of the witness's testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of corroborating or contradictory evidence and the overall strength of the prosecution's case." *United States v. Martin*, 618 F.3d 705, 730 (7th Cir. 2010) (internal quotation marks omitted).

Gee's testimony undoubtedly contributed to Maxwell's conviction and had a substantial influence on the jury. Maxwell's indictment explicitly charged him with possessing crack, (App. at 26a), and the government was thus obliged to prove beyond a reasonable doubt that Maxwell indeed possessed crack, not merely cocaine. That is why Gee's testimony was so important to the government's case: she provided the only objective and direct scientific evidence that Maxwell had crack. What is more, the jury was asked to find by special verdict that Maxwell possessed a substance containing crack, (App. at 27a), further underscoring Gee's contribution to the eventual verdict. *See United States v. Taylor*, 471 F.3d 832, 842 (7th Cir. 2006) (vacating the defendant's sentence under plain-error review, not merely harmless-error review, where testimony violating the Confrontation Clause established a fact specially found by the jury).

By contrast, arresting officer Jeff Wilson could only offer subjective and indirect testimony that Maxwell had crack (because it looked "rocky"). (App. at 30a.) Wilson testified that his "field test" was positive for cocaine; only after the government prompted him did he opine that Maxwell had crack. (App. at 34a–35a.) In other

words, while his (objective) field test only indicated cocaine, he continued to hold the (subjective) belief that Maxwell had crack. (That, at least, is how the government itself characterized Wilson's testimony. (App. at 53a.)) Nothing in the record lays a foundation that Wilson's field test was reliable or could even distinguish crack from cocaine or other substances.[2] DEA Agent Craig Grywalsky's testimony, based solely on a visual observation, was even less objective or scientific ("It appears to be what appears like crack[.]"). (R. 111 at 110.) In any event, Gee provided the only reliable, direct, and objective scientific testimony in the record that Maxwell possessed crack. That is precisely why her testimony was not cumulative. In short, there is at least "a reasonable *possibility* that [Gee's testimony] *might have* contributed to the conviction." *Chapman*, 386 U.S. at 23 (emphases added).

To be sure, Wilson's subjective and circumstantial testimony might have been legally sufficient to prove that Maxwell had crack. *See United States v. Dominguez*, 992 F.2d 678, 681 (7th Cir. 1993). But contrary to the district court's assertion, that does not mean that the constitutional error is harmless. To so conclude would "ignore[] the significant prejudicial effect the error can have on a jury's ability to

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[2] A U.S. Drug Enforcement Agency publication points out that field test kits suffer from both "false positives" and "false negatives," and that adulterants—including levamisole—can contribute to the tests' inaccuracies. Jim W. McGill et al., *Discovery of an Interesting Temperature Effect on the Sensitivity of the Cobalt Thiocyanate Test for Cocaine*, 6 Microgram Journal, Jan.–June 2008, at 26, 28, *available at* http://www.justice.gov/dea/pr/microgram-journals/2008/journal_v6_num12.pdf; *see also* Yukari Tsumura et al., *False Positives and False Negatives with a Cocaine-Specific Field Test and Modification of Test Protocol to Reduce False Decision*, 155 Forensic Sci. Int'l 158, 164 (2005) (reprinted for this Court's convenience in the Appendix at 62a–68a) (noting various field-test inaccuracies and concluding that "[w]hen a field-test sample is suspected of being cocaine, it should be laboratory tested as soon as possible").

evaluate fairly the remaining evidence." *Jones*, 635 F.3d at 1053. In an age of *CSI* and *NCIS*, Gee's discussion of sophisticated forensic analysis ("gas chromatography," "mass spectrometry," "infrared spectrometry," (App. at 43a)), undoubtedly affected the jury's ability to evaluate fairly Wilson's subjective testimony ("It looks like—similar to a rocky form," (App. at 30a)). And to reiterate, the government, not Maxwell, bears the burden of showing beyond a reasonable doubt that the forensic testimony was not uniquely compelling to the jury—a claim belied by the government's own decision to put Gee on the stand in the first place.

Nor can the government, as did the district court, establish harmlessness by claiming that Maxwell never disputed at trial that the substance was crack. (App. at 16a–17a.) The district court concluded that Maxwell had "strategically concentrated his efforts on showing that he lacked the intent to distribute the drugs in his possession." (App. at 15a) (emphasis omitted). Even if that attribution were true, it did not relieve the prosecution of its burden to produce *evidence* proving beyond a reasonable doubt every element of the crime. *Martin*, 618 F.3d at 730 (stating that harmless-error analysis only looks to "the presence or absence of corroborating or contradictory *evidence*" (emphasis added)). Maxwell's statement during closing arguments that he had crack, (R. 146 at 40), is not evidence—a point the government itself emphasized, (R. 146 at 57) (government's rebuttal argument stating "[t]he Judge instructed you . . . that the lawyers' statements and arguments are not evidence. . . . [E]ven though the defendant is acting as his own attorney,

nothing that he stood up here and said to you, other than what came out of the mouths of someone sitting in that chair or that you physically saw, is evidence.").

And even putting that aside, the government's failure to fulfill its constitutional duty might well have influenced Maxwell's defense. Had the government called Nied to testify, perhaps Maxwell would have chosen to probe the testing procedures more deeply. Or had it decided not to introduce the forensic evidence at all, perhaps Maxwell would have decided to "strategically concentrate[] his efforts on showing that" he did not have crack instead. We will never know, because Maxwell never had the chance to make those decisions. All the more reason why the government cannot prove harmlessness.

Finally, looking only to the sufficiency of the remaining evidence "offers prosecutors no real incentive to comply with the Constitution." *Jones*, 635 F.3d at 1053. Prosecutors called Gee without bothering to explain why or whether Nied, a retiree, was unavailable for cross-examination or to testify. *See Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2714 (2011) ("The State in the instant case never asserted that the analyst who signed the certification, Curtis Caylor, was unavailable. . . . Nor did Bullcoming have an opportunity to cross-examine Caylor."). In fact, this is at least the fourth recent case on appeal in which the Wisconsin State Crime Laboratory has sent a surrogate who did not perform the analysis to testify in a criminal trial. *See United States v. Garvey*, 688 F.3d 881 (7th Cir. 2012); *United States v. Turner*, 591 F.3d 928 (7th Cir. 2010), *cert. granted, vacated, and remanded*, 80 U.S.L.W. 3715 (U.S. June 29, 2012) (No. 09-10231); *State v. Elim*, No.

2011AP2549-CR, 2012 WL 4350040 (Wis. Ct. App. Sept. 25, 2012). The government must respect constitutional limits in its prosecution—and must suffer the consequences when it does not.

III. Maxwell is entitled to resentencing under the Fair Sentencing Act following the Supreme Court's decision in *Dorsey v. United States*

In June 2012, the United States Supreme Court held that the Fair Sentencing Act of 2010 (the "FSA") applies to all sentences imposed after its August 3, 2010 enactment, regardless of when the crime occurred. *Dorsey v. United States*, 132 S. Ct. 2321, 2335 (2012). At the time of Maxwell's sentencing in March 2012, however, this Court had consistently and repeatedly held that district courts must not apply the FSA's more lenient terms when sentencing offenders, such as Maxwell, whose crimes predated the FSA's enactment. *See United States v. Fisher*, 635 F.3d 336, 340 (7th Cir. 2011), *vacated and remanded sub nom. Dorsey*, 132 S. Ct. 2321; *see also United States v. Holcomb*, 657 F.3d 445 (7th Cir. 2011); *United States v. Hill*, 417 F. App'x 560 (7th Cir. 2011), *vacated and remanded sub nom. Dorsey*, 132 S. Ct. 2321; *United States v. Bell*, 624 F.3d 803 (7th Cir. 2010). Accordingly, the district court—correctly, at the time—sentenced Maxwell under the old statute. Because Maxwell's case is still on direct appeal, he is now among a class of defendants who stand to benefit from the holding in *Dorsey*. *United States v. Jackson*, Nos. 11-2617, 11-2619, 2012 WL 2580589, at *1 (7th Cir. July 5, 2012) ("At the time the district court sentenced Jackson, this circuit had held definitively that the Fair Sentencing Act was not retroactive; while Jackson's appeal was pending, *Dorsey* resolved the

question the other way. It is thus plain that Jackson too is entitled to be resentenced under the Fair Sentencing Act.").

Maxwell did not object to the district court's use of the old statute at sentencing and so this Court's review is for plain error. But "when the law was settled in the circuit at the time of the district court's decision, the plain-error standard can be satisfied if the law becomes clear (the other way) on appeal." *Id.* (holding that a defendant who was sentenced under the pre-FSA rules but who failed to raise the issue before the district court was nevertheless entitled to resentencing under the FSA). Such is the case here.

The district court sentenced Maxwell under 21 U.S.C. § 841(b)(1)(B), which, prior to the FSA, applied to crack quantities exceeding 5 grams. Section 841(b)(1)(B) provides for a statutory range of 5–40 years, which in turn led the district court to compute a corresponding career-offender Guidelines range of 262–327 months. (R. 136 at 6–7.) Under the FSA, Maxwell is subject to the 0–20 year statutory range contained in § 841(b)(1)(C) (which now applies to crack quantities less than 28 grams), with a corresponding career-offender Guidelines range of 210–240 months (truncated from the Sentencing Table's range of 210–262 months because of the 20-year statutory maximum, *see* USSG § 5G1.1(c)(1)). To repeat: The district court sentenced Maxwell assuming a 5–40-year statutory range and a 262–327-month Guidelines range; post-*Dorsey*, Maxwell is actually subject to a 0–20-year statutory range and a 210–240-month Guidelines range.

This Court has "repeatedly held that a sentencing based on an incorrect Guidelines range constitutes plain error and warrants remand for resentencing." *United States v. Martin*, 692 F.3d 760, 766 (7th Cir. 2012) (internal quotation marks omitted) (citing *United States v. Pineda-Buenaventura*, 622 F.3d 761, 767 (7th Cir. 2010), *United States v. Farmer*, 543 F.3d 363, 375 (7th Cir. 2008), and *United States v. Garrett*, 528 F.3d 525, 527 (7th Cir. 2008)). This is true even when a court happens to select a sentence that is consistent with the correct range because there is "no reason to believe that the district court would not have selected an even lower sentence if given the opportunity to do so." *Farmer*, 543 F.3d at 375. Only if the incorrect range "*in no way* affect[s] the district court's selection of a particular sentence" may a sentence be upheld. *Pineda-Buenaventura*, 622 F.3d at 767 (emphasis added).

Although Maxwell ultimately received a below-Guidelines sentence of 144 months, the record does not show that the (now) incorrect Guidelines range "in no way affected the district court's selection" of Maxwell's sentence. *Pineda-Buenaventura*, 622 F.3d at 767. In sentencing Maxwell to twelve years in prison, the court said that it had "tak[en] into consideration the nature of the offenses as well as the defendant's personal history and characteristics." (App. at 20a.) The court went on to state that the sentence would "achieve parity with the sentences of similarly-situated offenders." (App. at 20a.) But both the "nature" of the offense and the selection of "similarly-situated offenders" with whom to compare Maxwell may well have been influenced by the higher Guidelines or statutory ranges. Certainly

the court never "firmly indicated" or "explicitly stated" that it would have arrived at the same twelve-year sentence had it understood Maxwell's crime to be one that carried no minimum sentence at all. *United States v. Foster*, No. 11-3097, 2012 WL 5935388, at *13 (7th Cir. Nov. 28, 2012). The district court might well have "selected an even lower sentence if given the opportunity to do so." *Farmer*, 543 F.3d at 375.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests that this Court reverse the district court and either grant Maxwell's motion for acquittal or a new trial or remand for further proceedings.

Respectfully submitted,

Maurice L. Maxwell
Defendant-Appellant

By: /s/ Sarah O'Rourke Schrup
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No. 12-1809

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

United States of America, Plaintiff-Appellee, v. Maurice L. Maxwell, Defendant-Appellant.	Appeal from the United States District Court for the Western District of Wisconsin Case No. 11-CR-25-WMC The Honorable Chief Judge William M. Conley

CERTIFICATE OF COMPLIANCE WITH
FEDERAL RULE OF APPELLATE PROCEDURE 32(a)(7)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(b) because this brief contains 7,725 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in 12-point Century Schoolbook font with footnotes in 11-point Century Schoolbook font.

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Dated: December 14, 2012

CERTIFICATE OF SERVICE

I, the undersigned, counsel for the Defendant-Appellant, Maurice L. Maxwell, hereby certify that I electronically filed this brief and appendix with the clerk of the Seventh Circuit Court of Appeals on December 14, 2012, which will send notice of the filing to counsel of record.

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Dated: December 14, 2012

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CIRCUIT RULE 30(d) STATEMENT

I, the undersigned, counsel for the Defendant-Appellant, Maurice L. Maxwell, hereby state that all of the materials required by Circuit Rules 30(a), 30(b), and 30(d) are included in the Appendix to this brief.

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Dated: December 14, 2012

No. 12-1809

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

United States of America, Plaintiff-Appellee, v. Maurice L. Maxwell, Defendant-Appellant.	Appeal from the United States District Court for the Western District of Wisconsin Case No. 11-CR-25-WMC The Honorable Chief Judge William M. Conley

REQUIRED RULE 30(a) SHORT APPENDIX OF DEFENDANT-APPELLANT MAURICE L. MAXWELL

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Counsel for Defendant-Appellant
Maurice L. Maxwell

RULE 30(A) APPENDIX TABLE OF CONTENTS

United States District Court

Western District of Wisconsin

UNITED STATES OF AMERICA

V.

MAURICE L. MAXWELL

JUDGMENT IN A CRIMINAL CASE
(for offenses committed on or after November 1, 1987)

Case Number: 11-CR-25-WMC-01

Defendant's Attorney: Robert Ruth

The defendant, Maurice L. Maxwell, was found guilty on count 1 of the indictment.

ACCORDINGLY, the court has adjudicated defendant guilty of the following offense(s):

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
21 U.S.C. § 841(a)(1)	Possession With Intent to Distribute 5 Grams or More of Cocaine Base, a Schedule II Controlled Substance, a Class B felony	July 29, 2010	1

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States Attorney of any material change in the defendant's economic circumstances.

Defendant's Date of Birth: [redacted], 1962

Defendant's USM No.: 07394-090

Defendant's Residence Address: c/o Columbia County Jail
403 Jackson Street
Portage, WI 53901

Defendant's Mailing Address: c/o Columbia County Jail
403 Jackson Street
Portage, WI 53901

February 29, 2012
Date of Imposition of Judgment

/s/ William Conley
William M. Conley
District Judge

March 22, 2012
Date Signed:

IMPRISONMENT

As to count one of the indictment, I believe a sentence of 144 months is reasonable and not more than necessary to achieve the statutory purposes of sentencing set forth in 18 U.S.C § 3553(a). However, I am crediting the defendant for the 19 months custody he has served since his arrest following the instant offense. Therefore, I am imposing a sentence of 125 months to be served concurrently with the remainder of the incarceration imposed upon revocation in Eau Claire County Case No. 06CF335.

The U.S. Probation Office is to notify local law enforcement agencies, and the state attorney general, of defendant's release to the community.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
Deputy Marshal

SUPERVISED RELEASE

The term of imprisonment is to be followed by a 5-year term of supervised release, subject to the standard conditions.

Defendant shall report to the probation office in the district to which defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

Defendant shall not commit another federal, state, or local crime.

Defendant shall not illegally possess a controlled substance.

If defendant has been convicted of a felony, defendant shall not possess a firearm, destructive device, or other dangerous weapon while on supervised release.

Defendant shall cooperate with the collection of DNA by the U.S. Justice Department and/or the U.S. Probation and Pretrial Services Office as required by Public Law 108-405.

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Financial Penalties sheet of this judgment.

Defendant shall comply with the standard conditions that have been adopted by this court (set forth on the next page).

In light of the nature of the offense and the defendant's personal history, I adopt the special conditions set out in the presentence report. Neither party has raised objections to the proposals.

As special conditions, defendant is to:

1) Register with local law enforcement agencies and the state attorney general, as directed by the supervising U.S. probation officer;

2) Provide the supervising U.S. probation officer any and all requested financial information, including copies of state and federal tax returns;

3) Submit his person, property, residence, office or vehicle to a search conducted by a U.S. probation officer at a reasonable time and in a reasonable manner, whenever the probation officer has reasonable suspicion of contraband or of the violation of a condition of release; failure to submit to a search may be a ground for revocation; the defendant shall warn any other residents that the premises he is occupying may be subject to searches pursuant to this condition; and

4) Abstain from the use of alcohol and illegal drugs and from association with drug users and sellers and participate in substance abuse treatment. The defendant shall submit to drug testing beginning within 15 days of his release and 60 drug tests annually thereafter. The probation office may utilize the Administrative Office of the U.S. Courts' phased collection process.

STANDARD CONDITIONS OF SUPERVISION

1) Defendant shall not leave the judicial district without the permission of the court or probation officer;

2) Defendant shall report to the probation officer in a manner and frequency directed by the court or probation officer;

3) Defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) Defendant shall support his or her dependents and meet other family responsibilities;

5) Defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) Defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) Defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute or administer any narcotic or other controlled substance, or any paraphernalia related to such substances except as prescribed by a physician;

8) Defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) Defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) Defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) Defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) Defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) As directed by the probation officer, defendant shall notify third parties of risks that may be occasioned by defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm defendant's compliance with such notification requirement.

CRIMINAL MONETARY PENALTIES

Defendant shall pay the following total financial penalties in accordance with the schedule of payments set forth below.

Count	Assessment	Fine	Restitution
1	$100.00	$0.00	$0.00
Total	$100.00	$0.00	$0.00

It is adjudged that the defendant is to pay a $100 criminal assessment penalty to the Clerk of Court for the Western District of Wisconsin immediately following sentencing.

The defendant does not have the means to pay a fine under § 5E1.2(c) without impairing his ability to support himself upon release from custody.

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order:

(1) assessment;
(2) restitution;
(3) fine principal;
(4) cost of prosecution;
(5) interest;
(6) penalties.

The total fine and other monetary penalties shall be due in full immediately unless otherwise stated elsewhere.

Unless the court has expressly ordered otherwise in the special instructions above, if the judgment imposes a period of imprisonment, payment of monetary penalties shall be due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of court, unless otherwise directed by the court, the probation officer, or the United States Attorney.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

In the event of a civil settlement between victim and defendant, defendant must provide evidence of such payments or settlement to the Court, U.S. Probation office, and U.S. Attorney's office so that defendant's account can be credited.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v.

MAURICE MAXWELL,

Defendant.

ORDER

11-cr-25-wmc

In his Motion for Judgment of Acquittal or in the Alternative a New Trial (dkt. #112) following conviction by a jury for possession with intent to distribute 5 grams or more of cocaine base, defendant Maurice Maxwell argues that the court's admission of the expert testimony of Michelle Gee, a forensic scientist at the Wisconsin State Crime Laboratory in Wausau, Wisconsin, violated the Confrontation Clause of the Sixth Amendment to the United States Constitution. At trial, the prosecution did not offer testimony from the analyst who actually ran and observed the gas chromatograph spectrum analysis of the substance found in Maxwell's possession that allegedly contained cocaine base. Instead, it presented expert testimony from Gee, who had merely examined the results generated by that analyst. Maxwell asserts that this conduct is "identical" on "all important points" to the conduct struck down as a Sixth Amendment violation in *Bullcoming v. New Mexico*, 131 S. Ct. 2705 (2011). (Mot. for Acquittal (dkt. #112) pp. 4-5.)

The government does not dispute any of the similarities noted by Maxwell, but instead relies on what it contends is a crucial distinction between *Bullcoming*, which involved the admission into evidence of the actual laboratory report of the defendant's blood-alcohol concentration certified by a non-testifying analyst, as a "business record," and this case, which involved only the admission of Gee's expert opinion testimony, albeit based in part on her review of laboratory results obtained by another, non-testifying analyst. (Df's Response (dkt. #115) p. 4.) *See Bullcoming*, 131 S. Ct. at 2722 (Sotomayor, J. concurring in part) (asserting that the Court's decision left open whether it was a Confrontation Clause violation to present a witness for his independent opinion about underlying testimonial reports that were not themselves admitted into evidence).

Curiously, Maxwell did not point out in his opening brief, and the government only mentioned in a footnote in its response, that this same distinction is under consideration by the United States Supreme Court in *Williams v. Illinois*, Case No. 10-8505, *cert. granted* June 28, 2011. The specific question certified is:

> Whether a state rule of evidence allowing an expert witness to testify about the results of DNA testing performed by non-testifying analyst, where the defendant has no opportunity to confront the actual analyst, violates the Confrontation Clause.

Id.

In light of the *Bullcoming* decision, the grant of certiorari in *Williams*, and the tenor of recent oral argument before the Court, the United States Supreme Court may well find the Confrontation Clause is violated by the admission of expert testimony which relies in material part upon tests performed by a non-testifying analyst, at least where the results

are introduced into evidence through the expert on a key element of the crime -- in this case, the composition of the illegal substance. This court is not, however, able to predict with certainty the outcome of the *Williams* decision, nor is it free to ignore still binding Seventh Circuit precedent approving the admission of similar expert testimony, particularly given the arguable factual differences between the expert's testimony in *Williams* and Gee's testimony, the latter of which only referred to her review of "data printouts" from the earlier tests and her conclusion that they showed the presence of cocaine base, rather than the results shown on those printouts or the other analyst's personal conclusions. Moreover, even if the unobjected-to admission of Gee's testimony were deemed error that was clear and obvious, this court cannot find that it affected the outcome of the trial. On the contrary, other testimony independently established Maxwell's possession of crack cocaine and Maxwell's own trial strategy was to concede his possession of crack cocaine and dispute only proof of his intent to distribute. Accordingly, this court will deny Maxwell's motion.

OPINION

I. Admissibility of Gee's Testimony Describing the Composition of the Substance Found in Maxwell's Possession

At trial, Michelle Gee testified about her credentials to opine on the chemical composition of a substance, including a Bachelor of Science degree in Chemistry from the University of Wisconsin – Oshkosh, 500 hours of on-the-job training in the analysis of controlled substances, attendance at various seminars dealing with the analysis of

controlled substances, 13-and-a-half years with the Wisconsin State Crime Laboratory, much of it spent in testing of controlled substances, membership in the Midwestern Association of Forensic Scientists, and service as a court-approved drug identification expert on 111 previous occasions. As "Acting Unit Leader" of the State Laboratory's Controlled Substance Unit, Gee also testified to her supervisory role and the unit's protocols for maintaining the custody and control of drug samples provided by law enforcement officials and for the analysis of those samples.

Gee then confirmed that the sample, previously identified on the record as taken from a "special hiding place" or "secret place" in Maxwell's underwear at the time of his arrest and marked as Exhibit 1, had been tested in her lab based on her review of the markings made by other State Laboratory workers. Gee further explained that, after weighing it and running a series of color spot tests, workers would extract material from samples like Exhibit 1 using a solvent and then run it through instrumentation applying gas chromatography, mass spectrometry and, if needed, infrared spectrometry, all tests relied upon by experts in her field generally and by the State Laboratory in particular. Gee also testified that each of these instruments generates printouts of its readings.

In the case of the substances found in Exhibit 1, Ms. Gee testified that she did not perform the "primary analysis," but rather that an analyst who has since retired performed those tests and she later reviewed the test results (the "data printouts") generated by the instruments, which allowed her to come to her "own independent conclusion about the substance" contained in Exhibit 1. (Trial Tr. (dkt. #111) 103:25 - 104:15.) Based on

her "review of the data generated," Gee opined "that the material contained in that exhibit contained cocaine base." (Trial Tr. (dkt. #111) 104:16-21; 106:17-25.)

At trial, Maxwell did not object to Ms. Gee's qualifications as an expert, to the basis for her opinion, or to her expert opinion that the substance taken from his possession contained crack cocaine. Instead on cross examination, Maxwell -- who insisted on representing himself[1] -- questioned Gee on the weight of the substance taken from him and the presence of Levamisole, which is sometimes used to "cut" or dilute cocaine. As to the former, Gee testified that she could not opine on the weight because she would be to relying solely on a weight entered by another analyst. (Trial Tr. (dkt. #111) 106:10-16.) As to the latter, Gee testified that from her review of the data obtained from the "primary analysis," there was Levamisole present. (Trial Tr. (dkt #111) 107:1-16.)

Nevertheless, Maxwell's present counsel -- who was appointed by the court to represent him post-verdict -- now challenges Gee's reliance on data generated by the other analyst as a violation of the Confrontation Clause.[2] In response, the government draws a

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1 Over the course of seven months, Magistrate Judge Crocker excused three experienced defense lawyers, each of whom had been appointed at government expense to represent Mr. Maxwell. After Maxwell expressed dissatisfaction with all three, and after he was strongly advised of the pitfalls of attempting to represent himself, Maxwell was ultimately allowed to represent himself at trial, with the assistance of standby counsel. (Dkt. #45.)

2 Typically, a defendant cannot waive a violation of the Confrontation Clause at trial unless his knowing waiver is documented on the record. *See Godinez v. Moran*, 509 U.S. 389, 390 (1993)("[W]hen a defendant seeks to waive his right to counsel, a determination that he is competent to stand trial is not enough; the waiver must also be intelligent and voluntary before it can be accepted."); *Johnson v. Zerbst*, 304 U.S. 458, 464-65 (1938) ("A waiver is ordinarily an intentional relinquishment or abandonment of

distinction between the actual introduction of another analyst's forensic report, which was struck down by the United States Supreme Court in *Bullcoming,* and an expert's reliance on the underlying conclusions of another analyst's forensic report, which was upheld by the Illinois Supreme Court in *Illinois v. Williams*, 238 Ill.2d 125, 939 N.E.2d 268 (2010). The problem with the government's position is that it does not appear that the distinction drawn by the Illinois Supreme Court in *Williams* is likely to be upheld by the United States Supreme Court. Indeed, during questioning at oral argument by a number of Justices, the Court seemed hostile to the idea that an expert could escort in the results of tests performed by another analyst without frustrating the Confrontation Clause's prohibition on the admission of out-of-court statements for the truth of the matter asserted. (*Williams* Oral Argu. Tr. 7:21-23, 38:1-3 (Scalia, J.), 22:8-10 (Kennedy, J. and Ginsberg, J.), 34, 35:9-12 (Kennedy, J.), 6:9-16 (Alito, J.), 34:15-19 (Kagan, J.).)

Even so, this court -- like everyone else -- can only speculate as to the final outcome of *Williams*. Pending that decision, this court is bound by the Seventh Circuit's decision in *United States v. Turner*, 591 F.3d 928 (7th Cir. 2010), which rejected the very argument made by Maxwell here: that the Confrontation Clause was violated when the government introduced the testimony of an expert who relied on infrared spectrometry

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a known right or privilege. . . . While an accused may waive the right to counsel, whether there is a proper waiver should be clearly determined by the trial court, and it would be fitting and appropriate for that determination to appear on the record."). The court will assume without deciding that this general rule applies even where (1) a defendant has chosen to represent himself, (2) there is no violation based on the then-existing law, and (3) the burden falls solely on the court (and arguably prosecutor) to recognize a possible change in Constitutional jurisprudence, so advise a *pro se* defendant, and then procure an

and gas chromatography tests performed by another analyst, but arrived at and expressed his own opinion on the composition of the tested substance. *Id.* at 933 (holding that Sixth Amendment Confrontation Clause does not demand that a chemist or other testifying expert have done the lab work himself); *see also United States v. Pablo*, 625 F.3d 1285, 1292 (10th Cir. 2010) (holding that where an expert witness discloses otherwise inadmissible, out-of-court testimonial statements on which she based her opinion, the admission of those testimonial statements typically will not implicate a defendant's confrontation rights because the statements are not admitted for their substantive truth); *United States v. Johnson*, 587 F.3d 625, 635 (4th Cir. 2009) (holding that the Confrontation Clause allows expert witnesses to offer their independent judgments even if informed in some part by their exposure to otherwise inadmissible evidence).

Indeed, even after *Williams*, which appears to have involved an expert testifying as to the actual *results* obtained by another analyst's work, *Turner* may remain good law for cases like the one here, where Gee only refers to review of another analyst's testing, but does not disclose the results of those tests and, therefore, at least arguably, does not introduce the other analyst's out-of-court testimony. *See Turner*, 591 F.3d at 933 (holding that supervisor analyst at state crime laboratory could, as an expert, testify to his opinion that the substance sold by defendant was cocaine, even though he was not the analyst who conducted the testing, where nothing from the testing analyst's notes, machine test results, or final report was introduced). In any event, barring clear guidance

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informed waiver.

from the United States Supreme Court or the Seventh Circuit, this court has no choice but to uphold the law as it is, rather than as Maxwell would like it to be.[3]

II. Plain Error

Even if there is a change in current law, Maxwell faces another seemingly-insurmountable hurdle. Having failed to object to the introduction of Gee's testimony at trial, Maxwell's post-trial motion must establish that its introduction constituted "plain error."[4] Fed. R. Crim. P. 52(b); *United States v. Vonn*, 535 U.S. 55, 62-63 (2002) ("Rule 52(b) [is the] "plain-error" rule covering issues not raised before the district court in a timely way . . . . the defendant who sat silent at trial has the burden."). For the reasons discussed above, the admissibility of Gee's testimony was not even error, much less error that was "clear and obvious" at the time admitted. Moreover, "plain error," must also affect "substantial rights" which could prejudice the outcome of the trial. Fed. R. Crim. P. 52(b); *Vonn*, 535 U.S. at 69; *United States v. Ohano*, 507 U.S. 725, 732

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3 Obviously, this does not preclude Maxwell from appealing this court's ruling based on a good faith belief that the law may change.

4 During argument, the government opined that a plain error analysis under Fed. R. Crim. P. 52(b) is inapplicable to motions after verdict. However, both the history and purpose of Rule 52 suggest otherwise. The 1944 Advisory Committee Notes on Rule 52 clarify that a court must consider (whether on appeal or on a motion for new trial) all non-harmless errors. The exception is when the error is not "specified" (ie. preserved by timely motion), in which case the court may only rule if it is "plain error." Although this rule originally developed for Supreme Court practice, no language suggests it cannot be applied by the district courts to post-trial motions on untimely objections. Even if the court were to apply the standard set forth in Fed. R. Crim. P. 33(a), which allows for a new trial where there exists "a reasonable probability that a trial error had a prejudicial effect upon the jury's verdict," *United States v. Van Eyl*, 468 F.3d 428, 436 (7th Cir. 2006), this court would engage in a similar analysis, and come to the same conclusion.

(1994).

Admission of Ms. Gee's testimony does not meet this test for at least two reasons. First, Maxwell never disputed that he concealed 13 grams of crack cocaine in his underwear at the time of his arrest. Instead, he strategically concentrated his efforts on showing that he lacked the intent to *distribute* the drugs in his possession. In his opening statement, Maxwell told the jury that he had been sober for eight months, then fell back into his old habits of drug use, and was arrested soon thereafter. He emphasized his efforts to remain clean after a lifetime of drug addiction, his employment, and his stable home life. He blamed his relapse on the fact that he began "meeting people" who were "triggers" causing him to possess and use drugs again, including crack cocaine. Here, he said, his story diverged from the prosecutor's: "the elements of this crime [are] evolv[ing] and . . . the prosecutor will try to prove that intent to deliver."

On the contrary, Maxwell said, he never intended to distribute the crack cocaine in his possession -- he was simply too high to form the requisite intent to distribute. Maxwell expressed his "hope respectfully that [the jury members would] all write down everything and take a close look at everything and listen to everything," "because intent -- can't nobody know what's in one person's mind, can't nobody know what another person is thinking. Intent can revolve around a lot of things."

During the course of trial, Maxwell kept his focus on these same themes. For example, the arresting officer, Investigator Jeffrey Wilson, was the first to testify to finding "approximately 13 grams of crack" hidden in a "special pocket" in Maxwell's

underwear, obtaining a positive field test for cocaine, observing the "rocky form as opposed to a powder form" of crack cocaine, and later weighing "approximately five pre-packaged bags and then the larger amount of crack cocaine." (Trial Tr. (dkt. #111) 10:10 – 13:25.) In response, Maxwell neither challenged nor even intimated a dispute over what the officer found in his possession. Instead, his cross-examination of Wilson focused on whether he noted evidence of Maxwell's claimed intoxication, such as his behavior, speech and physical appearance.

Maxwell himself called a number of witnesses to describe his long-term addiction to marijuana, cocaine and other drugs, his eight-month period of sobriety, successful employment, and then relapse. (Trial Tr. (dkt. #110) 12-143.) Over the government's objection, Maxwell was allowed to present evidence of the results of a blood test taken shortly after his arrest, which indicated the presence of cocaine and other drugs in his system.

In closing, Maxwell again emphasized that his dispute with the government was not his possession of crack cocaine, but rather with his alleged intent to distribute it: "I was in possession of crack cocaine and I'm not denying that. But the government didn't have one person out of Sam, Emily, all the other people that was involved in this case to testify and say I sold them drugs." At another point, he emphasized that "the only information that was presented in this case about Maurice Maxwell is that I had possession. . . . But the evidence show[s] clearly that I wasn't running the street trying to meet people or trying to sell drugs." Ultimately then, the identity of the substance

discovered on Maxwell's person was never a disputed issue at trial.

The other reason exclusion of Ms. Gee's testimony was not likely to impact trial was that the arresting officer independently established Maxwell's possession of crack cocaine. Officer Wilson testified about the results of his field test on the substance taken from Maxwell, which was "conclusive for the presence of cocaine." (Trial Tr. (dkt. #111) 17:18-18:10.) Wilson also testified to his observations and handling of what was clearly the crack variety of cocaine based on his years of experience in investigating, arresting and prosecuting similar crimes. (Trial Tr. (dkt. #111) 6:19-17:17.) Even if the government was required to provide independent proof of the identity of the substance found in Maxwell's possession beyond the expert opinion of Ms. Gee, the government met that burden.

ORDER

For all the reasons stated above, IT IS ORDERED that defendant's Motion for Judgment of Acquittal or in the Alternative a New Trial (dkt. #112) is DENIED.

Entered this 27th day of March, 2012.

BY THE COURT:

/s/

_____

WILLIAM M. CONLEY
District Judge

that.

And I'm tellin' you, I'm at the end of that train wreck, Your Honor, you told me about. And I don't want to get aboard. I'm not goin' aboard no more, Your Honor. I'm gonna stay positive.

THE COURT: I hope that's the case. And you certainly have every reason to make it the case. In determining a reasonable sentence, I have considered the history and characteristics of the defendant as well as the nature of the offense.

The defendant's father was not involved in his life and his mother was an alcoholic. The defendant was raised in a neighborhood that included gang violence and drug dealing. He admirably took on the role of provider and protector for younger siblings, some of whom have fared far better than he.

The defendant is now 49 years old with a criminal history dating back more than 30 years. His offenses have involved drug and property offenses, and in the past violent offenses, although I do not believe and I don't think his record indicates that he is fundamentally a violent person.

The defendant's advisory guideline imprisonment range is greatly affected by his classification as a career offender. He has also repeatedly demonstrated an

inability to control his use of illegal drugs, which has significantly contributed to his criminal activity. He has been afforded numerous opportunities to address his substance abuse and has failed to modify his behavior.

Most recently, he was instructed to enroll in an after-care substance abuse program by a state probation agent, but failed to do so. Ultimately the defendant has chosen to continue or at least has demonstrated an inability to cease his illegal drug use, reflecting the defendant's unwillingness to confront the effect of his behavior on those he loves, much less the larger community as a whole.

On the other hand, the Court is unwilling to give up on this defendant, believing that he is capable of good if he can stay away from the many triggers and believes that the defendant would certainly like to lead a better life. Whether he is capable of doing so is unclear.

I therefore find some justification for a sentence below the guideline range, but not at the range suggested by the defendant's counsel. As I have previously stated, the defendant's criminal history points are almost double that required for a criminal history category of VI. He also has several other convictions that are not counted in the criminal history

score due to their ages, including burglary, possession of a stolen vehicle, armed burglary, and armed robbery.

The defendant has little verifiable work history, having spent much of his life either incarcerated or engaging in illegal behavior. At the age of 49 he has shown no inclination to change, however much he can eloquently describe the reasons why he should and now believes he will. His distribution of heroin, methadone, powder and crack cocaine and ecstasy while under state supervision support the need to protect the public from his ongoing criminal behavior and that is what the Court believes it is obligated to do.

Taking into consideration the nature of the offenses as well as the defendant's personal history and characteristics, I am persuaded that a custodial sentence of 144 months is reasonable and no greater than necessary to satisfy the statutory purposes of sentencing. Such a sentence will serve to hold the defendant accountable, protect the community, and achieve parity with the sentences of similarly-situated offenders.

As to Count 1 of the Indictment, the defendant is hereby committed to the custody of the Bureau of Prisons for a term of 144 months. The term of imprisonment is to be followed by a five-year term of supervised release

subject to standard conditions.

In light of the nature of the offense and the defendant's personal history, I also adopt Special Conditions set forth in the pre-sentence report. Neither party has objected to those and I simply note that for the record. It is adjudged the defendant is to pay a $100 criminal assessment penalty to the Clerk of Court for the Western District of Wisconsin immediately following sentencing. I find the defendant does not have the means to pay a fine under Sec. 5E1.2(c) without impairing his ability to support himself upon release from custody.

I will make the sentence concurrent from the date that he was arrested for the conduct that is at issue in this case, but I am not otherwise going to make it concurrent. I am struggling as to what to say to you, Mr. Maxwell, because I don't doubt the sincerity of what you say. In fact, the reason why I didn't give you an even higher sentence, and I certainly could have justified going to a much higher sentence and the guidelines would tell me that I should have imposed it, is because I do believe that you have reached something of a crossroads and that you see what the consequences are. And also that I will be here, God willing, at the end of your time in prison and you will be under my

supervision for five years and if you misstep you will go away for likely the remainder of your life. You will not fall through the cracks without our probation office knowing it, and if you do, there will be no discussion of another chance.

You're going to be in prison for the better part of 12 years. That's longer than you've ever served. I don't mean to minimize it. But you've already experienced almost that time in another sentence early in your life. I don't know what will be different this time other than that you will not come out as someone approaching 50, but someone who is well over 60 years of age, and you will have every reason to want to do better.

I only hope that your time in prison can be spent constructively. And let me suggest one of those ways: For those individuals that you encounter who are willing to listen, you can tell them what the choices are and not only you yourself can make better choices, but you can encourage others to make them. You can participate in drug programs that are available to you, and you can tell your story to others who may use it as motivation not to end up where you have.

And you can try to educate yourself further. You're articulate. You're compelling in some ways. And

further education, reading, and even training may result in your ending your life in a way that makes those who care about you proud, and I hope that that's what you do. And I will be here to hold you responsible if you don't.

I do also find that the probation office should notify local law enforcement agencies and the state Attorney General upon the defendant's release back into the community.

You have a right to appeal this Court's sentence, as well as your conviction. I'll address part of that in a moment. But you should consult promptly with your capable counsel, Mr. Ruth, who will advise you as to the potential basis for an appeal in the short time you have to do so.

Before I turn to the motion for acquittal or a new trial, anything with regard to the sentencing that the government wishes to address?

MS. ALTMAN: No, Your Honor. Thank you.

THE COURT: All right. Anything more, Mr. Ruth?

MR. RUTH: Your Honor, are you recommending him for the Comprehensive Drug Treatment Program?

THE COURT: I'm not sure that he would be entitled to a reduction, but I will recommend treatment,

No. 12-1809

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

United States of America, Plaintiff-Appellee, v. Maurice L. Maxwell, Defendant-Appellant.	Appeal from the United States District Court for the Western District of Wisconsin Case No. 11-CR-25-WMC The Honorable Chief Judge William M. Conley

CIRCUIT RULE 30(D) STATEMENT

I, the undersigned, counsel for the Defendant-Appellant, Maurice L. Maxwell, hereby state that all of the materials required by Circuit Rules 30(a), 30(b), and 30(d) are included in the Appendix to this brief.

/s/ Sarah O'Rourke Schrup
Attorney
Bluhm Legal Clinic
Northwestern University School of Law
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Chicago, IL 60611
Phone: (312) 503-0063

Dated: December 14, 2012

CERTIFICATE OF SERVICE

I, the undersigned, counsel for the Defendant-Appellant, Maurice L. Maxwell, hereby certify that I electronically filed this brief and appendix with the clerk of the Seventh Circuit Court of Appeals on December 14, 2012, which will send notice of the filing to counsel of record.

/s/ Sarah O'Rourke Schrup
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375 East Chicago Avenue
Chicago, IL 60611
Phone: (312) 503-0063

Dated: December 14, 2012

No. 12-1809

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

United States of America, Plaintiff-Appellee, v. Maurice L. Maxwell, Defendant-Appellant.	Appeal from the United States District Court for the Western District of Wisconsin Case No. 11-CR-25-WMC The Honorable Chief Judge William M. Conley

REQUIRED RULE 30(b) SHORT APPENDIX OF DEFENDANT-APPELLANT MAURICE L. MAXWELL

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Counsel for Defendant-Appellant
Maurice L. Maxwell

RULE 30(B) APPENDIX TABLE OF CONTENTS

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA v. MAURICE L. MAXWELL, Defendant.	INDICTMENT Case No. 11 CR 25 wmc 21 U.S.C. § 841(a)(1)

THE GRAND JURY CHARGES:

COUNT 1

On or about July 29, 2010, in the Western District of Wisconsin, the defendant,

MAURICE L. MAXWELL,

knowingly and intentionally possessed with the intent to distribute five grams or more of a mixture or substance containing cocaine base (crack cocaine), a Schedule II controlled substance.

(In violation of Title 21, United States Code, Section 841(a)(1)).

A TRUE BILL

PRESIDING JUROR

JOHN W. VAUDREUIL
United States Attorney

Indictment returned: March 2, 2011

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v.

MAURICE L. MAXWELL,

Defendant.

VERDICT

11-cr-25-wmc

COUNT 1

We, the Jury in the above-entitled cause, find the defendant, Maurice L. Maxwell,

GUILTY
("Guilty" or "Not Guilty")

of the offense charged in Count 1 of the indictment.

SPECIAL VERDICT QUESTION FOR COUNT 1

Answer this question only if you found the defendant guilty of Count 1:

Did the conduct charged in Count 1 involve five grams or more of a mixture or substance containing cocaine base (crack cocaine)?

YES
("Yes" or "No")

[redacted]
Presiding Juror

Madison, Wisconsin

Date: DEC 2011

A. I don't know if I asked him if it was a special pocket or if they were in a special pocket, but he confirmed that it was in a special hiding area in his underwear.

Q. What did you do next?

A. I then --

Q. Did you do a further search of him?

A. Yes, I did, ma'am. I retrieved the drugs.

Q. Where did that occur?

A. That occurred in a storage room with the door closed at that location at 1515 Ball Street.

Q. Did you need him to take his underwear off to complete the search?

A. I did.

Q. And was he able to do that?

A. I assisted him and yes.

Q. Did he stumble or trip when that was occurring?

A. Not that I recall, no.

Q. Prior to coming to court today, did you have the opportunity to look at some exhibits?

A. I did.

Q. And I'm showing you -- I think it should be on your screen only.

THE COURT: At some point this may be displayed to you on your screens, but for now the foundation has to

be laid.
BY MS. ALTMAN:
Q. Did you review this exhibit? This is Government's Exhibit No. 1. Did you review that prior to today?
A. Yes.
Q. And what's contained within Government's Exhibit 1?
A. I believe that's the approximately 13 grams of cocaine.
Q. That was found where?
A. On Mr. Maxwell.
MS. ALTMAN: I would offer Government's Exhibit 1.
THE COURT: All right. Without objection, it is admitted.
MS. ALTMAN: Thank you.
BY MS. ALTMAN:
Q. Is this the way it was packaged when you found it?
A. No, ma'am.
Q. Okay. I'm going to show you Government's Exhibits -- actually, if you look at your screen, can you describe what part of that -- what's the crack cocaine, just so the jury has an idea?
A. Can I describe what, ma'am?
Q. Where's the crack in that picture, that exhibit?
A. In a bag. It's approximately the 13 grams of crack

that was on Mr. Maxwell.

Q. Okay. It's --

THE COURT: Just to lay the foundation here, you testified earlier 13 grams of cocaine. You had said "crack." You may want to clarify that.

BY MS. ALTMAN:

Q. Okay. In your training and experience, Investigator Wilson, are you familiar with the terms *crack cocaine* and *powder cocaine*?

A. Yes, ma'am.

Q. What's the difference between the two?

A. Crack is a smokable form of cocaine.

Q. Does it look different? If you're in the field or doing an investigation, how do you tell whether someone is in possession of crack or powder?

A. Just based on its appearance. It looks like -- similar to a rocky form as opposed to a powder form or a compressed form.

Q. The substance that you found on the defendant, on Mr. Maxwell, did you believe it to be the crack form or the powder form of cocaine?

A. Crack form.

Q. And the crystalline substance in this bag, is that substance that you found on him?

A. Yes, ma'am.

Q. Was it all in -- can you describe how it was packaged when you found it?
A. It was in a bag and there were approximately five prepackaged bags that I would estimate, based on my training and experience, were anywhere between a half gram and a gram amount and then a larger quantity of crack loose within the bag, so five prepackaged bags and then the larger amount of crack cocaine.
Q. And when you say "prepackaged bags," can you describe what those were? Were they Ziploc bags or --
A. Just people that normally traffic drugs will place drugs into the corner of a bag and then tie it off and cut the top of it. And that's what they appeared to be, knotted baggies with drugs in them.
Q. Okay. On the screen in front you is Government's Exhibit 1a. Did you look at this prior to today's hearing as well?
A. I did.
Q. Okay. And what is this bag or what is this?
A. I believe that's a plastic bag.
Q. Is it difficult to see on the screen?
A. Yes, it is, ma'am.
Q. Okay.

THE COURT: You may approach, if you wish to.

MS. ALTMAN: Thank you, Your Honor.

BY MS. ALTMAN:

Q. May I have you take a look at 1a, 1b, 1c and 1d, please?

A. A, b, c and d?

Q. Yes.

A. Okay.

Q. Do you recognize those items?

A. Yes.

Q. What are they?

A. Those are the corner-cut bags that he had prepackaged amounts of crack cocaine contained inside that bigger bag that was found in his crotch area.

Q. Okay. Do those have any drugs in them right now, do they appear to?

A. No, they don't.

Q. Do you know what happened to the drugs in those bags?

A. Based on my training and experience, I believe that the drugs were sent to the crime laboratory in Wausau and they then removed them and took them out and put them all in one bag.

Q. So the entire amount is now contained in Government's Exhibit 1?

A. Yes, ma'am.

Q. If I could --

MS. ALTMAN: I would offer Government's Exhibit 1a, 1b, 1c and 1d.

THE COURT: Without objection, they are admitted.

BY MS. ALTMAN:

Q. If I could have you look at 1e and 1f, please.

A. Okay.

Q. Do you recognize those bags?

A. The bags that were taken from Mr. Maxwell that contained the crack cocaine.

MS. ALTMAN: I would offer Government's Exhibits 1e and 1f.

THE COURT: They are admitted as well.

MS. ALTMAN: Thank you.

BY MS. ALTMAN:

Q. Now, I think you said that there were five small bags; is that correct?

A. Yes.

Q. Do you know -- can you tell from what you have in front of you where the fifth bag is?

A. I believe it's in Government Exhibit 1 or what's attached and there's a -- I think a corner-cut bag in here that I am going to assume was the fifth corner-cut bag that was prepackaged in that larger amount.

Q. Okay.

THE COURT: And for the jury's benefit, a witness isn't -- it isn't evidence if a witness assumes something for you or testifies as to what likely happened, but other evidence may be presented to you that will tie those matters up. You may proceed.

MS. ALTMAN: Thank you.

BY MS. ALTMAN:

Q. What did you do with the crack cocaine after you found it?

A. Kept it in my custody until such time as it was entered into evidence at the Eau Claire Police Department.

Q. Prior to entering it in, did you weigh it?

A. I did.

Q. And what was the approximate weight that you obtained?

A. Approximately 13 grams.

Q. And did you do a field test on it?

A. I did.

Q. What's a field test?

A. A field test just is a test that allows us to determine if a certain substance tests positive for something that we believe may be in it, such as marijuana or cocaine. It's an inclusive, conclusive or negative or positive test is a way a lot of people refer to it as.

And when I tested the cocaine, it tested conclusive for the presence of cocaine.

Q. And when you're saying "cocaine," you are -- I think the judge brought this up earlier.

A. Correct.

Q. Every time that you say "cocaine" in this case, are you talking about the crack cocaine --

A. Yes, ma'am.

Q. -- unless I clarify it?

A. Yes.

Q. What else, if anything, did you find on the defendant when you searched him?

A. There were two snort straws, there was a cell phone, there was a -- I believe a camera, approximately $121 and the cocaine.

Q. And I think you already mentioned this, but what did you do with everything after you finished your testing and your weighing?

A. The items of evidence that we kept were entered into the Eau Claire Police Department evidence room. The money that he had on his person was returned.

MS. ALTMAN: I have nothing further. Thank you.

THE COURT: Any questions, Mr. Maxwell?

THE DEFENDANT: Yes, Your Honor.

THE COURT: You can come straight forward through the door there and, if you can, negotiate your way around.

MS. ALTMAN: Your Honor, Mr. Roemhild is going to take the exhibit up to Ms. Gee, if that's okay.

THE COURT: That's fine.

DIRECT EXAMINATION

BY MS. ALTMAN:

Q. Could you state your name, please?

A. Michelle Gee.

Q. How are you employed?

A. I am employed as a forensic scientist in the Controlled Substances Unit at the Wisconsin State Crime Laboratory in Wausau.

Q. And how long have you worked for the Wisconsin State Crime Lab?

A. About 13 and-a-half years.

Q. And have you recently been promoted temporarily?

A. Temporarily in name, yes.

Q. Acting?

A. Yes, acting.

Q. What's your current title?

A. I am the acting unit leader in the Controlled Substances Unit.

Q. And that's recent?

A. Yes.
Q. But you have been doing testing and working for the crime lab for approximately 13 years?
A. Yes.
Q. So in July of 2010, you were an analyst; you were not acting director, queene of the lab, whatever it is that you are?
A. No. I became the acting unit leader starting probably in July.
Q. Of 2011?
A. Yes.
Q. Okay. Prior to that date, what were your duties?
A. I received items of evidence submitted to the laboratory and then analyzed them for the presence of controlled substances.
Q. And what kind of education do you have to allow you to do that?
A. I have a bachelor of science degree in chemistry from the University of Wisconsin-Oshkosh, I had over 500 hours of on-the-job training in the analysis of controlled substances and I have also attended various seminars dealing with controlled substances and their analysis.
Q. And that continued since your graduation?
A. Yes.

Q. Do you belong to any professional organization?
A. Yes. I belong to MAFS, which is the Midwestern Association of Forensic Scientists. And I belong to CLIC, the Clandestine Laboratory Investigating Chemists Association.
Q. Have you qualified as a drug identification expert in other cases?
A. Yes, I have.
Q. Do you have an estimate as to approximately how many times?
A. 111 times.
Q. Did you look that up? That's a pretty specific number.
A. Yes, I did.
Q. Can you explain briefly, is there a difference between cocaine and cocaine base?
A. Yes, there is.
Q. And what is that.
A. The basic difference is what's normally referred to as *cocaine* is called -- is usually the powder form which is usually injected or snorted. The cocaine base form is the form that usually is a more solid, rock-like looking appearance and that is the form that is commonly smoked.
Q. What percentage of your work involves -- let me take it back. In July of 2010, prior to your promotion, what

percentage of your work involved analyzing items for controlled substances?

A. The majority of the work I did at the laboratory was specifically for analyzing case work for controlled substances. That was my primary duty.

Q. Okay. And even now as acting administrator, what percentage of your work is analyzing controlled substances?

A. Probably 60 to 70% of my work still involves actually analyzing case work.

Q. Approximately how many times have you examined items for the presence of cocaine base?

A. It's been over 4,000 times.

Q. If I could have you take a look at all of the exhibits that's in that bag in front of you, that should be Exhibits 1 and then 1a, 1b, 1c, 1d, 1e and 1f. Can you just briefly say what those are?

A. Exhibit 1 is a heat-sealed plastic bag. It contains a manila envelope in the top section and numerous Ziploc bags with off-white, chunky material. And the exhibits marked 1a, 1b, 1c, 1d, 1e and 1f all appear to be packaging material.

Q. Okay. Were those items received at the crime lab?

A. Yes, they were.

Q. And when was that?

A. These items were received at the crime laboratory on October 19th, 2010.
Q. Maybe I should back up. Did they come to the lab more than once?
A. Yes, they did.
Q. Okay. And is that the first time?
A. Yes.
Q. How do you know that they arrived at the crime lab?
A. On exhibit or in Exhibit 1, the manila envelope has a laboratory barcode label with the case number W10-1874. One of the laboratory's evidence specialists, Mary Barnett, her initials are on the label with the date 10/19/10, which would have been when she received and receipted the evidence at the laboratory.
Q. What happens when an item arrives at a lab, at your lab?
A. An item of evidence, when it's received, is given a unique laboratory case number, as I described for this item was W10-1874, and then that number is how the evidence is tracked within the lab. So those numbers are sequentially given to cases as they arrive to the lab so each case has a separate laboratory case number.
Q. Once the laboratory case number is assigned, what happens?
A. Then the evidence is distributed to the analyst

that's going to analyze the items.
Q. Okay. Once the testing is done, does the item go back to the submitting agency?
A. Yes, it does.
Q. The first time in this case, when was that?
A. That was November 3rd of 2010.
Q. Can you tell me, are there sometimes occasions when items are taken apart for additional testing?
A. Yes.
Q. And does it appear that that happened in this case?
A. Yes, it does.
Q. Why do you say that?
A. Because each of the items marked Exhibits 1a through 1f have a laboratory barcode label on them and those are -- they each also have an item designation on them which are subdesignations of the original item received, which would be Exhibit 1.
Q. Okay. So can you explain what that means? Did it all come out of Exhibit 1 and it was pulled apart or --
A. Yes. Originally Exhibit 1, the drugs, were kept in the little or were separated from the packaging and put in the little Ziplocs and then sent back to the agency with the original barcode label with Item No. B. And then each of the items of packaging were sealed separately in their each individual package with a

subdesignation of Item B. So on the barcode labels, for example, Exhibit 1a has the barcode item designation of B-2, B-1 and 1b is B-2, A-1. So they each have a separate designation meaning that they came out of Item B.

Q. Okay. Did the drugs come back to the lab for a second time?

A. Yes, they did.

Q. And when did that occur?

A. That occurred on March 10th of 2011.

Q. And how do you know?

A. The laboratory barcode label on the outside of the packaging has the laboratory evidence specialist's initials from Laurie Hood and has the date 3/10/11.

Q. And then was an additional test done at that time?

A. Yes, it was.

Q. And then what happened after that?

A. Then it was sent back to the agency for the second time.

Q. Are there safeguards done to protect evidence from being tampered with when it's at the lab?

A. Yes.

Q. Can you describe what those are, please?

A. The items of evidence, unless they're actually being analyzed at that time, are required to be sealed. And,

also, each analyst has their own individual evidence locker where all their evidence is stored that no one else has access to. And any evidence that's not assigned to a person is stored and locked in evidence rooms within the laboratory.

Q. Now, in general, can you explain how evidence is determined or is examined to determine whether it contains a controlled substance?

A. First the item is opened and the material inside it is weighed. Then there are a series of color spot tests that can be performed. Then the material is extracted using a solvent. And then it is ran on instrumentation which would consist of gas chromatography, mass spectrometry and also, additionally, if needed, infrared spectrometry.

Q. And are those examinations relied upon by experts in the field of determining identification of a drug?

A. Yes.

Q. Do the instruments that you described, do they generate printouts of readings taken in each test?

A. Yes, they do.

Q. And from those, does that consist of part of your analysis?

A. Yes.

Q. Okay. Now, did you do the primary analysis in this

case?
A. No, I did not.
Q. Did you -- who did?
A. An analyst that has since retired from the laboratory, John Nied, is the one that performed the primary analysis.
Q. Now, the tests that he performed, I think you indicated that that would have generated data, correct?
A. Correct.
Q. Did you review the data that it generated yourself?
A. Yes, I did.
Q. And from the data generated, were you able to come to your own independent conclusion about the substance that's contained in Exhibit A?
A. , yes I was.
Q. And what is Exhibit A? I'm sorry, Exhibit 1. I'm sorry.
A. Exhibit 1 is the off-white, chunky material and I determined that based on my review of the data generated that the material contained in that exhibit contained cocaine base.
Q. Okay. Are there any steps taken to make sure that instruments that were used to perform these tests were working properly?
A. Yes.

Q. And what are they?

A. For the gas chromatography and mass spectrometry, there are standards that we run along with our sample data to show that or to compare against our samples to show that the instrument is working properly.

For the mass spectrometry, we also call calibrate it every day prior to being used in case work. We get a printout based on the calibration program that's ran on the instrument and there are certain criteria that that has to meet before we are able to use that instrument for case work analysis. So we have to make sure that all of those things are met prior to use.

And for the infrared spectrometry, that also has a calibration that's done monthly that has to be met and then there's a daily check that has to pass in order for us to use that in case work.

Q. You indicated that the substance in Exhibit 1 contains cocaine base, correct?

A. Correct.

Q. Now, are you familiar with the street term *crack cocaine*?

A. Yes.

Q. What is crack cocaine?

A. Crack cocaine is the form of cocaine that is smoked, which is the cocaine base form.

Q. And does it appear that that's what Exhibit 1 is?
A. Yes.
MS. ALTMAN: I have nothing further.
THE COURT: All right. Questions, Mr. Maxwell?
THE DEFENDANT: Yes.

CROSS-EXAMINATION

BY THE DEFENDANT:
Q. Exhibit 1, B-1, when ya'll test cocaine, you said ya'll weigh it?
A. Yes.
Q. Okay. Could you tell me the accurate weight of the substance that was sent to the lab?
A. I don't have the -- I didn't weigh the material. I would have to refer to the original analysis done by the primary analyst that did it. He did the actual weighing. I didn't actually weigh the material.
Q. You tested the material?
A. I looked at the data that was generated from his primary analysis. And based on the data that was obtained from his analysis, that is what I use to make my determination that the material was cocaine base.
Q. Okay. It was tested with the presence of cocaine, right?
A. It was tested. And based on the data printouts, it was cocaine base.

Q. Okay. Also, there was the presence of, I can't pronounce this word, L-E-V-A-M-I-S-O-L-E, was also indicated in the white, chunky product?
A. *Levamisole* I believe is how it's pronounced.
Q. Okay. Yeah. And that was in the presence of this cocaine?
A. There was also a small amount of that material contained along with the cocaine base.
Q. Would you know how much amount was it?
A. No, I don't.
Q. Do you know what that is used for inside the cocaine, the crack cocaine?
A. To my knowledge, it's just something that's added to the cocaine base. Normally we refer to it as a *cut*, so it's something that's added to it just to increase the amount of material present.
Q. So do that take away the purity of the crack cocaine --
MS. ALTMAN: Objection. Relevance.
BY THE DEFENDANT:
Q. -- the levamisole?
A. I'm sorry. Did you ask if it affects the purity --
Q. Yes?
A. -- or what did you --
Q. Yes, do it affect the purity of the cocaine base.

A. Yes, it would. It would indicate to me that it's not 100% cocaine base.

Q. Would you know what percent would it be at with this levamisole?

A. No, I don't.

THE DEFENDANT: Okay. I have no further questions, Your Honor.

THE COURT: All right. Any redirect?

MS. ALTMAN: No. Thank you.

THE COURT: Very good. Thank you. Does the government have a further witness?

MS. ALTMAN: We do, Sergeant Craig Grywalsky.

CRAIG GRYWALSKY, GOVERNMENT'S WITNESS, SWORN

DIRECT EXAMINATION

BY MS. ALTMAN:

Q. And actually, before you start, Sergeant Craig Grywalsky, it might be easier if you moved -- if you switched places with the screen and the box so that when you show the jury the items in the box, the screen isn't in the way. Perfect. Could you state and spell your name, please?

A. First name is Craig. My last name is Grywalsky, G-R-Y-W-A-L-S-K-Y.

Q. How are you employed, sir?

A. I'm a special agent with the Drug Enforcement

and I will also include participation in the RDAP Program. I can't stress enough that you are at your last chance, Mr. Maxwell.

Anything further for the defense as to sentencing?

MR. RUTH: No, Your Honor.

THE COURT: Let me explain the reason why I wanted to address the motion for acquittal. I am convinced that the information that was admitted is at the edge of current law. Neither party cited to me the *Williams* case, which is fully briefed and has been argued to the United States Supreme Court, which is very, very close on its facts. It was the follow-on case that Sotomayor had indicated may be legal. The case itself, the extension of *Bullcoming* is *Williams v. Illinois*. It's Supreme Court Case Number 10-8505, and the only difference that I can see from the case before us is that there was an actual reference to the results of the testing done by the earlier individual, but it was admitted simply as part of what an expert considered. And based on my listening to the oral argument, I think it's possible that that case -- that conviction will be overturned, at which point it seems to me that there is a serious question as to whether expert testimony relying on testing done by another would be allowed.

On the other hand, there was no such question at the time this evidence was admitted, and no one raised it, but one of the questions I've tried to examine is whether this could be plain error since there was no objection to its admission. I do not believe it can qualify as plain error under the current state of the law because the current state of the law says it's admissible. In fact, the Seventh Circuit has said the evidence is admissible. And while *Bullcoming* suggests there's a concern, it was certainly not clear that an expert could not rely upon this evidence. Although I don't minimize that the Confrontation Clause makes this a very different case than one if we were in a civil setting and I don't know how the Seventh Circuit will come out. But I don't think it's plain error.

I also agree with the government that it is harmless error in this case. As the government pointed out, there was testimony as to a field test, which also was not objected to, and indicated that there was crack cocaine involved in the substance that was found on the defendant. Moreover, and to me this is equally compelling, the defendant's essential defense at trial was not that this was not crack cocaine, it was that all of the drugs he possessed was for his own use, not for sale.

That is how the Court intends to resolve this, but because some of these issues, starting with the *Williams* case, was not briefed to the Court, I felt it only appropriate to give both sides an opportunity to respond before I issue my written decision. And so you have that chance now and I'll hear first from the government.

MS. ALTMAN: Thank you, Your Honor. I apologize, I don't have my materials on this topic with me today. I thought, and perhaps it was a different case, that my entire brief was taken from the *Williams* case and that I had put that in the footnote; that it had been argued, but not decided.

THE COURT: If it was there, I did not see it and unfortunately I don't -- let me see if I do have your brief in front of me. All right. Having said that, I don't know how you could say it was based on a briefing unless what you're saying is that you used the government's brief in your argument to this Court.

MS. ALTMAN: I did. I copied it almost word-for-word out of the Solicitor General's brief.

THE COURT: And so your view is that plain error is not at work.

MS. ALTMAN: Correct.

THE COURT: Or you just didn't raise plain error because it was in the brief made to the United

States Supreme Court where plain error wasn't being addressed.

MS. ALTMAN: No. I thought about plain error, and the issue -- I could not find a case that said when the same court is reviewing itself without an objection that it was plain error. I could find where the Seventh Circuit, if it were ruling this decision, would be plain error. But because I couldn't find a case that specifically said I'm looking at something I already decided, I couldn't find a case that applied plain error to that and that is why I did not make a plain error argument.

THE COURT: I'm trying to understand the distinction you're drawing. Having not been raised before me during the course of the trial, you're saying that I do need to decide *sui generis* an issue that was only raised after the fact and that the plain error doctrine does not apply here.

MS. ALTMAN: I could not find a case that said it did. I believe that it should, but I could not find a case that said that it did.

THE COURT: All right. Anything further the government wishes to say?

MS. ALTMAN: No. Thank you.

THE COURT: And I'm looking at your brief and

MS. ALTMAN: I believe, although I'm not 100% sure, I think he may have said that the test was cocaine and that combined with his knowledge as to what he was holding in his hand, officers can visually tell the difference between powder and crack; that those overcome or would have proven that it was crack cocaine.

MR. RUTH: Actually what happened, Your Honor, was --

THE COURT: Well, I will give you a chance.

MR. RUTH: Okay.

THE COURT: Briefly I'll give you a chance because I've gone beyond what I think either side was entitled to, given the nature of the arguments that were made. But -- so your position would be that having done a field test that it was cocaine, and having then said that he believed it to be crack cocaine based on his -- I guess we have to impute that he's basing it on his ability to discern it by looking at it, that that's sufficient to satisfy the government's burden of proof?

MS. ALTMAN: Yes.

THE COURT: All right. I said I would hear from you briefly.

MR. RUTH: Okay. Thank you, Judge. Two things. Here is how it went with the officer: He said he tested it and it tested positive for cocaine. And

Exhibit A

CONFIDENTIAL REPORT OF LABORATORY FINDINGS

Wisconsin Department of Justice
Division of Law Enforcement Services
State Crime Laboratory - Wausau
7100 Stewart Avenue
Wausau, WI 54401-8410
(715) 845-5625
FAX (715) 848-5833

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Submitting Agency:

Chief Jerry Matysik
Attn: Kristopher K. O'Neill
Eau Claire Police Department
740 Second Avenue
P.O. Box 496
Eau Claire WI 54702-0496

Date: October 22, 2010

Lab Case: W10-1873

Agency No.: 10-14248

Laboratory Analyst: MG 10-25-10

John Nied
Drug Identification

Case Name: Maxwell, Maurice L. (S)

I do hereby certify this document, consisting of 1 page(s), to be a true and correct report of the findings of the State Crime Laboratory on the items examined as shown by this report.

J.B. Van Hollen
ATTORNEY GENERAL

DESIGNEE

Item	Description / Source
A	A sealed manila envelope with a knotted plastic baggie corner containing 2.086 grams of white chunky material.

Examinations of the white chunky material from item A identified the presence of Cocaine, which is controlled by Section 961.16(2)(b)1 of the Wisconsin Uniform Controlled Substances Act. The presence of levamisole was also indicated in the white chunky material from item A.

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U.S. v. Maurice L. Maxwell 139

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Eau Claire Police Department
740 Second Avenue
P.O. Box 496
Eau Claire WI 54702-0496

Date: October 26, 2010
Lab Case: W10-1874
Agency No.: 10-15425
Laboratory Analyst: aug 10-27-10
John Nied
Drug Identification

Case Name: Maxwell, Maurice L. (S)

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J.B. Van Hollen
ATTORNEY GENERAL

DESIGNEE

Item	Description / Source
A	A sealed manila envelope containing an Alltel bill and a torn plastic baggie with: A1. a knotted plastic baggie containing 1.719 grams of plant material, A2. a knotted plastic baggie corner containing 0.248 gram of plant material, and A3. 0.169 gram of loose plant material.
B	A sealed manila envelope with a ziplock plastic bag containing a plastic baggie with a knotted plastic baggie containing: B1. 9.148 grams of off-white chunky material, B2. four knotted plastic baggie corners (items B2a through B2d) containing a total of 1.112 grams of off-white chunky material, and B3. a plastic baggie corner containing white powder residue.

Examinations of the plant material from item A1 identified the presence of Tetrahydrocannabinol, a substance from marijuana, which is controlled by Section 961.14(4)(t) of the Wisconsin Uniform Controlled Substances Act.

Examinations of the off-white chunky material from item B1 identified the presence of Cocaine, which is controlled by Section 961.16(2)(b)1 of the Wisconsin Uniform Controlled Substances Act. The presence of levamisole was also indicated in the off-white chunky material from item B1.

Items A2, A3, B2a through B2d, and B3 were examined visually only.

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Oct. 28. 2010 11:38AM Wausau Crime Lab No. 2221 P. 2

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Division of Law Enforcement Services
State Crime Laboratory - Wausau
7100 Stewart Avenue
Wausau, WI 54401-8410
(715) 845-8828
FAX (715) 845-8833

Submitting Agency:

Sheriff Ronald D. Cramer
Attn: Donald Henning
Eau Claire County Sheriff's Office
728 Second Avenue
Eau Claire WI 54703-5499

Date: October 27, 2010

Lab Case: W10-1891

Agency No.: 10-4834

Laboratory Analyst: 10-28-10

John Nied
Drug Identification

Case Name: Maxwell, Maurice Lovell (S)

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J.B. Van Hollen
ATTORNEY GENERAL

DESIGNEE

Item	Description / Source
A	A sealed manila envelope with a knotted plastic baggie corner containing a plastic baggie corner with 2.438 grams of off-white chunky material.
B	A sealed manila envelope with a ziplock plastic bag containing a knotted plastic baggie corner with: B1. two orange round tablets weighing 0.484 gram, B2. one red irregular-shaped tablet weighing 0.229 gram, and B3. two red round tablets weighing 0.476 gram.

Examinations of the off-white chunky material from item A identified the presence of Cocaine, which is controlled by Section 961.16(2)(b)1 of the Wisconsin Uniform Controlled Substances Act. The presence of nicotinamide was also indicated in the off-white chunky material from item A.

Examinations of the tablets from items B1, B2, and B3 did not identify the presence of any controlled substances. The presence of diphenhydramine was indicated in the tablets from items B1, B2, and B3. The presence of caffeine was also indicated in the tablet from item B2.

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U.S. v. Maurice L. Maxwell 141

TRANSMITTAL OF CRIMINAL EVIDENCE

DJ-LE-1015 (Rev. 4/84)

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WISCONSIN DEPARTMENT OF JUSTICE
STATE CRIME LABORATORY-WAUSAU
7100 Stewart Avenue
Wausau, WI 54401-9339
(715) 845-8626
FAX (715) 845-8633

Submitting Agency: Eau Claire Police Department	Agency Case No.: 10-14248
City of Agency: Eau Claire / County: Eau Claire	Date Transmitted: October 16, 2010
Offense Committed in City/Town/Village: City of Eau Claire / County: Eau Claire	Offense Date: July 14, 2010
Criminal Offense (In drug cases report charge; i.e., Possession, Possession with Intent, Delivery)	Trial Date (If known):

Delivery of Cocaine

	Sex/Race	Date of Birth	Age
Victim(s)			
Suspect(s): Maurice L. Maxwell	[redacted]	[redacted]	[redacted]
Suspect(s)			

Agency Exhibit Number	Number of Items	Item Description and Source
41944	1	Package containing a quantity of material suspected to be crack cocaine
		Please examine the above listed item for the presence of any controlled substances.

Full Name of Submitting Officer: Kristopher K. O'Neill
PLEASE PRINT

Phone No. (715) 839-4997

U.S. v. Maurice L. Maxwell 142

TRANSMITTAL OF CRIMINAL EVIDENCE

DJ-LE-101B (Rev. 4/94)

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STATE CRIME LABORATORY-WAUSAU
7100 Stewart Avenue
Wausau, WI 54401-9339
(715) 845-8626
FAX (715) 845-5833

Submitting Agency: Eau Claire Police Department		Agency Case No.: 10-15425
City of Agency: Eau Claire	County: Eau Claire	Date Transmitted: October 18, 2010
Offense Committed in City/Town/Village: City of Eau Claire	County: Eau Claire	Offense Date: July 29, 2010
Criminal Offense (In drug cases report charge; i.e., Possession, Possession with intent, Delivery): Delivery of Cocaine, Delivery of THC		Trial Date (if known):

	Sex/Race	Date of Birth	Age
Victim(s)			
Suspect(s): Maurice L. Maxwell	[redacted]	[redacted]	[redacted]
Suspect(s)			

Agency Exhibit Number	Number of Items	Item Description and Source
42176	2	Packages containing a quantity of material suspected to be marijuana
42179	1	Package containing a quantity of material suspected to be crack cocaine
		Please examine the above listed items for the presence of any controlled substances.
[redacted]		

Full Name of Submitting Officer: Kristopher K. O'Neill
PLEASE PRINT

Phone No. (715) 839-4997

U.S. v. Maurice L. Maxwell 143

TRANSMITTAL OF CRIMINAL EVIDENCE

DJ-LS-1019 (FORM 5/07)

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STATE CRIME LABORATORY- WAUSAU
7100 Stewart Avenue
Wausau, WI 54401-8410
(715) 845-8626
FAX (715) 845-5833

Submitting Agency: Eau Claire County SO		Agency Case No.: 10-4834
City of Agency: Eau Claire	County: Eau Claire	Date Transmitted: 10/19/10
Offense Committed in City/Town/Village: Eau Claire	County: Eau Claire	Offense Date: 07/20/10
Criminal Offense (In drug cases report charge; i.e., Possession, Possession with Intent, Delivery): Drugs-Possession with Intent to Sell		Trial Date (if known)

	Sex/Race	Date of Birth	Age
Victim(s)			
Suspect(s) Maxwell, Maurice, Lovell	[redacted]	[redacted]	[redacted]
Suspect(s)			

Agency Exhibit Number	Number of Items	Description
1	1	2.8 grams of suspected crack cocaine
2	5	Suspected Ecstacy Tablets

Full Name & Title of Submitting Officer (Please Type or Print): Detective Donald Henning	Phone No.: [redacted]

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Jun. 1. 2011 10:29AM Wausau Crime Lab No. 2983 P. 2

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State Crime Laboratory - Wausau
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Wausau, WI 54401-8410
(715) 845-8528
FAX (715) 848-5699

Submitting Agency:
Chief Jerry Matysik
Attn: Kristopher K. O'Neill
Eau Claire Police Department
740 Second Avenue
P.O. Box 496
Eau Claire WI 54702-0496

Date: May 31, 2011

Lab Case: W10-1874

Agency No.: 10-15425

Laboratory Analyst: JN 5-31-11

John Nied
Controlled Substances Unit

Case Name: Maxwell, Maurice L. (8)

I do hereby certify this document, consisting of 1 page(s), to be a true and correct report of the findings of the State Crime Laboratory on the items examined as shown by this report.

J.B. Van Hollen
ATTORNEY GENERAL

DESIGNEE

SUPPLEMENTAL REPORT

Further examination of the off-white chunky material from item B1 identified the presence of Cocaine Base.

Examinations of the off-white chunky material from items B2a, B2b, B2c, and B2d identified the presence of Cocaine Base, which is controlled by Section 961.16(2)(b)1 of the Wisconsin Uniform Controlled Substances Act.

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False positives and false negatives with a cocaine-specific field test and modification of test protocol to reduce false decision

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Abstract

The specificity of the Scott test, which is widely used in the field to detect cocaine, was investigated. Several drugs and medicines were applied to the test, and the conditions leading to false positives or false negatives were defined. The Scott test consists of three steps, each involving the addition of a certain reagent and observation of the color that consequently develops. In the first step, blue precipitates appear. In the second, these precipitates completely disappear. In the third step, blue appears again, but in the lower layer. It became clear that proper sample size is critical for correct decision, since too much heroin or dibucaine showed exactly the same color sequence as cocaine HCl and thus gave false positives, and too much cocaine HCl showed persisting precipitates in the second step, yielding a false negative. The appropriate sample size was 1 mg or smaller. Freebase (crack) cocaine gave false negatives even when the sample size was appropriate, and it could not be distinguished from a newer substance of abuse, 5-methoxy-*N,N*-diisopropyltryptamine (5-MeO-DIPT, foxy). The authors developed a new protocol to distinguish crack from 5-MeO-DIPT.

Keywords: Cocaine; Crack; Field test; Cobalt thiocyanate

1. Introduction

Various field tests are utilized to identify suspected illicit substance at the site of abuse or trafficking. The Scott test is widely used in the field to identify cocaine. Some kinds of recent designer drugs produce results similar to cocaine in the Scott test, possibly leading to incorrect on-site decision. In February 2004, three boys were arrested in this manner by police in Tokyo; ultimately it became clear that their substance was not cocaine but an uncontrolled drug [1].

The Scott test was developed by Scott in 1973 [2] and improved by Fasanello and Higgins, who made it applicable to crack [3]. This improved version of the Scott test is now included in the field test manual of the United Nations [4] and is used by many Japanese law enforcement officers. Though the Scott test is widely used, few reports have examined it in detail.

The test consists of three steps, each involving the addition of a certain reagent and observation of the color that develops as a result. If a sample contains cocaine, the reactions will go as follows. In the first step, cobalt thiocyanate is added and blue precipitates appear. In the second step, hydrochloric acid is added and the blue precipitates completely disappear. In the third step, chloroform is added and blue reappears, but this time in the lower layer (Fig. 1A).

Several forensic chemists have reported a specificity problem with the Scott test. Prall described that diphenhydramine hydrochloride, chlorpromazine hydrochloride, and some other medicines showed the same color sequence as cocaine hydrochloride [5]. Ishiguro et al. reported the same

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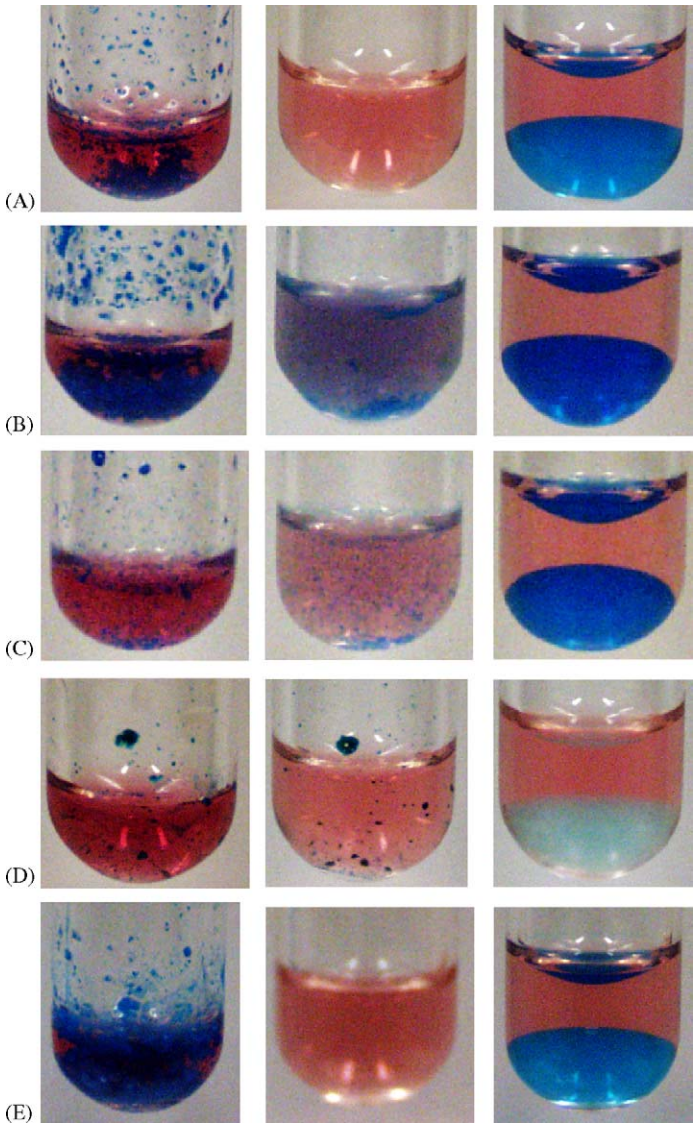

Fig. 1. Reaction sequences of drugs in Scott test: (A) cocaine HCl, 1 mg; (B) cocaine HCl, 3 mg; (C) crack, 2 mg; (D) 5-methoxy-*N*,*N*-diisopropyltryptamine, 1 mg; (E) heroin, 5 mg. Each photo corresponds to a reaction step in the Scott test. Left: step 1; center: step 2; right: step 3.

phenomenon about promazine hydrochloride and scopolamine [6]. Lorch reported that promethazine alone or phencyclidine alone did not behave like cocaine in the test, but that mixing them together caused a false positive [7]. Lorch found that the combination of phencyclidine with either promazine, dibucaine, or methapyrilene showed a false positive [8]. Grant et al. stated that tests for cocaine based on cobalt thiocyanate would continue to show an unacceptable incidence of false positives and false negatives. They suggested another field test for cocaine based on the recognition of the odor of methyl benzoate as a test product [9,10].

On the other hand, several authors have recognized the superior specificity of the Scott test for cocaine. Inoue et al. applied this test to 105 substances and found none of them showed cocaine's color sequence [11]. Likewise, Oguri et al. applied 30 substances to the test and noted its high specificity [12]. With all these discussions, cobalt thiocyanate tests such as the Scott test are still the most popular field tests for cocaine.

The aim of our study is to clarify the conditions that cause false negatives and false positives in the Scott test and to improve the test's specificity. Some of this study's findings are expected to lead law enforcement officers to more accurate diagnoses on site. The findings are also expected to help forensic chemists obtain better analytical information in laboratories with limited equipment, where spot tests are still important [13].

2. Materials and methods

2.1. Scott reagents and test protocol

2.1.1. Original Scott reagents [2]

- Solution #1: 2% cobalt(II) thiocyanate dissolved in water and then diluted 1:1 with glycerine.
- Solution #2: concentrated hydrochloric acid.
- Solution #3: chloroform.

After being weighed, the sample powder or crystal was placed in a test tube to which 0.2 ml of solution #1 was added, and the tube was shaken. Blue precipitates then appeared (step 1). Then 0.05 ml of solution #2 was added and the tube was mechanically shaken at 1200 rpm for 2 min. The shaking machine was a Tube Mixer TRIO HM-2, a product of As One, Inc. If not all of the blue disappeared, 0.05 ml solution #2 was added and the tube was shaken again (step 2). Finally, 0.1 ml of solution #3 was added, the tube was shaken, and the color of the lower layer was observed (step 3).

2.1.2. Scott reagents applicable to crack [3]

- Solution #1: a solution consisting of 2% cobalt(II) thiocyanate in 10% acetic acid was prepared and then diluted 1:1 with glycerine.
- Solution #2: 10% hydrochloric acid [14].
- Solution #3: chloroform.

After being weighed, the sample powder or crystal was placed in a test tube, 0.2 ml of solution #1 was added, and the tube was shaken. Blue precipitates appeared (step 1). Then, 0.2 ml of solution #2 was added, and the tube was mechanically shaken at 1200 rpm for 2 min (step 2). Finally, 0.2 ml of solution #3 was added, the tube was shaken, and the color of the lower layer was observed (step 3).

2.2. Marquis test

Marquis reagent was made by adding one drop of formaldehyde solution to 1 ml of concentrated sulfuric acid. The test sample was placed in a well on a white porcelain plate, onto which two drops of Marquis reagent were added. The color that developed was noted.

2.3. Drugs and medicines

The standard cocaine HCl for quantitative analysis was Japanese Pharmacopoeia (JP) grade. Illegally traded cocaine HCls used in the Scott test experiments had been seized by Japanese police and were legally possessed by our laboratory for the purpose of research. Crack cocaine was made by dissolving powdered cocaine HCl in water, adding $NaHCO_3$, and heating the resultant mixture. As it cooled, crystals of this freebase formed and were filter-separated from the NaCl solution [15]. Some of the crystals were re-crystallized from diethylether to get higher-purity crystals. The heroin HCl used had also been obtained from police seizures. Phencyclidine HCl was provided by the Japanese Ministry of Health and Welfare. 5-Methoxy-*N,N*-dimethyltryptamine and 5-methoxy-*N,N*-diisopropyltryptamine HCl were purchased on the market and identified by comparing melting point, mass spectral data, infrared spectral data, and NMR data with data from the literature [16–20].

Dibucaine HCl, lidocaine, procaine HCl, and promethazine HCl were JP grade. Chlorpromazine HCl, diphenhydramine HCl, ketamine HCl, scopolamine HBr ($3H_2O$), and tryptamine HCl were all laboratory grade.

2.4. Quantification of cocaine in seized samples

The purity of seized cocaine HCls and laboratory-made crack cocaine was assayed using high-performance liquid chromatography (HPLC). About 0.010 g of sample was precisely weighed, placed in a volumetric flask, to which water (for cocaine HCl) or 0.36% hydrochloric acid (for crack cocaine) was added until 20 ml was reached. The solution was diluted five-fold by water and injected into the HPLC apparatus. The chromatographic conditions were as follows: column, Zorbax extend C18 (15 cm × 4.6 mm, 3.5 μm); mobile phase, 10 mM ammonium acetate and acetonitrile (70:30); flow rate, 0.5 ml/min; oven temperature, 35 °C; wavelength for detection, 235 nm; injection volume, 5 μl.

2.5. Spectrophotometer

A Bacharach Coleman Model 35 spectrophotometer was used to obtain the absorbance data on the colored test solutions at 625 nm. A Shimadzu Model UV-2500 PC spectrophotometer was used to obtain the solution spectra. A Shimadzu Model FTIR-8200 PC infrared spectrophotometer was used to obtain the infrared spectra of crystalline chemicals by using the Nujol Mull method. A Varian Model GEMINI 2000 NMR machine (300 MHz) was used to obtain the NMR spectra.

3. Results and discussion

3.1. Scott test with potential false-positive drugs or medicines

Chemicals that had been reported in the literature at least once to have given false positives, along with some of their structural analogs, were selected for application of the Scott test. The sample weight was controlled at 1 mg. The results are shown in Table 1.

No chemical showed the same color sequence as cocaine HCl; this corresponded to the results of Inoue et al. [11] and Oguri et al. [12]. However crack cocaine gave persisting precipitates after the second reagent was

Table 1
Scott test with cocaine and potential false-positive drugs or medicines

Chemicals	Acetic acid[a]			Original[b]		
	Step 1	Step 2	Step 3	Step 1	Step 2	Step 3
Cocaine or its salt						
Cocaine HCl (JP grade)	Blue	Disappear	Blue	Blue	Disappear	Blue
Freebase cocaine A (95%)[c]	Blue	Remain	Blue	White	Remain	Blue
Freebase cocaine B (87%)[c]	Blue	Remain	Blue			
Freebase cocaine C (86%)[c]	Blue	Remain	Blue			
Chemicals yielding blue precipitate						
Chlorpromazine HCl	Blue	Remain	Blue			
Dibucaine HCl	Blue	Disappear	No	Blue	Disappear	No
Diphenhydramine HCl	Blue	Remain	Blue			
Heroin HCl	Blue	Disappear	No			
Ketamine HCl	Blue	Disappear	No			
Lidocaine	Blue	Remain	No	White	Remain	No
5-Methoxy-*N,N*-dimethyltryptamine	Blue	Disappear	No	Blue	Disappear	No
5-Methoxy-*N,N*-diisopropyltryptamine HCl[d]	Blue	Remain	Blue	Blue	Remain	Blue
Promethazine	Blue	Remain	Blue	Blue	Remain	Blue
Chemicals not yielding blue precipitate						
Phencyclidine HCl	White	Remain	Blue	Blue	Remain	Blue
Procaine HCl	No	No	No			
Scopolamine HBr	White	Disappear	No	White	Disappear	No
Tryptamine HCl	No	No	No	No	No	No

Details of reagents are described in text.
[a] Improved Scott test applicable to crack.
[b] Original Scott test.
[c] Laboratory-made from seized cocaine HCl, and contents of freebase were quantified by HPLC.
[d] So-called 'foxy'.

added (Fig. 1C). There are four chemicals that show the same color sequence as crack cocaine: chlorpromazine HCl, diphenhydramine HCl, 5-methoxy-*N,N*-diisopropyltryptamine HCl (5-MeO-DIPT, Fig. 1D), and promethazine HCl. If the complete disappearance of precipitates at the second step was considered requisite for a cocaine-positive decision, a crack cocaine sample would give a false negative. On the other hand, if the persistence of precipitate at the second step was not considered an obstacle to a positive decision, all four of the chemicals would give false positives. Thus it became clear that persisting precipitate is one cause of false decision.

Chlorpromazine and diphenhydramine were included in Inoue's and Oguri's reports as possible false-positive chemicals. However, neither of those authors found a specificity problem with those chemicals, since they did not test crack cocaine and may have neglected the significance of persisting precipitates.

3.2. Effect of sample weight

As sample weight seemed to be critical, various sample weights were used in applying the Scott test to cocaine HCl, crack cocaine, and eight other substances that could lead to false positives. The results are shown in Table 2. Cocaine HCl gave persisting precipitates when it was sampled at weights greater than 3 mg, as shown in Fig. 1B (false negative.)

Some substances at higher sample weights showed the same color sequence as that of the normal amount of cocaine. An amount of 2 mg of dibucaine HCl or heroin HCl (Fig. 1E), and 4 mg of ketamine HCl produced such sequences (false positives.)

Thus, a sample must weigh no more than 1 mg for precise decision with the Scott test. Amounts over that will cause false negatives in the case of cocaine or false positives in the case of dibucaine, heroin, or ketamine. This is the first report of a correlation between sample weight and test results. For on-site testing, the capacity of the spoon or spatula should be measured, and law enforcement officers should be trained in the proper sampling amounts of suspected drugs.

3.3. Spectral data of final solution

Spectral data for the complex yielded in the Scott test have not been available in the literature. We took the spectral data of some substances within the range of visible wavelengths, as shown in Fig. 2. The wavelength range of maximum absorbance was 622 to 626 nm. The color tones of these complexes are so similar that they are indistinguishable from each other.

Table 2
Scott test with cocaine and potential false-positive drugs at various sample weights

Chemicals	Sample weight (mg)							
	0.1[a]	0.2[a]	0.5[a]	1	2	3	4	5
Cocaine or its salt								
Cocaine HCl (JP grade)				A	A	B		
Freebase cocaine A (95%)[b]	A	A	B	B				
Freebase cocaine B (87%)[b]	B	B	B	B				
Freebase cocaine C (86%)[b]	B	B	B	B				
Chemicals yielding insoluble precipitate								
Chlorpromazine HCl	C	C	B	B				
Diphenhydramine HCl	C	C	B	B				
Lidocaine				C	B			B
5-Methoxy-*N,N*-diisopropyltryptamine HCl	C	C	C	B				
Promethazine HCl		C	B	B				
Chemicals showing color sequence like cocaine								
Dibucaine HCl				D	A			A
Heroine HCl				D	A			A
Ketamine HCl				D	D	D	A	A

Pattern of color sequence at 1st, 2nd, and 3rd steps; A: + + +, B: + − +, C: + − −, D: + + −; a certain weight of each drug was applied to the Scott test with 0.2 ml of solutions #1, #2, and #3.
[a] Actual weight in the experiments was 1 mg. Multiplied volumes of Scott reagents were used and calculated to each sample weight.
[b] Laboratory-made from seized cocaine HCl, and contents of freebase were quantified by HPLC.

3.4. New protocol to distinguish between crack cocaine and 5-MeO-DIPT

Distinguishing between crack cocaine and 5-MeO-DIPT by the Scott test is considered difficult, since both substances give the same color sequence as each other even when the sample weight is controlled. We tried to use an additional amount of solution #2, hydrochloric acid, to dissolve precipitates in a test mixture. However, excess hydrochloric acid produced a blue color in the second step, and this blue could not be extracted into the chloroform layer, as Scott reported [2].

In the case of persisting precipitate, one method of preventing 5-MeO-DIPT or other chemicals from showing a false positive is to place the supernatant of the second-step mixture into another test tube and then add chloroform to it. With this method, the blue color in the lower layer will develop only with cocaine or crack. However, this method is not very convenient for on-site use.

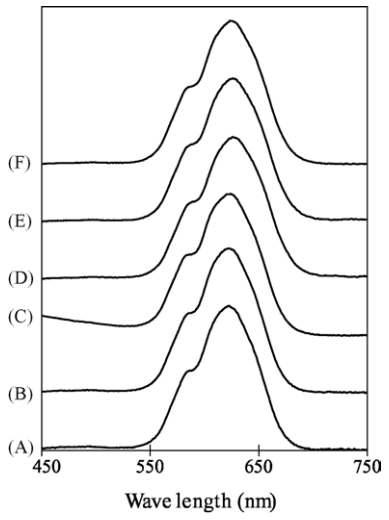

Fig. 2. Spectra of final solutions of the Scott test for some kinds of drugs. The wavelength of maximum absorbance of each mixture is shown in parentheses. (A) Cocaine HCl (622.6 nm); (B) crack (622.4 nm); (C) 5-methoxy-*N,N*-diisopropyltryptamine (624.2 nm); (D) heroin HCl (626.0 nm); (E) chlorpromazine HCl (626.0 nm); (F) diphenhydramine HCl (623.8 nm).

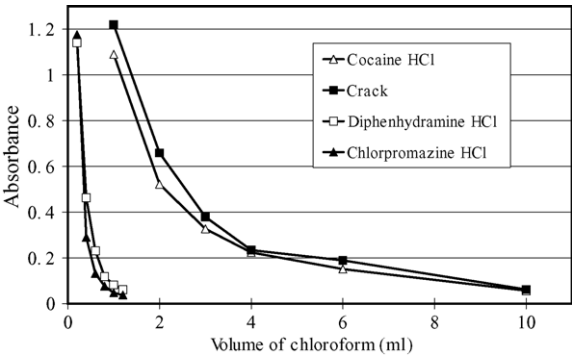

Fig. 3. Absorbance of lower layer in final reaction mixture at 625 nm.

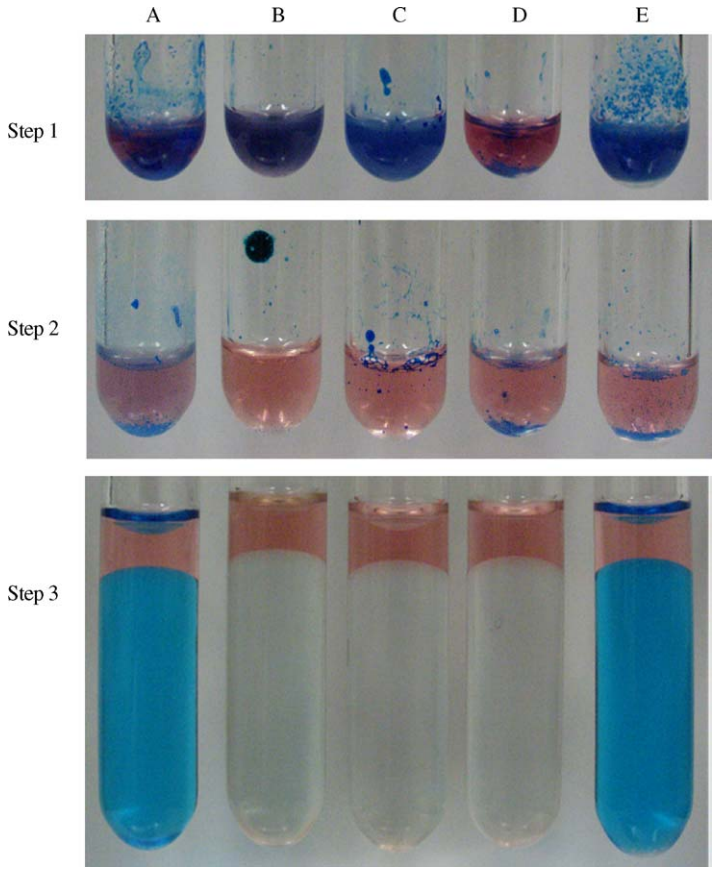

Fig. 4. Final mixture of modified protocol for persisting precipitates. (A) crack, 2 mg, (B) 5-methoxy-*N,N*-diisopropyltryptamine, 2 mg, (C) diphenhydramine HCl, 1 mg, (D) chlorpromazine HCl, 1 mg, (E) cocaine HCl, 3 mg.

On the other hand, concentration–absorbance curves suggested that crack and 5-MeO-DIPT are distinguishable from each other. Fig. 3 shows the absorbance (625 nm) of the lower layer in a final mixture of the Scott test when it was diluted stepwise. Diphenhydramine and chlorpromazine were used in this experiment because they show same color sequence as 5-MeO-DIPT and the color is stronger. The reaction solutions of diphenhydramine and chlorpromazine gave absorbance of 0.1 with 0.8 ml or 0.6 ml of chloroform, respectively. At that absorbance, the blue was so slight that it could not be seen by the naked eye. On the other hand, the third-step colors for cocaine and crack were quite deep, and about 8 ml of chloroform was needed to dilute either of them to reach an absorbance of 0.1.

Based on the strong absorbance of the cocaine–cobalt complex, a new protocol for the Scott test has been developed: If the precipitate in the second step does not disappear completely, add a larger volume of a third solution to the test mixture. If 2 ml of a third solution is added, at least 2.5 mg diphenhydramine HCl is necessary for blue to appear in the third step. On the other hand, 0.25 mg of crack or cocaine HCl will give a blue color in the same conditions. The efficacy of this increase in solution 3 is shown in Fig. 4.

3.5. Additional screening tests

Prall recommended the use of Marquis reagent as an additional test to screen out false-positive results for cocaine by chlorpromazine, diphenhydramine, doxylamine, and diphenylpyraline [5]. We applied these potential false-positive substances to the Marquis test. Dibucaine and ketamine were colorless in this test and could not be distinguished from cocaine. 5-MeO-DIPT produced a pale green immediately after the addition of Marquis reagent, consistent with a report by the US Drug Enforcement Administration [17] in which 5-MeO-DIPT is reported to show an olive green in the test. However, the color was not strong and it quickly turned into a pale brown that was somewhat indistinct from the pale brown shown by impure cocaine. (Cocaine HCls of 40–70% purity were tested.) 5-MeO-DIPT can be distinguished from cocaine by the Scott test protocol described above, and also by the Ehrlich indole test. In the Scott test, when the sample weights of dibucaine and ketamine were too high, each gave exactly the same color sequence as cocaine. The sample weight should be controlled especially carefully for those two substances.

Diphenhydramine HCl gave a brown color, while heroin, chlorpromazine, and promethazine gave a purple and lido-

caine gave a red. They were distinguishable from cocaine by the Marquis test.

3.6. Influence of mixed materials

Cocaine is sometimes mixed with various materials to increase its volume or for camouflage. These materials may cause incorrect decision in the Scott test. Starch and sucrose were each experimentally mixed with cocaine HCl and applied to the Scott test. Neither material influenced the color sequence in the test, though the solution with starch was slightly cloudy.

4. Conclusions

To maximize the specificity of the Scott test and reduce on-site false decision, the following terms would be effective.

The amount of sample tested has a definite effect on the result of the test therefore the sampling weight should be 1 mg or less.

When blue precipitate does not disappear completely in the second step, 2 ml of a third solution should be added because cocaine gives blue color even with such larger amount of third solution while any other substance tested does not.

Some substances at higher sample weights show same color sequence as that of the normal amount of cocaine. Therefore other field tests, such as the Marquis or Ehrlich indole test, should be done as additional field testing in case the sample weight is not controlled well.

When a field-test sample is suspected of being cocaine, it should be laboratory tested as soon as possible.

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No. 12-1809

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

United States of America, Plaintiff-Appellee, v. Maurice L. Maxwell, Defendant-Appellant.	Appeal from the United States District Court for the Western District of Wisconsin Case No. 11-CR-25-WMC The Honorable Chief Judge William M. Conley

CIRCUIT RULE 30(D) STATEMENT

I, the undersigned, counsel for the Defendant-Appellant, Maurice L. Maxwell, hereby state that all of the materials required by Circuit Rules 30(a), 30(b), and 30(d) are included in the Appendix to this brief.

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Dated: December 14, 2012

CERTIFICATE OF SERVICE

I, the undersigned, counsel for the Defendant-Appellant, Maurice L. Maxwell, hereby certify that I electronically filed this brief and appendix with the clerk of the Seventh Circuit Court of Appeals on December 14, 2012, which will send notice of the filing to counsel of record.

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Dated: December 14, 2012