IN THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 12-1809

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. MAURICE MAXWELL, Defendant-Appellant.	) Appeal from the United States) District Court for the Western) District of Wisconsin)) Case No. 11-cr-25-wmc))) Honorable William Conley) Presiding))

BRIEF OF PLAINTIFF-APPELLEE

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JURISDICTIONAL STATEMENT

The jurisdictional statement set forth in the appellant's brief is not complete and correct. Accordingly, pursuant to Circuit Rule 28(b), the United States submits the following jurisdictional statement.

I. District Court Jurisdiction

A. The district court's jurisdiction was based on Title 18, United States Code, Section 3231.

II. Appellate Court Jurisdiction

A. The Appellate Court's jurisdiction is based on Title 28, United States Code, Sections 1291 and 1294.

B. The appellant Maurice Maxwell was sentenced on February 29, 2012. (R. 125). A judgment was signed by the district court on March 22, 2012, and entered on the district court docket the next day. (R. 128; Appellant's Appendix (AA), pgs. 1a-6a).

C. Maxwell filed a motion for acquittal, or in the alternative, a new trial, on December 19, 2011. (R. 112). The district court denied this motion orally at sentencing and by written order docketed on March 27, 2012. (R. 130; AA, pgs. 7a-17a).

D. Maxwell filed his timely notice of appeal on April 4, 2012. (R. 131).

E. This case is not a direct appeal from a decision of a magistrate judge.

STATEMENT OF THE ISSUES

I. Whether the district court correctly applied plain-error review in denying the defendant's Rule 29 motion.

II. Whether it was plain error for Michelle Gee to testify about her own independent conclusions based on reports of lab testing that she did not conduct and that were not introduced into evidence.

III. Whether the district court committed plain error in sentencing the defendant without considering the Fair Sentencing Act, and if so, whether a limited remand is appropriate to determine if the district court would impose the same sentence.

STATEMENT OF THE CASE

On March 2, 2011, a federal grand jury in the Western District of Wisconsin returned a one-count indictment against Maurice Maxwell, charging him with possessing five grams or more of crack cocaine with the intent to distribute it. (R. 2; AA, pg. 26a). Maxwell fired three attorneys and chose to represent himself at trial. (R. 13, 23, 45). He was appointed stand-by counsel. (R. 45).

The United States provided the defendant notice on November 4, 2011, that Michelle Gee, a Supervising Analyst for the Wisconsin State Crime Lab, would testify as an expert that the drugs involved in this case were crack cocaine. (R. 48). The defendant never objected to this notice, either pre-trial or at trial, and never raised any objection at trial to Gee's testimony or qualifications as an expert witness.

Maxwell's jury trial began before Chief District Judge William Conley on December 5, 2011. The trial ended on December 6, 2011, with a guilty verdict. (R. 100).

Immediately following the trial, the court reappointed Maxwell's third attorney, who has acted as stand-by counsel at trial, to assist the defendant with post-trial motions and sentencing. (R. 106).

On December 19, 2011, pursuant to Federal Rule of Criminal Procedure 29(c), Maxwell renewed the motion for judgment of acquittal that the district court made for him at the close of the government's case. (R. 112). In the alternative, he asked for a new trial. (Id.). Maxwell argued that the testimony of the government's lab analyst was in violation of his rights under the Confrontation Clause. (Id). This motion was denied (R. 130; AA, pgs. 7a-17a) and on February 29, 2011, Maxwell was sentenced to 144 months in prison. (R. 125; R. 128; AA, pgs. 1a-6a).[1] On April 4, 2012, he filed a timely notice of appeal from the judgment docketed March 23, 2012, and the order denying his post-trial motion. (R. 130, 131, 127).

[1] The Judgment and Conviction order indicates a sentence of 125 months. (R. 127, 128). The judge explained that he was crediting the defendant with 19 months he had already spent in custody. (Id).

STATEMENT OF FACTS

I. Trial Testimony

On July 29, 2010, Maxwell was arrested at work. (R. 111, pg. 8). Following his arrest, Detective Jeff Wilson searched Maxwell and found what he believed to be crack cocaine in Maxwell's underwear, packed in five separate packages. (Id., pgs. 11, 14; AA, pgs. 28a-31a). Wilson, a drug agent for more than 13 years, explained that crack was a smokeable form of cocaine that appeared rocky, while cocaine was a powder or compressed. (R. 111, pgs. 6, 13; AA, pg. 30a).

Wilson field-tested the drugs found on the defendant. The result was "conclusive for the presence of cocaine." (R. 111, pg. 18; AA, pg. 35a). When asked if he meant crack cocaine, he answered that he did. (Id.). Additionally, he weighed the substance and determined it weighed approximately 13 grams.[2] (R. 111, pg. 17; AA. pg. 34a).

Drug Enforcement Administration Special Agent Craig Grywalsky also testified that based on his 16 years of experience, the drugs appeared to him to be crack cocaine. (R. 111, pgs. 108, 110). He explained that cocaine hydrochloride is "made into crack cocaine by a chemical process that removes basically the

[2]The crime lab later determined that it actually weighed 10.26 grams but this amount was never presented to the jury. (R. 116, ¶ 20).

impurities of what's in the cocaine hydrochloride, so it's a more pure form of the drug." (Id., pg. 110).

II. Gee's Testimony

On November 4, 2011, the United States provided notice to the defendant that Michelle Gee, a forensic scientist with the Wisconsin State Crime Laboratory in Wausau, would be testifying as an expert in the case. (R. 48). Maxwell was notified that Gee would offer her opinion that the substance seized in this case contained cocaine base and that her opinion was based on the results of her visual examination, along with a gas chromatography test and a mass spectrometry test performed on a liquid extraction of the substance, and an infrared spectroscopy performed on the solid material. (Id.).

At trial, and without objection, Gee explained that cocaine is usually in a powder form that is injected or snorted, while crack cocaine is generally a more solid, rock-like substance that is smoked. (R. 108, pg. 5; R. 111, pg. 98; AA, pg. 38a). She described the substance in this case as a white, chunky substance that appeared to be crack cocaine. (R. 108, pgs. 6, 12; R. 111, pgs. 99, 105-106; AA, pgs. 39a, 45a-46a).

Gee testified that the drug evidence was received at the crime lab the first time on October 19, 2010. (R. 108, pg. 6; R. 111, pg. 100; AA, pg. 40a). She

explained the procedure for evidence intake, where it goes from there, and when it is sent back. (R. 108, pgs. 6-7; R. 111, pgs. 100-101; AA, pgs. 40a-41a). The first time the drugs were returned to the agency in the case was November 3, 2010. (R. 108, pg. 7; R. 111, pg. 101; AA, pg. 41a). The drugs came back to the lab for further analysis on March 10, 2011, and were sent back to the submitting agency. (R. 108, pgs. 8-9; R. 111, pgs. 102-103; AA, pgs. 42a-43a). While drugs are at the lab, there are certain precautions that are followed to maintain the integrity of the drugs, including keeping the drugs sealed, using individual evidence lockers, and keeping any evidence that has not been assigned to an analyst locked in an evidence room within the laboratory. (R. 108, pg. 9; R. 111, pgs 102-103; AA, pgs. 42a-43a).

To determine whether submitted evidence contains a controlled substance, an item is opened and the material is weighed. (R. 108, pg. 9; R. 111, pg. 103; AA, pg. 43a). A series of color spot tests can be performed and then the material is extracted using a solvent. (Id.). The material is then run on instrumentation, which consists of gas chromatography, mass spectrometry, and sometimes, infrared spectrometry. (Id.). These examinations are relied on by experts in the field of drug identification. (R. 108, pg. 10; R. 111, pg. 103, AA, pg. 43a).

There are steps taken to make sure the machines used to test the drugs are working properly. (R. 108, pg. 11; R. 111, pg. 104; AA, pg. 44a). For the gas chromatography and mass spectrometry, standards are run with the sample to show the instrument is working properly. (R. 108, pg. 11; R. 111, pg. 105; AA, pg. 45a). The mass spectrometry is also calibrated every day prior to use. (Id.). The infrared spectrometry is calibrated monthly and is checked daily before use. (R. 108, pgs. 11-12; R. 111, pg. 105; AA, pg. 45a).

The instruments described above generate printouts of the reading taken in each case. (R. 108, pg. 10; R. 111, pg. 103; AA, pg. 43a). Although another analyst, John Nied, performed the primary analysis in this case,[3] Ms. Gee reviewed the data generated by the tests and formed her own independent conclusion that the substance tested contained cocaine base. (R. 108, pgs. 11, 13; R. 111, pgs. 104, 105-106; AA, pgs. 44a, 45a-46a). Gee did not describe the procedure Nied used to test the drugs; rather she explained in general what the process was. (R. 108, pg. 9-10; R. 111, pgs. 103-104; AA, pgs. 43a-44a). Nor did she at any time comment on what Nied's conclusions were or vouch for them. Additionally, she declined to answer a question asked by the defendant about

[3]John Nied had retired from his position with the crime lab by the time of Maxwell's trial. (R. 108, pg. 19; R. 111, pg. 104; AA, pg. 44a).

the weight of the drugs, as she had not weighed them herself. (Id., pgs. 12-13; R. 111, pg. 106; AA, pg. 46a).

III. Rule 29 Motion

Shortly after the conviction, pursuant to Federal Rule of Criminal Procedure 29(c), Maxwell renewed the motion for judgment of acquittal that was made at the close of the government's case. (R. 112). In the alternative, he asked for a new trial. (Id.). Maxwell argued that the testimony of Michelle Gee, regarding the nature of the drugs found in Maxwell's possession, was in violation of his rights under the Confrontation Clause. (Id.).

Before sentencing, the court stated it was denying the motion. (R. 136, pg. 2). The court noted that a similar issue was pending decision in *Williams v. Illinois*, 132 S.Ct. 2221 (2012), a case decided while Maxwell's case was on appeal. The district judge opined that he did not believe Gee's testimony was plain error because the state of the law at the time of the trial allowed it. (R. 136, pg. 37; AA, pg. 50a). The court also indicated that any error was harmless, based on the field test and other testimony in the case. (Id.).

When questioned about the standard of review the district judge should apply, the government indicated it did not believe plain error applied, because it could not find any cases where a district court had used plain error to review its

own decision. (R. 136, pg. 38-39; AA. pgs. 51a-52a). The government further indicated it believed plain error should be the standard used, but could not find a case supporting its use. (R. 136, pg. 39; AA, pg. 52a). Defense counsel also stated he could find no authority for the district court to apply plain error review. (R. 136, pg. 42). The government added that review by the Seventh Circuit would be for plain error. (Id.).

In a written decision, the district court denied the motion, saying

> . . . it [was] not 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.

(R. 130, pg. 3; AA, pg. 9a).

The district court further noted that even if it had not used plain-error analysis in reaching its decision, it would have come to the same conclusion if it had used the standard under Fed. R. Crim. P. 33(a), which allows for a new trial

when there is "a reasonable probability that a trial error had a prejudicial effect upon the jury's verdict." (R. 330, pg. 8; AA, pg. 14a).

IV. Sentencing

The defendant was charged with, and convicted of, possessing with intent to distribute more than five grams of crack cocaine. (R. 2; AA, pg. 26a). At the time he committed his crime, that amount carried a maximum penalty of forty years in prison. The defendant was sentenced as a career offender. (R. 116, ¶ 33). Because the charge carried a maximum prison term of 40 years, the defendant's base offense level was 34. (Id., ¶ 34). When combined with a criminal history category VI, the defendant's advisory guideline range was 262 to 327 months in prison. (Id., ¶ 105). Additionally, he was subject to at least four years of supervised release. (Id., ¶ 108).

The defendant objected to his classification as a career offender and to drug weights attributed to him by other subjects in the investigation. (R. 117). He did not, however, make any objection based on the Fair Sentencing Act. (Id.). He argued for a sentence of "around 84 months." (R. 123). This would have been the low end of Maxwell's guideline range had he not been a career offender. (Id.).

In sentencing the defendant, the district court judge noted that the defendant had a 30-year criminal history and that his advisory guideline range was greatly increased due to the defendant's criminal history classification. (R. 136, pgs. 30-31). The court further indicated the defendant's drug habit contributed to his criminal activity and that he failed to address his drug habit even though he had numerous opportunities to do so. (Id., pg. 31).

The court sentenced the defendant to 144 months in prison, well below the advisory career offender guideline range, and imposed five years of supervised release. (R. 136, pg. 32). In sentencing the defendant the court stated,

> I therefore find some justification for a sentence below the guideline range, but not at the range suggested by 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 very 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.

(Id., pgs. 31-32).

The court continued,

> I am struggling with 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.

(Id., pgs. 33-34).

SUMMARY OF ARGUMENT

Shortly after trial, the defendant filed a Rule 29 motion claiming that the trial testimony of the government's expert witness, Michelle Gee, violated his rights under the Confrontation Clause. The district court properly denied this motion. While the government did not make a plain error argument to the district court, this Court has the authority to decide the proper standard of review on appeal and that standard is plain error review.

Even if the district court incorrectly used plain error review in denying the defendant's motion, the error was harmless because the court indicated it would have conducted the same analysis and come to the same result without applying plain error.

Under any standard, Michelle Gee's testimony regarding her independent conclusion as to the nature of the drugs was proper. A scientific expert may testify to her independent opinion based in part on laboratory data produced by non-testifying analysts from her own lab. Raw data generated by a machine in a laboratory, which the government did not move into evidence, are not statements of witnesses subject to the Confrontation Clause. Gee's independent opinion was based upon her own review of the raw data and her testimony about that review was proper under *Williams v. Illinois*, 132 S.Ct. 2221 (2012), and

this Courts recent decision in *United States v. Turner*, No. 08-3109 (7th Cir. March 4, 2013).

Even if Gee's testimony was somehow in error, it is not plain error that affected the outcome or impugned the fairness, integrity, or public reputation of the district court proceedings. Gee's testimony had no impact on the outcome because the evidence against Maxwell was overwhelming, the expert's testimony was cumulative of other evidence, and it was not central to the determination of guilt. Reversal is not warranted to ensure the fairness and integrity of the proceedings.

Nor is the defendant entitled to a remand for re-sentencing pursuant to the Fair Sentencing Act. The defendant did not object to his sentence below on that ground and he cannot show the court committed plain error in sentencing him to 144 months. If this Court has any question on whether the district court would have sentenced the defendant differently, the most he is entitled to is a limited remand for the district court to answer that question.

ARGUMENT

I. The District Court Correctly Applied Plain-Error Review In Denying The Defendant's Rule 29 Motion.

A. Standard of Review

This Court reviews whether a district court applied the correct legal standard *de novo*. *United States v. Aldaco*, 201 F.3d 979, 987 (7th Cir. 2000).

B. Argument

The district court found that Rule 52(b) allowed it to review the defendant's motion for plain error. (R. 130, pg. 8; AA, pg. 14a). The text of the rule says "[a] plain error that affects substantial rights may be considered even though it was not brought to the court's attention." Fed. R. Crim. P. 52(b). The defendant claims that, because the government did not make a plain error argument in district court, the court should have assessed the motion solely on its merits. (Appellant's Brief, pgs. 15, 17). It also claims that because the government did not raise a plain error argument before the district court, and waived the standard below, it cannot make the argument before this court. The defendant is wrong on both counts.

The government agrees that it did not argue for plain-error review in its brief to the district court and conceded, as did defense counsel, that it could not find cases in which the district court used a plain-error standard in this type of

situation. (R. 136, pgs. 38-39, 42; AA, pgs. 50a-51a). Further research reveals that some district courts have in fact used this standard of review in similar situations and the district court, therefore, may have correctly applied it below to deny defendant's motion. *See, e.g. United States v. Brandao*, 448 F.Supp.2d 311, 318-319 (D. Mass. 2006).

Whether the government was right or wrong on that point, however, does not matter because for purposes of appeal "the [appellate] court, not the parties, must determine the standard of review, and therefore it cannot be waived." *Worth v. Tyler*, 276 F.3d 249, 262 n.4 (7th Cir. 2001) (citations omitted).[4] *cf. United States v. Brandao*, 539 F.3d 44, 57 (1st Cir. 2008) (applying plain-error review on appeal without deciding whether district court had erred in itself using plain-error review).

That same standard requires this Court to review for plain error, despite the defendant's claim to the contrary. Additionally, the government expressly stated that if the argument were raised before the Seventh Circuit, the review

[4]Should this Court find the district court should not have reviewed the issue for plain error, the defendant is still not entitled to relief. The court expressly stated that if it reviewed the case under the more stringent standard set forth in Fed. R. Crim. P. 33(a), as the defendant claims it should have done, it would have engaged in a similar analysis and come to the same conclusion. (R. 130, pg. 8; AA, pg. 14a).

would be for plain error. (R. 136, pg. 39; AA, pg. 52a). The government thus, did not waive plain-error review by this Court as defendant contends.

II. Michelle Gee's Testimony About Her Own Independent Conclusions, Based On Her Review Of Data Created By Lab Tests She Did Not Conduct, Did Not Constitute Error, Plain Or Otherwise

A. Standard of Review

Because Maxwell failed to object to the admission of Gee's testimony at trial and, instead, raised the challenge to her testimony for the first time in his motion for a new trial, the Court reviews this issue on only for plain error. *United States v. Garvey*, 688 F.3d 881, 884 (7th Cir. 2012); *United Stats v. Taylor*, 471 F.3d 832, 841 (7th Cir. 2006).

B. Argument

1. Gee's testimony did not violate the Confrontation Clause.

Maxwell argues that under *Williams v. Illinois* Gee's testimony violated his rights under the Confrontation Clause. (Appellant's Brief, pgs. 18-22). This Court has recently held otherwise in *United States v. Turner*, No. 08-3109 (7th Cir. March 4, 2013), and Maxwell is wrong. Moreover, even if admission of Gee's testimony violated Maxwell's Confrontation Clause rights, this Court should still affirm as any error is harmless. *See Garvey,* 688 F.3d at 884-886*, United States v. Turner,* No. 08-3109, slip op. at 5 (7th Cir. Mar. 4, 2013).

The Confrontation Clause of the Sixth Amendment 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. In *Crawford v. Washington*, 541 U.S. 36 (2004), the Supreme Court held that the Confrontation Clause bars the introduction into evidence at a criminal trial of "testimonial statements of a witness who did not appear at trial" unless the witness is unavailable to testify and the defendant has had a prior opportunity for cross-examination. *Id*. at 51, 53-54, 68. That prohibition "applies only to testimonial hearsay." *Davis v. Washington*, 547 U.S. 813, 823-824 (2006). Hearsay involves "[o]ut-of-court statements . . . offered in evidence to prove the truth of the matter asserted." *Anderson v. United States*, 417 U.S. 211, 219 (1974); Fed. R. Evid. 801(c). The Confrontation Clause "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." *Crawford*, 541 U.S. at 60 n.9 (citing *Tennessee v. Street*, 471 U.S. 409, 414 (1985)).

In *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 129 S. Ct. 2527, 2532 (2009), the Supreme Court held that affidavits reporting the results of forensic drug testing that had been created "sole[ly]" as evidence for criminal proceedings were "testimonial" and could not be admitted as substantive evidence under the Confrontation Clause, unless the State produced a live witness at trial competent

to testify to the truth of the statements in the affidavits. In *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2710, 2715-2716 (2011), the Supreme Court applied *Melendez-Diaz* to hold that the Confrontation Clause did not allow the admission of an analyst's signed, forensic report certifying the results of a blood-alcohol test when offered through the testimony of another scientist who "did not sign the certification or perform or observe the test" and who had no "independent opinion" about its results. Such "surrogate testimony," the Court stated, "does not meet the constitutional requirement." *Id*. at 2710.

In *Williams v. Illinois*, the Supreme Court applied *Bullcoming, Melendez-Diaz*, and *Crawford* to a bench trial in which an expert witness offered testimony about DNA testing that she did not perform and that was based on the report of a non-testifying DNA analyst. In particular, the testimony at issue was the expert's testimony that "the [DNA] profile produced by [the lab] was based on the vaginal swabs taken from the victim." *Williams,* 132 S.Ct. at 2236. In a 4-1-4 opinion, the Court ruled that the defendant's Confrontation Clause rights were not violated by that testimony.

Writing for a four-justice plurality, Justice Alito agreed with Justice Sotomayor's concurring opinion in *Bullcoming* that neither that case nor *Melendez-Diaz* addressed the situation "in which an expert witness was asked for

his independent opinion about underlying testimonial reports that were not themselves admitted into evidence." *Williams,* 132 S.Ct. at 2233 (quoting *Bullcoming*, 131 S. Ct. at 2722 (Sotomayor, J., concurring)). The plurality, therefore, distinguished those two earlier opinions, finding admission of this testimony proper on two separate grounds. *Id.* at 2240-2241.

First, the plurality explained that the applicable Illinois rule of evidence (which is consistent with Fed. R. Evid. 703), as well as historical practice, condone the ability of experts to "voice an opinion based on facts concerning the events at issue in a particular case even if the expert lacks firsthand knowledge of those facts." *Williams,* 132 S.Ct. at 2233. In such situations, the underlying facts, although revealed to the fact-finder, are not offered for the truth of the matter asserted and therefore do not implicate the Confrontation Clause. *Id*. at 2233-2234, 2239-2240.

Rather, the underlying facts merely give the basis for the expert's opinion, and the presentation of a weak evidential link between the expert's opinion and the facts of the case goes to the weight, and not the admissibility, of the expert's opinion. *Id*. at 2236-2238.

Second, the plurality explained that even if the underlying DNA report had been admitted for its truth, it was non-testimonial and therefore did not implicate

the Confrontation Clause. *Williams,* 132 S.Ct. at 2242-2244. In reaching this conclusion, the plurality pointed out that this profile was generated before a suspect had been identified; DNA evidence is not inherently inculpatory; creation of DNA profiles involves numerous technicians and should not be discouraged by imposing burdensome requirements at trial; and defendants are free to subpoena those non-testifying individuals who took part in the testing. *Id*. Summarizing its ruling, the plurality explained, "the use at trial of a DNA report prepared by a modern, accredited laboratory 'bears little if any resemblance to the historical practices that the Confrontation Clause aimed to eliminate.'" *Id*. at 2244 (quoting *Michigan v. Bryant*, 131 S.Ct. 1143, 1167 (2011)(Thomas, J., concurring).

Justice Thomas, writing solely for himself, concurred in the judgment, and provided the fifth vote to affirm. According to him, the lab report was not a "deposition[], affidavit[], [or] prior testimony," and therefore "lacked the requisite 'formality and solemnity' to be considered 'testimonial' for purposes of the Confrontation Clause." *Williams*, 132 S.Ct. at 2255, 2260 (Thomas, J., concurring). Justice Thomas also criticized the plurality's two rationales for affirmance. *Id*. at 2255, 2258.

Finally, Justice Kagan wrote for the four remaining Justices in dissent. The dissent noted that there were "five votes to approve the admission of the [lab]

report, but not a single good explanation." *Williams*, 132 S.Ct. at 2265 (Kagan, J., dissenting). The dissent rejected both of the plurality's rationales, as well as Justice Thomas' concurrence, claiming that the testimony was testimonial and offered for the truth and therefore violated the defendant's Confrontation Clause rights under *Bullcoming* and *Melendez-Diaz*. *Id*. at 2268-2277. Given the fractured 4-1-4 nature of the opinions, Justice Kagan summarized the effect of *Williams* for future cases, writing, "What comes out of four Justices' desire to limit *Melendez-Diaz* and *Bullcoming* in whatever way possible, combined with one Justice's one-justice view of those holdings, is—to be frank—who knows what." *Id*. at 2277.

This Court recently applied *Williams* in *Turner*, where a lab supervisor, Bob Block, testified about his own personal opinion based on data produced by tests performed by an analyst, Amanda Hanson, who was on maternity leave. *Turner*, slip op. at 2. Unlike Gee, Block commented on the procedures Hanson used and testified that he reached the same conclusion as Hanson. *Id*. Other than this testimony about the procedures Hanson followed and affirming her results, which the Court found may have violated defendant's Confrontation Clause rights, Block's testimony was otherwise entirely permissible. *Turner*, slip op. at 4-7. This included Block's testimony describing general lab procedures, testing,

and safeguards, his peer review of Hanson's work, and his opinion that the data Hanson produced in testing the substances Turner distributed indicated they contained cocaine base. *Id*.

This case is substantially identical to *Turner*.[5] As in *Turner*, an expert witness testified about results from tests that she did not conduct and the underlying test results were not admitted into evidence or shown to the fact-finder. Specifically, neither Nied's lab report, nor his notes, nor the data charts were introduced into evidence. Gee formed her own opinion based upon her personal knowledge and the printouts from the lab machines. (R. 108, pgs., 10-12; R. 111, pgs. 104-106; AA, pgs. 44a-46a). Therefore, under *Williams*, Gee testimony was appropriate, as it satisfies both of the plurality's alternative tests for admission as well as the concurring opinion. *Turner*, slip op. at 7.

Additionally, Gee's testimony regarding the procedures and safeguards at the lab and the procedure for testing substances submitted to the lab was entirely permissible. *Turner*, slip op. at 5-6. Because Gee did not testify regarding the procedures Nied used in this specific analysis nor the results he obtained, there is no Confrontation Clause violation. *See id.,* slip op. at 4-5.

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[5]The fact that unlike Gee's relationship to Nied, Block was Hanson's supervisor at the time of the review does not change the analysis.

As mentioned earlier, the underlying tests were not offered into evidence, and, to the extent that they were revealed, were offered only to "explain the facts on which [Gee's] opinion [was] based without testifying to the truth of those facts." *Williams*, 132 S.Ct. at 2238 (citing Fed. R. Evid. 703), *See also Turner*, slip op. at 6. Gee's testimony based on points within her personal knowledge created no Confrontation Clause problem. *Turner*, slip op. at 7.

Because the underlying tests on which Gee relied were machine generated reports, the Confrontation Clause simply does not require the Government to call the analyst who participated in the testing of the drug exhibits, and Gee's testimony also satisfies the plurality's alternative basis for admission. *Williams*, 132 S.Ct. at 2228.

The only two concerns the Court had in *Turner*, Block's explanation of the process Hanson followed and his comment regarding Hanson's results, were not present in this case. Therefore, Gee's testimony was entirely proper and Maxwell's claim fails because there was no error, plain or otherwise.

2. If there was any error, it was not plain

Because no new rule of law emerges from *Williams* and because the state prevailed, *Williams* cannot provide a basis for finding error. Assuming only for the sake of argument that Gee's testimony was error, Maxwell cannot show it

was plain. To establish plain error, the Court must determine whether there was "(1) an error, (2) that was plain, meaning clear or obvious, (3) that affected the defendant's substantial rights in that he probably would not have been convicted absent the error, and (4) that seriously affected the fairness, integrity, or public reputation of judicial proceedings." *United States v. Christian,* 673 F.3d 702, 708 (7th Cir. 2012).

"An error is 'plain' when it is so obvious 'that the trial judge and prosecutor were derelict in countenancing it, even absent the defendant's timely assistance in detecting it.'" *Christian*, 673 F.3d at 708) (quotation omitted). At the time of trial, this Circuit allowed the type of expert testimony Gee provided. *See United States v. Turner*, 591 F.3d 928 (7th Cir. 2010) *cert. granted, judgment vacated and case remanded for further consideration in light of Williams, Turner v. U.S.,* 80 USLW 3715 (U.S. June 29, 2012). *See also United States v. Moon*, 512 F.3d 359, 362 (7th Cir. 2008) (concluding in part that such expert testimony involving lab reports did not violate the Confrontation Clause). Moreover, in light of the discordant views of the various opinions in *Williams,* Maxwell cannot show any clear or obvious error under the first two prongs of plain-error review.

Additionally, the defendant cannot show that, if it were an error to allow Gee's testimony, it affected his substantial rights. Determining this prong of the

plain-error test requires essentially a harmless-error inquiry. *Christian*, 673 F.3d at 711 (citation omitted); *Garvey*, 688 F.3d at 885 (noting there must be a reasonable probability that any *Williams* error affected the outcome of the trial and that defendant bears the burden of persuasion).

The testimony at trial established the drugs in the defendant's possession were crack cocaine even without Gee's testimony. This Court has repeatedly held that expert analysis and testimony are not necessary to establish the identity of controlled substances. *Turner*, slip op. at 17 (citations omitted). The nature of the substance can be proven circumstantially in many ways, including testimony by law enforcement witnesses or others familiar with the drugs. *Id.,* slip op. at 17-18 (citations omitted).

Detective Wilson, who has been a drug officer for more than 13 years, testified that, based on his training and experience, he believed the drugs found in the defendant's possession were crack cocaine. (R. 111, pgs. 6, 13; AA, pg. 29a). He field-tested the drugs found on the defendant and they tested "conclusive for the presence of cocaine." (R. 111, pg. 18; AA, pg. 35a). When asked at trial if he meant crack cocaine, he answered that he did. (Id.). Additionally, DEA Special Agent Craig Grywalsky, who has been a drug agent

for 16 years, testified that the substance seized from the defendant appeared to be crack cocaine. (Id., pgs. 109-10).

In addition to the agents' testimony, Gee also explained that cocaine is usually in a powder form that is injected or snorted, while crack cocaine is usually a more solid, rock-like substance that is smoked. (R. 108, pg. 5; R. 111, pg. 98; AA, pg. 38a). She described the substance in this case as a white, chunky substance that appeared to be crack cocaine. (R. 108, pgs. 6, 12; R. 111, pgs. 99, 105-106; AA, pgs. 39a, 45a-46a). The drugs were available for the jury to see for themselves whether the drugs fit the description of crack cocaine the witnesses described. *See Turner,* slip op. pg. 20.

Moreover, as the district court observed in denying Maxwell's motion for a new trial, the defendant's trial strategy centered on claiming the drugs were for personal use and denying the intent to distribute.[6] *See Turner*, slip op. at 21-22. For example, the defendant asked SA Grywalsky how long seven grams would last a binge user. (R. 111, pgs. 126-27). Additionally, he called a witness to testify to large amounts of drugs in defendant's system. (R. 110, pgs. 17-20). Maxwell also asked one of his brothers in direct examination, "And did you know I was usin' cocaine at that time in 2010 of July?" (Id., pg. 62), and asked another brother

[6] Even with this defense, the government acknowledges that absent a stipulation, it must still prove the drugs were in fact crack cocaine.

whether the brother thought the defendant was using drugs in July 2010. (Id., pg. 72).

Maxwell did not cross-examine any witness regarding the identification of the drug and elicited no independent evidence that the substance was something other than crack cocaine. Further, neither of the parties mentioned Gee's testimony or how the substance was proven to be crack cocaine during closing arguments. The argument for both sides focused primarily on what the defendant intended to do with the drugs.

The defendant claims that "Gee's testimony undoubtedly contributed to Maxwell's conviction and had a substantial influence on the jury." (Appellant's Brief pg. 24). The record, however, does not support this assertion. He goes on to claim that "[i]n an age of CSI and NCIS, Gee's discussion of sophisticated forensic analysis ('gas chromatography,' 'mass spectrometry,' 'infrared spectrometry') undoubtedly affected the jury's ability to evaluate fairly Wilson's subjective testimony." (Id., pg. 26). Again, this is pure conjecture on the defendant's part.

While it is true that Gee was the only scientist who testified about crack cocaine, her testimony was not the only scientific testimony. SA Grywalsky testified that crack cocaine was made through a chemical process that removes

the impurities of cocaine hydrochloride, making a purer substance. (Id., pg. 110). Additionally, the defendant undercuts his own argument by claiming that Gee's testimony contributed to the special verdict regarding the drug's weight. Gee specifically refused to answer the defendant's question about the weight of the drug because she had not weighed it herself. (R. 105, pg. 12; R. 111, pg. 106; AA, pg. 46a). The *only* testimony that the crack weighed more than five grams, which the jury found, was provided by Detective Wilson. (R. 111, pg. 17).

The defendant also suggests that the field test Detective Wilson used was not necessarily reliable. (Appellant's Brief, pg. 25). There is nothing to indicate that was the case here. And in fact, Wilson's testimony verifies that the substance the officers described as crack cocaine actually was crack cocaine. *See Turner* at slip op. 20.

Based on the above, the defendant cannot prevail on this issue because there was no error in Gee's testimony, plain or otherwise. And even if there were, any conceivable error was harmless in light of the record, whether it is the defendant's burden or the government's burden to prove harmlessness.[7]

[7]Contrary to Maxwell's assertions in his opening brief, pgs. 22-23, the government has not forfeited a harmless error argument, and in fact, argued harmless error in its district court response to defendant's motion by asserting the Detective Wilson's testimony was sufficient to sustain Maxwell's conviction if Gee's testimony were excluded. (R. 115, pg. 19).

III. The District Court Did Not Commit Plain Error In Sentencing The Defendant Without Considering The Fair Sentencing Act.

A. Standard of Review

Because the defendant did not object to his guideline range based on the Fair Sentencing Act, this Court reviews for plain error. *United States v. Garrett*, 528 F.3d 525, 527 (7th Cir. 2008). As the Supreme Court explained, this means the defendant must show (1) "an error or defect," (2) that is "clear or obvious, rather than subject to reasonable dispute," (3) which "'affected the outcome of the district court proceedings," and (4) "'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'" *Puckett v. United States*, 556 U.S. 129, 129 S. Ct 1423, 1429 (2009), quoting *United States v.Olano*, 507 U.S. 725, 734, 736 (1993) (internal citation omitted).

B. Argument

Maxwell's offense level based on the amount of drugs he was held responsible was 22.[8] (R. 116, ¶ 25). Maxwell, however, was sentenced as a career offender. (Id., ¶ 33). Based on the law in effect at the time he was sentenced, his career-offender offense level was 34 because his conduct involved more than five

[8]The drug level was based on a July 14, 2010 sale of crack cocaine, a July 20, 2010, sale of crack cocaine and ecstasy, the crack cocaine found on his person at the time of his arrest and the powder cocaine, heroin, and methadone he sold to Emily Rush, his former roommate. (R. 116, pg. 20). The marijuana equivalent for these drugs was 60,128.16 grams. (Id.).

grams of crack cocaine, which at the time, carried a maximum prison term of 40 years. (Id., ¶ 34). A base-offense level of 34 combined with a criminal history category of VI put Maxwell's advisory guideline range at 262 to 327 months.

Under the Fair Sentencing Act, the defendant's base offense level would have been 32 because the amount of drugs he was charged with possessing carried a maximum penalty of only 20 years as opposed to 40. This offense level, when combined with a criminal history category of VI would put his advisory guideline range at 210-262 months, capped by a statutory maximum of 20 years in prison.

There is no dispute that under the law of the Circuit at the time of sentencing, the Fair Sentencing Act, enacted on August 3, 2010, was not retroactive, leaving Maxwell subject to the higher guideline range. There is also no dispute that *Dorsey v. United States*, 132 S.Ct. 2321 (2012) has now clarified that the Fair Sentencing Act is, in fact, retroactive for defendants sentenced after August 3, 2010, and based on the amount charged in the indictment, Maxwell would be subject to the lower guideline range.

It is true that the court never "firmly indicated" or "explicitly stated" that it would have given the same sentence had it known the FSA applied. But Maxwell cannot show plain error and a remand in this case is not necessary,

given the district court's clear statement that the 144-month sentence it imposed was the sentence it believed Maxwell should serve.

The defendant claims that the district court "might well" have given the defendant a lower sentence if given the opportunity. (Appellant's Brief, pg. 31). The defendant cites no facts to support this weak assertion and it is his burden based on the plain-error standard of review. In fact, the court did have an opportunity to impose a lower sentence and specifically declined to do so. (R. 136, pg. 31).

In sentencing the defendant to 144 months, the district court stated that there was justification for a sentence below the guidelines, but refused to impose the 84-month sentence defendant requested in his sentencing memorandum. (R. 136, pgs. 31-32, R. 123). The court noted that Maxwell had almost double the number of criminal history points than that required for a criminal history category VI, had several other convictions that were not included in his criminal history, had very little work history, and at age 49 had shown no inclination to change his criminal habits. (R. 136, pgs. 31-32). The court told the defendant it could have justified a higher sentence but that it believed the defendant was at a crossroads and could now see what the consequences of his actions were. (Id., pg. 33). The court did not tie the defendant's sentence to the guideline range in

any way or indicate it was departing a set number of levels such that an identical departure from a lower guideline range could have meant a lower sentence.

At no point did the district court indicate it wished to impose a lower sentence, and in fact declined to give the lower sentence defendant requested. (R. 136, pg. 31). Moreover, the court specifically stated that the sentence was appropriate based on all of the circumstances of the offense and Maxwell's prior criminal history. (R. 135, pgs. 30-32). While the district judge did not specifically say that he would have given the same sentence had he known the FSA was retroactive, given the court's clear statement, remand is not necessary.

If, however, this Court determines that a remand is required, it should remand for the limited purpose of clarifying whether the district court would have issued a lower sentence had it known the Fair Sentencing Act was retroactive. *See, e.g. United States v. Paladino*, 401 F.3d 471, 483-84 (7th Cir. 2005): "The only practical way (and it happens also to be the shortest, the easiest, the quickest, and the surest way) to determine whether the kind of plain error argued in these cases has actually occurred is to ask the district judge." The *Paladino* Court continued:

> [W]hat an appellate court should do in *Booker* cases in which it is difficult for us to determine whether the error was prejudicial is, while retaining jurisdiction of the appeal, order a limited remand to permit the sentencing judge to determine whether he would (if

> required to resentence) reimpose his original sentence. If so, we will affirm the original sentence against a plain-error challenge provided that the sentence is reasonable, the standard of appellate review prescribed by *Booker*, 125 S.Ct. at 765.

Paladino, 401 F.3d at 484. *See also United States v. White*, 582 F.3d 787, 788-799 (7th Cir. 2009).

On this limited remand, should the district court indicate that, in keeping with its statements at the time of sentencing, it would have imposed the same sentence, a remand for full re-sentencing is not required.

CONCLUSION

For the foregoing reasons, the government respectfully requests that the judgment and conviction order of the district court and the defendant's sentence be affirmed.

Dated this 15th day of March 2013.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 12-1809

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. MAURICE MAXWELL, Defendant-Appellant.	) Appeal from the United States) District Court for the Western) District of Wisconsin)) Case No. 11-cr-25-wmc))) Honorable William Conley) Presiding)

CERTIFICATE OF COMPLIANCE

The United States of America, by Assistant United States Attorney Elizabeth Altman, hereby certifies, pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B) and (C), that the attached brief complies with the type volume limitation. This brief contains 7,593 words. This document has been prepared using WordPerfect X5.

Dated this 15th day of March 2013.

Respectfully submitted,

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United States Attorney

By: /s/
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CERTIFICATE OF SERVICE

I hereby certify that on March 15, 2013, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/
SHARON MARTIN