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**Confronting the New Jersey Supreme Court’s Application of the Confrontation Clause to  
DNA Evidence in *State v. Roach***  
Danielle Levine\*

**I. Introduction**

After a jury found Reginald Roach guilty of first-degree aggravated sexual assault and other associated charges,<sup>1</sup> he was sentenced to forty years in prison. He was on trial after police identified him as a suspect for the robbery and rape of a woman in her home.<sup>2</sup> The pivotal issue at trial was the identity of the attacker, therefore, the State relied on DNA evidence to prove its case by linking Roach to the sperm found on the victim.<sup>3</sup> At trial, Roach objected to any expert testimony regarding the DNA found on the victim because he argued that it would violate his constitutional right to confront the analyst who performed the forensic testing.<sup>4</sup>

The court overruled his objection, and on appeal, the New Jersey Supreme Court affirmed his conviction and sentence concluding that Roach’s rights under the Confrontation Clause were not violated because the analyst’s coworker independently reviewed the DNA profile and testified.<sup>5</sup> Roach never had the opportunity to confront and cross-examine the analyst who generated the DNA profile from the sperm even though it was integral to the jury’s guilty verdict.<sup>6</sup> The Confrontation Clause is a vital protection for defendants because “[c]ross-examination has been described as one of the greatest devices ever conceived for the exposition

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<sup>1</sup> *State v. Roach*, 95 A.3d 683, 689 (N.J. 2014). The jury also found Roach guilty of second-degree sexual assault, second-degree burglary, and third-degree possession of a weapon for an unlawful purpose. *Id.* His forty-year prison sentence was subject to New Jersey’s No Early Release Act. *Id.* Under this statute, when a defendant is sentenced to incarceration for certain offenses (including aggravated sexual assault) in the first or second degree, he must serve a minimum of 85% of the sentence imposed before becoming eligible for parole. N.J. STAT. § 2C:43-7.2 (2014).

<sup>2</sup> *Roach*, 95 A.3d at 686.

<sup>3</sup> *Id.* at 687. The victim could not identify Roach as her attacker because she did not see her attacker’s face and no one found any fingerprints at the scene. *Id.*

<sup>4</sup> *Id.* at 688, 698.

<sup>5</sup> *Id.* at 697–98.

<sup>6</sup> *Id.* at 687.

of truth and disclosure of error.”<sup>7</sup> Therefore, in *Roach*, the DNA evidence was only as reliable as the analyst who conducted the forensic tests and Roach should have had a constitutional right to cross-examine her.<sup>8</sup>

Part II of this comment will examine how the United States Supreme Court has interpreted the Confrontation Clause and how it has been applied to cases involving forensic reports. Part III will take a closer look at the facts in *State v. Roach* and examine how the majority and dissenting justices approached the confrontation objection. Part IV will discuss different methods and rules state courts have adopted through the years to solve the issue of who has to testify in order to admit the forensic report into evidence. Part V will recommend that state courts require every analyst who makes a “testimonial” statement during the forensic testing process to testify. It will also discuss how this rule would apply to *State v. Roach* and address the primary concerns associated with this approach. Part VI concludes by reiterating how requiring every analyst who makes a testimonial statement to testify is most consistent with the Supreme Court’s decisions and the Sixth Amendment. The conclusion will stress the importance of state courts not limiting confrontation rights until the Supreme Court clarifies this issue because the Confrontation Clause provides an essential safeguard for defendants.

## **II. The United States Supreme Court’s Confrontation Clause Jurisprudence**

Section A of Part II will explore the background of the Confrontation Clause in English law and how it came to be an important part of our Constitution. It will also examine the Supreme Court’s landmark cases where it interpreted the Confrontation Clause and determined what protections it affords defendants. Section B will specifically focus on how the Court has

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<sup>7</sup> *Roach*, 95 A.3d. at 701 (Albin, J., dissenting).

<sup>8</sup> *Id.* at 700 (Albin, J., dissenting)(citing Sheldon Krinsky & Tania Simoncelli, *Genetic Justice: DNA Data Banks, Criminal Investigations, & Civil Liberties* 280 (2011)).

defined confrontation rights in the context of forensic evidence admitted at trial. There are three primary Supreme Court cases in this area; it is important to examine them to determine what precedents were set and to understand the difficulty state courts have in analyzing similar cases.

### **A. The Confrontation Clause Generally**

The Confrontation Clause of the Sixth Amendment provides that "in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."<sup>9</sup> The right of confrontation was developed through statutory and judicial reforms in English law after the trial of Sir Walter Raleigh for treason in 1603.<sup>10</sup> During his trial, a written statement by Lord Cobham, his alleged co-conspirator, was read to the jury and used to implicate Raleigh.<sup>11</sup> Despite Raleigh's demands to, "let Cobham be here, let him speak it. Call my accuser before my face," the judges refused to allow Raleigh to confront Cobham.<sup>12</sup> After Raleigh was found guilty and sentenced to death, one of his trial judges later said "'the justice of England has never been so degraded and injured as by the condemnation of Sir Walter Raleigh."<sup>13</sup>

The United States Supreme Court often looks to English authorities and the historical record to determine what was required at common law when analyzing Confrontation Clause objections because the Sixth Amendment was adopted during the classic common law period.<sup>14</sup> Even though the Framers did not have forensic analysts and analysts are not "conventional" witnesses, the Court held that they are not automatically excluded from the purview of the

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<sup>9</sup> U.S. CONST. amend. VI.

<sup>10</sup> *Crawford v. Washington*, 541 U.S. 36, 44 (2004).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* (quoting *The Trial of Sir Walter Raleigh*, 2 HOWELL'S STATE TRIALS 1, 15-16, (1603)).

<sup>13</sup> *Id.* (quoting 1 David Jardine, *Criminal Trials* 435, 520 (1832)).

<sup>14</sup> *Id.* at 54, 59. The Supreme Court wants its decisions and rationales to remain faithful to the Framers' original public understanding of the Confrontation Clause. *Id.* at 60.

Confrontation Clause.<sup>15</sup> Analysts can still be “witnesses against” defendants under some circumstances when they provide forensic evidence information to support a conviction.

The Confrontation Clause is similar to evidentiary hearsay rules because both prohibit certain out of court statements from being introduced at trial.<sup>16</sup> Until 2004, *Ohio v. Roberts* governed confrontation objections and an out of court statement would be admissible without subjecting the witness to cross-examination if statement proved to be sufficiently reliable by showing “particularized guarantees of trustworthiness.”<sup>17</sup> Under *Roberts*, reliability was inferred without anything more if the statement fit within one of the “firmly rooted hearsay exceptions.”<sup>18</sup>

In *Crawford v. Washington*, the Court overruled the reliability test from *Ohio v. Roberts* by stating “[w]here testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of ‘reliability.’”<sup>19</sup> The Court revamped the way Confrontation Clause objections would be analyzed by holding that out of court testimonial statements are barred under the Confrontation Clause if the witness is unavailable for cross-examination.<sup>20</sup> This rule applies even if the testimonial statements satisfy the state’s hearsay rules and regardless of how reliable the statements are. The Confrontation Clause “is a procedural rather than a substantive

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<sup>15</sup> *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 313 (2009). Proponents of an exception to the Confrontation Clause for analysts argue that they are not witnesses against the defendant because of their time and space distance from the crime and the defendant. *Id.* at 316. Under that reasoning, the exception would extend to all experts and police officers who did not observe the crime and it is unlikely the Framers were willing to carve out that exception. *Id.*

<sup>16</sup> *Crawford*, 541 U.S. at 61.

<sup>17</sup> *Ohio v. Roberts*, 448 U.S. 56, 66 (1980). Roberts was charged with forgery of a check and possession of stolen credit cards. *Id.* at 58. One of the State’s key witnesses testified at a preliminary hearing but did not appear at the trial. *Id.* at 58–59. The State introduced the transcript of her testimony as evidence and the Court found no confrontation violation because the transcript bore sufficient “indicia of reliability.” *Id.* at 73.

<sup>18</sup> *Id.* at 66.

<sup>19</sup> *Crawford*, 541 U.S. at 61.

<sup>20</sup> *Id.* at 68.

guarantee. This clause commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.”<sup>21</sup>

The Supreme Court in *Crawford* made clear that only testimonial hearsay would be subject to the Confrontation Clause and nontestimonial hearsay would be left to the flexibility of the states’ rules of evidence. However, the Court decided to “leave for another day any effort to spell out a comprehensive definition of ‘testimonial.’”<sup>22</sup> That day came two years later in *Davis v. Washington*, when the Court developed the “primary purpose test” and ruled that a statement is “testimonial” if the person’s primary purpose of making the statement is to establish a fact or past event that could be used later in criminal prosecution.<sup>23</sup> A forensic laboratory report containing testimonial statements cannot be introduced at trial unless the defendant’s confrontation rights are satisfied because the Court has refused to make a forensic exception to *Crawford*.<sup>24</sup>

### **B. The Confrontation Clause in Forensic Report Cases**

Since 2004, the United States Supreme Court has considered *Crawford*’s application of the Confrontation Clause in three major cases involving forensic reports: *Melendez-Diaz v. Massachusetts*, *Bullcoming v. New Mexico*, and *Williams v. Illinois*.<sup>25</sup> In *Melendez-Diaz*, the Court ruled that certificates (the forensic testing results) signed by forensic analysts are

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<sup>21</sup> *Id.* at 61.

<sup>22</sup> *Id.* at 68. The Court did not articulate a definition of testimonial statements but did give some examples such as *ex parte* testimony at a preliminary hearing, affidavits, depositions, confessions, affidavits, and custodial examinations. *Id.* at 51–52.

<sup>23</sup> *Davis v. Washington*, 547 U.S. 813, 822 (2006). A statement is nontestimonial, however, “when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency.” *Id.* The purpose of statements made during an ongoing emergency is not to prove facts that could be relevant to later criminal prosecution.

<sup>24</sup> *Bullcoming v. New Mexico*, 131 S.Ct. 2705, 2707 (2011).

<sup>25</sup> *State v. Roach*, 95 A.3d 683, 693 (N.J. 2014).

testimonial statements and thus subject to the Confrontation Clause.<sup>26</sup> Certificates are testimonial because they are “declaration[s] of facts written down and sworn to by the declarant before an officer authorized to administer oaths”<sup>27</sup> and are “functionally identical to live, in-court testimony.”<sup>28</sup> The Court held that the defendant’s confrontation rights in *Melendez-Diaz* were violated when drug analysis certificates were admitted at trial because the certificates reported that the material the police seized from the defendant was cocaine and the defendant was denied the right to confront the analysts who performed on the forensic tests on the samples.<sup>29</sup>

In *Bullcoming*, the Court addressed the issue of whether a substitute analyst can testify instead of the analyst who performed the forensic testing and certified the results.<sup>30</sup> After Bullcoming was arrested for driving while intoxicated, a blood sample was drawn and sent to a laboratory for a blood alcohol analysis.<sup>31</sup> At his trial, the prosecution introduced the laboratory report certifying that defendant's blood alcohol content was 0.21 and a substitute analyst from the laboratory testified even though he did not observe the actual test performed.<sup>32</sup> The Supreme Court ruled that the testimony of this substitute analyst constituted “surrogate testimony” and violated the defendant’s confrontation rights because the substitute analyst could not testify what the certifying analyst knew or observed during the testing process, and the surrogate’s testimony would not expose any mistakes or lies made by the certifying analyst.<sup>33</sup>

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<sup>26</sup> *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 311 (2009). The certificates of analysis reported that the substance the police seized from the defendant was cocaine and the weight of the cocaine. *Id.* at 309.

<sup>27</sup> *Id.* at 310 (quoting Black’s Law Dictionary 62 (8th ed. 2004)).

<sup>28</sup> *Id.* at 310–311.

<sup>29</sup> *Id.* at 311.

<sup>30</sup> *Bullcoming*, 131 S.Ct. at 2710. “The text of the Sixth Amendment does not suggest any open-ended exceptions from the confrontation requirement to be developed by the courts.” *Id.* at 2716 (quoting *Crawford v. Washington*, 541 U.S. 36, 54 (2004)).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 2711–2712.

<sup>33</sup> *Id.* at 2715–2716.

The most recent Supreme Court case involving the application of the Confrontation Clause to forensic laboratory reports is *Williams v. Illinois*. The facts of this case are similar to the facts of *State v. Roach*. Unfortunately, *Williams* has only caused more confusion in state courts about who has to testify because the plurality's opinion was criticized by a majority of the Court and each of the four opinions suggested a different approach.<sup>34</sup> In *Williams*, Cellmark laboratory generated a DNA profile from a semen sample found on a rape victim.<sup>35</sup> Cellmark sent that profile to the Illinois State Police laboratory where Sandra Lambatos, a forensic specialist, searched the state DNA database to determine if there was a match to Cellmark DNA profile.<sup>36</sup> She found a match to the defendant's DNA profile that was created by the state lab when he was arrested on unrelated charges in August 2000.<sup>37</sup> The Cellmark analyst who developed the DNA profile of the victim's attacker from biological samples never testified; therefore, *Williams* was never given the opportunity to confront and cross-examine him.<sup>38</sup>

The plurality found that William's confrontation rights were not violated because the Cellmark report was not admitted into evidence and was only referenced in Lambatos' testimony to provide a basis for her expert opinion that the two profiles were a match.<sup>39</sup> Further, the plurality stated that even if the Cellmark report were admitted into evidence, there still would not have been a confrontation violation because defendant was not under suspicion yet; therefore, the

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<sup>34</sup> *State v. Michaels*, 95 A.3d 648, 666 (N.J. 2014) ("We find *Williams's* force, as precedent, at best unclear.") *Id.* See also *Young v. United States*, 63 A.3d 1033, 1042 (D.C. 2013) ("The fractured decision in *Williams* may be a harbinger of changes to come in the Supreme Court's Confrontation Clause jurisprudence, but for now its force as precedent is uncertain because no rationale for the decision—not one of the three proffered tests for determining whether an extrajudicial statement is testimonial—attracted the support of a majority of the Justices.").

<sup>35</sup> *Williams v. Illinois*, 132 S. Ct. 2221, 2229 (2012).

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* At trial, the state introduced three expert witnesses to testify about the DNA evidence: one who tested the swabs taken from the victim's body and found semen present, one who created the defendant's DNA profile when he was arrested in 2000 and entered it into the state's database, and Lambatos who testified as to why the DNA profiles were a match and discussed the general DNA testing process. *Id.*

<sup>38</sup> *Id.* at 2230.

<sup>39</sup> *Id.* at 2228. Under both the Illinois and the Federal Rules of Evidence, experts can base their opinions on facts that they are made aware of even if the facts are inadmissible. *Williams*, 132 S.Ct. at 2234 (citing ILL. R. EVID. 703; FED. R. EVID. 703).



primary purpose for creating the report was not to use it against him at trial.<sup>40</sup> In his concurring opinion, Justice Breyer adhered to the dissenting opinion in *Melendez-Diaz* and *Bullcoming* and opined that laboratory analysts should not be considered “witnesses” under the Confrontation Clause.<sup>41</sup>

Justice Thomas’ concurring opinion took a narrow view of the Confrontation Clause and *Crawford*; he argued that only formal testimonial statements are subject to the Confrontation Clause.<sup>42</sup> He agreed with the plurality’s conclusion only because the DNA profile was unsworn and, therefore, not a formal testimonial statement.<sup>43</sup> Justice Kagan authored a dissent that strongly disagreed with the other four justices’ attempts to limit the scope of the Confrontation Clause.<sup>44</sup> In her view, in order to satisfy the requirements of the Confrontation Clause, defendants must have the opportunity to cross-examine the analyst who performed the test.<sup>45</sup>

Many state courts, including the New Jersey Supreme Court, find *Williams*’s precedent unclear because the courts cannot draw a narrow rule from the four opinions that would support a majority of the Court.<sup>46</sup> Therefore, these state courts apply the pre-*Williams* jurisprudence because *Melendez-Diaz* and *Bullcoming* provide more “reliable guidance” on the Confrontation Clause.<sup>47</sup>

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<sup>40</sup> *Id.* at 2243. The plurality concluded that the primary purpose of the forensic testing was to catch a dangerous rapist who was still on the loose. *Id.*

<sup>41</sup> *Id.* at 2244. “The immediate systemic concern is that the Court makes no attempt to acknowledge the real differences between laboratory analysts who perform scientific tests and other, more conventional witnesses-- “witnesses” being the word the Framers used in the Confrontation Clause.” *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 330 (2009) (Kennedy, J., dissenting).

<sup>42</sup> *Williams*, 132 S.Ct. at 2255.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 2277.

<sup>45</sup> *Id.* at 2265.

<sup>46</sup> *State v. Michaels*, 95 A.3d 648, 666 (N.J. 2014). Typically, when a majority of the Court does not agree with one rationale, “the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.” *Id.* at 665 (citing *Marks v. United States*, 430 U.S. 188, 193 (1977)). According to the majority opinion in *Michaels*, there is no “common denominator” that can be discerned from the opinions in *Williams*. *Id.* at 665.

<sup>47</sup> *Id.* at 667.

### III. The Facts and Opinions of the New Jersey Supreme Court Case *State v. Roach*

#### A. The Facts of *State v. Roach*

On the night of November 5, 2005, the victim H.H.<sup>48</sup> was raped and robbed in her home by a man wearing a mask and pointing a sharp object at her neck.<sup>49</sup> H.H. went to a Rape Crisis Center where a sexual assault kit was prepared and sent to the State Police Forensic Laboratory (State Lab) for analysis.<sup>50</sup> At the State Lab, Charles Williams tested the items in the sexual assault kit and found both blood and semen present.<sup>51</sup> He sent the items to the DNA Department where Linnea Schiffner performed a differential extraction on the items in order to separate the sperm cells from the skin cells and create samples from each specimen.<sup>52</sup> Schiffner also performed a differential extraction on a buccal swab taken from E.A., who the police suspected was the attacker at the time.<sup>53</sup> She generated DNA profiles from the samples and created a report that listed the samples she tested, the DNA profiles generated for each, and her conclusion that E.A.'s DNA profile did not match the DNA profile of the sperm found on the victim.<sup>54</sup>

Several weeks later, when Roach was identified as a suspect, his buccal swab was sent to the State Lab's DNA Department and assigned to Jennifer Banaag because Schiffner had moved to Wisconsin.<sup>55</sup> Banaag created a DNA profile for Roach and prepared a report containing Roach's DNA profile, and the DNA profile Schiffner generated from the samples taken from H.H.<sup>56</sup> In her report, Banaag concluded that it was Roach's DNA found in the samples taken

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<sup>48</sup> To protect the privacy of the victim, the court refers to the victim by her initials.

<sup>49</sup> *State v. Roach*, 95 A.3d 683, 685 (N.J. 2014).

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 686.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Roach*, 95 A.3d at 686. The trial court found that Schiffner moved to Wisconsin for reasons unrelated to job performance. *Id.* at 684.

<sup>56</sup> *Id.* at 686.

from H.H. after the assault.<sup>57</sup> At Roach's trial, the State introduced two expert witnesses: Williams, the analyst who conducted the tests on samples from the sexual assault kit and found sperm present, and Banaag, the analyst who had created Roach's DNA profile from his buccal swab and compared it to the DNA profiles Schiffner created from the samples taken from H.H.<sup>58</sup>

Roach objected to Banaag's testimony about the forensic analysis performed by Schiffner; he argued it violated his right to confront the analyst who had performed the tests being used against him but his objection was overruled.<sup>59</sup> Banaag testified about her responsibilities at the State Lab, the standard testing methods used at the lab for DNA analysis, and how she followed the lab's standard processes when she generated Roach's DNA profile from his buccal swab.<sup>60</sup> When the prosecutor showed Banaag Schiffner's report, she identified it and testified that she incorporated that report into her own report.<sup>61</sup> She explained Schiffner's testing processes and said that she reviewed every page of Schiffner's report to verify all the data she reported was correct and that Banaag agreed with them.<sup>62</sup> Banaag testified that "within a reasonable scientific certainty" Roach was the source of the DNA samples taken from H.H. after the assault.<sup>63</sup> This conclusion was essential to the State's case because "the key issue was identity, which turned on the DNA analysis performed at the State Lab."<sup>64</sup>

The jury found Roach guilty of second-degree burglary, two counts of first-degree aggravated sexual assault, second-degree sexual assault, and third-degree possession of a weapon for an unlawful purpose.<sup>65</sup> Roach was sentenced to a forty-year prison term and he must serve

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<sup>57</sup> *Id.* at 687.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 687–688.

<sup>60</sup> *Roach*, 95 A.3d at 688.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 687.

<sup>65</sup> *Id.* at 689.

eighty-five percent of it before becoming eligible for parole under the No Early Release Act.<sup>66</sup> In an unpublished opinion, the Appellate Division affirmed Roach's conviction and sentence because Banaag had independently reviewed Schiffner's work and was not a "mere conduit" for Schiffner's report.<sup>67</sup> The New Jersey Supreme Court granted Roach's petition for certification, which only raised Confrontation Clause issues.<sup>68</sup> *Roach* was heard as a companion case to *State v. Michaels*, a case where the defendant's blood sample sent to a laboratory to be tested for drugs or alcohol and a supervisor from the laboratory testified at trial about the results even though he was not the analyst who performed the test.<sup>69</sup>

In *Michaels*, the supreme court held that there is no confrontation violation when “a forensic report is admitted at trial and only the supervisor/reviewer testifies and is available for cross-examination, when the supervisor is knowledgeable about the testing process, reviews scientific testing data produced, . . . and prepares, certifies, and signs a report setting forth the results of the testing.”<sup>70</sup> Justice Albin dissented in *Michaels* asserting that defendants’ confrontation rights are only satisfied when they have the opportunity to cross-examine the analysts who actually perform the scientific tests.<sup>71</sup> In *Roach*, Justice Lavecchia delivered the opinion of the court affirming the Appellate Division’s decision, using *Michaels* as a basis for

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<sup>66</sup> *Roach*, 95 A.3d at 689.

<sup>67</sup> *State v. Roach*, 2011 N.J. Super. Unpub. LEXIS 2071 (App. Div. Aug. 1, 2011). In his appeal, he argued that his confrontation rights were violated, his sentence was excessive, and that several of his offenses should have merged. *Id.* at 2. The Appellate Division only remanded the case because several of his offenses should have merged for sentencing purposes but the forty-year aggregate prison sentence was still upheld. *Id.* at 27.

<sup>68</sup> *State v. Roach*, 95 A.3d 683, 690 (N.J. 2014).

<sup>69</sup> *State v. Michaels*, 95 A.3d 648, 651 (N.J. 2014).

<sup>70</sup> *Id.* at 651.

<sup>71</sup> *Id.* at 682.

the majority opinion.<sup>72</sup> The entire Court joined her opinion except Justice Albin, who again filed a separate dissenting opinion.<sup>73</sup>

### **B. The Majority Opinion in *State v. Roach***

The majority stated its holding in *Michaels* was analogous to the situation of a non-supervisory co-worker or other independent reviewer.<sup>74</sup> The independent reviewer still needs to be knowledgeable about the laboratory's processes, and testify based on an independent review of the raw data and his or her own conclusions drawn from that data.<sup>75</sup> The majority found Banaag sufficiently explained how she used her "scientific expertise and knowledge to independently review and analyze the graphic raw data that was the computer-generated product of Schiffner's testing."<sup>76</sup> Therefore, the court concluded Roach's confrontation rights were satisfied by his ability to cross-examine Banaag.<sup>77</sup>

The majority distinguished this case from *Bullcoming* and *Melendez-Diaz*, where the forensic reports were placed into evidence because Schiffner's report was not introduced at trial.<sup>78</sup> Unlike Banaag, the testifying witness in *Bullcoming* was a "surrogate" because he had no involvement with the disputed report besides being familiar with the laboratory's testing procedures.<sup>79</sup> The majority quoted Justice Sotomayor's concurring opinion in *Bullcoming*, where she explained that *Bullcoming* "is not a case in which the person testifying is a supervisor, reviewer, or someone else with a personal, albeit limited, connection to the scientific test at issue" and that "it would be a different case if, for example, a supervisor who observed an

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<sup>72</sup> *State v. Roach*, 95 A.3d 683, 698 (N.J. 2014).

<sup>73</sup> *Id.* Chief Justice Rabner, Justices Patterson And Fernandez-Vina, and Judges Rodríguez and Cuff, who were both temporarily assigned, joined the majority opinion. *Id.*

<sup>74</sup> *Id.* at 695.

<sup>75</sup> *Id.* at 697.

<sup>76</sup> *Id.*

<sup>77</sup> *Roach*, 95 A.3d at 697.

<sup>78</sup> *Id.* at 693.

<sup>79</sup> *Id.*

analyst conducting a test testified about the results or a report about such results.”<sup>80</sup> The majority reiterated that neither *Bullcoming's* nor *Melendez-Diaz's* holding requires every analyst involved in the forensic testing processes to testify for the defendant’s confrontation rights to be satisfied.<sup>81</sup>

### C. The Dissenting Opinion in *State v. Roach*

In the dissenting opinion, Justice Albin disagreed with the majority’s use of a substitute witness to circumvent Roach’s confrontation rights because it directly conflicts with *Bullcoming* and is inconsistent with the guarantees of the Sixth Amendment.<sup>82</sup> Specifically, he pointed to the fact that Banaag did not participate in or observe any of Schiffner's tests and “[a]lthough Banaag was familiar with the DNA testing procedures in the laboratory, reviewed Schiffner's written notes, and analyzed the DNA sample taken from defendant, she was a stranger to the tests actually performed by Schiffner.”<sup>83</sup> He concluded that the protections of the Confrontation Clause are lost by not requiring the analysts who performed the test to testify because there is no assuring accurate forensic testing.<sup>84</sup>

Justice Albin’s concern was that errors in the testing process may not be disclosed without testing the actual analyst in the “crucible of cross-examination.”<sup>85</sup> “Exposing lab analyst incompetency, inexperience, bias, or dishonesty through cross-examination is one of the defendant's few tools for undermining such damning evidence.”<sup>86</sup> He found it problematic that Roach never cross-examined Schiffner to ask what she did and observed during the forensic

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<sup>80</sup> *Id.* at 694 (quoting *Bullcoming v. New Mexico*, 131 S.Ct. 2705, 2722 (2011)) ((Sotomayor, J., concurring)).

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 698. (Albin, J., dissenting).

<sup>83</sup> *Roach*, 95 A.3d at 698 (Albin, J., dissenting).

<sup>84</sup> *Id.* at 683 (Albin, J., dissenting).

<sup>85</sup> *Id.* (Albin, J., dissenting)

<sup>86</sup> *Id.* at 700. (Albin, J., dissenting) (quoting Lucie Bernheim, Student Scholarship, *Getting Back to Our "Roots": Why the Use of Cutting Edge Forensic Technology in the Courtroom Should (and Can) Still Be Constrained by the Plain Language of the Confrontation Clause*, 10 Seattle J. Soc. Just. 887, 890-91 (2012)).

testing and if “there were any errors, lapses, or malfunctions that may have corrupted the integrity of the results.”<sup>87</sup> Therefore, Justice Albin concluded that Roach was not afforded the protections guaranteed to him by the Confrontation Clause.

#### IV. The Different Approaches to Confronting this Issue

##### A. Notice and Demand Statutes

Confrontation rights, like many other constitutional rights, may be waived and the waiver can be express or implied by a failure to object.<sup>88</sup> State rules govern how and when the defendant would need to exercise his objection to avoid waiving his confrontation right.<sup>89</sup> Notice-and-demand statutes require the prosecution to notify the defendant when it intends to introduce a testimonial forensic report into evidence at trial.<sup>90</sup> If the prosecution does not anticipate having the analyst responsible for the forensic report testify, the defendant has a specified time period where he can object to the admission of the report.<sup>91</sup> When the defendant does not object within that time period, he waives his confrontation rights.<sup>92</sup> The United States Supreme Court expressly approved state Notice and Demand Statutes in *Melendez-Diaz*, “[t]he defendant *always* has the burden of raising his Confrontation Clause objection; notice-and-demand statutes simply govern the *time* within which he must do so. States are free to adopt procedural rules governing objections.”<sup>93</sup>

New Jersey has a notice-and-demand statute that requires a party to notify the opposing party at least twenty days before a proceeding if it intends to use a laboratory report at trial.<sup>94</sup> After the party gives notice, the opposing party has ten days to notify his adversary if he has any

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<sup>87</sup> *Id.* at 698 (Albin, J., dissenting)

<sup>88</sup> *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 313 n.3 (2009).

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 326.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 327.

<sup>93</sup> *Id.* at 326-327.

<sup>94</sup> N.J. Stat. § 2C:35-19 (2014).

objections to the admission of the report.<sup>95</sup> If the opposing party does not make a timely objection, it “shall constitute a waiver of any objections to the admission” of the laboratory report.<sup>96</sup> The New Jersey Supreme Court held that under this notice-and-demand statute, the State should notify the defendant if it intends to call an expert witness to testify about a forensic report, which he did not conduct, supervise, or participate in.<sup>97</sup> Pursuant to the statute, the defendant then has ten days to make a confrontation objection to the expected testimony of the expert witness or he waives his confrontation rights.<sup>98</sup>

Many defendants will waive their confrontation rights to cross-examine forensic analysts as a defense strategy because most times the testimony will only make the forensic evidence more reliable and not benefit the defendant.<sup>99</sup> The defendant always has the burden of raising a Confrontation Clause objection because is in the “best position to decide whether objecting or playing through best advanced his strategic trial interests”.<sup>100</sup> A defendant must attempt to exercise his confrontation rights by raising an objection in order to later claim that his confrontation rights were violated.<sup>101</sup> In *State v. Williams*, the New Jersey Supreme Court reached a unanimous opinion authored by Justice Albin holding that a defendant waives his confrontation rights when he waits until after the trial to exercise those rights.

The defendant in *Williams* was found guilty of murder and related weapons offenses after Dr. Zhongxue Hua, a medical examiner who did not perform or assist in the actual autopsy, testified as to the cause and manner of the victim’s death.<sup>102</sup> The defendant appealed and claimed that his right to confrontation had been violated, however, he never objected to the

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<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *State v. Williams*, 95 A.3d 701, 709 (N.J. 2014).

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 703.

<sup>100</sup> *Id.* at 704.

<sup>101</sup> *Id.* at 703.

<sup>102</sup> *Id.* at 704–05.



testimony of the medical examiner during the trial.<sup>103</sup> The court held that the defendant waived his confrontation rights by not objecting to Dr. Hua's testimony.<sup>104</sup> When the State introduced Dr. Hua as an expert witness during trial, the defense counsel said, "[n]o questions on qualifications, your Honor. I don't object to the doctor testifying in that way".<sup>105</sup> When the defense counsel cross-examined Dr. Hua, he tried to elicit favorable testimony to support his theory that the defendant had acted in self-defense.<sup>106</sup> The court found that it was the defendant's strategy to avoid raising an objection to Dr. Hua's testimony because "the defense may have calculated that it was better to draw favorable inferences from the cold, written report of Dr. Zaretski than possibly have unfavorable testimony from a live witness."<sup>107</sup> The defendant cannot claim that his rights were violated when his strategy does not result in a favorable outcome for him.<sup>108</sup>

The majority of states have enacted similar notice-and-demand statutes that reduce the burdens on the prosecution and forensic laboratories.<sup>109</sup> Many defense counsels do not request testimony of all the analysts the defendant has the right to cross-examine because the "effect will be merely to highlight rather than cast doubt upon the forensic analysis."<sup>110</sup> The issue of who has to testify still exists when the defendant files a timely objection, because then he has not waived his confrontation rights.

## **B. Burden Shifting Statutes**

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<sup>103</sup> *Williams*, 95 A.3d 701 at 703.

<sup>104</sup> *Id.* at 709.

<sup>105</sup> *Id.* at 708.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 701.

<sup>108</sup> *Id.* at 707.

<sup>109</sup> *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 348 (2009).

<sup>110</sup> *Id.* at 332.

Some state supreme courts permit burden-shifting statutes that required a criminal defendant to call the forensic analyst as a witness to exercise his confrontation rights and if the defendant does not subpoena the analyst, he waived any confrontation objections.<sup>111</sup> In *Melendez-Diaz*, the Supreme Court rejected the argument that a confrontation clause objection is waived if the defendant fails to call a witness, ruling that “the Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court.”<sup>112</sup>

The Supreme Court again rejected the use of burden shifting statutes when it remanded *Briscoe v. Commonwealth*. In *Briscoe*, police officers seized suspected cocaine from Briscoe’s apartment and a rock-like substance from Briscoe’s pocket.<sup>113</sup> The police sent the items to a forensic laboratory and the analyst reported that the confiscated substance was cocaine totaling 36.578 grams.<sup>114</sup> The analyst prepared two written certificates of analysis confirming her results and how she performed the analysis.<sup>115</sup> The certificates were introduced into evidence, even though Briscoe objected to their admission without the testimony of the forensic analyst.<sup>116</sup> The analyst was never called as witness and Briscoe was found guilty of possession with the intent to distribute cocaine.<sup>117</sup> The Virginia Supreme Court rejected the defendant’s argument that his confrontation rights were violated because, under the Virginia Code, defendants have the right to call the forensic scientist as a witness.<sup>118</sup> The court found that he waived his rights to confront

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<sup>111</sup> See, e.g., *State v. Campbell*, 719 N.W.2d 374, 378 (N.D. 2006); *State v. Hughes*, 713 S.W.2d 58, 59 (Tenn. 1986); and *State v. Smith*, 323 S.E.2d 316, 382 (N.C. 1984).

<sup>112</sup> *Melendez-Diaz*, 557 U.S. at 324.

<sup>113</sup> *Magruder v. Commonwealth*, 657 S.E.2d 113, 117 (Va. 2008). In *Magruder*, the Virginia Supreme Court consolidated three unrelated cases on appeal and *Briscoe* was one of them. *Id.* at 115.

<sup>114</sup> *Id.* at 117.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Magruder*, 657 S.E.2d at 119. The accused “shall have the right to call the person performing such analysis or examination or involved in the chain of custody as a witness therein, and examine him in the same manner as if he

the forensic analyst because he did not subpoena the analyst as defense witness.<sup>119</sup> The United States Supreme Court disagreed with a two sentence opinion, “[w]e vacate the judgment of the Supreme Court of Virginia and remand the case for further proceedings not inconsistent with the opinion in *Melendez-Diaz v. Massachusetts*. It is so ordered.”<sup>120</sup>

### C. Substitute Testimony

The Supreme Court only ruled in *Bullcoming* that substitute testimony was unconstitutional when the substitute played no role in the forensic analysis and had no connection to the report he testified about other than knowing the laboratory's testing procedures.<sup>121</sup> Justice Sotomayor stated in her concurring opinion that *Bullcoming* “is not a case in which the person testifying is a supervisor, reviewer, or someone else with a personal, albeit limited, connection to the scientific test at issue.”<sup>122</sup> She recognized that the Court did not need to “address what degree of involvement is sufficient because here Razatos had no involvement whatsoever in the relevant test and report” but “[i]t would be a different case if, for example, a supervisor who observed an analyst conducting a test testified about the results or a report about such results.”<sup>123</sup>

Similar to the New Jersey Supreme Court, many other state supreme courts allow a supervisor or other reviewing analyst to testify about a forensic report without violating the defendant's confrontation rights.<sup>124</sup> These states have a similar rule that the reviewing analyst is an adequate substitute as long as he or she conducts an independent review of the data and

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had been called as an adverse witness. Such witness shall be summoned and appear at the cost of the Commonwealth.” VA. CODE ANN. § 19.2-187.1 (2014).

<sup>119</sup> *Magruder*, 657 S.E.2d at 124.

<sup>120</sup> *Briscoe v. Virginia*, 559 U.S. 32, 33 (2010).

<sup>121</sup> *State v. Roach*, 95 A.3d 683, 694 (N.J. 2014).

<sup>122</sup> *Bullcoming v. New Mexico*, 131 S.Ct. 2705, 2722 (2011) (Sotomayor, J., concurring).

<sup>123</sup> *Id.* (Sotomayor, J., concurring).

<sup>124</sup> *State v. Michaels*, 95 A.3d 648, 676 (N.J. 2014). *See, e.g.*, *Marshall v. People*, 2013 CO 51, 309 P.3d 943; *Jenkins v. State*, 102 So. 3d 1063 (Miss. 2012); *Commonwealth v. Yohe*, 79 A.3d 520 (Pa. 2013); and *State v. Ortiz-Zape*, 743 S.E.2d 156 (N.C. 2013).

testifies about his or her own conclusions drawn from his independent review.<sup>125</sup> Unfortunately, in June 2010, the United States Supreme Court denied certiorari in *Pendergrass v. State* to decide whether a supervisor who did not perform the forensic test, but has direct knowledge of the laboratory's testing procedures, could testify.<sup>126</sup>

The New Jersey Supreme Court recognized that the flaw in this approach is that “the United States Supreme Court may one day agree on the most exacting interpretation of confrontation rights vis-à-vis multiple actors involved in handling and testing evidence subject to all forms of forensic testing.”<sup>127</sup> The outcome is still uncertain, thus, the majority of the New Jersey Supreme Court stated that the disadvantages of having every analyst who physically performed the tests testify outweigh the benefits.<sup>128</sup> Justice Albin disagreed because of the concern that countless convictions may be jeopardized if the United States Supreme Court does not adopt the approach followed by the majority.<sup>129</sup> He opined, “when federal jurisprudence is in a state of flux, a conservative approach is best.”<sup>130</sup>

## **V. The Recommended Approach: Require Analysts To Testify If They Produced Information Against The Defendant**

### **A. Substitute Testimony is Unconstitutional**

Justice Albin made a strong and persuasive argument that the cross-examination of a substitute analyst does not satisfy a defendant's constitutional rights. Substitute testimony is inconsistent with the purpose of the Confrontation Clause and the principles enunciated in *Crawford*, “[t]he text of the Sixth Amendment does not suggest any open-ended exceptions from

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<sup>125</sup> *State v. Michaels*, 95 A.3d 648, 676 (N.J. 2014).

<sup>126</sup> *Pendergrass v. Indiana*, 560 U.S. 965 (2010).

<sup>127</sup> *State v. Michaels*, 95 A.3d 648, 677 (N.J. 2014).

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at 682 (Albin, J., dissenting).

<sup>130</sup> *Id.* (Albin, J., dissenting).

the confrontation requirement to be developed by the courts.”<sup>131</sup> Substitute testimony also directly conflicts with the holdings in *Bullcoming* and *Melendez-Diaz* because the substitute witness testifies about another person’s testimonial statement, “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.”<sup>132</sup> The main problem with the majority’s approach is that it claims the supervisor or other reviewer is conducting independent reviews of *raw data* generated by another analyst and testifying about his own conclusion.

This is similar to the argument rejected by the United States Supreme Court in *Bullcoming*, where the New Mexico Supreme Court held the analyst was a “mere scrivener who simply transcribed machine-generated test results.”<sup>133</sup> The United States Supreme Court disagreed because the analyst did more than just report machine-generated information, he had to follow specific protocols to ensure the integrity of the samples was not compromised.<sup>134</sup> These human actions are not revealed in raw data, which is why the witnesses testify about their own actions and what they observed.<sup>135</sup> If the analyst makes an error in the data or testing process, the results would be incorrect. Therefore, the accuracy of the conclusion depends on the analyst who conducted the test and the machine-generated data is not raw data because it has human components and therefore, subject to human error.

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<sup>131</sup> *Crawford v. Washington*, 541 U.S. 36, 54 (2004).

<sup>132</sup> *Bullcoming v. New Mexico*, 131 S.Ct. 2705, 2716 (2011).

<sup>133</sup> *Id.* at 2714.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* The Court compared this rationale to a situation where a police records in his report an objected fact such as the number he saw above a house or the reading of a radar gun. “Could an officer other than the one who saw the number on the house or gun present the information in court--so long as that officer was equipped to testify about any technology the observing officer deployed and the police department’s standard operating procedures?” The Court said in this situation the answer would be unequivocally “No.” *Id.* at 2714–2715.

The majority of the New Jersey Supreme Court correctly pointed out that the holdings in *Bullcoming* and *Melendez-Diaz* do not require every analyst involved in the testing process to testify to satisfy the defendant's confrontation rights.<sup>136</sup> In fact, The Supreme Court in *Melendez-Diaz* expressly stated that, "we do not hold, and it is not the case, that anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device, must appear in person as part of the prosecution's case."<sup>137</sup>

Justice Albin and Roach were not suggesting that every analyst who performed any type task in connection with the DNA profiles had to testify in order for Roach's confrontation rights to be satisfied. They were only arguing that Roach had a right to confront Schiffner because she had performed the tests being used against him. The problem with Schiffner not testifying is that her "test results were *testimonial* statements implicating defendant in a crime" and they were used without Schiffner's testimony.<sup>138</sup> The focus of Justice Albin's dissent was that analysts who make testimonial statements have to confront the defendant and there is no dispute here that Schiffner's test results were testimonial.<sup>139</sup>

## **B. Analysts Who Make Testimonial Statements**

"Cross-examination is rendered a useless weapon in the truth-seeking process when the person bearing testimonial statements against the accused does not have to be called as a witness."<sup>140</sup> The New Jersey Supreme Court should adopt an approach that would require every analyst who made a testimonial statement related to the forensic report to testify. Testimonial statements would include reports generated from computers or machines because analysts

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<sup>136</sup> *State v. Roach*, 95 A.3d 683, 694 (N.J. 2014).

<sup>137</sup> *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 322 n.1 (2009).

<sup>138</sup> *Roach*, 95 A.3d at 698 (Albin, J., dissenting).

<sup>139</sup> *Id.* at 701 (Albin, J., dissenting) (emphasis added).

<sup>140</sup> *Id.* (Albin, J., dissenting).

generate the reports using precise protocols and usually create the reports to prove a fact that could be later used at trial against a defendant.

Throughout the *Roach* opinion, the majority described the steps taken in the DNA testing process. First, the court explained swabs are taken from the victim and sent to a forensic laboratory for a scientist to determine if any biological fluids are present.<sup>141</sup> A buccal swab is also taken from anyone later identified as a potential suspect.<sup>142</sup> None of the people involved with these procedures would have to testify under the Confrontation Clause because no testimonial statements were made yet.

When Banaag testified, she explained the four steps used at the State Lab to create a DNA profile from any samples taken from the victim and suspects: (1) extraction; (2) quantification; (3) polymerase chain reaction amplification; and (4) detection.<sup>143</sup> During extraction, the analyst places the sample in a test tube and adds chemicals in order to extract the DNA.<sup>144</sup> The next step is quantification, where the analyst measures the amount of DNA in the sample to ensure it is enough to test.<sup>145</sup> Polymerase chain reaction amplification is when the DNA is multiplied billions of times by heating it with chemicals in a thermocycler machine.<sup>146</sup> Up to this point, still no testimonial statements have been made against Roach; therefore, none of the analysts involved in these steps would be required to testify.

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<sup>141</sup> *Id.* at 685.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* There is a graph in the appendix of Justice Breyer's concurring opinion in *Williams*, which describes a similar process: evidence examination, extraction, quantification, amplification, electrophoresis, and analyst. *Williams v. Illinois*, 132 S.Ct. 2221, 2253 (2012) (Breyer, J., concurring). He stresses that "[a]s many as six technicians may be involved in deriving the profile from the suspect's sample; as many as six more technicians may be involved in deriving the profile from the crime-scene sample; and an additional expert may then be required for the comparative analysis, for a total of about a dozen different laboratory experts." *Id.* at 2252. In *Roach*, however, only one analyst completed all of these steps for each DNA profile. *Roach*, 95 A.3d at 686. Therefore, if a laboratory is concerned about the burden of having several analysts testify, then the laboratory may change its procedures to assign only one analyst to every sample.

<sup>144</sup> *Id.* at 685.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

Lastly, during detection, the DNA is placed in a Genetic Analyzer machine that measures the length of the DNA strands and produces a graph.<sup>147</sup> This graph is a testimonial statement because it is the full DNA profile of the offender. When a DNA report is prepared, the analyst records the values from the graph onto a table because it makes it easier for the reader to compare it to other DNA profiles.<sup>148</sup> In a DNA report, the analyst will compare a DNA profile generated from samples taken from the scene or victim with the DNA profile for the suspect and she will report her conclusion whether the profiles are a match.<sup>149</sup> This DNA report would also be a testimonial statement if presented to the trier of fact to implicate the defendant.

Roach's confrontation rights were violated when he was not given an opportunity to cross-examine Schiffner, the analyst who made a testimonial statement by creating the full DNA profile from the samples taken from the victim. This was a testimonial statement made to prove who the attacker was, a fact that could be later used at trial. Even though her actual report was not in evidence, the analyst who did testify relied on that report when she concluded that Roach's DNA matched the DNA left on the victim.

### **C. Concerns**

State supreme courts should not completely eliminate surrogate testimony because there are rare instances, such as death, where an analyst is truly unavailable to testify.<sup>150</sup> The laboratory should be required to attempt to perform a second test on the sample and have the analyst who performed that test testify. If this is not possible, then an independent reviewer should be permitted to testify instead of ruling the forensic report inadmissible. If this exception

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<sup>147</sup> *Id.*

<sup>148</sup> *Id.* at 686.

<sup>149</sup> *Roach*, 95 A.3d at 686.

<sup>150</sup> An analyst who moved to another state like Schiffner in *Roach* is not truly unavailable because she can still return to the state to testify.



was not allowed, then the prosecutor's case could be jeopardized without the forensic evidence, introducing the risk that a guilty defendant will go free.

There are many concerns surrounding the extra burden of cost and time this approach would put on prosecutors, analysts, and courts. First, this is not a sufficient reason to ignore the constitutional rights of defendants: “[t]he Confrontation Clause may make the prosecution of criminals more burdensome, but that is equally true of the right to trial by jury and the privilege against self-incrimination. The Confrontation Clause—like those other constitutional provisions—is binding, and we may not disregard it at our convenience.”<sup>151</sup> Secondly, it is unlikely that the extra burden will be significant. Even though forensic testing is frequently used, analysts only testify in a small percentage of cases because there are only a small percentage of cases that go to trial.<sup>152</sup> In the cases that go to trial, “defendants who exercise their right to go to trial stipulate (when asked) regularly, if not frequently, to the admission of forensic analysis.”<sup>153</sup> Unless the defendant's strategy is to challenge the forensic evidence, he would not want analysts to testify because the live testimony would only highlight the reliability of the forensic report.<sup>154</sup> Furthermore, it could frustrate the judge and jury if they feel that their time was wasted hearing the testimony of a witness the defendant did not intend to challenge.<sup>155</sup>

On the other hand, there could be opposing concerns that arise by not having every analyst involved in the process testify. These can include the mislabeling of a sample or a calibration error; however, the Confrontation Clause does not provide protection for this issue because the analyst would not have made a testimonial statement. If the defense “challenges the

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<sup>151</sup> *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 325 (2009).

<sup>152</sup> *Id.* (citing Brief for Law Professors as Amici Curiae supporting Petitioner, *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009) (No. 07-591)).

<sup>153</sup> Brief for Public Defender Service for District of Columbia et al. as Amici Curiae supporting Petitioner, *Bullcoming v. New Mexico*, 131 S. Ct. 2705 (2011) (No. 09-10876).

<sup>154</sup> *Melendez-Diaz*, 557 U.S. at 328.

<sup>155</sup> *Id.*

procedures for a secure chain of custody for evidence . . . that does not mean it can demand that, in the prosecution's case in chief, each person who is in the chain of custody—and who had an undoubted opportunity to taint or tamper with the evidence—must be called by the prosecution . . . .”<sup>156</sup> In these circumstances, the defendant still retains the right to subpoena the analyst or call his own expert to testify why there was an error in the testing but that is his burden.<sup>157</sup>

## VI. Conclusion

The Confrontation Clause is an important safeguard for criminal defendants in cases where forensic reports are used to implicate them because it guarantees defendants the opportunity to face the prosecution's witnesses and cross-examine them in order to ensure the accuracy of the forensic testing. The recommendation for New Jersey courts and other state courts to require analysts to testify if they made testimonial statements is a workable approach that is most consistent with the Sixth Amendment and the precedents set by the United States Supreme Court. An analyst makes a testimonial statement when he or she produces information against a defendant that can be presented to the trier of fact to help convict the defendant. Providing the defendant with the opportunity to cross-examine the analyst who produced information against him is directly in accordance with the protections afforded by the Confrontation Clause, “the accused shall enjoy the right . . . to be confronted with the witnesses against him.”<sup>158</sup> It is essential for defendants to question the actual analyst who performed the test in the “crucible of cross-examination” because that is when any of the analyst’s errors, bias, inexperience, or poor judgment would be exposed.

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<sup>156</sup> *Id.* at 340 (Kennedy, J., dissenting).

<sup>157</sup> The Sixth Amendment also provides that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor.” U.S. CONST. amend. VI. This provision is referred to as the Compulsory Process Clause and differs from the Confrontation Clause because it guarantees defendants the right to call witnesses in their favor, whereas under the Confrontation Clause, the prosecution must call the witnesses against the defendant. *Melendez-Diaz*, 557 U.S. at 313.

<sup>158</sup> U.S. Const. amend. VI.

This approach would not cause an undue burden on the court system and forensic laboratories because of the limited circumstances in which this right would be invoked. It would also avoid undermining the Supreme Court's precedent that surrogate analysts cannot testify on behalf of the analyst who conducted and observed the testing process. The Court's most recent decision in this area was unclear and caused confusion, therefore, state courts should not narrowly define defendants' confrontation rights until the Supreme Court provides better guidance. The New Jersey Supreme Court is taking a dangerous risk and "chancing the reversal of countless future convictions by rendering an opinion that may fall below the minimum guarantees of the Sixth Amendment."<sup>159</sup>

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<sup>159</sup> State v. Michaels, 95 A.3d 648, 678 (N.J. 2014) (Albin, J., dissenting).