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COMMENT

**CORROSION OF THE CONFRONTATION CLAUSE IN
NORTH CAROLINA: A COMPARISON OF *STATE V.
BREWINGTON* AND *STATE V. ORTIZ-ZAPE*
WITH *STATE V. CRAVEN***

MICHELLE M. WEINER*

PART I: INTRODUCTION

The Confrontation Clause of the Sixth Amendment to the United States Constitution guarantees that “[i]n all criminal prosecutions, the accused shall enjoy the right to . . . be confronted with the witnesses against him.”¹ The device for confrontation is cross-examination, which has been described as “the greatest legal engine ever invented for the discovery of truth.”² “The Confrontation Clause protects us all by mandating that testimony against the accused is subject to ‘the crucible of cross-examination.’”³

The Sixth Amendment right to confrontation has been hailed as “part of the bedrock of American freedom since the beginning of the Republic.”⁴ However, the application of this guarantee is sometimes at odds with established exceptions to the hearsay rule, which allow out-of-court statements to be admitted for the truth of the matter asserted, even when the declarant is not present at trial and not subject to confrontation by the defendant.⁵ “Current Confrontation Clause

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1. U.S. CONST. amend. VI.

2. *California v. Green*, 399 U.S. 149, 158 (1970) (internal quotation marks omitted).

3. Michael A. Sabino & Anthony Michael Sabino, Article, *Confronting the “Crucible of Cross-Examination”*: Reconciling the Supreme Court’s Recent Edicts on the Sixth Amendment’s Confrontation Clause, 65 *BAYLOR L. REV.* 255, 257 (2013).

4. *Id.* at 256; see also *Crawford v. Washington*, 541 U.S. 36, 42 (2004) (describing the Sixth Amendment as a “bedrock procedural guarantee [that] applies to both federal and state prosecutions.”).

5. John R. Grimm, Note, *A Wavering Bright Line: How Crawford v. Washington Denies Defendants a Consistent Confrontation Right*, 40 *AM. CRIM. L. REV.* 185, 185 (2011).

jurisprudence has been defined by the struggle to reconcile these conflicting principles.”⁶

The protections guaranteed by the Sixth Amendment are separate and above the evidentiary rules that govern the admissibility of evidence. Although “hearsay rules and the Confrontation Clause are generally designed to protect similar values,” the Confrontation Clause is not to be understood as “nothing more or less than a codification of the rules of hearsay and their exceptions.”⁷ Pursuant to the Supremacy Clause, the rules of evidence are without effect when they contradict provisions of the United States Constitution; the protections guaranteed by the Confrontation Clause of the Sixth Amendment cannot be circumvented by reliance on the rules of evidence.⁸ The United States Supreme Court explained that “[l]eaving the regulation of out-of-court statements to the law of evidence would render the Confrontation Clause powerless to prevent even the most flagrant inquisitorial practices.”⁹ When faced with testimonial statements, the Framers intended that the criminal defendant be guaranteed the protections of the Sixth Amendment.¹⁰

The question of whether an expert witness can present an expert opinion based on statements and analyses prepared out of court has created a division among lower courts around the country.¹¹ On June 27, 2013, the North Carolina Supreme Court decided five cases regarding the Confrontation Clause that sought to resolve this tenuous struggle between constitutional and evidentiary concerns.¹² The Court addressed the basic issue of “whether an expert who bases an opinion on otherwise inadmissible facts and data may, consistent with the Confrontation Clause, disclose those facts and data to the factfinder.”¹³ In each case, an expert witness in the area of forensic science testified to the identity of a controlled substance that was al-

6. *Id.*

7. *Green*, 399 U.S. at 155–56.

8. See *State v. Brewington*, ___ N.C. ___, ___, 743 S.E.2d 626, 632 (2013) (Beasley, J., dissenting), *petition for cert. filed*, 2013 U.S. S. Ct. Briefs LEXIS 4258 (U.S. Oct. 17, 2013) (No. 13-504) (explaining that the “rules of evidence cannot be used to escape the Confrontation Clause.”); see also *Crawford*, 541 U.S. at 61.

9. *Crawford*, 541 U.S. at 51.

10. *Id.* at 61 (“Where 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.”).

11. See *Petition for Writ of Certiorari, Ortiz-Zape v. North Carolina*, No. 13-633, 2013 U.S. S. Ct. Briefs LEXIS 4739, at *10 (Nov. 21, 2013) (citing *Nardi v. Pepe*, 662 F.3d 107, 112 (1st Cir. 2011); *United States v. Johnson*, 587 F.3d 625 (4th Cir. 2009)).

12. The five cases are: *State v. Ortiz-Zape*, ___ N.C. ___, 743 S.E.2d 156 (2013), *petition for cert. filed*, 2013 U.S. S. Ct. Briefs LEXIS 4739 (U.S. Nov. 21, 2013) (No. 13-633); *Brewington*, ___ N.C. ___, 743 S.E.2d 626; *State v. Craven*, ___ N.C. ___, 744 S.E.2d 458 (2013); *State v. Williams*, ___ N.C. ___, 744 S.E.2d 125 (2013); and *State v. Brent*, ___ N.C. ___, 743 S.E.2d 152 (2013). See also <http://appellate.nccourts.org/opinions/> (follow N.C. Supreme Court Opinions 2013).

13. *Ortiz-Zape*, ___ N.C. at ___, 743 S.E.2d at 162.

legedly confiscated from the defendant, but the witness had no personal knowledge of the testing that was actually performed on the substance.¹⁴ This issue could have been easily resolved with a proper reading of the relevant constitutional provision and the binding precedent.¹⁵ However, based on its misinterpretation of the Constitution and existing United States Supreme Court precedent, the North Carolina Supreme Court has over-complicated an already unclear area of law, and has failed to meet its “charge as a Court . . . to provide guidance to lower courts.”¹⁶

This Comment will criticize the recent rule announced by the North Carolina Supreme Court; it will suggest to State of North Carolina a simple solution that will allow it to protect the rights of criminal defendants, while ensuring that convictions are not vacated or overturned because of an avoidable technicality. Part II of this Comment will discuss the evolution of the post-*Crawford* Confrontation Clause jurisprudence as it relates to forensic science. Part III will discuss the factual background and procedural history of the series of North Carolina Supreme Court opinions filed on June 27, 2013. Part IV will provide an analysis of the Court’s rule, and discuss two central flaws in the majority’s reasoning. Finally, Part V will advocate to the State of North Carolina a simple solution to this over-complicated and analytically challenging legal issue.

PART II

The Confrontation Clause of the Sixth Amendment demands that when the State presents the results of forensic testing as the substantive evidence against a criminal defendant, that defendant has the right to cross-examine the analyst who actually performed the testing.¹⁷ The Confrontation Clause guarantees a criminal defendant the

14. *Id.* at ___, 743 S.E.2d at 158–59; *Brewington*, ___ N.C. at ___, 743 S.E.2d at 626–27; *Craven*, ___ N.C. at ___, 744 S.E.2d at 460–62; *Williams*, ___ N.C. at ___, 744 S.E.2d at 126–27; *Brent*, ___ N.C. at ___, 743 S.E.2d at 153–54.

15. *See Craven*, ___ N.C. at ___, 744 S.E.2d at 462 (Hudson, J., concurring) (concluding that “in this slice of cases—in which certified lab reports prepared for this prosecution are entered into evidence through a surrogate witness who was not involved in the testing—the approach can be quite simple.”).

16. *See Ortiz-Zape*, ___ N.C. at ___, 743 S.E.2d at 171 (Hudson, J., dissenting) (explaining that “[p]art of our charge as a Court is to provide guidance to lower courts.”); *see also Brewington*, ___ N.C. at ___, 743 S.E.2d at 638 (Beasley, J., dissenting) (“I fear our lower courts will be left with no guidance on what constitutes an ‘independent opinion’ when data are ‘truly machine-generated,’ and when a violation of the Confrontation Clause has occurred.”).

17. *See, e.g., Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2710 (holding that “[t]he accused’s right is to be confronted with the analyst who made the certification, unless that analyst is unavailable at trial, and the accused had an opportunity, pretrial, to cross-examine that particular scientist.”). *But cf. Williams v. Illinois*, 132 S. Ct. 2221, 277 (Kagan, J., dissenting) (allowing testimony that was clearly prohibited by the Confrontation Clause, the Court’s fractured decision “left significant confusion in their wake.”).

right to confront witnesses, or “those who ‘bear testimony,’” against him.¹⁸ The analysis of the Confrontation Clause has evolved dramatically in the decade since the Supreme Court’s landmark decision in *Crawford v. Washington*.¹⁹ Before *Crawford*, the prosecution could introduce hearsay evidence against a criminal defendant, as long as the statement fell within a “firmly rooted” hearsay exception, or the court otherwise determined that the statement possessed “adequate ‘indicia of reliability.’”²⁰ Under *Crawford*, testimonial statements of a witness who is absent from trial may be admitted only if: (1) the declarant is unavailable, and (2) the defendant had a prior opportunity to cross-examine the declarant.²¹ The Court in *Crawford* declined to set forth a comprehensive definition of “testimonial statements,”²² but did explain that “testimony . . . is typically ‘a solemn declaration or affirmation made for the purpose of establishing or proving some fact.’”²³ Writing for a unified Court, Justice Scalia described various formulations of “testimonial statements,” including “statements that were made under circumstances which would lead an objective witness to believe that the statement would be available for use at a later trial.”²⁴ The Supreme Court’s decision in *Crawford* set forth a radical new precedent, and initiated a series of cases in which the Court attempted to define the parameters of this new rule.

The rule established in *Crawford* has been difficult for courts to consistently apply, especially in the area of expert testimony.²⁵ The application of the *Crawford* rule to forensic laboratory reports has been a controversial area of jurisprudence, particularly since forensic science has “become such an important and routinized aspect of our criminal justice system.”²⁶ From the outset, North Carolina courts have been reluctant to apply *Crawford* and its progeny in a forthright manner.²⁷ Before *Crawford*, “many jurisdictions found it irresistibly tempting to allow prosecutors to present the results of forensic lab

18. *Crawford v. Washington*, 541 U.S. 36, 51 (2004).

19. See, e.g., Libby Greismann, *Williams v. Illinois: Another Look at Expert Testimony and the Confrontation Clause*, 7 DUKE J. CONST. LAW & PP SIDEBAR 133, 133 (2012).

20. *Ohio v. Roberts*, 448 U.S. 56, 66 (1980); see also Richard D. Friedman, *Sixth Annual Criminal Law Symposium: The Sixth Amendment: Panel One: Confrontation: Confrontation and Forensic Laboratory Reports, Round Four*, 45 TEX. TECH. L. REV. 51, 51 (2012).

21. *Crawford*, 541 U.S. at 59.

22. *Id.* at 61.

23. *Id.* at 51.

24. *Id.*

25. See Brief for North Carolina Advocates for Justice as Amici Curiae Supporting Petitioner, *Ortiz-Zape v. North Carolina*, No. 13-633, 2013 WL 6858555, at *8–9 (Dec. 26, 2013) (“*Crawford* has proved complicated to apply, particularly in the area of expert testimony.”).

26. See Friedman, *supra* note 20, at 53.

27. Petition for Writ of Certiorari, *Ortiz-Zape v. North Carolina*, No. 13-633, 2013 U.S. S. Ct. Briefs LEXIS 4739, at *5–8 (Nov. 21, 2013).

tests by presenting reports from the lab without the need for a live witness.”²⁸ In fact, the North Carolina General Assembly passed a statute effective December 1, 2004 (after the Supreme Court’s decision in *Crawford*) that allows “the results of [a laboratory report of a written forensic analysis] that is signed and sworn to by the person performing the analysis [to] be admissible in evidence without the testimony of the analyst who prepared the report.”²⁹ However, under *Crawford*, it should be clear that when a forensic laboratory report is created with the understanding that it will be used as evidence against a criminal defendant, that report is testimonial and thus subject to the Confrontation Clause.³⁰

In 2009, the United States Supreme Court addressed the meaning of “testimonial” as it relates to certified lab reports.³¹ In *Melendez-Diaz v. Massachusetts*, the Court explained that affidavits prepared by laboratory analysts are “testimonial statements, and the analysts were ‘witnesses’ for purposes of the Sixth Amendment.”³² The defendant is entitled to be confronted with the testing analyst at trial, unless the State shows that the analysts were unavailable to testify at trial *and* that the defendant had a prior opportunity to cross-examine that analyst.³³ Justice Scalia, again writing for the Court, explained that scientific reports are not immune from confrontation based on the reliability of the science that is used because, “[l]ike the eyewitness who fabricated his account to the police, the analyst who provides false results may, under oath in open court, reconsider his false testimony.”³⁴ As with any expert witness, cross-examination allows the defendant to expose an analyst’s deficiency in judgment, lack of training, or failure to follow protocol.³⁵ *Melendez-Diaz* thus establishes that this type of laboratory report may not be admitted against a criminal defendant without the testimony of a witness who has personal knowledge of, and is competent to testify to, the truth of the statements set forth in the report.³⁶

In the 2011 case of *Bullcoming v. New Mexico*, the United States Supreme Court addressed the application of the Confrontation Clause

28. *Id.*

29. N.C. Gen. Stat. § 8-58.20 (2011).

30. Friedman, *supra* note 20, at 53.

31. *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 307 (2009); *see also* *State v. Ortiz-Zape*, ___ N.C. ___, ___, 743 S.E.2d 156, 166 (2013) (Hudson, J., dissenting), *petition for cert. filed*, 2013 U.S. S. Ct. Briefs LEXIS 4739 (U.S. Nov. 21, 2013) (No. 13-633).

32. *Melendez-Diaz*, 557 U.S. at 311 (internal quotation marks omitted).

33. *Id.*

34. *Id.* at 319.

35. *Id.* at 320.

36. *See id.*; *see also* *Ortiz-Zape*, ___ N.C. at ___, 743 S.E.2d at 166 (Hudson, J., dissenting) (quoting *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2709 (2011)).

to forensic laboratory reports.³⁷ The specific issue before the Court was whether, under the Confrontation Clause, the prosecution was allowed to introduce a forensic laboratory report containing a testimonial certification through the in-court testimony of a scientist who did not perform or observe the reported test.³⁸ The testing analyst's affidavit certified facts other than machine-generated data, such as an unbroken chain of custody, the particular test performed, and the analyst's adherence to protocol in performing that test.³⁹ Writing for the Court, Justice Ginsburg explained that it is "[t]hese representations, relating to past events and human actions not revealed in raw, machine-produced data, [that] are meet for cross-examination."⁴⁰ Further, this type of "surrogate testimony" can neither "expose any lapses or lies" of the testing analyst, nor convey what the testing analyst knew or observed about the particular test and testing process.⁴¹ The Court held that, although the proffered expert in *Bullcoming* was competent to testify regarding the general lab procedures, this type of "surrogate testimony" did not satisfy the constitutional demands prescribed by the Sixth Amendment.⁴² Justice Ginsburg's decision in *Bullcoming* established a clear rule for lower courts to follow: the Sixth Amendment guarantees the defendant the right confront the testing analyst, unless that analyst is unavailable at trial, *and* the accused had an opportunity before trial to cross-examine that *particular* scientist.⁴³ The *Bullcoming* rule thus protects the Sixth Amendment rights of criminal defendants, while providing a straightforward standard for lower courts to follow.

However, just one year after *Bullcoming*, the Supreme Court created widespread confusion with its "fractured" four-one-four plurality in *Williams v. Illinois*.⁴⁴ The Court in *Williams* considered whether *Crawford* prevents an expert witness from expressing an *opinion* that is based on facts about which the expert is not competent to testify.⁴⁵

37. *Bullcoming*, 131 S. Ct. at 2705.

38. *Id.* at 2710.

39. *Id.* at 2714.

40. *Id.*

41. *Id.* at 2715.

42. *Id.* at 2710; *see also* State v. Ortiz-Zape, ___ N.C. ___, ___, 743 S.E.2d 156, 166 (2013) (Hudson, J., dissenting), *petition for cert. filed*, 2013 U.S. S. Ct. Briefs LEXIS 4739 (U.S. Nov. 21, 2013) (No. 13-633).

43. *Bullcoming*, 131 S. Ct. at 2710.

44. *See* Williams v. Illinois, 132 S. Ct. 2221, 2265 (2012) (Kagan, J., dissenting). *See also* DAVID H. KAYE, DAVID E. BERNSTEIN & JENNIFER L. MNOOKIN, THE NEW WIGMORE: A TREATISE ON EVIDENCE: EXPERT EVIDENCE § 4.12.11 (Aspen Publishers, 2014) ("The Williams decision—and indeed the unruly array of opinions across many jurisdictions applying the Confrontation Clause to forensic-science evidence—has perplexed lower courts seeking coherence, or at least clarity.")

45. *Williams*, 132 S. Ct. at 2227.

Five Justices (the four Justice plurality and Justice Thomas) found that the underlying report was not testimonial, and therefore not a Confrontation Clause violation.⁴⁶ However, Justice Thomas based his conclusion on a different analysis than the plurality, and in fact expressly rejected the plurality's reasoning.⁴⁷ To confound matters even further, five Justices (Justice Thomas and the four Justice dissent) found that the report was offered for the truth of the matter asserted therein.⁴⁸ "This disagreement among the members of [the Supreme Court] as to the proper interpretation and application of the Confrontation Clause has left the lower courts in disarray."⁴⁹ Specifically, after *Williams*, it is still unclear what is considered "testimonial" when an expert opinion is based in whole or in substantial part on the analysis and opinions of an out-of-court expert.⁵⁰

The *Williams* decision must be read on extremely narrow grounds, and it does not apply to any of the cases decided by the North Carolina Supreme Court on June 27, 2013. "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds."⁵¹ Justice Beasley correctly explained that "the only common, and thereby narrowest, ground between Justice Thomas's concurrence and the plurality opinion is that there is no Confrontation Clause violation in a case having the exact fact pattern of *Williams*."⁵² Part of the North Carolina Supreme Court's confusion in these cases appears to stem from its misinterpretation of the *Williams* decision.⁵³ Justice Kagan forecasted the potential turbulence

46. *Id.*; see also *Ortiz-Zape*, ___ N.C. at ___, 743 S.E.2d at 167 n. 6 (Hudson, J., dissenting) ("I believe the only firm conclusions we can draw from *Williams* are that the lab report there was *not* testimonial and that five justices agreed it was offered for its truth. These conclusions appear to apply only to the precise facts in *Williams*. Because it is clear that the lab report here *was* testimonial, as well as offered for its truth, *Williams* gives us little additional guidance."); and *State v. Brewington*, ___ N.C. ___, ___, 743 S.E.2d 626, 636 n.2 (2013) (Beasley, J., dissenting), *petition for cert. filed*, 2013 U.S. S. Ct. Briefs LEXIS 4258 (U.S. Oct. 17, 2013) (No. 13-504) ("Here . . . [t]here is no question that [the report] is testimonial in nature, even under Justice Thomas's standards.")

47. *Williams*, 132 S. Ct. at 2253 (Thomas, J., concurring in the judgment); see also *Brewington*, ___ N.C. at ___, 743 S.E.2d at 636 (Beasley, J., dissenting).

48. *Id.*

49. Brief for North Carolina Advocates for Justice as Amici Curae Supporting Petitioner, *Ortiz-Zape v. North Carolina*, No. 13-633, 2013 WL 6858555, at *2 (Dec. 26, 2013).

50. *Id.* at *4.

51. *Marks v. United States*, 430 U.S. 188, 193 (1977) (citing *Gregg v. Georgia*, 428 U.S. 153, 169 n. 15 (1976)).

52. *State v. Brewington*, ___ N.C. ___, ___, 743 S.E.2d 626, 636 (2013) (Beasley, J., dissenting), *petition for cert. filed*, 2013 U.S. S. Ct. Briefs LEXIS 4258 (U.S. Oct. 17, 2013) (No. 13-504).

53. See *Petition for Writ of Certiorari, Ortiz-Zape v. North Carolina*, No. 13-633, 2013 U.S. S. Ct. Briefs LEXIS 4739, at *27-28 (Nov. 21, 2013). ("The North Carolina Supreme Court failed to recognize the key distinctions between *Williams v. Illinois* and the present appeal. Addition-

that *Williams* would create when she lamented in her dissent that the plurality “‘left significant confusion in [its] wake’ because of an apparent desire to retreat from the *Crawford*, *Melendez-Diaz*, and *Bullcoming* trilogy, resulting in a view of ‘who knows what’ because ‘no proposed limitation commands the support of a majority.’”⁵⁴ Referencing *Melendez-Diaz* and *Bullcoming*, Justice Kagan explained that prior to *Williams*, if the State wished to admit the results of forensic testing, it was required to produce the testing analyst, and that “until a majority of this Court reverses or confines those decisions, I would understand them as continuing to govern, in every particular, the admission of forensic evidence.”⁵⁵ *Williams* should be completely disregarded except in cases that present the exact facts of that case. As none of the five cases decided by the North Carolina Supreme Court on June 27, 2013 involve the same facts as were present in *Williams*, the *Williams* opinion is not relevant to this analysis.⁵⁶

PART III

On June 27, 2013, the North Carolina Supreme Court issued five opinions regarding the application of the Confrontation Clause as it relates to the admissibility of forensic evidence.⁵⁷ These cases reveal three discrete perspectives within the North Carolina Supreme Court: the four-Justice majority consisting of Justices Newby, Jackson, Edmunds, and Martin; the two-Justice dissent of Justice Hudson and Chief Justice Parker; and Justice Beasley who dissented alone.⁵⁸ This Comment will focus on the three most substantive in this series of decisions: *State v. Ortiz-Zape*, *State v. Brewington*, and *State v. Craven*. The issue that the Court addressed in each case is “whether an expert who bases an opinion on otherwise inadmissible facts and data may, consistent with the Confrontation Clause, disclose those facts and data to the factfinder.”⁵⁹ The majority emphasized that the answer to this question turns on a determination of whether the expert’s testimony is an “independent opinion” or “surrogate testimony”; how-

ally, the North Carolina Supreme Court placed undue reliance on the precedential value of *Williams v. Illinois*.”).

54. Brief for North Carolina Advocates for Justice as Amici Curae Supporting Petitioner, *Ortiz-Zape v. North Carolina*, No. 13-633, 2013 WL 6858555, at *6 (Dec. 26, 2013) (quoting *Williams*, 132 S. Ct. at 2277) (Kagan, J., dissenting)).

55. *Williams v. Illinois*, 132 S. Ct. 2221, 2277 (2012) (Kagan, J., dissenting).

56. See *Brewington*, ___ N.C. at ___, 743 S.E.2d at 636 (Beasley, J., dissenting) (explaining that “*Williams* . . . is simply not binding upon this case.”).

57. See *supra* note 12.

58. Justice Beasley only participated in three of the seven decisions: *State v. Brewington*, *State v. Williams*, and *State v. Hough*.

59. *State v. Ortiz-Zape*, ___ N.C. ___, ___, 743 S.E.2d 156, 162 (2013), petition for cert. filed, 2013 U.S. S. Ct. Briefs LEXIS 4739 (U.S. Nov. 21, 2013) (No. 13-633).

ever, the North Carolina Supreme Court failed to set forth a clear definition of either term.⁶⁰ Further, the rules announced in each individual opinion take on a new meaning when the cases are read as a whole. Together, these three cases set forth a contradictory rule that essentially road-maps an end-run around *Crawford* the Confrontation Clause.⁶¹

A comparison of *Ortiz-Zape* and *Brewington* with *Craven* will illustrate the arbitrary and troublesome nature of the rule crafted by the North Carolina Supreme Court. In both *Ortiz-Zape* and *Brewington*, the majority held that the challenged testimony was an “independent opinion” based on the expert’s own scientific analysis, and therefore not subject to the protections of the Sixth Amendment.⁶² However, in *Craven*, the Court came to the opposite conclusion with nearly identical facts.⁶³ These three cases reveal two central flaws in the majority’s reasoning: first, the majority’s confusion between the evidentiary and constitutional issues presented by these cases; and second, the Court’s arbitrary and unfounded reliance on the classification of evidence as an independent opinion or surrogate testimony.

A. *Holding the Challenged Testimony Was Not a Violation of the Confrontation Clause*

1. *State v. Ortiz-Zape*

State v. Ortiz-Zape involves the arrest of the defendant, Mario Eduardo Ortiz-Zape, for possession with intent to sell or deliver cocaine.⁶⁴ The substance allegedly confiscated from the defendant (Item Number 9) was sent to the Charlotte Mecklenburg Police Department (CMPD) crime lab for analysis, where it was tested by a chemist named Jennifer Mills.⁶⁵ At trial, the State sought to introduce the results of the analysis through the testimony of Agent Tracey Ray of the CMPD crime lab as an expert in forensic chemistry.⁶⁶ Agent Ray did not personally perform and was not present during the tests performed on Item Number 9.⁶⁷ At trial, the defendant challenged admission of this evidence based on Sixth Amendment grounds, and

60. *See id.* (“We emphasize that the expert must present an independent opinion obtained through his or her own analysis and not merely ‘surrogate testimony,’ parroting otherwise inadmissible statements.”) (citing *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2710 (2011)).

61. *See Brewington*, ___ N.C. at ___, 743 S.E.2d at 634 (Beasley, J., dissenting) (“We must not create a back door to evade the Confrontation Clause by merely changing the diction from ‘surrogate’ to ‘independent opinion.’”).

62. *Id.*; *Ortiz-Zape*, ___ N.C. at ___, 743 S.E.2d at 165.

63. *See State v. Craven*, ___ N.C. ___, ___, 744 S.E.2d 458, 462 (2013).

64. *Ortiz-Zape*, ___ N.C. at ___, 743 S.E.2d at 157–58.

65. *Id.* at ___, 743 S.E.2d at 158.

66. *Id.*

67. *Id.* at ___, 743 S.E.2d at 163.

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“sought to exclude admission of a lab report created by a non-testifying analyst and any testimony by any lab analyst who did not perform the tests or write the lab report.”⁶⁸ The trial court ruled that Agent Ray could testify about the practices and procedures of the CMPD crime lab, her review of the testing of the substance, and her “independent opinion” concerning the testing; however, the trial court excluded admission of Agent Mills’ laboratory report under North Carolina Rule of Evidence 403.⁶⁹

After testifying about the standard lab procedures for receipt, storage, and testing of substances, Agent Ray testified that she conducted a “peer review” of the chemical analysis of Item Number 9.⁷⁰ Agent Ray explained that her “peer review” consisted of “review[ing] the drug chemistry worksheet or the lab notes that the analyst wrote her notes on and the data that came from the instrument that was in the case file and then [she] also reviewed the data that was on the instrument and made sure that was all there too.”⁷¹ Agent Ray described the tests that Agent Mills performed on the substance, and when asked to give her “independent expert opinion,” Agent Ray responded, “[m]y conclusion was that the substance was cocaine.”⁷² On cross-examination, defense counsel emphasized that any opinions Agent Ray gave regarding the identity of the substance were based entirely on testing done by someone else, that Agent Ray was not present when the testing was performed, and that her testimony assumed that Agent Mills had followed standard lab procedures when testing Item Number 9.⁷³ The jury found the defendant guilty of possession of cocaine, and the defendant appealed.⁷⁴

In an unpublished opinion, a unanimous North Carolina Court of Appeals panel reversed the decision of the trial court.⁷⁵ The Court explained that, because the State failed to prove all elements of the charged crime, the defendant’s motion to dismiss should have been granted.⁷⁶ “An essential element of felony possession of cocaine is evidence that the substance . . . was actually cocaine. Cocaine can only be identified through chemical analysis. The State did not properly present any chemical analysis which identified the white sub-

68. *Id.* at ___, 743 S.E.2d at 158.

69. *Id.*

70. *Id.*

71. *Id.* at ___, 743 S.E.2d at 168 (Hudson, J., dissenting).

72. *Id.* at ___, 743 S.E.2d at 159 (majority opinion).

73. *Id.*

74. *Id.*

75. *State v. Ortiz-Zape*, 213 N.C. App. 425, 714 S.E.2d 275, 2011 WL 2848792, at *3 (2011), *rev’d*, ___ N.C. ___, 743 S.E.2d 156 (June 27, 2013).

76. *Id.*

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stance as cocaine.”⁷⁷ The Court therefore concluded that it was reversible error to allow Agent Ray’s testimony.⁷⁸ The North Carolina Supreme Court granted the State’s petition for discretionary review, and in a four-two opinion, reversed the decision of the Court of Appeals.⁷⁹

The North Carolina Supreme Court held that Agent Ray’s testimony was not surrogate testimony, but instead it was her own “independently reasoned opinion.”⁸⁰ The Court came to this conclusion by explaining that the prosecution laid the proper foundation for Agent Ray’s testimony under North Carolina Rule of Evidence 703 by specifically asking, “are these tests standards such that other experts in the field of forensic chemistry would rely upon them in performing [sic] the opinion as to the identity of a chemical substance.”⁸¹ Relying on outdated precedent and the rules of evidence, the Court explained that “when an expert gives an opinion, it is the expert opinion itself, not its underlying factual basis, which constitutes substantive evidence. Therefore, when an expert gives an opinion, the expert is the witness whom the defendant has the right to confront.”⁸² The Court thus concluded that “[t]his expert opinion, from Ray’s own analysis of the data, constituted the substantive evidence being presented against defendant.”⁸³

After explaining that “‘representations[] relating to past events and human actions not revealed in raw, machine-produced data’ may not be admitted through ‘surrogate testimony,’”⁸⁴ the majority concluded that, “[a]ccordingly, consistent with the Confrontation Clause, if of a type reasonably relied upon by experts in the particular field, raw data generated by a machine may be admitted for the purpose of showing the basis of an expert’s opinion.”⁸⁵ While the Court relied heavily on the distinction between an independent opinion and surrogate testimony, it went no further to define the boundaries of these two amorphous concepts.⁸⁶

77. *Id.* (internal citations omitted).

78. *Id.*

79. *Ortiz-Zape*, ___ N.C. at ___, 743 S.E.2d at 165 (Justice Beasley, who was a member of the three-judge panel at the Court of Appeals, did not participate in the consideration or decision of the case.).

80. *Id.* at ___, 743 S.E.2d at 163 (quoting *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2710 (2011)).

81. *Id.*

82. *Id.* at ___, 743 S.E.2d at 161 (quoting *State v. Fair*, 354 N.C. 131, 162, 557 S.E.2d 500, 552 (2001), *cert. denied*, 535 U.S. 1114 (2002) (internal citations and quotation marks omitted)).

83. *Id.* at ___, 743 S.E.2d at 164. See *Fair*, 354 N.C. 162, 557 S.E.2d 552.

84. *Ortiz-Zape*, ___ N.C. at ___, 743 S.E.2d at 161 (quoting *Bullcoming*, 131 S. Ct. at 2714).

85. *Id.* (internal citations and quotation marks omitted).

86. *Id.* at ___, 743 S.E.2d at 162 (“We emphasize that the expert must present an independent opinion obtained through his or her own analysis and not merely ‘surrogate testimony’

In her dissenting opinion, Justice Hudson severely criticized the majority's misinterpretation of Supreme Court precedent, and emphasized that there was no indication in the record that Agent Ray conducted an "independent analysis" of Item Number 9.⁸⁷ Justice Hudson explained that "Agent Ray did not simply evaluate raw data—she reviewed the lab report and testified to some of its contents, specifically which tests the nontestifying analyst conducted and the results of those tests."⁸⁸ Agent Ray's analysis was not "independent" because all she did was "simply view[] and agree[] with the test results of another."⁸⁹ She was not present for any of the tests, and therefore had to rely entirely on the certification by the testing analyst that the tests were in fact performed, and were performed in compliance with the standard procedure and without error.⁹⁰ Under *Bullcoming*, "these representations, relating to past events and human actions not revealed in raw, machine-produced data, are meet for cross-examination."⁹¹

2. *State v. Brewington*

State v. Brewington involves the arrest of the defendant, John Edward Brewington, for possession of cocaine.⁹² The "rock-like substance" allegedly confiscated from the defendant was transported to the North Carolina State Bureau of Investigation (SBI) laboratory where it was analyzed by Assistant Supervisor in Charge Nancy Gregory.⁹³ Agent Gregory performed the chemical analysis on the substance, and prepared a written report concluding that the substance was "cocaine base" weighing 0.1 gram.⁹⁴ At trial, the State did not elicit the testimony of Agent Gregory to introduce this evidence; instead, the prosecution introduced the testimony of SBI Special Agent Kathleen Schell.⁹⁵ Agent Schell is an employee of the SBI laboratory, but she did not personally perform, observe, or certify any of the tests

parroting otherwise inadmissible statements."); see also DAVID H. KAYE, DAVID E. BERNSTEIN & JENNIFER L. MNOOKIN, *supra* note 44 ("State v. Ortiz-Zape illustrates the extraordinarily fine line between the use of a surrogate witness (as prohibited in *Bullcoming*) and the use of an alternate witness expressing an allegedly independent opinion based on evidence that would be testimonial if introduced for its truth (as the plurality in *Williams* permits).").

87. *Ortiz-Zape*, ___ N.C. at ___, 743 S.E.2d at 168 (Hudson, J., dissenting).

88. *Id.* at ___, 743 S.E.2d at 170 (emphasis in original).

89. *Id.* at ___, 743 S.E.2d at 168.

90. *Id.* at ___, 743 S.E.2d at 170.

91. *Id.* (citing *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2714 (2011)).

92. *State v. Brewington*, ___ N.C. ___, ___, 743 S.E.2d 626, 626 (2013), *petition for cert. filed*, 2013 U.S. S. Ct. Briefs LEXIS 4258 (U.S. Oct. 17, 2013) (No. 13-504).

93. *Id.* at ___, 743 S.E.2d at 627.

94. *Id.*; see also, *Petition for Writ of Certiorari, Brewington v. North Carolina*, No. 13-504, 2013 U.S. S. Ct. Briefs LEXIS 4258, at *5 (Oct. 17, 2013).

95. *Brewington*, ___ N.C. at ___, 743 S.E.2d at 626.

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performed on the substance allegedly recovered from the crime scene.⁹⁶

At trial, the defendant objected and moved to exclude Agent Schell's testimony as a violation of the Confrontation Clause.⁹⁷ The defendant argued that the Confrontation Clause entitled him to cross-examine the expert who actually performed the forensic testing, and that Agent Schell's testimony was thus inadmissible.⁹⁸ The trial court denied the defendant's motion.⁹⁹ Referring to Agent Gregory's notes, Agent Schell testified as to what tests were performed on the substance, and the results of those tests.¹⁰⁰ When asked for her "opinion as to the identity of the substance," Agent Schell responded that the substance was "cocaine base [with] a weight of 0.1 gram."¹⁰¹ Further, Agent Schell answered affirmatively when asked on cross-examination, "they sent you here to testify from that person's notes who actually did the test; is that right?"¹⁰²

The jury convicted the defendant of possession of cocaine, and the defendant appealed arguing that it was error to allow Agent Schell's testimony to identify the "rock-like" substance.¹⁰³ The North Carolina Court of Appeals agreed, explaining that "to allow a testifying expert to reiterate the conclusions of a non-testifying expert would eviscerate the protection of the Confrontation Clause."¹⁰⁴ After reviewing the transcript of Special Agent Schell's testimony, the Court stated that, "[i]t is clear from the testimony of Special Agent Schell that she had no part in conducting any testing on the substance, nor did she conduct any independent analysis of *the substance*."¹⁰⁵ Thus, the Court distinguished between an expert opinion based on a review of the actual substance that was confiscated, as opposed to an allegedly independent opinion of an inadmissible laboratory report prepared by a non-testifying expert.¹⁰⁶ This distinction is crucial in determining whether a defendant's Sixth Amendment Confrontation Clause rights have been protected. The Court concluded that, "[a]s Special Agent Schell testified, her expert opinion could go no further than the determination that she 'would have come to the same conclusion' as the testing analyst. This . . . is not an independent expert

96. Petition for Writ of Certiorari, *Brewington*, *supra* note 94, at *6.

97. *Brewington*, 204 N.C. App. at 69–70, 693 S.E.2d at 184.

98. *Id.*

99. *Brewington*, ___ N.C. at ___, 743 S.E.2d at 627.

100. *Id.*

101. *Brewington*, 204 N.C. App. at 72, 693 S.E.2d at 185.

102. *Brewington*, ___ N.C. at ___, 743 S.E.2d at 630 (Beasley, J., dissenting).

103. *Id.* at ___, 743 S.E.2d at 627 (majority opinion).

104. *Brewington*, 204 N.C. App. at 78, 693 S.E.2d at 189.

105. *Id.* at 80, 693 S.E.2d at 190 (emphasis in original).

106. *See id.*

opinion arising from the observation and analysis of raw data.”¹⁰⁷ Accordingly, the Court unanimously ordered that the defendant was entitled to a new trial.¹⁰⁸

The North Carolina Supreme Court granted the State’s petition for discretionary review, and in a four-three opinion, reversed the decision of the Court of Appeals.¹⁰⁹ The Court held that “Agent Schell presented an independent opinion formed as a result of her own analysis, not mere surrogate testimony.”¹¹⁰ Agent Schell’s testimony revealed that she would have come to the same conclusion that Agent Gregory did, but only if Agent Gregory followed the correct procedures, and only if she did not make any mistakes.¹¹¹ The majority noted the conclusion from the Court of Appeals that “it is precisely these ‘ifs’ that need to be explored upon cross-examination to test the reliability of the evidence.”¹¹² Without responding to the merits of this statement, the Court reasoned that the defendant’s Sixth Amendment rights were satisfied because he “was able to conduct a vigorous and searching cross-examination that exposed the basis of, and any weaknesses in, Agent Schell’s opinion.”¹¹³

In her dissenting opinion, Justice Hudson lamented that the majority in *Brewington* went “even farther astray than in *Ortiz-Zape*.”¹¹⁴ Justice Hudson explained that in *Brewington*, unlike in *Ortiz-Zape*, “Agent Schell was not asked and made no attempt to characterize her testimony as an ‘independent expert opinion.’”¹¹⁵ In *Ortiz-Zape*, Agent Ray avoided reference to the testing analyst’s conclusions; however, in *Brewington*, Agent Schell “actually introduced through her testimony Agent Gregory’s conclusion from the lab report—the *very conclusion* that the trial court had explicitly ruled was inadmissible without testimony from Agent Gregory.”¹¹⁶ By informing the jury of the conclusion in the laboratory report, that the substance was 0.1 grams of cocaine, Agent Schell “informed the jury of the absent analyst’s testimonial conclusion and thereby acted as a surrogate rather than an independent witness.”¹¹⁷ This is plainly the type of “surrogate

107. *Id.* at 82, 693 S.E.2d at 191.

108. *Id.* at 83, 693 S.E.2d at 192.

109. *State v. Brewington*, ___ N.C. ___, ___, 743 S.E.2d 626, 628 (2013), *petition for cert. filed*, 2013 U.S. S. Ct. Briefs LEXIS 4258 (U.S. Oct. 17, 2013) (No. 13-504).

110. *Id.*

111. *Id.* at ___, 743 S.E.2d at 627 (Agent Schell testified that “[b]ased upon all the data that [Agent Gregory] obtained from the analysis of that particular item . . . I would have come to the same conclusion that she did.” *Id.* at ___, 743 S.E.2d at 630).

112. *Id.*

113. *Id.* at ___, 743 S.E.2d at 628.

114. *Id.* (Hudson, J., dissenting).

115. *Id.*

116. *Id.*

117. *Id.*

testimony” prohibited by *Bullcoming*,¹¹⁸ and admissibility of this constitutionally prohibited evidence cannot be saved by framing the testimony as an “independent expert opinion” when it is clear that the “opinion was entirely based on another’s work and notes, and involved no independent analysis whatsoever.”¹¹⁹

Justice Beasley wrote a separate dissent in *Brewington*, and focused her analysis on the role that the challenged evidence played in the defendant’s conviction.¹²⁰ Justice Beasley rejected the majority’s reasoning, and explained that she would instead examine the “true and actual purpose” of the evidence, and the centrality of the evidence to the State’s case, in considering whether there was a violation of the Confrontation Clause.¹²¹ Justice Beasley stated that “[i]n this case, the majority determines that the expert opinion was independent and that the underlying information relied upon was not offered for the truth of the matter asserted. This holding contradicts the United States Constitution, United States Supreme Court precedent, and this Court’s precedent.”¹²² Allowing the defendant to cross-examine the testifying expert is not sufficient because it “fails to address concerns regarding the critical evidence itself.”¹²³ Thus, Justice Beasley focused her analysis of the Confrontation Clause on the centrality and purpose of the evidence in the proceeding.¹²⁴

In both *Ortiz-Zape* and *Brewington*, the majority of the North Carolina Supreme Court held that the challenged testimony was an “independent opinion” based on the expert’s own scientific analysis, and thus not subject to the Sixth Amendment.¹²⁵ The Court used faulty logic when it explained that “when an expert gives an opinion, it is the expert opinion itself, not its underlying factual basis, that constitutes substantive evidence. Therefore, when an expert gives an opinion, the expert is the witness whom the defendant has the right to confront.”¹²⁶ However, in *State v. Craven*, the Court faced a similar factual situation as in *Brewington* and *Ortiz-Zape*, but held that admitting the expert testimony would deprive the defendant of any meaningful cross-examination, as is his right under the Sixth Amendment.¹²⁷ Therefore, a

118. *Id.* at ___, 743 S.E.2d at 628–29.

119. *Id.* at ___, 743 S.E.2d at 628.

120. *Id.* at ___, 743 S.E.2d at 629.

121. *Id.*

122. *Id.* at ___, 743 S.E.2d at 632 (Beasley, J., dissenting).

123. *Id.* at ___, 743 S.E.2d at 631.

124. *See id.*

125. *See id.* at ___, 743 S.E.2d at 628 (Hudson, J., dissenting); *State v. Ortiz-Zape*, ___ N.C. ___, ___ 743 S.E.2d 156, 165 (2013), *petition for cert. filed*, 2013 U.S. S. Ct. Briefs LEXIS 4739 (U.S. Nov. 21, 2013) (No. 13-633).

126. *Ortiz-Zape*, ___ N.C. at ___, 743 S.E.2d at 621.

127. *See State v. Craven*, ___ N.C. ___, ___, 744 S.E.2d 458, 465 (2013).

comparison of these three cases highlights the arbitrary and illogical rule established by the North Carolina Supreme Court.

B. *Holding the Challenged Testimony Was a Violation of the Confrontation Clause*

In *State v. Craven*, the defendant, Marcus Arnell Craven, was charged with possession with intent to sell and deliver cocaine, and with sale and delivery of cocaine.¹²⁸ The charges arose out of three separate “controlled buy” operations conducted by the Chatham County Sheriff’s Department on March 3, 2008, March 6, 2008, and March 21, 2008.¹²⁹ The three samples of crack cocaine recovered from the three separate controlled buy operations were sent to the North Carolina SBI laboratory for analysis.¹³⁰

Three different agents tested the samples from the three controlled buy operations.¹³¹ Agents Tom Shoopman and Irvin Allcox performed the testing on the samples from March 3, 2008 and March 6, 2008, respectively.¹³² Agent Kathleen Schell personally tested the sample from March 21, 2008.¹³³ At trial, the State called Agent Schell to testify about the identity, composition, and weight of the three substances recovered on each of the three controlled buy dates.¹³⁴ The court admitted all three laboratory reports into evidence.¹³⁵ With regard to the substances that Agent Schell did not personally test, the prosecutor asked Agent Schell what conclusion the testing analyst reached, and Agent Schell read into the record the results listed on the reports.¹³⁶ The defendant objected to this testimony on Sixth Amendment grounds, claiming that Agent Schell’s testimony and the admission of the laboratory reports violated his right to confront witnesses against him.¹³⁷ The trial court overruled the defendant’s objection, and he was convicted of the charged offenses.¹³⁸

The defendant appealed his conviction to the North Carolina Court of Appeals.¹³⁹ A unanimous Court of Appeals panel vacated the convictions for the charges arising out of the March 3, 2008 and March 6,

128. *Id.*

129. *Id.* at ___, 744 S.E.2d 459.

130. *Id.* at ___, 744 S.E.2d at 460.

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.* at ___, 744 S.E.2d at 461.

136. *Id.*

137. *Id.* at ___, 744 S.E.2d at 460.

138. *Id.*

139. *State v. Craven*, 205 N.C. App. 393, 394, 696 S.E.2d 750, 751 (2010).

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2008 transactions.¹⁴⁰ However, the Court found no error in the convictions based on the March 21, 2008 events.¹⁴¹ Upon petition by the State for discretionary review, the North Carolina Supreme Court reversed this decision of the Court of Appeals with respect to the remedy, and ordered a new trial on the March 6, 2008 sale or delivery conviction.¹⁴² The Court left undisturbed the decision of the Court of Appeals regarding the two remaining convictions.¹⁴³

The North Carolina Supreme Court found that Agent Schell's testimony regarding the two samples that she did not personally test was a violation of the defendant's Sixth Amendment Confrontation Clause rights.¹⁴⁴ The Court stated that "Agent Schell did not offer—or even purport to offer—her own independent analysis or opinion on the 3 March and 6 March 2008 samples. Instead, Agent Schell merely parroted [the testing analysts'] conclusions from their lab reports."¹⁴⁵ Citing to *Bullcoming* and *Melendez-Diaz*, the Court explained that Agent Schell's statements amounted to testimonial hearsay, and therefore triggered the protections of the Confrontation Clause.¹⁴⁶ Accordingly, the Court held that allowing this "surrogate testimony" constituted a violation of the defendant's Sixth Amendment right to confrontation because "the State did not show that [the testing analysts] were unavailable, and that defendant had a prior opportunity to cross-examine them."¹⁴⁷

Justice Hudson concurred with the majority's judgment, but continued her firm opposition to the rule announced by the majority in *Ortiz-Zape*.¹⁴⁸ Justice Hudson explained that "[b]ecause both reports were offered and received into evidence through Agent Schell's testimony without any limitation on purpose, over defendant's objection based on the Confrontation Clause, their admission into evidence without testimony from the testing analysts was a clear violation of the Confrontation Clause under *Bullcoming*."¹⁴⁹ Further, Justice Hudson emphasized that this Confrontation Clause error allowed the admission of the crucial evidence of a central element of the charged offense.¹⁵⁰ A witness's status as an expert witness does not eliminate

140. *Id.* at 405, 696 S.E.2d at 756.

141. *Id.*

142. *Craven*, ___ N.C. at ___, 744 S.E.2d at 462.

143. *Id.*

144. *Id.*

145. *Id.* at ___, 744 S.E.2d at 461.

146. *Id.*

147. *Id.*

148. *Id.* at ___, 744 S.E.2d at 462 (Hudson, J., concurring in the result).

149. *Id.* at ___, 744 S.E.2d at 463–64.

150. *Id.*

the protections of the Confrontation Clause.¹⁵¹ Justice Hudson asserted that, “there is nothing independent about agreeing with a conclusion in an inadmissible report. This testimony is functionally indistinguishable from the testimony prohibited in *Bullcoming*, in that it deprives defendant of any meaningful cross-examination regarding either agent’s testing procedures.”¹⁵²

PART IV

The rule that the North Carolina Supreme Court announced through this series of opinions confuses the evidentiary and constitutional issues, and places undue reliance on the arbitrary classification of evidence as an independent opinion as opposed to surrogate testimony. The rule can be understood as follows: Inadmissible evidence may be admissible through the testimony of an expert witness, so long as the testimony is phrased as an “independent opinion.”¹⁵³ This rule is not limited to forensic experts, and can in fact apply to any expert in any field.¹⁵⁴ Under the majority’s rule, “any expert could give an opinion based on any outside inadmissible evidence, no matter how clearly testimonial or pointedly designed to prove an element of the State’s case, without running afoul of the Confrontation Clause.”¹⁵⁵ Such a rule is objectively beneficial to the prosecution.¹⁵⁶

The rule expressed by the Court in these opinions reveals two central flaws in the Court’s reasoning. Specifically, the Court held that the information and conclusions contained in an inadmissible forensic laboratory report created by an analyst who does not testify at trial may be admissible through the expert testimony of a different analyst, if the reports are “of a type reasonably relied upon by experts in the field.”¹⁵⁷ The North Carolina Supreme Court has classified this evidence as nontestimonial, and therefore not subject to a *Crawford*

151. *Id.* at ___, 744 S.E.2d at 465 (“Agent Schell’s status as an expert witness does not allow the State to bypass the Confrontation Clause by simply asking her to read the conclusions of nontestifying witnesses into evidence. Nor has she provided any independent expert opinion—developed through her own analysis—for which the lab reports were a basis.”).

152. *Id.*

153. *Id.*

154. See *State v. Ortiz-Zape*, ___ N.C. ___, 743 S.E.2d at 163 (opening the door for the application of this rule to any field, and explaining that “when an expert gives an opinion, the opinion is the substantive evidence and the expert is the witness whom the defendant has the right to confront.”), *petition for cert. filed*, 2013 U.S. S. Ct. Briefs LEXIS 4739 (U.S. Nov. 21, 2013) (No. 13-633).

155. *State v. Brewington*, ___ N.C. ___, 743 S.E.2d 626, 629 (2013) (Hudson, J., dissenting), *petition for cert. filed*, 2013 U.S. S. Ct. Briefs LEXIS 4258 (U.S. Oct. 17, 2013) (No. 13-504).

156. See *id.* at ___, 743 S.E.2d at 631 (2013) (Beasley, J., dissenting).

157. *State v. Ortiz-Zape*, ___ N.C. ___, 743 S.E.2d 156, 161 (2013), *petition for cert. filed*, 2013 U.S. S. Ct. Briefs LEXIS 4739 (U.S. Nov. 21, 2013) (No. 13-633); see also Jennifer A. Brobst, *Right to Confrontation – Crawford Ruling – Forensic Reports*, Admissibility of Evidence in N.C. §24:10.

analysis, so long as the defendant has an opportunity to cross-examine the expert who testifies at trial.¹⁵⁸

The expert must give an “independent expert opinion” of the results, and if so, the expert’s testimony can serve as the only substantive evidence to prove an essential element of the charged crime.¹⁵⁹ However, an expert witness may not give “surrogate testimony,” merely “parroting” the opinions and conclusions of the underlying analyst’s test results and procedures, without conducting any independent review or analysis.¹⁶⁰ The Court’s analysis of this issue thus turns on determining whether the testimony is an “independent opinion” or “surrogate testimony;”¹⁶¹ however, the Court failed to comprehensively define either term.¹⁶² The majority “declined to follow the guidance of the U.S. Supreme Court’s recent Sixth Amendment opinions, from *Crawford* through *Williams*, and has thus failed to protect a defendant’s right to confront witnesses against him.”¹⁶³

Part IV of this Comment will explore two central flaws in the rule created by the North Carolina Supreme Court. First, part (A) will explore the Court’s confusion between the evidentiary and constitutional issues presented by these cases. Second, part (B) will criticize the Court’s arbitrary and unfounded reliance on the classification of evidence as an independent opinion or surrogate testimony.

A. *Confusion Between Evidentiary and Constitutional Issues*

The source of the majority’s grievous rule apparently stems from its confusion between the constitutional and evidentiary issues that muddy this area of Confrontation Clause jurisprudence.¹⁶⁴ It has been noted that “North Carolina did not come quietly into the new world of confrontation under *Crawford* and its progeny.”¹⁶⁵ However, as Justice Hudson explained, “[t]he majority may disagree with the rulings of the United States Supreme Court, but we are nonetheless bound by them, as we are bound by the Constitution of the United States.”¹⁶⁶

158. *Ortiz-Zape*, ___ N.C. at ___, 743 S.E.2d at 161 n. 1.

159. *Id.* at 162.

160. *Id.*

161. *See State v. Craven*, ___ N.C. ___, ___, 744 S.E.2d 458, 460 (2013).

162. *See Ortiz-Zape*, ___ N.C. at ___, 743 S.E.2d at 162.

163. *State v. Brewington*, ___ N.C. ___, ___, 743 S.E.2d 626, 629 (2013) (Hudson, J., dissenting), *petition for cert. filed*, 2013 U.S. S. Ct. Briefs LEXIS 4258 (U.S. Oct. 17, 2013) (No. 13-504).

164. Brief for North Carolina Advocates for Justice as Amici Curiae Supporting Petitioner, *Ortiz-Zape v. North Carolina*, No. 13-633, 2013 WL 6858555, at *8–9 (Dec. 26, 2013).

165. *Id.* at *7 (noting that “[f]rom the outset, North Carolina courts misapplied *Crawford*.”); citing *State v. Lewis*, 360 N.C. 1, 619 S.E.2d 830 (2005) (no confrontation violations); *State v. Forest*, 596 S.E.2d 22 (N.C. App. 2004) (no confrontation violation).

166. *Brewington*, ___ N.C. at ___, 743 S.E.2d at 629 (Hudson, J., dissenting).

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As an initial point, the defendant in each case challenged his conviction on Sixth Amendment grounds, not based on the rules of evidence, and as such “the North Carolina Rules of Evidence have no place in this discussion.”¹⁶⁷ However, the majority relied heavily on the rules of evidence in crafting this rule.¹⁶⁸ The North Carolina Rules of Evidence allow expert testimony “in the form of an opinion,” if the expert’s “scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue,” provided: “(1) The testimony is based upon sufficient facts or data[;] (2) The testimony is the product of reliable principles and methods[; and] (3) The witness has applied the principles and methods reliably to the facts of the case.”¹⁶⁹ The expert may base the opinion on information “made known to him at or before the hearing,” and “[i]f of a type reasonably relied upon by experts in the particular field in forming opinions or inference upon the subject, the facts or data need not be admissible in evidence.”¹⁷⁰ The majority found that, because a laboratory report was “of a type reasonably relied upon by experts” in the field of forensic science, then the expert may base her opinion on that information, so long as it was an “independent expert opinion” and not “‘mere surrogate testimony’ parroting otherwise inadmissible statements.”¹⁷¹

The rules of evidence cannot be used to escape the guarantees of the Confrontation Clause.¹⁷² Under the Supremacy Clause, the rules of evidence “are entirely without effect when they contradict the Confrontation Clause.”¹⁷³ Yet, the majority used the North Carolina Rules of Evidence to bypass the Confrontation Clause, “such an outcome is impermissible under the Supremacy Clause.”¹⁷⁴ “To permit independent opinion testimony on a critical element of the offense when that opinion is based on evidence presented at trial ‘not for the truth of the matter asserted’ is to permit the North Carolina Rules of Evidence to preempt the Confrontation Clause.”¹⁷⁵ Therefore, the majority violated the protections of the United States Constitution in relying on the rules of evidence in crafting its decision.

167. *State v. Ortiz-Zape*, ___ N.C. ___, ___ 743 S.E.2d 156, 171 (2013) (Hudson, J., dissenting), *petition for cert. filed*, 2013 U.S. S. Ct. Briefs LEXIS 4739 (U.S. Nov. 21, 2013) (No. 13-633).

168. *See id.*

169. N.C. R. Evid. § 8C-1,702 (2013).

170. N.C. R. Evid. § 8C-1,703 (2013).

171. *Ortiz-Zape*, ___ N.C. at ___, 743 S.E.2d at 162.

172. *See State v. Brewington*, ___ N.C. ___, ___ 743 S.E.2d 626, 632 (2013) (Beasley, J., dissenting), *petition for cert. filed*, 2013 U.S. S. Ct. Briefs LEXIS 4258 (U.S. Oct. 17, 2013) (No. 13-504).

173. *Id.*

174. *Id.*

175. *Id.*

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The majority's confusion between the constitutional and evidentiary issues is especially apparent in Footnote 1 in *Ortiz-Zape*.¹⁷⁶ The Court stated that “[i]f the challenged testimony is not hearsay—in other words, if the witness does not repeat out-of-court statements—then it is not necessary to determine whether a lab report is testimonial.”¹⁷⁷ The Court thus explained that the expert's testimony was not hearsay because the expert was not repeating out-of-court statements.¹⁷⁸ Classifying the evidence as not hearsay, the Court concluded that it was therefore not testimonial, and thus admissible as an independent analysis.¹⁷⁹ The problem with the Court's analysis is that the classification of a statement as “hearsay” and the classification of a statement as “testimonial” are two discrete analyses. Although the concepts overlap, the determination of whether a statement is hearsay is based solely on modern evidentiary laws; while the classification of a statement as “testimonial” derives from the Supreme Court's interpretation in *Crawford* of the guarantees of the Sixth Amendment.¹⁸⁰

The rule announced by the North Carolina Supreme Court in this series of opinions is entirely contrary to the mandates of the United States Supreme Court. Justice Scalia explained that the Sixth Amendment “applies to ‘witnesses’ against the accused—in other words, those who ‘bear testimony.’”¹⁸¹ In fact, the Court explicitly rejected “the view that the Confrontation Clause applies of its own force only to in-court testimony and that its application to out-of-court statements introduced at trial depends upon the law of Evidence for the time being.”¹⁸² While recognizing that the ultimate goal of the Confrontation Clause is to “ensure reliability of evidence,” the Court emphasized the fact that the Clause is a procedural, not substantive, guarantee.¹⁸³ The Clause “commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.”¹⁸⁴ Here, the North Carolina Supreme Court majority advocates the very view that the Court rejected in *Crawford*.

The majority attempted to avoid the constitutional issue by classifying the opinion, analysis, and data of the non-testifying analyst as hav-

176. See generally Petition for Writ of Certiorari, *Ortiz-Zape v. North Carolina*, No. 13-633, 2013 U.S. S. Ct. Briefs LEXIS 4739 (Nov. 21, 2013) (noting that the majority avoided the Confrontation Clause issue by “basing its analysis on a faulty premises”).

177. *Ortiz-Zape*, ___ N.C. at ___, 743 S.E.2d at 162 n.1.

178. *Id.*

179. *Id.*

180. *Crawford v. Washington*, 541 U.S. 36 (2004).

181. *Id.* at 51.

182. *Id.* at 50–51.

183. *Id.* at 61.

184. *Id.*

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ing been admitted solely for the purpose of providing the basis of the expert's opinion, and not for the truth of the matter asserted.¹⁸⁵ However, when such testimony is admitted into evidence, a jury will consider it for its truth, and "could hardly do otherwise."¹⁸⁶ "[W]hen the truth of the matter asserted in a lab report is critical to the State's case, and not merely evidence to bolster the State's case, any attempt to reveal the substance of that report, regardless of the stated purpose, without making its author available for cross-examination necessarily violates" the Confrontation Clause.¹⁸⁷

The rule created by the North Carolina Supreme Court is objectively beneficial to the prosecution, as the State can now "present the fruits of the laboratory analysis, confident that the jury will see them as conclusive scientific evidence, yet unencumbered by testing in the crucible of cross-examination."¹⁸⁸ This allows "Confrontation Clause defects [to be] eliminated by arbitrarily designating that testimony, and indeed even the laboratory report itself, as the foundation for the expert testimony."¹⁸⁹ Justice Beasley explained that the problem with this is that "the testifying expert cannot verify that no mistakes were made in the testing or that the results generated by the testing analyst were not based on false information, error, or lies. This information cannot be ascertained without the right to confront the testing expert."¹⁹⁰ It is "[t]hese representations, relating to past events and human actions not revealed in raw, machine-produced data, [that] are meet for cross-examination."¹⁹¹

Even applying evidentiary principles, the person who tested the substance and certified it as cocaine is the witness against the defendant.¹⁹² Accordingly, it is this person whom the defendant has the right to confront under the Sixth Amendment.¹⁹³ Justice Hudson explained that, even if the testifying analyst had formed her opinion by reviewing only the raw data, this opinion would only be relevant if the State provided the requisite foundation for the data, "a foundation that would presumably require testimony from the non-testifying ana-

185. Brief for North Carolina Advocates for Justice as Amici Curae Supporting Petitioner, *Ortiz-Zape v. North Carolina*, No. 13-633, 2013 WL 6858555, at *12 (Dec. 26, 2013).

186. *Id.* at *12-13.

187. *State v. Brewington*, ___ N.C. ___, 743 S.E.2d 626, 631 (2013) (Beasley, J., dissenting), *petition for cert. filed*, 2013 U.S. S. Ct. Briefs LEXIS 4258 (U.S. Oct. 17, 2013) (No. 13-504).

188. Petition for Writ of Certiorari, *Ortiz-Zape v. North Carolina*, No. 13-633, 2013 U.S. S. Ct. Briefs LEXIS 4739, at *13 (Nov. 21, 2013).

189. *Id.*

190. *Brewington*, ___ N.C. at ___, 743 S.E.2d at 633.

191. *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2714 (2011).

192. *Id.*

193. *Id.*

lyst anyway.”¹⁹⁴ If the report itself is not admitted into evidence and the testifying analyst is not allowed to testify from the report about chain-of-custody, there is no independent evidence establishing that the data reviewed was in fact from the sample taken at the crime scene.¹⁹⁵ Without this foundation, the testimony is not relevant, and therefore inadmissible.¹⁹⁶

Further, even if Agent Ray’s testimony was admissible as an independent expert opinion, it would be legally insufficient to prove the identity of the substance beyond a reasonable doubt.¹⁹⁷ In her dissenting opinion in *Ortiz-Zape*, Justice Hudson explained that, “[e]ffectively, [Agent Ray’s] opinion is ‘if everything was done properly, and if the report is accurate, then the substance is cocaine.’ Without other evidence to confirm those assumptions, there is no actual proof that defendant possessed cocaine.”¹⁹⁸ Thus, even following the majority’s arbitrary rule set forth in these opinions, the evidence is still legally insufficient to convict the defendant of the charged offense.¹⁹⁹

B. *The Court’s Amorphous Distinction Between an Independent Opinion and Surrogate Testimony*

The crux of the majority’s analysis relies on a determination of whether the expert testimony is an “independent opinion” or mere “surrogate testimony.” This distinction stems from the fact that “[t]he decision in *Bullcoming* leaves room for an expert who did not conduct the testing in question to offer an ‘independent opinion’ on the fact at issue.”²⁰⁰ However, while the Court places this distinction at the heart of its analysis, it fails to define either term, and therefore leaves “our lower courts . . . with no guidance on what constitutes an ‘independent opinion’ when data are ‘truly machine-generated,’ and when a violation of the Confrontation Clause has occurred.”²⁰¹

194. *State v. Ortiz-Zape*, ___ N.C. ___, ___ 743 S.E.2d 156, 170 (2013) (Hudson, J., dissenting), *petition for cert. filed*, 2013 U.S. S. Ct. Briefs LEXIS 4739 (U.S. Nov. 21, 2013) (No. 13-633) (“if the prosecution cannot muster any independent admissible evidence to prove the foundational facts that are essential to the relevance of the expert’s testimony, then the expert’s testimony cannot be given any weight by the trier of fact.” (citing *Williams v. Illinois*, 132 S. Ct. 2221, 2241 (2012))).

195. *Id.*

196. *Id.*

197. *See id.*

198. *Id.*

199. *See Id.* at ___, 743 S.E.2d at 173.

200. *State v. Craven*, ___ N.C. ___, ___ 744 S.E.2d 458, 464 (2013) (Hudson, J., concurring); *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2722 (2011) (Sotomayor, J., concurring).

201. *State v. Brewington*, ___ N.C. ___, 743 S.E.2d 626, 639 (2013) (Beasley, J., dissenting), *petition for cert. filed*, 2013 U.S. S. Ct. Briefs LEXIS 4258 (U.S. Oct. 17, 2013) (No. 13-504).

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The Court's distinction between an independent opinion and surrogate testimony was clearly articulated in *Ortiz-Zape* when the majority explained that "when an expert states her own opinion, without merely repeating out-of-court statements, the expert is the person whom the defendant has the right to cross examine . . . 'It is the expert opinion itself, not its underlying factual basis, that constitutes substantive evidence.'"²⁰² However, as Justice Hudson explained, this statement

completely ignores the Supreme Court's explanations of the scope of the Sixth Amendment's Confrontation Clause. Indeed, if that statement were law, any expert could give an opinion based on any outside inadmissible evidence, no matter how clearly testimonial or pointedly designed to prove an element of the State's case, without running afoul of the Confrontation Clause. This is precisely the type of problem that the Supreme Court has repeatedly addressed since *Crawford*, and most recently in *Williams*. The majority may disagree with the rulings of the United States Supreme Court, but we are nonetheless bound by them, as we are bound by the Constitution of the United States.²⁰³

Justice Hudson clarified that "in reality the majority has created a rule under which the State can circumvent the Confrontation Clause simply by asking the testifying analyst the question: 'What is your independent expert opinion?'"²⁰⁴

Justice Beasley reached a similar conclusion, and urged that "[w]e must not create a back door to evade the Confrontation Clause by merely changing the diction from 'surrogate' to 'independent opinion.'"²⁰⁵ She explained that "[w]hen a jury is capable of drawing the same conclusions as the substitute expert if given the same information (*i.e.* the report), this is indicative that the expert is merely parroting the testing analyst's result . . . No expert knowledge is necessary and could not possibly produce an 'independent' opinion" separate from the inadmissible report.²⁰⁶

This is especially clear when distinguishing *Craven* from *Brewington* and *Ortiz-Zape*, where the key factual distinction was that in *Brewington* and *Ortiz-Zape* the State asked the witness for the testing analyst's conclusion, as opposed to in *Craven* where the State asked the witness for her personal opinion.²⁰⁷ "This is mere semantics."²⁰⁸ Justice Hudson explained that

202. *Ortiz-Zape*, ___ N.C. at ___, 743 S.E.2d at 161.

203. *Brewington*, ___ N.C. at ___, 743 S.E.2d at 629 (Hudson, J., dissenting).

204. *Craven*, ___ N.C. at ___, 744 S.E.2d at 464 (Hudson, J., dissenting).

205. *State v. Brewington*, ___ N.C. ___, 743 S.E.2d 626, 634 (2013) (Beasley, J., dissenting), petition for cert. filed, 2013 U.S. S. Ct. Briefs LEXIS 4258 (U.S. Oct. 17, 2013) (No. 13-504).

206. *Id.*

207. *See id.* at ___, 743 S.E.2d at 638.

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The majority's rule, as applied in *Ortiz-Zape* and *Brewington*, does not actually require any independent analysis or work on the expert's part. The expert may simply review the nontestifying analyst's report and adopt its conclusions as her own. That rule is flatly inconsistent with United States Supreme Court precedent on this issue.²⁰⁹

"That the majority in *Craven* holds a Confrontation Clause violation occurred under the precedent of *Bullcoming*, but fails to do so here, is a remarkable demonstration of the semantics embodied in the term 'independent opinion.'"²¹⁰

PART V

Not much is clear in this area of Confrontation Clause jurisprudence. However, there is one thing that is certain: it will continue to evolve. The lack of an identifiable rule in *Williams* has created confusion and uncertainty in lower courts around the country.²¹¹ The defendants in both *Brewington* and *Ortiz-Zape* have petitioned the United States Supreme Court for certiorari to resolve the confusion created by *Williams*.²¹²

While the legal community waits for the Nation's Highest Court to resolve this constitutional conundrum, North Carolina officials would be wise to give only limited deference to the rule declared by the North Carolina Supreme Court in this series of opinions. The State of North Carolina must protect the constitutional rights of criminal defendants, and must also ensure that convictions are not vacated or overturned because of an avoidable technicality. If the United States Supreme Court grants certiorari in either of these pending petitions (or in a different Confrontation Clause petition) it is likely that it will resolve the *Williams* confusion consistent with its opinions in *Melendez-Diaz* and *Bullcoming*.

In the interim, there is a relatively simple solution that will avoid this issue altogether. The State can simply call the testing analyst to testify at trial. If the analyst who originally tested the sample is not available to testify at trial, the State can have the testifying expert personally retest the sample prior to trial.²¹³ The testifying expert would then have personal knowledge of the identity of the substance,

208. *Id.*

209. *Craven*, ___ N.C. at ___, 744 S.E.2d at 465 (Hudson, J., dissenting).

210. *Brewington*, ___ N.C. at ___, 743 S.E.2d at 638 (Beasley, J., dissenting).

211. See Petition for Writ of Certiorari, *Brewington*, ___ N.C. ___, 743 S.E.2d 626 (No. 13-504); and Petition for Writ of Certiorari, *State v. Ortiz-Zape*, ___ N.C. ___, 743 S.E.2d 156 (2013) (No. 13-633).

212. See *id.*

213. *Craven*, ___ N.C. at ___, 744 S.E.2d at 465 (Hudson, J., dissenting) (insisting that "the expert have actually done independent analysis—either by doing his or her own analysis of raw data obtained by the nontestifying analyst or (preferably) retesting the substance and reporting

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and there would be no Confrontation Clause violation. The expert's testimony would be a true "independent opinion" regarding crucial evidence against the defendant, and cross-examination by the defendant would sufficiently reveal any defects in the testing process. It is important to note that, while the criminal defendant can subpoena the testing analyst to testify at trial, it is the State's burden to prove each element of the charged offense beyond a reasonable doubt.²¹⁴ If the State does not meet this burden, it does not fall to the defendant to bring in a witness who will present testimony against him.²¹⁵

While this process is admittedly more expensive and burdensome to the State, it is significantly *less* burdensome than having to re-try cases that may be overturned as a result of future Supreme Court decisions. Further, while this new standard is "perhaps inconvenient, this is not too high a hurdle to impose to protect our citizens' constitutional rights."²¹⁶ "The 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."²¹⁷

PART VI: CONCLUSION

In this series of cases, the North Carolina Supreme Court set forth a self-contradictory rule that essentially road-maps an end-run around the Confrontation Clause.²¹⁸ This rule, which is objectively beneficial to the prosecution, severely limits the Confrontation Clause rights for criminal defendants. The Court misinterpreted the Supreme Court's fractured decision in *Williams*, and used this misinterpretation to support a dangerous retreat from the well-settled guarantees of the Sixth Amendment. The confusion that was created by the Supreme Court in *Williams* will need to be resolved in the years to come. Until that

his or her own results. Otherwise, the Sixth Amendment gives defendant the right to confront the testing analyst by cross-examination.").

214. See Transcript of Oral Argument at 8–9, *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009) (No. 07-591), available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/07-591.pdf (arguing that "the right to confrontation is a passive right in the defendant's hands. It requires the prosecution to arrange for the confrontation. . ."). *But cf.* *Taylor v. Illinois*, 484 U.S. 400, 402 (1988) (explaining that the Compulsory Process Clause of the Sixth Amendment guarantees that in all criminal prosecutions, the accused shall enjoy the right to have compulsory process for obtaining witnesses in his favor).

215. *Id.*

216. *State v. Brewington*, ___ N.C. ___, ___, 743 S.E.2d 626, 639 (2013) (Beasley, J., dissenting), petition for cert. filed, 2013 U.S. S. Ct. Briefs LEXIS 4258 (U.S. Oct. 17, 2013) (No. 13-504).

217. *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 325 (2009).

218. See *Brewington*, ___ N.C. ___, 743 S.E.2d at 634 (Beasley, J., dissenting).

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time, North Carolina courts should give only limited deference to this new rule set forth by the North Carolina Supreme Court in order to protect the constitutional rights of criminal defendants.

