No. 13-___

IN THE

Supreme Court of the United States

JOHN EDWARD BREWINGTON

Petitioner,

v.

NORTH CAROLINA,

Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of North Carolina

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Confrontation Clause of the Sixth Amendment permits a forensic analyst who did not observe or participate in any of the forensic testing at issue to tell the jury the conclusions that another analyst set forth in a testimonial forensic report – so long as the testifying analyst offers an "independent opinion" that, based on reviewing the other analyst's report and notes, she agrees with other analyst's conclusions.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner John Edward Brewington respectfully petitions for a writ of certiorari to review the judgment of the North Carolina Supreme Court.

OPINIONS BELOW

The opinion of the North Carolina Supreme Court (Pet. App. 1a) is published at 743 S.E.2d 626. The opinion of the North Carolina Court of Appeals (Pet. App. 37a) is published at 693 S.E.2d 182. The relevant proceedings and order from the trial court are unpublished.

JURISDICTION

The judgment of the North Carolina Supreme Court was entered on June 27, 2013. Pet. App. 1a. On September 16, 2013, Chief Justice Roberts extended the time for the filing of a petition for a writ of certiorari to October 25, 2013. No. 13A268. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL PROVISION

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."

STATEMENT OF THE CASE

In *Bullcoming v. New Mexico*, 131 S. Ct. 2705 (2011), this Court held that the Confrontation Clause forbids the prosecution in a criminal case from introducing one forensic analyst's conclusions in a testimonial report through the in-court testimony of another analyst who did not personally oversee or participate in the testing. This case presents the issue whether the prosecution may evade that holding by having the testifying analyst offer her "independent opinion" – based on reviewing the nontestifying analyst's report and notes – that the nontestifying analyst's conclusions were correct.

1. One evening in 2008, a Goldsboro, North Carolina police officer stopped petitioner John Edward Brewington for riding a bicycle with no reflective lights. The officer then asked petitioner for consent to be searched, and petitioner acceded to this request. During the course of the search, a napkin fell out of one of petitioner's socks. Looking inside the napkin, the officer discovered a tiny amount of an "offwhite rock like substance, that he believed to be cocaine." Pet. App. 2a.

The officer arrested petitioner and sent the "rock like substance" to the State Bureau of Investigation (SBI) for analysis. There, Assistant Supervisor Nancy Gregory performed a crystal test and an instrumental analysis test to discern the nature of the substance. Agent Gregory concluded in a written report that the substance was cocaine base weighing 0.1 gram. "[T]he report was certified by Agent Gregory's supervisor and prepared for the purpose of serving a evidence against [petitioner]." Pet. App. 28a n.2 (Beasley, J., dissenting). Accordingly, upon

completing the report, the SBI sent it (along with the rock like substance itself) back to the Goldsboro Police Department.

2. The State charged petitioner with possession of a controlled substance. At trial, the State did not call Agent Gregory to the stand or introduce her report into evidence. Instead, the State proposed to establish the identity of the rock like substance through the testimony of SBI Special Agent Kathleen Schell, an employee of the laboratory who "did not personally perform or observe any of the tests," or certify the tests, that Agent Gregory conducted. Pet. App. 4a.

Petitioner "objected to the testimony of Special Agent Schell on Sixth Amendment grounds." Pet. App. 39a. Specifically, petitioner contended that under the Confrontation Clause framework established in *Crawford v. Washington*, 541 U.S. 36 (2004), Agent Gregory's forensic report was "testimonial" evidence, thereby prohibiting the prosecution from introducing the substance of the report through a witness other than its author. Pet. App. 39a; *see also id.* 3a. Even though the State never argued that Agent Gregory was unavailable to testify herself or that petitioner had had any prior opportunity to cross-examine her, the trial court overruled petitioner's objection. *Id.* 39a-40a.

The State then presented Special Agent Schell's testimony. After testifying about various SBI laboratory procedures, Special Agent Schell explained what testing Agent Gregory had performed "according to the lab notes." *Id.* 40a. The prosecution then elicited the following testimony:

> Q: Now have you reviewed the testing procedures that you've described and the results of the examinations of the test yourself?
>
> A: I have.
>
> Q. And have you also reviewed Agent Gregory's conclusion?
>
> A: I have.
>
> Q: Have you formed an opinion as to the item that was submitted inside the plastic bag that's been marked as State's Exhibit 1B [the rock like substance]?
>
> A: I have.
>
> Q: And what is your opinion based on?
>
> A: Based upon all of the data that she [Agent Gregory] obtained from the analysis of that particular item, State's Exhibit 1B, I would have come to the same conclusion as she did.
>
> Q: And what is your opinion as to the identity of the substance that was submitted as State's Exhibit 1B?
>
> [revised objection omitted]
>
> A: State's Exhibit 1B is the Schedule II controlled substance cocaine base. It had a weight of 0.1 gram.

Pet. App. 42a-43a.

The jury found petitioner guilty of possession of cocaine. The court sentenced him to 5-6 months in prison, which it suspended while placing him on supervised probation for 24 months. The court also imposed various costs and fees totaling about $2000.

3. The North Carolina Court of Appeals unanimously reversed. Relying on this Court's intervening decision in *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009), the court of appeals began by noting that Agent Gregory's certified forensic report was clearly testimonial. That being so, the court of appeals reasoned that "to allow a testifying expert to reiterate the [testimonial] conclusions of a non-testifying expert would eviscerate the protection of the Confrontation Clause." Pet. App. 51a. The court of appeals continued:

> It is clear from the testimony of Special Agent Schell that she had no part in conducting any testing of the substance, nor did she conduct any independent analysis of *the substance.* She merely reviewed the reported findings of Agent Gregory, and testified that if Agent Gregory followed procedures, and if Agent Gregory did not make any mistakes, and if Agent Gregory did not deliberately falsify or alter the findings, then Special Agent Schell "would have come to the same conclusion that she did." As the Supreme Court clearly established in *Melendez-Diaz*, it is precisely those "ifs" that need to be explored upon cross-examination to test the reliability of evidence.

Pet. App. 54a-55a (emphasis in original; citation omitted).

Finally, the court of appeals held that the error was not harmless. Agent Schell's testimony was the only "concrete evidence or testimony that the substance in question was indeed cocaine." *Id.* 59a.

Thus, absent that evidence, "the jury could have reached a different conclusion regarding the guilt of defendant on the charge of possession of cocaine." *Id.*

4. The North Carolina Supreme Court granted the State's petition for discretionary review and, by a bare majority, reversed and reinstated petitioner's conviction.

The majority did not question the North Carolina Court of Appeals' determination that Agent Gregory's certified forensic report was testimonial. To the contrary, in another opinion issued the same day, the North Carolina Supreme Court held that a report from the same lab that was identical in all respects was testimonial. *See State v. Craven*, 744 S.E.2d 458, 461-62 (N.C. 2013). And in yet another case decided the same day, *State v. Ortiz-Zape*, 743 S.E.2d 156, 160 (N.C. 2013), the North Carolina Supreme Court also noted this Court's intervening holding in *Bullcoming v. New Mexico*, 131 S. Ct. 2705 (2011), that the prosecution may not introduce one forensic analyst's testimonial report "through the in-court testimony of [another analyst] who did not sign the certification or perform or observe the test reported in the certification." *Bullcoming*, 131 S. Ct. at 2710.

Yet the majority held that *Bullcoming* was inapplicable here. According to the majority, the procedure the prosecution utilized here differs from the one *Bullcoming* because "Agent Schell presented an *independent opinion* formed as a result of her own analysis, not mere surrogate testimony." Pet. App. 5a (emphasis added). In the majority's view, "when an expert gives an opinion" based solely on a review of another analyst's notes and report, "the opinion is the substantive evidence and the expert is the

witness whom the defendant has the right to confront." *Id.* (quoting *Ortiz-Zape*, 743 S.E.2d at 163). And – most critical here – this is so even when the testifying expert conveys the nontestifying analyst's conclusions to the jury and makes clear that her opinion is based entirely on reviewing those conclusions. Pet. App. 4a. So long as the report itself is "not admitted into evidence" and the testifying expert states "that she 'would have reached the same conclusion that [the nontestifying analyst] did,'" *id.*, the Confrontation Clause gives the defendant no right to cross-examine the analyst whose conclusions the testifying expert repeats, relies upon, and expresses agreement with.

Three Justices issued two separate dissents. In the lead dissent, Justice Hudson asserted that the majority's holding "directly violates the rule in *Bullcoming*, in that Agent Gregory, not Agent Schell, should have been made available for cross-examination to satisfy the Confrontation Clause." Pet. App. 7a. Specifically, Justice Hudson explained that even if "[a] truly independent expert opinion may serve as evidence," testimony "based solely on review of *and agreement with* the inadmissible report is constitutionally infirm." *Id.* 7a (emphasis added). Allowing such testimony through the guise of an "independent opinion," Justice Hudson asserted, "completely ignores the Supreme Court's explanations of the scope of the Sixth Amendment's Confrontation Clause." *Id.* 9a.

Justice Beasley dissented separately, maintaining that "[t]he facts presented to this Court today fall squarely under the rule of *Bullcoming*." Pet. App. 15a. Under that rule, "any attempt [by a

testifying expert] to reveal the substance of [another analyst's] report, regardless of the stated purpose, without making its author available for cross-examination necessarily violates the defendant's right to confront the witnesses against him." *Id.* 14a.

REASONS FOR GRANTING THE WRIT

A bare majority of the North Carolina Supreme Court held here that the Confrontation Clause of the Sixth Amendment permits a testifying expert who did not observe or participate in the forensic testing at issue to tell the jury the conclusions that another, nontestifying analyst set forth in a testimonial forensic report – so long as the testifying analyst offers a so-called "independent opinion" that, based on reviewing the other analyst's report and notes, she agrees with other analyst's conclusions. As the dissenters below recognized, this holding constitutes a blueprint for evading this Court's holdings in *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009), and *Bullcoming v. New Mexico*, 131 S. Ct. 2705 (2011), that when the prosecution introduces the conclusions of a testimonial forensic report, the defendant has the right to confront the author of the report. The holding also conflicts with decisions from several other state courts of last resort and federal courts of appeals – all of which faithfully follow this Court's precedent.

The North Carolina Supreme Court's error may be so manifest that it warrants summary reversal. Alternatively, this Court may wish to resolve the conflict the North Carolina Supreme Court has created by means of plenary review. Either way, it is critical that this Court address, and reverse, the decision below.

I. The North Carolina Supreme Court's Decision Contravenes This Court's Holding In *Bullcoming v. New Mexico*.

Under this Court's precedent, this case is neither complicated nor difficult. The Confrontation Clause forbids the admission of "testimonial" statements unless "the declarant is unavailable and . . . the defendant has had a prior opportunity to cross-examine" the declarant. *Crawford v. Washington*, 541 U.S. 36, 59 (2004). This Court held in *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009), and *Bullcoming v. New Mexico*, 131 S. Ct. 2705 (2011), that forensic reports are testimonial at least when, as in this case, they are certified and created for the primary purpose of providing evidence for a criminal prosecution.[1] The State never made any showing that Agent Gregory, who authored the report at issue here, was unavailable; nor did petitioner ever have any opportunity to cross-examine her. The issue is

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[1] This Court recently held in *Williams v. Illinois*, 132 S. Ct. 2221 (2012), that a DNA report that was "neither a sworn nor a certified declaration of fact" was nontestimonial because it "lack[ed] the solemnity" required for a testimonial forensic statement. *Id.* at 2260 (opinion of Thomas, J.); *see also id.* at 2244 (plurality opinion). But that holding is irrelevant here because the lab report at issue here, as is typically the case with drug and alcohol reports, was certified. Pet. App. 28a n. 2 (Beasley, J., dissenting). The report also states that it is used specifically "for the purpose stated in [N.C.] G.S. 90-95(g)." Section 90-95 is the state's statute criminalizing the possession or sale of controlled substances, and subsection (g) provides for the admission of laboratory reports in order to prove such charges. Accordingly, there can be no question that the lab report here is testimonial.

thus whether the fact that the State introduced Agent Gregory's findings through the in-court testimony of another analyst wholly removed from the process of observing, participating in, or supervising the testing somehow satisfied the Confrontation Clause because, in preparing for trial, she reviewed Agent Gregory's report and notes and offered what the court below called an "independent opinion" based solely on that review.[2]

This Court's decision in *Bullcoming* effectively answers that question. There, the prosecution introduced one analyst's testimonial findings through the in-court testimony of another analyst who, just as here, "did not sign the certification or perform or observe the test reported in the certification." *Id.* at 2710. This Court held that this procedure violated the Confrontation Clause. "The accused's right," this Court explained, "is to be confronted with the analyst *who made the certification*," not someone else from the lab or who is otherwise familiar with the forensic practices at issue. *Id.* (emphasis added). Only though confrontation with the original analyst can the defendant explore "what [that analyst] knew or

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[2] It is a strange usage of the term "independent opinion" to describe a conclusion that, as the North Carolina Supreme Court itself acknowledged, was "based upon [the testifying expert's] review of the results of the [nontestifying analyst's] testing," such that the opinion was valid "only if [the nontestifying analyst] followed procedures and if [she] did not make any mistakes." Pet. App. 3a-4a. One might have thought a more accurate description of such testimony would be a "dependent" opinion. In any case, nomenclature is irrelevant. We deal here in substance, not labels, and there is no dispute over any of the underlying facts.

observed about the events his certification concerned, *i.e.*, the particular test and testing process he employed" and seek to "expose any lapses or lies on the certifying analyst's part." *Id.* at 2715.

It is true that the analyst here, unlike in *Bullcoming*, also offered an "independent opinion" as to the accuracy of the testing analyst's findings. Pet. App. 40a-41a. But that additional testimony is of no moment. The constitutional violation in *Bullcoming* stemmed from the introduction of the nontestifying analyst's testimonial statements, not any failure of the testifying analyst to offer his personal "opinion" about them. 131 S. Ct. at 2715-16. As this Court put it, "when the State elected to introduce [the nontestifying analyst's] certification, [the nontestifying analyst] became a witness Bullcoming had the right to confront." *Id.* at 2716. And once the prosecution introduced that evidence, nothing that the testifying witness did in preparation for testifying, or that he might have said on the witness stand, could erase the defendant's right to confront the original analyst. *Id.*

That leaves the North Carolina Supreme Court's suggestion that the prosecution avoids running afoul of *Bullcoming* when the testifying witness "does not repeat out-of-court statements" from a testimonial forensic report. *Ortiz-Zape*, 743 S.E.2d at 161 n.1 (*cited in* Pet. App. 5a); *see also Bullcoming*, 131 S. Ct. at 2722 (Sotomayor, J., concurring in part) (noting that *Bullcoming* was not "a case in which an expert witness was asked for his independent opinion about underlying testimonial reports *that were not themselves admitted into evidence*") (emphasis added). Even assuming that the testifying expert

witness in the case the North Carolina Supreme Court cited for that proposition, *Ortiz-Zape*, truly "avoided any reference to the original analyst's conclusions," Pet. App. 7a (Hudson, J. dissenting), that is not what happened here. In this case, the testifying analyst "actually introduced through her testimony [the original analyst's] conclusion from the lab report." *Id.* Specifically, the testifying analyst described the nontestifying analyst's findings at length and expressly stated that she "would have come to the same conclusion that [the nontestifying] analyst" did – namely, that "State's Exhibit 1B is the Schedule II controlled substance cocaine base" and "had a weight of 0.1 gram." Pet. App. 4a, 43a.

Just as surely as introducing the nontestifying analyst's report itself, this method of conveying forensic findings violates the Confrontation Clause. *See Davis v. Washington*, 547 U.S. 813, 826 (2006) (Clause prohibits orally repeating a nontestifying witness's testimonial statements just the same as introducing the witness's statements directly); *Melendez-Diaz*, 557 U.S. at 334 (Kennedy. J., dissenting) ("The Court made clear in *Davis* that it will not permit the testimonial statement of one witness to enter into evidence through the in-court testimony of a second."). Indeed, given that under this method the original report is withheld from the jury, the confrontation violation is, if anything, "even more egregious" because the jury is not even able to assess the nontestifying witness's written work product. Pet. App. 34a (Beasley, J., dissenting).

The type of confrontation violation here is deeply damaging not just in a procedural sense but on a substantive level as well. It is one thing – as

occurred in *Ortiz-Zape*, 743 S.E.2d 156 – for a testifying expert to proffer an in-court opinion, based on undisclosed evidence, that she believes certain forensic facts to be true. If the prosecution elects to proceed in that manner, the defendant can profitably attack the opinion as unsupported and perhaps even inadmissible for a lack of foundation. But, as the dissenters here recognized, it is wholly another thing for an expert to convey another analyst's conclusions reached in a testimonial report and to testify that she agrees with those conclusions. *See* Pet. App. 6a (Hudson, J., dissenting). In that scenario, the prosecution essentially offers the testimony of two forensic witnesses, but only one is subject to cross examination – and, worse yet, *not* the one who did the actual testing and thus possesses the exclusive knowledge regarding how that testing was done and whether it is accurately conveyed in the report. In other words, allowing a testifying expert to convey a nontestifying expert's testimonial findings to the jury substantially bolsters the testifying expert's opinion while insulating that basis evidence from adversarial challenge. Such insulation is exactly what the Confrontation Clause is designed to prohibit.[3]

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[3] To be clear, petitioner takes no position on whether the procedure that, according to the North Carolina Supreme Court, the State utilized in *Ortiz-Zape* (and that the federal government used in *United States v. Turner*, 709 F.3d 1187, 1190-91 (7th Cir. 2013), *pet'n for cert. filed* (No. 13-127)), satisfies the Confrontation Clause. That is a separate question this Court may elect to consider in one of those cases. Petitioner's point, which the *Turner* decision also recognizes, *see id.* at 1189-90, is that even if that procedure is permissible, the

II. The North Carolina Supreme Court's Holding Conflicts With Every Other Federal Court Of Appeals And State High Court To Address The Issue.

Since this Court issued its decision in *Bullcoming*, several other courts have considered whether testifying forensic experts purportedly offering independent opinions may convey the findings of a nontestifying analyst's testimonial report. Every one of these courts has held, contrary to the North Carolina Supreme Court's decision here, that the Confrontation Clause prohibits such disclosures.

In *United States v. Soto*, 720 F.3d 51 (1st Cir. 2013), for example, one analyst "testified about a conclusion he drew from his own independent examination" of forensic evidence previously tested by another analyst. *Id.* at 59. The testifying analyst also conveyed the original analyst's findings to the jury, stating that "everything that was in [the original analyst's] report was exactly the way he said it was." *Id.* at 56. The First Circuit held that insofar as the original analyst's report was testimonial, the disclosure of its contents violated the Confrontation Clause. *Id.* at 60. It improperly "bolstered" the testifying agent's conclusion. *Id.*

In *United States v. Ignasiak*, 667 F.3d 1217 (11th Cir. 2012), the Eleventh Circuit reached the same conclusion. There, a testifying expert "expressed her own independent agreement with the non-testifying

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procedure deployed here is qualitatively different and significantly more damaging.

medical examiner's conclusions" in a testimonial autopsy report. *Id.* at 1234. The Eleventh Circuit held that this in-court testimony contravened *Bullcoming*. Because the testifying expert "had neither performed nor been present during the autopsies in question, she was not in a position to testify on cross-examination as to the facts surrounding how the autopsies were actually conducted or whether any errors, omissions, or mistakes were made." 667 F.3d at 1234.

The D.C. Circuit also has held that *Bullcoming* prohibits a testifying expert who "did not observe the test being performed and did not sign the [forensic] report as the approving official" from conveying testimonial results reached by another analyst. *United States v. Moore*, 651 F.3d 30, 71 (D.C. Cir. 2011). In a per curiam opinion, Chief Judge Sentelle and Judges Rogers and Kavanaugh deemed it irrelevant that the testifying expert independently explained to the jury that he "ma[d]e sure that [the analyst] used proper scientific-based knowledge to come up with [the] results." *Id.* (alterations in original; internal quotation marks and citation omitted). Only confrontation with the original analyst could reveal whether that analyst actually "did do each of the tests that [he] wrote down on [his] worksheet" and followed proper protocols in doing so. *Id.* at 72 (quoting expert's trial testimony).[4]

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[4] The Seventh Circuit also has assumed that it violates the Confrontation Clause for a testifying expert who was not involved in the testing at issue to tell the jury that he reviewed the testing analyst's report and "he reached the same conclusion about the nature of the substances that [the testing analyst]

Numerous state high court decisions are in accord. The New Hampshire Supreme Court has held that when a testifying expert offers an independent opinion, it violates the Confrontation Clause for the expert to disclose "testimonial statements of an unavailable witness on direct examination" that form the basis of the expert's opinion. *State v. McLeod*, 66 A.3d 1221, 1232 (N.H. 2013). The Massachusetts Supreme Judicial Court likewise has held in a series of cases that forensic experts offering independent opinions "may not . . . testify to facts in the underlying [forensic testimonial] report where that report has not been [properly] admitted." *Commonwealth v. Reavis*, 992 N.E.2d 304, 312 (Mass. 2013).[5] The West Virginia Supreme Court of Appeals has held that it violates the Confrontation Clause for one analyst to testify that he has reviewed a nontestifying analyst's testimonial report and then to offer his "opinion" that he "concur[s]" with the original analyst's findings. *State v. Kennedy*, 735 S.E.2d 905, 920-21 (W. Va. 2012). Finally, the Texas Court of Criminal Appeals

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did." *Turner*, 709 F.3d at 1189-90. But the Seventh Circuit found that any error in that case was harmless.

[5] *See also Commonwealth v. Enemy*, 972 N.E.2d 1003, 1010-1011 (Mass. 2012) (finding confrontation violation under these circumstances); *Commonwealth v. Phim*, 969 N.E.2d 663, 671 (Mass. 2012) (same); *Commonwealth v. Avila*, 912 N.E.2d 1014, 1029 (Mass. 2009) ("[T]he substitute medical examiner, as an expert witness, is not permitted on direct examination to recite or otherwise testify about the underlying factual findings of the unavailable medical examiner as contained in the autopsy report."); *Commonwealth v. Nardi*, 893 N.E.2d 1221, 1232-33 (Mass. 2008) (same).

has held that the Confrontation Clause forbids the prosecution from introducing a nontestifying analyst's findings through a testifying analyst when the latter lacks "personal knowledge that the tests were done correctly or that the tester did not fabricate the results." *Burch v. State*, 401 S.W.3d 634, 637 (Tex. Crim. App. 2013). This is so even if the testifying analyst has "reviewed" and "double-checked" the nontestifying analyst's report. *Id.* at 635.

Each of these cases, of course, varies in its details. But the North Carolina Supreme Court's holding that a testifying analyst who had no connection to the testing at issue can convey the testimonial findings of a nontestifying analyst so long as she then tacks on a purportedly independent opinion about the findings cannot be reconciled with any of them. Only this Court can require North Carolina to abide by the same confrontation rules that other jurisdictions now accept.

III. The Issue Presented Is Extremely Important.

Petitioner appreciates that this Court may be growing a bit weary of cases involving the Confrontation Clause's application to forensic evidence. But, for two reasons, it is critical that this Court grant certiorari here to reverse the North Carolina Supreme Court's decision in this case.

First, this North Carolina Supreme Court's holding guts this Court's holding in *Bullcoming*. Note that there is nothing special about what the testifying analyst did here. She merely "review[ed] the results of Agent Gregory's testing, as to the identity of the substance" seized from petitioner and

couched her testimony as a so-called "independent opinion" that Agent Gregory's findings were correct. Pet. App. 3a. If that is all it takes to satisfy the Confrontation Clause and to avoid any *Bullcoming* problem, then state and federal prosecutors need never worry again about putting any original analysts on the stand. Such analysts' "competence, evasiveness, or dishonesty" can always be shielded from defendants, in direct contravention of this Court's recent and emphatic precedent. *Bullcoming*, 131 S. Ct. at 2715; *accord Melendez-Diaz*, 557 U.S. at 318-19.

Second, it is vital that this Court continue to insist that forensic evidence be subject to the traditional adversarial process. Much as many might like to think that forensic evidence is different from other kinds of testimony because it scientific, proof continues to pour in that forensic analysts sometimes make mistakes and on occasion even lie in forensic reports. Perhaps most pointedly, it was discovered after this Court's decision in *Melendez-Diaz* that the quality control chemist in the very lab involved in that case fabricated numerous drug analyses over an eight-year span. *See* Bridget Murphy, *Mass. Chemist's Colleagues Had Questioned Her* Work, Associated Press, Sept. 27, 2012. Crime labs in North Carolina and other states have suffered similar lapses. An audit last year of the North Carolina's crime lab revealed that it had "produced biased reports for more than a decade." Marie Cusick, *Scandals Call Into Question Crime Labs' Oversight*, NPR, Nov. 20, 2012. In particular, SBI lab reports over this period – a period that includes the forensic work in this case – sometimes "(1) mentioned that tests for the presence of blood were

not conclusive but failed to report a confirmatory negative test; (2) failed to mention one or more negative or inconclusive confirmatory tests; [and] (3) stated that no further tests were conducted when, in fact, one or more confirmatory tests were conducted with negative or inconclusive results." Paul Giannelli, *The North Carolina Crime Lab Scandal*, ABA Crim. Justice, Vol. 27, No. 1 (Spring 2012), at 43.

None of these types of lies and omissions could be uncovered through the trial procedure that the North Carolina Supreme Court has now condoned. When, as here, a testifying expert does nothing more than review the original analysts' notes and reports in order to form her "opinion," that expert has no way of knowing – and thus the defense has no way of ferreting out through cross-examination – whether the original analyst was fully honest and conscientious. This Court should grant certiorari to ensure that this procedure does not take hold in North Carolina or elsewhere and that testimonial forensic evidence is subjected to effective adversarial testing. The liberty of untold numbers of defendants, present and future, depends on it.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 17, 2013

APPENDIX A

IN THE SUPREME COURT OF NORTH CAROLINA

No. 235PA10

FILED 27 JUNE 2013

STATE OF NORTH CAROLINA

v.

JOHN EDWARD BREWINGTON

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 204 N.C. App. 68, 693 S.E.2d 182 (2010), finding prejudicial error in a judgment entered on 13 February 2009 by Judge Arnold O. Jones, II in Superior Court, Wayne County, and ordering that defendant receive a new trial. Heard in the Supreme Court on 12 February 2013.

Roy Cooper, Attorney General, by Robert C. Montgomery, Special Deputy Attorney General, and Daniel P. O'Brien, Assistant Attorney General, for the State-appellant.
Anna S. Lucas for defendant-appellee.

EDMUNDS, Justice.

Defendant John Edward Brewington's conviction for possession of cocaine was reversed by the Court of Appeals on the grounds that his right to confront the witnesses against him, guaranteed by the Sixth Amendment to the Constitution of the United States, was violated. Because we conclude that defendant's confrontation rights were adequately preserved, we reverse.

At about 10:15 p.m. on 18 January 2008, Goldsboro Police Officer James Serlick observed defendant riding a bicycle on Potley Street. None of the lights or reflectors legally required for riding after dark were on the bicycle, so the officer stopped defendant and asked for identification. When the officer further asked defendant if he was carrying either drugs or a weapon, defendant gave Officer Serlick consent to search his person. During the ensuing pat-down, the officer touched something that "felt like a rock" on the inside of defendant's left leg. Officer Serlick pulled defendant's sock down and a napkin fell out. The officer opened the napkin and saw "an offwhite rock-like substance" that he believed to be cocaine. Officer Serlick seized the substance, then arrested defendant and transported him to the magistrate's office. Defendant was indicted for possession of cocaine, in violation of N.C.G.S. § 90-95(a)(3).

At defendant's trial, the State presented evidence to establish chain of custody of the seized substance. Officer Serlick testified that he placed the rock-like substance in a plastic bag, initialed it, added such routine information as the case number, defendant's name, the item number, and the date and time the item was recovered, and then secured the plastic bag in an evidence locker. The material subsequently was transported to the North Carolina State Bureau of Investigation (SBI) laboratory, where it was analyzed by Assistant Supervisor in Charge Nancy Gregory. However, at trial, evidence of the identity of the material found in defendant's sock was presented through the testimony of SBI Special Agent Kathleen Schell.

Before Agent Schell reached the crux of her testimony as to the chemical analysis of the substance, defense counsel objected and moved to exclude her testimony on the grounds that Agent Schell "didn't actually do the analysis in the case," and, as a result, defendant was "not able to cross-examine this person . . . because her opinion is not going to be based on an actual test done to the item of evidence . . . , her opinion is going to be based solely on what some other person did and wrote down in a report." The trial court allowed an extensive *voir dire* of Agent Schell, then denied defendant's motion.

Continuing her testimony before the jury, Agent Schell described how an item submitted to the SBI laboratory is given a unique identification number and how the progress of such an item is tracked. She identified Agent Nancy Gregory as her supervisor and described Agent Gregory's training and experience. Agent Schell then reported how preliminary color tests are performed on a substance, followed by more specific tests tailored to the results of the color tests. She advised that the chemist who does the testing prepares a report and that the data and resulting report are reviewed by another SBI chemist, adding that her own duties include conducting such reviews. The record indicates that Agent Gregory's laboratory report was not admitted into evidence. Agent Schell's direct testimony concluded with the prosecutor asking whether she had formed an opinion, based upon her review of the results of Agent Gregory's testing, as to the identity of the substance. Defendant again objected but his objection was overruled. Agent Schell testified that, in her opinion, the substance was cocaine base. Defendant thereafter cross-examined Agent Schell

carefully and extensively, leaving no doubt that Agent Schell did not personally perform or observe any of the tests she relied on in forming her opinion.

On appeal, defendant argued that his rights secured under the Confrontation Clause of the Sixth Amendment were violated when the trial court permitted Agent Schell to testify that the substance found on defendant was cocaine based solely on Agent Gregory's notes and lab report. Relying heavily on the Supreme Court of the United States' decision in *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009), the Court of Appeals found that the admission of Agent Schell's testimony constituted "an expert utilizing data collected by another person to form an independent opinion," *State v. Brewington*, 204 N.C. App. 68, 77, 693 S.E.2d 182, 188 (2010), and determined that admission of the testimony violated the Confrontation Clause, *id.* at 82-83, 693 S.E.2d at 191-92.

The Court of Appeals noted that Agent Schell testified that she "'would have come to the same conclusion that [Agent Gregory] did,'" but only "if Agent Gregory followed procedures" and "if [she] did not make any mistakes." *Id.* at 80, 693 S.E.2d at 190. The court continued that "it is precisely these 'ifs' that need to be explored upon cross-examination to test the reliability of the evidence" and concluded that permitting Agent Schell to testify about the composition of the substance tested, and to identify it as cocaine, was error. *Id.* The Court of Appeals further found that no other concrete evidence identified the substance as cocaine and concluded that the admission of Agent Schell's testimony was not harmless error.

Accordingly, the Court of Appeals ordered a new trial. *Id.* at 82-83, 693 S.E.2d at 192.

We allowed the State's petition for discretionary review and now reverse the holding of the Court of Appeals. This Court has recently considered the scope of protections provided by the Confrontation Clause of the Sixth Amendment in *State v. Ortiz-Zape*, ___ N.C. __, __ S.E.2d __ (2013) (329PA11). In *Ortiz-Zape*, after conducting an exhaustive review of current Confrontation Clause jurisprudence, we determined 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." *Id.* at __, __ S.E.2d at __. In addition, we stated that "an expert may render an independent opinion based on otherwise inadmissible facts or data." *Id.* at __, __ S.E.2d at __. Here, Agent Gregory's lab notes were not admitted into evidence. Instead, as in *Ortiz-Zape*, Agent Schell presented an independent opinion formed as a result of her own analysis, not mere surrogate testimony. *Id.* at __, __ S.E.2d at __. Defendant was able to conduct a vigorous and searching cross-examination that exposed the basis of, and any weaknesses in, Agent Schell's opinion. Accordingly, we conclude that defendant's Confrontation Clause rights were not violated.

The decision of the Court of Appeals is reversed.

REVERSED.

Justice HUDSON dissenting.

Because the majority here relies entirely on what I see as the flawed analysis in *State v. Ortiz-Zape*, __ N.C. __, __ S.E.2d ___(2013) (329PA11), I will not repeat the discussion from my dissenting opinion there. I write specifically to draw attention to the ways in which the majority here has gone even farther astray than in *Ortiz-Zape*.

In *Ortiz-Zape* Agent Ray described her review of the testing analyst's work. According to the majority's opinion, "Ray compared the machine-produced graph to the data from the lab's sample library and concluded that the substance was cocaine." *Ortiz-Zape*, __ N.C. at __, __ S.E.2d at __. Although it is clear from the testimony that Ray merely gleaned the conclusion from the report (She admitted that "I can only say according to the worksheet."), she was asked, "What is your independent expert opinion?" and answered, "My conclusion was that the substance was cocaine." *Id.* at __, __ S.E.2d at __. Here, by contrast, Agent Schell was not asked and made no attempt to characterize her testimony as an "independent expert opinion." Rather, she was asked if she had "reviewed . . . the results of the examinations" performed by the testing analyst and if she had "also reviewed Agent Gregory's conclusion[.]" She 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*." (Emphasis added.) This testimony is problematic.

As with every other Confrontation Clause case we decide today, a central question is whether the analyst's opinion is independent or not. The

independence of the testifying expert's opinion becomes crucial when, as here, the lab report underlying that opinion is testimonial and the analyst who prepared the report did not testify. Under these circumstances, the report and its conclusions are usually inadmissible under the Confrontation Clause. A truly independent expert opinion may serve as evidence in the case, while an opinion based solely on review of and agreement with the inadmissible report is constitutionally infirm. Here, Agent Schell did nothing more than review Agent Gregory's notes and results and agree with her conclusion. Agent Schell's opinion was entirely based on another's work and notes, and involved no independent analysis whatsoever.

Moreover, while Agent Ray in *Ortiz-Zape* avoided reference to the original analyst's conclusions, 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. Agent Schell testified that she "[came] to the same conclusion that [Agent Gregory] did," and then reported to the jury that conclusion: that the substance was 0.1 grams of cocaine base. In so testifying, Agent Schell informed the jury of the absent analyst's testimonial conclusion and thereby acted as a surrogate rather than an independent witness. This directly violates the rule in *Bullcoming*, in that Agent Gregory, not Agent Schell, should have been made available for cross-examination to satisfy the Confrontation Clause. "[S]urrogate testimony . . . could not convey what [the certifying analyst] knew or observed about the events this certification concerned,

i.e., the particular test and testing process he employed. Nor could such surrogate testimony expose any lapses or lies on the certifying analyst's part." *Bullcoming v. New Mexico*, __ U.S. __, __, 131 S. Ct. 2705, 2715 (2011) (footnote omitted).

Finally, the majority in *Ortiz-Zape* purports to find independent state law grounds to uphold the conviction, claiming that any possible constitutional error was harmless in light of other evidence establishing the chemical identity of the substance. Even if that analysis were correct – and it is not – no such escape valve exists in this case. Here, the officer testified on direct examination that he arrested defendant because he observed something he "believed" to be crack cocaine fall out of defendant's sock during a pat-down and that he took "the cocaine" into evidence. Even if visual identification of crack cocaine by a layperson were permissible – a question this Court has not addressed, though the Court of Appeals has consistently ruled that it is not – such visual identification could hardly be considered "overwhelming evidence" of guilt sufficient to rebut the strong presumption that constitutional error is prejudicial. *See State v. Autry*, 321 N.C. 392, 399-400, 364 S.E.2d 341, 346 (1988). I would hold that the State has failed to prove harmless error beyond a reasonable doubt.

Through this and the other opinions released today, the majority has 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. The majority asserted in *Ortiz-Zape*, and again here, 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." 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. Because in my view this decision, as that in *Ortiz-Zape*, is inconsistent with this Supreme Court jurisprudence, I must respectfully dissent.

Chief Justice PARKER joins in this dissenting opinion.

Justice BEASLEY dissenting.

Because defendant's right to confront the witnesses against him as guaranteed by the Sixth Amendment to the Constitution of the United States was violated, I respectfully dissent. The majority's rule allowing a substitute expert to provide the sole evidence of a critical element of the charged offense through an "independent opinion" diminishes our Confrontation Clause analysis. Instead, I would examine whether the information offered is critical to the State's case so as to determine its true and actual

purpose and thus, whether the Confrontation Clause was violated.

The following facts are necessary for a proper decision in this case. At trial, Agent Schell testified that Agent Gregory is her supervisor. She then testified as to her knowledge of Agent Gregory's experience and training, in addition to her own. Agent Schell then outlined the general testing procedure for determining whether a substance is cocaine. She described the security measures in place to track the reports that are produced and ensure they are not changed. The State next produced the sample sent to the lab for testing and the envelope in which it was returned to law enforcement. Referring to Agent Gregory's notes, Agent Schell testified to when testing was performed and what kinds of tests were performed, describing the testing procedure and reason for each test. The first test described was a color test:

> Q. And concerning this particular sample, can you just explain first the first color test, what kind of test that was and how it was performed?
>
> . . .
>
> Q. And from the notes that you retrieved were you able to determine what the result was of this particular color test?
>
> A. In this particular test it did not turn any color.

Agent Schell testified that the failure to change color is a negative result, indicating particular chemicals are not present. She then explained that a second color

test was performed, testifying as to how one typically performs it and what it indicates.

> Q. And when you reviewed this particular case, did you see the results of this test?
>
> A. I did.
>
> Q. And what was the result of that test?
>
> A. It turned blue.

Again, she testified as to the results of the next test:

> Q. And based on your review of the lab report, were you able to determine what the result was of this particular test?
>
> A. Yes, crosses were obtained. Those specific crosses were obtained.

She testified that this indicates the substance is cocaine. Yet again, Agent Schell testified as to the last test: although this time, the question asked and her testimony spoke more directly to the specific process employed:

> Q. And was any other test performed then?
>
> A. A more specific instrumental test was performed.
>
> Q. Can you describe how that test was performed?
>
> . . .
>
> Q. And in this particular case did you review the results of that particular test?
>
> A. I did.
>
> Q. And what were the results?

> A. In this case the graph produced, there was a mixture of cocaine base and bicarbonate, which is just baking soda. So further tests had to be conducted.
>
> . . .
>
> Q. And what happened when that was done?
>
> A. A graph was produced using that same instrument and it was a clean graph of just cocaine base.
>
> Q. Now during your tests – during your explanation of the tests . . . ?

Agent Schell then testified that she reviewed the tests performed and the results obtained and provided her opinion:

> A. Based upon all the data that [Agent Gregory] obtained from the analysis of that particular item, State's Exhibit 1B, I would have to come to the same conclusion that she did.
>
> Q. And what is your opinion as to the identity of the substance that was submitted as State's Exhibit 1B?
>
> [objection/overruled]
>
> . . .
>
> A. State's Exhibit 1B is the Schedule II controlled substance cocaine base. It had a weight of 0.1 gram.

On cross-examination Agent Schell testified that she did not personally perform the tests, as noted by the majority. Most significantly, defense counsel asked, "And they sent you here to testify from that

person's notes who actually did the test; is that right?" to which Agent Schell responded, "That is correct."

Based on these facts and the Confrontation Clause precedent that is binding on this Court, I would hold that it is a violation of the Confrontation Clause to offer a substitute analyst's opinion on the identity of a controlled substance when that opinion relies upon testing performed by another analyst and seeks to serve as evidence or proof of a critical element of the offense, though purportedly not offered for the truth of the matter asserted. I would hold it is a further violation to admit the report of the testing analyst as the basis for that expert opinion.

The Confrontation Clause mandates that defendants have the right to ensure that any evidence, let alone essential evidence, be vulnerable to its shortcomings and exposed for any falsities that underlie it. *See* U.S. Const. amend. VI; *Crawford v. Washington*, 541 U.S. 36, 61-62 (2004). When the report at issue, entered into evidence or not, addresses a critical element of the offense charged, it inherently operates "against" the defendant, and any person responsible for authoring that evidence becomes a witness against him. *See Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 311 (2009) ("[U]nder our decision in *Crawford* the analysts' affidavits were testimonial statements, and the analysts were 'witnesses' for purposes of the Sixth Amendment."). In these cases the very nature of the details of the lab report go beyond testimonial evidence; these details are essential evidence required by statute and are thus valuable for the truth of the matter asserted. Consequently, when 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 defendant's right to confront witnesses against him. *See Bullcoming v. New Mexico*, __ U.S. __, __, 131 S. Ct. 2705, 2710 (2011) ("The question presented is whether the Confrontation Clause permits the prosecution to introduce a forensic laboratory report containing a testimonial certification – *made for the purpose of proving a particular fact* – through the in-court testimony of a scientist who did not sign the certification or perform or observe the test reported in the certification. We hold that surrogate testimony of that order does not meet the constitutional requirement." (emphasis added)); *Melendez-Diaz*, 557 U.S. at 311 fn. 1 ("It is up to the prosecution to decide what steps in the chain of custody are so crucial as to require evidence; but what testimony *is* introduced must . . . be introduced live."). It is not sufficient to only permit the defendant to expose the inadequacies in the testifying expert's opinion, for this fails to address concerns regarding the critical evidence itself. In fact there will likely not be any inadequacies to expose in the testifying expert's opinion when the opinion is merely recitation of factual results obtained from the tests of another.

The rule and principles that I set forth above are consistent with the decision of the United States Supreme Court in *Bullcoming*:

> Principal evidence against Bullcoming was a forensic laboratory report certifying that Bullcoming's blood-alcohol concentration was well above the threshold for aggravated DWI. At

> trial, the prosecution did not call as a witness the analyst who signed the certification. Instead, the State called another analyst who was familiar with the laboratory's testing procedures, but had neither participated in nor observed the test on Bullcoming's blood sample.
>
> The question presented is whether the Confrontation Clause permits the prosecution to introduce a forensic laboratory report containing a testimonial certification – made for the purpose of proving a particular fact – through the in-court testimony of a scientist who did not sign the certification or perform or observe the test reported in the certification. We hold that surrogate testimony of that order does not meet the constitutional requirement. The accused's right is to be confronted with the analyst who made the certification, unless that analyst is unavailable at trial, and the accused had an opportunity, pretrial, to cross-examine that particular scientist.

Bullcoming, ___U.S. at ___, 131 S. Ct. at 2709-10. The facts presented to this Court today fall squarely under the ruling in *Bullcoming*.

Just as in *Bullcoming*, here the principal evidence against defendant was that which the State submitted through the testifying expert. The evidence at issue – a substance identified as a controlled substance – is most assuredly critical to the State's case: without it a conviction is not statutorily possible. The State made no showing that the testing analyst was unavailable, and defendant did not have a prior opportunity to cross-examine the testing analyst. Because the

evidence at issue is directly prohibited by *Bullcoming* and is central to defendant's conviction, a violation of the Confrontation Clause occurred, and the violation was not harmless beyond a reasonable doubt.

The majority in *State v. Ortiz-Zape*, __ N.C. __, __ S.E.2d __ (2013) (329PA11), upon which the majority here relies, held that the "admission of an expert's independent opinion based on otherwise inadmissible facts or data 'of a type reasonably relied upon by experts in the particular field' does not violate the Confrontation Clause so long as the defendant has the opportunity to cross-examine the expert." *Ortiz-Zape*, __ N.C. at __, __ S.E.2d at __. In this case the majority determines that the expert opinion was independent and 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.

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. Rules 703 and 705 of the North Carolina Rules of Evidence generally allow expert testimony in the form of an opinion, including provision of the information reasonably relied upon to reach the expert opinion. But these Rules are entirely without effect when they contradict the Confrontation Clause. The Supremacy Clause of the United States Constitution has long required, as recognized by this Court on numerous occasions, such a hierarchy of authority:

> This constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the constitution or laws of any state to the contrary notwithstanding.

U.S. Const. art. VI, cl. 2; *Stephenson v. Bartlett*, 355 N.C. 354, 369, 562 S.E.2d 377, 388 (2002) ("When federal law preempts state law under the Supremacy Clause, it renders the state law invalid and without effect."). In sum, the majority's opinion bypasses the Confrontation Clause by using the North Carolina Rules of Evidence; such an outcome is impermissible under the Supremacy Clause.

In *Crawford* the United States Supreme Court held that rules of evidence cannot be used to escape the Confrontation Clause:

> 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, much less to amorphous notions of "reliability." Certainly none of the authorities discussed above acknowledges any general reliability exception to the common-law rule. Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation. To be sure, the Clause's ultimate goal is to ensure reliability of evidence, *but it is a procedural rather than a substantive guarantee.* It commands, not that evidence be reliable, but that reliability be assessed in a

> particular manner: by testing in the crucible of cross-examination. The Clause thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined.

541 U.S. at 61 (emphasis added) (citations omitted) (overruling its prior decision in *Ohio v. Roberts*, 448 U.S. 56 (1980), which permitted testimonial evidence to be admitted so long as it was deemed reliable, regardless of whether there was an opportunity for confrontation). Thus, not only did the Court hold that rules of evidence are secondary to the Confrontation Clause, but the Court expressed that the Confrontation Clause is concerned not just with whether the information was *reliable*, but with whether the information can be determined to be *truthful* in open court. The only way to make that determination is to confront the individual from whom the information originated.

Here the majority relies on the North Carolina Rules of Evidence to admit evidence about the identity of a chemical substance on the grounds that "basis information" is admissible when an expert lays the foundation that the information on which she relied is the same as that on which others in her field would rely in forming an opinion on the identity of the substance. The first problem with this rationale is that the majority focuses on whether the information was reliably obtained and reliably used, or used in a reliable and common manner. This question is not among the concerns raised in *Crawford* that serve as the basis for the Court's application of the Confrontation Clause; instead, this question directly

aligns with the concerns of *Ohio v. Roberts* that *Crawford* overruled. *See id.* Reliability of this kind is an *evidentiary* question. The Confrontation Clause addresses a *procedural* question: whether the defendant has the opportunity to determine, in front of the jury, if the information relied upon is reliable at all or is in fact a lie. *See id.*; *see also Bullcoming*, __ U.S. at __, 131 S. Ct. at 2715 ("[S]urrogate testimony of the kind [the testifying expert] was equipped to give could not convey what [the testing analyst] knew or observed about the events his certification concerned, *i.e.,* the particular test and testing process he employed. Nor could such surrogate testimony expose any lapses or lies on the certifying analyst's part." (footnote omitted)).

Our Court has previously recognized this procedural concern. *State v. Ward*, 364 N.C. 133, 147, 694 S.E.2d 738, 747 (2010) ("The practical effect of the *Melendez-Diaz* ruling is that through cross-examination more light is being shed on the procedures expert witnesses use to support their testimony. In some instances, when practices are illuminated 'in the crucible of cross-examination,' their shortcomings become apparent." (citation omitted)); *id.* at 156, 694 S.E.2d at 752 (Newby, J., dissenting) ("The Confrontation Clause is a 'procedural . . . guarantee.' Those accused of criminal offenses are entitled to cross-examine the witnesses against them." (alteration in original) (internal citation omitted)). Furthermore, in cases such as this, the ability to cross-examine the testifying expert does not adequately address the procedural concern at issue: whether the testing analyst performed the tests correctly. *See Bullcoming*, __ U.S. at __, 131 S. Ct. at 2716 ("[T]he 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."). The likelihood of a procedural violation becomes especially important when the evidence or information in question goes to a critical element of the offense.

It is true that an expert would rely upon the tests performed by the testing analyst, as relied on here by Agent Schell, to show the identity of a substance. These tests comply with the generally accepted scientific methods of proving that a substance is indeed an illicit drug. But this truth addresses an evidentiary question of reliability and not the procedural one at issue in Confrontation Clause analysis. With respect to the procedural concern, 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. It is precisely because of these lapses in procedure that the Confrontation Clause commands that the State present the testing analyst to testify. Because the State did not present such a witness in this case, it violated defendant's Sixth Amendment rights.

While the majority here, relying on *Ortiz-Zape*, contends that *Bullcoming* is distinguishable because the expert here is not a surrogate but is testifying to her own "independent" opinion about the reports, *Bullcoming* is directly on point with this case. Nothing in Agent Schell's opinion is "independent"; in fact, the

veracity of Agent Schell's testimony is dependent on the validity and accuracy of Agent Gregory's testing methods. If Agent Gregory's testing was faulty, Agent Schell's testimony is inaccurate. Thus, without Agent Gregory's testimony, there is no reliable way to determine that the identity of the substance to which Agent Schell is testifying is accurate. The United States Supreme Court provided a very appropriate visual in *Bullcoming* that describes exactly what the State is attempting to do here and very clearly precludes it:

> Most witnesses, after all, testify to their observations of factual conditions or events, *e.g.*, "the light was green," "the hour was noon." Such witnesses may record, on the spot, what they observed. Suppose a police report recorded an objective fact – Bullcoming's counsel posited the address above the front door of a house or the read-out 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? As our precedent makes plain, the answer is emphatically "No." See *Davis v. Washington*, 547 U.S. 813, 826 (2006) (Confrontation Clause may not be "evaded by having a note-taking police[officer] recite the . . . testimony of the declarant" (emphasis deleted)); *Melendez-Diaz*, 557 U.S., at 335 (KENNEDY, J., dissenting) ("The Court made clear in *Davis* that it will not permit the testimonial statement of one witness to enter

> into evidence through the in-court testimony of a second.").

Bullcoming, ___ U.S. at ___, 131 S. Ct. at 2714-15 (alterations in original) (internal citation omitted).

Here, much like the radar gun hypothetical, Agent Schell is merely testifying to the observations of another witness. *Bullcoming* directly forbids this. *Id.* Agent Schell even admits on cross-examination to such a recitation of Agent Gregory's notes. In fact, the majority of Agent Schell's testimony recites the recordation of visual observations made by Agent Gregory, exactly like the Supreme Court's radar gun example. She testified with respect to the color tests: "In this particular test it did not turn any color," and, "It turned blue." Again, Agent Schell testified: "Yes, crosses were obtained. Those specific crosses were obtained." These are visual observations. There is no difference between this testimony and testifying, "It read fifty-five miles per hour," with respect to an officer's notes about what he saw on the radar gun. The only way to know the accuracy of the result of these tests is to *observe* them. The same logic applies to the weight of the substance: "It had a weight of 0.1 gram." Agent Schell could not know this with any sense of "independent" knowledge unless she personally verified that the scales were calibrated, personally executed the testing protocol properly, and observed the weight on the scale itself. In fact, the State's phrasing of the questions to Agent Schell indicates a request for exact recitation of Agent Gregory's notes and visual observations: "And *from the notes* that you retrieved were you able to determine what the result *was* of this particular color test?"; "[W]ere you able to determine what the result *was* of

this particular test?"; "[D]id you *see* the results of this test?" (Emphases added.) This testimony directly violates the rule in *Bullcoming*. Whether referred to as an independent opinion or a peer review, testimony regarding these matters could only be based on the analyst's actual observance of a factual and visual occurrence.

When 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 results. Here if the jury were handed the report that stated the sample "turned blue" and told that blue indicated the presence of cocaine, a jury would conclude that the sample was cocaine. No expert knowledge is necessary and could not possibly produce an "independent" opinion outside that provided in the report. We must not create a back door to evade the Confrontation Clause by merely changing the diction from "surrogate" to "independent opinion."

Furthermore, there is no difference between handwritten notes to document an officer's observation of radar gun results and machine-produced data to document the results of a chemical test prepared and set up by a live person. Both leave room for falsification, entry error, sample error, or any number of other errors. The majority in *Ortiz-Zape* declares that machine-generated results may not operate as a witness against a defendant and thus are impervious to the Confrontation Clause:

> Because machine-generated raw data, "if truly machine-generated," are not a statement by a person, they are "neither hearsay nor

> testimonial." We note that "representations[] relating to past events and human actions not revealed in raw, machine-produced data" may not be admitted through "surrogate testimony." Accordingly, 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.[1]

Ortiz-Zape, __ N.C. at __, __ S.E.2d at __ (internal citations omitted). The same majority reiterates this conclusion in *State v. Brent*, __ N.C. __, __, __ S.E.2d __, __ (2013) ("Thus, machine-generated raw data, if of a type reasonably relied upon by experts in the field, may be admitted to show the basis of an expert's

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[1] This assertion grows out of the majority's reference to Justice Sotomayor's concurring opinion in *Bullcoming*, which notes that *Bullcoming* did not present a question of an independent opinion or reliance on results that were purely machine-generated. *Id.* at ___, 131 S. Ct. at 2722 (Sotomayor, J., concurring). Such a reference provides no support to the majority's position. This Court is not bound by the dicta within a concurring opinion of a single Justice of the Supreme Court. Further, the plurality opinion in *Williams*, authored by Justice Alito, made the same attempt to distinguish its case from *Bullcoming* by using Justice Sotomayor's observation. Justice Alito declared, "We now confront that question." *Williams*, __U.S. at __, 132 S. Ct. at 2233. Yet, Justice Sotomayor joined Justice Kagan in the dissent in *Williams*, declaring that a Confrontation Clause violation had occurred. *See id.* at __, 132 S. Ct. at 2264-65 (Kagan, J., dissenting). Thus, while Justice Sotomayor may have observed that the question would be different when it involved an "independent" opinion or machine-generated results, she declared that the answer is the same.

opinion."). Yet, such data serves as a receipt of human action the same way a note does.

In fact, the majority's opinions completely obscure the very safeguard the majority's own rule regarding such machine-generated data puts in place: the concerns of the Confrontation Clause are alleviated only when the data are "*truly* machine-generated." *Ortiz-Zape*, __ N.C. at __, __ S.E.2d at __. It is precisely that limitation that recognizes the procedural concern of the Confrontation Clause. Because the majority ignores this limitation, as is apparent by its lack of analysis in *Ortiz-Zape* and in *Brent*, the majority obscures the fact that the Confrontation Clause necessarily applies here. The Supreme Court made clear in *Crawford* that reliability (an evidentiary concern) does not preclude the fact that the concern of the Confrontation Clause (a procedural one) may still be present. *See Crawford*, 541 U.S. at 61. The Confrontation Clause is not concerned with whether the machine itself reliably produced the results (the evidentiary concern); it is concerned with whether the testing analyst actually followed a reliable procedure in order to allow the machine to produce a reliable result (the procedural concern).

Here the majority concludes that the expert opinion was "independent" and, by way of reference to the majority opinion in *Ortiz-Zape*, that the report was not used for the truth of the matter asserted because it was only used to support this "independent opinion" of a qualified expert. It is necessary to note that the majority acknowledges that without qualifying as "basis information" for the expert's opinion, the information is "otherwise inadmissible." *Brewington*,

__ N.C. at __, __ S.E.2d at __; *see also Ortiz-Zape*, __ N.C. at __, __ S.E.2d at __. This inadmissibility stems directly from the fact that the evidence violates the Confrontation Clause if it is used for the truth of the matter asserted. Thus, it is necessary to determine whether the report was indeed used for the truth of the matter asserted. This determination is informed by the critical role the report plays in the State's case and by the testimony.

In *State v. Llamas-Hernandez*, 363 N.C. 8, 673 S.E.2d 658 (2009), (per curiam), this Court adopted the dissenting opinion from the Court of Appeals concluding that chemical testing was required to identify a substance as powder cocaine. *Id.* In *Ward* this Court extended that rule to cover pills requiring "very little technical and specific chemical designation[s]" that "imply the necessity of performing a chemical analysis to accurately identify controlled substances." *Ward*, 364 N.C. at 143, 694 S.E.2d at 744 (majority opinion) (alterations in original) (citations and internal quotation marks omitted). Further,

> [b]y imposing criminal liability for actions related to counterfeit controlled substances, the legislature not only acknowledged that their very existence poses a threat to the health and well-being of citizens in our state, but that a scientific, chemical analysis must be employed to properly differentiate between the real and the counterfeit. . . . As such, a scientifically valid chemical analysis of alleged controlled substances is critical to properly enforcing the North Carolina Controlled Substances Act.

Id. at 143-44, 694 S.E.2d at 745. Thus, this Court has held that chemical testing is required to establish the identity of any alleged controlled substance *and* that such testing must be "scientifically valid." *Id.* The State did not introduce any such substantive evidence of chemical testing; thus, the Confrontation Clause was violated.

In addition to conflicting with the precedent of this Court, the majority's opinion, through the majority opinion in *Ortiz-Zape*, relies on case law that is without effect or weight here. First among these is the United States Supreme Court's recent decision in *Williams v. Illinois*, __ U.S. __, 132 S. Ct. 2221 (2012).

In *Williams* the Supreme Court failed to reach a majority opinion. Instead, it decided the case with a four-one-four plurality, with Justice Thomas concurring in the judgment, but offering an alternative rationale. Justice Thomas directly rejected the reasoning used by the plurality and its conclusion that the report was not used for the truth of the matter asserted and instead concurred solely on the basis that the report lacked the formality required of testimonial statements. *Id.* at __, 132 S. Ct. at 2256 (Thomas, J., concurring in the judgment) ("[T]here was no plausible reason for the introduction of Cellmark's statements other than to establish their truth."). "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. . . ." *Marks v. United States*, 430 U.S. 188, 193 (1977) (citation and internal quotation marks omitted). In *Williams* 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*. *Williams*, thus, is simply not binding upon this case.[2]

The majority next relies on *State v. Fair*, 354 N.C. 131, 557 S.E.2d 500 (2001), *cert. denied*, 535 U.S. 1114 (2002) and, by implication, also on *State v. Huffstetler*, 312 N.C. 92, 322 S.E.2d 110 (1984), *cert. denied*, 471 U.S. 1009 (1985). In *Huffstetler* this Court opined that "[t]he admission into evidence of expert opinion based upon information not itself admissible into evidence does not violate the Sixth Amendment guarantee of the right of an accused to confront his accusers where the expert is available for cross-examination." 312 N.C. at 108, 322 S.E.2d at 120 (citations omitted). In *Fair* this Court stated that "[a]n expert may properly base his or her opinion on tests performed by another person, if the tests are of the type *reasonably relied upon* by experts in the field." 354 N.C. at 162, 557 S.E.2d at 522 (emphasis added) (citations omitted).

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[2] In fact, the only certainty that can be derived from *Williams* that is applicable to this case is that, had the report in *Williams* possessed the testimonial qualities of solemnity and formality that Justice Thomas was looking for, Justice Thomas would have likely found a Confrontation Clause violation. *See* __ U.S. at __, 132 S. Ct. at 2259-61. Here the report was certified by Agent Gregory's supervisor and prepared for the purpose of serving as evidence against defendant. There is no question that it is testimonial in nature, even under Justice Thomas's standards. *See id.*; *Bullcoming,* __ U.S. at __, __, 131 S. Ct. at 2710, 2713-14 (holding a laboratory report that contained a "Certificate of Analyst" was testimonial); *Melendez–Diaz,* 557 U.S. at 308, 310 (finding laboratory reports testimonial when they were sworn to before a notary public by the testing analysts).

The majority relies on these cases for its position that the information upon which an expert relies to formulate his or her opinion may be admitted as the basis for that opinion without violating the Confrontation Clause because the defendant has the opportunity to cross-examine the testifying expert on the substantive evidence, which is only the opinion of the testifying expert.

Foremost, these cases predate *Melendez-Diaz*, *Bullcoming*, and this Court's own decision in *State v. Locklear*, 363 N.C. 438, 681 S.E.2d 293 (2009). *Huffstetler* was decided in 1984, well before the Supreme Court's 2004 ruling in *Crawford* that changed the Confrontation Clause landscape. *Fair*, decided in 2001, also predates *Crawford*. To the extent either conflicts with *Crawford* and its progeny, they are overruled. With respect to *Huffstetler*, this conflict with *Crawford* is most apparent in the references to reliability.

Ohio v. Roberts permitted the admission of testimony without confrontation when the statements satisfied various indicia of reliability. 448 U.S. at 66. In *Crawford* the Supreme Court unambiguously overruled *Roberts*, regardless of what the Rules of Evidence may dictate. 541 U.S. at 60, 61, 63, 65, 68-69. Because this Court's entire evaluation of the Confrontation Clause claim in *Huffstetler* concerned the reliability of the expert opinion and its status as an exception to the hearsay rule, 312 N.C. at 106-08, 322 S.E.2d at 119-21 (concluding that because the information was "inherently reliable" and "reasonably relied upon" by other experts in the field there could be no violation of the Confrontation Clause (internal citations omitted)), *Crawford* directly overrules *any*

precedent set by *Huffstetler*, making it entirely invalid for purposes of Confrontation Clause jurisprudence. In turn, because this Court's opinion in *Fair* relied almost exclusively on the rationale developed in *Huffstetler*, *Fair*, 354 N.C. at 162-63, 557 S.E.2d at 522, *Fair* is also void.

Further, *Huffstetler* and *Fair* are entirely distinguishable from this case. In both, the testifying expert had actually seen and directly examined the sample in question at some point. *Fair*, 354 N.C. at 163, 557 S.E.2d at 522 (noting that the testifying expert physically examined the clothing cutouts and held them up to the clothing to confirm from where they were cut); *Huffstetler*, 312 N.C. at 105-06, 322 S.E.2d at 119 (noting that the testifying expert had performed some of the tests on the samples to determine the blood grouping). Thus, these testifying experts were not working *solely* from the reports of the testing analysts and added some of their own *independent* work to the information derived from the underlying reports. In contrast, here the expert had *only* the report of the testing analyst, had *never* personally tested the actual sample, and had *never* touched or seen it until trial. Her opinion was entirely *dependent* upon the work of the testing analyst, in direct contradiction to the holding in *Bullcoming*.

That the evidence in question here goes to the heart of what the State is required to prove further distinguishes this case from those upon which the majority relies. *Williams* dealt with DNA matching that amounted to "bolstering evidence" to suggest that the defendant was the perpetrator. The defendant could have been convicted without DNA evidence; thus, the DNA was not evidence needed to prove an

essential element of the crime. Similarly, *Huffstetler* and *Fair* were both homicide cases in which the evidence in question was not direct proof required to establish an essential element of the crime. *See Fair*, 354 N.C. at 136-39, 557 S.E.2d at 507-08 (examining testimony regarding DNA testing with respect to the Confrontation Clause evidence, amid other evidence implicating the defendant in the victim's murder, including possession of the alleged murder weapon, use and possession of the victim's credit cards, lay witness testimony, and prior statements made by the defendant); *Huffstetler*, 312 N.C. at 96-99, 105-06, 322 S.E.2d at 114-15, 119 (addressing evidence of blood matches with respect to the Confrontation Clause, amid a slew of other evidence implicating the defendant in the victim's murder, including the alleged murder weapon). Conversely, in *Bullcoming* the evidence at issue went to prove an essential element of the crime – an elevated blood alcohol level – without which the defendant could not be convicted. *Bullcoming*, ___ U.S. at ___, 131 S. Ct. at 2709 ("Principal evidence against Bullcoming was a forensic laboratory report certifying that Bullcoming's blood-alcohol concentration was well above the threshold for aggravated DWI."). Thus, this case is bound by *Bullcoming*.[3]

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[3] Our Court's decision in *Locklear* is both valid and factually applicable to this case as well. In *Locklear* this Court recognized the firm precedent set by *Crawford* and concluded that it was a violation of the Confrontation Clause to admit the opinion testimony of a forensic analyst as to the reports and findings of two nontestifying forensic analysts with respect to the cause of death and identity of the victim. 363 N.C. at 451-52, 681 S.E.2d at 304-05. This Court, however, found that the violation was harmless because the State had presented "other evidence of" a

The parallel to *Bullcoming* becomes more apparent in the context of the majority's opinion in *State v. Craven*, ___ N.C. ___, ___ S.E.2d ___ (2013) (holding that the testifying expert was a mere "surrogate"), decided concurrently with this case. 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." In *Craven* the State asked the substitute analyst, who coincidentally was also Agent Schell, whether she reviewed the reports of the testing analyst and whether she agreed with the results of the report. She answered both questions affirmatively. *Craven*, __ N.C. at __, __ S.E.2d at __. That exact same procedure was followed here: Agent Schell stated that she did not perform the tests, but reviewed the reports of the testing analyst and agreed with the conclusions. In both *Craven* and the case *sub judice* the information at issue goes to a critical element of the offense charged. Yet, in *Craven* the fatal error to achieving the classification of "independent opinion" as observed by the majority was that the State then asked, "What was [the testing analyst's] conclusion?" Here the State asked for Agent Schell's opinion. This is mere semantics.

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second, unrelated murder allegedly committed by the same defendant, and "[n]either fact [provided by the testifying expert regarding the other victim] was *critical* . . . to the State's case against defendant for the murder [for which the defendant was being tried]." *Id.* at 453, 681 S.E.2d at 305 (emphasis added). As mentioned above, the evidence presented in this case through Agent Schell's testimony was most certainly "critical" to the State's case.

In overruling *Roberts*, the Supreme Court made clear that the Confrontation Clause is concerned with more than just hearsay. *Crawford*, 541 U.S. at 51 ("[N]ot all hearsay implicates the Sixth Amendment's core concerns. An off-hand, overheard remark might be unreliable evidence and thus a good candidate for exclusion under hearsay rules, but it bears little resemblance to the civil-law abuses the Confrontation Clause targeted. On the other hand, *ex parte* examinations might sometimes be admissible under modern hearsay rules, but the Framers certainly would not have condoned them."). Thus, it is not enough to only examine the diction that a witness employs to provide another's statement; our courts must examine the substance of what is said as well. When both opinions are determined to be the same by the substitute expert's own statement of agreement with the testing analyst, and when the substitute analyst's opinion is entirely dependent upon the information provided by the testing analyst, there is no practical or logical basis for excluding one opinion over the other: the *substance* is still a violation of the Confrontation Clause because of the procedural concern raised under the circumstances. The defendant's constitutional right to confrontation must not hinge on such a charade of diction.

Further, the majority's inconsistency between *Craven* and this case actually encourages the State to produce *less* evidence in order to secure a conviction while circumventing the Confrontation Clause. This paradox is a result of the factual nuance between the cases: in *Craven* the testimonial reports of the nontestifying testing analyst were admitted into evidence without the pretext of their serving as "basis

information," whereas here the reports were not admitted. The majority's opinion does not turn on this nuance[4] but by virtue of the result, the majority elevates this nuance to significance. Yet the form in which the testimonial statements are admitted should have no bearing on our Confrontation Clause analysis, especially when the information at issue goes to a critical element of the offense charged.

Lab reports are "testimonial in nature." *Melendez-Diaz*, 557 U.S. at 311 (concluding that "[lab] analysts' affidavits were testimonial statements, and the analysts were 'witnesses' for purposes of the Sixth Amendment"). When the substance of the testimony presented by the substitute analyst is specifically derived from the lab reports such that there can be no independent opinion because this information is admitted for the truth of the matter asserted, as demonstrated above is the case here, the information too is testimonial in nature. The form does not change the substance, nor does form change the original source. Whether the information contained in the lab reports was admitted in written form, or in oral form through Agent Schell's testimony, our Court must address the Confrontation Clause procedural concern. The jury still receives the same information without presenting a defendant the opportunity to expose the potential falsities or weaknesses therein. Consequently, it appears an even more egregious

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[4] The majority in *Craven* holds that it is not the admission of the reports that trigger the Confrontation Clause, but the admission of the surrogate analyst's statements themselves: "[T]he *statements* introduced by Agent Schell constituted testimonial hearsay, triggering the protections of the Confrontation Clause." __ N.C. at __, __ S.E.2d at __.

violation of the Confrontation Clause to permit only oral testimony of this critical element of the charged offense, eviscerating the importance of the admission of the signed lab report, especially considering the statutory requirements.

The rule I propose today would not unreasonably impede the State's opportunity to offer proof of all necessary elements of the crime. Under *Crawford* the State may utilize such testimonial evidence when it can show "unavailability and a prior opportunity for cross-examination." *Crawford*, 541 U.S. at 68. While perhaps inconvenient, this is not too high a hurdle to impose to protect our citizens' constitutional rights. *See Melendez-Diaz*, 557 U.S. at 325 ("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."). Moreover, 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. The rule I propose would provide clear guidance to the lower courts when determining what constitutes a violation of the Confrontation Clause, consistent with the United States Constitution, the previous guidance of both this Court and the United States Supreme Court, and common sense.

In the exercise of that rule, it is clear that today we are presented with a case in which the State offered a testifying expert to parrot the report of the nontestifying testing analyst in order to admit

evidence of a critical element of the offense charged. Today we are presented with a case that mimics *Bullcoming*. Today we are presented with a case that clearly violates the Confrontation Clause.

APPENDIX B

In the North Carolina Court of Appeals

STATE OF NORTH CAROLINA

v.

JOHN EDWARD BREWINGTON

NO. COA09-956

(Filed 18 May 2010)

Constitutional Law – right to confront witnesses – report of drug test

The trial court erred by admitting over defendant's constitutional objection testimony from an SBI agent about a drug analysis performed by another agent. The witness's determination that she would have come to the same conclusion as the testing analyst was not an independent expert opinion arising from the observation and analysis of raw data; defendant could only hope to attack on cross-examination pure assumptions about whether procedures were properly followed during the testing process. The evidence was prejudicial because the only other evidence concerning the substance found was the officer's testimony that he believed it to be cocaine.

Appeal by defendant from judgment entered 13 February 2009 by Judge Arnold O. Jones, II, in Wayne County Superior Court. Heard in the Court of Appeals 10 December 2009.

Attorney General Roy Cooper, by Assistant Attorney General Lisa Bradley Dawson, for the State.

Lucas & Ellis, PLLC, by Anna S. Lucas, *for defendant appellant.*

HUNTER, JR., Robert N., Judge.

Defendant John Edward Brewington ("defendant") appeals from a judgment finding him guilty of possessing cocaine. Defendant argues on appeal that the trial court erred by allowing the State's expert forensic chemist to offer an opinion as to the composition of the contraband substance in issue because the testifying expert was not the expert that conducted the analysis of the substance. After careful review, we hold that the expert testimony should have been excluded, and award defendant a new trial.

I. BACKGROUND

On 1 December 2008, a grand jury returned a true bill of indictment against defendant charging him with possession of a controlled substance. Defendant pled not guilty, and the trial commenced on 12 February 2009.

The State's evidence tended to show that on 18 January 2008, defendant was stopped on the street by Officer James Serlick of the Goldsboro Police Department for riding a bicycle with no reflective lights. Officer Serlick advised defendant that it was unlawful to operate a bicycle without reflectors, and asked if defendant would consent to being searched. Defendant consented, and during the course of the search, a napkin fell out of one of defendant's socks. Officer Serlick testified that when he looked inside the napkin, he discovered an "offwhite rock like substance, what [he] believed to be cocaine." Officer Serlick testified that he placed defendant under arrest for

possession of a controlled substance, and transported him to the magistrate's office. After delivering defendant to the jail, Officer Serlick completed the necessary paperwork and secured the "rock like substance" in the police department evidence locker.

Officer Robert Smith, an evidence technician at the Goldsboro Police Department, testified that he and another officer later retrieved the evidence placed in the locker and packaged it to be sent to the State Bureau of Investigation ("SBI") for analysis. Officer Smith testified that he received the evidence back from the SBI on 9 May 2008, along with the written results of the analysis conducted by the SBI.

SBI Special Agent Kathleen Schell was tendered as an expert witness in forensic chemistry, and testified regarding the testing of the "offwhite rock like substance." Defendant objected to the testimony of Special Agent Schell on Sixth Amendment grounds, and argued that the testimony should be excluded because Special Agent Schell was not the expert that actually conducted the testing. Defendant contended that he was entitled to cross-examine the testing expert under the Confrontation Clause. The trial court allowed an extensive *voir dire* of Special Agent Schell, but declined to rule on defendant's motion. Thereafter, the jury was brought back into the courtroom, and after further direct examination by the State, the trial court qualified Special Agent Schell as an expert in forensic chemistry. Court was then recessed until the following morning.

On 13 February 2009, the trial court opened proceedings with further *voir dire* of Special Agent Schell. After hearing final arguments from each side,

the trial court denied defendant's motion, citing *State v. Delaney*, 171 N.C. App. 141, 613 S.E.2d 699 (2005); *State v. Jones*, No. COA03-976, 2004 N.C. App. LEXIS 1655, 2004 WL 1964890 (N.C. Ct. App., Sept. 7, 2004) (unpublished); and *State v. Huffstetler*, 312 N.C. 92, 322 S.E.2d 110 (1984). Applying these cases, the trial court ruled that admitting Special Agent Schell's testimony did not violate the Confrontation Clause of the Sixth Amendment.

After testifying in detail about routine SBI lab procedures, Special Agent Schell offered the following testimony.

> Q. And who, according to the information that you located in the computer, who analyzed the sample containing State's Exhibit 1B?
>
> A. Nancy Gregory.
>
> . . . .
>
> Q. And according to the lab notes, if you'll just right now list them. What types of tests were performed on this sample?
>
> A. There were two preliminary color tests, a preliminary crystal test and a more specific instrumental analysis test that was conducted on this piece of evidence.
>
> . . . .
>
> Q. And from the notes that you retrieved were you able to determine what the result was of this particular color test?
>
> A. In this particular color test it did not turn any color.

Q. And based on your training and experience, what does that indicate?

A. That indicates that such drugs like heroin, which would turn purple for this test; or methamphetamine, which would turn orange, are not present. We're looking for something that doesn't turn this particular color test a color.

. . . .

Q. And when you reviewed this particular case, did you see the result of this [second] test?

A. I did.

Q. And what was the result of that test?

A. It turned blue.

Q. And based on your training and experience, what does that mean?

A. It means that those specific chemical groups are present.

Q. What was the next test that was performed?

A. The next test was a crystal test.

. . . .

Q. And based on your review of the lab report, were you able to determine what the result was of this particular test?

A. Yes, crosses were obtained. Those specific crosses were obtained.

Q. And what does that result mean to you as a chemical analyst?

A. It indicates that cocaine is present.

. . . .

Q. [T]he testing that Agent Gregory did on April 9 of 2008, was that reviewed by anyone else at the State Bureau of Investigation Laboratory?

A. It was reviewed by the supervisor of the Drug Chemistry Section, Ann Hamlin.

. . . .

Q. Now have you reviewed the testing procedures that you've described and the results of the examinations of the test yourself?

A. I have.

Q. And have you also reviewed Agent Gregory's conclusion?

A. I have.

Q. Have you formed an opinion as to the item that was submitted inside the plastic bag that's been marked as State's Exhibit 1B?

A. I have.

Q. And what is your opinion based on?

A. Based upon all the data that she [Agent Gregory] obtained from the analysis of that particular item, State's Exhibit 1B, I would have come to the same conclusion that she did.

Q. And what is your opinion as to the identity of the substance that was submitted as State's Exhibit 1B?

> MR. GURLEY: Just objection for the record, Judge.
>
> THE COURT: I'll overrule the objection. You can answer the question.
>
> A. State's Exhibit 1B is the Schedule II controlled substance cocaine base. It had a weight of 0.1 gram.

The jury convicted defendant of possession of cocaine on 13 February 2009, and defendant gave oral notice of appeal.

II. JURISDICTION AND STANDARD OF REVIEW

Jurisdiction in this Court is proper pursuant to N.C. Gen. Stat. § 7A-27(b) (2009). This Court reviews alleged violations of constitutional rights *de novo*. *State v. Tate*, 187 N.C. App. 593, 599, 653 S.E.2d 892, 897 (2007). If a defendant shows that an error has occurred, the State bears the burden of proving the error was harmless beyond a reasonable doubt. N.C. Gen. Stat. § 15A-1443(b) (2009). Under the *de novo* standard of review, this Court "considers the matter anew and freely substitutes its own judgment for that of the [trial court]." *In re Appeal of the Greens of Pine Glen Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003) (citing *Mann Media, Inc. v. Randolph Cty. Planning Bd.*, 356 N.C. 1, 13, 565 S.E.2d 9, 17 (2002)).

III. ANALYSIS

On appeal, defendant argues that it was reversible error for the trial court to allow the testimony of Special Agent Schell as to the identity of the substance contained in State's Exhibit 1B. Defendant argues that by permitting Special Agent Schell to testify as to her opinion regarding the substance based solely on

testing conducted by Agent Gregory, defendant was denied his right under the Sixth Amendment to meaningfully confront the witness against him, Agent Gregory. We agree.

"The Confrontation Clause of the Sixth Amendment bars admission of testimonial evidence unless the declarant is unavailable to testify and the accused has had a prior opportunity to cross-examine the declarant." *State v. Locklear,* 363 N.C. 438, 452, 681 S.E.2d 293, 304 (2009) (citing *Crawford v. Washington*, 541 U.S. 36, 68 (2004)). The U.S. Supreme Court has recently applied the holding in *Crawford* to documents or reports that the government seeks to enter into evidence that are "testimonial" in nature, holding that "[t]he Sixth Amendment does not permit the prosecution to prove its case via *ex parte* out-of-court affidavits, and the admission of such evidence [is] error." *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 329 (2009).

In *Melendez-Diaz*, the government sought to introduce "certificates of analysis" as evidence that a substance was cocaine. The Supreme Court held that the "certificates of analysis" prepared by a forensic analyst for trial were "functionally identical to live, in-court testimony, doing 'precisely what a witness does on direct examination.'" *Id.* at 311 (quoting *Davis v. Washington*, 547 U.S. 813, 830 (2006)).

In the case *sub judice*, we are faced not with the State's attempt to introduce the documents themselves as proof of the identity of a substance, but the testimony of an expert allegedly relying on such documents as the basis for her opinion. The North Carolina Supreme Court has squarely addressed the

issue of expert testimony based on reports prepared by other, non-testifying experts in *State v. Locklear*, 363 N.C. 438, 681 S.E.2d 293 (2009). In that case, the North Carolina Supreme Court applied the holding of *Melendez-Diaz* to the in-court testimony of an expert who relied on the contents of "testimonial" reports prepared by forensic examiners. The *Locklear* Court held that

> [t]he [*Melendez-Diaz*] Court determined that forensic analyses qualify as "testimonial" statements, and forensic analysts are "witnesses" to which the Confrontation Clause applies. The Court specifically referenced autopsy examinations as one such kind of forensic analyses. Thus, when the State seeks to introduce forensic analyses, "[a]bsent a showing that the analysts [are] unavailable to testify at trial *and* that petitioner had a prior opportunity to cross-examine them" such evidence is inadmissible under *Crawford*.

Id. at 452, 681 S.E.2d at 304-05 (quoting *Melendez-Diaz*, 557 U.S. at 311).

The *Locklear* Court made clear that, like the certificates of analysis at issue in *Melendez-Diaz*, the contents of the reports were "testimonial," and the defendant had the right to confront the expert that had prepared the report, and who in effect was "testifying" through that report. *Locklear*, 363 N.C. at 452, 681 S.E.2d at 304-05.

This Court has applied the *Locklear* extension of *Melendez-Diaz* in several decisions relevant to this appeal. In *State v. Galindo*, __N.C. App. __, 683 S.E.2d 785 (2009), this Court held that the trial court erred in

admitting the testimony of chemist Michael Aldridge, where the record showed that Aldridge

> had been the supervisor of the lab for 20 years. Aldridge testified that although he did not personally weigh or observe the weighing of the seized cocaine, as part of his supervisory duties he calibrated the scale on which it was weighed both the month before and after it was weighed and found that the scale was in "perfect working order." When asked, Aldridge stated that the analyst that had identified and weighed the cocaine and prepared the lab report was currently working in a crime lab in South Carolina and that she had not been subpoenaed to testify.
>
> Aldridge explained the chain of custody procedures at the lab and stated that they had been followed in this case. Aldridge stated that the lab's analysis procedures exceeded industry standards and that the types of tests performed and recorded in the lab's reports are relied upon by experts in the field of forensic chemistry. Aldridge then went on to testify that in his opinion – based "solely" on the lab report – the substances seized from the West Ridge Road residence were, in fact, marijuana and cocaine. With respect to the cocaine, Aldridge gave his opinion – over defendant's objections – that approximately 1031.83 grams of cocaine [were] found in various parcels.

Galindo, __ N.C. App. at __, 683 S.2d at 787. Though we held that admission of Aldridge's testimony was error, we did not reverse defendant's conviction

because the State succeeded in meeting its burden on appeal that the error was harmless beyond a reasonable doubt based on other evidence adduced at trial. *Id.* at __, 683 S.E.2d at 788-89.

After *Galindo*, this Court held in *State v. Mobley*, __ N.C. App. __, 684 S.E.2d 508 (2009), *disc. review denied*, 363 N.C. 809, __ S.E.2d __ (2010), that a forensic DNA analyst's expert opinion was admissible because the expert merely *based* her opinion on otherwise inadmissible testimonial hearsay documents. In reviewing the DNA expert's testimony under a plain error standard of review via Rule 2 of the North Carolina Rules of Appellate Procedure, this Court observed that the State's expert "testified not just to the results of other experts' tests, but to her own technical review of these tests, her own expert opinion of the accuracy of the non-testifying experts' tests, and her own expert opinion based on a comparison of the original data." *Mobley*, __ N.C. App. at __, 684 S.E.2d at 511.

State v. Davis, __ N.C. App. __, 688 S.E.2d 829 (2010) followed *Galindo* and *Mobley*. In that case, we upheld defendant's convictions for possession with intent to sell or deliver cocaine and sale of cocaine, in part, because defense counsel at trial failed to object to the forensic expert's testimony on Sixth Amendment grounds. *Id.* at __, 688 S.E.2d at 834 ("As Defendant failed to object at trial to any of the aforementioned testimony, Defendant failed to preserve for appeal the argument that the evidence was erroneously admitted."). Since the defendant in *Davis* failed to object to "copious" evidence at trial showing that the confiscated substance was crack cocaine – including the forensic chemist's expert testimony based purely

on underlying tests not performed by the testifying expert – we held that admission of the underlying testimonial report was harmless beyond a reasonable doubt. *Id.* at __, 688 S.E.2d at 835 ("[W]e conclude that, even if Aldridge's laboratory report was erroneously admitted, such error was harmless beyond a reasonable doubt in view of the copious – indeed, overwhelming – unchallenged evidence establishing that the substance at issue was crack cocaine.").

This Court distinguished *Galindo* and applied the *Mobley* exception in a new factual context in *State v. Hough*, __ N.C. App. __, 690 S.E.2d 285 (2010). In *Hough*, we held that the admission of expert forensic testimony on the issue of whether several confiscated substances were, in fact, marijuana and cocaine was not plain error under *Locklear*. *Id.* at __, 690 S.E.2d at 291. Despite the fact that the testifying expert in *Hough* did not conduct the tests on the contraband in issue, we concluded that the testifying expert conducted a "peer review" of her colleague's work, such that *Galindo* did not preclude admission of the forensic expert's testimony.

> The report at issue in this case formed the basis of Alloway's expert opinion, but was not offered for the proof of the matter asserted and was not prima facie evidence that the substances recovered from the crime scene were, in fact, marijuana and cocaine. It is not our position that every "peer review" will suffice to establish that the testifying expert is testifying to his or her expert opinion; however, in this case, we hold that Alloway's testimony was sufficient to establish that her expert opinion was based on her own analysis of the lab reports.

Id.

In the most recent case in this series, *State v. Brennan*, this Court held that an expert's "peer review" of drug testing procedures by a testing analyst was not admissible evidence. No. COA09-1362, 2010 WL 1753339, *3-4 (N.C. Ct. App., May 4, 2010). In concluding that the forensic expert chemist's "peer review" failed to qualify as an admissible independent opinion at trial, this Court stated:

> It is obvious from the above-excerpted testimony that Agent Icard was merely reporting the results of other experts. We cannot conclude from this, as this Court did in *Mobley*, that "the underlying report, which would be testimonial on its own, is used as a basis for the opinion of an expert who independently reviewed and confirmed the results, and is therefore not offered for the proof of the matter asserted under North Carolina case law." *Id.* at __, 684 S.E.2d at 512. On the contrary, as Agent Icard explained on cross-examination, her "review" consisted entirely of testifying in accordance with what the underlying report indicated. Although there is some indication that Agent Knott was unavailable due to illness, there is no indication in the record of any prior opportunity by Defendant to cross-examine Agent Knott.
>
> Agent Icard did no independent research to confirm Agent Knott's results; in fact, she saw the substance for the first time in open court when she testified to what – in her expert opinion – it was. Such expertise is manifestly no more reliable than lay opinion based on a visual

> inspection of suspected powder cocaine, such as has been deemed inadmissible. *See State v. Llamas-Hernandez*, 189 N.C. App. 640, 652, 659 S.E.2d 79, 86 (2008) (Steelman, J., dissenting), *rev'd for reasons stated in the dissent*, 363 N.C. 8, 673 S.E.2d 658 (2009) (per curiam). Insofar as Agent Icard testified to Agent Knott's results, the testimony violated Defendant's constitutional rights as interpreted in *Melendez-Diaz* and *Locklear*.

Id. at *4.

In making our decision here, we believe it is paramount to revisit *Melendez-Diaz* to ensure clarity. We believe that *Melendez-Diaz* and *Locklear*, without further influence, clearly resolve the admissibility of (1) an expert utilizing data collected by another person to form an independent opinion and (2) the impermissible reiteration of another's findings and conclusions. The Supreme Court in *Melendez-Diaz* stated that the foundation for a Confrontation Clause analysis is as follows:

> [T]he [Confrontation] Clause's ultimate goal is to ensure *reliability* of evidence, but it is a *procedural* rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. . . . Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes.

Melendez-Diaz, 557 U.S. at 317-318 (emphasis added) (citation omitted). The Supreme Court went on to say that "[a] forensic analyst responding to a request from a law enforcement official may feel pressure – or have an incentive – to alter the evidence in a manner favorable to the prosecution." *Id.* The Court explained that "[c]onfrontation is one means of assuring accurate forensic analysis. While it is true, as the dissent notes, that an honest analyst will not alter his testimony when forced to confront the defendant . . . the same cannot be said of the fraudulent analyst." *Id.* "Like the eyewitness who has fabricated his account to the police, the analyst who provides false results may, under oath in open court, reconsider his false testimony." *Id.* "Confrontation is designed to weed out not only the fraudulent analyst, but the incompetent one as well. Serious deficiencies have been found in the forensic evidence used in criminal trials." *Id.* at 319. "Like expert witnesses generally, an analyst's lack of proper training or deficiency in judgment may be disclosed in cross-examination." *Id.* at 320.

These excerpts make clear that the purpose of requiring the analysts themselves testify is so that their honesty, competence, and the care *with which they conducted the tests* in question could be exposed to "'testing in the crucible of cross-examination.'" *Id.* at 317 (citation omitted). Thus, to allow a testifying expert to reiterate the conclusions of a nontestifying expert would eviscerate the protection of the Confrontation Clause.

Here, the question of whether the Sixth Amendment rights of defendant were violated turns on whether Special Agent Schell offered an independent expert opinion as to the chemical composition of the

State's evidence or whether she merely summarized the findings of Agent Gregory. If Special Agent Schell simply offered the opinion contained in Agent Gregory's report – the type of report that the Supreme Court held to be "testimonial" in *Melendez-Diaz* and that the North Carolina Supreme Court held to be inadmissible through a testifying expert in Locklear – then the defendant's right to confrontation was implicated and violated. If, however, Special Agent Schell offered her own expert opinion based on independent analysis, then her use of the underlying report prepared by Agent Gregory as a source of data facilitating that analysis would not violate defendant's right to confrontation.

Applying the rules articulated in *Melendez-Diaz* and *Locklear* to the case at bar, a four-part inquiry[1] is necessary: (1) determine whether the document at issue is testimonial; (2) if the document is testimonial, ascertain whether the declarant was unavailable at trial and defendant was given a prior opportunity to cross-examine the declarant; (3) if the defendant was not afforded the opportunity to cross-examine the unavailable declarant, decide whether the testifying expert was offering an independent opinion or merely summarizing another non-testifying expert's report or analysis; and (4) if the testifying expert summarized another non-testifying expert's report or analysis, determine whether the admission of the document through another testifying expert is reversible error.

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[1] For an explanation on the genesis of this inquiry, *see State v. Conley*, COA09-456, 2010 WL 157554 (Jan. 5, 2010) (unpublished) and *State v. King*, COA09-524, 2010 WL 521022 (Feb. 16, 2010) (unpublished).

In this case, the law is clear that the report utilized by Special Agent Schell was testimonial in nature. *Melendez-Diaz*, 557 U.S. at 310 (testimonial evidence includes "'statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial'") (citation omitted). Moreover, there is nothing in the record to suggest that the State claimed that Agent Gregory was unavailable and defendant had a previous opportunity to cross-examine Agent Gregory. Accordingly, we conclude that Agent Gregory's report was inadmissible testimonial evidence, so we next examine whether Special Agent Schell's testimony based on Agent Gregory's report was an independent expert opinion or merely a summation of inadmissible testimonial evidence.

Special Agent Schell testified extensively at trial about the testing procedures that are typically adhered to at the SBI lab. She testified regarding the manner in which tests are conducted in the regular course of business. However, the following exchange that occurred between Special Agent Schell and defense counsel on cross-examination is revealing:

> Q. Okay. And it's true that you did not perform any of the tests on this evidence; is that correct?
>
> A. It is. I did not perform these tests.
>
> Q. So you didn't do any color test that came back negative – or the first test in this case you said didn't show any color change; is that right?
>
> A. That's correct.

Q. So it didn't test – it didn't test positive on the first test. The second test you didn't observe any part of this evidence put in a liquid and turn blue.

A. I did not, but these are tests that are commonly performed in our section.

Q. Right. But my point is you didn't do this test so you don't know; you didn't see it turn blue for yourself.

A. I did not, no.

Q. Okay. And the crystal test, you didn't look through the slide that was where a part of the evidence was mixed with a liquid and showed cross crystals. You didn't actually see that, did you?

A. I did not, no.

Q. And the last test about the graph that had to be cleaned up, you didn't see this actual result being cleaned up or see the test performed, did you?

A. I did not see the test performed, but I have the data that Nancy Gregory obtained.

It is clear from the testimony of Special Agent Schell that she had no part in conducting any testing of the substance, nor did she conduct any independent analysis of *the substance*. She merely reviewed the reported findings of Agent Gregory, and testified that if Agent Gregory followed procedures, and if Agent Gregory did not make any mistakes, and if Agent Gregory did not deliberately falsify or alter the findings, then Special Agent Schell "would have come

to the same conclusion that she did." As the Supreme Court clearly established in *Melendez-Diaz*, it is precisely these "ifs" that need to be explored upon cross-examination to test the reliability of the evidence. *Melendez-Diaz*, 557 U.S. at 320 (methodology that forensic drug analysts use "requires the exercise of judgment and presents a risk of error that might be explored on cross-examination"). Special Agent Schell could not have answered these questions because she conducted no independent analysis. She testified exclusively as to the tests that Agent Gregory claimed to have performed, and used testimonial documents not admissible under *Melendez-Diaz*. Her conclusion that she agreed with Agent Gregory's analysis assumes that Agent Gregory conducted the tests in the same manner that Special Agent Schell would have; however, the record shows that Special Agent Schell had no such actual knowledge of Agent Gregory's actions during the testing process.

The State's attempt to posture Special Agent Schell's testimony as an admissible "peer review" both at trial and on appeal is not persuasive. In the end, the transcript of the trial shows that the testimonial document prepared by Agent Gregory was admitted into evidence against defendant for the substantive purpose of showing that the contraband seized was cocaine. This end was achieved through the testimony of Special Agent Schell. Under *Melendez-Diaz* and *Locklear*, we are bound to conclude that this testimony was admitted in violation of defendant's right under the Confrontation Clause of the Sixth Amendment.

In reaching this conclusion under these particular facts, we believe that the facts of this case are closer to those in *Brennan* rather than those in *Hough*. We

believe that the *Hough* Court correctly stated that not "every 'peer review' will suffice to establish that the testifying expert is testifying to his or her expert opinion[.]" *Hough*, __ N.C. App. at __, 690 S.E.2d at 291. Though the *Hough* Court did not further explain under what circumstances a "peer review" would skirt the edges of a constitutional violation and thus avoid the mandate of *Melendez-Diaz*, we believe that this case presents such a situation.

In *Melendez-Diaz*, Justice Scalia addressed a portion of the dissenting opinion – in which Justice Kennedy insisted that the "certificates of analysis" were admissible – because the certificates were akin to admissible authentications produced by a clerk of court at common law. In disagreeing with the dissent's position, Justice Scalia explained the scope of the clerk's ability to provide evidence through the authenticating document in the context of the Confrontation Clause:

> The dissent identifies a single class of evidence which, though prepared for use at trial, was traditionally admissible: a clerk's certificate authenticating an official record – or a copy thereof – for use as evidence. But a clerk's authority in that regard was narrowly circumscribed. He was permitted "to certify to the correctness of a copy of a record kept in his office," but had "no authority to furnish, as evidence for the trial of a lawsuit, his interpretation of what the record contains or shows, or to certify to its substance or effect." The dissent suggests that the fact that this exception was "'narrowly circumscribed'" makes no difference. To the contrary, it makes all the

> difference in the world. It shows that even the line of cases establishing the one narrow exception the dissent has been able to identify simultaneously vindicates the general rule applicable to the present case. A clerk could by affidavit *authenticate* or provide a copy of an otherwise admissible record, but could not do what the analysts did here: *create* a record for the sole purpose of providing evidence against a defendant.
>
> Far more probative here are those cases in which the prosecution sought to admit into evidence a clerk's certificate attesting to the fact that the clerk had searched for a particular relevant record and failed to find it. Like the testimony of the analysts in this case, the clerk's statement would serve as substantive evidence against the defendant whose guilt depended on the nonexistence of the record for which the clerk searched. Although the clerk's certificate would qualify as an official record under respondent's definition – it was prepared by a public officer in the regular course of his official duties – and although the clerk was certainly not a "conventional witness" under the dissent's approach, the clerk was nonetheless subject to confrontation.

Melendez-Diaz, 557 U.S. at 322-323 (footnotes and citations omitted).

This same distinction is applicable here. If the *substance* of a testimonial document is to be admitted into evidence, the author of the testimonial document must be subjected to confrontation either (1) before

trial if he or she is unavailable and defendant chooses to exercise his right or (2) during trial if he or she is available. If a third party, such as an expert, wishes to give testimony concerning the contents of a testimonial document, he or she may take one of two permissible approaches: (1) "certify" the correctness of the testimonial document without offering either an "interpretation of what the record contains or shows" or a certification "to its substance or effect," *id.* at 322; or (2) render an opinion independent of the substance of the testimonial document such that the information in the document is not being offered for the truth of the matter asserted.

It is precisely these principles that support the divergent directions of *Mobley* and *Brennan*. As *Mobley* explains in detail, a forensic DNA analyst must perform an independent analysis of raw data to form their expert opinion. *Mobley*, __ N.C. App. at __, 684 S.E.2d at 511-12. In this process, the underlying DNA data collectors do not reach their own conclusions that are then merely reviewed by the forensic expert based solely on a cold record. *Id.* This contrasts starkly with the process utilized in this case.

As 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, as *Brennan* correctly holds, is not an independent expert opinion arising from the observation and analysis of raw data. Unlike an analysis of DNA data, there is no opportunity for a meaningful cross-examination of testimony concerning the results of a drug test, and a defendant presented with such damning evidence can only hope to attack pure assumptions on whether procedures were

properly followed during the forensic testing process. As the Supreme Court explained in *Melendez-Diaz*, it is this sort of accountability, placed directly on the testing analyst, that the Sixth Amendment requires. It was therefore error to allow Special Agent Schell to testify concerning the composition of the confiscated substance at issue in this case.

We now turn to the question of whether this error requires reversal. The only other evidence offered by the State at trial concerning the composition of the "offwhite rock like substance" was Officer Serlick's testimony.

> Q. And what happened next?
>
> A. . . . I picked the napkin up, looked inside the napkin and saw an offwhite rock like substance, what I *believed* to be cocaine.

(Emphasis added).

Unlike *Galindo* and *Davis*, this evidence is not sufficient to show that the admission of Special Agent Schell's testimony was harmless beyond a reasonable doubt. *State v. Lewis*, 361 N.C. 541, 549, 648 S.E.2d 824, 830 (2007) ("'A violation of the defendant's rights under the Constitution of the United States is prejudicial unless . . . it was harmless beyond a reasonable doubt.'") (quoting N.C.G.S. § 15A-1443(b) (2005)). Absent any concrete evidence or testimony that the substance in question was indeed cocaine, it is possible that the jury could have reached a different conclusion regarding the guilt of defendant on the charge of possession of cocaine. We therefore agree with defendant that he should be awarded a new trial.

IV. CONCLUSION

The trial court erred in admitting the testimony of Special Agent Schell over defendant's constitutional objection. Because the State has not shown that the error was harmless beyond a reasonable doubt, defendant is deserving of a new trial.

New trial.

Judges STROUD and ERVIN concur.