NO. COA22-1064 TWENTY-SEVEN-B DISTRICT

NORTH CAROLINA COURT OF APPEALS

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STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Cleveland County
	)	20 CRS 72, 50345
ROBERT LEE PRICE	)	

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BRIEF OF AMICI CURIAE[1]

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[1] The full roster of *amici curiae* and a detailed statement of their interests is included in the concurrently filed Motion for Leave to File *Amicus Curiae* Brief. The views expressed herein reflect those of the *amici curiae*, but not those of any academic institution to which they belong, such as Duke University or Duke University School of Law. No person or entity other than *amici curiae*, their members, or their counsel directly or indirectly wrote this brief or contributed money for its preparation.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

SUMMARY OF THE ARGUMENT

The Confrontation Clause of the Sixth Amendment guarantees defendants the right to confront the witnesses against them. As such, a witness must testify to their own opinions to allow a defendant to confront the *actual* witness against them—rather than a surrogate witness, who simply parrots the opinion of another. Here, the State's expert witness acted as a surrogate witness by failing to form an independent opinion, and instead, simply parroted the testing analyst's conclusions. When the testifying analyst plays no meaningful role in the analysis, their testimony violates the Confrontation Clause of the Sixth Amendment and Rule 703 of the North Carolina Rules of Evidence, and raises serious public policy and ethical concerns. To prevent future wrongful convictions based on non-independent and unreliable surrogate expert testimony, *amici* urge this Court to explicitly declare that surrogate testimony like the testimony in this case violates the Confrontation Clause of the Sixth Amendment.

ARGUMENT

I. THE USE OF A SURROGATE FORENSIC ANALYST VIOLATES THE CONFRONTATION CLAUSE OF THE SIXTH AMENDMENT WHEN THE TESTIFYING ANALYST PLAYS NO MEANINGFUL ROLE IN THE ANALYSIS.

The Confrontation Clause of the Sixth Amendment is a bedrock constitutional guarantee, providing that "[i]n all criminal prosecutions, the

accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. XI; *see Pointer v. Texas*, 380 U.S. 400, 406 (1965) (finding the Confrontation Clause applies to both state and federal prosecutions). In *Crawford*, the Supreme Court held that "where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." *Crawford v. Washington*, 541 U.S. 36, 68–69 (2004). *Crawford* is essential in recognizing the procedural guarantee of the Sixth Amendment, "not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination," *id.* at 61. It is crucial, then, that a witness testify to their own opinions so as to allow a defendant to confront the *actual* witness against them.

Expert witnesses are often a central part of the criminal trial, providing specialized knowledge for the trier of fact, necessary to accurately evaluate relevant evidence. When expert witnesses create reports to serve as evidence in criminal proceedings, the reports are testimonial and therefore subject to the confrontation requirements of the Sixth Amendment. *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009). In the context of expert testimony, Confrontation Clause issues typically arise when—as in the present case—a surrogate witness, with no meaningful involvement in the case, testifies about the non-testifying analyst's conclusions. Allowing for a

"surrogate" witness that merely "parrots" the opinions of the original analyst—as opposed to a proper "substitute" witness who has formed their own, independent opinion[2]—creates a crucial Confrontation Clause violation by depriving the defendant of their right to confront the actual expert who developed the opinion presented. *State v. Ortiz-Zape*, 367 N.C. 1, 9, 743 S.E.2d 156, 162 (2013).

In the forensic evidence context, the Supreme Court has rejected arguments that forensic evidence is uniquely reliable or neutral due to its scientific nature and subsequently not bound by Confrontation requirements. *Melendez-Diaz*, 557 U.S. at 318. At the heart of the matter, cross-examination is necessary so that defendants can address fraudulent or incompetent actions taken by the forensic experts who gather the evidence against them.

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[2] In this brief, "surrogate" is used to refer to a witness's testimony that lacks independence and solely parrots the conclusions of the absent, original analyst. While caselaw terminology varies, a "substitute" witness and a "surrogate" witness are distinct in important ways. In the seminal case, *Bullcoming v. New Mexico*, petitioners argued their witness was a proper "substitute"; the Court rejected this argument and held that their "surrogate" testimony violated the Confrontation Clause. 564 U.S. 647, 661–62 (2011). In *State v. Ortiz-Zape*, the North Carolina Supreme Court explained an expert "must present an independent opinion obtained through his or her own analysis and not merely 'surrogate testimony' parroting otherwise inadmissible statements." 367 N.C. 1, 9, 743 S.E.2d 156, 162 (2013). Indeed, the variation in terminology makes clear that "substitute" witness testimony is permissible, whereas "surrogate" testimony violates the Confrontation Clause. *See, e.g.*, *State v. Baker,* 2004 N.C. App. LEXIS 462, 7 (2004) (upholding the use of a "substitute" witness after the original analyst retired).

"The [Confrontation] 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." *Bullcoming v. New Mexico*, 564 U.S. 647, 662 (2011).

A. The Forensic Evidence Context Requires Heightened Consideration.

Forensic evidence collection and analysis play an increasingly important role in the criminal justice system but are hardly "immune from the risk of manipulation." *Melendez-Diaz*, 557 U.S. at 318. While the goal of forensic evidence collection is neutral and accurate analysis, indeed this is not always the case. *See, e.g.*, National Research Council of the National Academies, *Strengthening Forensic Science in the United States: A Path Forward* (2009) (revealing the numerous deficiencies within the forensic science field from biased analysis, incompetence, and unscientific methods and misconduct); Brandon L. Garrett & Peter J. Neufeld, *Invalid Forensic Science Testimony and Wrongful Convictions*, 95 Va. L. Rev. 1, 12 (2009) (finding invalid forensic testimony contributed to convictions in 60% of overturned criminal convictions). Given the known reliability issues with forensic evidence, it is imperative that proper weight is given to a defendant's right to confrontation.

The Court has recognized that forensic science methodology is susceptible to human error, and that accuracy of a report often relies on the

actions of the analyst. *Melendez-Diaz*, 557 U.S. at 321. In the forensic analysis context, problematic surrogate testimony arises when an expert neither conducted the original analysis, nor—as in the case at hand—performed their own, independent analysis of the original tests and reports but instead simply parrots the testing analyst's opinion. *See, e.g.*, *Bullcoming*, 564 U.S. 647 (blood alcohol report was testimonial, and admission through testimony of a different witness at trial was error); *Melendez-Diaz*, 557 U.S. 305 (forensic lab reports are testimonial, and therefore subject to Confrontation Clause requirements); *State v. Craven*, 367 N.C. 51, 744 S.E.2d 458 (2013) (lab report was testimonial, and admission through testimony of a different witness at trial was error).

Notably, *Melendez-Diaz* highlights some concerns with the methodology used in the present case, infrared or gas spectrometer for drug identification, explaining these tests overly rely on the subjective judgment of the analyst, thus creating a risk of error that cannot be explored through cross examination. *Melendez-Diaz*, 557 U.S. at 321 (citing 2 P. Giannelli & E. Imwinkelried, Scientific Evidence § 23.03[c], pp 532–33, and ch. 23A, p. 607 (4th ed. 2007); Shellow, The Application of *Daubert* to the Identification of Drugs, 2 Shepard's Expert & Scientific Evidence Quarterly 593, 600 (1995)). Even assuming gas spectrometer methodology is precise, the Supreme Court has recognized that even incredibly automated or precise scientific analysis

requires a degree of interpretation, and thus the defendant must have the ability to confront the original analyst. *Id.* An expert's familiarity with the tests or processes used by the absent analyst is not, on its own, enough to permit the expert to act as a proper substitute witness. *Bullcoming*, 564 U.S. at 662–63 ("[S]urrogate testimony of the kind [the testifying witness] was equipped to give could not convey what [the original 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."). Ultimately, cross-examination provides the necessary opportunity for defendants to scrutinize the processes taken by the analyst in order to avoid such pitfalls. Preventing the defendant from confronting the actual witness against them (i.e., the original analyst) creates significant reliability risks.[3]

[3] While the U.S. Supreme Court discussed Confrontation Clause issues in *Williams v. Illinois*, 567 U.S. 50 (2012), the case lacks precedential value because it involved a plurality opinion of only four justices. Since no single rationale supporting the Court's holding received five votes, "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) (quotation omitted). Thus, the holding in *Williams* is little more than the resolution of its specific dispute or cases involving very similar facts—facts that are not implicated in the case at hand. Further, because Williams involved only a plurality opinion and its facts were complex, it has drawn substantial criticism from commentators and resulted in lower courts treating the case "inconsistently" with some "effectively confining it to its facts." Edward K. Cheng & Cara C. Mannion, *Unraveling* Williams v. Illinois, 95 N.Y.U. L. Rev. 136 (2020); *see, e.g.*, *State*

B. North Carolina Rule 703 Provides a Legitimate Road Map for Permissable "Substitute" Testimony.

Rule 703 of the North Carolina Rules of Evidence defines the permissible bases for expert opinions. N.C. R. Evid. 703. Through proper "substitute" testimony, an expert's testimony is admissible even when they did not personally develop the tests or reports, so long as they have formed and can testify to their own, *independent* opinion.[4] *State v. Crumitie*, 266 N.C. App. 373, 379, 831 S.E.2d 592, 596 (2019). Under Rule 703, an expert's independent opinion must be obtained through their analysis of the original reports and supporting materials, and not merely by providing "surrogate testimony" based solely on otherwise inadmissible statements. *State v. Ortiz-Zape*, 367 N.C. 1, 743 S.E.2d 156 (2013). Simply restating the original analyst's conclusions and opinions, as the expert did in the case at hand, is a

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v. Kennedy, 229 W. Va. 756, 773 (W.V. 2012) (holding "to the extent that [a witness] is a 'mere conduit' for the opinions of the authoring pathologist, such testimony violates the Confrontation Clause").

[4] Specifically, a testifying witness may rely on the testing or analysis conducted by another analyst if: (i) that information is of a type "reasonably relied on by experts in the field" in forming their opinions; and (ii) the testifying witness actually used that information and reached his or her own independent conclusion in this case. *Crumitie*, 266 N.C. App. at 379, 831 S.E.2d at 596. Further, Rule 703's official comment recognizes three permissible sources for forming an independent opinion: (i) personal observation; (ii) presentation at trial through a hypothetical question or by having the expert attend the trial to hear testimony and render an opinion; or (iii) presentation of data to the expert outside of court. Fed. R. Evid. 703 advisory committee's notes to 2000 amendment.

far cry from the permissible, independent testimony allowed under Rule 703. *See id*. And notably, in the case at hand, the state provided notice of its intent to call its expert witness, Miguel Cruz-Quiñones, to testify to the identity of the controlled substance, *before* Mr. Cruz-Quiñones had even reviewed the original analyst's report—further demonstrating the lack of independence and analysis underlying the state's expert opinion. (R Add p 2-7).

As Justice Kagan aptly stated in her dissent in *Williams v. Illinois*: "If the Confrontation Clause prevents the State from getting its evidence in through the front door, then the State could sneak it in through the back. What a neat trick—but really, what a way to run a criminal justice system. No wonder five Justices reject it." 567 U.S. 50, 133 (2012) (Kagan, J., dissenting).

II. ALLOWING SURROGATE WITNESSES TO PRESENT EXPERT OPINIONS RAISES SIGNIFICANT ETHICAL AND PUBLIC POLICY CONCERNS.

As Justice Hudson warned in her concurrence in *State v. Craven*, "the majority has created a rule under which the State can circumvent the Confrontation Clause simply by asking the testifying analyst the question: 'What is your independent expert opinion?'" 367 N.C. 51, 62, 744 S.E.2d 458, 464 (2013) (Hudson, J., concurring) (explaining "[t]he majority's rule . . . does not actually require any independent analysis or work on the expert's part. The expert may simply review the nontestifying analyst's report and adopt its

conclusions as her own. That rule is flatly inconsistent with United States Supreme Court precedent on this issue.").[5] To continue along this path not only creates a dangerous loophole to the Confrontation Clause—denying the accused the crucial right to confront the witnesses against them—but also raises serious professional responsibility concerns for the expert witness. Indeed, the National Commission on Forensic Science's *National Code of Ethics and Professional Responsibility for the Forensic Sciences* requires that forensic scientists "[c]onduct full, fair and unbiased examinations, leading to independent, impartial, and objective opinions and conclusions." Nat'l Comm'n on Forensic Sci., *National Code of Ethics and Professional Responsibility for the Forensic Sciences*, U.S. Dep't Just., https://www.justice.gov/archives/ncfs/page/file/788576/download. Whether resulting from original or secondary examinations, an expert's opinions and

[5] *See also Ortiz-Zape*, 367 N.C. at 20–21, 743 S.E.2d at 168 (Hudson, J., dissenting) ("[T]he majority asserts that Agent Ray offered an independent opinion on the identity of the substance tested based on the lab reports. As I understand the opinion, the only 'evidence' the majority points to in support of this holding is the questioning by the State at trial. Agent Ray was asked, 'What is your independent expert opinion?' She answered that 'the substance was cocaine.' However, careful review of the testimony, both on direct and cross-examination, demonstrates that her opinion was in no way independent—all her knowledge and opinions about the testing process and the substance were based entirely on the review and analysis by Agent Mills, who had left the lab two years before Ray's employment even began.").

conclusions must adhere to this principle; simply repeating the original analyst's conclusions surely does not suffice.

A. Surrogate Witnesses Are Inherently Incentivized to Agree with the Original Analyst and Unable to be Meaningfully Cross Examined.

Surrogate witnesses are inherently incentivized to agree with the original analyst's report. Frequently, as in the case at hand, the surrogate witness works in the same lab as the original analyst. As such, should the surrogate witness testify that the original analyst used questionable methods or reached erroneous results, the witness may very well jeopardize their professional relationship with the analyst, and even their position and career trajectory within the forensic lab and greater forensic community. Further, when a surrogate witness knows and trusts the original analyst, they risk making false assumptions about the quality, accuracy, and reliability of the analyst's report.

Moreover, a surrogate witness cannot meaningfully testify to the original analyst's specific knowledge and observations, or to the specific test or testing processes they employed; because their testimony simply parrots the original report, neither their direct nor cross-examination are capable of exposing any potential "lapses or lies." *See Bullcoming v. New Mexico*, 564 U.S. 647, 661–62 (2011). This is especially important in the forensic science field. In *Melendez-Diaz*, Justice Scalia made clear that cross-examination of

forensic analysts was necessary due to reliability problems within the forensic sciences, citing the National Research Council of the National Academies' 2009 report, *Strengthening Forensic Science in the United States: A Path Forward. Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 318 (2009). Thus, by calling a surrogate witness to testify, rather than the original analyst or a substitute analyst that has legitimately formed an independent opinion, the prosecution not only effectively avoids any questioning into the original analyst's competency, ability or training, but also into the *reliability* of the evidence.

By ensuring that only valid, reliable expert testimony is admitted into evidence or relied upon to secure convictions, courts play a crucial role in the prevention of the injustice of wrongful convictions. Even a skillful cross-examination of a surrogate witness fails to mitigate the fact that the witness cannot answer key questions about their work – because they neither did the work, nor independently analyzed the work of the original analyst. Thus, to protect the integrity of both individual judicial proceedings and the broader justice system, courts must scrutinize the testimony of a potential surrogate witness and exclude such testimony when warranted. Ultimately, "[t]he fair administration of justice requires that science is accurately and effectively communicated to the fact finders" in judicial proceedings. Itiel E. Dror &

Nicholas Scurich, *(Mis)use of Scientific Measurements in Forensic Science*, 2 Forensic Sci. Int'l: Synergy 333, 333 (2020).

B. Expert Witnesses Have a Demonstrably Biasing Impact on Jurors as Jurors Overestimate Their Probative Value.

Expert witnesses hold enormously persuasive power over juries, which can result in the wrongful conviction and unjust imprisonment of innocent people.[6] Indeed, social science reveals that jurors generally defer to expert testimony, and simply labeling a witness an "expert" increases the value jurors assign to the witness's testimony: jurors generally presume that scientific evidence brought before them through "expert" testimony has been thoroughly vetted and screened by the court before its presentation. *See* N. J. Schweitzer & Michael J. Saks, *The Gatekeeper Effect the Impact of Judges' Admissibility Decisions on the Persuasiveness of Expert Testimony*, 15

[6] *See, e.g.*, *Timothy Bridges*, The National Registry of Exonerations, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4845 (describing exoneration of Timothy Bridges, who was convicted on the basis of improper expert testimony about microscopic hair analysis); *Keith Allen Harward*, Innocence Project, https://innocenceproject.org/cases/keith-allen-harward/ (detailing exoneration of Keith Harward, who was convicted primarily on the testimony of forensic dentists who "falsely claimed that Harward's teeth matched a bite mark on one of the victims"); *Robert Lee Stinson*, The National Registry of Exonerations, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3666 (detailing exoneration of Robert Stinson, who was "convicted based on the improper and unvalidated expert testimony of a bitemark analyst whose conclusions were uncontested at trial").

Psychol. Pub. Pol'y & L. 1, 1–18 (2009). Further, participants of a 2009 study found that evidence presented by an expert witness at a trial was more convincing than when that very same evidence was presented to them in other contexts. *Id.*

Additionally, studies demonstrate that judicial instructions "expressing limitations of forensic science had no appreciable effect" on juror appraisal of forensic expert testimony. Dawn McQuiston-Surrett & Michael J. Saks, *The Testimony of Forensic Identification Science: What Expert Witnesses Say and What Factfinders Hear*, 33 Law & Hum. Behav. 436 (2009); *see also* Tom R. Tyler, *Viewing CSI and the Threshold of Guilt: Managing Truth and Justice in Reality and Fiction*, 115 Yale L.J. 1050, 1068 (2006) ("There is widespread evidence indicating that people already overestimate the probative value of scientific evidence."); Richard H. Underwood, *Evaluating Scientific and Forensic Evidence*, 24 Am. J. Trial Advoc. 149, 166 (2000) ("Given their lack of scientific sophistication and innumeracy, jurors are likely to overestimate the significance of [expert testimony]."); Mark A. Godsey & Marie Alao, *She Blinded Me with Science: Wrongful Convictions and the "Reverse CSI Effect,"* 17 Tex. Wesleyan L. Rev 481, 495 (2011) (noting that "jurors in this country often accept state forensic testimony as if each prosecution expert witness is the NASA scientist who first put man on the moon").

Amici submit that—particularly in consideration of the role expert witnesses have played in securing wrongful convictions and the social science demonstrating the impact of expert testimony upon jurors—surrogate witnesses pose a major threat to convicting the innocent. The United States Supreme Court has recognized "the threat to fair criminal trials posed by the potential for incompetent or fraudulent prosecution forensics experts." *Hinton v. Alabama*, 571 U.S. 263, 276 (2014). It is undisputed that our criminal justice system "produces erroneous convictions based on discredited forensics." *Melendez-Diaz*, 557 U.S. at 319 (quoting Pamela R. Metzger, *Cheating the Constitution*, 59 Vand. L.Rev. 475, 491 (2006)). Indeed, after examining cases in which exonerating evidence resulted in the overturning of criminal convictions, one study "concluded that invalid forensic testimony contributed to the convictions in *60% of the cases*." *Hinton*, 571 U.S. at 276 (quoting *Melendez-Diaz*, 557 U.S. at 319) (emphasis added). Similarly, misapplication of forensic science was found in nearly half of more than 350 DNA exoneration cases examined by the Innocence Project. *Exonerate the Innocent*, Innocence Project, https://innocenceproject.org/exonerate/.

CONCLUSION

To prevent future wrongful convictions based on non-independent and unreliable surrogate expert testimony, *amici* urge this Court to explicitly

declare that surrogate testimony like the testimony in this case violates the Confrontation Clause of the Sixth Amendment and Rule 703 of the North Carolina Rules of Evidence.

Respectfully submitted, this 27th day of February, 2023.

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CERTIFICATE OF COMPLIANCE WITH RULE 28(J)

Undersigned counsel hereby certifies that this brief complies with North Carolina Rule of Appellate Procedure 28(j), in that it is printed in 13-point Century Schoolbook font and contains no more than 3,750 words in the body of the brief, footnotes and citations included, as indicated by the word-processing program used to prepare this brief.

This the 27th day of February, 2023.

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CERTIFICATE OF SERVICE

I certify that a copy of the above and foregoing Motion for Leave to file Brief as *Amicus Curiae* has been duly served pursuant to Appellate Rule 26 upon David W. Andrews, Assistant Appellate Defender, Office of the Appellate Defender, 123 W. Main Street, Suite 500, Durham, North Carolina 27701, by emailing a copy of the motion to the following email address: david.w.andrews@nccourts.org.

I further certify that a copy of the above and foregoing Motion for Leave to file Brief as Amicus Curiae has been duly served pursuant to Appellate Rule 26 upon Mr. Charles White, Assistant Attorney General, North Carolina Department of Justice, Post Office Box 629, Raleigh, North Carolina 27602, by emailing a copy of the motion to the following email address: cwhite@ncdoj.gov.

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