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Confronting Judicial Efficiency: State v. Whittington and the Effects of Notice-and-Demand Statutes on States and Defendants in Light of Evolving Crawford Analysis

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NOTE

CONFRONTING JUDICIAL EFFICIENCY: *STATE V. WHITTINGTON* AND THE EFFECTS OF NOTICE-AND-DEMAND STATUTES ON STATES AND DEFENDANTS IN LIGHT OF AN EVOLVING *CRAWFORD* ANALYSIS

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I. INTRODUCTION

The United States Constitution allows the criminally accused to confront their accuser through the Sixth Amendment.[1] However, recent jurisprudence in North Carolina and the United States Supreme Court calls into question the extent and scope the Confrontation Clause.[2] Now, defendants in North Carolina may find themselves at the mercy of an expert's report without the opportunity to cross-examine the analyst who generated the report.[3] This may arise if two requirements are met. First, the State must properly notify the defendant. Then, the defendant must either waive his right to object or fail to object within five business days of receiving notice.[4]

Notice-and-demand statutes force defendants to either exercise their rights under the Confrontation Clause prior to trial, or risk forfeiting those rights. Recent decisions from the North Carolina Supreme Court and the United States Supreme Court raise concerns regarding the constitutionality

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1. Melendez-Diaz v. Massachusetts, 557 U.S. 305, 309 (2009); State v. Ortiz-Zape, 743 S.E.2d 156, 159 (N.C. 2013).

2. *Melendez-Diaz*, 557 U.S. 305; State v. Whittington (*Whittington II*), 753 S.E.2d 320 (N.C. 2014); *see also Ortiz-Zape*, 743 S.E.2d at 159–61 (discussing the recent changes to the Confrontation Clause since Crawford v. Washington, 541 U.S. 36 (2004)).

3. *See* N.C. GEN. STAT. § 90-95(g) (2013).

4. *Melendez-Diaz*, 557 U.S. at 326 ("In their simplest form, notice-and-demand statutes require the prosecution to provide notice to the defendant of its intent to use an analyst's report as evidence at trial, after which the defendant is given a period of time in which he may object to the admission of the evidence absent the analyst's appearance live at trial.").

of these statutes.[5] At first blush, such actions seem contrary to the Confrontation Clause, but if the defendant fails to raise a proper objection at trial or to raise an objection under N.C. Gen. Stat. § 90-95(g) (2013), then the issue becomes moot.[6] Such a result, however, is not so straightforward in practice.

Section II of this note will summarize the procedural posture of a recent Supreme Court of North Carolina case involving the Confrontation Clause. Section III of this note begins with an examination of the recent changes to the interpretation of the Confrontation Clause and the impact on criminal defendants. Section III will then focus on the validity of notice-and-demand statutes by addressing the concerns raised in the dissenting opinions in *State v. Whittington* (*Whittington II*)[7] and *Melendez-Diaz v. Massachusetts*.[8] Finally, Section IV will assess the beneficial effects of adopting notice-and-demand statutes for both states and criminal defendants.

II. THE CASE

On April 7, 2011, a jury in Nash County, North Carolina found Glenn E. Whittington guilty on three counts of trafficking in opium.[9] On July 2, 2008, an informant working for the Nash County Sheriff's Office purchased "green colored pills" from Whittington.[10] On May 11, 2009, the State charged Whittington with "trafficking in controlled substances by sale (Count I), delivery (Count II), and possession (Count III)" of opium.[11]

On November 16, 2009, the State delivered sixteen green colored pills to the State Bureau of Investigation (SBI) laboratory for chemical analysis.[12] The SBI lab identified the pills as "Oxycodone–Schedule II Opium Derivative."[13] However, Brittany Dewell, the analyst who conducted the report, never testified to her findings.[14] Instead, the State, pursuant to N.C. Gen. Stat. § 90-95(g), informed Whittington "it intended to introduce a laboratory report of a chemical analysis of the contraband without calling the testing chemist as a witness."[15] At trial, Whittington objected to the State's use of

5. *Whittington II*, 753 S.E.2d at 323; *see generally Melendez-Diaz*, 557 U.S. at 325–28 (discussing the validity of notice-and-demand statutes and the burden on the defendant to object at trial).
6. *Whittington II*, 753 S.E.2d. at 324.
7. *Id.* at 320.
8. 557 U.S. 309, 330–57 (2009).
9. *Whittington II*, 753 S.E.2d at 322; *see also* State v. Whittington (*Whittington I*), 728 S.E.2d 385, 387 (N.C. Ct. App. 2012).
10. *Whittington II*, 753 S.E.2d. at 321.
11. *Id.*
12. *Id.*
13. *Id.*
14. *Whittington I*, 728 S.E.2d. at 387.
15. *Whittington II*, 753 S.E.2d at 321.

the report, but the trial court overruled the objection and allowed the report to be read into evidence by someone other than Dewell.[16]

Under N.C. Gen. Stat. § 90-95(g), the State has a duty to call the analyst at trial in order for the accused to confront his or her accuser.[17] However, the statute allows for an exception, which was the central issue in dispute in *Whittington II*.[18] Specifically, the statute required the State to inform Whittington at least fifteen business days prior to the trial that it intended to use Dewell's report without calling her to testify.[19] Once the State notified Whittington,[20] he had an obligation to file a written objection with the court and the State concerning the admission of the report without the analyst present at least five business days prior to the trial.[21] Finally, the statute provides that if no report is filed indicating the defendant's objection to the admission of the report at trial, the report shall be admitted into evidence without the testimony of the analyst.[22]

The dispositive issue in this case was whether Whittington's objection at trial was sufficient to prevent Dewell's report from being introduced at trial.[23] The underlying issue driving this dispute was Whittington's rights under the Confrontation Clause in light of recent United States Supreme Court decisions, and Whittington's failure to file a timely written objection, as required by N.C. Gen. Stat. § 90-95(g).[24]

The trial court overruled Whittington's objection to the introduction of Dewell's report after expressing its understanding that Whittington bore the burden to timely object.[25] Furthermore, the trial court permitted Jason Bryant, an investigator with the Nash County Sheriff's Office, to testify in the

16. *Id.*at 322.

17. N.C. GEN. STAT. § 90-95(g) (2013); *see Whittington II*, 753 S.E.2d at 323.

18. N.C. GEN. STAT. § 90-95(g) (2013); *see Whittington II*, 753 S.E.2d at 323.

19. *Whittington II*, 753 S.E.2d. at 323.

20. *Id.* at 321 ("[T]he State advised defendant that it intended to introduce as evidence pursuant to [N.C. Gen. Stat.] § 90-95(g), 'any and all reports prepared by the N.C. State Bureau of Investigation concerning the analysis of substances seized in the above-captioned case. A copy of report(s) will be delivered upon request.'").

21. N.C. GEN. STAT. § 90-95(g) (2013); *see Whittington II*, 753 S.E.2d at 323.

22. N.C. GEN. STAT. § 90-95(g) (2013); *see Whittington II*, 753 S.E.2d at 323 n.1 ("In 2013, after defendant's trial, the General Assembly amended subsection 90-95(g) by changing the term 'may' to 'shall.'").

23. *Whittington II*, 753 S.E.2d at 321–22 ("That this officer is not allowed — not a physician, he's not allowed to testify about the examination of a substance that was done by another officer who has not been on the witness stand, who has not testified and cannot testify about the results of any examination that another person did based upon purely and simply from reading of the report into evidence.").

24. *Id.* at 322–24; *see also Whittington I*, 728 S.E.2d at 389–90 (The Court of Appeals interpreted N.C. GEN. STAT. § 90-95(g) (2013) to require the State to prove that the defendant waived his rights).

25. *Whittington II*, 753 S.E.2d at 322 ("The court expressed its understanding that, once given such notice, defendant had the burden of raising a Confrontation Clause objection in sufficient time to allow the State to subpoena the analyst for trial . . . .").

place of Dewell.[26] However, the Court of Appeals granted Whittington a new trial.[27] The Court of Appeals held that the State bore the burden of proving that Whittington waived his rights under the Confrontation Clause and that he received the actual report when the State notified Whittington of its intended use at trial.[28] Ultimately, the Supreme Court of North Carolina reversed the ruling of the Court of Appeals as to Count III,[29] holding that Whittington's objection at trial was insufficient and that he failed to raise a proper objection on appeal.[30]

In her dissenting opinion, Justice Robin Hudson conceded the validity of N.C. Gen. Stat. § 90-95(g) and stated that the defendant always bears the burden of objecting at trial.[31] However, Justice Hudson opined that once Whittington objected, the burden then shifted to the State to prove that it complied with the requirements of the statute.[32] Thus, even though the State introduced evidence that it complied with the notice requirements of the statute, Justice Hudson asserted that such notice was insufficient because Whittington never received the report.[33]

III. BACKGROUND

The Sixth Amendment Confrontation Clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."[34] The Supreme Court's decision in *Ohio v. Roberts*,[35] which permitted hearsay testimony so long as "it possessed 'adequate indicia of reliability'"[36] created confusion for courts interpreting the Confrontation Clause.[37] However, in *Crawford v. Washington*,[38] Justice Scalia attempted to provide the necessary framework for determining what consti-

26. *Id.*

27. *Id.* at 321; *see also Whittington I*, 728 S.E.2d at 390 (vacating Counts I and II and granting a new trial as to Count III).

28. *Whittington I*, 728 S.E.2d at 389 ("The State bears the burden of proving that a defendant made a knowing and intelligent waiver of his rights . . . ." (quoting State v. Bunnell, 445 S.E.2d 426, 429 (N.C. 1995))).

29. *Whittington II*, 753 S.E.2d at 325.

30. *Id.*

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

32. *Id.* ("To prove waiver the State must show that it (1) 'notific[d] the defendant at least 15 business days before the proceeding at which the report would be used of its intention to introduce the report into evidence' and (2) 'provide[d] a copy of the report to the defendant.'" (citing N.C. GEN STAT. § 90-95(g) (2013))).

33. *Id.* at 326.

34. Crawford v. Washington, 541 U.S. 36, 42 (2004) (citing U.S. CONST. amend. VI).

35. 448 U.S. 56 (1980).

36. *Id.* at 66.

37. *See Crawford*, 541 U.S. at 40, 65–66.

38. *Id.* at 38.

tutes testimonial statements.[39] Ultimately, the *Crawford* Court held that "a defendant's Confrontation Clause rights are violated when out-of-court testimonial statements are admitted without a showing that the declarant is unavailable to testify and that the defendant had a prior opportunity to cross-examine that person."[40] The Court also noted that "'[t]he Clause . . . does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.'"[41]

Since the *Crawford* decision was rendered, the Court has heard three additional cases in its effort to firmly establish a comprehensive definition of "testimonial."[42] The first of the trilogy was *Melendez-Diaz*,[43] which addressed whether affidavits prepared by the State for use in testimony against the defendant were testimonial, and, therefore, subject to confrontation under the Sixth Amendment.[44]

The trial court found the defendant, Melendez-Diaz, guilty of distributing and trafficking cocaine despite his objection that "his Sixth Amendment right to be confronted with the witness against him" was violated.[45] The Sixth Amendment provides defendants with the right to confront their accusers at trial.[46] Therefore, "a witness's testimony against a defendant is thus inadmissible unless the witness appears at trial or, if the witness is unavailable, the defendant had a prior opportunity for cross-examination."[47] Relying on *Crawford* and the Sixth Amendment, the defendant argued at trial that the affidavits prepared by the analysts could not be used in court because such evidence violated his rights under the Confrontation Clause.[48] However, the trial court overruled the objection and permitted the use of the affidavits at trial.[49] On review, the Massachusetts Appeals Court affirmed, and the Massachusetts Supreme Judicial Court denied review.[50]

Justice Scalia, writing for the majority, held that the analyst's sworn affidavits constituted testimonial statements and, unless the analyst was unavailable to testify in court, Melendez-Diaz was entitled to the opportunity

39. *Id.* at 68.
40. *Id.* at 53–54.
41. *Id.* at 60 n.9.
42. *See generally* State v. Ortiz-Zape, 743 S.E.2d. 156, 159–61 (N.C. 2013) (discussing the holdings of Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009); Bullcoming v. New Mexico, 131 S. Ct. 2705 (2011); *and* Williams v. Illinois, 132 S. Ct. 2221 (2012)).
43. 557 U.S. 305 (2009).
44. *Id.* at 307.
45. *Id.* at 309.
46. *Id.*
47. Crawford v. Washington, 541 U.S. 36, 54 (2004).
48. *Melendez-Diaz*, 557 U.S. at 308–09.
49. *Id.* at 309.
50. *Id.*

for cross-examination at trial.[51] Therefore, the Court held that the sworn affidavits were insufficient to allow the defendant an opportunity to exercise his Sixth Amendment rights to confront his accuser.[52] Additionally, the Court held that "the Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court."[53]

In addition to finding that the affidavits were testimonial, Justice Scalia discussed the validity of notice-and-demand statutes and how such statutes benefit states as well as defendants.[54] First, Justice Scalia stated that many states already adopted notice-and-demand statutes prior to the Court's ruling.[55] Second, Scalia noted that such statutes require defendants to object within specific time frames, and that failure to meet the statutory requirements would result in a forfeiture of the defendant's rights under the Confrontation Clause.[56] According to Justice Scalia, notice-and-demand statutes are constitutional because the burden to object remains squarely on the defendant, and notice-and-demand statutes do not alter that burden.[57] Furthermore, states reserve the right to control the policies and procedures of court, including when and how a defendant may object.[58] Moreover, by implementing a notice-and-demand statute, states are merely controlling the time in which an objection is made, and in no way remove or alter a defendant's right to confront his or her accuser.[59]

However, the dissenting opinion articulated a number of concerns with the holding.[60] The main issue the dissent addressed was whether the defendant's silence and failure to object during the time frame allowed by the notice-and-demand statute created a constitutional waiver under the Confrontation Clause.[61] Justice Kennedy, writing for the dissent, argued that the majority's approach would prove disastrous for the criminal justice system,

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51. *Id.* at 310–11.

52. *Id.* at 329 ("The Sixth Amendment does not permit the prosecution to prove its case via *ex parte* out-of-court affidavits, and the admission of such evidence against Melendez-Diaz was error.").

53. *Id.* at 324.

54. *Id.* at 325–28.

55. *Id.* at 325–26 n.11 (listing the states that had notice-and-demand statutes in place at the time: Florida, Colorado, Oregon, Missouri, Washington, D.C., Minnesota, Nevada, Illinois, Georgia, and Mississippi. North Carolina enacted its notice-and-demand statute after this case was decided.).

56. *Id.* at 325–26 ("[Many states] permit the defendant to assert (or forfeit by silence) his Confrontation Clause right after receiving notice of the prosecution's intent to use a forensic analyst's report.").

57. *Id.* at 327 ("[T]hese statutes shift no burden whatsoever. The defendant *always* has the burden of raising his Confrontation Clause objection; notice-and-demand statutes simply govern the *time* within which he must do so.") (emphasis in original).

58. *Id.*

59. *Id.* ("There is no conceivable reason why [the defendant] cannot similarly be compelled to exercise his Confrontation Clause rights before trial.").

60. *Id.* at 330 (Kennedy, J., dissenting).

61. *See id.* at 330–32.

and could cause the unintended result of allowing any person who participated in the testing process to testify.[62] Justice Kennedy then argued that the defendant was put on notice and could have subpoenaed the analyst to testify.[63] However, such notice did not come through a statutory provision, but through trial preparation.[64] This is because Massachusetts did not have a notice-and-demand statute in place at the time of trial to guarantee Melendez-Diaz's rights under the Confrontation Clause.[65]

The other two cases of the trilogy came in 2011[66] and 2012.[67] In *Bullcoming v. New Mexico,*[68] the Court addressed whether a forensic analyst could present a report containing testimonial evidence "through the in-court testimony of a scientist who did not sign the certification or perform or observe the test reported in the certification."[69] The holding in *Bullcoming* sought to eliminate "surrogate testimony," which is testimony read into evidence by an analyst who did not conduct the report in question.[70] Such testimony, the Court held, prevented defendants from exposing the weaknesses of the analyst's testimony because the analyst on the stand had no knowledge of the actions taken.[71] Furthermore, surrogate testimony denies the defendant the opportunity to confront his or her accuser.[72] Justice Ginsburg, writing for the majority, noted that notice-and-demand statutes serve as a means to introduce such testimony because the defendant retains the right to confront his or her accuser.[73]

Justice Sotomayor, in her concurring opinion, discussed the limited scope of the Court's opinion and identified multiple scenarios that were not addressed.[74] First, the analyst's report at issue in *Bullcoming* (a blood alcohol content report) did not involve some alternative purpose,[75] such as "provid[ing] Bullcoming with medical treatment."[76] Second, the surrogate

62. *Id.* at 332.
63. *Id.* at 337–38
64. *Id.*
65. *Id.* at 325–26 n.11 (majority opinion).
66. Bullcoming v. New Mexico, 131 S. Ct. 2705, 2709 (2011);
67. Williams v. Illinois, 132 S. Ct. 2221, 2227 (2012).
68. 131 S. Ct. at 2705 (2011).
69. *Id.* at 2710.
70. *Id.*
71. *Id.* at 2715
72. *Id.* (asserting that surrogate testimony fails to address the procedures the testing analysts took, and prevents the defendant from uncovering, through cross-examination, any errors the analyst may have made).
73. *Id.* at 2718 (stating that notice-and-demand statutes preserve the defendant's Confrontation Clause right to call a forensic analyst who wrote the report to testify, so long as the defendant timely exercises his right after receiving notice that the prosecution plans to introduce the report as evidence.).
74. *See* State v. Ortiz-Zape, 743 S.E.2d 156, 160 (N.C. 2013).
75. *Bullcoming*, 131 S. Ct. at 2722 (The report failed the primary purpose test and constituted testimonial evidence in violation of the Confrontation Clause.).
76. *Id.*

testifying on behalf of the analyst who actually conducted the test was not "a supervisor who observed an analyst conducting a test" and could not testify as to the reliability of the test or the procedures and protocol followed by the analyst in question.[77] However, most noteworthy were scenarios three and four.[78] Scenario three addressed a situation where "an expert witness was asked for his independent opinion about underlying testimonial reports that were not themselves admitted into evidence."[79] Scenario four arose when "the State introduced only machine-generated results . . . ."[80] Thus, Justice Sotomayor's opinion suggests that none of the four scenarios would violate a defendant's rights under the Confrontation Clause.[81]

The last case of the trilogy, *Williams v. Illinois,*[82] resulted in a plurality opinion of four Justices, with Justice Thomas concurring in part despite rejecting the plurality's analysis.[83] However, the five Justices did agree that a statement made by an expert who did not testify how the tests were performed, but who did testify as to the results, did not violate the Confrontation Clause.[84] At issue was the testimony of Sandra Lambatos, an expert testifying on behalf of the State.[85] Lambatos relied on a DNA test performed by Cellmark, an independent laboratory charged with testing Williams' DNA.[86] Williams' DNA was tested because L.J., a victim of rape, received a vaginal swab and the police sent the swab to Cellmark for analysis.[87] At this time, Williams was not a suspect and Cellmark was not aware of his identity.[88] Moreover, the Cellmark report was never introduced into evidence.[89] Instead, it served as the basis for Lambatos' expert, opinion that Williams' DNA matched the DNA found in L.J.[90] Therefore, the plurality held that the focus of the testimony concerning the report did not go to the

77. *Id.*

78. *Id.* (Sotomayor, J., concurring in part).

79. *Id.*

80. *Id.*

81. *Id.; see also* Thomas C. Frongillo et. al., *The Reinvigorated Confrontation Clause: A New Basis to Challenge the Admission of Evidence From Nontestifying Forensic Experts in White Collar Prosecutions*, 81 DEF. COUNSEL J. 11, 11–31 (2014).

82. 132 S. Ct. 2221 (2012).

83. *Id.* at 2240–43, 2255.

84. *Id.* at 2240, 2243 (representing scenario three suggested by Justice Sotomayor).

85. *Id.* at 2227–29.

86. *Id.* at 2227; *see also* Katelyn Carr, *Constitutional Law — Confrontation Clause — Expert Testimony on Non-Testifying Analyst's DNA Report is Non-Testimonial and Does Not Violate the Confrontation Clause, but Supreme Court Fails to Define "Testimonial,"* 43 CUMB. L. REV. 361 (2013) (discussing the holding of Williams v. Illinois).

87. *Williams*, 132 S.Ct. at 2229.

88. *Id.*

89. *Id.* at 2229–30.

90. *Id.* at 2232, 2234 ("Modern rules of evidence continue to permit experts to express opinions based on facts about which they lack personal knowledge, but these rules dispense with the need for hypothetical questions."); *see also* FED. R. EVID. 703.

truth of the matter asserted, but instead to the opinion of the expert, to which the Confrontation Clause does not apply.[91]

Moreover, the plurality held that even if the report had been admitted, it would not have violated the Confrontation Clause because, as noted above, the report was not prepared for use at trial in order to prove that Williams was guilty of rape.[92] However, Justice Thomas opined that the report was non-testimonial because it lacked the "solemnity of an affidavit or deposition" to be relied upon in court.[93] Despite Justice Thomas' disagreement with the plurality's analysis, *Williams* holds that a qualified expert may testify to provide an independent opinion on otherwise inadmissible out-of-court statements in specific situations where the defendant has an opportunity to cross-examine the expert.[94]

In 2013, the North Carolina Supreme Court faced a similar situation to that discussed in *Whittington II*.[95] In *State v. Ortiz-Zape*[96], the State charged Ortiz-Zape with "possession with intent to sell or deliver cocaine."[97] Ortiz-Zape objected to the testimony of Tracey Ray (Ray), an expert in forensic chemistry at the Charlotte Mecklenburg Police Department (CMPD), on Sixth Amendment grounds because she did not perform the tests or assist with the report.[98] Jennifer Mills (Mills), an analyst who left the CMPD two years prior to Ray's employment with the lab,[99] conducted the original tests and prepared the corresponding report.[100] The trial court excluded the actual report, but permitted Ray to testify as to her background, her experience, her education, the practices and procedures of the lab, her review of the tests performed, and her independent opinion of the tests.[101] Ultimately, Ray's testimony was permitted under Rules 702 and 703 of the North Carolina Rules of Evidence.[102]

The Court of Appeals reversed *Ortiz-Zape*, holding that it was error for Ray to testify because she was not present at the time the tests were con-

91. *Id.* at 2235.

92. *Id.* at 2242–43.

93. *Id.* at 2260 (Thomas J., concurring); *see also* Carr, *supra* note 86, at 364 (discussing the holding of Williams v. Illinois).

94. *See* State v. Ortiz-Zape, 743 S.E.2d 156, 161 (N.C. 2013).

95. 753 S.E.2d 320, 321 (N.C. 2014).

96. 743 S.E.2d 156 (N.C. 2013).

97. *Id.* at 158.

98. *Id.*

99. *Id.* at 168 (Hudson, J., dissenting).

100. *Id.* at 158 (majority opinion).

101. *Id.* at 163.

102. *Id.* at 159; *see also* N.C. R. EVID. 702(a) (stating that expert opinion testimony is permissible if it assists the triers of fact to understand the evidence or to determine a fact in issue provided that, "(1) The testimony is based upon sufficient facts or data[;] (2) The testimony is the product of reliable principles and methods [and] (3) The witness has applied the principles and methods reliably to the facts of the case.").

ducted and she was unable to provide her own testimony as to the identity of the substance tested.[103] On appeal, the North Carolina Supreme Court reversed, holding that the trial court did not violate Ortiz-Zape's rights when it allowed Ray to testify.[104] The State argued that Ray was merely testifying as to her own opinion, which did not constitute a testimonial statement or hearsay.[105] Further, the State argued that the defendant had every opportunity to cross-examine his accuser and offer ample evidence against Ray at trial.[106] Ortiz-Zape, however, argued that Ray's testimony was inadmissible because she did not perform the test or observe the tests performed in the lab.[107]

The North Carolina Supreme Court agreed with the State, holding that Ray was the accuser whom Ortiz-Zape could cross-examine.[108] The Court, relying on the precedent established in *Bullcoming* and *Williams*, as well as Rule 703 of the North Carolina Rules of Evidence, held that an expert could testify about the results of machine-generated raw data so long as the expert relied on such data in forming an opinion.[109] The Court emphasized that the expert must offer his or her own opinion and not just read the report.[110] The majority applied a harmless error standard and found that even if Ray's testimony violated the Confrontation Clause, such a result was harmless.[111] The Court reasoned that because the arresting officer testified that Ortiz-Zape admitted to owning the substance found in his car, any testimony offered by Ray was harmless and the jury could have still convicted Ortiz-Zape.[112] While such a holding was proper under a harmless error standard, it left attorneys without clear guidance on what constituted a violation of the Confrontation Clause.

Justice Hudson delivered a scathing dissent, calling into question the majority's holding and its interpretation of the Confrontation Clause based on the Supreme Court's recent precedent.[113] According to Justice Hudson, Ray's testimony constituted surrogate testimony, and thus violated the Confrontation Clause.[114] More specifically, given that Mills, not Ray, conducted the tests and authored the report, Justice Hudson concluded that Ray's tes-

103. *Ortiz-Zape*, 743 S.E.2d. at 159.
104. *Id.* (relying on the plurality decision reached in Williams v. Illinois).
105. *Id.*
106. *Id.* at 164.
107. *Id.* at 163.
108. *Id.* (citing State v. Fair, 557 S.E.2d 500, 522 (N.C. 2001)).
109. *Id.* at 162.
110. *Id.* (citing Bullcoming v. New Mexico, 131 S. Ct. 2705, 2710 (2011)).
111. *Id.* at 164.
112. *Id.* at 164–65.
113. *Id.* at 165 (Hudson, J., dissenting).
114. *Id.* at 167–68 ("Were there any indication in the record that Agent Ray did 'independent analysis,' I could perhaps agree with the majority.").

timony did not hold Mills responsible for her actions under cross-examination.[115] Justice Hudson also emphasized that while Ortiz-Zape confronted Ray during cross-examination, Ray's testimony itself was incomplete and lacked proper foundational knowledge, such as how the tests were completed and the steps taken by Mills because Ray was never present to witness such acts.[116]

IV. ANALYSIS

The holding in *Whittington II* raises concerns about pre-trial notice to introduce evidence and whether a defendant's rights under the Confrontation Clause are violated through the use of notice-and-demand statutes. Under North Carolina's notice-and-demand statute, Whittington had sufficient notice and opportunity to object to the evidence presented at trial.[117] Thus, while Whittington incorrectly argued that the statute was unconstitutional based on *Melendez-Diaz*,[118] he still had the opportunity to object at trial and failed to raise a proper constitutional issue.[119] Therefore, it is inconsequential that Whittington never received the actual report from the State. Moreover, while Justice Hudson's position that the State must present the actual report in order to remain compliant with the statute may be valid, such an issue was not before the Court.[120]

Support for the majority decision is twofold. First, the statute served its purpose of putting Whittington on notice.[121] Second, it is unclear how the test that determined the pills to be Oxycodone was performed. Assuming *arguendo* that the report was machine-generated, the State could have introduced the report without the analyst present to testify, even if Whittington raised a timely objection.[122]

Moving forward from *Whittington II*, the use of notice-and-demand statutes will serve a practical purpose for the criminal justice system. Given the limited resources of the judicial system and the constraints on state budg-

115. *Id.* at 169.

116. *Id.*

117. *Whittington II*, 753 S.E.2d 320, 324 (N.C. 2014).

118. *Id.* (Defendant argued that Melendez-Diaz v. Massachusetts held notice-and-demand statutes unconstitutional).

119. *Id.*

120. *See Whittington II*, 753 S.E.2d at 323–324 (considering two issues: whether N.C. Gen. Stat. § 90-95(g) was still good law after the Supreme Court's holding in *Melendez-Diaz*, and whether Whittington properly preserved the notice and waiver issue.).

121. *Id.*

122. State v. Ortiz-Zape, 743 S.E.2d 156, 160–161 (N.C. 2013) (citing Williams v. Illinois, 132 S. Ct. 2221, 2240–43 (2012)).

ets,[123] it is unrealistic for every analyst to be called into court to testify.[124] Such a result would likely produce a serious strain on the justice system and create large backlogs of work for analysts to complete.[125] Additionally, a defendant could lose her right to a fast and speedy trial.[126] Instead, a defendant could find herself waiting months for an analyst to complete the results of laboratory analysis and still choose not to call the analyst to testify.[127] Given the detrimental effects in the absence of notice-and-demand statutes, states like North Carolina are not only upholding the best interests of the defendant, but are also ensuring a more efficient system of adjudication. Therefore, Justice Kennedy's argument in *Melendez-Diaz* missed the mark.[128] The issue is not whether the defendant knew or had the opportunity to prepare for trial.[129] Instead, the issue is whether guarantees were in place for criminal defendants to exercise their constitutional right to confront their accuser at trial. Furthermore, the implementation of notice-and-demand statutes satisfies both sides by allowing a defendant to call an analyst to court or to waive the right and prevent calling numerous analysts to the stand.[130]

Moreover, given the decisions reached in *Ortiz-Zape* and *Whittington II*, it is unlikely that the concerns raised by Justice Kennedy would ever come to fruition.[131] Instead, the rulings issued in *Ortiz-Zape* and *Whittington II* indicate that such a result is not likely to occur. Furthermore, Rule 703 of the North Carolina Rules of Evidence provides further discretion for the State by allowing it to call an expert who relies on his or her own independent opinion about the facts in dispute, or relies on machine-generated raw data.[132] Such an expert could be a laboratory supervisor who is competent to testify about the procedures and practices of the lab or the qualifications of the analyst(s) involved in the testing process.

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123. *See generally* Melendez-Diaz v. Massachusetts, 557 U.S. 305, 341 (2009) (Kennedy, J., dissenting) (arguing that the majority's decision would create increased costs for states prosecuting drug offenses).

124. *Id.*

125. *Id.*

126. *Id.* at 325 n.10 (majority opinion).

127. *Id.*

128. *Id.* at 343 (Kennedy, J., dissenting) ("The Court's holding is a windfall to defendants, one that is unjustified by any demonstrated deficiency in trials, any well-understood historical requirement, or any established constitutional precedent.").

129. *Id.* at 341.

130. *Id.* at 325 n.10 (majority opinion).

131. *Id.* at 340–342 (Kennedy, J., dissenting) (Justice Kennedy opined that the majority's opinion would result in increased costs for criminal trials, that it would require increased trial preparation, and that it would result in calling all analysts that contributed to the report to testify and be subject to cross-examination in order to satisfy the Confrontation Clause.).

132. *See Williams*, 132 S. Ct. at 2228; *see also* N.C. R. EVID. 703.

Such testimony simultaneously solves three problems. First, by allowing the laboratory supervisor to testify, the limited resources of the state judicial system are conserved. Second, only one analyst will be called to testify at court, which will prevent the otherwise inevitable backlog of cases from occurring. Most importantly, the defendant is still given the opportunity to confront her accuser.

Admittedly, the supervisor is not the analyst who conducted the tests. However, there is nothing in place preventing laboratories from implementing greater quality control standards that ensure analysts follow all steps and procedures. Such steps could allow a supervisor to see the completed work product of every analyst involved in the process from beginning to end.

V. CONCLUSION

As the interpretation of the Confrontation Clause continues to evolve, North Carolina is already ahead of other states without a notice-and-demand statute in place. A careful reading of *Melendez-Diaz* clearly places the burden on the defendant to object, and further states that notice-and-demand statutes, such as N.C. Gen. Stat. § 90-95(g), are constitutional.[133] Despite strong dissents in both *Ortiz-Zape* and *Whittington II* arguing to the contrary, defendants are still allowed sufficient opportunities to object to the presentation of evidence and, thus, enabled to confront their accusers at trial. Therefore, the rights guaranteed under the Sixth Amendment are preserved and the rights of the criminally accused are still protected.

133. *Melendez-Diaz*, 557 U.S at 324–327.

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