The NC Supreme Court's Recent Substitute Analyst Cases

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If you're on my listserv, you know that the NC Supreme Court recently issued several confrontation clause decisions, all dealing with substitute analysts (if you're not on my listserv, you can sign up here for my case summaries). I've previously written (here) about *Williams v. Illinois*, the US Supreme Court's most recent confrontation decision on substitute analyst testimony. Because *Williams* was a fractured opinion in which no rationale garnered five votes, it left judges and litigants largely in the dark about the constitutionality of substitute analyst testimony. And this is a big deal. In a state as geographically large as NC and in tough budget times, getting the testing analyst to court is no easy matter, and in some cases impossible. In its most recent decisions the NC Supreme Court weighed in, with prosecution-pleasing results. Below I summarize my main take-away points from these cases. But here's a cautionary note: While these cases are the law in NC, the final word from the US Supreme Court is still to come. Smart defenders will make objections at trial, thus preserving the issue.

1. Substitute analyst testimony is OK if the expert testifies to an independent opinion based on information reasonably relied upon by experts in the field. This was the holding of *State v. Ortiz-Zape*, __ N.C. __ (June 27, 2013), a cocaine drug case. Over the defendant's objection, the trial court allowed the State's expert witness, Tracey Ray of the CMPD crime lab to testify about the lab's practices and procedures, her review of the testing in the case, and her opinion that the substance at issue was cocaine. Ray was not involved in the actual testing of the substance at issue; her opinion was based on tests done by a non-testifying analyst. The trial court excluded the non-testifying analyst's report under Rule 403. The defendant was convicted and appealed. The NC Supreme Court upheld the conviction, finding that no confrontation clause violation occurred. It explained:

[W]hen an expert gives an opinion, [i]t is the expert opinion itself, not its underlying factual basis, that constitutes substantive evidence. Therefore, when an expert gives an opinion, the expert is the witness whom the defendant has the right to confront. In such cases, the Confrontation Clause is satisfied if the defendant has the opportunity to fully cross-examine the expert witness who testifies against him, allowing the factfinder to understand the basis for the expert's opinion and to determine whether that opinion should be found credible. Accordingly, 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, slip op. at 12-13 (quotations and citations omitted). *State v. Brewington*, __ N.C. __ (June 27, 2013), another cocaine case, followed *Ortiz-Zape* and found no error where the testifying expert gave an independent opinion. A third decision, *State v. Hurt,* __ N.C. __ (June 27, 2013), applied *Ortiz-Zape* to a case involving substitute analysts in serology and DNA.

2. The State must lay a proper foundation for substitute analyst testimony. The *Ortiz-Zape* court found that the prosecutor had laid a proper foundation for Ray's testimony. Specifically, that the information she relied upon—the tests done by the non-testifying analyst—was reasonably relied upon by experts in the field and that Ray was asserting her own independent opinion. *Ortiz-Zape*, slip op. at 18. In a footnote it elaborated on the foundational requirements: "[W]e suggest that prosecutors err on the side of laying a foundation that establishes compliance with Rule of Evidence 703, as well as the lab's standard procedures, whether the testifying analyst observed or participated in the initial laboratory

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testing, what independent analysis the testifying analyst conducted to reach her opinion, and any assumptions upon which the testifying analyst's testimony relies." *Ortiz-Zape,* slip op. at 19 n.3.

3. "Surrogate" testimony isn't OK. This was the holding of *State v. Craven*, __ N.C. __ (June 27, 2013), another cocaine drug prosecution. In that case, the testifying expert was asked whether she agreed with non-testifying analysts' conclusions in two lab reports. When she replied in the affirmative, she was asked what the non-testifying analysts' conclusions were and the underlying reports were introduced into evidence. In *Craven* the court concluded that the substitute analyst did not offer an independent opinion regarding the identity of the substance but rather was merely a surrogate who "parroted" the conclusions of the non-testifying analysts. *Craven*, slip op. at 8. This, the court held, is impermissible. *See also Ortiz-Zape,* slip op. at 13 (expert must present an independent opinion and "not merely 'surrogate testimony' parroting otherwise inadmissible statements"); *Brewington,* slip op. at 5 (expert gave an independent opinion, not "mere surrogate testimony").

4. A defendant's admission that the substance is a controlled substance may be sufficient evidence for conviction. This conclusion is suggested by two of the cases. First, in *State v. Williams,* __ N.C. __ (June 27, 2013), a cocaine drug case, the court held that even if a confrontation clause error occurred with regard to the substitute analyst's testimony, it was harmless beyond a reasonable doubt because the defendant testified that the substance at issue was cocaine. Slip op. at 8. In *Ortiz-Zape*, the court found that any possible confrontation error was harmless, noting in part that the defendant told the arresting officer that the substance was cocaine. *Ortiz-Zape*, slip op. at 21. In retrospect, the court's decision in *State v. Nabors* (discussed here) may have hinted at this result.

5. "Machine-generated" raw data likely will be non-testimonial. The *Ortiz-Zape* court stated in dicta that "machine-generated raw data," such as a printout from a gas chromatograph, is non-testimonial. *Ortiz-Zape*, slip op. at 14. As a result, the court suggested, if such data is reasonably relied upon by experts in the field, this information may be disclosed at trial. *Id.* at 15. Note however that a non-testifying analyst's *opinion* based on machine-generated data is testimonial. *Craven*, slip op. at 8. Thus while the raw data may be admissible, the non-testifying analyst's conclusion based on that data is not. *Id.*

Those are my main take away points. If you have others, please weigh in.

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