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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DEFENDANT-APPELLANT’S BRIEF

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**INDEX**

TABLE OF AUTHORITIES iii

# ISSUES PRESENTED 1

STATEMENT OF THE CASE 2

STATEMENT OF THE GROUNDS FOR APPELLATE REVIEW 2

STATEMENT OF THE FACTS 3

ARGUMENT 6

I. The trial court committed plain error and violated Mr. Price’s state and federal rights to confrontation by allowing Mr. Cruz-Quinones to identify the substance Mr. Price possessed as methamphetamine because Mr. Cruz-Quinones did not form an independent opinion about the identity of the substance 6

* 1. Standard of review 7
	2. Mr. Cruz-Quinones based his identification of the substance on the analysis of a non-testifying analyst 7

C. A new trial is required 15

II. The trial court committed plain error and violated Evidence Rule 702 by admitting Mr. Cruz-Quinones’s opinion that the substance in this case was methamphetamine because his opinion was not based upon sufficient facts or data, and the evidence did not establish that he applied principles and methods reliably to the facts of the case 17

* 1. Standard of review 18
	2. Mr. Cruz-Quinones’s testimony did not satisfy the rigorous standards of Evidence Rule 702 18
	3. A new trial is required 22

# CONCLUSION 25

CERTIFICATE OF COMPLIANCE WITH RULE 28(j) 27

CERTIFICATE OF SERVICE 27

# TABLE OF AUTHORITIES

Cases

*Barnes v. North Carolina State Highway Com.*,

 250 N.C. 378 (1959) 7

*Bullcoming v. New Mexico*,

 564 U.S. 647 (2011) 8

*Burns v. United States*,

 235 A.3d 758 (D.C. 2020) 15

*Commonwealth v. Yohe*,

 621 Pa. 527 (Penn. 2013) 9

*Crawford v. Washington*,

 541 U.S. 36 (2004) 8

*Daubert v. Merrell Dow Pharm., Inc.*,

 509 U.S. 579 (1993) 19

*Grim v. State*,

 102 So. 3d 1073 (Miss. 2012) 9

*Jailall v. N.C. Dep’t of Pub. Instruction*,

 196 N.C. App. 90 (2009) 24

*Marshall v. People*,

 309 P.3d 943 (Colo. 2013) 9

*Melendez-Diaz v. Massachusetts*,

 557 U.S. 305 (2009) 8

*People v. Gomez*,

 596 P.2d 1192 (Colo. 1979) 12, 21

*Pointer v. Texas*,

 380 U.S. 400 (1965) 7

*Santen v. Tuthill*,

 578 S.E.2d 788 (Va. 2003) 21

*State v. Brent*,

 367 N.C. 73 (2013) 7, 10, 11, 13

*State v. Brewington*,

 367 N.C. 29 (2013) 11, 12

*State v. Campbell*,

 2022-NCCOA-627 23, 25

*State v. Cao*,

 175 N.C. App. 434 (2006) 7

*State v. Coria*,

 131 N.C. App. 449 (1998) 24

*State v. Craven*,

 367 N.C. 51 (2013) 11, 12, 15

*State v. Daughtridge*,

 248 N.C. App. 707 (2016) 19

*State v. Dean*,

 196 N.C. App. 180 (2009) 24

*State v. Delsanto*,

 172 N.C. App. 42 (2005) 23

*State v. Helms*,

 348 N.C. 578 (1998) 16

*State v. Hunt*,

 250 N.C. App. 238 (2016) 18

*State v. Jones*,

 157 N.C. App. 472 (2003) 17

*State v. Koiyan*,

 270 N.C. App. 792 (2020) 18

*State v. Lawrence*,

 365 N.C. 506 (2012) 7, 18, 23

*State v. McDonald*,

 216 N.C. App. 161 (2011) 21

*State v. McGrady*,

 368 N.C. 880 (2016) 19

*State v. Medicine Eagle*,

 835 N.W.2d 886 (S.D. 2013) 9

*State v. Ortiz-Zape*,

 367 N.C. 1 (2013) 10, 13

*State v. Piland*,

 263 N.C. App. 323 (2018) 23, 25

*State v. Sasek*,

 271 N.C. App. 568 (2020) 21, 22, 23, 25

*State v. Towe*,

 366 N.C. 56 (2012) 15, 22

*State v. Ward*,

 364 N.C. 133 (2010) 16, 20

*State v. Workman*,

 122 P.3d 639 (Utah 2005) 20

*Williams v. Illinois*,

 567 U.S. 50 (2012) 8

Constitutional Provisions

N.C. Const. Art. I, § 23 7

U.S. Const. Amend. VI 7

Statutes

N.C. Gen. Stat. § 7A-27(b) 2

N.C. Gen. Stat. § 15A-1444(a) 2

N.C. Gen. Stat. § 90-90(3) 16, 19

**Other Authorities**

N.C. R. Evid. 702 17, 18, 19, 20, 21

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DEFENDANT-APPELLANT’S BRIEF

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# ISSUES PRESENTED

1. Did the trial court commit plain error and violate Mr. Price’s state and federal rights to confrontation by allowing Mr. Cruz-Quinones to identify the substance Mr. Price possessed as methamphetamine because Mr. Cruz-Quinones did not form an independent opinion about the identity of the substance?
2. Did the trial court commit plain error and violate Evidence Rule 702 by admitting Mr. Cruz-Quinones’s opinion that the substance in this case was methamphetamine because his opinion was not based upon sufficient facts or data, and the evidence did not establish that he applied principles and methods reliably to the facts of the case?

**STATEMENT OF THE CASE**

On 17 February 2020, a Cleveland County grand jury indicted Robert Price for possession of methamphetamine with intent to sell or deliver, sale or delivery of methamphetamine, and attaining habitual felon status. (R pp 5-8) The State tried the case before a jury during the 11 April 2022 Criminal Session of Cleveland County Superior Court, the Honorable Gregory Hayes presiding. At the conclusion of the trial, the jury acquitted Mr. Price of possession of methamphetamine with intent to sell or deliver, but found him guilty of sale or delivery of methamphetamine. (R pp 30-31) Mr. Price then admitted his status as an habitual felon. (R pp 32-35) After, Judge Hayes sentenced Mr. Price to 110-144 months in prison. (R pp 38-39) Mr. Price appealed. (R pp 40-41)

**STATEMENT OF THE GROUNDS FOR APPELLATE REVIEW**

 Mr. Price appeals pursuant to N.C. Gen. Stat. §§ 7A-27(b) and 15A-1444(a) from a final judgment entered in Cleveland County Superior Court. The defense attorney gave oral notice of appeal after Mr. Price pled guilty to the habitual felon charge, but before the trial court entered judgment. (T pp 221-22) Thus, undersigned counsel has filed a petition for writ of certiorari contemporaneously with this brief in the event this Court determines that the defense attorney failed to comply with Appellate Rule 4.

**STATEMENT OF THE FACTS**

On 8 January 2020, two narcotics investigators for the Cleveland County Sherriff’s Office set up a controlled drug buy with Andrew Owens, a confidential informant. (T p 22) That day, they met Owens behind an old Wal-Mart and gave him $100. Owens was then supposed to purchase 3.5 grams of methamphetamine from Mr. Price. (T pp 22, 29, 130)

The investigators followed Owens to a neighborhood and parked by a house nearby to conduct surveillance. Owens pulled into a driveway and Mr. Price walked up to the car. Owens gave $100 to Mr. Price and Mr. Price gave Owens a clear plastic bag. (T pp 32, 131-32) The bag contained a “crystal-like substance.” (T p 33)

Investigators sent the bag with the crystal substance to the State Crime Lab. (T pp 47, 99) On 12 April 2022 – the day before Mr. Price’s trial began – the prosecutor filed a notice stating that she planned to call Miguel Cruz-Quinones, a forensic scientist at the Crime Lab, as an expert witness and that she expected him to provide an “independent opinion” that the crystal substance was methamphetamine. (R Add pp 2-7)

The following day, the State called Mr. Cruz-Quinones to testify at Mr. Price’s trial. He testified that his “coworker Mrs. Reagan” was “the analyst of the evidence in this case.” (T p 99) However, he explained that the Crime Lab sent him “as a substitute witness” and that he reviewed the case file “this morning.” (T p 99) The case file contained Mrs. Reagan’s data and notes. (T p 99)

Mr. Cruz-Quinones testified that Mrs. Reagan performed a color test on the substance and that she “reported an orange color, which is a positive reaction.” (T p 100) According to Mr. Cruz-Quinones, the color orange indicated the presence of “phenethylamines,” which is “type of chemical compound” that includes methamphetamine. (T p 100) Mr. Cruz-Quinones also described the infrared spectrometer test. He explained that an infrared spectrometer is an instrument that “shines very specific wavelengths of infrared light directly to the sample and will generate a spectrum, or a graph.” (T p 100) After, analysts can visually compare the spectrum with “known reference standards” and identify the substance. (T pp 100-01)

Mr. Cruz-Quinones did not describe the results of the infrared spectrometer test that Mrs. Reagan performed. Instead, he next testified that the weight of the substance as reported by Mrs. Reagan was “3.55 plus/minus 0.06 grams.” (T p 101) He then testified that “after reviewing the case file and based on the results that – the analysis performed by Mrs. Reagan, [he] reached the same conclusion, the same opinion that Mrs. Reagan has,” which was that “the one plastic bag corner that was analyzed that it was found to contain methamphetamine, which is a Schedule II controlled substance in North Carolina, and the net weight of the material was 3.55 plus/minus 0.06 grams.” (T p 102)

The jury began deliberations at 12:28 p.m. on the second day of trial. (T p 189) Shortly after deliberations began, the jury asked to see a video of the drug buy, which the court permitted. (R p 21, T pp 189-194) Later, at 2:31 p.m., the jury asked whether they were supposed to decide Mr. Price’s guilt on two separate offenses, or a greater offense and a lesser offense. (R p 22) The court explained that the possession of methamphetamine charge contained a greater offense and a lesser offense. (T p 198)

At around 3:05 p.m., the jury sent a note saying, “We are hung on both charges. Intent is not guilty 12 to 0, but possession is tied. To selling and deliver, we are 6/4/2.” (R p 25) In response, the court gave the jurors an *Allen* charge, instructing them in part to “deliberate with a view towards reaching an agreement, if it can be done without violence to individual judgment.” (T pp 200-01) The jury then twice asked to see the video again. (R pp 28-29) The court allowed the requests, but stated to the attorneys after the second request, “They’re getting frustrated with each other . . . .” (T p 205) At 4:19 p.m., the jury returned verdicts finding Mr. Price guilty of sale and delivery of methamphetamine, but not guilty of the possession of methamphetamine charge. (R pp 30-31, T pp 210)

**ARGUMENT**

1. **The trial court committed plain error and violated Mr. Price’s state and federal rights to confrontation by allowing Mr. Cruz-Quinones to identify the substance Mr. Price possessed as methamphetamine because Mr. Cruz-Quinones did not form an independent opinion about the identity of the substance.**

This case should be remanded for a new trial because the trial court improperly admitted surrogate testimony about the identity of the substance at issue in this case. Mr. Cruz-Quinones did not test the substance himself and acknowledged that the conclusion he drew about the substance was based on the analysis performed by a non-testifying analyst. Further, the State failed to establish that Mr. Cruz-Quinones developed an independent opinion obtained through his own analysis of the data generated when the substance was tested. In light of these circumstances, the admission of Mr. Cruz-Quinones’s testimony violated Mr. Price’s right to confrontation.

The violation prejudiced Mr. Price and constituted plain error because Mr. Cruz-Quinones’s inadmissible opinion testimony addressed the core question of whether the substance was illegal. That is, the State did not present any other evidence about the chemical make-up of the substance. Further, the jurors struggled to agree on a verdict, stating at one point during deliberations that they were “tied” on the possession charge and fractured on the sell and delivery charge. (R p 25, T p 199) Ultimately, the jury likely would not have convicted Mr. Price if the court had excluded Mr. Cruz-Quinones’s opinion. This case should therefore be remanded for a new trial.

* 1. **Standard of review.**

The defense attorney did not object to Mr. Cruz-Quinones’s testimony on confrontation grounds. Therefore, this issue should be reviewed for plain error. *State v. Brent*, 367 N.C. 73, 78 (2013) (holding that the defendant lost the opportunity for appellate review of a confrontation argument “by failing to allege plain error”); *State v. Cao*, 175 N.C. App. 434, 436-37 (2006) (reviewing confrontation argument for plain error). Plain error is error that had a probable impact on the jury’s verdict. *State v. Lawrence*, 365 N.C. 506, 518 (2012).

* 1. **Mr. Cruz-Quinones based his identification of the substance on the analysis of a non-testifying analyst.**

The Sixth Amendment to the United States Constitution and Article I, § 23 of the North Carolina Constitution guarantee the right to confrontation in criminal cases. Confrontation is “a fundamental right essential to a fair trial in a criminal prosecution.” *Pointer v. Texas*, 380 U.S. 400, 404 (1965). Indeed, the ability to cross-examine adverse witnesses is “[o]ne of the most jealously guarded rights in the administration of justice . . . .” *Barnes v. North Carolina State Highway Com.*, 250 N.C. 378, 394 (1959) (citation omitted). The right to confrontation requires that testimonial statements of a witness who is absent from trial may not be admitted unless (1) the declarant is unavailable and (2) the defendant had a prior opportunity to cross-examine the declarant. *Crawford v. Washington*, 541 U.S. 36, 59 (2004).

In *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 311 (2009), the United States Supreme Court held that forensic laboratory reports are testimonial and that, absent a stipulation, the State may not introduce such a report without an opportunity for the defendant to cross-examine the author. Then, in *Bullcoming v. New Mexico*, 564 U.S. 647, 663 (2011), the Court held that the State could not rely on surrogate testimony of an expert who did not conduct any analysis in the case to introduce a lab report into evidence.

In *Williams v. Illinois*, 567 U.S. 50 (2012), the Supreme Court considered the admissibility of evidence involving DNA testing. There, four analysts were involved in establishing that the defendant’s DNA matched DNA taken from swabs of the victim in a sexual assault case. At trial, three of the analysts testified. The fourth analyst – the one who produced a DNA profile from the swab taken from the victim – did not testify. In a plurality opinion, four justices concluded that the admission of the non-testifying analyst’s statements about the DNA profile through a surrogate analyst did not violate the defendant’s right to confrontation because the statements were not admitted for their truth or prepared for the primary purpose of proving any past events.

After *Williams*, appellate courts around the country carefully scrutinized the testimony of surrogate analysts. In *Grim v. State*, 102 So. 3d 1073, 1081 (Miss. 2012), the Supreme Court of Mississippi upheld the testimony of a surrogate analyst who was “actively involved” in the production of a lab report and had “intimate knowledge” of the analysis of a substance determined to be cocaine. In *State v. Medicine Eagle*, 835 N.W.2d 886, 898-902 (S.D. 2013), the Supreme Court of South Dakota affirmed the testimony of a surrogate analyst who “performed various steps of the [testing]” and “independently reviewed, analyzed, and compared the data obtained from the testing.”

Similarly, in *Commonwealth v. Yohe*, 621 Pa. 527, 542 (Penn. 2013), the Supreme Court of Pennsylvania upheld the testimony of a surrogate analyst who reviewed the “raw data contained in the test printouts, compared the results of the three tests, ensured that they supported each other, verified the correctness of the procedures as logged by the technicians, and certified and authored the Report.” Finally, in *Marshall v. People*, 309 P.3d 943, 947 (Colo. 2013), the Supreme Court of Colorado upheld the testimony of a surrogate analyst who “synthesized the tests performed by two different analysts to ensure that both had reached the same conclusion,” reviewed the data generated by instruments to “ensure that the controls show the instruments were working properly while they performed the tests,” and reviewed the non-testifying analysts’ notes to “conclude that they followed lab protocol throughout the testing process.”

During that same period, our Supreme Court considered the admissibility of surrogate testimony in four cases involving cocaine charges. In *State v. Ortiz-Zape*, 367 N.C. 1 (2013), the surrogate analyst who testified for the State said that she conducted a “peer review” of the chemical analysis that the non-testifying analyst performed on the substance. *Id*. at 12. To that end, she reviewed the “drug chemistry worksheet or the lab notes” that the non-testifying analyst prepared, the “data that came from the instrument” the non-testifying analyst used, and the “data that was still on the instrument.” *Id*. at 12-13. After reviewing all of these materials, she concluded that the substance was cocaine. *Id*. at 4. The Supreme Court held that the testimony of the surrogate analyst did not violate the defendant’s right to confrontation because the opinion she gave in court was based on her “own analysis of the data . . . .” *Id*. at 13. In reaching this conclusion, the Court stressed that “the expert must present an independent opinion obtained through his or her own analysis and not merely ‘surrogate testimony’ parroting otherwise inadmissible statements.” *Id*. at 9.

In *State v. Brent*, 367 N.C. 73 (2013), the State’s surrogate analyst testified that she reviewed “three machine-produced graphs showing the results of infrared scans” and determined that the substance at issue in the case was cocaine. The Supreme Court upheld the surrogate analyst’s testimony, holding that she developed “an independent opinion based on her analysis of data reasonably relied upon by experts in her field.” *Id*. at 77. The Court also upheld the testimony of the State’s surrogate analyst in *State v. Brewington*, 367 N.C. 29 (2013). There, the surrogate analyst based her opinion on her own review of the results of testing done by another analyst. *Id*. at 32. Specifically, the surrogate analyst reviewed notes indicating that the substance in the case “did not turn any color” on one color test. She also saw the results of a second color test, noting that “[i]t turned blue.” *Id*. at 35 (Beasley, J., dissenting). Additionally, the surrogate analyst reviewed two graphs produced by a separate instrument that the non-testifying analyst used on the substance. *Id*. at 36.

In contrast to *Ortiz-Zape*, *Brent*, and *Brewington*, the Supreme Court held in *State v. Craven*, 367 N.C. 51 (2013) that the State’s surrogate analyst did not develop an independent opinion. There, the surrogate analyst brought the non-testifying analyst’s report, as well as “notes and documentation,” to the defendant’s trial. *Id.* at 55. The surrogate analyst also testified that she reviewed the report and agreed with its conclusion that the substance was cocaine. *Id*. at 56. She also had the “underlying data” and lab report for a separate charge and agreed with the conclusion of the non-testifying analyst about the identity of that substance. *Id*. Our Supreme Court held that the surrogate analyst’s testimony violated the defendant’s right to confrontation because the surrogate analyst did not offer her own “independent analysis” of the substances and that she instead “parroted” the conclusions that non-testifying analysts drew from their analysis. *Id*. at 56-57.

Out of these four cases, this case most closely resembles *Craven*. That is, Mr. Cruz-Quinones’s involvement in Mr. Price’s case fell short of the work performed by the surrogate analysts in *Ortiz-Zape*, *Brent*, and *Brewington*. Mr. Cruz-Quinones stated that he reviewed Mrs. Reagan’s data and notes. (T p 99) However, the State did not establish that Mr. Cruz-Quinones carefully reviewed the data produced by the testing in this case to develop an independent opinion about the identity of the substance at issue in the case. For example, the surrogate analyst in *Brewington* determined that one of the color tests did not turn any color and directly reviewed the results of another color test to determine that the results were, in fact, blue. *Brewington*, 367 N.C. at 32. Reviewing the raw data from the color test is critical because “color tests are subjective” and an analyst’s conclusion that a color test indicates the presence of drugs “is dependent upon the accuracy of his observation.” *People v. Gomez*, 596 P.2d 1192, 1194 (Colo. 1979). In contrast to the surrogate analyst in *Brewington*, Mr. Cruz-Quinones did not review the results of the color test himself. Instead, he testified that his “coworker Mrs. Reagan reported an orange color” on the color test. (T p 100)

Additionally, while Mr. Cruz-Quinones described how the infrared spectrometer worked, (T p 100), he did not testify about any of the data produced by the infrared spectrometer for this case, whether he reviewed those data, or how he knew any data from the instrument indicated that the substance was methamphetamine. As described above, the surrogate analyst in *Brent* specifically testified that she directly reviewed graphs depicting the results of infrared scans. *Brent*, 367 N.C. at 77. By contrast, Mr. Cruz-Quinones made no such claims. He testified, for example, that the infrared spectrometer “shines very specific wavelengths of infrared light directly to the sample and will generate a spectrum, or a graph.” (T p 100) He also testified that after comparing that spectrum with “known reference standards,” an analyst “can identify the substance.” (T pp 100-01) However, at no point did he testify that he actually reviewed the spectrum produced for the substance in this case, that he compared that spectrum to any reference standards, or how he knew the spectrum produced by the infrared spectrometer indicated that the substance was methamphetamine.

In footnote 3 of the *Ortiz-Zape* opinion, our Supreme Court recommended 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 testing, what independent analysis the testifying analyst conducted to reach her opinion, and any assumptions upon which the testifying analyst’s testimony relies.” *Id*. at 13 n.3. Here, Mr. Cruz-Quinones talked generally about the lab’s procedures. However, his testimony indicated that he did not observe or participate in the laboratory testing for the substance in this case. He also did not describe what independent analysis he conducted to reach his opinion other than looking at Mrs. Reagan’s notes. And, finally, he did not describe any assumptions that he relied on to reach his conclusions.

Perhaps the most telling detail in this case is the timing of Mr. Cruz-Quinones’s review. On 12 April 2022, the day before Mr. Price’s trial, the prosecutor filed a notice stating that she expected Mr. Cruz-Quinones to testify about his “independent opinion” that the substance in this case was methamphetamine. (R Add pp 2-7) However, Mr. Cruz-Quinones had not even done any work on this case at the time. He testified the following day, on 13 April 2022. As he admitted in his testimony, he read Mrs. Reagan’s notes “this morning” – that is, on the morning he was set to testify against Mr. Price. (T p 99) Thus, the prosecutor understood that Mr. Cruz-Quinones would testify that he agreed with Mrs. Reagan’s analysis *even before Mr. Cruz-Quinones himself ever looked at Mrs. Reagan’s notes*. Further, reading a colleague’s notes for the first time on the day of trial provides little time for serious analysis, much less the formulation of a truly independent opinion.

Ultimately, Mr. Cruz-Quinones did not develop an independent opinion about the substance that was the subject of the controlled buy in this case. By his own admission, Mr. Cruz-Quinones concluded the substance was methamphetamine based on “the analysis performed *by Mrs. Reagan*.” (T p 102) (emphasis added). Indeed, he acknowledged that it was Mrs. Reagan who was “the analyst of the evidence in this case.” (T p 99) As explained in an amicus brief filed in this case, Mr. Cruz-Quinones could not “meaningfully testify to [Mrs. Reagan’s] specific knowledge and observations, or to the specific test or testing processes [she] employed.” Brief of Amicus Curiae, p. 11. To the extent that Mr. Cruz-Quinones had any opinion of the substance in this case, he was far more of a “transmitter” of Mrs. Reagan’s conclusions about the identity of the substance, *Burns v. United States*, 235 A.3d 758, 787 (D.C. 2020), and “merely parroted” her opinion to the jury, *Craven*, 367 N.C. at 56-57. The trial court therefore violated Mr. Price’s state and federal rights to confrontation by depriving him of an opportunity to cross-examine Mrs. Reagan – the individual who analyzed the substance in this case and identified it as methamphetamine.

* 1. **A new trial is required.**

To demonstrate prejudice under plain error review, the defendant must show that the error had a probable impact on the trial. *State v. Towe*, 366 N.C. 56, 64 (2012). Here, the admission of Mr. Cruz-Quinones’s testimony had a probable impact on the verdict for this case. The jurors in this case had difficulty reaching a verdict. They deliberated for approximately three hours. (T pp 187, 197, 209) During their deliberations, they sent a note to the judge explaining that they were “hung on both charges.” (R p 25, T p 199) As deliberations continued, the trial court remarked that the jurors were “frustrated with each other . . . .” (T p 205) Then, they returned a split verdict – not guilty of the possession of methamphetamine charge, but guilty of sale or delivery of methamphetamine. (R pp 30-31, T p 210)

Further, Mr. Cruz-Quinones’s testimony addressed the central fact in question at Mr. Price’s trial – the identity of the substance that he gave the informant. Methamphetamine is chemically-defined as a Schedule II controlled substance. N.C. Gen. Stat. § 90-90(3). Our Supreme Court has held that “some form of scientifically valid chemical analysis is required” to establish the identify of controlled substances. *State v. Ward*, 364 N.C. 133, 147 (2010). Further, it is well-known that juries tend to give “heightened credence” to “scientific evidence.” *State v. Helms*, 348 N.C. 578, 583 (1998).

Although the State presented testimony about the controlled buy, Mr. Cruz-Quinones’s testimony was the only evidence that purported to identify the chemical make-up of the substance. Had the court properly excluded Mr. Cruz-Quinones’s testimony, the jury likely would not have convicted Mr. Price of the sale and delivery of methamphetamine charge. Therefore, the erroneous admission of Mr. Cruz-Quinones’s testimony prejudiced Mr. Price, constituted plain error, and warrants a new trial. And because the judgment for Mr. Price’s conviction for sale or delivery of methamphetamine served as the basis for the habitual felon conviction, the habitual felon conviction must also be vacated. *State v. Jones*, 157 N.C. App. 472, 479 (2003).

1. **The trial court committed plain error and violated Evidence Rule 702 by admitting Mr. Cruz-Quinones’s opinion that the substance in this case was methamphetamine because his opinion was not based upon sufficient facts or data, and the evidence did not establish that he applied principles and methods reliably to the facts of the case.**

If this Court does not grant a new trial based on the violation of Mr. Price’s rights to confrontation, it should nevertheless grant a new trial because Mr. Cruz-Quinones’s opinion about the identity of the substance violated Rule 702 of the North Carolina Rules of Evidence. Mr. Cruz-Quinones’s opinion was not admissible under Rule 702 because it was not based on sufficient facts or data, and because he failed to establish that he applied principles and methods reliably to the facts of this case.

Further, the admission of his testimony prejudiced Mr. Price. Even with Mr. Cruz-Quinones’s testimony, the jury struggled to agree on the verdicts in this case and only convicted Mr. Price of one of the substantive charges. Had the court properly excluded Mr. Cruz-Quinones’s inadmissible opinion testimony – which was the only evidence of the chemical make-up of the substance – the jurors likely would have acquitted Mr. Price of sale and delivery of methamphetamine just as they did with the possession of methamphetamine charge. In other words, there is a reasonable probability that one or more jurors would not have agreed to convict Mr. Price of sale and delivery of methamphetamine had the court prevented the State from presenting Mr. Cruz-Quinones’s inadmissible opinion testimony to the jury. Therefore, the admission of Mr. Cruz-Quinones’s testimony constituted plain error and warrants a new trial on both the sale and delivery of methamphetamine and habitual felon charges.

* 1. **Standard of review.**

The defense attorney did not object to Mr. Cruz-Quinones’s testimony on the ground that it violated Rule 702 of the North Carolina Rules of Evidence. This Court should therefore review this argument for plain error. *State v. Koiyan*, 270 N.C. App. 792, 795 (2020). *See also* *State v. Hunt*, 250 N.C. App. 238, 246 (2016) (holding that an “unpreserved challenge to the performance of a trial court’s gatekeeping function in admitting opinion testimony in a criminal trial is subject to plain error review in North Carolina state courts”). Plain error is error that had a probable impact on the jury’s verdict. *State v. Lawrence*, 365 N.C. 506, 518 (2012).

* 1. **Mr. Cruz-Quinones’s testimony did not satisfy the rigorous standards of Evidence Rule 702.**

Evidence Rule 702 permits the testimony of expert witnesses who are qualified by “knowledge, skill, experience, training, or education.” However, the witness may not give an opinion unless “all of the following” apply:

(1) The testimony is based upon sufficient facts or data.

(2) The testimony is the product of reliable principles and methods.

(3) The witness has applied the principles and methods reliably to the facts of the case.

 By including these criteria in Rule 702, our General Assembly aligned the North Carolina Rules of Evidence with the Federal Rules of Evidence and formally adopted the standard for expert testimony under *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993). *State v. McGrady*, 368 N.C. 880, 884 (2016). Under *Daubert*, trial courts are obligated to ensure that “any and all scientific testimony or evidence admitted is not only relevant, but reliable.” *Daubert*, 509 U.S. at 589. In other words, trial courts “must now perform a more rigorous gatekeeping function when determining the admissibility of opinion testimony by expert witnesses than was the case under the prior version of Rule 702.” *State v. Daughtridge*, 248 N.C. App. 707, 722 (2016).

Applying the *Daubert* standard for expert testimony in criminal cases involving drugs is critical because most controlled substances – like methamphetamine – are chemically-defined by statute. *See, e.g.,* N.C. Gen. Stat. § 90-90(3) (including “[a]ny material, compound, mixture, or preparation which contains any quantity” of “[m]ethamphetamine, including its salts, isomers, and salts of isomers” in Schedule II of the North Carolina Controlled Substances Act). As explained by our Supreme Court, “chemical analysis” is essential to “accurately identify controlled substances before the criminal penalties” of North Carolina law can be imposed. *State v. Ward*, 364 N.C. 133, 143 (2010).

Here, Mr. Cruz-Quinones’s identification of the substance at issue in this case as methamphetamine was not admissible because it did not satisfy the level of rigor now required under Rule 702. Specifically, his opinion testimony did not satisfy the first and third criteria under Rule 702.

Take the first criterion under Rule 702: To be admissible, opinion testimony must be supported by sufficient facts or data. With respect to the color test, Mr. Cruz-Quinones testified that Mrs. Reagan “reported an orange color” on the color test. (T p 100) That is, Mr. Cruz-Quinones himself did not see the results of the color test. His failure to review the results of the color test himself is significant for purposes of Rule 702 because color tests have a “significant subjective element.” *State v. Workman*, 122 P.3d 639, 643 (Utah 2005). Similarly, although Mr. Cruz-Quinones described how the infrared spectrometer test worked in general, he did not testify about how the test worked *in this case*. He did not testify, for example, that he reviewed the spectrum that the infrared spectrometer produced for the substance the informant gave to the officers or that he reviewed any reference standards for methamphetamine. Without evidence that Mr. Cruz-Quinones reviewed the results of the color test or the spectrum produced by the infrared spectrometer, or that he was familiar with the reference standard for methamphetamine, his opinion was not supported by sufficient facts or data.

Under the third criterion under Rule 702, the State must show that the witness applied principles and methods reliably to the facts of the case. In *State v. Sasek*, 271 N.C. App. 568, 574 (2020), this Court held that the trial court erred by admitting expert testimony that the substance at issue in the case was methamphetamine “without first requiring that she explain how she applied GCMS testing in this case.” The same is true here. As described above, Mr. Cruz-Quinones did not see the results of the color test himself. Because color tests are “dependent upon the accuracy” of the analyst’s observation, *People v. Gomez*, 596 P.2d 1192, 1194 (Colo. 1979), the trial court could not have concluded that Mr. Cruz-Quinones reliably applied any principles or methods involving the color test to the substance in this case.

Similarly, while Mr. Cruz-Quinones generally described how the infrared spectrometer works, he did not testify that the machine was properly calibrated or cleaned of any contaminants. *See Santen v. Tuthill*, 578 S.E.2d 788, 791 (Va. 2003) (upholding the exclusion of expert testimony about a preliminary breath test because “there was no evidence . . . that the machine . . . had been regularly calibrated”); *State v. McDonald*, 216 N.C. App. 161, 166 (2011) (upholding expert testimony that the substance in the case was cocaine in part because the expert testified about “the calibration of the equipment and the use of ‘blank’ samples to clean the instruments and prevent cross-contamination between samples of evidence”). Mr. Cruz-Quinones also did not explain how the infrared spectrometer helped him identify the substance in this case. He did not describe any spectrum that was produced by Mrs. Reagan for this case or testify that he himself reviewed any spectrum. He also did not testify that he compared the spectrum produced for the substance in this case to any reference standards. Ultimately, without any evidence on these issues, the court could not conclude that Mr. Cruz-Quinones applied principles and methods reliably to the facts of this case. *Sasek*, 271 N.C. App. at 574.

* 1. **A new trial is required.**

In order to warrant relief under the plain error standard of review, the defendant must show that the error had a probable impact on the trial. *State v. Towe*, 366 N.C. 56, 64 (2012). In this case, Mr. Cruz-Quinones’s testimony likely affected the outcome of Mr. Price’s trial. Even after Mr. Cruz-Quinones testified that the substance in this case was methamphetamine, the jury acquitted Mr. Price of the possession of methamphetamine charge. (R p 31) Had the court excluded his opinion testimony altogether, it is likely the jury would have acquitted Mr. Price of the sale or delivery of methamphetamine charge, as well. The State did not present any other evidence about the chemical make-up of the substance and, as the trial judge recognized, the jurors were deeply conflicted about the case. Thus, there is a reasonable probability the jury would not have found Mr. Price guilty of sale or delivery of methamphetamine if the court had kept Mr. Cruz-Quinones’s inadmissible opinion testimony out of the evidence.

Although Mr. Cruz-Quinones’s testimony affected the outcome of Mr. Price’s trial, this Court has held that improperly admitted expert opinion testimony about the identity of substances in a drug case did not constitute plain error because the State’s expert testified that she performed “chemical analysis” and then testified about “the results” of that analysis. *State v. Piland*, 263 N.C. App. 323, 340 (2018). This Court reached the same conclusion in *State v. Sasek*, 271 N.C. App. at 574 and *State v. Campbell*, 2022-NCCOA-627, ¶ 14. However, those cases contradict longstanding precedent on determining prejudice in cases involving plain error review.

When an appellate court examines the impact of an evidentiary error under plain error review, it must review the strength of the remaining evidence in the case. In other words, the question is whether a different outcome would have occurred in the *absence* of the erroneously admitted evidence. As our Supreme Court explained in *State v. Lawrence*, 365 N.C. 506, 519 (2012), when a defendant asserts plain error on appeal, he must show that, “absent the error, the jury probably would have returned a different verdict.” This Court has taken the same approach. In *State v. Delsanto*, 172 N.C. App. 42, 49 (2005), for example, this Court granted a new trial based on the improper admission of expert testimony because “[t]he State did not present other overwhelming evidence of defendant’s guilt.” Similarly, in *State v. Dean*, 196 N.C. App. 180, 195 (2009), this Court denied relief under plain error review because of the “non-objectionable evidence” presented against the defendant and because the “the challenged evidence did not tilt the scales and cause the jury to reach its verdict.”

It is well-settled that this Court must follow precedent from our Supreme Court, as well as prior decisions of this Court. *State v. Coria*, 131 N.C. App. 449, 456 (1998); *Jailall v. N.C. Dep’t of Pub. Instruction*, 196 N.C. App. 90, 98 (2009). *Piland*, *Sasek*, and *Campbell* violate decisions like *Lawrence*, *Delsanto*, and *Dean* regarding the way our courts analyze prejudice under the plain error standard of review. Under cases like *Lawrence*, *Delsanto*, and *Dean*, an appellate court cannot rely on evidence it has found to be erroneously admitted in determining whether the admission of that same evidence was prejudicial. This means that the State cannot rely on the results of any chemical analysis that occurred in this case to find that the admission of Mr. Cruz-Quinones’s opinion testimony about those same results was not prejudicial.

Even assuming *Piland*, *Sasek*, and *Campbell* were binding, the cases would *still* not apply to this case because they are distinguishable in one key respect. In each case, this Court held that inadmissible expert opinion testimony was harmless because the experts testified that they performed a “chemical analysis” and then described the results of the chemical analysis they performed. *Campbell*, 2022-NCCOA-627, ¶ 14; *Sasek*, 271 N.C. App. at 574; *Piland*, 263 N.C. App. at 339. Unlike the State’s witnesses in *Piland*, *Sasek*, and *Campbell*, Mr. Cruz-Quinones did not perform any chemical analysis on the substance in this case. By Mr. Cruz-Quinones’s own admission, his only involvement in the case was reviewing Mrs. Reagan’s work on the morning of Mr. Price’s trial. (T pp 100, 102) Thus, he did not provide the type of testimony that rendered the errors in *Piland*, *Sasek*, and *Campbell* harmless. Ultimately, because Mr. Cruz-Quinones’s testimony was inadmissible and prejudiced Mr. Price, Mr. Price’s convictions for sale or delivery of methamphetamine and attaining habitual felon status should be reversed.

# CONCLUSION

For the foregoing reasons, this Court should grant Mr. Price a new trial.

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

 (Electronically Submitted)

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**CERTIFICATE OF COMPLIANCE WITH RULE 28(j)**

I hereby certify that this brief is in compliance with Rule 28(j)(2) of the North Carolina Rules of Appellate Procedure and this Court’s 19 September 2022 order issued in this appeal in that it is printed in thirteen-point Century Schoolbook font and the body of the brief, including footnotes, citations, and PowerPoint slides included in the arguments, contains no more than 8,750 words as indicated by Microsoft Word, the program used to prepare the brief.

This the 27th day of February, 2023.

 (Electronically Submitted)

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**CERTIFICATE O****F SERVICE**

I certify that a copy of the foregoing brief has been served 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 brief to the following email address: cwhite@ncdoj.gov.

This, the 27th day of February, 2023.

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