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## Colorado's Undemanding Notice Requirement: Pro Se Defendants and Forensic Technician Testimony

### Keywords

Confrontation clause, Criminal law, Defendants, Evidence, Notice, Procedure, States, Testimony

## COLORADO'S UNDEMANDING NOTICE REQUIREMENT: PRO SE DEFENDANTS AND FORENSIC TECHNICIAN TESTIMONY

Sarah M. Morris and Lauren L. Fontana\*

*"The right of confrontation may not be dispensed with so lightly."*<sup>1</sup>

### I. INTRODUCTION

"Call my accuser before my face," Sir Walter Raleigh demanded, before his triers refused and sentenced him to death.<sup>2</sup> Raleigh's command, which criminal defendants have echoed since his 1603 trial, is of renewed relevance after a string of decisions by the United States Supreme Court, as well as continuing controversies debunking the accuracy and impartiality of forensic testing.

Since 2004's *Crawford v. Washington*,<sup>3</sup> the United States Supreme Court has transformed the scope of the Sixth Amendment's Confrontation Clause. One facet of this transformation has been the holding, in *Melendez-Diaz v. Massachusetts*,<sup>4</sup> that the Sixth Amendment is violated by the admission of forensic reports without the testimony of their authors.<sup>5</sup> In *Melendez-Diaz*, the Court determined that an accused's Sixth Amendment right to be confronted with the witnesses against him extends to laboratory analysts.<sup>6</sup> This express extension of the right of confrontation to forensic analysts is critical in an era

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<sup>1</sup> Barber v. Page, 390 U.S. 719, 725 (1968).

<sup>2</sup> 541 U.S. 36, 44 (2004) (citation omitted) (internal quotation marks omitted).

<sup>3</sup> *Id.*

<sup>4</sup> 557 U.S. 305 (2009).

<sup>5</sup> *Id.* at 310-11; *see also* Bullcoming v. New Mexico, 131 S. Ct. 2705, 2708 (2011) (determining that said confrontation right is not satisfied by surrogate technician testimony). *But see* Williams v. Illinois, 132 S. Ct. 2221, 2228 (2012) (plurality opinion) (concluding that Confrontation Clause was not violated by expert witness who testified as to DNA match of samples she had not herself tested).

<sup>6</sup> *Melendez-Diaz*, 557 U.S. at 347-48.

when “[s]erious deficiencies have been found in the forensic evidence used in criminal trials.”<sup>7</sup>

In the course of reaching its holding in *Melendez-Diaz*, the Court passed on the basic validity of state “notice-and-demand” statutes, which, it said:

[i]n their simplest form . . . 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.<sup>8</sup>

The decision specifically cited an opinion of the Colorado Supreme Court, *Hinojos-Mendoza v. People*,<sup>9</sup> but neither discussed the merits of that opinion nor passed on the constitutionality of the Colorado statute itself.<sup>10</sup> *Hinojos-Mendoza*, in turn, had upheld the constitutionality of Colorado's notice-and-demand statute, Colo. Rev. Stat. § 16-3-309(5), as to defendants represented by counsel, but expressly left open the constitutionality of the statute as applied to pro se defendants.<sup>11</sup>

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<sup>7</sup> *Id.* at 319; see, e.g., *id.* at 318-19 (documenting how “[f]orensic evidence is not uniquely immune from the risk of manipulation”); *United States v. Washington*, 498 F.3d 225, 235 (4th Cir. 2007) (Michael, J., dissenting) (“In one notorious case, a forensic serologist at the West Virginia Department of Public Safety falsified hundreds of forensic tests between 1979 and 1989.”); *Pierce v. Gilchrist*, 359 F.3d 1279, 1283-84 (10th Cir. 2004) (documenting misconduct of one Oklahoma forensic chemist across at least four criminal cases and two professional sanctions); Paul C. Giannelli, *Admissibility of Lab Reports: The Right of Confrontation Post-Crawford*, 19 CRIM. JUST. 26, 30 (2004) (“Anyone who would question the value of cross-examination in this context need only look at recent newspaper headlines.”); Pamela R. Metzger, *Cheating the Constitution*, 59 VAND. L. REV. 475, 491-500 (2006) (detailing the “[m]yth of [r]eliability” surrounding forensic evidence and describing scandals at Baltimore and Phoenix crime laboratories); Jennifer L. Mnookin, *Expert Evidence and the Confrontation Clause After Crawford v. Washington*, 15 J.L. & POL'Y 791, 843 n.86 (2007) (citing problems with DWI testing and with FBI laboratory results); U.S. DEP'T OF JUSTICE, OFFICE OF INSPECTOR GEN., THE FBI DNA LABORATORY: A REVIEW OF PROTOCOL AND PRACTICE VULNERABILITIES i-iii (2004) (reviewing protocol and practice vulnerabilities following discovery of misconduct by DNA analyst who, from 1988-2002, consistently failed to complete control tests in a majority of her cases and falsified laboratory documentation to cover it up); Jack Healy, *Colorado State Lab Accused of Mishandling Evidence*, N.Y. TIMES, June 10, 2013 (reporting how investigation revealed “problems including bias against defendants, inadequate training and flaws in the way evidence is stored at the lab”); Joseph Goldstein & Nina Bernstein, *Ex-Technician Denies Faulty DNA Work*, N.Y. TIMES, Jan. 11, 2013, at A15 (discussing New York City laboratory technician who missed and commingled biological evidence in rape cases); Nick Bunkley, *Detroit Police Lab Is Closed After Audit Finds Serious Errors in Many Cases*, N.Y. TIMES, Sept. 26, 2008, at A17 (reporting the closure of Detroit's crime laboratory after an “audit said sloppy work had probably resulted in wrongful convictions”); Denise Lavoie, *Ex-state Chemist Annie Dookhan Pleads Not Guilty; Faces 6 Charges of Obstruction*, BOSTON GLOBE, Jan. 31, 2013, at B2, B22 (documenting criminal charges against former state chemist accused of faking test results, who allegedly would add cocaine to samples and report results as positive without testing); Solomon Moore, *Science Found Wanting in Nation's Crime Labs*, N.Y. TIMES, Feb. 4, 2009, at A1 (describing National Academy of Sciences report containing “sweeping critique of many forensic methods that the police and prosecutors rely on, including fingerprinting, firearms identification and analysis of bite marks, blood spatter, hair and handwriting,” which was later cited in *Melendez-Diaz*); Campbell Robertson, *Questions Left for Mississippi Doctor After Thousands of Autopsies*, N.Y. TIMES, Jan. 7, 2013, <http://www.nytimes.com/2013/01/08/us/questions-for-mississippi-doctor-after-thousands-of-autopsies.html?pagewanted=2> (describing forensic pathologist who, between the late 1980s and late 2000s, misrepresented his qualifications and testified as to theories well beyond those standard in the field). In short, “[i]t is not difficult to find instances in which laboratory procedures have been abused.” *Williams*, 132 S. Ct. at 2250 (Breyer, J., concurring) (citation omitted).

<sup>8</sup> *Melendez-Diaz*, 557 U.S. at 326 (citation omitted).

<sup>9</sup> 169 P. 3d 662, 670 (Colo. 2007).

<sup>10</sup> *Melendez-Diaz*, 557 U.S. at 327 (citing *Hinojos-Mendoza v. People*, 169 P.3d 662, 670 (Colo. 2007)).

<sup>11</sup> *Hinojos-Mendoza*, 169 P.3d at 670 n.7. (“We offer no opinion on whether the analysis would be altered if *Hinojos-Mendoza* had been a pro se defendant.”).

This Article tackles the question that *Hinojos-Mendoza* left open. Section II reviews the United States Supreme Court's line of cases, beginning with the watershed case of *Crawford v. Washington*, redefining the reach of the Confrontation Clause to bar the admission of testimonial statements of an unavailable witness whom the defendant did not have a prior opportunity to cross-examine. Section III details the Colorado Supreme Court's three pronouncements on the constitutionality of Colorado's notice-and-demand statute, the last of which came after—but, this Article argues, does not follow—*Melendez-Diaz*. Section IV reviews, in the words of dissenting Colorado Supreme Court Justice Martinez, “the U.S. Supreme Court's steadfast refusal to presume waiver [of a fundamental constitutional right] from inaction.”<sup>12</sup> Section V adds a review of other state court decisions on the constitutionality or lack thereof of notice-and-demand statutes as enacted across the country. Section VI concludes that the way by which the statute waives an accused's constitutional right to confrontation renders the statute unconstitutional as applied to pro se defendants. In reaching that conclusion, this Article bears in mind the United States Supreme Court's admonition that “[t]he Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not still be done.”<sup>13</sup>

## II. “[W]HAT THE SIXTH AMENDMENT PRESCRIBES”<sup>14</sup>: *CRAWFORD V. WASHINGTON* AND ITS PROGENY

The Confrontation Clause of the Sixth Amendment to the United States Constitution, which extends to federal and state prosecutions,<sup>15</sup> guarantees a criminal defendant “the right . . . to be confronted with the witnesses against him.”<sup>16</sup> Until recently, courts held that the admission of an unavailable witness's testimony did not offend the Confrontation Clause if the testimony bore “adequate indicia of reliability.”<sup>17</sup> In a recent line of cases beginning with the watershed case of *Crawford v. Washington*, however, the United States Supreme Court rejected this method of analysis<sup>18</sup> and left in its place a holding that the Confrontation Clause is violated by the admission of testimonial statements of an unavailable witness whom the defendant did not have a prior opportunity to cross-examine.<sup>19</sup> This Section details *Crawford* and its relevant progeny, culminating in the most recent cases that apply *Crawford* to the testimony of laboratory technicians and analysts.<sup>20</sup>

<sup>12</sup> *Cropper v. People*, 251 P.3d 434, 442 (Colo. 2011) (en banc) (Martinez, J., dissenting) (citations omitted).

<sup>13</sup> *Johnson v. Zerbst*, 304 U.S. 458, 462 (1938), *overruled in part on other grounds by Edwards v. Arizona*, 451 U.S. 477 (1981) (citation and internal quotation marks omitted).

<sup>14</sup> *Crawford v. Washington*, 541 U.S. 36, 62 (2004).

<sup>15</sup> *Mendoza v. People*, 169 P.3d 662, 665 (Colo. 2007) (en banc) (citing *Pointer v. Texas*, 380 U.S. 400, 406 (1965)).

<sup>16</sup> U.S. CONST. amend. VI. The analogous provision of the Colorado Constitution guarantees a criminal defendant “the right . . . to meet the witnesses against him face to face.” COLO. CONST. art. II, § 16.

<sup>17</sup> *Crawford*, 541 U.S. at 40 (citing *Ohio v. Roberts*, 448 U.S. 56, 66 (1980)).

<sup>18</sup> *See id.* at 60-62 (characterizing the *Roberts* reliability test as “amorphous” and a “malleable standard [that] often fails to protect against paradigmatic confrontation violations”). The Court further described reliability as “a procedural rather than a substantive guarantee.” *Id.* at 61. According to the Court, the *Roberts* test, rather than ensuring that guarantee was realized, operated as “a surrogate means of assessing reliability.” *Id.* at 62.

<sup>19</sup> *Id.* at 68.

<sup>20</sup> Two cases in the *Crawford* line, *Michigan v. Bryant*, 131 S. Ct. 1143, 1150 (2011) (holding that murder victim's statements to police identifying defendant after he was shot but before he died were not testimonial because they were intended to help police resolve an ongoing emergency, and *Crawford* did not bar their admission); and *Giles v. California*, 554 U.S. 353, 355-56, 377 (2008) (holding that a murder victim's statements to police about the defendant three weeks before she was murdered were not admissible pursuant to *Crawford*

### A. *Crawford v. Washington: Redefining the Confrontation Clause's Protection*

In the watershed case of *Crawford v. Washington*, the United States Supreme Court announced a new test governing the scope of the Sixth Amendment's guarantee to the accused of the right to be confronted with the witnesses against him.<sup>21</sup> Tracing the confrontation right to Roman times, the Court drew two inferences about the meaning of the Sixth Amendment.<sup>22</sup> First, the Court concluded that "the principal evil at which the Confrontation Clause was directed" was the "use of *ex parte* examinations as evidence against the accused."<sup>23</sup> Accordingly, the Court determined that the Framers directed the Confrontation Clause at "witnesses" who "bear testimony."<sup>24</sup> The Court in turn defined "testimony" as "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact."<sup>25</sup> Though it ultimately left for another day the pronouncement of a comprehensive definition, *Crawford* did enumerate examples of what it termed the "core class of 'testimonial' statements":

*ex parte* in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially; extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions; statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.<sup>26</sup>

The second inference that the *Crawford* Court drew was that the Framers, via the Sixth Amendment, "conditioned admissibility of an absent witness's examination on unavailability and a prior opportunity to cross-examine."<sup>27</sup> In its analysis, the Court forcefully described the Confrontation Clause as "a procedural rather than a substantive guarantee,"<sup>28</sup> not intended to be left to "the vagaries of the rules of evidence."<sup>29</sup> The Court

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because the defendant could not confront his accuser, despite the fact that his actions caused her to be unavailable), are excepted, as they do not bear on this Article.

<sup>21</sup> *Crawford*, and for that matter *Davis* after it, were written by Justice Scalia. Some trace the origins of the opinion to Justice Scalia's dissent in *Maryland v. Craig*, 497 U.S. 836 (1990), in which he rejected the majority's holding that a Maryland statute did not violate the Confrontation Clause by permitting a child abuse victim to testify via one-way closed-circuit television rather than face-to-face in a courtroom against the accused. Justice Scalia characterized the majority opinion as the "subordination of explicit constitutional text to currently favored public policy." *Id.* at 861 (Scalia, J., dissenting). According to Justice Scalia, the holding contravened the Constitution because "[t]he purpose of enshrining [the Confrontation Clause's] protection in the Constitution was to assure that none of the many policy interests from time to time pursued by statutory law could overcome a defendant's right to face his or her accusers in court." *Id.* Justice Scalia would have required face-to-face confrontation of the child witness because, he stated, "For good or bad, the Sixth Amendment requires confrontation, and we are not at liberty to ignore it." *Id.* at 870.

<sup>22</sup> *Crawford*, 541 U.S. at 50, 53-54.

<sup>23</sup> *Id.* at 50; *accord id.* at 53 ("[E]ven if the Sixth Amendment is not solely concerned with testimonial hearsay, that is its primary object. . .").

<sup>24</sup> *See id.* at 51 (citing 2 N. WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828)) (defining "witnesses" as "those who 'bear testimony'") (first internal quotation omitted).

<sup>25</sup> *Id.* at 51 (citing 2 N. WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828)) (internal quotations omitted).

<sup>26</sup> *Id.* at 51-52, 68 (citations omitted) (internal quotations omitted).

<sup>27</sup> *Id.* at 54.

<sup>28</sup> *Id.* at 61.

<sup>29</sup> *Id.*

summarized its holding as follows: “Where testimonial evidence is at issue . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination.”<sup>30</sup>

**B. *Davis v. Washington*: Further Defining “Testimonial”**

The day to which *Crawford* left a more comprehensive definition of “testimonial”<sup>31</sup> soon came. In *Davis v. Washington*,<sup>32</sup> the Supreme Court clarified *Crawford*'s definition of “testimonial” within the context of police interrogations.<sup>33</sup> While still refusing “to produce an exhaustive classification,” the Court held:

Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.<sup>34</sup>

The key difference, according to the *Davis* Court, is between describing “what is happening” and “what happened.”<sup>35</sup> Given that *Davis* addressed only statements in response to police interrogations (and then, not even “exhaustive[ly]”<sup>36</sup>), questions remained concerning the application of “testimonial” to statements made in other contexts.

**C. *Melendez-Diaz v. Massachusetts*: Forensic Technician Affidavits Are Testimonial**

In *Melendez-Diaz v. Massachusetts*, the United States Supreme Court took up one variant of those remaining questions: whether affidavits from forensic analysts are testimonial statements triggering the protection of the Confrontation Clause.<sup>37</sup> The Massachusetts state court below had admitted into evidence sworn affidavits called “certificates of analysis” that showed the results of forensic analysis performed on the substances seized from the criminal defendant to be cocaine.<sup>38</sup> The defendant had objected on Confrontation Clause grounds, but the court below admitted the certificates pursuant to a state statute “as ‘prima facie evidence of the composition, quality, and the net weight of

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<sup>30</sup> *Id.* at 68.

<sup>31</sup> *See id.* (“We leave for another day any effort to spell out a comprehensive definition of ‘testimonial.’”).

<sup>32</sup> 547 U.S. 813 (2006).

<sup>33</sup> *Id.* at 817, 822. *Davis* also determined the companion case of *Hammon v. Indiana*, 547 U.S. 813, 819-21. As a primary matter, the *Davis* Court clarified, in case *Crawford* had left any doubt, that *Crawford* applies only to testimonial statements. *Id.* at 824. Technically, *Crawford* had not decided this question, nor had it comprehensively defined testimonial evidence. *See Crawford*, 541 U.S. at 52.

<sup>34</sup> *Davis*, 547 U.S. at 822. Importantly, the Court noted that its holding did not imply “that statements made in the absence of any interrogation are necessarily nontestimonial.” *Id.* at 822 n.1. The Court was careful to explain that its decision did not “consider whether and when statements made to someone other than law enforcement personnel are ‘testimonial.’” *Id.* at 823 n.2.

<sup>35</sup> *Id.* at 830. The Court did note the possibility that a conversation might “evolve into testimonial statements.” *Id.* at 828 (citation omitted) (internal quotation marks omitted).

<sup>36</sup> *Id.* at 822.

<sup>37</sup> *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 307 (2009).

<sup>38</sup> *Id.* at 308 (internal quotation marks omitted).

the narcotic . . . analyzed.”<sup>39</sup> The state courts below held that the certificates were not testimonial hearsay subject to the protections of the Confrontation Clause.<sup>40</sup>

The United States Supreme Court quickly and decisively reversed.<sup>41</sup> The Court had no trouble viewing the documents at issue “quite plainly [as] affidavits” and therefore “within the ‘core class of testimonial statements’” described in *Crawford*.<sup>42</sup> Accordingly, “[a]bsent a showing that the analysts were unavailable to testify at trial *and* that petitioner had a prior opportunity to cross-examine them, petitioner was entitled to ‘be confronted with’ the analysts at trial.”<sup>43</sup> In reaching its holding, the Court rejected two rationales that other courts had employed to admit forensic affidavits as evidence.<sup>44</sup> First, the Court rejected the notion that the Compulsory Process Clause, and a defendant’s ability to obtain “witnesses ‘in his favor’” under it, could serve as an adequate substitute for an accused’s confrontation right.<sup>45</sup> Second, the Court rejected the proposition that forensic analysis affidavits are admissible as business records.<sup>46</sup> Instead, the Court determined: “there [may be] other ways—and in some cases better ways—to challenge or verify the results of a forensic test. But the Constitution guarantees one way: confrontation. We do not have license to suspend the Confrontation Clause when a preferable trial strategy is available.”<sup>47</sup> “The Confrontation Clause—like those other constitutional provisions—is binding, and we may not disregard it at our convenience.”<sup>48</sup>

The Court recognized that its opinion had practical ramifications, but was convinced that those consequences would not be dire.<sup>49</sup> The Court observed, “Many States have already adopted the constitutional rule we announce today, while many others 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,”<sup>50</sup> and explicated as follows:

*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. Contrary to the dissent’s perception, these statutes shift no burden whatever. 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. States are free to adopt procedural rules governing objections. It is common to require a defendant to exercise his rights under the Compulsory Process Clause in advance of trial, announcing his intent to present certain witnesses. There is no conceivable reason*

<sup>39</sup> *Id.* at 309 (quoting MASS. GEN. LAWS, ch. 111, § 13) (omission in original).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 329.

<sup>42</sup> *Id.* at 310; *see also id.* at 329 (“This case involves little more than the application of our holding in *Crawford v. Washington*”).

<sup>43</sup> *Id.* at 311 (citing *Crawford*, 541 U.S. at 54) (emphasis in original).

<sup>44</sup> *Id.* at 326-29.

<sup>45</sup> *Id.* at 313-14, 324-25 (quoting U.S. CONST. amend VI).

<sup>46</sup> *Id.* at 321-24.

<sup>47</sup> *Id.* at 318 (footnote omitted).

<sup>48</sup> *Id.* at 325.

<sup>49</sup> *Id.* (explaining that “the sky will not fall after today’s decision”).

<sup>50</sup> *Id.* at 325-26 (footnote omitted).



why he cannot similarly be compelled to exercise his Confrontation Clause rights before trial. See *Hinojos-Mendoza v. People*, 169 P. 3d 662, 670 (Colo. 2007) (discussing and approving Colorado's notice-and-demand provision).<sup>51</sup>

The Court expressly disavowed the notion that its opinion constitutionalized anything more than the “simplest form [of] notice-and-demand statutes.”<sup>52</sup> The majority opinion offered no discussion of the Colorado Supreme Court’s opinion in *Hinojos-Mendoza* other than the citation offered above.

Justice Kennedy’s dissent, however, would have drawn a distinction “between laboratory analysts who perform scientific tests and other, more conventional witnesses.”<sup>53</sup> The former, Justice Kennedy believed, are not “witnesses against” an accused within the original meaning of those words.<sup>54</sup> Rather, the Framers intended the Confrontation Clause to apply only to the latter, which he defined as witnesses with some personal knowledge of the defendant’s guilt.<sup>55</sup> Throughout, Justice Kennedy expressed grave concerns about the practical implications of the Court’s holding,<sup>56</sup> and suggested that the holding failed to account for “the increasing reliability of scientific testing.”<sup>57</sup> His opinion contains little doubt that the holding granted criminal defendants and the defense bar a tactical advantage that will certainly be deployed.<sup>58</sup>

Importantly, Justice Kennedy rebutted the majority’s interpretation of notice-and-demand statutes.<sup>59</sup> His opinion recognized that such statutes, contrary to the majority’s reasoning, “do impose requirements on the defendant,” which operate to “reduce[] the confrontation right.”<sup>60</sup> He named Colorado, and *Hinojos-Mendoza* specifically, among this group.<sup>61</sup> This Article will go on to argue, using the *Hinojos-Mendoza* opinion itself, that Justice Kennedy’s interpretation was the better one.

#### D. *Bullcoming v. New Mexico*: Rejecting Surrogate Technician Testimony

The Court next visited the topic of confrontation of forensic technician witnesses in *Bullcoming v. New Mexico*.<sup>62</sup> There, the prosecution introduced testimonial evidence,

<sup>51</sup> *Id.* at 325-27 (some internal citations omitted, emphasis added).

<sup>52</sup> *Id.* at 327 n.12 (alteration in original) (internal quotation marks omitted) (“We have no occasion today to pass on the constitutionality of every variety of statute commonly given the notice-and-demand label. It suffices to say that what we have referred to as the ‘simplest form [of] notice-and-demand statutes,’ is constitutional.” (citation omitted)); accord Andrew W. Eichner, Note, *The Failures of Melendez-Diaz v. Massachusetts and the Unstable Confrontation Clause*, 38 AM. J. CRIM. L. 437, 450-51 (2011) (observing that after *Melendez-Diaz*, certain variations of notice-and-demand statute may yet be deemed unconstitutional).

<sup>53</sup> *Melendez-Diaz*, 557 U.S. at 330 (Kennedy, J., dissenting).

<sup>54</sup> *Id.* at 343.

<sup>55</sup> *Id.* at 330-31.

<sup>56</sup> *Id.* at 331-43.

<sup>57</sup> *Id.* at 351.

<sup>58</sup> *Id.* at 352-55.

<sup>59</sup> *Id.* at 355-56.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 356-57 (citing, *inter alia*, *Hinojos-Mendoza v. People*, 169 P. 3d 662, 668-71 (Colo. 2007); COLO. REV. STAT. ANN. § 16-3-309)).

<sup>62</sup> 131 S. Ct. 2705, 2707 (2011). One opinion interceded between *Melendez-Diaz* and *Bullcoming*, but the Court did not use it to offer any substantive guidance on its holding in *Melendez-Diaz*. Four days after the publication of its opinion in *Melendez-Diaz*, the Court granted certiorari in *Briscoe v. Virginia*, 557 U.S. 933 (2009). Several months later, the Court disposed of the case, per curiam, by vacating the judgment of the Virginia high court and remanding the case “for further proceedings not inconsistent with the opinion in *Melendez-Diaz v.*

namely, a forensic laboratory report certifying that the DWI defendant's blood alcohol concentration level was above the threshold for aggravated DWI, but it did so via the testimony of an analyst who neither signed the report nor observed the test reported.<sup>63</sup> Citing *Crawford* and its line, including *Davis*'s pronouncement that the "Confrontation Clause may not be 'evaded' by having a note-taking police [officer] recite the . . . testimony of the declarant,"<sup>64</sup> the Court determined that the right of confrontation is not satisfied by such so-called "surrogate testimony."<sup>65</sup> The Court once again rejected the notion that laboratory reports are non-testimonial, and firmly reiterated its holding in *Melendez-Diaz* that they are.<sup>66</sup> In so doing, the Court disavowed any reliance on the supposed reliability of such reports: "the comparative reliability of an analyst's testimonial report drawn from machine-produced data does not overcome the Sixth Amendment bar. This Court settled in *Crawford* that the 'obviou[s] reliab[ility]' of a testimonial statement does not dispense with the Confrontation Clause."<sup>67</sup>

Justice Ginsburg, in a portion of her opinion joined only by Justice Scalia, echoed *Melendez-Diaz* and rejected any notion that its holding imposed an undue burden on prosecution.<sup>68</sup> According to her, any such burden was capable of being reduced.<sup>69</sup> Retesting of the sample at issue by the analyst to be called was always an option.<sup>70</sup> Similarly, the Court reiterated that states may enact notice-and-demand statutes that "specifically preserv[e]" an accused's confrontation right.<sup>71</sup>

Justice Kennedy again dissented, echoing his *Melendez-Diaz* dissent and also tracing the problems with the majority opinion to *Crawford* and the cases extending it.<sup>72</sup> His opinion detailed his view that, via *Crawford* and later cases, the "Court has taken the Clause far beyond its most important application, which is to forbid sworn, *ex parte*, out-of-court statements by unopposed and available witnesses who observed the crime and do not appear at trial."<sup>73</sup> Making passing reference to notice-and-demand statutes, Justice Kennedy discarded the majority's reliance on such laws as an appropriate "palliative" for the disruption to be wrought by its holding.<sup>74</sup>

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*Massachusetts*." *Briscoe*, 559 U.S. at 32. The holding of the Virginia court on remand, in *Cypress v. Commonwealth*, 699 S.E.2d 206 (Va. 2010), is addressed in Section 0., *infra*.

<sup>63</sup> *Bullcoming*, 131 S. Ct. at 2709.

<sup>64</sup> *Id.* at 2715 (citing *Davis v. Washington*, 547 U.S. 813, 826 (2006) (alteration in original) (omission in original) (deletion of emphasis in original)).

<sup>65</sup> *Id.* at 2710. A majority of the Court joined in all but one part of the decision written by Justice Ginsburg. Justice Sotomayor joined in all but Part IV of that decision, *id.* at 2709, and also issued her own concurrence in part, *id.* at 2719-23.

<sup>66</sup> *Id.* at 2717 (majority opinion).

<sup>67</sup> *Id.* at 2715 (citing *Crawford v. Washington*, 541 U.S. 36, 61 (2004)).

<sup>68</sup> *Id.* at 2717.

<sup>69</sup> *Id.* at 2718.

<sup>70</sup> *Id.* ("New Mexico could have avoided any Confrontation Clause problem by asking Razatos to retest the sample, and then testify to the results of his retest rather than to the results of a test he did not conduct or observe."); Jesse J. Norris, *Who Can Testify about Lab Results after Melendez-Diaz and Bullcoming?: Surrogate Testimony and the Confrontation Clause*, 38 AM. J. CRIM. L. 375, 385 (2011) ("[T]he Court's opinion did not rule on the constitutionality of surrogate testimony when the surrogate had played some role in or observed the test, or had offered an independent analysis of either an analyst's report that was not admitted into evidence, or machine-generated 'raw data' that was admitted into evidence.").

<sup>71</sup> *Bullcoming*, 131 S. Ct. at 2718.

<sup>72</sup> *Id.* at 2723-28 (Kennedy, J., dissenting).

<sup>73</sup> *Id.* at 2727 (emphasis in original).

<sup>74</sup> *Id.* at 2728.

**E. *Williams v. Illinois*: “Nothing Comparable Happened Here”<sup>75</sup>**

If *Bullcoming* was a sign that the *Crawford* majority was fracturing, the next case to reach the Supreme Court’s docket confirmed it.<sup>76</sup> In *Williams v. Illinois*, the Court took up the issue of whether “*Crawford* bar[s] an expert from expressing an opinion based on facts about a case that have been made known to the expert but about which the expert is not competent to testify.”<sup>77</sup> At *Williams*’ bench trial, the prosecution called an expert witness who testified that a DNA profile produced by an outside laboratory matched a profile produced by the state laboratory using *Williams*’ blood sample.<sup>78</sup> The expert testified that the outside laboratory was accredited and provided the police with a DNA profile, and explained that according to shipping manifests admitted as business records, swabs taken from the victim were provided to and received back from the outside lab.<sup>79</sup> The expert did not testify as to the accuracy of the profile of the outside lab, nor did he testify as to how the outside lab handled or tested the sample.<sup>80</sup> The outside laboratory report was neither admitted into evidence, nor identified as the source of the expert’s opinion; the expert testified that her testimony relied exclusively on the outside report.<sup>81</sup> The problem, as Justice Thomas explained in his concurrence, was that the expert’s testimony “went well beyond what was necessary to explain why she performed the [match].”<sup>82</sup>

Justice Alito delivered a plurality opinion, in which Chief Justice Roberts, Justice Kennedy, and Justice Breyer joined. The opinion issued “two independent reasons . . . [to] conclude that there was no Confrontation Clause violation in this case.”<sup>83</sup> First, the plurality held that no Confrontation Clause violation was effected by the expert’s testimony because his testimony was not considered for the truth of the matter asserted.<sup>84</sup> That is, “the report was not to be considered for its truth but only for the ‘distinctive and limited purpose’ of seeing whether it matched something else.”<sup>85</sup> This portion of the

<sup>75</sup> *Williams v. Illinois*, 132 S. Ct. 2221, 2240 (2012).

<sup>76</sup> This fracturing was evident in the fact that *Williams* produced a plurality opinion, as explained in this Section. Justice Alito’s opinion went so far as to suggest, “Experience might yet show that the holdings in those cases should be reconsidered for the reasons, among others, expressed in the dissents the decisions produced.” *Id.* at 2242 n.13.

<sup>77</sup> *Id.* at 2227. Justice Sotomayor had raised this question in her concurrence in *Bullcoming*, noting that the Court’s opinion did not address this issue and therefore it remained to be confronted. *See id.* at 2233 (citing *Bullcoming*, 131 S. Ct. at 2719 (Sotomayor, J., concurring in part)).

<sup>78</sup> *Id.* at 2227. This expert was one of three expert forensic witnesses. *Id.* at 2229.

<sup>79</sup> *Id.* at 2227.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 2230; *see also id.* at 2229-31, 2235-36. In recounting the laboratory technician’s testimony, the plurality (and the dissent) focused on the following line of questioning: “Q Was there a computer match generated of the male DNA profile found in semen from the vaginal swabs of [L.J.] to a male DNA profile that had been identified as having originated from Sandy Williams?” “A Yes, there was.” *Id.* at 2236 (emphasis omitted) (internal quotation marks omitted).

<sup>82</sup> *Id.* at 2258 n.3 (Thomas, J., concurring); *accord id.* at 2270 (Kagan, J., dissenting).

<sup>83</sup> *Id.* at 2244 (majority opinion).

<sup>84</sup> *Id.* at 2228. According to the plurality, such testimony “fall[s] outside the scope of the Confrontation Clause.” *Id.* In reaching this conclusion, the opinion relied in part on the long-standing rule that an expert witness may opine as to facts even if he lacks first-hand knowledge of them. *Id.* at 2233; *see also id.* at 2228 (“[A]n expert may express an opinion that is based on facts that the expert assumes, but does not know, to be true.”).

<sup>85</sup> *Id.* at 2240 (citing *Tennessee v. Street*, 471 U.S. 409, 417 (1985)). In this portion of the decision, the plurality in several instances hinted that its holding was factually dependent on the fact that the trier-of-fact at issue was a judge in a bench trial. *See, e.g., id.* at 2236-37, 2241 n.11. Ultimately, however, the plurality disavowed the “suggest[ion] that the Confrontation Clause applies differently depending on the identity of the factfinder.” *Id.* at 2237 n.4; *cf. id.* at 2271 (Kagan, J., dissenting) (“But the presence of a judge does not transform the constitutional question.”).

decision was in harmony with *Crawford*,<sup>86</sup> as well as with *Bullcoming* and *Melendez-Diaz*,<sup>87</sup> according to the plurality opinion. Second, the plurality concluded that, even if the report were considered for the truth of the matter asserted, there was no confrontation violation.<sup>88</sup> The plurality distinguished the report at issue in *Williams* as one that “plainly was not prepared for the primary purpose of accusing a targeted individual . . . no[r] to accuse petitioner or to create evidence for use at trial.”<sup>89</sup> The plurality stated that this holding, too, comported with *Crawford* and subsequent cases.<sup>90</sup> It distinguished the report at issue from the reports in prior cases by noting that “[i]n all but one of the post-*Crawford* cases in which a Confrontation Clause violation has been found,” the statement at issue had “the primary purpose of accusing a targeted individual.”<sup>91</sup> It went on to describe *Melendez-Diaz* and *Bullcoming* as holding the forensic reports at issue to be testimonial, but “not hold[ing] that all forensic reports fall into the same category.”<sup>92</sup>

Justice Breyer issued a concurrence, in which he stated that he would adhere to the dissenting views in *Melendez-Diaz* and *Bullcoming*, but joined in the plurality.<sup>93</sup> Justice Breyer would have gone farther than the majority and answered the broader question of, “How does the Confrontation Clause apply to the panoply of crime laboratory reports and underlying technical statements written by (or otherwise made by) laboratory technicians?”<sup>94</sup> His concurrence adhered to the dissents in *Melendez-Diaz* and *Bullcoming* to determine that the report at issue was not “testimonial” and therefore no confrontation was required.<sup>95</sup> In reaching this decision, he agreed with the plurality’s determination that the report at issue was not prepared for the purpose of accusing a targeted individual.<sup>96</sup> Justice Breyer would have created a presumption that “reports such as the DNA report before us presumptively to lie outside the perimeter of the Clause as established by the Court’s precedents.”<sup>97</sup> That presumption could be rebutted by “good reason to doubt the laboratory’s competence or the validity of its accreditation” or “the existence of a motive to falsify.”<sup>98</sup>

<sup>86</sup> *Id.* at 2235 (majority opinion) (“*Crawford* . . . took pains to reaffirm the proposition that the Confrontation Clause ‘does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.’” (quoting *Crawford v. Washington*, 541 U.S. 36, 59-60 n.9 (2004)).

<sup>87</sup> *Id.* at 2240. The plurality determined that “[i]n those cases, the forensic reports were introduced into evidence, and there is no question that this was done for the purpose of proving the truth of what they asserted.” *Id.*

<sup>88</sup> *Id.* at 2242.

<sup>89</sup> *Id.* at 2243. In this vein, the plurality characterized the report as “not inherently inculpatory” and noted that the technicians who prepare such reports have “no idea what the consequences of their work will be . . . whether it will turn out to be incriminating or exonerating—or both.” *Id.* at 2228, 2244.

<sup>90</sup> *Id.* at 2232, 2240.

<sup>91</sup> *Id.* at 2242 (footnote omitted).

<sup>92</sup> *Id.* at 2243.

<sup>93</sup> *Id.* at 2245 (Breyer, J., concurring).

<sup>94</sup> *Id.* at 2244.

<sup>95</sup> *Id.* at 2248.

<sup>96</sup> *Id.* at 2250-51; *id.* at 2248-49 (describing the statements at issue as “made by an accredited laboratory employee operating at a remove from the investigation in the ordinary course of professional work” who was “operat[ing] behind a veil of ignorance that likely prevented them from knowing the identity of the defendant in this case”); *id.* at 2251 (citation omitted) (“[H]ere the DNA report sought, not to accuse petitioner, but instead to generate objectively a profile of a then-unknown suspect’s DNA from the semen he left in committing the crime.”). Despite this, the California Supreme Court has held that a laboratory analyst’s report stating the defendant’s blood-alcohol content was not testimonial because “the critical portions of that report were not made with the requisite degree of formality or solemnity to be considered testimonial.” *People v. Lopez*, 286 P.3d 469, 477 (Cal. 2012).

<sup>97</sup> *Williams*, 132 S. Ct. at 2251 (Breyer, J., concurring).

<sup>98</sup> *Id.* at 2252.

Yet “[f]ive Justices specifically reject[ed] every aspect of [the plurality’s] reasoning and every paragraph of its explication.”<sup>99</sup> Justice Thomas concurred with the conclusion that the expert testimony did not violate the defendant’s confrontation right, but agreed with the dissent that the plurality’s opinion was flawed.<sup>100</sup> Justice Kagan, joined by Justices Scalia, Ginsburg, and Sotomayor, dissented.<sup>101</sup> Her dissent determined that the report was identical to those in *Melendez-Diaz* and *Bullcoming*<sup>102</sup> and that the expert’s testimony at issue was “functionally identical” to that unconstitutionally proffered in *Bullcoming*.<sup>103</sup> When the expert introduced the substance of the report into evidence, then, the author of “that report ‘became a witness’ whom Williams ‘had the right to confront.’”<sup>104</sup> “The plurality’s primary argument to the contrary tries to exploit a limit to the Confrontation Clause recognized in *Crawford*”<sup>105</sup> and created for the prosecution “a ready method to bypass the Constitution.”<sup>106</sup> The dissent rejected the “targeted individual” test supported by the plurality, finding that it could not be supported by *Crawford* and its progeny.<sup>107</sup> Under the dissent’s reading of the Court’s precedents, “[w]e have held that the Confrontation Clause requires something more.”<sup>108</sup>

After *Williams*, the fate of the Confrontation Clause as interpreted by *Crawford* is unclear, especially as to forensic witnesses. As Justice Kagan acutely summarized in her dissent,

What comes out of four Justices’ desire to limit *Melendez-Diaz* and *Bullcoming* in whatever way possible, combined with one Justice’s one-justice view of those holdings, is—to be frank—who knows what. Those decisions apparently no longer mean all that they say. Yet no one can tell in what way or to what extent they are altered because no proposed limitation commands the support of a majority.<sup>109</sup>

### III. COLORADO’S NOTICE-AND-DEMAND STATUTE

In the meantime, however, the fate of technician testimony is settled for the time being in Colorado, at least as to defendants represented by counsel. Colorado has a notice-and-demand statute, Colo. Rev. Stat. § 16-3-309(5), and its Supreme Court has passed judgment on it.<sup>110</sup> In its current form, that statute provides:

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<sup>99</sup> *Id.* at 2265 (Kagan, J., concurring).

<sup>100</sup> *Id.* at 2255 (Thomas, J., concurring). Justice Thomas concluded that the “report [wa]s not a statement by a ‘witness[s]’ within the meaning of the Confrontation Clause.” *Id.* at 2260 (alterations in original).

<sup>101</sup> *Id.* at 2264 (Kagan, J., dissenting).

<sup>102</sup> *Id.* at 2266. Accordingly, Justice Kagan determined that the report was testimonial. *Id.* at 2272-75.

<sup>103</sup> *Id.* at 2267, 2270. Justice Kagan also accurately identified “the typical problem with laboratory analyses--and the typical focus of cross-examination” as “careless or incompetent work, rather than with personal vendettas.” *Id.* at 2274.

<sup>104</sup> *Id.* at 2268 (quoting *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2716 (2011)).

<sup>105</sup> *Id.* at 2268. Like Justice Thomas, Justice Kagan argued that the “admission of the out-of-court statement in this context has no purpose separate from its truth.” *Id.* at 2269; see also *id.* at 2258 n.3 (Thomas, J., concurring).

<sup>106</sup> *Id.* at 2270 (Kagan, J., dissenting).

<sup>107</sup> *Id.* at 2274 (“None of our cases has ever suggested that, in addition, the statement must be meant to accuse a previously identified individual.”).

<sup>108</sup> *Id.* at 2270.

<sup>109</sup> *Id.* at 2277.

<sup>110</sup> See *Hinojos-Mendoza v. People*, 169 P.3d 662 (Colo. 2003).

Any report or copy thereof or the findings of the criminalistics laboratory shall be received in evidence in any court, preliminary hearing, or grand jury proceeding in the same manner and with the same force and effect as if the employee or technician of the criminalistics laboratory who accomplished the requested analysis, comparison, or identification had testified in person. Any party may request that such employee or technician testify in person at a criminal trial on behalf of the state before a jury or to the court, by notifying the witness and other party at least fourteen days before the date of such criminal trial.<sup>111</sup>

This Section details the Colorado Supreme Court decisions analyzing the statute both before and after *Crawford*.

**A. *People v. Mojica-Simental*: The (Short-Lived) Actual Notice Requirement**

Even before *Crawford*, the Colorado Supreme Court took up the constitutionality of Colorado's notice-and-demand statute in the 2003 case of *People v. Mojica-Simental*.<sup>112</sup> Characterizing the statute as a mere precondition on an accused's exercise of his constitutional right, which can be met by "minimal effort" on his part, the Court determined that Colorado's notice-and-demand statute is facially constitutional.<sup>113</sup> Under the Court's conceptualization, the notice-and-demand statute "does not impermissibly shift the burden of proof to the defendant."<sup>114</sup> The Court determined that the defendant's as-applied challenge was not yet ripe for review, but was careful to recognize that "there may be circumstances where it is, in fact, an unreasonable burden and effectively abridges a defendant's right to confrontation."<sup>115</sup> The Court enumerated at least one such circumstance: "[i]f a defendant does not have actual notice of the requirements of the statute, or mistakenly fails to notify the prosecution to have the technician present to testify."<sup>116</sup> In that circumstance, the Court cautioned, "there is a significant possibility that a defendant's failure to act may not constitute a voluntary waiver of his fundamental right to confrontation," as required by the Constitution.<sup>117</sup>

The Court concluded by enumerating "some factors" a trial court might consider before admitting a laboratory report without its author's testimony:

whether an attorney or a pro se litigant actually knew that he was required to notify the opposing party of his desire to have the witness present; the reasons why notice was late or was not given at all; the difficulty of acquiring the presence of the witness; the significance to the case of the report and of the testimony that would be elicited from the technician; and any other pertinent circumstances.<sup>118</sup>

Underscoring the importance of *actual* notice, the Court stated that the statute would be "best utilized" in practice if both the prosecution and defense "discuss the matter, at some pre-trial opportunity, to ensure that all parties are in agreement as to whether the witness

<sup>111</sup> Colo. Rev. Stat. § 16-3-309(5) (2012).

<sup>112</sup> 73 P.3d 15, 17 (Colo. 2003).

<sup>113</sup> *Id.* at 17-18.

<sup>114</sup> *Id.* at 19.

<sup>115</sup> *Id.* at 20-21.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 21.

will be present.”<sup>119</sup> Unfortunately for defendants, despite the Supreme Court’s subsequent pronouncements in *Crawford*, the actual notice requirement that *Mojica-Simental* appeared to impose was soon abandoned by the Colorado Supreme Court.

**B. *Hinojos-Mendoza v. People*: “No Constitutional Infirmity in Section 16-3-309(5)”<sup>120</sup>**

In *Hinojos-Mendoza*, the Colorado Supreme Court revisited the constitutionality of Colorado’s notice-and-demand statute in light of *Crawford*.<sup>121</sup> First, the Court determined that laboratory reports are testimonial statements subject to *Crawford*.<sup>122</sup> This decision predated—but accords with—the United States Supreme Court’s later opinions in *Melendez-Diaz* and *Bullcoming*. The Court went on to consider both facial and as-applied challenges to Section 16-3-309(5).<sup>123</sup>

The Court began its analysis by noting that the right to confrontation is waivable<sup>124</sup> and defining waiver “as the ‘intentional relinquishment or abandonment of a known right.’”<sup>125</sup> Against this backdrop, the Court conceptualized the statute as nothing more than a statutory procedural requirement and upheld its facial constitutionality:

The procedure provided in section 16-3-309(5) for ensuring the presence of the lab technician at trial does not deny a defendant the opportunity to cross-examine the technician, but simply requires that the defendant decide prior to trial whether he will conduct a cross-examination. The statute provides the opportunity for confrontation – only the timing of the defendant's decision is changed.<sup>126</sup>

The Court went on to uphold the constitutionality of the statute as applied to *Hinojos-Mendoza*.<sup>127</sup> Its reasoning on this prong, however, was far more detailed—and convoluted. At trial, the prosecution introduced the lab report without the testimony of its author.<sup>128</sup> Defense counsel objected on hearsay grounds and, when questioned by the trial court, explained that he had not requested the report’s author pursuant to Section 16-3-309(5) because he was unaware of the statute.<sup>129</sup> The trial court overruled the objection and admitted the report into evidence.<sup>130</sup> This ruling was not without consequence. A critical fact in determining *Hinojos-Mendoza*’s potential punishment was the net weight of the drugs; because the report was ambiguous on this point, and because the author of the

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<sup>119</sup> *Id.*

<sup>120</sup> *Hinojos-Mendoza v. People*, 169 P.3d 662, 669 (Colo. 2007).

<sup>121</sup> *Id.* at 664. The Court employed the same reasoning and reached the same result in a case announced the same day, *Coleman v. People*, 169 P.3d 659 (Colo. 2007), *reh’g denied*, No. 06SC155, 2007 Colo. LEXIS 1037 (Colo. Nov. 5, 2007).

<sup>122</sup> *Id.* at 666. The dissenting opinion agreed with this portion of the Court’s holding. *Id.* at 671 (Martinez, J., dissenting).

<sup>123</sup> *Id.* at 667-78.

<sup>124</sup> *Id.* at 668 (citing *Brookhart v. Janis*, 384 U.S. 1, 4 (1966); *Hawkins v. Hannigan*, 185 F.3d 1146, 1154 (10th Cir. 1999)).

<sup>125</sup> *Id.* (quoting *United States v. Olano*, 507 U.S. 725, 733 (1993)).

<sup>126</sup> *Id.* at 668-69.

<sup>127</sup> *Id.* at 670.

<sup>128</sup> *Id.* at 664.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 664-65.

report was not required to testify to resolve the ambiguity, Hinojos-Mendoza faced a longer potential maximum sentence.<sup>131</sup>

First, the Court abandoned *Mojica-Simental* as foreshadowing a different outcome for Hinojos-Mendoza. It stated, “The dicta in *Mojica-Simental* was based on the faulty premise that the right to confrontation can only be waived if the defendant personally makes a voluntary, knowing, and intentional waiver.”<sup>132</sup> Instead, the Court determined, a defendant’s right to confrontation may be waived by defense counsel,<sup>133</sup> and it may be waived by defense counsel’s failure to comply with the procedural demand of Section 16-3-309(5).<sup>134</sup> On the latter point, the Court issued a conclusive presumption that “where a defendant such as Hinojos-Mendoza is represented by counsel, the failure to comply with the statutory prerequisites of section 16-3-309(5) waives the defendant’s right to confront the witness just as the decision to forgo cross-examination at trial would waive that right.”<sup>135</sup> This presumption arose from a separate, underlying presumption in Colorado law, that of defense counsel having knowledge of all applicable rules of procedure.<sup>136</sup> The Court’s reasoning makes both presumptions irrebuttable, because it applied the presumptions in the face of defense counsel’s admission that he was unaware of the statute and had not intended to waive confrontation.<sup>137</sup>

The Court explicitly left open the question of the constitutionality of Section 16-3-309(5) as applied to pro se defendants.<sup>138</sup> This opening, however, did Hinojos-Mendoza no good. For him, the Colorado Supreme Court’s opinion was the end of the road. That court denied his petition for rehearing.<sup>139</sup> And four days after the United States Supreme Court announced its decision in *Melendez-Diaz v. Massachusetts*, and the same day it remanded *Briscoe v. Virginia*, that Court denied Hinojos-Mendoza’s petition for certiorari.<sup>140</sup>

Two justices of the Colorado Supreme Court would have found in favor of Hinojos-Mendoza’s confrontation right.<sup>141</sup> Having discerned in the majority opinion no

<sup>131</sup> *Id.* at 674 (Martinez, J., dissenting). Crucially, the report “listed the weight of the ‘tan tape wrapped block’ as 1004.5 grams, but omitted whether the weight included the tape and packaging or was just the net weight of the drugs. . . . The maximum sentence for a class three felony possession with intent to distribute less than one thousand grams is sixteen years in prison. The maximum sentence for one thousand grams or more is twenty-four years in prison.” *Id.* (footnote omitted). Because of one ambiguous sentence in a report whose author he was denied the opportunity to cross-examine, Hinojos-Mendoza faced eight more years in prison.

<sup>132</sup> *Id.* at 669 (citing *People v. Mojica-Simental*, 73 P.3d 15, 20 (Colo. 2003)).

<sup>133</sup> *Id.* (“The right to confrontation falls into the class of rights that defense counsel can waive through strategic decisions.”).

<sup>134</sup> *Id.* at 670.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* (citing *Christie v. People*, 837 P.2d 1237, 1244 (Colo. 1992)). The Court determined that, “[g]iven this knowledge [of procedural rules], we can infer from the failure to comply with the procedural requirements that the attorney made a decision not to exercise the right at issue.” *Id.*

<sup>137</sup> *Id.* at 664; *accord id.* at 672 (Martinez, J., dissenting) (“The majority applies its presumption in this case even though there is evidence rebutting it.”); *id.* at 673 (“In effect, the majority creates an irrebuttable presumption by applying the presumption of knowledge of the law when the attorney said on the record that he was unaware of the law.”). Indeed, the Court made clear that a trial court need not inquire of the defense lawyer or his client. *Id.* at 670 n.6 (“[T]he trial court does not need to make sure that the attorney’s failure to comply with section 16-3-309(5) reflects the informed and voluntary decision of the defendant.”).

<sup>138</sup> *Id.* at 670 n.7 (“We offer no opinion on whether the analysis would be altered if Hinojos-Mendoza had been a pro se defendant.”).

<sup>139</sup> *Hinojos-Mendoza v. People*, No. 05SC881, 2007 Colo. LEXIS 1036 (Colo. Nov. 5, 2007). Justices Martinez and Bender would have granted the rehearing.

<sup>140</sup> *Hinojos-Mendoza v. Colorado*, 557 U.S. 934 (2009).

<sup>141</sup> *Hinojos-Mendoza v. People*, 169 P.3d 662, 671 (Colo. 2007)



“constitutionally sufficient explanation for how unknowing inaction amounts to an ‘intentional’ waiver.”<sup>142</sup> Justice Martinez, joined by Justice Bender, dissented.<sup>143</sup> In the dissent’s view, *People v. Mojica-Simental* conditioned the constitutionality of Section 16-3-309(5) on a “proper waiver,” which could only be achieved by a “voluntary, knowing, and intentional [waiver] . . . by the defendant or his attorney.”<sup>144</sup> That is, Justice Martinez agreed that defense counsel may waive the confrontation right on behalf of his client, but disagreed that counsel could do so by inaction.<sup>145</sup> Instead, Justice Martinez would have required, before finding a “proper waiver,” the type of voluntary, knowing, and intentional action that would be required of the defendant himself.<sup>146</sup> Justice Martinez refused the majority’s conceptualization of the statute as “a matter of timing”<sup>147</sup> and plainly saw the majority’s reasoning for what it was: an “irrebuttable presumption” of waiver.<sup>148</sup> In the face of evidence that no such knowing, voluntary, and intelligent waiver had been made by defense counsel here, Justice Martinez would have reversed Hinojos-Mendoza’s conviction.<sup>149</sup>

**C. Cropper v. People: No-Actual-Notice-and-Demand Is Constitutional**

*Hinojos-Mendoza* has not been the Colorado Supreme Court’s final word on the constitutionality of Colorado’s notice-and-demand statute. In the 2011 case of *Cropper v. People*, the Court reviewed an as-applied challenge to the statute based on *Melendez-Diaz*.<sup>150</sup> Cropper argued that Section 16-3-309(5) was unconstitutional because it does not actually require the prosecution to issue constitutionally sufficient “notice,” differentiating Colorado’s statute from the simple notice-and-demand statutes that *Melendez-Diaz* opined were constitutional.<sup>151</sup>

In Cropper’s case, the prosecution had included on its pre-trial witness list the forensic technician who had authored a report stating that a shoe-print found at the crime scene could have been from the same type of shoe the defendant was wearing when he was apprehended.<sup>152</sup> The prosecution had also provided the report in pre-trial discovery.<sup>153</sup> At trial, the prosecution moved to introduce technician’s report without his live testimony, explaining that he was unavailable due to family emergency.<sup>154</sup> Finding that the defendant

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<sup>142</sup> *Id.* at 673.

<sup>143</sup> *Id.* at 675 (Martinez, J., dissenting).

<sup>144</sup> *Id.* at 671. The dissent rejected the majority’s characterization of *Mojica-Simental*’s pronouncements on waiver as “dicta” and would have categorized them as a holding. *Id.* at 674 n.15. Justice Martinez wrote, “The majority has overruled *Mojica-Simental*’s analytical foundation by discarding the requirement of a voluntary, knowing, and intentional waiver, and leaving it without the central premise upon which the holding of facial constitutionality is dependent.” *Id.* at 671. *Crawford* required adherence to, not an abandoning of, *Mojica-Simental*’s holding, in Justice Martinez’s view. *Id.* at 675 (“[P]ost-*Crawford*, *Mojica-Simental*’s waiver requirement has become even more important because it is now the only manner in which the statute can be applied constitutionally without cross-examination.”)

<sup>145</sup> *Id.* at 673.

<sup>146</sup> *Id.* at 674 (“[T]hough defendants need not personally waive this right, that does not justify undermining the Sixth Amendment’s fundamental constitutional protections.”).

<sup>147</sup> *Id.* at 673.

<sup>148</sup> *Id.* at 672 (Martinez, J., dissenting) (rejecting “the majority[’s] replace[ment of] *Mojica-Simental*’s requirement of a voluntary, knowing, and intentional waiver with an automatic waiver premised upon an irrebuttable presumption”).

<sup>149</sup> *Id.* at 675 (Martinez, J., dissenting).

<sup>150</sup> *Cropper v. People*, 251 P.3d 434, 435-37 (Colo. 2011).

<sup>151</sup> *Id.* at 437.

<sup>152</sup> *Id.* at 435.

<sup>153</sup> *Id.* at 437.

<sup>154</sup> *Id.* at 435.

had not complied with Section 16-3-309(5), the trial court admitted the report.<sup>155</sup> As in *Hinojos-Mendoza*, the trial court did so in the face of defense counsel's protestation that she was unaware of the statute and had not intended to waive her client's confrontation right.<sup>156</sup>

The Colorado Supreme Court adhered to its prior holding that a waiver may result from defense counsel's inaction,<sup>157</sup> and that defense counsel may waive his client's right to confrontation by not complying with the procedures set forth in Section 16-3-309(5), even where defense counsel is unaware of the statute.<sup>158</sup> While noting that *Melendez-Diaz* had been decided in the years since *Hinojos-Mendoza* and was applicable to the case at issue, the court also (rightfully) acknowledged that "[d]espite [*Melendez-Diaz*'s] discussion of *Hinojos-Mendoza*, the Supreme Court did not pass judgment on section 16-3-309(5)."<sup>159</sup> The Colorado Supreme Court took the opportunity to do so, however, and "h[e]ld that providing the defense with a forensic lab report through discovery is sufficient to put the defendant on notice that, absent a specific request under section 16-3-309(5), the report can be introduced without live testimony."<sup>160</sup> This result was unchanged by the fact that the prosecution had represented that it would call the live testimony of the technician.<sup>161</sup> Also unchanged was the court's strict adherence to its irrebuttable presumption that a defense lawyer who does not adhere to Section 16-3-309(5) intends to waive her client's confrontation right.<sup>162</sup>

Likewise, Justice Martinez, and again Chief Justice Bender with him,<sup>163</sup> remained steadfast in his dissent from the majority's reapplication of its *Hinojos-Mendoza* reasoning.<sup>164</sup> Echoing his dissent in that case, Justice Martinez reviewed the decades of United States Supreme Court precedent in which "the Court has steadfastly refused to presume the waiver of a defendant's constitutional rights from inaction alone."<sup>165</sup> Moving to the most recent relevant United States Supreme Court precedent, *Melendez-Diaz*, and its dicta that simple notice-and-demand statutes are constitutional, Justice Martinez wrote, "Crucial to the Court's reasoning was the fact that simple notice-and-demand statutes, unlike the variety of statutes receiving the notice-and-demand label, require the

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<sup>155</sup> *Id.*

<sup>156</sup> *Id.* at 438.

<sup>157</sup> *Id.* at 435 (citing *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 314 n.3 (2009)).

<sup>158</sup> *Id.* at 436 (citing *Hinojos-Mendoza v. People*, 169 P.3d 662, 670 (Colo. 2007)). In fact, the Court considered this case nothing more than a re-application of *Hinojos-Mendoza*. *Id.* at 438 ("Thus, to reach our decision in this case, we need only look to and apply the same reasoning that we employed in *Hinojos-Mendoza*.").

<sup>159</sup> *Id.* at 437.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.* at 437-38 ("Regardless of any representations that the prosecution made that the technician would testify, Cropper had notice of the presence of the report and had an adequate opportunity to assert Cropper's confrontation rights and request that the technician be present for cross-examination."); see *Jones v. State*, 2011 Ark. App. 683, 6 (Ark. Ct. App. 2011) (holding that defendant's failure to provide notice that he wanted to examine analyst who appeared on prosecution's witness list but did not testify waived his Confrontation Clause rights because "the *Melendez-Diaz* Court acknowledged that some states have notice-and-demand statutes, [like Arkansas's], and found them consistent with constitutional requirements").

<sup>162</sup> *Cropper*, 251 P.3d at 438. If anything, that presumption was strengthened, as the Court's language evinced little patience for the defense counsel's unawareness of the statute. See, e.g., *id.* at 438 nn.8-9 (suggesting that Cropper may have a colorable claim for malpractice and observing that "section 16-3-309(5) is not a new statute. It has been in effect since 1984").

<sup>163</sup> *Id.* at 438 (Martinez, J., dissenting).

<sup>164</sup> *Id.* at 440.

<sup>165</sup> *Id.* at 439 (citing *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938); *Carnley v. Cochran*, 369 U.S. 506, 516 (1962); *Miranda v. Arizona*, 384 U.S. 436, 475 (1966); *Boykin v. Alabama*, 395 U.S. 238, 242-43 (1969); *Barker v. Wingo*, 407 U.S. 514, 525 (1972)). For a more detailed discussion of this precedent, see *infra* Section 0.

prosecution to provide the defendant with *actual* notice.”<sup>166</sup> Justice Martinez reasoned Colorado’s statute does no such thing and therefore “is not a simple notice-and-demand statute of the type approved in *Melendez-Diaz*.”<sup>167</sup> His dissent perspicaciously recognized that *Melendez-Diaz* listed several state notice-and-demand statutes were of the “simple” type, and Colorado’s was “[n]oticeably absent.”<sup>168</sup> Justice Martinez interpreted *Melendez-Diaz*’s list as a “refus[al] to approve statutes that lack an actual notice requirement” and thereby “cast[ing] doubt on the constitutionality of section 16-3-309(5) and other notice-and-demand statutes that fail to require the prosecution to provide actual notice to defense counsel.”<sup>169</sup> Finding no prosecutorial action that provided actual notice of prosecution’s intent to introduce the footprint forensic report without the testimony of its author, Justice Martinez determined that defense counsel’s failure to demand that testimony pursuant to Section 16-3-309(5) “was not a constitutionally sufficient communication of waiver.”<sup>170</sup> The majority’s holding to the contrary effected an unconstitutional application of Section 16-3-309(5) from which Justice Martinez dissented. In reaching this result, Justice Martinez again maligned the majority for creating and applying a conclusive presumption of waiver in the face of evidence rebutting it.<sup>171</sup>

Like Hinojos-Mendoza before him, the Colorado Supreme Court’s decision was the end of the line for Cropper. That court denied him a rehearing,<sup>172</sup> and United States Supreme Court denied his petition for certiorari.<sup>173</sup>

#### IV. “[T]HE U.S. SUPREME COURT’S STEADFAST REFUSAL TO PRESUME WAIVER [OF A FUNDAMENTAL CONSTITUTIONAL RIGHT] FROM INACTION”<sup>174</sup>

The Colorado and United States Supreme Court cases detailed in Sections 0 and III *supra* have not, of course, occurred in a vacuum. Instead, they have occurred against the backdrop of decades of United States Supreme Court case law explaining that inaction is insufficient to give rise to a waiver of a fundamental right, as discussed in *Mojica-Simental* and in Colorado Supreme Court Justice Martinez’s dissents from *Hinojos-Mendoza* and *Cropper*.<sup>175</sup> This Section details that case law.

As a primary matter, an accused’s right to confront the witnesses against him is a “bedrock procedural guarantee” and a “fundamental right.”<sup>176</sup> That “fundamental right” is

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<sup>166</sup> *Id.* (emphasis added) (footnote omitted) (citing *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009)). Justice Martinez also traced this point to *Mojica-Simental*, observing that “*Melendez-Diaz* confirms the fundamental importance of our emphasis in *Mojica-Simental* on actual notice.” *Id.* at 441 n.11 (citing *People v. Mojica-Simental*, 73 P.3d 15, 21 (Colo. 2003)).

<sup>167</sup> *Id.* at 440.

<sup>168</sup> *Id.* (citing *Melendez-Diaz*, 557 U.S. at 326).

<sup>169</sup> *Id.*

<sup>170</sup> *Id.* at 441.

<sup>171</sup> *Id.* at 441-42. On this point, Justice Martinez firmly rejected any hint that *Melendez-Diaz* approved of the presumption of waiver created in *Hinojos-Mendoza* and instead read *Melendez-Diaz* to “impl[y] that the mere existence of a statute is an insufficient basis to presume that an attorney made an informed decision to forego the right to confrontation.” *Id.* at 440-41.

<sup>172</sup> *Cropper v. People*, No. 09SC828, 2011 Colo. LEXIS 358 (Apr. 25, 2011). Justice Martinez and Chief Justice Bender would have granted the rehearing.

<sup>173</sup> *Cropper v. Colorado*, 132 S. Ct. 837 (2011).

<sup>174</sup> *Cropper v. People*, 251 P.3d 434, 442 (Colo. 2011) (Martinez, J., dissenting).

<sup>175</sup> *Id.* at 439; *Hinojos-Mendoza*, 169 P.3d 662, 671 (Colo. 2007) (Martinez, J., dissenting); *People v. Mojica-Simental*, 73 P.3d 15, 20 (Colo. 2003).

<sup>176</sup> *People v. Fry*, 92 P.3d 970, 974-75 (Colo. 2004) (citing *Crawford v. Washington*, 541 U.S. 36 (2004)); *Id.* at 975; see also *Pointer v. Texas*, 380 U.S. 400, 404-06 (1965).

guaranteed under both the United States and Colorado Constitutions.<sup>177</sup> Like other fundamental rights, the right to confrontation is waivable.<sup>178</sup> However, “[g]enerally, the U.S. Supreme Court has refused to presume waiver of a fundamental constitutional right from a defendant’s inaction.”<sup>179</sup> “The question of a waiver of a federally guaranteed constitutional right is, of course, a federal question controlled by federal law.”<sup>180</sup>

To that end, the United States Supreme Court has defined the waiver of a fundamental constitutional right as “an intentional relinquishment or abandonment of a known right or privilege,” dependent “upon the particular facts and circumstances surrounding that case.”<sup>181</sup> The Colorado Supreme Court has summarized (and harmonized) United States and Colorado case law to require three elements of a waiver: that it be made (1) “knowingly,” (2) “intentionally and intelligently,” and (3) “voluntarily”:

Thus, a valid waiver must be “knowingly” made, that is, the person waiving the particular right must “know” of the existence of the right and any other information legally relevant to the making of an informed decision either to exercise or relinquish that right. Second, the waiver must be made “intentionally” and “intelligently,” that is, *the person waiving that right must be fully aware of what he is doing and must make a conscious, informed choice to relinquish the known right. And, third, that conscious choice must be made “voluntarily,” that is, not coerced by the state either physically or psychologically.*<sup>182</sup>

Given the affirmative action required to waive a fundamental constitutional right, “courts indulge every reasonable presumption against waiver of fundamental constitutional rights and . . . do not presume acquiescence in the loss of fundamental rights.”<sup>183</sup> This Section details that presumption, as delineated across decades of United States Supreme Court decisions, and across the United States Constitution’s protections for the accused.

### A. The Right to Counsel

The Supreme Court has consistently recognized the fundamental Sixth Amendment right to the assistance of counsel.<sup>184</sup> The Court has equally consistently held that a defendant’s waiver of that fundamental right must be explicit and may not be inferred from his inaction.<sup>185</sup>

<sup>177</sup> U.S. CONST. amend. VI; COLO. CONST. art. II, § 16.

<sup>178</sup> See *Hinojos-Mendoza v. People*, 169 P.3d 662, 668 (Colo. 2007) (citing *Brookhart v. Janis*, 384 U.S. 1, 4 (1966); *Hawkins v. Hannigan*, 185 F.3d 1146, 1154 (10th Cir. 1999)).

<sup>179</sup> *Cropper*, 251 P.3d at 439 (Martinez, J., dissenting); see also Metzger, *supra* note 7, at 517-18 (explaining how “application of the demand-waiver doctrine is particularly absurd” in the context of confrontation of forensic witnesses).

<sup>180</sup> *Brookhart*, 384 U.S. at 4; see also *Boykin v. Alabama*, 395 U.S. 238, 243 (1969) (citing *Douglas v. Alabama*, 380 U.S. 415, 422 (1965)).

<sup>181</sup> *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938), *overruled in part on other grounds by Edwards v. Arizona*, 451 U.S. 477 (1981).

<sup>182</sup> *People v. Mozece*, 723 P.2d 117, 121 n.4 (Colo. 1986) (emphasis added); see also *Hinojos-Mendoza v. People*, 169 P.3d 662, 673 (Colo. 2007) (Martinez, J., dissenting).

<sup>183</sup> *Johnson*, 304 U.S. at 464 (internal quotation marks and footnotes omitted).

<sup>184</sup> U.S. CONST. amend. VI; *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) (noting that “lawyers in criminal courts are necessities, not luxuries”).

<sup>185</sup> See, e.g., *Brewer v. Williams*, 430 U.S. 387, 404 (1977).

Case law generally traces the definition of a waiver, with regard to constitutional rights, to the United States Supreme Court's 1938 decision in *Johnson v. Zerbst*,<sup>186</sup> a case involving the right to counsel. In *Johnson*, a criminal defendant was tried and convicted without the assistance of counsel.<sup>187</sup> The Court "pointed out that 'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights and that we 'do not presume acquiescence in the loss of fundamental rights.'"<sup>188</sup> The Court defined a waiver as "an intentional relinquishment or abandonment of a known right or privilege."<sup>189</sup> Importantly, the Court noted that in applying that definition, "The determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused."<sup>190</sup> The Court remanded the case to the district court for a factual determination of whether such an intelligent waiver had occurred.<sup>191</sup>

In the decades since *Johnson*, the Supreme Court has repeatedly applied this holding to reject state court attempts to presume waiver of the right to counsel based only on failure of the defendant to appear with counsel.<sup>192</sup> In *Rice v. Olson*,<sup>193</sup> a 1945 case, a criminal defendant pled guilty at his arraignment without being advised of his right to counsel.<sup>194</sup> He alleged that he had been denied his right to counsel and to call witnesses, despite the fact that "he had not waived those rights by word or action."<sup>195</sup> The Nebraska Supreme Court below had held that "[i]t is not necessary that there be a formal waiver; and a waiver will ordinarily be implied where accused appears without counsel and fails to request that counsel be assigned to him, particularly where accused voluntarily pleads guilty."<sup>196</sup> The United States Supreme Court resolutely rejected the state court's conclusive presumption of waiver.<sup>197</sup> First, the Court noted that "[w]hatever inference of waiver could be drawn from the petitioner's plea of guilty is adequately answered by the uncontroverted statement in his petition that he did not waive the right either by word or action."<sup>198</sup> Instead, the Court held, the defendant's denial raised a question of fact as to whether the defendant had knowingly and intelligently waived his Sixth Amendment rights.<sup>199</sup> The Court remanded for a factual determination of whether the defendant had made such a waiver.<sup>200</sup>

Two decades later, in 1962, the Supreme Court reiterated the impermissibility of a waiver of the right to counsel based solely on the defendant's failure to appear with

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<sup>186</sup> 304 U.S. 458 (1938).

<sup>187</sup> *Id.* at 460.

<sup>188</sup> *Id.* at 464 (citing *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393 (1937); *Hodges v. Easton*, 106 U.S. 408, 412 (1882); *Ohio Bell Tel. Co. v. Public Utils. Comm'n*, 301 U.S. 292, 307 (1937)).

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> *Id.* at 469.

<sup>192</sup> *Cropper v. People*, 251 P.3d 434, 439 (Colo. 2011) (citing *Barker v. Wingo*, 407 U.S. 514, 525 (1972); *Boykin v. Alabama*, 395 U.S. 238, 242-43 (1969); *Miranda v. Arizona*, 384 U.S. 436, 475 (1966); *Carnley v. Cochran*, 369 U.S. 506, 516 (1962); *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)).

<sup>193</sup> 324 U.S. 786 (1945).

<sup>194</sup> *Id.* at 786-87.

<sup>195</sup> *Id.* at 787.

<sup>196</sup> *Id.* at 788 (internal quotation marks omitted).

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> *Id.* at 788-89.

<sup>200</sup> *Id.* at 791.

counsel.<sup>201</sup> In *Carnley v. Cochran*,<sup>202</sup> a criminal defendant was tried without the assistance of counsel.<sup>203</sup> Echoing its decision in *Rice*, the Supreme Court rejected a state-court-created presumption that a defendant had waived a fundamental constitutional right based solely on the absence of an appearance of counsel in the record.<sup>204</sup> The Court unequivocally held that “[p]resuming waiver from a silent record is impermissible.”<sup>205</sup> This is because “[t]o cast such a burden on the accused is wholly at war with the standard of proof of waiver of the right to counsel . . . laid down in *Johnson v. Zerbst*.”<sup>206</sup> Instead of presuming waiver from silence or inaction, the Court stated, a waiver only arises if the record shows “that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver.”<sup>207</sup> “[N]o such burden can be imposed upon an accused unless the record . . . reveals his affirmative acquiescence.”<sup>208</sup>

## B. The Right to Remain Silent

Like the right to assistance of counsel, the right to remain silent is a fundamental constitutional right enjoyed by all citizens.<sup>209</sup> This right arises from Fifth Amendment’s privilege against self-incrimination.<sup>210</sup> Because of the fundamental nature of the right, a person subject to custodial interrogation “must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed”<sup>211</sup> before he may be questioned.<sup>212</sup> Further, a “defendant may waive effectuation of these rights” only if “the waiver is made voluntarily, knowingly, and intelligently.”<sup>213</sup> “[A] valid waiver will not be presumed simply from the silence of the accused after [Miranda] warnings are given or simply from the fact that a confession was in fact eventually obtained.”<sup>214</sup>

The Supreme Court has explained that “[e]ven absent the accused’s invocation of the right to remain silent, the accused’s statement during a custodial interrogation is inadmissible at trial unless the prosecution can establish that the accused ‘in fact knowingly and voluntarily waived [Miranda] rights’ when making the statement.”<sup>215</sup> In determining whether a defendant has voluntarily waived the right to remain silent, the

<sup>201</sup> *Carnley v. Cochran*, 369 U.S. 506, 516 (1962).

<sup>202</sup> 369 U.S. 506 (1962).

<sup>203</sup> *Id.*

<sup>204</sup> *Id.* at 513 (“[T]he State Supreme Court imputed to petitioner the waiver of the benefit of counsel on a ground stated in the court’s opinion as follows: ‘If the record shows that defendant did not have counsel . . . , it will be presumed that defendant waived the benefit of counsel.’” (citation omitted)); *Id.* at 516.

<sup>205</sup> *Id.*

<sup>206</sup> *Id.* at 514.

<sup>207</sup> *Id.* at 516.

<sup>208</sup> *Id.* at 516-17.

<sup>209</sup> *Couch v. United States*, 409 U.S. 322, 327 (1973) (“The importance of preserving inviolate the privilege against compulsory self-incrimination has often been stated by this Court and need not be elaborated. By its very nature, the privilege is an intimate and personal one. It respects a private inner sanctum of individual feeling and thought and proscribes state intrusion to extract self-condemnation.” (citations omitted)).

<sup>210</sup> U.S. CONST. amend. V (“No person . . . shall be compelled in any criminal case to be a witness against himself . . . .”); see *Miranda v. Arizona*, 384 U.S. 436, 439 (1966).

<sup>211</sup> *Miranda*, 384 U.S. at 444.

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

<sup>214</sup> *Id.* at 475.

<sup>215</sup> *Berghuis v. Thompkins*, 130 S. Ct. 2250, 2260 (2010) (alteration in original) (quoting *North Carolina v. Butler*, 441 U.S. 369, 373 (1979)).

Court has employed the waiver test articulated in *Johnson v. Zerbst* with respect to a waiver of the right to counsel.<sup>216</sup>

This right extends beyond the point of conviction and includes a defendant's right to remain silent during sentencing proceedings.<sup>217</sup> In fact, statements made by a defendant facing the death penalty to a court-appointed psychiatrist at an evaluation requested by the prosecution during the sentencing phase of his criminal proceedings may not later be used against the defendant unless he knowingly, intelligently, and voluntarily waived his right to remain silent before making statements to the psychiatrist.<sup>218</sup> Thus, the Court has steadfastly enforced the rule that, "[g]overnments, state and federal, are . . . constitutionally compelled to establish guilt by evidence independently and freely secured, and may not by coercion prove a charge against an accused out of his own mouth."<sup>219</sup> absent an adequate waiver of this "essential mainstay of our adversary system."<sup>220</sup>

### C. The Right to a Speedy Trial

As "one of the most basic rights preserved by our Constitution," the Sixth Amendment right to a speedy trial is yet another fundamental right.<sup>221</sup> It "is an important safeguard to prevent undue and oppressive incarceration prior to trial, to minimize anxiety and concern accompanying public accusation and to limit the possibilities that long delay will impair the ability of an accused to defend himself."<sup>222</sup> In *Barker v. Wingo*,<sup>223</sup> a 1972 case, the Supreme Court considered the contours of the right to a speedy trial, in the appeal of a criminal defendant's conviction after 16 continuances obtained by the prosecution.<sup>224</sup> The case gave the Court the opportunity to determine multiple potential approaches to protect a right that is "necessarily relative" and "generically different from any of the other rights enshrined in the Constitution for the protection of the accused."<sup>225</sup> One such approach that the Court considered was the "demand-waiver doctrine."<sup>226</sup> "The demand-waiver doctrine provides that a defendant waives any consideration of his right to speedy trial for any period prior to which he has not demanded a trial. Under this rigid approach, a prior demand is a necessary condition to the consideration of the speedy trial right."<sup>227</sup> Citing, *inter alia*, *Johnson*, *Carnley*, *Miranda*, and *Boykin*, the Court decisively ruled this approach unconstitutional: "Such an approach, by presuming waiver of a fundamental right from inaction, is inconsistent with this Court's pronouncements on

<sup>216</sup> *Butler*, 442 U.S. at 374-75.

<sup>217</sup> *Mitchell v. United States*, 526 U.S. 314, 330 (1999). In *Mitchell*, the Court held that a district court may not hold a defendant's "silence against her in determining the facts of the offense at [a] sentencing hearing." *Id.*

<sup>218</sup> *Estelle v. Smith*, 451 U.S. 454, 468-69 (1981). The *Estelle* Court concluded that, "[a] criminal defendant, who neither initiates a psychiatric evaluation nor attempts to introduce any psychiatric evidence, may not be compelled to respond to a psychiatrist if his statements can be used against him at a capital sentencing proceeding." *Id.* at 468. The defendant in *Estelle*, who had been sentenced to death, had his death sentence reversed because his "statements to [the psychiatrist] were not 'given freely and voluntarily without any compelling influences' and, as such, could be used as the State did at the penalty phase only if [he] had been apprised of his rights and had knowingly decided to waive them." *Id.* at 469 (quoting *Miranda*, 384 U.S. at 478).

<sup>219</sup> *Malloy v. Hogan*, 378 U.S. 1, 8 (1964).

<sup>220</sup> *Miranda*, 384 U.S. at 461.

<sup>221</sup> *Klopfer v. North Carolina*, 386 U.S. 213, 226 (1967).

<sup>222</sup> *United States v. Ewell*, 383 U.S. 116, 120 (1966).

<sup>223</sup> 407 U.S. 514 (1972).

<sup>224</sup> *Id.* at 515-16.

<sup>225</sup> *Id.* at 519, 522-24.

<sup>226</sup> *Id.* at 524-25.

<sup>227</sup> *Id.* at 525.

waiver of constitutional rights.”<sup>228</sup> The Court flatly rejected “the rule that a defendant who fails to demand a speedy trial forever waives his right.”<sup>229</sup>

**D. The “Several Federal Constitutional Rights . . . Involved . . . When a Plea of Guilty Is Entered in a State Criminal Trial”<sup>230</sup>**

The Supreme Court has taken up the issue of waiver of the constitutional rights effected by a criminal defendant’s guilty plea and, each time, applied the principle that those rights are not forfeited except by a voluntary, intelligent, and knowing waiver.<sup>231</sup>

In the 1969 case of *Boykin v. Alabama*,<sup>232</sup> the Supreme Court expounded on exactly which rights are waived when a criminal defendant enters a plea of guilty.<sup>233</sup> It found “several”: the Fifth Amendment right against self-incrimination, the right to trial by jury, and the right to confront one’s accusers.<sup>234</sup> The Court then considered those rights in the context of a criminal defendant who had pled guilty at his arraignment to all indictments against him.<sup>235</sup> Alabama law required sentencing by jury thereafter, and the jury found the defendant guilty and sentenced him to death.<sup>236</sup> The Court determined that *Carnley*’s rationale, rejecting the presumption of a waiver based on a silent record, applied with equal force “to determin[e] whether a guilty plea is voluntarily made.”<sup>237</sup> The Court refused to “presume a waiver of these three important federal rights from a silent record.”<sup>238</sup> Instead, the Court would have required “an affirmative showing” that waiver of his constitutional rights was made intelligently and voluntarily.<sup>239</sup> Because no such affirmative showing existed in the record, the Court reversed the conviction.<sup>240</sup>

The Court took up the issue again in *Brady v. United States*,<sup>241</sup> wherein it described *Boykin*’s holding as adding a requirement of an affirmative showing to the long-standing requirement that a guilty plea must be voluntary and intelligent.<sup>242</sup> The case again considered whether a guilty plea was made voluntarily, this time in the context of a defendant who faced a maximum sentence of death but received a sentence of 50 years under the plea.<sup>243</sup> The defendant alleged that his plea was not voluntary because (1) the

<sup>228</sup> *Id.* (footnote omitted).

<sup>229</sup> *Id.* at 528. In its place, the Supreme Court announced a rule “that the defendant’s assertion of or failure to assert his right to a speedy trial is one of the factors to be considered in an inquiry into the deprivation of the right.” *Id.* The Court made clear that the rule “places the primary burden on the courts and the prosecutors to assure that cases are brought to trial.” *Id.* at 529. In so doing, the Court was guided by the “unique” nature of the right to a speedy trial, “in its uncertainty as to when and under what circumstances it must be asserted or may be deemed waived.” *Id.* In making its ruling, the Court “[d]id not depart from [its] holdings in other cases concerning the waiver of fundamental rights, in which [it] ha[s] placed the entire responsibility on the prosecution to show that the claimed waiver was knowingly and voluntarily made.” *Id.*

<sup>230</sup> *Boykin v. Alabama*, 395 U.S. 238, 243 (1969).

<sup>231</sup> *Id.*

<sup>232</sup> 395 U.S. 238 (1969).

<sup>233</sup> *Id.*

<sup>234</sup> *Id.*

<sup>235</sup> *Id.* at 239.

<sup>236</sup> *Id.* at 240.

<sup>237</sup> *Id.* at 242.

<sup>238</sup> *Id.* at 243.

<sup>239</sup> *Id.* at 242.

<sup>240</sup> *Id.* at 244.

<sup>241</sup> 397 U.S. 742 (1970).

<sup>242</sup> *Id.* at 747 n.4 (1970) (citing *Boykin*, 385 U.S. at 242).

<sup>243</sup> *Id.* at 744. The sentence was later reduced to 30 years. *Id.*



statute under which he was charged operated to coerce his plea because it authorized a sentence of death, (2) his attorney improperly pressured his plea, and (3) his plea was induced by representations with respect to reduction of sentence and clemency.<sup>244</sup> The Court rejected the argument that the criminal statute was inherently coercive because it authorized a sentence of death.<sup>245</sup> Instead, the Court reaffirmed that the proper test was whether his plea was voluntary and intelligent, as evidenced by an affirmative showing in the record.<sup>246</sup> The Court defined waiver as follows: “Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done *with sufficient awareness of the relevant circumstances and likely consequences.*”<sup>247</sup> Applying this definition, and reviewing the circumstances of the guilty plea, the Court affirmed that Brady made the plea voluntarily and intelligently and thus constitutionally.<sup>248</sup>

### E. The Right to Be Confronted with One’s Accusers

As described above, an accused’s right to be confronted with the witnesses against him is a fundamental right.<sup>249</sup> The Supreme Court has repeatedly held that it may not be forfeited absent a knowing, voluntary, and intelligent waiver. It has done so in the context of the waiver of the confrontation right subsumed in a guilty plea, as described in Section 0(0) *supra*, and it has do so in cases concerning more direct waivers of the confrontation right, as detailed in this Section.

In the 1966 case of *Brookhart v. Janis*,<sup>250</sup> the Court considered the conviction of a defendant after his counsel had agreed to a *prima facie* bench trial.<sup>251</sup> The defendant argued that his confrontation right had been violated by (1) the introduction of an out-of-court alleged confession of a co-defendant and (2) the denial of his right to cross-examine any of the prosecution’s witnesses.<sup>252</sup> The Court first observed that the defendant’s confrontation right could not have been denied without a valid waiver.<sup>253</sup> It went on to find that the record showed that “that petitioner himself did not intelligently and knowingly agree to be tried in a proceeding which was the equivalent of a guilty plea and in which he would not have the right to be confronted with and cross-examine the witnesses against him.”<sup>254</sup> Because the defendant had “neither personally waived his right nor acquiesced in his lawyer’s attempted waiver,” the Court reversed the conviction.<sup>255</sup>

<sup>244</sup> *Id.*

<sup>245</sup> *Id.* at 746-47.

<sup>246</sup> *Id.* at 747, 747 n.4 (citing *Boykin*, 395 U.S. at 242).

<sup>247</sup> *Id.* at 748 (emphasis added) (citing *Brookhart v. Janis*, 384 U.S. 1 (1966); *Adams v. United States ex rel. McCann*, 317 U.S. 269, 275 (1942); *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938); *Patton v. United States*, 281 U.S. 276, 312 (1930)).

<sup>248</sup> *Id.* at 758. On this point, the Court pointed to an absence of “evidence that Brady was so gripped by fear of the death penalty or hope of leniency that he did not or could not, with the help of counsel, rationally weigh the advantages of going to trial against the advantages of pleading guilty.” *Id.* at 750. The Court declined to invalidate a guilty plea “whenever motivated by the defendant’s desire to accept the certainty or probability of a lesser penalty rather than face a wider range of possibilities extending from acquittal to conviction and a higher penalty authorized by law for the crime charged.” *Id.* at 751. Instead, the Court upheld the constitutionality of his plea even though acknowledging it “may well have been motivated in part by a desire to avoid a possible death penalty.” *Id.* at 758.

<sup>249</sup> See *supra* notes 176-77.

<sup>250</sup> 384 U.S. 1 (1966).

<sup>251</sup> *Id.* at 5-6.

<sup>252</sup> *Id.* at 2.

<sup>253</sup> *Id.* at 4.

<sup>254</sup> *Id.* at 7. The Court found that “[h]is emphatic statement to the judge that ‘in no way am I pleading guilty’ negatives any purpose on his part to agree to have his case tried on the basis of the State’s proving a *prima facie*

The Court reached a similar decision in the 1968 case of *Barber v. Page*.<sup>256</sup> There, the Supreme Court considered the conviction of a defendant in which the principal evidence against him was the reading of the preliminary hearing testimony of a witness who, by the time of trial, was incarcerated in a different state.<sup>257</sup> At that preliminary hearing, an attorney for the defendant had not cross-examined the witness, although an attorney for a co-defendant did.<sup>258</sup> Nevertheless, the Court determined that the defendant had not waived his right to confrontation.<sup>259</sup> At that hearing, the Court determined, the defendant could not have been aware that by the time of trial, the witness would be incarcerated out-of-state, and he could also not have been aware that the prosecution would make no effort to produce the witness by trial.<sup>260</sup> According to the Court, “[t]o suggest that failure to cross-examine in such circumstances constitutes a waiver of the right of confrontation at a subsequent trial hardly comports with this Court’s definition of a waiver as ‘an intentional relinquishment or abandonment of a known right or privilege.’”<sup>261</sup> Even if the defendant had cross-examined at the preliminary hearing, the Court would have reached the same result, because “[t]he right to confrontation is basically a trial right.”<sup>262</sup> Determining that “[t]he right of confrontation may not be dispensed with so lightly,” the Court reversed the defendant’s conviction.<sup>263</sup>

Thus, it is unequivocal that a defendant’s fundamental confrontation right may not be forfeited by anything short of his knowing, voluntary, and intelligent waiver.

## V. NOTICE-AND-DEMAND PROVISIONS IN THEIR VARIOUS FORMS

The Colorado Supreme Court is not, of course, the only state court to consider the constitutionality of its state’s notice-and-demand provision. To contextualize Colorado’s judicial opinions on this issue, this Section reviews case law from other states concerning notice-and-demand statutes.

### A. Unconstitutional Notice-and-Demand Provisions

Many state courts that have struck down notice-and-demand statutes have employed a variant of the rationale that the automatic waiver of rights effected when a defendant fails to demand testimony is not a waiver that, as the Constitution requires, is knowing, voluntary, and intelligent. Others have construed their state’s statute in a way to avoid constitutionally problematic results. Still others have upheld notice-and-demand statutes while employing reasoning that supports the proposition that statutes such as Colorado’s are unconstitutional as applied to pro se defendants. This Section details those decisions.

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case which both the trial court and the State Supreme Court held was the practical equivalent of a plea of guilty.” *Id.*

<sup>255</sup> *Id.* at 8.

<sup>256</sup> *Barber v. Page*, 390 U.S. 719 (1968).

<sup>257</sup> *Id.* at 720-21.

<sup>258</sup> *Id.* at 720.

<sup>259</sup> *Id.* at 725.

<sup>260</sup> *Id.* Elsewhere, the Court faulted the prosecution for its lack of effort to locate the witness. *Id.* at 724. The Court determined that a witness may not be deemed “unavailable” for confrontation and hearsay purposes “unless the prosecutorial authorities have made a good-faith effort to obtain his presence at trial.” *Id.* at 724-25.

<sup>261</sup> *Id.* at 725 (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938); *Brookhart v. Janis*, 384 U.S. 1, 4 (1966)).

<sup>262</sup> *Id.* at 725.

<sup>263</sup> *Id.* at 725-26.

One early decision striking down a notice-and-demand statute was the Illinois' Supreme Court's decision in *People v. McClanahan*.<sup>264</sup> That decision held Illinois' notice-and-demand statute unconstitutional even under the pre-*Crawford*, arguably looser *Ohio v. Roberts* framework.<sup>265</sup> Similar to Colorado's, the Illinois statute permitted the admission into evidence of a laboratory report, unless the defendant demanded testimony within seven days of receipt of the report.<sup>266</sup> The Court found that the automatic statutorily-operated waiver that occurs if the defendant fails to demand "does not guarantee that this waiver is a knowing and intelligent act done with sufficient awareness of the relevant circumstances and likely consequences."<sup>267</sup> The Court emphasized that an accused's "right to be confronted with the witnesses against him . . . is a mandatory constitutional obligation of the prosecuting authority. It arises automatically at the inception of the adversary process, and no action of the defendant is necessary to activate this constitutional guarantee in his case."<sup>268</sup> Because the statute did not guarantee that this constitutional obligation would be met, the Court struck down the statute as violative of the federal and state Confrontation Clauses.<sup>269</sup>

Other states have joined Illinois. In *State v. Caulfield*,<sup>270</sup> the Minnesota Supreme Court deemed Minnesota's notice-and-demand statute unconstitutional.<sup>271</sup> Minnesota's statute was also strikingly similar to Colorado's in that it "permit[ted] the admission of 'a report of the facts and results of any laboratory analysis or examination if it is prepared and attested by the person performing the analysis or examination in any laboratory operated by the Bureau of Criminal Apprehension,'" but allowed the defendant to demand the live testimony of the analyst at least ten days before trial.<sup>272</sup> The Court struck down the statute because it did not provide adequate notice to the defendant of the consequences of his failure to demand the testimony:

At a minimum, any statute purporting to admit testimonial reports without the testimony of the preparer must provide adequate notice to the defendant of the contents of the report and the likely consequences of his failure to request the testimony of the preparer. Otherwise, there is no reasonable basis to conclude that the defendant's failure to request the testimony constituted a knowing, intelligent, and voluntary waiver of his confrontation rights.<sup>273</sup>

<sup>264</sup> *People v. McClanahan*, 729 N.E.2d 470 (Ill. 2000).

<sup>265</sup> *Id.* at 474-75, 478.

<sup>266</sup> *Id.* at 473 (citing 725 ILCS 5/115-15); see COLO. REV. STAT. § 16-3-309 (2012).

<sup>267</sup> *McClanahan*, 729 U.S. at 477.

<sup>268</sup> *Id.* (emphasis in original).

<sup>269</sup> *Id.* at 478. In a subsequent case, the Illinois Supreme Court held that defense counsel may waive a defendant's confrontation right by stipulating to the admission of evidence as long as the defendant does not object and the decision to waive is a matter of legitimate trial tactics and strategy. *People v. Campbell*, 802 N.E.2d 1205, 1213, 1215 (Ill. 2003). Importantly, "[w]here the stipulation includes a statement that the evidence is sufficient to convict the defendant or where the State's entire case is to be presented by stipulation, we find that a defendant must be personally admonished about the stipulation and must personally agree to the stipulation." *Id.* at 1215. The Court thus acknowledged that, even though waiver of confrontation by counsel is permissible in some circumstances, there remain circumstances where a defendant must personally participate in and making a knowing, voluntary, and intelligent waiver of his confrontation right.

<sup>270</sup> 722 N.W.2d 304 (Minn. 2006).

<sup>271</sup> *Id.*

<sup>272</sup> *Id.* at 310 (citing Minn. Stat. § 634.15, subd. 1(a), 2(a)(2004); see COLO. REV. STAT. § 16-3-309 (2012)).

<sup>273</sup> *Caulfield*, 722 N.W.2d at 313. The dissent in *Caulfield* attempted to find that Minnesota's notice-and-demand statute constitutional by reference to what it deemed "nonexplicit waivers of confrontation rights" authorized by Supreme Court case law. *Id.* at 318 n.2 (Johnson, J., dissenting). This reasoning, however, is unpersuasive. First,

An especially relevant interpretation of a notice-and-demand statute came in the District of Columbia Court of Appeals' decision in *Thomas v. United States*.<sup>274</sup> The District of Columbia's notice-and-demand statute "direct[ed] that a chemist's report is admissible in evidence in the chemist's absence (even if the chemist is available, and even if the defendant had no prior opportunity to cross-examine the chemist), unless the defendant subpoenas the chemist to appear."<sup>275</sup> The court found that direction to be problematic after *Crawford* and chose to construe the statute to preserve its constitutionality.<sup>276</sup> The Court reinterpreted the statute as follows:

As we now construe § 48-905.06, it still authorizes the government to introduce a chemist's report without calling the chemist in its case-in-chief, but only so long as the record shows a *valid waiver* by the defendant of his confrontation right. Absent a valid waiver, *which usually must be express but under some circumstances may be inferable from a defendant's failure to request the government to produce the author of the report*, the defendant enjoys a Sixth Amendment right to be confronted with the chemist in person.<sup>277</sup>

As to a "valid waiver," the court considered and conformed to the United States Supreme Court formulations of that concept.<sup>278</sup> The court described "the best course for the government obviously" to be to obtain an express waiver from the defendant, perhaps via a stipulation or pretrial hearing.<sup>279</sup> The court suggested one—and only one—circumstance in which a court might permissibly "infer a valid waiver of the right of confrontation, in the absence of an express waiver."<sup>280</sup> That circumstance was as follows:

[I]f a defendant represented by counsel is provided with the chemist's report and is advised that a failure to request the chemist's presence for purposes of confrontation will be understood as a waiver of the right and as a stipulation to the admissibility of the chemist's report, we think that a trial court would be justified in inferring a valid waiver from an unexplained or unexcused failure by the defendant to respond.<sup>281</sup>

That circumstance leaves open two possibilities where a waiver may not be inferred: (1) where defense counsel explains or excuses failure to respond, and (2) where a defendant is *not* represented by counsel. The District of Columbia Court of Appeals' decision thus acknowledges that pro se defendants must be analyzed differently than represented defendants with respect to waiver of their confrontation rights.<sup>282</sup>

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the dissent itself acknowledged that the cases it cited were distinguishable from the facts at hand, in that those cases all involved instances of defendant misconduct. *Id.* Second, misconduct, of course, is not inaction but affirmative conduct.

<sup>274</sup> 914 A.2d 1 (D.C. 2006).

<sup>275</sup> *Id.* at 18.

<sup>276</sup> *Id.* at 5, 18-20.

<sup>277</sup> *Id.* at 5 (emphases added).

<sup>278</sup> *Id.* at 19 (citing *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938); *Barber v. Page*, 390 U.S. 719, 725 (1968); *Barker v. Wingo*, 407 U.S. 514, 525 (1972)).

<sup>279</sup> *Id.*

<sup>280</sup> *Id.*

<sup>281</sup> *Id.* (citing *Barker*, 407 U.S. at 528-29).

<sup>282</sup> *Id.*

The Ohio Supreme Court's pronouncements on Ohio's notice-and-demand statute echo this sentiment. In *State v. Pasqualone*,<sup>283</sup> that court affirmed the constitutionality of Ohio's notice-and-demand statute, but did so in a way that left two openings relevant to this Article.<sup>284</sup> First, the court observed that the notice provided to Pasqualone included notice of the consequences of his failure to demand the analyst's testimony and also otherwise complied in full with the statute, and thus a valid waiver had occurred in the circumstances presented.<sup>285</sup> In making this observation, the court specifically distinguished the case at hand from a prior Ohio Court of Appeals decision wherein the notice provided had *not* stated the consequences of failure to demand testimony pursuant to the statute.<sup>286</sup> The court carefully confined its decision to the facts at hand,<sup>287</sup> at least one Ohio lower appellate case has seized on this distinction to determine that where the prosecution's notice does not state the consequences of failure to demand testimony, no valid waiver can be found.<sup>288</sup> The second crucial point in the court's logic, providing a ground on which the case may be distinguished, is that the court emphasized that the defendant was represented by counsel and that a defendant's counsel may waive his client's confrontation rights without approval.<sup>289</sup> The court cited to *Hinojos-Mendoza* on this point,<sup>290</sup> and again confined its holding to the facts before it, *i.e.*, where the defendant is represented by counsel.<sup>291</sup> The *Pasqualone* opinion therefore does not govern the case of a pro se defendant.

In addition, other state high courts have deemed unconstitutional their state's statutory mechanism for procuring analyst testimony based on the rationale, eventually elucidated in *Melendez-Diaz*, that a state may not shift the burden of calling witnesses against the defendant to the defense.<sup>292</sup> At least one other, the Kansas Supreme Court, has

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<sup>283</sup> 903 N.E.2d 270 (Ohio 2009).

<sup>284</sup> *Id.*

<sup>285</sup> *Id.* at 275.

<sup>286</sup> *Id.* (citing *State v. Smith*, No. 1-05-39, 2006 WL 846342, at\*7 (Ohio Ct. App. 2006)).

<sup>287</sup> *Id.* ("We determine that a valid waiver occurs in the situation presented by the case sub judice.").

<sup>288</sup> See *State v. McClain*, No. L-10-1088, 2012 WL 5508133, at \*5 (Ohio Ct. App. Nov. 9, 2012) (citing *Tacon v. Arizona*, 410 U.S. 351, 355 (1973) (Douglas, J., dissenting)) (citing *Pasqualone* "to implicitly approve the proposition first stated [in *State v. Smith*] that, in order to comply with the Sixth Amendment and R.C. 2925.51 [the notice-and-demand statute], the notice provision in a lab report must convey to the defendant the consequences of failure to demand the laboratory analyst's testimony).

<sup>289</sup> *Pasqualone*, 903 N.E.2d at 275-77.

<sup>290</sup> *Id.* at 276 (citing *Hinojos-Mendoza v. People*, 169 P.3d 662 (Colo. 2007)).

<sup>291</sup> *Id.* at 280 ("We hold that an accused's attorney is capable of waiving his client's right to confrontation by not demanding that a laboratory analyst testify pursuant to the opportunity afforded by [the notice-and-demand statute].").

<sup>292</sup> See *State v. Birchfield*, 157 P.3d 216, 219-220 (Or. 2007) (striking down, as unconstitutional under the State Constitution's Confrontation Clause, a statutory requirement that the defendant notify the state if he insisted on the right to cross-examine a laboratory analyst); *Cypress v. Commonwealth*, 699 S.E.2d 206, 213 (Va. 2010) (determining, in light of *Melendez-Diaz*, that Virginia statute that shifted the burden of calling witnesses against the defendant to the defense "did not adequately protect [the defendants'] Confrontation Clause rights" and failure to comply with the statute did not operate as a waiver of those rights); Mnookin, *supra* note 7, at 799 n.19 (arguing that notice-and-demand statutes requiring that defendant's demand contain some kind of good-faith showing are "constitutionally problematic"); *cf.* *State v. Belvin*, 986 So. 2d 516, 525 (Fla. 2008) (citing FLA. STAT. § 316.1934 (2012)) (determining that statute that permits admission of breath test operator's affidavit but also allows defendant to subpoena the operator as an adverse witness "does not adequately preserve the defendant's Sixth Amendment right to confrontation"); *State v. Miller*, 790 A.2d 144, 156 (N.J. 2002) (construing notice-and-demand statute to require only that defendant object to admission of lab certificate and assert it will be contested, rejecting an interpretation requiring a more detailed objection as it would have placed too great a burden on defendant). The Oregon Supreme Court's decision in *Birchfield* struck down Oregon's statute on this ground, but suggested that a notice-and-demand requirement would indeed be constitutional.

found constitutional infirmity in its notice-and-demand statute on the ground that it extends too far beyond *Melendez-Diaz*'s description of such statutes in their "simplest form."<sup>293</sup>

### B. "[T]reat[ing] the Question of Waiver Cavalierly"<sup>294</sup>: Decisions Affirming the Constitutionality of Notice-and-Demand Statutes

By contrast, other state courts have upheld their state's notice-and-demand statutes. Of those, some have done so with fleeting reference to *Melendez-Diaz*'s footnote authorizing notice-and-demand statutes "[i]n their simplest form."<sup>295</sup> Lower appellate courts in Arkansas, Iowa, North Carolina, Texas, and Washington are among this group.<sup>296</sup> Similarly, some state courts have upheld their state's notice-and-demand statute with no consideration whatsoever of Supreme Court case law governing an accused's waiver of his or her constitutional rights.<sup>297</sup> One early example of this type of decision was the Nevada Supreme Court's 2005 decision in *City of Las Vegas v. Walsh*.<sup>298</sup> There, the court determined that a forensic affidavit was a testimonial statement.<sup>299</sup> It further determined that, because the statute permitted the defense to object "in writing" to the admission of the affidavit absent testimony of its author, it "adequately preserve[d] the constitutional right to confront witnesses against a defendant by providing a statutory confrontation mechanism."<sup>300</sup> The statute was therefore constitutional and failure to use the statutory mechanism would result in a waiver.<sup>301</sup> The Nevada Supreme Court reached this

*Birchfield*, 157 P.3d at 219-220; cf. *State v. Willis*, 236 P.3d 714, 717 n.1 (Ore. 2010) (observing that *Birchfield* accords with the Supreme Court's decision in *Melendez-Diaz*).

<sup>293</sup> *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 326 (2009); see *State v. Laturner*, 218 P.3d 23, 38-40 (Kan. 2009) (severing portion of Kansas' notice-and-demand statute, in order to transform it into a constitutional, simple notice-and-demand statute under *Melendez-Diaz*). The lower appellate court in *Laturner* had considered, and struck down the statute based on the United States Supreme Court's pronouncements on waiver of fundamental rights. *Id.* at 31-32. The Kansas Supreme Court, however, read *Melendez-Diaz* to cast some doubt on that rationale, and instead severed Kansas' statute such that the remaining portions mirrored the "simplest" notice-and-demand statute deemed constitutional by *Melendez-Diaz*. *Id.* at 39. Prior to this decision severing the statute, the Kansas statute "require[d] not just that a defendant demand that the laboratory analyst testify at trial but that the defendant state an objection and the grounds for the objection." *Id.* at 30.

<sup>294</sup> *Tacon v. Arizona*, 410 U.S. 351, 354 (1973) (Douglas, J., dissenting).

<sup>295</sup> *Melendez-Diaz*, 557 U.S. at 326.

<sup>296</sup> See *Jones v. State*, 2011 Ark. App. 683, at 6-7 (Ark. Ct. App. 2011) (holding that defendant's failure to provide notice that he wanted to examine analyst who appeared on prosecution's witness list but did not testify did not violate Confrontation Clause because "the *Melendez-Diaz* Court acknowledged that some states have notice-and-demand statutes [like Arkansas's], and found them consistent with constitutional requirements"); *Watson v. State*, No. 2-1057/11-1833, 2013 Iowa App. LEXIS 40, at \*14-16 (Iowa Ct. App. Jan. 9, 2013) (noting that the *Melendez-Diaz* Court approved of "such statutes" as Iowa's ten-day notice-and-demand requirement); *State v. Steele*, 689 S.E.2d 155, 160-61 (N.C. Ct. App. 2010); *Carson v. State*, No. 11-10-00178-CR, 2012 Tex. App. LEXIS 4721, at \*5-7 (Tex. App. June 14, 2012) (per curiam) (determining that *Melendez-Diaz* authorized notice-and-demand statutes and cursorily deciding that, because defendant did not demand testimony of laboratory report author pursuant to the statute, defendant had waived his Confrontation rights); *Herring v. State*, No. 05-08-01699-CR, 2010 Tex. App. LEXIS 3136, at \*2-5 (Tex. App. Apr. 28, 2010) (same); *State v. Schroeder*, 262 P.3d 1237, 1239 (Wash. Ct. App. 2011) ("This rule comports with *Melendez-Diaz*.").

<sup>297</sup> See, e.g., *Culberson v. State*, No. 11-06-00196-CR, 2008 Tex. App. LEXIS 2720, at \*11 (Tex. App. Apr. 17, 2008) (agreeing with *Deener* that Texas notice-and-demand statute is not facially unconstitutional); *Deener v. State*, 214 S.W.3d 522, 527-28 (Tex. App. 2006) (determining that criminal defendant suffered no Confrontation violation where his right to confront the witnesses against him was waived by his failure to object under two Texas notice-and-demand statutes).

<sup>298</sup> *City of Las Vegas v. Walsh*, 124 P.3d 203, 208-09 (Nev. 2005).

<sup>299</sup> *Id.* at 207-08.

<sup>300</sup> *Id.* at 208.

<sup>301</sup> *Id.* at 209.

conclusion with minimal analysis, never considering an as-applied challenge or opining on whether and how the statute might be applied unconstitutionally.

Another example of this minimal analysis came in the North Dakota Supreme Court's decision in *State v. Campbell*.<sup>302</sup> There, the court cited *Walsh* to determine that the defendants waived their confrontation rights by failing to follow the notice-and-demand statute, but the court never once considered the constitutionality of statute itself.<sup>303</sup> Louisiana is another of this group, as it has now twice affirmed its notice-and-demand statute without considering the constitutional validity of the waiver effected by it.<sup>304</sup>

The minimalistic analysis contained in these decisions simply fails to persuade. The United States Supreme Court has "never treated the question of waiver cavalierly,"<sup>305</sup> and state-court decisions that do cannot offer persuasive force on the question of waiver of a federal constitutional right.

## VI. "THE RIGHT OF CONFRONTATION MAY NOT BE DISPENSED WITH SO LIGHTLY"<sup>306</sup>: THE UNCONSTITUTIONALITY OF COLORADO'S NOTICE-AND-DEMAND STATUTE AS APPLIED TO PRO SE DEFENDANTS

Against the backdrop outlined in Sections 0-0 *supra*, this Section picks up where footnote seven in *Hinojos-Mendoza* left off and addresses how that opinion's analysis is altered for pro se defendants.<sup>307</sup>

It has long been clear that a criminal defendant has the right to forego his constitutionally guaranteed right to assistance of counsel in order to exercise his right to represent himself.<sup>308</sup> As a result, numerous questions arise regarding whether *pro se* defendants and defendants represented by counsel must (or should) be treated the same way. Dissenting in *Faretta v. California*, Justice Blackmun explicitly listed some of these questions:

Must every defendant be advised of his right to proceed *pro se*? If so, when must that notice be given? Since the right to assistance of counsel and the right to self-representation are mutually exclusive, how is the waiver of each right to be measured? If a defendant has elected to exercise his right to proceed *pro se*, does he still have a constitutional right to assistance of standby counsel? How soon in the criminal proceeding must a defendant decide between proceeding by counsel or *pro se*? Must he be allowed to switch in midtrial? May a violation of the right to self-representation ever be harmless error? *Must the trial court treat the pro se defendant differently than it would professional counsel?* I assume that many of these questions will be answered with finality in due course. Many of them, however, such as the standards of

<sup>302</sup> 719 N.W.2d 374, 378 (N.D. 2006).

<sup>303</sup> *Id.* at 377-78 (citing *Walsh*, 124 P.3d at 209).

<sup>304</sup> *See State v. Simmons*, 78 So. 3d 743, 745-48 (La. 2012); *State v. Cunningham*, 903 So. 2d 1110, 1121 (La. 2005).

<sup>305</sup> *Tacon v. Arizona*, 410 U.S. 351, 354 (1973) (Douglas, J., dissenting).

<sup>306</sup> *Barber v. Page*, 390 U.S. 719, 725 (1968).

<sup>307</sup> *Hinojos-Mendoza v. People*, 169 P.3d 662, 670 n.7 (Colo. 2007).

<sup>308</sup> *Faretta v. California*, 422 U.S. 806, 807 (1975) ("[T]he question is whether a State may constitutionally hale a person into its criminal courts and there force a lawyer upon him, even when he insists that he wants to conduct his own defense. It is not an easy question, but we have concluded that a State may not constitutionally do so.").

waiver and *the treatment of the pro se defendant, will haunt the trial of every defendant who elects to exercise his right to self-representation.*<sup>309</sup>

Unique concerns undoubtedly arise within the context of a defendant representing himself at trial.<sup>310</sup> To that end, at least some judges issuing decisions about the constitutionality of notice-and-demand statutes have recognized a difference between a defendant represented by counsel and a defendant representing himself. For instance, Louisiana Supreme Court Justice Johnson's dissent in *State v. Cunningham*<sup>311</sup> differentiated pro se and indigent defendants from those represented by counsel and expressed concern regarding the effect of Louisiana's defense subpoena statute on such defendants.<sup>312</sup> The District of Columbia Court of Appeals did so even more persuasively when, in *Thomas v. United States*,<sup>313</sup> it suggested at least one circumstance—that of the pro se defendant—in which a waiver may not be inferable from a defendant's failure to demand forensic technician testimony.<sup>314</sup>

Those judges take the better view. As a primary matter, where a defendant has no defense counsel, he is not operating under the principle that his lawyer may waive his rights by inaction or without approval.<sup>315</sup> Similarly, *Hinojos-Mendoza*'s “presum[ption] that attorneys know the applicable rules of procedure”<sup>316</sup> is obviously inoperative in the case of a pro se defendant. The Supreme Court has explicitly recognized that the legal knowledge of a defense attorney may not be presumed on behalf of a pro se defendant. In *Carnley v. Cochran*,<sup>317</sup> the Court pointed out that:

While [the pro se defendant] was advised that he need not testify, he was not told what consequences might follow if he did testify. He chose to testify and his criminal record was brought out on his cross-examination. For defense lawyers, it is commonplace to weigh the risk to the accused of the revelation on cross-examination of a prior criminal record, when advising an accused whether to take the stand in his own behalf; for petitioner, the question had to be decided in ignorance of this important consideration.<sup>318</sup>

Lower court judges have recognized this distinction as well. For example, Ninth Circuit Judge Stephen Reinhardt, in a dissenting opinion, wrote:

Finally, unlike Green, who was represented by counsel, Ohman had no lawyer present. The lack of representation is critical here. The message conveyed when a sentencing judge personally addresses a defendant who has a lawyer by his side, and inquires whether the defendant himself wishes to speak to the court regarding his sentence is

<sup>309</sup> *Id.* at 852 (Blackmun, J., dissenting) (emphases added).

<sup>310</sup> See Sharon Finegan, *Pro Se Criminal Trials and the Merging of Inquisitorial and Adversarial Systems of Justice*, 58 CATH. U. L. REV. 445, 471-72 (2009) (“Trials in which a defendant represents himself present a host of problems that undermine the fairness of the proceedings. Determinations of competency, conflicts with standby counsel, utilization of proper procedure, and overall fairness of the proceedings are called into question when a defendant proceeds pro se.” (footnotes omitted)).

<sup>311</sup> 903 So. 2d 1110 (La. 2005).

<sup>312</sup> *Id.* at 1127 (Johnson, J., dissenting).

<sup>313</sup> 914 A.2d 1 (D.C. 2006)

<sup>314</sup> *Id.* at 19.

<sup>315</sup> *Cf. Hinojos-Mendoza v. People*, 169 P. 3d 662, 670 (Colo. 2007); *Thomas*, 914 A.2d at 19; *People v. Campbell*, 802 N.E.2d 1205, 1213, 1215 (Ill. 2003); *State v. Pasqualone*, 903 N.E.2d 270 (Ohio 2009).

<sup>316</sup> *Hinojos-Mendoza*, 169 P.3d at 670 (citing *Christie v. People*, 837 P.2d 1237, 1244 (Colo. 1992)).

<sup>317</sup> 369 U.S. 506 (1962).

<sup>318</sup> *Id.* at 511.



fundamentally different from the message conveyed when a judge inquires jointly of a *pro se* defendant/advocate and the prosecutor whether they wish to make ‘any comments . . . before [she] announce[s] the sentence [she is] inclined to impose.’ In the former case, the question is much more likely to be interpreted by the defendant as an opportunity to speak freely about why he deserves leniency. (He also has the benefit of his lawyer’s counsel as to what he may and may not say in response to the invitation to speak.) In the latter case, the defendant may well not understand, as Ohman clearly did not, that he should speak in his role as defendant rather than in his capacity as an advocate.<sup>319</sup>

These differences provide a backdrop for the conclusion that, in the absence of defense counsel, a defendant is returned to that baseline principle that waiver of any of his constitutional rights must be done only by himself and only knowingly, intelligently, and voluntarily.<sup>320</sup> That is, in the case of a *pro se* defendant, a different presumption operates: that by which “courts indulge every reasonable presumption against waiver of fundamental constitutional rights and . . . do not presume acquiescence in the loss of fundamental rights.”<sup>321</sup>

With this different presumption in mind, it is especially important to review how Colorado’s notice-and-demand statute operates. *Cropper* provides that merely “providing the defense with a forensic lab report through discovery is sufficient to put the defendant on notice that, absent a specific request under section 16-3-309(5), the report can be introduced without live testimony.”<sup>322</sup> This action, as Justice Martinez’s dissent in *Cropper* accurately observes, does not serve as “notice” that the prosecution intends to offer the report pursuant to Section 16-3-309(5).<sup>323</sup> This action is a separate duty under Colo. R. Crim. Pro. 16, which governs the prosecution’s disclosure obligations; disclosure in discovery pursuant to this rule provides no indication of whether the prosecution will introduce the report at trial.<sup>324</sup>

This review reveals two infirmities in the application of the statute to *pro se* defendants: that (1) the statute is not within the “simplest” category of such statutes passed on in dicta in *Melendez-Diaz*, and (2) the “notice” provided by the statute does not trigger a knowing, intelligent, voluntary waiver on the part of a *pro se* defendant. As to the first point, the precise category of “simple” notice-and-demand statutes on which *Melendez-Diaz* remarked was as follows: statutes that “require the prosecution to provide notice to the defendant of its intent to use an analyst’s report as evidence *at trial*.”<sup>325</sup> Providing the report in discovery provides notice only of the report’s existence, not of the prosecution’s intent to use it *at trial*. In the case of a *pro se* defendant, mere provision in discovery cannot be equated with notice of intent to use the report at trial. To complete that equation,

<sup>319</sup> *United States v. Ohman*, 13 F. App’x 568, 572-73 (9th Cir. 2001) (Reinhardt, J., dissenting) (alterations and omission in original).

<sup>320</sup> This is reinforced by the fact that federal law controls the waiver of a federally guaranteed constitutional right. See *supra* note 180.

<sup>321</sup> *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938), *overruled in part on other grounds by* *Edwards v. Arizona*, 451 U.S. 477 (1981) (internal quotations marks omitted) (quoting, respectively, *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393 (1937); *Hodges v. Easton*, 106 U.S. 408, 412 (1882); *Ohio Bell Tel. Co. v. Public Utils. Comm’n*, 301 U.S. 292, 307 (1937)).

<sup>322</sup> *Cropper v. People*, 251 P.3d 434, 437 (Colo. 2011).

<sup>323</sup> *Id.* at 441 & n.12 (Martinez, J., dissenting).

<sup>324</sup> *Id.*

<sup>325</sup> *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 326 (2009) (emphasis added); see also *Cropper*, 251 P.3d at 439-40 (Martinez, J., dissenting) (citing *Melendez-Diaz*, 129 S. Ct. at 2541).

*Cropper* resorted to its presumption that defense counsel has knowledge of all procedural rules.<sup>326</sup> In the case of a pro se defendant, there is no presumption available to make the leap from discovery to intent to use at trial. Thus, at least as applied to a pro se defendant, Colorado's is not a notice-and-demand statute in "simplest form."<sup>327</sup> The constitutionality of Colorado's statute is therefore not within *Melendez-Diaz*'s dicta.

As to the second point, as described in *Cropper*, Colorado's notice-and-demand statute is triggered upon the provision in discovery of a forensic lab report.<sup>328</sup> Absent a demand pursuant to the statute, a defendant's right to confront the report's author is waived.<sup>329</sup> A pro se defendant provided a laboratory report via discovery is situated more akin to the defendants in *Johnson*, *Rice*, and *Carnley* than he is to his represented counterpart in *Mojica-Simental*, *Hinojos-Mendoza*, and *Cropper*. As to the pro se defendant, "[t]he determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused."<sup>330</sup> The automatic waiver of Colorado Rev. Stat. § 16-3-309(5) cannot govern the pro se defendant, because to do so would "not waive th[ose] right[s] either by word or action,"<sup>331</sup> but would impermissibly "[p]resum[e] waiver from a silent record."<sup>332</sup> As in *Carnley v. Cochran*, "[t]o cast such a burden on the accused is wholly at war with the standard of proof of waiver of the right to counsel . . . laid down in *Johnson v. Zerbst*."<sup>333</sup> This is so because the automatic waiver of § 16-3-309(5) neither "reveals [the defendant's] affirmative acquiescence,"<sup>334</sup> nor contains the affirmative showing of waiver of a fundamental constitutional right required after *Boykin v. Alabama*.<sup>335</sup> Perhaps most importantly for the analysis, provision of a laboratory report via discovery utterly fails to make a pro se defendant "sufficient[ly] aware[] of the relevant circumstances and likely consequences."<sup>336</sup> Namely, the consequence that failure to demand the live testimony of the forensic technician upon receipt of his report via discovery waives the right to confront that technician. As applied to pro se defendants, Colorado's statute provides "no reasonable basis to conclude that the defendant's failure to request the testimony constituted a knowing, intelligent, and voluntary waiver of his confrontation rights."<sup>337</sup> Just as in *Barker v. Wingo*,<sup>338</sup> the doctrine of demand-waiver must be rejected as applied

<sup>326</sup> See *Cropper*, 251 P.3d at 436-48.

<sup>327</sup> *Melendez-Diaz*, 557 U.S. at 326.

<sup>328</sup> *Cropper*, 251 P.3d at 437.

<sup>329</sup> COLO. REV. STAT. § 16-3-309(5) (2012).

<sup>330</sup> *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938), *overruled in part on other grounds* by *Edwards v. Arizona*, 451 U.S. 477 (1981).

<sup>331</sup> *Rice v. Olson*, 324 U.S. 786, 788 (1945).

<sup>332</sup> *Carnley v. Cochran*, 369 U.S. 506, 516 (1962).

<sup>333</sup> *Id.* at 514.

<sup>334</sup> *Id.* at 516-17.

<sup>335</sup> See *Boykin v. Alabama*, 395 U.S. 238, 242 (1969); *Brady v. United States*, 397 U.S. 742, 747 n.4 (1970) (citing *Boykin*, 385 U.S. at 242).

<sup>336</sup> *Brady*, 397 U.S. at 742, 748 (1970) (emphasis added) (citing *Brookhart v. Janis*, 384 U.S. 1 (1966); *Adams v. United States ex rel. McCann*, 317 U.S. 269, 275 (1942); *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938); *Patton v. United States*, 281 U.S. 276, 312 (1930)); *accord* *People v. McClanahan*, 729 N.E.2d 470, 477 (Ill. 2000); *State v. Caulfield*, 722 N.W.2d 304, 313 (Minn. 2006); *State v. Pasqualone*, 903 N.E.2d 270, 275 (Ohio 2009) (citing *State v. Smith*, No. 1-05-39, 2006 WL 846342 (Ohio Ct. App. 2006)); *State v. McClain*, No. L-10-1088, 2012 WL 5508133, at ¶ 26 (Ohio Ct. App. Nov. 9, 2012) (citing *Tacon v. Arizona*, 410 U.S. 351, 355 (1973) (Douglas, J., dissenting)).

<sup>337</sup> *State v. Caulfield*, 722 N.W.2d 304, 313 (Minn. 2006).

<sup>338</sup> 407 U.S. 514 (1972).

to pro se defendants under Section IV, *supra*.<sup>339</sup> “Such an approach, by presuming waiver of a fundamental right from inaction, is inconsistent with this Court’s pronouncements on waiver of constitutional rights.”<sup>340</sup>

## VII. CONCLUSION

The United States Supreme Court has never taken lightly the requirement that any waiver of a fundamental constitutional right must be done “voluntarily, knowingly, and intelligently.”<sup>341</sup> This is particularly true for pro se defendants, who are often “ignorant of th[e] important consideration[s]”<sup>342</sup> underlying a waiver of such rights. Allowing a pro se defendant to waive his confrontation rights, including those against forensic technicians, by mere inaction is inconsistent with the longstanding principle that the right to confront one’s accusers is a “bedrock procedural guarantee.”<sup>343</sup> Colorado’s Notice-and-Demand statute, which presumes a waiver by a defendant’s inaction,<sup>344</sup> is therefore unconstitutional as applied to pro se defendants.

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<sup>339</sup> See Metzger, *supra* note 7, at 517-18 (arguing for the rejection of the demand-waiver doctrine in the context of confrontation of forensic witnesses).

<sup>340</sup> *Barker*, 407 U.S. 514, 525 (1972) (footnote omitted); see also *Rice v. Olson*, 324 U.S. 786, 788 (1945) (rejecting state-court-created presumption of waiver of Sixth Amendment right); *Carnley v. Cochran*, 369 U.S. 506, 513 (1962) (same).

<sup>341</sup> *Miranda*, 384 U.S. 436, 444 (1966).

<sup>342</sup> *Carnley*, 369 U.S. 506, 511 (1962).

<sup>343</sup> *Crawford*, 541 U.S. 36, 42 (2004).

<sup>344</sup> See COLO. REV. STAT. § 16-3-309(5) (2012).

