A GUIDE TO *CRAWFORD* AND THE CONFRONTATION CLAUSE

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Contents

I. The New *Crawford* Rule.

The Sixth Amendment's confrontation clause provides that "[i]n all criminal prosecutions the accused shall enjoy the right . . . to be confronted with the witnesses against him."[1] This protection applies to the states by way of the Fourteenth Amendment.[2] In *Crawford v. Washington*,[3] the Court radically revamped the analysis that applies to confrontation clause objections. *Crawford* overruled the reliability test for confrontation clause objections and set in place a new, stricter standard for admission of hearsay statements under the confrontation clause. Under the former *Ohio v. Roberts*[4] reliability test, the confrontation clause did not bar admission of an unavailable witness's statement if the statement had an "adequate indicia of reliability."[5] Evidence satisfied that test if it fell within a firmly rooted hearsay exception or had particularized guarantees of trustworthiness.[6] *Crawford* rejected the *Roberts* analysis, concluding that although the ultimate goal of the confrontation clause is to ensure reliability of evidence, "it is a procedural rather than a substantive guarantee."[7] It continued: The confrontation clause "commands, not that the evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination."[8] *Crawford* went on to hold that testimonial statements by declarants who do not appear at trial may not be admitted unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant.[9]

The *Crawford* Rule

Testimonial statements by witnesses who are not subject to cross-examination at trial may not be admitted unless the witness is unavailable and there has been a prior opportunity for cross-examination.

A. When *Crawford* Issues Arise.

Crawford issues arise whenever the State seeks to introduce statements of a witness who is not subject to cross-examination at trial. For example, *Crawford* issues arise when the State seeks to admit:

- out-of-court statements of a nontestifying domestic violence victim to first-responding officers or to a 911 operator;
- out-of-court statements of a nontestifying child sexual assault victim to a family member, social worker, or doctor;

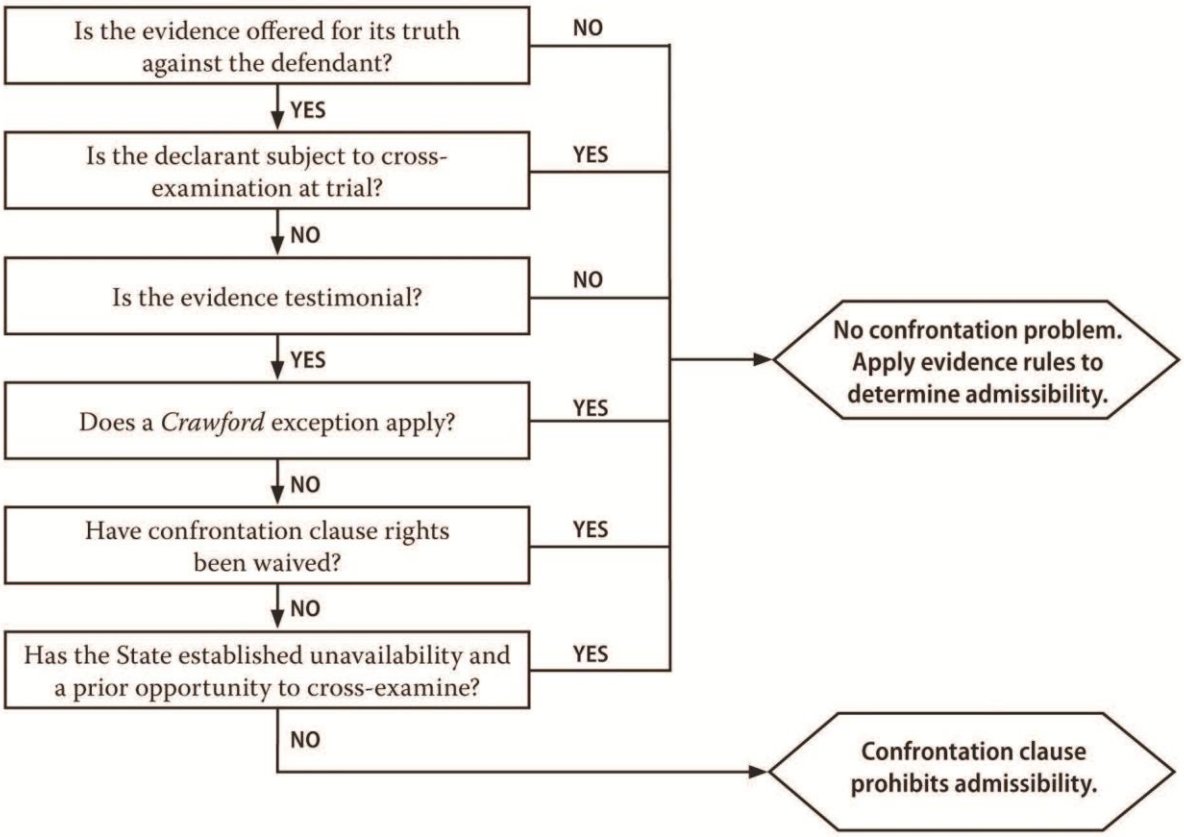
1. U.S. CONST. amend. VI.
2. Melendez-Diaz v. Massachusetts, 557 U.S. 305, 309 (2009).
3. 541 U.S. 36 (2004).
4. 448 U.S. 56 (1980).
5. *Crawford*, 541 U.S. at 40 (quotation omitted) (describing the *Roberts* test).
6. *Id*.
7. *Id*. at 61.
8. *Id*.
9. *Id.* at 68. For a more detailed discussion and analysis of *Crawford*, see JESSICA SMITH, CRAWFORD V. WASHINGTON: CONFRONTATION ONE YEAR LATER (UNC School of Government 2005), *available at* http://shopping.netsuite.com/s.nl/c.433425/it.A/id.4164/.f.

- a forensic report, by a nontestifying analyst, identifying a substance as a controlled substance or specifying its weight;
- an autopsy report, by a nontestifying medical examiner, specifying the cause of a victim's death;
- a chemical analyst's affidavit in an impaired driving case, when the analyst is not available at trial;
- a written record prepared by an evidence custodian to establish chain of custody, when the custodian does not testify at trial.

B. Framework for Analysis.

The flowchart in Figure 1 below sets out a framework for analyzing *Crawford* issues. The steps of this analysis are fleshed out in the sections that follow.

Figure 1. *Crawford* flowchart



II. Statement Offered For Its Truth Against the Defendant.

A. For Its Truth.

Crawford is implicated only if the out of court statement is offered for its truth.[10]

10. *See, e.g.*, Melendez-Diaz v. Massachusetts, 557 U.S. 305, 310 (2009) (testimonial statements are solemn declarations or affirmations "made for the purpose of establishing or proving some fact" (quoting *Crawford*, 541 U.S. at 51)).

1. *Crawford* Analysis Is Not Tied to Hearsay Rules.

Because hearsay is defined as an out of court statement offered for its truth,[11] one might be tempted to assume that the *Crawford* analysis involves a hearsay analysis. That assumption is incorrect. *Crawford* made clear that the confrontation clause analysis is not informed by the hearsay rules.[12] This is an important analytical change. Under the old *Roberts* test, evidence that fell within a firmly rooted hearsay exception was deemed sufficiently reliable for confrontation clause purposes. In this way, under the old test, confrontation clause analysis collapsed into hearsay analysis. *Crawford* rejected this approach, creating a separate standard for admission under the confrontation clause, and making clear that constitutional confrontation standards cannot be determined by reference to federal or state rules of evidence.[13]

However, *Crawford* did not affect the hearsay rules, and these rules remain in place for both testimonial and nontestimonial evidence. Thus, after *Crawford*, the State has two hurdles to leap before testimonial hearsay statements by nontestifying witnesses may be admitted at trial: the new *Crawford* rule and the evidence rules.

2. Offered for a Purpose Other Than the Truth.

If a statement is offered for a purpose other than for its truth, it falls outside of the confrontation clause.[14]

a. Impeachment. If the out of court statement is offered for impeachment, it is offered for a purpose other than its truth and is not covered by the *Crawford* rule.[15]

b. Basis of an Expert's Opinion. Prior to the Court's decision in *Williams v. Illinois*,[16] the North Carolina appellate courts, like many courts around the nation, held that a statement falls outside of the *Crawford* rule when offered as the basis of a testifying expert's opinion.[17] They reasoned that when offered for this purpose, a statement is not offered for its truth. While *Williams* is a fractured opinion of questionable precedential value, it is significant in that five Justices rejected the reasoning of the pre-existing North Carolina cases. Thus, while *Williams* did not overrule North Carolina's decisions on point, they clearly are on shaky ground. *Williams* is discussed in more detail in Section IV.F.3. below.

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11. N.C. R. EVID. 801(c).
12. *Crawford*, 541 U.S. at 50-51 (rejecting the view that confrontation analysis depends on the law of evidence).
13. *Id.* at 61 (the Framers did not intend to leave the Sixth Amendment protection "to the vagaries of the rules of evidence.").
14. *Id*. at 59 n.9 ("The [Confrontation] Clause . . . does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted."). For North Carolina cases, *see, e.g.*, State v. Ross, 216 N.C. App. 337, 346 (2011) (same); State v. Mason, __ N.C. App. __, 730 S.E.2d 795, 801 (2012) (same); State v. Rollins, __ N.C. App. __, 738 S.E.2d 440, 446 (2013) (same).
15. Five Justices agreed on this issue in *Williams v. Illinois*, 567 U.S.__, 132 S. Ct. 2221 (2012); *id.* (Thomas, J., concurring at 2256) (calling this a "*legitimate* nonhearsay purpose"); *id*. (Kagan, J., dissenting at 2269).
16. 567 U.S. __, 132 S. Ct. 2221 (2012).
17. *See, e.g.*, State v. Mobley, 200 N.C. App. 570, 576 (2009) (no *Crawford* violation occurred when a substitute analyst testified to her own expert opinion, formed after reviewing data and reports prepared by nontestifying expert); State v. Hough, 202 N.C. App. 674, 680-82 (2010) (following *Mobley* and holding that no *Crawford* violation occurred when reports by a nontestifying analyst as to composition and weight of controlled substances were admitted as the basis of a testifying expert's opinion on those matters; the testifying expert performed the peer review of the underlying reports, and the underlying reports were offered not for their truth but as the basis of the testifying expert's opinion), *aff'd per curiam by an equally divided court*, __ N.C. __, 743 S.E.2d 174 (2013).

c. Corroboration. When the evidence is admitted for the purpose of corroboration, cases hold that it is not offered for its truth and therefore falls outside of the scope of the *Crawford* rule.[18] It is not yet clear whether the Court's rejection of the "basis of the expert's opinion" rationale in *Williams* will impact these cases.[19]

d. To Explain the Course of an Investigation. Sometimes statements of a nontestifying declarant are admitted to explain an officer's action or the course of an investigation. Cases have held that such statements are not admitted for their truth and thus present no *Crawford* issue.[20]

e. To Explain a Listener's Reaction or Response. Some cases have held that if a statement is introduced to show a listener's reaction or response, it is not offered for its truth and there is no confrontation issue.[21]

f. As Illustrative Evidence. One unpublished North Carolina case held that when evidence is admitted as illustrative evidence, it is not admitted for its truth and the confrontation clause is not implicated.[22]

g. Limiting Instructions. When a statement is admitted for a proper "not for the truth" purpose, a limiting instruction should be given.[23]

B. Against the Defendant.

Because the confrontation clause confers a right to confront witnesses against the accused, the defendant's own statements do not implicate the clause or the

18. *See, e.g.*, State v. Mason, __ N.C. App. __, 730 S.E.2d 795, 800-01 (2012) (the defendant's confrontation rights were not violated when an officer testified to the victim's statements made to him at the scene where the statements were not admitted for the truth of the matter asserted but rather for corroboration); State v. Ross, 216 N.C. App. 337, 346-47 (2011) (*Crawford* does not apply to evidence admitted for purposes of corroboration).

19. See Section II.A.2.b. above.

20. *See, e.g.*, State v. Rollins, __ N.C. App. __, 738 S.E.2d 440, 448-49 (2013) (statements made to an officer were not introduced for their truth but rather to show the course of the investigation, specifically why officers searched a location for evidence); State v. Batchelor, 202 N.C. App. 733, 736-37 (2010) (statements of a nontestifying informant to a police officer were nontestimonial; statements were offered not for their truth but rather to explain the officer's actions); State v. Hodges, 195 N.C. App. 390, 400 (2009) (declarant's consent to search vehicle was admitted to show why the officer believed he could and did search the vehicle); State v. Tate, 187 N.C. App. 593, 600-01 (2007) (declarant's identification of "Fats" as the defendant was not offered for the truth but rather to explain subsequent actions of officers in the investigation); State v. Wiggins, 185 N.C. App. 376, 383-84 (2007) (informant's statements offered not for their truth but to explain how the investigation unfolded, why the defendants were under surveillance, and why an officer followed a vehicle; noting that a limiting instruction was given); State v. Leyva, 181 N.C. App. 491, 500 (2007) (to explain the officers' presence at a location).

21. *See, e.g.*, State v. Castaneda, 215 N.C. App. 144, 148 (2011) (officer's statements during an interrogation repeating what others had told the police were not admitted for their truth but rather to provide context for the defendant's responses); State v. Miller, 197 N.C. App. 78, 87-91 (2009) (purported statements of co-defendants and others contained in the detectives' questions posed to the defendant were not offered to prove the truth of the matters asserted but to show the effect they had on the defendant and his response; the defendant originally denied all knowledge of the events but when confronted with statements from others implicating him, the defendant admitted that he was present at the scene and that he went to the victim's house with the intent of robbing him); State v. Byers, 175 N.C. App. 280, 289 (2006) (statement offered to explain why witness ran, sought law enforcement assistance, and declined to confront defendant single-handedly).

22. State v. Larson, 189 N.C. App. 211, *3 (2008) (unpublished) (child sexual assault victim's drawings offered to illustrate and explain the witness's testimony).

23. N.C. R. EVID. 105; *see also Wiggins*, 185 N.C. App. at 384 (noting that a limiting instruction was given).

Crawford rule.[24] Similarly, the confrontation clause has no applicability to evidence presented by the defendant.[25]

III. Subject to Cross-Examination at Trial.

Crawford does not apply when the declarant is subject to cross-examination at trial.[26] Normally, a witness is subject to cross-examination when he or she is placed on the stand, put under oath, and responds willingly to questions.

A. Memory Loss.

Cases both before and after *Crawford* have held that a witness is subject to cross-examination at trial even if the witness testifies to memory loss as to the events in question.[27]

B. Privilege.

When a witness takes the stand but is prevented from testifying on the basis of privilege, the witness has not testified for purposes of the *Crawford* rule. In fact, this is what happened in *Crawford*, where state marital privilege barred the witness from testifying at trial.[28]

C. *Maryland v. Craig* Procedures For Child Abuse Victims.

In *Maryland v. Craig*,[29] the United States Supreme Court upheld a Maryland statute that allowed a judge to receive, through a one-way closed-circuit television system, the testimony of an alleged child abuse victim. Under the one-way system, the child witness, prosecutor, and defense counsel went to a separate room while the judge, jury, and defendant remained in the courtroom. The child witness was examined and cross-examined in the separate room, while a video monitor recorded and displayed the child's testimony to those in the courtroom.[30] The procedure prevented the child witness from seeing the defendant as she testified against the defendant at trial.[31] However, the child witness had to be competent to testify and to testify under oath; the defendant retained full opportunity for contemporaneous cross-examination; and the judge, jury, and defendant were able to view by video monitor the demeanor of the witness as she testified.[32] Throughout the procedure, the defendant remained in electronic communication with defense counsel, and objections were made and ruled on as if the witness were testifying in the courtroom.[33]

Upholding the Maryland procedure, the *Craig* Court reaffirmed the importance of face-to-face confrontation of witnesses appearing at trial but concluded that such confrontation was not an indispensable element of the right

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24. State v. Richardson, 195 N.C. App. 786, *5 (2009) (unpublished) ("*Crawford* is not applicable if the statement is that of the defendant . . . ."); *see also* CONFRONTATION ONE YEAR LATER, *supra* note 9, at 28 & n.156.
25. Giles v. California, 554 U.S. 353, 376 n.7 (2008) (confrontation clause limits the evidence that the state may introduce but does not limit the evidence that a defendant may introduce).
26. *See, e.g.*, *Crawford*, 541 U.S. at 59 n.9 ("[W]hen the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements."); State v. Burgess, 181 N.C. App. 27, 34 (2007) (no confrontation violation when the victims testified at trial); State v. Harris, 189 N.C. App. 49, 54-55 (2008) (same); State v. Lewis, 172 N.C. App. 97, 103 (2005) (same).
27. *See* CONFRONTATION ONE YEAR LATER, *supra* note 9, at 28–29 & n.159.
28. *Crawford,* 541 U.S. at 40.
29. 497 U.S. 836 (1990).
30. *Id*. at 841–42.
31. *Id.* at 841–42 & 851.
32. *Id.* at 851.
33. *Id.* at 842.

to confront one's accusers. It held that while "the Confrontation Clause reflects a preference for face-to-face confrontation . . . that [preference] must occasionally give way to considerations of public policy and the necessities of the case."[34] It went on to explain that "a defendant's right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured."[35]

As to the important public policy, the Court stated: "a State's interest in the physical and psychological well-being of child abuse victims may be sufficiently important to outweigh, at least in some cases, a defendant's right to face his or her accusers in court."[36] However, the Court made clear that the State must make a case-specific showing of necessity. Specifically, the trial court must (1) "hear evidence and determine whether use of the one-way closed-circuit television procedure is necessary to protect the welfare of the particular child witness who seeks to testify"; (2) "find that the child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant"; and (3) "find that the emotional distress suffered by the child witness in the presence of the defendant is more than de minimis, i.e., more than mere nervousness or excitement or some reluctance to testify."[37]

The Court went on to note that in the case before it, the reliability of the testimony was otherwise assured. Although the Maryland procedure prevented a child witness from seeing the defendant as he or she testified at trial, the procedure required that (1) the child be competent to testify and testify under oath; (2) the defendant have full opportunity for contemporaneous cross-examination; and (3) the judge, jury, and defendant be able to view the witness's demeanor while he or she testified.[38]

Crawford called into question the continued validity of *Maryland v. Craig* procedures.[39] Although the United States Supreme Court has not yet considered whether the type of procedure sanctioned in *Craig* for child victims survives *Crawford*, the North Carolina courts have held that it does.[40]

D. Remote Testimony.

Relying on *Maryland v. Craig,*[41] some have argued that when a witness testifies remotely through a two-way audio-visual system the witness is subject to cross-

34. *Id*. at 849 (citations and internal quotation marks omitted).
35. *Id.* at 850.
36. *Id*. at 853.
37. *Id.* at 855–56 (citations and internal quotation marks omitted).
38. *Id*. at 851.
39. *See Crawford*, 541 U.S. at 67-68 ("By replacing categorical constitutional guarantees with open-ended balancing tests, we do violence to their design."); JESSICA SMITH, EMERGING ISSUES IN CONFRONTATION LITIGATION: A SUPPLEMENT TO *CRAWFORD V. WASHINGTON*: CONFRONTATION ONE YEAR LATER 27 (UNC School of Government 2007), *available at* http://shopping.netsuite.com/s.nl/c.433425/it.A/id.4165/.f.
40. State v. Jackson, 216 N.C. App. 238, 244-47 (2011) (in a child sexual assault case, the defendant's confrontation rights were not violated when the trial court permitted the child victim to testify by way of a one-way closed circuit television system; the court held that *Craig* survived *Crawford* and that the procedure satisfied *Craig*'s procedural requirements; the court also held that the child's remote testimony complied with the statutory requirements of G.S. 15A-1225.1); State v. Lanford, __ N.C. App. __, 736 S.E.2d 619, 629-31 (2013) (following *Jackson*, the court held that the trial court did not err by removing the defendant from the courtroom and putting him in another room where he could watch the child victim testify on a closed circuit television while staying connected with counsel through a phone line; the trial court's findings of fact about the trauma that the child would suffer and the impairment to his ability to communicate if required to face the defendant in open court were supported by the evidence).
41. *See* Section III.C. above (discussing *Craig*).

examination at trial and the requirements of the confrontation clause are satisfied. To date, courts have been willing to uphold such a procedure only when the prosecution can assert a pressing public policy interest, such as:

- protecting child sexual assault victims from trauma,
- national security in terrorism cases,
- combating international drug smuggling,
- protecting a seriously ill witness's health, and
- protecting witnesses who have been intimidated.

At the same time, courts have either held or suggested that the following rationales are insufficient to justify abridging a defendant's confrontation rights:

- convenience,
- mere unavailability,
- cost savings, and
- general law enforcement.

For a detailed discussion of this issue, see the publication cited in the footnote.[42]

E. Making the Witness "Available" to the Defense.

In *Melendez-Diaz v. Massachusetts*,[43] the United States Supreme Court seemed to foreclose any argument that a witness is subject to cross-examination when the prosecution informs the defense that the witness will be made available if called by that side or when the prosecution produces the witness in court but does not call that person to the stand.[44]

IV. Testimonial Statements.

The *Crawford* rule, by its terms, applies only to testimonial evidence; non-testimonial evidence falls outside of the confrontation clause and need only satisfy the Evidence Rules for admissibility.[45] In addition to classifying as testimonial the particular statements at issue (a suspect's statements during police interrogation at the station house), the *Crawford* Court suggested that the term had broader application. Specifically, the Court clarified that the confrontation clause applies to those who "bear testimony" against the

42. Jessica Smith, *Remote Testimony and Related Procedures Impacting a Criminal Defendant's Confrontation Rights*, ADMIN. JUST. BULL. No. 2013/02 (UNC School of Government Feb. 2013), *available at* http://sogpubs.unc.edu/electronicversions/pdfs/aojb1302.pdf. For a recent North Carolina case decided after publication of that paper, see *State v. Seelig*, __ N.C. App. __, 738 S.E.2d 427, 432-35 (2013) (the trial court did not err by allowing an ill witness to testify by way of a two-way, live, closed-circuit web broadcast; the trial court found that the witness had a history of panic attacks, suffered a severe panic attack on the day he was scheduled to fly to North Carolina for trial, was hospitalized as a result, and was unable to travel because of his medical condition; the court found these findings sufficient to establish that allowing the witness to testify remotely was necessary to meet an important state interest of protecting the witness's ill health and that reliability of the witness's testimony was otherwise assured, noting, among other things that the witness testified under oath and was subjected to cross-examination).

43. 557 U.S. 305 (2009).

44. *Id*. at 324 ("[T]he Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court."); *see also* D.G. v. Louisiana, 559 U.S. 967 (2010) (vacating and remanding, in light of *Melendez-Diaz*, a state court decision that found no confrontation violation when the declarant was present in court but not called to the stand by the state).

45. Michigan v. Bryant, 562 U.S. __, 131 S. Ct. 1143, 1153 (2011) ("We … limited the Confrontation Clause's reach to testimonial statements . . . ."); Whorton v. Bockting, 549 U.S. 406, 420 (2007) ("Under *Crawford* . . . the Confrontation Clause has no application to [nontestimonial] statements . . . .").

accused.[46] "Testimony," it continued, is "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact."[47] Foreshadowing its analysis in *Davis v. Washington*[48] and *Michigan v. Bryant*[49], the Court suggested that "[a]n accuser who makes a formal statement to government officers bears testimony" within the meaning of the confrontation clause.[50] However, the *Crawford* Court expressly declined to comprehensively define the key term, "testimonial."[51] The meaning of that term is explored throughout the remainder of this section.

A. Prior Trial, Preliminary Hearing, and Grand Jury Testimony.

Crawford stated: "[w]hatever else the term [testimonial] covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial."[52] It is thus clear that this type of evidence is testimonial.

B. Plea Allocutions.

Crawford classified plea allocutions as testimonial.[53]

C. Deposition Testimony.

Davis suggests that deposition testimony is testimonial.[54]

D. Police Interrogation.

Crawford held that recorded statements made by a suspect to the police during a custodial interrogation at the station house and after *Miranda* warnings had been given qualified "under any conceivable definition" of the term interrogation.[55] The *Crawford* Court noted that when classifying police interrogations as testimonial it used the term "interrogation" in its "colloquial, rather than any technical, legal sense."[56] Additionally, the term police interrogation includes statements that are volunteered to the police. The Court has stated: "[t]he Framers were no more willing to exempt from cross-examination volunteered testimony or answers to open-ended questions than they were to exempt answers to detailed interrogation."[57] This language calls into doubt earlier North Carolina decisions holding that the testimonial nature of the statements at issue turned on whether or not they were volunteered to the police.[58]

1. Of Suspects.

As noted, *Crawford* held that recorded statements made by a suspect to the police during a tape-recorded custodial interrogation done after *Miranda* warnings had been given were testimonial.

2. Of Victims.

Crawford did not indicate whether its new rule was limited to police interrogation of suspects or whether it extended to questioning of victims

46. *Crawford*, 541 U.S. at 51.
47. *Id.* (quotation omitted).
48. 547 U.S. 813, 829-30 (2006) (holding, in part, that a victim's statements to responding officers were testimonial).
49. 562 U.S. __, 131 S. Ct. 1143, 1167 (2011) (holding that a shooting victim's statements to first responding officers were nontestimonial).
50. *Crawford*, 541 U.S. at 51.
51. *Id.* at 68.
52. *Id*.
53. *Id*. at 64.
54. *Davis*, 547 U.S. at 824 n.3, 825.
55. *Crawford*, 541 U.S. at 53 n.4.
56. *Id*.
57. *Melendez-Diaz*, 557 U.S. at 316 (quoting *Davis*, 547 U.S. at 822–23 n.1).
58. *See, e.g.*, State v. Hall, 177 N.C. App. 463, *2 (2006) (unpublished).

as well. The Court answered that question two years later in *Davis v. Washington*,[59] clarifying that the new *Crawford* rule extends to questioning of victims. In 2011, the Court again addressed the testimonial nature of a victim's statements to law enforcement officers in *Michigan v. Bryant*.[60] The guidance that emerged from those cases is discussed below.

a. ***Davis v. Washington* and the Emergence of a "Primary Purpose" Analysis.** *Davis* was a consolidation of two separate domestic violence cases, both involving statements by victims to police officers or their agents. The Court held that statements by one of the domestic violence victims during a 911 call were nontestimonial but that statements by the other domestic violence victim to first-responding officers were testimonial. In so doing the *Davis* Court adopted a primary purpose test for determining the testimonial nature of statements made during a police interrogation. Specifically, it articulated a two-part rule for determining the testimonial nature of statements to the police or their agents: (a) 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; and (b) statements 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 facts potentially relevant to later criminal prosecution.

The *Davis* Rules:

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.

Statements 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 facts potentially relevant to later criminal prosecution.

b. ***Michigan v. Bryant* and Ascendency of the Ongoing Emergency Factor in the Primary Purpose Analysis.** In *Michigan v. Bryant*,[61] the Court held that a mortally wounded shooting victim's statements to first-responding officers were non-testimonial. The Court noted that unlike *Davis,* the case before it involved a non-domestic dispute, a victim found in a public

59. 547 U.S. 813 (2006).
60. 562 U.S. __, 131 S. Ct. 1143 (2011).
61. *Id.*

location suffering from a fatal gunshot wound, and a situation where the perpetrator's location was unknown. These facts required the Court to "confront for the first time circumstances in which the 'ongoing emergency' . . . extends beyond an initial victim to a potential threat to the responding police and the public at large," and to provide additional clarification on how a court determines whether the primary purpose of the interrogation is to enable police to meet an ongoing emergency.[62] It concluded that when determining the primary purpose of an interrogation, a court must objectively evaluate the circumstances of the encounter and the statements and actions of both the declarant and the interrogator.[63] It further explained that the existence of an ongoing emergency "is among the most important circumstances informing the 'primary purpose' of an interrogation."[64]

Applying this analysis, the Court began by examining the circumstances of the interrogation to determine if an ongoing emergency existed. Relying on the fact that the victim said nothing to indicate that the shooting was purely a private dispute or that the threat from the shooter had ended, the Court found that the emergency was broader than those at issue in *Davis*, encompassing a threat to the police and the public.[65] The Court also found it significant that a gun was involved.[66] "At bottom," it concluded, "there was an ongoing emergency here where an armed shooter, whose motive for and location after the shooting were unknown, had mortally wounded [the victim] within a few blocks and a few minutes of the location where the police found [the victim]."[67]

c. Determining Whether an "Ongoing Emergency" Exists. As noted, *Bryant* made clear that the existence of an ongoing emergency is among the most important circumstances to consider when assessing the primary purpose of an interrogation. However, even after *Bryant,* there are no clear rules on what constitutes an ongoing emergency. The following factors would seem to support the conclusion that an emergency was ongoing:

- The perpetrator remains at the scene and is not in law enforcement custody
- The dispute is a public, not a private one
- The perpetrator is at large
- The perpetrator's location is unknown
- The perpetrator's motive is unknown
- The perpetrator presents a continuing threat
- A gun or other weapon with a "long reach" is involved
- The perpetrator is armed with such a weapon

62. *Id.* at __, 131 S. Ct. at 1156.
63. *Id*. at __, 131 S. Ct. at 1160.
64. *Id*. at __, 131 S. Ct. at 1157.
65. *Id*. at __, 131 S. Ct. at 1164.
66. *Id*.
67. *Id*.

- Physical violence is occurring
- The location is disorderly
- The location is unsecure
- The victim is seriously injured
- Medical attention is needed or the need for it is not yet determined
- The victim or others are in danger
- The questioning occurs close in time to the event
- The victim or others call for assistance
- The victim or others are agitated
- No officers are at the scene

On the other hand, the following factors would seem to support the conclusion that an emergency ended or did not exist:

- The perpetrator has fled and is unlikely to return
- The dispute is a private, not a public one
- The perpetrator is in law enforcement custody
- The perpetrator's location is known
- The perpetrator's motive is known and does not extend beyond the current victim
- The perpetrator presents no continuing threat
- A fist or another weapon with a "short reach" is involved
- The perpetrator is not armed with a "long reach" weapon
- No physical violence is occurring
- The location is calm
- The location is secure
- No one is seriously injured
- No medical attention is needed
- The victim and others are safe
- There is a significant lapse of time between the event and the questioning
- No call for assistance is made
- The victim or others are calm
- Officers are at the scene

d. Other Factors Relevant to the Primary Purpose Analysis. In addition to clarifying that whether an ongoing emergency exists is one of the most important circumstances informing the primary purpose analysis, *Bryant* made clear that the analysis must also examine the statements and actions of both the declarant and the interrogators[68] and the formality of the statement itself.[69] The Court did just that in *Bryant,* determining that given the circumstances of the emergency, it could not say that a person in the victim's situation would have had the primary purpose of establishing past facts relevant to a criminal prosecution.[70] As to

68. *Id*. at __, 131 S. Ct. at 1160.
69. *Id*. at __, 131 S. Ct. at 1166.
70. *Id*. at __, 131 S. Ct. at 1165.

the motivations of the police, the Court concluded that they solicited information from the victim to meet the ongoing emergency.[71] Finally, it found that the informality of the situation and interrogation further supported the conclusion that the victim's statements were nontestimonial.[72]

e. Equally Weighted or Other Purposes. The primary purpose test requires the decision-maker to determine the primary purpose of the interrogation. It is not clear how the statements should be categorized if the primary purpose of the interrogation was something other than meeting an ongoing emergency or establishing past facts, or if the interrogation had a dual, evenly weighted purpose.

f. Objective Determination. As the Court stated in *Davis* and reiterated in *Bryant,* when determining the primary purpose of questioning, courts must objectively evaluate the circumstances.[73]

g. Post-*Bryant* North Carolina Cases. To date North Carolina has only one published post-*Bryant* case on point. In *State v. Glenn*,[74] the court of appeals held that a victim's statement to a law enforcement officer was testimonial. The court distinguished *Bryant* and reasoned in part that there was no ongoing emergency when the statement was made.

3. Of Witnesses.

For confrontation clause purposes, there seems to be no reason to treat police questioning of witnesses any differently from police questioning of victims. However, at least one North Carolina decision holds that not all communications between private citizens and the police are testimonial.[75]

4. Interrogation by Police Agents.

Crawford clearly applies whenever questioning is done by the police or a police agent (in *Davis,* the Court assumed but did not decide that the 911 operator was a police agent). Factors cited by post-*Davis* decisions when determining that actors were agents of the police include the following:

- The police directed the victim to the interviewer or requested or arranged for the interview
- The interview was forensic
- A law enforcement officer was present during the interview
- A law enforcement officer observed the interview from another room
- A law enforcement officer videotaped the interview
- The interviewer consulted with a prosecution investigator before or during the interview

71. *Id*. at __, 131 S. Ct. at 1165-66.
72. *Id*. at __, 131 S. Ct. at 1166.
73. *Id*. at __, 131 S. Ct. at 1150; *Davis*, 547 U.S. at 822.
74. __ N.C. App. __, 725 S.E.2d 58, 63-65 (2012).
75. State v. Call, __ N.C. App. __, 748 S.E.2d 185, 188-89 (2013) (in a larceny from a merchant case, any assertions by the store's deceased assistant manager in a receipt for evidence form were non-testimonial; the receipt—a law enforcement document—established ownership of stolen baby formula that had been recovered by the police, as well as its quantity and type; its purpose was to release the property from the police department back to the store after having been seized during a traffic stop).

- The interviewer consulted with a law enforcement officer before or during the interview
- The interviewer asked questions at the behest of a law enforcement officer
- The purpose of the interview was to further a criminal investigation
- The lack of a non-law enforcement purpose to the interview
- The fact that law enforcement was provided with a videotape of the interview after it concluded

E. Statements to People Other Than the Police or Their Agents.

Crawford, Davis, and *Bryant* all involved questioning by the police or their agents. Although the high Court has not expressly stated that statements to people other than the police or their agents can be testimonial, it has suggested that to be so. In *Whorton v. Bockting*,[76] the Court held that the new *Crawford* rule did not apply retroactively. In that case, the defendant had asserted that his confrontation clause rights were violated when the trial court admitted statements by a child victim to both an officer and to her mother. In its decision the Court gave no indication that the child's statements to her mother fell outside of the protections of the confrontation clause. Additionally, the *Davis* Court's discussion of an old English case suggests that statements to family members can be testimonial.[77]

The lower courts have had to consider whether *Crawford* applies to statements made to persons other than the police and their agents. The sections below discuss those cases.

1. Statements to Family, Friends, Co-Workers, and Other Private Persons.

While many cases seem to adopt a *per se* rule that statements to family, friends, and other private persons are nontestimonial, some cases have applied the *Davis* primary purpose test to such remarks. As noted below,[78] *Crawford* classified a casual remark to an acquaintance as nontestimonial. Since *Crawford*, courts have had to grapple with classifying statements made to acquaintances, family, and friends that are decidedly not casual,[79] such as a statement by a domestic violence victim to her friends about the defendant's abuse and intimidation. North Carolina courts both before and after *Davis* have, without exception, treated statements made to private persons as nontestimonial.[80]

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76. 549 U.S. 406 (2007).

77. *Davis*, 547 U.S. at 828 (noting that the defendant offered *King v. Brasier*, 1 Leach 199, 168, Eng. Rep. 202 (1779), as an example of statements by a "witness" in support of his argument that the victim's statements during the 911 call were testimonial; *Brasier* involved statements of a young rape victim to her mother immediately upon coming home; the *Davis* Court suggested that the case might have been helpful to the defendant had it involved the girl's scream for aid as she was being chased; the Court noted that "by the time the victim got home, her story was an account of past events."). *But see Davis*, 547 U.S. at 825 (citing *Dutton v. Evans*, 400 U.S. 74, 87-89 (1970), a case involving statements from one prisoner to another, as involving nontestimonial statements); Giles v. California, 554 U.S. 353, 376-353 (2008) (suggesting that "[s]tatements to friends and neighbors about abuse and intimidation" would be nontestimonial).

78. *See* Section IV.E.6.

79. *See* CONFRONTATION ONE YEAR LATER, *supra* note 9, at 19 (cataloging cases); EMERGING ISSUES, *supra* note 39, at 22–23 (same).

80. North Carolina cases decided after *Davis* include: State v. Call, __ N.C. App. __, 748 S.E.2d 185, 187-88 (2013) (in a larceny by merchant case, statements made by a deceased Wal-Mart assistant manager to the store's loss prevention coordinator were non-testimonial; the loss prevention coordinator was allowed to testify that the assistant manager had informed him about the loss of property, triggering the loss prevention coordinator's investigation of the matter); State v. Calhoun, 189 N.C. App. 166, 170 (2008) (victim's statement to a homeowner identifying the shooter

2. Statements to Medical Personnel.

The United States Supreme Court has indicated that "statements to physicians in the course of receiving treatment" are nontestimonial.[81] Notwithstanding this statement, there has been a significant amount of litigation about the testimonial nature of statements to medical providers such as pediatricians, emergency room doctors, and sexual assault nurse examiners (SANE nurses).[82] Although the law is still developing, recent cases tend to focus on whether the services have a medical purpose (as opposed to, for example, a purely forensic purpose).[83]

3. Statements to Social Workers.

The testimonial nature of statements by child victims to social workers has been a hotly litigated area of confrontation clause analysis[84] and the law is still evolving. The Fourth Circuit weighed in on the issue in *United States v. DeLeon,*[85] holding that although no ongoing emergency existed, the child's statements to a social worker were nontestimonial based on an objective analysis of the primary purpose and circumstances of the interview.[86] Note that if the social worker is acting as an agent of the police, the statement will likely be testimonial.[87]

4. Statements to Informants.

The *Davis* Court indicated that statements made unwittingly to government informants are nontestimonial.[88]

5. Statements in Furtherance of a Conspiracy.

The Supreme Court has indicated that statements in furtherance of a conspiracy are nontestimonial.[89]

6. Casual or Offhand Remarks to An Acquaintance.

Crawford indicated that "off-hand, overheard remark[s]" and "casual remark[s] to an acquaintance" bear little relation to the types of evidence that the confrontation clause was designed to protect and thus are

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was a nontestimonial statement to a "private citizen" even though a responding officer was present when the statement was made); State v. Williams, 185 N.C. App. 318, 325 (2007) (applying the *Davis* test and holding that the victim's statement to a friend made during a private conversation before the crime occurred was nontestimonial); *see also* State v. McCoy, 185 N.C. App. 160 (2007) (unpublished) (victim's statements to her mother after being assaulted by the defendant were nontestimonial); State v. Hawkins, 183 N.C. App. 300, *3 (2007) (unpublished) (victim's statements to family members were nontestimonial).

Cases decided before *Davis* include: State v. Scanlon, 176 N.C. App. 410, 426 n.1 (2006) (victim's statements to her sister were nontestimonial); State v. Lawson, 173 N.C. App. 270, 275 (2005) (statement identifying the perpetrator, made by a private person to the victim as he was being transported to the hospital was nontestimonial); State v. Brigman, 171 N.C. App. 305, 313 (2005) (victims' statements to foster parents were nontestimonial); and State v. Blackstock, 165 N.C. App. 50, 62 (2004) (victim's statements to wife and daughter about the crimes were nontestimonial).

81. *Giles*, 554 U.S. at 376.

82. *See e.g.*, CONFRONTATION ONE YEAR LATER, *supra* note 9, at 23-24 (cataloging cases); EMERGING ISSUES, *supra* note 39, at 22 (same).

83. *See, e.g.*, State v. Miller, 264 P.3d 461, 490 (Kan. 2011) (surveying the law on point from around the country and concluding that a child's statements to a SANE nurse were nontestimonial).

84. Jessica Smith, *Evidence Issues in Criminal Cases Involving Child Victims and Child Witnesses*, ADMIN. JUST. BULL. No. 2008/07 at 14-34 (UNC School of Government Dec. 2008) (cataloging cases), *available at* http://sogpubs.unc.edu/electronicversions/pdfs/aojb0807.pdf.

85. 678 F.3d 317 (4th Cir. 2012), *reversed on other grounds*, 133 S. Ct. 2850 (2013).

86. *Id.* at 324-26. For a discussion of this case, see Jessica Smith, *4th Circuit Ruling: Child's Statements to Social Worker Are Non-testimonial*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (June 13, 2012), http://nccriminallaw.sog.unc.edu/?p=3666.

87. *See* Section IV.D.4. above.

88. *Davis*, 547 U.S. at 825.

89. *Crawford*, 541 U.S. at 56; *see also Giles*, 554 U.S. at 374, n.6 (2008).

nontestimonial.[90] A casual or offhand remark would include, for example, a victim's statement to a friend: "I'll call you later after I go to the movies with Defendant."

F. Forensic Reports.

Because of the ubiquitous nature of forensic evidence in criminal cases, a tremendous amount of post-*Crawford* litigation has focused on the testimonial nature of forensic reports, such as chemical analysts' affidavits, drug test reports, autopsy reports, DNA reports and the like.[91] The sections that follow explore how *Crawford* applies to this type of evidence.

1. Forensic Reports Are Testimonial.

In a pair of cases, the United States Supreme Court held that forensic reports are testimonial. First, in *Melendez-Diaz v. Massachusetts*[92] the Court held to be testimonial a report, sworn to before a notary by the preparer, stating that the substance at issue was cocaine. The Court further held that the defendant's confrontation clause rights were violated when the report was admitted into evidence to prove that the substance was cocaine without a witness to testify to its contents. Then, in *Bullcoming v. New Mexico,*[93] the Court applied *Melendez-Diaz* and held that the defendant's confrontation clause rights were violated in an impaired driving case when the State's witness read into evidence a forensic report by a non-testifying analyst.

2. Surrogate Testimony.

Bullcoming makes clear that "surrogate testimony"—when the testifying analyst simply reads into evidence the non-testifying analyst's opinion—is impermissible. In that case, the state's evidence against the defendant included a forensic laboratory report certifying that the defendant's blood-alcohol concentration was above the threshold for aggravated impaired driving. At trial, the prosecution did not call the analyst who signed the certification. Instead, the State called another analyst who was familiar with the laboratory's testing procedures, but had neither participated in nor observed the test on the defendant's blood sample. That witness read the report into evidence. The Court held that this procedure violated the defendant's confrontation rights. North Carolina case law is in accord with *Bullcoming.*[94] At least one North Carolina case has held that the person

90. *Crawford*, 541 U.S. at 51.

91. *See* CONFRONTATION ONE YEAR LATER, *supra* note 9, at 10-11 (cataloging cases); EMERGING ISSUES, *supra* note 39, at 13-17 (same); Jessica Smith, *Understanding the New Confrontation Clause Analysis*: *Crawford*, *Davis*, *and Melendez-Diaz*, ADMIN. OF JUSTICE BULL. 2010/02 (UNC School of Government Apr. 2010) (same), *available at* http://sogpubs.unc.edu/electronicversions/pdfs/aojb1002.pdf.

92. 557 U.S. 305 (2009).

93. 564 U.S. __, 131 S. Ct. 2705 (2011).

94. State v. Craven, __ N.C. __, 744 S.E.2d 458, 459 (2013) (applying *Bullcoming* and holding that the defendant's confrontation rights were violated when the testifying analyst did not give her own independent opinion, but rather gave "surrogate testimony" that "parroted" the testing analysts' opinions as stated in their lab reports); *see also* State v. Ortiz-Zape, __ N.C. __, 743 S.E.2d 156, 162 (2013) ("We emphasize that the expert must present an independent opinion obtained through his or her own analysis and not merely 'surrogate testimony' parroting otherwise inadmissible statements."); State v. Brewington, __ N.C. __, 743 S.E.2d 626, 628 (2013) (another cocaine case; following *Ortiz-Zape* and finding no error where the testifying expert gave an independent opinion, "not mere surrogate testimony").

who directly supervised the report's preparation may testify in lieu of the testing analyst.[95]

3. Substitute Analysts.

a. Guidance from the United States Supreme Court. Neither *Melendez-Diaz* nor *Bullcoming* addressed the issue of whether substitute analyst testimony is consistent with the confrontation clause. For these purposes substitute analyst testimony refers to when the state presents an expert witness who testifies to an independent opinion based on information in a non-testifying analyst's forensic report. North Carolina had endorsed the use of substitute analysts, distinguishing *Melendez-Diaz* and *Bullcoming* and reasoning that in this scenario, the underlying report is not being used for its truth but rather as the basis of the testifying expert's opinion. However, the United States Supreme Court's most recent case in this line, *Williams v. Illinois,*[96] calls this reasoning into question. *Williams* held that the defendant's confrontation clause rights were not violated when the State's DNA expert testified to an opinion based on a report done by a non-testifying analyst. However, the *Williams* decision is a fractured one in which no one line of reasoning garnered a five-vote majority. The fractured nature of the decision has resulted in confusion and uncertainty with regard to substitute analyst testimony. Adding to the confusion in North Carolina is the fact that five of the Justices in *Williams* expressly rejected the "not for the truth" rationale that had been used by the North Carolina courts to validate this procedure.[97]

b. North Carolina Cases. Lower courts have noted that *Williams* did little to clarify the constitutionality of using substitute analysts at trial.[98] However, *Williams* did affirm the conviction on appeal, indicating that at least in the circumstances presented in that case, use of a substitute analyst is permissible. Since *Williams,* the North Carolina Supreme Court has held that substitute analyst testimony is permissible in certain circumstances. Specifically, substitute analyst testimony is permissible if the expert testifies to an independent opinion based on information reasonably relied upon by experts in the field and the state lays a proper foundation for the testimony. This was the holding of *State v. Ortiz-Zape,*[99] a cocaine drug case. Over the defendant's objection, the trial court allowed the State's expert witness, Tracey Ray of the CMPD crime lab to testify about the lab's practices and procedures, her review of the testing in the case, and her opinion that the

95. State v. Harris, __ N.C. App. __, 729 S.E.2d 99, 105 (2012) (a trainee prepared the DNA report under the testifying expert's direct supervision and the findings in the report were the expert's own).
96. 567 U.S.__132 S. Ct. 2221 (2012).
97. For an extensive discussion of *Williams* and its implications on the admissibility of forensic reports in North Carolina, see Jessica Smith, *Confrontation Clause Update: Williams v. Illinois and What It Means for Forensic Reports,* ADMIN. JUST. BULL. 2012/03 (UNC School of Government Sept. 2012), *available at* http://sogpubs.unc.edu/electronicversions/pdfs/aojb1203.pdf.
98. *See, e.g.*, State v. Michaels, 219 N.J. 1, 29 (2014) ("[T]he fractured holdings of *Williams* provide little guidance in understanding when testimony by a laboratory supervisor or co-analyst about a forensic report violates the Confrontation Clause").
99. __ N.C. __, 743 S.E.2d 156 (2013).

substance at issue was cocaine. Ray was not involved in the actual testing of the substance at issue; her opinion was based on tests done by a non-testifying analyst. The trial court excluded the non-testifying analyst's report under Rule 403. The defendant was convicted and appealed. The North Carolina Supreme Court upheld the conviction, finding that no confrontation clause violation occurred. It explained:

> [W]hen an expert gives an opinion, [i]t is the expert opinion itself, not its underlying factual basis, that constitutes substantive evidence. Therefore, when an expert gives an opinion, the expert is the witness whom the defendant has the right to confront. In such cases, the Confrontation Clause is satisfied if the defendant has the opportunity to fully cross-examine the expert witness who testifies against him, allowing the factfinder to understand the basis for the expert's opinion and to determine whether that opinion should be found credible. Accordingly, admission of an expert's independent opinion based on otherwise inadmissible facts or data of a type reasonably relied upon by experts in the particular field does not violate the Confrontation Clause so long as the defendant has the opportunity to cross-examine the expert.[100]

The court continued, "[w]e emphasize that the expert must present an independent opinion obtained through his or her own analysis and not merely 'surrogate testimony' parroting otherwise inadmissible statements."[101]

Notwithstanding this North Carolina law, judges and litigants should be aware that the issue is likely to be addressed again by the United States Supreme Court, hopefully with more clarity than was provided in *Williams.*

c. Foundational Requirements. While case law from the North Carolina Supreme Court allows substitute analyst testimony post-*Williams,* the prosecution must lay a proper foundation for that evidence. In this regard, *Ortiz-Zape* is instructive. In that case, the court noted that the prosecutor had laid a proper foundation for Ray's testimony. Specifically, that the information she relied upon—the tests done by the non-testifying analyst—was reasonably relied upon by experts in the field and that Ray was asserting her own independent opinion.[102] The court elaborated on the foundational requirements:

> [W]e suggest that prosecutors err on the side of laying a foundation that establishes compliance with Rule of Evidence 703, as well as the lab's standard procedures, whether the testifying analyst observed or participated in

100. *Id.* at 161 (quotations and citations omitted).
101. *Id.* at 162. *see also* State v. Brewington, __ N.C. __, 743 S.E.2d 626, 628 (2013) (another cocaine case; following *Ortiz-Zape* and finding no error where the testifying expert gave an independent opinion, "not mere surrogate testimony"); State v. Hurt, __ N.C. __, 743 S.E.2d 173 (2013) (per curiam) (applying *Ortiz-Zape* to a case involving substitute analysts in serology and DNA).
102. *Ortiz-Zape*, 743 S.E.2d at 163-64.

the initial laboratory testing, what independent analysis the testifying analyst conducted to reach her opinion, and any assumptions upon which the testifying analyst's testimony relies.[103]

4. Machine Generated Data.

One post-*Williams* North Carolina case suggests that "machine-generated" raw data likely is not testimonial. In *State v. Ortiz-Zape*,[104] the court stated in dicta that "machine-generated raw data," such as a printout from a gas chromatograph, is non-testimonial.[105] As a result, the court suggested, if such data is reasonably relied upon by experts in the field, this information may be disclosed at trial.[106] Note however that a non-testifying analyst's opinion based on machine-generated data is testimonial.[107] Thus, while the raw data may be admissible as a basis of a testifying expert's opinion, the non-testifying analyst's conclusion based on that data is not.

5. Other Options for Proving the State's Case.

Two post-*Williams* North Carolina Supreme Court cases suggest that a defendant's admission that the substance is a controlled substance may be sufficient evidence for conviction. In *State v. Williams*,[108] a cocaine drug case, the court held that even if a confrontation clause error occurred with regard to the substitute analyst's testimony, it was harmless beyond a reasonable doubt because the defendant testified that the substance at issue was cocaine.[109] Likewise, in *Ortiz-Zape*, the court found that any possible confrontation error was harmless, noting in part that the defendant told the arresting officer that the substance was cocaine.[110]

G. Medical Reports and Records.

Melendez-Diaz indicated that "medical reports created for treatment purposes . . . would not be testimonial under our decision today."[111] Medical reports prepared for forensic purposes obviously are not prepared for treatment purposes; forensic reports are prepared for the very purpose of establishing or proving some fact at trial.[112]

H. Other Business and Public Records.

Crawford offered business records as an example of nontestimonial evidence.[113] In *Melendez-Diaz*, the Court was careful to clarify: "Business and public records

103. *Id.* at 164 n.3.
104. __ N.C. __, 743 S.E.2d 156 (2013).
105. *Id.* at 162.
106. *Id.*
107. *See* Section IV.F.1. above.
108. __ N.C. __, 744 S.E.2d 125 (2013).
109. *Id.* at 128.
110. *Ortiz-Zape*, __ N.C. at __, 743 S.E.2d at 164-65 (noting also that defense counsel elicited testimony from the officer that the substance "appear[ed] to be powder cocaine"). The court's earlier decision in *State v. Nabors*, 365 N.C. 306 (2011), may have hinted at this result. In that case, the court held that the testimony of defendant's witness identifying the substance at issue as cocaine "provided evidence of a controlled substance sufficient to withstand defendant's motion to dismiss." *Id.* at 313.
111. *Melendez-Diaz*, 557 U.S. at 312 n.2; *see also* State v. Smith, 195 N.C. App. 462, *3-4 (2009) (unpublished) (hospital reports and notes prepared for purposes of treating the patient were nontestimonial business records).
112. *See* Section IV.F.1. above (discussing forensic reports).
113. *Crawford*, 541 U.S. at 56 (business records are "by their nature" not testimonial).

are generally admissible absent confrontation not because they qualify under an exception to the hearsay rules, but because—having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial—they are not testimonial."[114] Also, the Court has suggested that documents created to establish guilt are testimonial, whereas those unrelated to guilt or innocence are nontestimonial.[115]

1. Records Regarding Equipment Maintenance.

Melendez-Diaz stated that "documents prepared in the regular course of equipment maintenance may well qualify as nontestimonial records."[116] Consistent with this statement, a number of cases have held that such records are nontestimonial.[117]

2. Police Reports.

Melendez-Diaz suggests that police reports are testimonial when they are used to establish a fact at trial.[118]

3. Fingerprint Cards.

In one pre-*Melendez-Diaz* case, the North Carolina Court of Appeals held, with little analysis, that a fingerprint card contained in the Automated Fingerprint Identification System (AFIS) database was a nontestimonial business record.[119] After *Melendez-Diaz*, a report of a comparison between a fingerprint taken from the crime scene and an AFIS card used to identify the perpetrator is almost certainly testimonial. However, it is not clear how *Melendez-Diaz* applies to the fingerprint card itself.

4. 911 Event Logs.

In a pre-*Melendez-Diaz* case, the North Carolina Court of Appeals cited a now discredited North Carolina Supreme Court case and held that a 911 event log was a nontestimonial business record.[120] The log detailed the timeline of a 911 call and the law enforcement response to it.[121] To the extent that such a log is kept for administrative purposes and not to establish guilt at trial, the logs may be nontestimonial even after *Melendez-Diaz*. However, if such logs are determined to be like police reports, they probably will be held to be testimonial.[122]

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114. *Melendez-Diaz*, 557 U.S. at 324; *see also Crawford*, 541 U.S. at 61 (confrontation rights cannot turn on the "vagaries" of federal or state evidence rules).

115. *See Davis,* 547 U.S. at 825 (citing *Dowdell v. United States*, 221 U.S. 325, 330-31 (1911), and describing it as holding that "facts regarding [the] conduct of [a] prior trial certified to by the judge, the clerk of court, and the official reporter did not relate to the defendants' guilt or innocence and hence were not statements of 'witnesses' under the Confrontation Clause"); *Melendez-Diaz*, 557 U.S. at 323 n.8. *Compare Melendez-Diaz*, 557 U.S. 305 (affidavit identifying a substance as a controlled substance in a drug case—a fact that established guilt—is testimonial), *with id.* at 311 n.1 (records of equipment maintenance on testing equipment—which do not go to guilt—are nontestimonial).

116. *Melendez-Diaz*, 557 U.S. at 311 n.1.

117. *See* EMERGING ISSUES, *supra* note 39, at 17–18.

118. *See Melendez-Diaz*, 557 U.S. at 316, 321-22 (suggesting that an officer's investigative report describing the crime scene is testimonial and stating that police reports do not qualify as business records because they are made essentially for use in court).

119. State v. Windley, 173 N.C. App. 187, 194 (2005).

120. State v. Hewson, 182 N.C. App. 196, 207 (2007). *Hewson* cited *State v. Forte*, 360 N.C. 427, 435-36 (2006), in support of its holding. *Forte* was abrogated by *Melendez-Diaz*, as discussed in *Understanding the New Confrontation Clause Analysis*, *supra* note 91, at 14 n.65, 16 n.74.

121. *Hewson*, 182 N.C. App. at 201.

122. *See Melendez-Diaz*, 557 U.S. at 316, 321-22 (suggesting that an officer's investigative report describing the crime scene is testimonial and stating that police reports do not qualify as business records because they are made essentially for use in court).

5. Private Security Firm Records.

In *State v. Hewson*,[123] relying again on the same discredited North Carolina Supreme Court case, the North Carolina Court of Appeals held that a "pass on information form" used by security guards in the victim's neighborhood was a nontestimonial business record. The forms were used by the guards to stay informed about neighborhood events. Analysis of the testimonial nature of such records after *Melendez-Diaz* likely will proceed as with 911 event logs.

6. Detention Center Incident Reports.

In a pre-*Melendez-Diaz* case, the North Carolina Supreme Court held that detention center incident reports were nontestimonial.[124] The court reasoned that the reports were created as internal documents concerning administration of the detention center, not for use in later legal proceedings. This analysis appears consistent with classifying business records "created for the administration of an entity's affairs" as nontestimonial and those created for the purpose of establishing or proving a fact at trial as testimonial.[125]

7. Certificates of Nonexistence of Records.

Melendez-Diaz indicates that certificates of nonexistence of records are testimonial.[126] An example of a certificate of nonexistence of record (from an identity fraud case involving an allegedly fraudulent driver's license) is a certificate from a DMV employee stating that there is no record of the defendant ever having been issued a North Carolina driver's license.

8. Court Records.

The United States Supreme Court has suggested that statements regarding a prior trial that do not relate to the defendant's guilt or innocence are nontestimonial.[127]

I. Chain of Custody Evidence.

Melendez-Diaz indicates that chain of custody information is testimonial.[128] However, the majority took issue with the dissent's assertion that "anyone whose testimony may be relevant in establishing the chain of custody . . . must appear in person as part of the prosecution's case."[129] It noted that while the state has to establish a chain of custody, gaps go to the weight of the evidence, not its admissibility.[130] It concluded: "It is up to the prosecution to decide what steps in the chain of custody are so crucial as to require evidence; but what testimony *is* introduced must (if the defendant objects) be introduced live."[131] This language

123. 182 N.C. App. 196, 208 (2007).
124. State v. Raines, 362 N.C. 1, 16-17 (2007).
125. *Melendez-Diaz*, 557 U.S. at 324.
126. *Id*. at 323.
127. *Davis*, 547 U.S. at 825 (citing *Dowdell v. United States*, 221 U.S. 325 (1911), for the proposition that facts regarding the conduct of a prior trial certified to by the judge, the clerk of court, and the official reporter did not relate to the defendant's guilt or innocence and thus were nontestimonial); *Melendez-Diaz*, 557 U.S. at 323 n.8 (same).
128. *Melendez-Diaz*, 557 U.S. at 311 n.1.
129. *Id.*
130. *Id*.
131. *Id*; *see also* State v. Biggs, __ N.C. App. __, 680 S.E.2d 901, *5 (2009) (unpublished) (the defendant's confrontation clause rights were not violated when the State called only one of two officers who were present when the victim's blood was collected and did not call the nurse who drew the blood; to establish chain of custody, the State called a detective who testified that he was present when the sample was taken, he immediately received the sample from the other detective present and who signed for the sample, he kept the sample securely in a locker, and he transported it to the lab for analysis).

calls into question earlier North Carolina cases suggesting that chain of custody information is nontestimonial.[132]

V. Exceptions to the *Crawford* Rule.

A. Forfeiture by Wrongdoing.

The United States Supreme Court has recognized a forfeiture by wrongdoing exception to the confrontation clause that extinguishes confrontation claims on the equitable grounds that a person should not be able to benefit from his or her wrongdoing.[133] Forfeiture by wrongdoing applies when a defendant engages in a wrongful act designed to prevent the witness from testifying, such as threatening, killing, or bribing the witness.[134] When the doctrine applies, the defendant is deemed to have forfeited his or her confrontation clause rights. Put another way, if the defendant intends to cause the witness's absence at trial, he or she cannot complain of that absence. At least one published North Carolina case has applied the doctrine.[135]

1. Intent to Silence Required.

In *Giles v. California*,[136] the United States Supreme Court held that for forfeiture by wrongdoing to apply, the prosecution must establish that the defendant engaged in the wrongdoing with an intent to make the witness unavailable.[137] It is not enough that the defendant engaged in a wrongful act, for example, killing the witness; the act must have been undertaken with an intent to make the witness unavailable for trial.

2. Conduct Triggering Forfeiture.

Examples of conduct that likely will result in a finding of forfeiture include threatening, killing, or bribing a witness.[138] However, *Giles* suggests that the doctrine has broader reach. Addressing domestic violence, the Court stated:

> Acts of domestic violence often are intended to dissuade a victim from resorting to outside help, and include conduct designed to prevent testimony to police officers or cooperation in criminal prosecutions. Where such an abusive relationship culminates in murder, the evidence may support a finding that the crime expressed the intent to isolate the victim and to stop her from reporting abuse to the authorities or cooperating with a criminal prosecution—rendering her prior statements admissible under the or forfeiture doctrine. Earlier abuse, or threats of abuse, intended to dissuade the victim from resorting to outside help would be highly relevant to this inquiry, as would evidence of ongoing criminal proceedings at which the

132. State v. Forte, 360 N.C. 427, 435 (2006) (SBI special agent's report identifying fluids collected from the victim was nontestimonial; relying, in part, on the fact that the reports contained chain of custody information); State v. Hinchman, 192 N.C. App. 657, 664-65 (2008) (chemical analyst's affidavit was nontestimonial when it was limited to an objective analysis of the evidence and routine chain of custody information).
133. Giles v. California, 554 U.S. 353, 359 (2008); *Crawford*, 541 U.S. at 62 (2004); *Davis*, 547 U.S. at 833; *see also* State v. Lewis, 361 N.C. 541, 549-50 (2007) (inviting application of the doctrine on retrial).
134. Giles, 554 U.S. at 359, 365.
135. State v. Weathers, __ N.C. App. __, 724 S.E.2d 114, 117 (2012) (the trial court properly applied the forfeiture by wrongdoing exception where the defendant intimidated the witness).
136. 554 U.S. 353 (2008).
137. *Id.* at 367.
138. *Id*. at 365.

victim would have been expected to testify.[139]

3. Wrongdoing by Intermediaries.

The *Giles* Court suggested that forfeiture applies not only when the defendant personally engages in the wrongdoing that brings about the witness's absence but also when the defendant "uses an intermediary for the purpose of making a witness absent."[140]

4. Conspiracy Theory.

A Fourth Circuit case applied traditional principles of conspiracy liability to the forfeiture by wrongdoing analysis, concluding that the exception may apply when the defendant's co-conspirators engage in the wrongdoing that renders the defendant unavailable.[141] The court noted that mere participation in the conspiracy is not enough to trigger liability; rather the defendant must have (1) participated directly in planning or procuring the declarant's unavailability through wrongdoing; or (2) the wrongful procurement was in furtherance, within the scope, and reasonably foreseeable as a necessary or natural consequence of an ongoing conspiracy.[142]

5. Procedural Issues.

a. Hearing. When the State argues for application of forfeiture by wrongdoing, a hearing may be required. There is some support for the argument that at a hearing, the trial judge may consider hearsay evidence, including the unavailable witness's out-of-court statements.[143] One North Carolina case held that forfeiture can be found even if the threatened witness fails to testify at the forfeiture hearing.[144]

b. Standard. Although the United States Supreme Court has not ruled on the issue, many courts apply a preponderance of the evidence standard to the forfeiture by wrongdoing inquiry.[145]

B. Dying Declarations.

Although *Crawford* acknowledged cases supporting a dying declaration exception to the confrontation clause, it declined to rule on the issue.[146] However,

139. *Id*. at 377.
140. *Id.* at 360.
141. United State v. Dinkins, 691 F.3d 358, 384-85 (4th Cir.) (citing similar holdings from other circuits).
142. *Id.* at 385-86 (finding both prongs of the test met in this case).
143. *Davis*, 547 U.S. at 833.
144. State v. Weathers, __ N.C. App. __, 724 S.E.2d 114, 117 (2012) (rejecting the defendant's argument that application of the doctrine was improper because the witness never testified that he chose to remain silent out of fear; "It would be nonsensical to require that a witness *testify against a defendant* in order to establish that the defendant has intimidated the witness into *not* testifying. Put simply, if a witness is afraid to testify against a defendant in regard to the crime charged, we believe that witness will surely be afraid to finger the defendant for having threatened the witness, itself a criminal offense.").
145. *Cf. Giles*, 554 U.S. 353, 379 (Souter, J., concurring) (assuming that the preponderance standard governs); *see*, *e.g.*, *Dinkins*, 691 F.3d. 358, 383 (4th Cir. 2012) (using the preponderance standard).
146. *Crawford*, 541 U.S. at 56 n.6; *see also Giles*, 554 U.S. at 357-59 (noting that dying declarations were admitted at common law even though unconfronted); *Bryant*, 131 S. Ct. 1143, 1177 (Ginsburg, J., dissenting) ("[W]ere the issue tendered here, I would take up the question whether the exception for dying declarations survives our recent Confrontation Clause decisions.").

the North Carolina Court of Appeals has recognized such an exception to the *Crawford* rule.[147]

VI. Waiver.

A. Generally.

Confrontation clause rights, like constitutional rights generally, may be waived.[148] To be valid, a waiver of confrontation rights, like a waiver of any constitutional right, must be knowing, voluntary, and intelligent.[149] Waivers may be expressed or implied. The sections below explore waiver of confrontation rights.

B. Notice and Demand Statutes.

1. Generally.

Melendez-Diaz indicated that states are free to adopt procedural rules governing the exercise of confrontation objections.[150] The Court discussed "notice and demand" statutes as one such procedure, noting that in their simplest form these statutes require the prosecution to give the defendant notice that it intends to introduce a testimonial forensic report at trial without the testimony of the preparer. The defendant then has a period of time in which to object to the admission of the evidence absent the analyst's appearance live at trial.[151] The Court went on to note that these simple notice and demand statutes are constitutional.[152]

2. North Carolina's Statutes.

In 2009, the North Carolina General Assembly responded to *Melendez-Diaz* by passing legislation amending existing notice and demand statutes and enacting others.[153] These statutes set up procedures by which the State may procure a waiver of confrontation rights with regard to forensic laboratory reports, chemical analyst affidavits, and certain chain of custody evidence. Table 1 summarizes North Carolina's notice and demand statutes.

a. Effect of the Statutes. If the State gives proper notice under a notice and demand statute and the defendant fails to timely file an objection, a waiver of the confrontation right occurs.[154] When this occurs, the trial judge is required to admit the report without the presence of the preparer.[155] If the defendant files a timely

147. State v. Bodden, 190 N.C. App. 505, 514 (2008); State v. Calhoun, 189 N.C. App. 166, 172 (2008).
148. Melendez-Diaz v. Massachusetts, 557 U.S. 305, 314 n.3 (2009), ("The right to confrontation may, of course, be waived.").
149. Maryland v. Shatzer, 559 U.S. 98, 104 (2010) (citing Johnson v. Zerbst, 304 U.S. 458 (1938)).
150. *Melendez-Diaz*, 557 U.S. at 314 n.3.
151. *Id*. at 326-27.
152. *Id*. at 327 n.12; *see also* State v. Whittington, __ N.C. __, 753 S.E.2d 320, 324-25 (2014) (if the defendant fails to object after notice is given under G.S. 90-95(g), a valid waiver of the defendant's constitutional right to confront the analyst occurs); State v. Steele, 201 N.C. App. 689, 696 (2010) (notice and demand statute in G.S. 90-95(g) is constitutional under *Melendez-Diaz*).
153. S.L. 2009-473.
154. *See, e.g.*, G.S. 8-58.20(f); G.S. 8-58.20(g)(5); *see also* State v. Jones, __ N.C. App. __, 725 S.E.2d 910, 912 (2012) (a report identifying a substance as cocaine was properly admitted; the State gave notice under the G.S. 90-95(g) and the defendant failed to object).
155. In 2013, the notice and demand statutes were amended, providing that when notice is given and no objection is made, the report "shall" be admitted into evidence without the presence of the preparer. S.L. 2013-171. The earlier versions of the statutes provided that admissibility of the evidence was permissive, not required.

objection, there is no waiver and *Crawford* applies.[156]

b. **Notice.** For all of the statutes, the State must give notice to defense counsel or directly to the defendant if he or she is unrepresented.[157] In its notice, the State must provide the defendant with a copy of the relevant report.[158] While the notice need not contain proof of service or a file stamp,[159] following those procedures eliminates any question about whether notice was properly received.

c. **Constitutionality.** As noted above, the United States Supreme Court opined in *Melendez-Diaz* that simple notice and demand statutes are constitutional. Since that case was decided, the North Carolina Court of Appeals has upheld the constitutionality of G.S. 90-95(g), the notice and demand statute that applies in drug cases.[160] That holding is likely to apply to North Carolina's six other similarly worded notice and demand statutes.

156. *See, e.g.*, G.S. 8-58.20(f) (if an objection is filed, the notice and demand provisions do not apply); G.S. 8-58.20(g)(6) (same).
157. State v. Blackwell, 207 N.C. App. 255, 259 (2010) (in a drug case, the trial court erred by admitting reports regarding the identity, nature, and quantity of the controlled substances where the State provided improper notice; instead of sending notice directly to the defendant, who was *pro se*, the State sent notice to a lawyer who was not representing the defendant at the time); *see also* G.S. 8-58.20(d).
158. State v. Whittington, __ N.C. __, 753 S.E.2d 320, 324 (2014) (the State's notice was deficient in that it failed to provide the defendant a copy of the report and stated only that "[a] copy of report(s) will be delivered upon request").
159. State v. Burrow, __ N.C. App. __, 742 S.E.2d 619, 620-22 (2013) (notice was properly given under G.S. 90-95(g) even though it did not contain proof of service or a file stamp; the argued-for service and filing requirements were not required by *Melendez-Diaz* or the statute; the notice was stamped "a true copy"; it had a handwritten notation saying "ORIGINAL FILED," "COPY FAXED," and "COPY PLACED IN ATTY'S BOX" and the defendant did not argue that he did not in fact receive the notice).
160. State v. Steele, 201 N.C. App. 689, 696 (2010) (notice and demand statute in G.S. 90-95(g) is constitutional under *Melendez-Diaz*).

Table 1. North Carolina's Notice and Demand Statutes

Statute	Relevant Evidence	Proceedings	Time for State's Notice	Time for Defendant's Objection or Demand	AOC Form
G.S. 8-58.20(a)-(f)	Laboratory report of a written forensic analysis	Any criminal proceeding	No later than 5 business days after receipt or 30 days before the proceeding, whichever is earlier	Within 15 business days of receiving the State's notice	None
G.S. 8-58.20(g)	Chain of custody statement for evidence subject to forensic analysis	Any criminal proceeding	At least 15 business days before the proceeding	At least 5 business day before the proceeding	None
G.S. 20-139.1(c1)	Chemical analysis of blood or urine	Cases tried in district and superior court and adjudicatory hearings in juvenile court	At least 15 business days before the proceeding	At least 5 business days before the proceeding	AOC-CR-344
G.S. 20-139.1(c3)	Chain of custody statement for tested blood or urine	Cases tried in district and superior court and adjudicatory hearings in juvenile court	At least 15 business days before the proceeding	At least 5 business days before the proceeding	AOC-CR-344
G.S. 20-139.1(e1)-(e2)	Chemical analyst affidavit	Hearing or trial in district court	At least 15 business days before the proceeding	At least 5 business days before the proceeding	AOC-CR-344
G.S. 90-95(g)	Chemical analyses in drug cases	All proceedings in district and superior court	At least 15 business days before the proceeding	At least 5 business days before the proceeding	None
G.S. 90-95(g1)	Chain of custody statement in drug cases.	All proceedings in district and superior court	At least 15 business days before trial	At least 5 business days before trial	None

C. Failure to Call or Subpoena Witness.

The *Melendez-Diaz* Court rejected the argument that a confrontation clause objection is waived if the defendant fails to call or subpoena a witness, ruling that "the Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court."[161] Any support for a contrary conclusion in earlier North Carolina cases is now questionable.[162]

Some viewed the Court's grant of certiorari in *Briscoe v. Virginia*,[163] issued four days after *Melendez-Diaz* was decided, as an indication that the Court might reconsider its position on this issue. The question presented in that case was as follows: If a state allows a prosecutor to introduce a certificate of a forensic laboratory analysis, without presenting the testimony of the analyst who prepared the certificate, does the state avoid violating the confrontation clause by providing that the accused has a right to call the analyst as his or her own witness? However, in January of 2010, the Court, in a two-sentence *per curiam* decision, vacated and remanded for further proceedings not inconsistent with *Melendez-Diaz*.[164] Since that *per curiam* decision, the Court has taken other action confirming its position on this issue.[165]

D. Stipulations as Waivers.

One North Carolina case held that the defendant waived a confrontation clause challenge to a laboratory report identifying a substance as a controlled substance by "stipulating" to the admission of the report "without further authentication or further testimony."[166] Although the trial judge in that case confirmed the defendant's "stipulation" through "extensive questioning,"[167] it is better practice for the trial court to deal with such a scenario as an express waiver and to make sure that the record reflects a knowing, voluntary and intelligent waiver of confrontation rights. Another North Carolina case can be read to suggest that a defendant's stipulation that the substance at issue is a controlled substance waives any objection to admission of the forensic report concluding that the substance is a controlled substance without the presence of a preparer.[168] However, that case is probably better read as involving an express waiver of confrontation rights,[169] and the better practice is to ensure that the record reflects a knowing, voluntary and intelligent waiver of confrontation rights.

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161. *Melendez-Diaz*, 557 U.S. at 324; *see also* D.G. v. Louisiana, 559 U.S. 967 (2010) (vacating and remanding, in light of *Melendez-Diaz*, a state court decision that found no confrontation violation when the declarant was present in court but not called to the stand by the state).
162. *See, e.g.*, State v. Brigman, 171 N.C. App. 305, 313 (2005).
163. 557 U.S. 933 (2009).
164. Briscoe v. Virginia, __ U.S. __, 130 S. Ct. 1316 (2010).
165. *See D.G.*, 559 U.S. 967 (vacating and remanding in light of *Melendez-Diaz* a state court decision that found no confrontation violation when the declarant was present in court but not called to the stand by the prosecution).
166. State v. English, 171 N.C. App. 277, 282-84 (2005).
167. *Id.*
168. *State v. Ward,* __ N.C. App. __, 742 S.E.2d 550, 554 (2013). *Ward* was a drug case in which the defendant stipulated that the pills at issue were oxycodone and a non-testifying analyst's report was introduced into evidence.
169. The *Ward* court noted that "[t]he trial court was explicit in announcing to Defendant that [the state's expert] would not testify as to [the non-testifying analyst's] report without Defendant's consent." *Ward,* __ N.C. App. at __, 742 S.E.2d at 554. It concluded: "the record belies Defendant's contention that his stipulation was not a 'knowing and intelligent waiver.'" *Id.*

VII. Unavailability.

Under *Crawford*, out of court statements by witnesses who do not testify at trial are not admissible unless the prosecution shows that the witness is unavailable and that the defendant has had a prior opportunity to cross-examine the witness. This section explores what it means for a witness to be unavailable.

A. Good Faith Effort.

A witness is not unavailable unless the State has made a good-faith effort to obtain the witness's presence at trial.[170]

B. Evidence Required.

To make the showing, the State must put on evidence to establish the steps it has taken to procure the witness for trial.[171]

VIII. Prior Opportunity to Cross-Examine.

Under *Crawford*, out of court statements by witnesses who do not testify at trial are not admissible unless the prosecution shows that the witness is unavailable and that the defendant has had a prior opportunity to cross-examine the witness. This section explores what it means to have a prior opportunity for cross-examination.

A. Prior Trial.

If a case is being retried and the witness testified at the first trial, the prior trial provided the defendant with a prior opportunity to cross-examine the witness.[172]

B. Probable Cause Hearing.

At least one North Carolina case has held that defense counsel's cross-examination of a declarant at a probable cause hearing satisfies *Crawford's* requirement of a prior opportunity to cross-examine.[173]

C. Pre-Trial Deposition.

One open issue is whether a pre-trial deposition constitutes a prior opportunity to cross-examine.[174]

D. Plea Proceeding.

At least one North Carolina case has held that a witness's testimony at a prior plea proceeding afforded the defendant a prior opportunity to cross-examination.[175]

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170. Hardy v. Cross, 565 U.S. __, 132 S. Ct. 490, 494 (2011) (the state court was not unreasonable in determining that the prosecution established the victim's unavailability for purposes of the confrontation clause).
171. *See* CONFRONTATION ONE YEAR LATER, *supra* note 9, at 30; *see also* State v. Ash, 169 N.C. App. 715, 727 (2005) ("Without receiving evidence on or making a finding of unavailability, the trial court erred in admitting [the testimonial evidence].").
172. CONFRONTATION ONE YEAR LATER, *supra* note 9, at 30–31; *see also* State v. Allen, 179 N.C. App. 434, *3-4 (unpublished).
173. State v. Ross, 216 N.C. App. 337, 345-46 (2011).
174. For a discussion of this issue, see REMOTE TESTIMONY, *supra* note 42, at 15-17; CONFRONTATION ONE YEAR LATER, *supra* note 9, at 31 and EMERGING ISSUES, *supra* note 39, at 9–10.
175. State v. Rollins, __ N.C. App. __, 738 S.E.2d 440, 446 (2013) (no violation of the defendant's confrontation rights occurred when the trial court admitted statements made by an unavailable witness at a proceeding in connection with the defendant's *Alford* plea; the court concluded that that the "defendant definitively had a prior opportunity to cross-examine" the witness during the plea hearing and "had a similar motive to cross-examine [the witness]as he would have had at trial").

IX. Retroactivity.

A. Generally.

Whenever the United States Supreme Court decides a case, its decision applies to all future cases and to those pending and not yet decided on appeal.[176] Whether the decision applies to cases that became final before the new decision was issued is a question of retroactivity.

B. Of *Crawford.*

The United States Supreme Court has held that *Crawford* is not retroactive under the rule of *Teague v. Lane*.[177] Later, in *Danforth v. Minnesota*,[178] the Court held that the federal standard for retroactivity does not constrain the authority of state courts to give broader effect to new rules of criminal procedure than is required under the *Teague* test.

Relying on *Danforth*, some defense lawyers argue that North Carolina judges are now free to disregard *Teague* and apply a more permissive retroactivity standard to new federal rules of criminal procedure—such as *Crawford*—in state court motion for appropriate relief proceedings. However, that argument is not on solid ground in light of the North Carolina Supreme Court's decision in *State v. Zuniga*.[179] In *Zuniga*, the North Carolina Supreme Court expressly adopted the *Teague* test for determining whether new federal rules apply retroactively in state court motion for appropriate relief proceedings. In so ruling it specifically rejected the argument that the state retroactivity rule of *State v. Rivens*[180] should apply in motion for appropriate relief proceedings. Instead, persuaded by concerns of finality, the court adopted the *Teague* rule. Although *Zuniga* is a pre-*Danforth* case, it is the law in North Carolina; although the North Carolina Supreme Court might come to a different conclusion if the issue is raised again, the lower courts are bound by the decision.[181]

C. Of *Melendez-Diaz.*

As noted above, *Melendez-Diaz* held that forensic laboratory reports are testimonial and thus subject to *Crawford.* Some have argued that *Melendez-Diaz* is not a new rule but, rather, was mandated by *Crawford*. If that is correct, *Melendez-Diaz* would apply retroactively at least back to the date *Crawford* was decided, March 8, 2004.[182] For more detail on this issue, see the publication

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176. *See generally* Jessica Smith, *Retroactivity of Judge-Made Rules*, ADMIN. JUST. BULL. No. 2004/10 (UNC School of Government Dec. 2004), *available at* http://shopping.netsuite.com/s.nl/c.433425/it.l/id.81/.f; *see also* State v. Morgan, 359 N.C. 131, 153-54 (2004) (applying *Crawford* to a case that was pending on appeal when *Crawford* was decided); State v. Champion, 171 N.C. App. 716, 722-723 (2005) (same).

177. 489 U.S. 288 (1989). *See* Whorton v. Bockting, 549 U.S. 406, 416-21 (2007) (*Crawford* was a new procedural rule but not a watershed rule of criminal procedure).

178. 552 U.S. 264 (2008).

179. 336 N.C. 508 (1994).

180. 299 N.C. 385 (1980) (new state rules are presumed to operate retroactively unless there is a compelling reason to make them prospective only).

181. It is worth noting that the United States Supreme Court came to a different conclusion than the *Zuniga* court with regard to application of the *Teague* test to the new federal rule at issue. *Compare Zuniga*, 336 N.C. at 510 *with* Beard v. Banks, 542 U.S. 406, 408 (2004) (*Zuniga* held that the *McKoy* rule applied retroactively under *Teague*; ten years later in *Beard*, the United States Supreme Court concluded otherwise). However, even if that aspect of *Zuniga* is no longer good law, *Danforth* reaffirms the authority of the *Zuniga* court to adopt the *Teague* test for purposes of state post-conviction proceedings. *Danforth*, 552 U.S. at 275.

182. *See Whorton*, 549 U.S. at 416 (old rules apply retroactively).

noted in the footnote.[183] For a discussion of the related issue of whether North Carolina might hold *Melendez-Diaz* to be retroactive in state motion for appropriate relief proceedings under *Danforth*, see the section immediately above.

X. Proceedings to Which *Crawford* Applies.

A. Criminal Trials.

By its terms, the Sixth Amendment applies to "criminal prosecutions." It is thus clear that the confrontation protection applies in criminal trials.[184]

B. Sentencing.

Crawford applies at the punishment phase of a capital trial.[185] The North Carolina Court of Appeals held that *Crawford* applies to *Blakely*-style non-capital sentencing proceedings in which the jury makes a factual determination that increases the defendant's sentence.[186]

C. Termination of Parental Rights.

Crawford does not apply in proceedings to terminate parental rights.[187]

D. Juvenile Delinquency Proceedings.

In an unpublished opinion, the North Carolina Court of Appeals applied *Crawford* in a juvenile adjudication of delinquency.[188] More recently the United States Supreme Court took action indicating that *Crawford* applies in these proceedings.[189]

XI. Harmless Error Analysis.

If a *Crawford* error occurs at trial, the error is not reversible if the State can show that it was harmless beyond a reasonable doubt.[190] This rule applies on appeal as well as in post-conviction proceedings.[191]

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183. Jessica Smith, *Retroactivity of Melendez-Diaz*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (July 20, 2009), nccriminallaw.sog.unc.edu/?p=545.
184. *See*, *e.g.*, *Crawford*, 541 U.S. at 43.
185. State v. Bell, 359 N.C. 1, 34-35 (2004) (applying *Crawford* to such a proceeding).
186. State v. Hurt, 208 N.C. App. 1, 6 (2010) (*Crawford* applies to all "*Blakely*" sentencing proceedings in which a jury makes the determination of a fact or facts that, if found, increase the defendant's sentence beyond the statutory maximum; here, the trial court's admission of testimonial hearsay evidence during the defendant's non-capital sentencing proceeding violated the defendant's confrontation rights, where at the sentencing hearing the jury found the aggravating factor that the murder was especially heinous, atrocious, or cruel and the trial judge sentenced the defendant in the aggravated range; the court distinguished *State v. Sings*, 182 N.C. App. 162 (2007) (declining to apply the confrontation clause in a non-capital sentencing hearing), on the basis that it involved a sentencing based on the defendant's stipulation to aggravating factors not a *Blakely* sentencing hearing and limited that decision's holding to its facts), *reversed on other grounds* __ N.C. __, 743 S.E.2d 173 (2013).
187. *In Re* D.R., 172 N.C. App. 300, 303 (2005); *see also In Re* G.D.H., 186 N.C. App. 304, *4 (2007) (unpublished) (following *In Re* D.R.).
188. *In Re* A.L., 175 N.C. App. 419, *2-3 (2006) (unpublished).
189. *See* D.G. v. Louisiana, 559 U.S. 967 (2010) (reversing and remanding a juvenile delinquency case for consideration in light of *Melendez-Diaz*).
190. *Compare* State v. Lewis, 361 N.C. 541, 549 (2007) (error not harmless), *with* State v. Morgan, 359 N.C. 131, 156 (2004) (error was harmless in light of overwhelming evidence of guilt); *see generally* G.S. 15A-1443(b) (harmless error standard for constitutional errors).
191. *See* G.S. 15A-1420(c)(6) (incorporating into motion for appropriate relief procedure the harmless error standard in G.S. 15A-1443).