

COVID-19 and Remote Testimony in Criminal Trials

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The Right to Face-to-Face Confrontation

As COVID-19 cases continue to rise across North Carolina, criminal jury trials have resumed in some districts following a six-month hiatus. Their resumption has raised a number of issues, among them whether the State may present remote testimony of its witnesses by electronic means to mitigate the risk of contracting the virus, as opposed to requiring them to appear in court. While courts may be sympathetic to concerns about contracting the disease, the Sixth Amendment to the U.S. Constitution places significant limitations on their authority with respect to remote testimony. Absent extraordinary circumstances, criminal defendants must waive their right to face-to-face confrontation before remote testimony may lawfully be introduced against them.

Criminal defendants have a federal and state constitutional right to confront and cross-examine the witnesses against them at trial.¹ The violation of this right will entitle them to a new trial absent a determination that the error was harmless beyond a reasonable doubt.² The U.S. Supreme Court has said “it is this literal right to ‘confront’ the witness at the time of trial

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1. See U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.”); N.C. CONST. art. I, § 23 (“In all criminal prosecutions, every person charged with crime has the right . . . to confront the accusers and witnesses . . .”). The Supreme Court of North Carolina has “generally construed the right to confrontation under our state constitution consistent with its federal counterpart.” *State v. Nobles*, 357 N.C. 433, 435 (2003).

2. *State v. Lewis*, 361 N.C. 541, 549–50 (2007) (granting new trial to defendant in response to Confrontation Clause violation in which alleged victim’s statement against defendant was introduced against her at trial and she was not afforded an opportunity for cross-examination); see generally Chapter 15A, Section 1443(b) of the North Carolina General Statutes (hereinafter G.S.) (“A violation of the defendant’s rights under the Constitution of the United States is prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt. The burden is on the State to demonstrate, beyond a reasonable doubt, that the error was harmless.”).

that forms the core of the values furthered by the Confrontation Clause.”³ This right includes the right to face-to-face confrontation.⁴ Narrow exceptions to the right to face-to-face confrontation exist, but even in the era of COVID-19, the bar for permitting remote testimony at trial is a high one.

Standard for Remote Video Testimony

In *Maryland v. Craig*, the U.S. Supreme Court recognized an exception to the right to face-to-face confrontation, narrowly approving as consonant with the Confrontation Clause the use of remote video testimony for certain child sexual assault victims.⁵ *Craig* observed that “the face-to-face confrontation requirement is not . . . easily [] dispensed with” and applied this two-part test: “[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.”⁶ The Court concluded that this standard is satisfied “at least in some cases” involving child sexual abuse victims where their “physical and psychological well[-]being” is at stake and “other elements of confrontation . . . adequately ensure[] that the testimony is both reliable and subject to rigorous adversarial testing in a manner functionally equivalent to that accorded live, in-person testimony.”⁷ The North Carolina Court of Appeals subsequently followed *Craig* under the federal and state constitutions.⁸

Fourteen years later, in *Crawford v. Washington*, the U.S. Supreme Court drastically revised its analysis of the Confrontation Clause and held that deviations from the requirement of

3. *California v. Green*, 399 U.S. 149, 157 (1970).

4. *Coy v. Iowa*, 487 U.S. 1012, 1016 (1988) (“We have never doubted . . . that the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact.”); see also Jessica Smith, *Remote Testimony and Related Procedures Impacting a Criminal Defendant’s Confrontation Rights*, ADMINISTRATION OF JUSTICE BULLETIN No. 2013/02, at 3 (UNC Sch. Gov’t, Feb. 2013) (“This is understood to mean that the witness testifies live at trial, in a setting in which the defendant and the witness can see and hear each other.”).

5. 497 U.S. 836 (1990). In *Craig*, Justice Scalia, joined by three other Justices, filed a dissent in which he argued that “[s]eldom has th[e] Court failed so conspicuously to sustain a categorical guarantee of the Constitution against the tide of prevailing current opinion.” To the dissenting Justices, the majority’s conclusion that it could not be said “that [face-to-face] confrontation . . . is an indispensable element of the Sixth Amendment[.]” was “like saying ‘we cannot say that being tried before a jury is an indispensable element of the Sixth Amendment[.]’” *Id.* at 860–61 (Scalia, J., dissenting).

6. *Maryland v. Craig*, 497 U.S. 836, 850 (1990) (emphases added); see also Amendments to Rule 26(b) of the Federal Rules of Criminal Procedure, 207 F.R.D. 89, 94 (2002) (statement of Scalia, J.) (“As we made clear in *Craig*, . . . a purpose of the Confrontation Clause is ordinarily to compel accusers to make their accusations *in the defendant’s presence*—which is not equivalent to making them in a room that contains a television set beaming electrons that portray the defendant’s image. Virtual confrontation might be sufficient to protect virtual constitutional rights; I doubt whether it is sufficient to protect real ones.”) (emphasis in original).

7. *Craig*, 497 U.S. at 851 & 853.

8. *In re Stradford*, 119 N.C. App. 654 (1995) (relying on *Craig* in finding no violation where child rape victims testified by way of closed-circuit television due to their “inability to communicate if forced to testify in [the] defendant’s presence”).

confrontation are limited to specific, narrow circumstances.⁹ Absent waiver, testimonial statements are admissible at trial against a criminal defendant without the opportunity to confront the witness only if they come within an exception that existed at the time of the Constitution's adoption, such as the exception for dying declarations, or if the witness is unavailable and was previously subject to cross-examination. The opinion's originalist approach to the Confrontation Clause stood in such contrast to the rationale of *Craig* that it prompted some courts to consider whether it had effectively overruled it.¹⁰

Yet the test announced in *Craig*—that a witness's physical absence be found “necessary” to further an important public policy interest and that the reliability of the testimony be assured—continues to guide courts' evaluation of the admissibility of remote video testimony. The North Carolina Court of Appeals has held that remote testimony is “controlled by *Craig*, not *Crawford*, and we tailor our analysis accordingly.”¹¹

A different question is whether the government must meet the *Craig* standard when offering two-way remote testimony. *Craig* involved one-way remote testimony. The North Carolina Court of Appeals has held that the State must satisfy *Craig* when offering either one-way or two-way remote testimony.¹² A majority of other courts, including the Fourth, Eighth, Ninth, Tenth, and Eleventh Federal Circuit Courts of Appeal, as well as federal district courts in the Sixth Circuit, have held that two-way remote testimony is not equivalent to face-to-face confrontation in court and must satisfy the *Craig* test to be admissible.¹³ The Second Circuit, in a pre-*Crawford* decision, took a different view, but it is against the weight of authority.¹⁴

9. 541 U.S. 36 (2004).

10. See, e.g., *United States v. Pack*, 65 M.J. 381, 384 (C.A.A.F. 2007) (observing that “the *Crawford* opinion itself contains statements that are difficult to reconcile with certain other statements in the *Craig* opinion” but concluding that the *Craig* test continues to apply to remote testimony); Raymond LaMagna, *(Re)constitutionalizing Confrontation: Reexamining Unavailability and the Value of Live Testimony*, 79 S. CAL. L. REV. 1499, 1501 (2006) (“[T]he Court reversed the direction of confrontation jurisprudence with *Crawford v. Washington*. *Crawford* disentangled constitutional analysis from the law of evidence and reestablished confrontation as a categorical procedural right.”).

11. *State v. Jackson*, 216 N.C. App. 238, 243 (2011) (rejecting defendant's argument that *Crawford* “so ‘destroy[ed] the linchpin’ of *Craig* that it is no longer good precedent”); see also Jessica Smith, *Crawford & The Confrontation Clause* at 9 & n.42, NC SUPERIOR COURT JUDGES' BENCHBOOK (July 2018) (observing that “*Crawford* called into question the continued validity of *Maryland v. Craig* procedures” but recognizing that North Carolina decisions have continued to follow *Craig*).

12. *State v. Seelig*, 226 N.C. App. 147, 156–57 (2013).

13. *United States v. Abu Ali*, 528 F.3d 210, 239–42 (4th Cir. 2008); *United States v. Bordeaux*, 400 F.3d 548, 554 (8th Cir. 2005); *United States v. Carter*, 907 F.3d 1199, 1206 (9th Cir. 2018); *United States v. Carrier*, 9 F.3d 867, 869–70 (10th Cir. 1993); *United States v. Yates*, 438 F.3d 1307, 1314–18 (11th Cir. 2006); *Gentry v. Deuth*, 381 F. Supp. 2d 614, 623–24 (W.D. Ky.), *vacated on other grounds*, 381 F. Supp. 2d 630 (W.D. Ky. 2004), *habeas motion granted*, 381 F. Supp. 2d 634 (W.D. Ky. 2004), *aff'd*, 456 F.3d 687 (6th Cir. 2006); see also *United States v. Nippon Paper Indus. Co.*, 17 F. Supp. 2d 38, 40–43 & nn.3 & 10 (D. Mass. 1998) (citing *Craig*) (stating that “had the defendant not effectively waived its objections” to its use, the fact that “videoscreens necessarily present antiseptic, watered down versions of reality” might have counseled rejecting admission of two-way video testimony).

14. See *United States v. Gigante*, 166 F.3d 75, 80 (2d Cir. 1999). *Gigante* rests on the assumption that *Craig* is inapposite because it involved only “one-way closed-circuit television.” *Id.* at 81. Three years after *Gigante* was decided, the U.S. Supreme Court rejected a proposed change to the Federal Rules of Evidence that was modeled on *Gigante's* distinction between one-way and two-way remote testimony. The current rule continues to restrict the use of remote testimony. Anthony Garofano, *Avoiding Virtual*

Assessing Pandemic-Related Claims Regarding Remote Testimony

Courts have found that remote testimony may satisfy the *Craig* standard in circumstances other than those involving the testimony of child sexual assault victims, as in *Craig*. Pertinent to the subject of this bulletin, the courts have found in rare instances that concerns about a witness's health were sufficient to overcome a defendant's right to face-to-face confrontation.¹⁵ These cases typically involve people with extremely serious medical conditions, such as a terminal illness, or people who have recently undergone major surgeries.¹⁶

Early opinions issued during the pandemic suggest that many of the disruptions occasioned by COVID-19, while significant, may not be sufficient to override a defendant's confrontation rights. In the first cases to consider the issue, federal courts denied motions to permit remote testimony, holding that the interest in mitigating the threat of COVID-19 was not so strong as to make remote testimony "necessary."¹⁷

In *United States v. Casher*, a federal bank fraud prosecution, two witnesses filed a motion with the U.S. District Court for the District of Montana to quash a subpoena and permit them to appear at trial via video.¹⁸ The witnesses expressed concerns about the safety of traveling, with one citing the advice of his doctor, his advanced age, and a history of serious underlying health issues.¹⁹ The defendant and the government both objected to the proposed video testimony, asserting that it would "raise serious Confrontation Clause concerns in light of the record."²⁰ The court agreed and denied the witnesses' motion, concluding that "[w]hat is 'necessary' is a high bar."²¹ It reasoned that although the witnesses lived a great distance away and air travel may no longer be practicable due to the pandemic, they could still drive.²² While perhaps

Justice: Video-Teleconference Testimony in Federal Criminal Trials, 56 CATH. U. L. REV. 683, 704–05 n.137 (2007); see also statement of Scalia, J., *supra* note 6, at 93–94 ("I cannot comprehend how one-way transmission (which *Craig* says does not ordinarily satisfy confrontation requirements) becomes transformed into full-fledged confrontation when reciprocal transmission is added.").

15. See *Smith*, *supra* note 4, at 10 n.63 (collecting cases); see also *State v. Seelig*, 226 N.C. App. 147, 158 (2013) (holding that trial court did not commit plain error by permitting the remote video testimony of a witness who "had a history of panic attacks, had suffered a severe panic attack on the day he was scheduled to fly from Nebraska to North Carolina for trial, was hospitalized as a result, and was unable to travel to North Carolina because of his medical condition").

16. See *Horn v. Quarterman*, 508 F.3d 306, 320 (5th Cir. 2007) (affirming district court ruling that permitted a terminally ill witness to testify via two-way closed-circuit television); *United States v. Benson*, 79 F. App'x 813, 820–21 (6th Cir. 2003) (finding no clear error where trial court permitted remote video testimony of "elderly and infirm" witness who had recently undergone major surgery and was under the continuing care of a gastrologist).

17. *United States v. Pangelinan*, No. 19-10077-JWB, 2020 WL 5118550 (D. Kan. Aug. 31, 2020); *United States v. Casher*, No. CR 19-65-BLG-SPW, 2020 WL 3270541 (D. Mont. June 17, 2020); cf. *Roman Catholic Diocese of Brooklyn v. Cuomo*, No. 20A87, 2020 WL 6948354, at *3 (U.S. Nov. 25, 2020) (observing that "even in a pandemic, the Constitution cannot be put away and forgotten" and holding that restrictions on religious gatherings violated First Amendment).

18. *Casher*, 2020 WL 3270541, at *1.

19. *Id.*

20. *Id.*

21. *Id.* at *2.

22. *Id.* at *3. In *State v. Seelig*, 226 N.C. App. 147, 158 (2013), discussed *supra* note 15, the court did not address the option of a long-distance drive from Nebraska to North Carolina by a witness who was medically unable to fly. Trial counsel did not object to the testimony on face-to-face confrontation

highly inconvenient, the circumstances did “not present a ‘necessity’ to forego Mr. Casher’s confrontation rights.”²³

Similarly, in *United States v. Pangelinan*, a prosecution for attempted coercion and enticement in connection with an alleged prostitution business, the U.S. District Court for the District of Kansas denied a government motion to take the remote video testimony of three government witnesses located in New York who faced a two-week mandatory quarantine if forced to travel.²⁴ The government offered evidence that the witnesses lived with people who had medical conditions that put them at high risk if they were to contract COVID-19.²⁵ In its opinion, the court agreed that remote testimony “might be a reasonable resolution due to the witnesses’ health concerns and these unprecedented times with the virus.”²⁶ Nevertheless, it concluded that the salient question was “whether the government has shown it is *necessary* to deny face-to-face confrontation to further these public policies.”²⁷ Reviewing cases in which remote testimony had been allowed before the pandemic, the court found them to be distinguishable because each involved witnesses who either had an “indefinite inability to travel” or who were themselves “gravely ill.”²⁸ The court also concluded that the remote testimony could not be said to be necessary since it had the option of simply continuing the case.²⁹

Pangelinan also considered practical concerns related to the taking of remote testimony, which could affect the reliability of the testimony.³⁰ The opinion noted that communication issues had already arisen during prior internet-based testimony in the case. At a pretrial hearing, the court noted that one witness “continued to testify after there was an objection and the undersigned was speaking.”³¹ The court wrote that it was clear the witness “was confused as to who was speaking and whether he had been presented with a question” and stated that he “was told not to speak but he continued to do so.”³² The court expressed its concern about the prospect of these kinds of episodes recurring in front of a jury.³³

grounds, and the court found that the trial judge did not commit plain error in allowing the testimony, but the case could be read to suggest that the court did not believe a cross-country drive was reasonable to expect of the witness. State courts in other jurisdictions have sometimes permitted remote testimony of a foreign witness upon a showing that the witness was in poor health and “lived beyond the subpoena power of the court.” See *Harrell v. State*, 709 So. 2d 1364, 1369–71 (Fla. 1998) (affirming robbery conviction, concluding that victims’ remote testimony from their home country of Argentina did not violate Confrontation Clause where victims were under oath and remained subject to extradition and prosecution for perjury).

23. *Casher*, 2020 WL 3270541, at *2–3.

24. *Pangelinan*, No. 19-10077-JWB, 2020 WL 5118550, at *1 & 5 (D. Kan. Aug. 31, 2020).

25. *Id.* at *1.

26. *Id.* at *4.

27. *Id.* (emphasis in original).

28. *Id.* at *3.

29. *Id.* at *3–4.

30. *Id.* at *4; see also *United States v. Carter*, 907 F.3d 1199, 1207 (9th Cir. 2018) (discussing logistical problems with video testimony, including “variables [that] can distort any effort to approximate in-person testimony”); *Smith*, *supra* note 4, at 13–14 (discussing steps that may be necessary to assure reliability).

31. *Pangelinan*, 2020 WL 5118550, at *4.

32. *Id.*

33. *Id.*

In different contexts and under different standards, a few opinions appear to have taken a more accommodating approach to the use of video testimony based on the risks of COVID-19. These cases are distinguishable from cases involving testimony at trial under the applicable law in North Carolina and other jurisdictions. They include a trial court opinion from Massachusetts, *Commonwealth v. Masa*, in which the judge permitted a suppression hearing to be held by video conference, concluding it was necessary to protect the health of participants.³⁴ The trial court's opinion recognized that the "more adaptable" due process standard applies to pretrial hearings, not the Sixth Amendment right to confrontation at trial.³⁵ In *United States v. Donziger*, the U.S. District Court for the Southern District of New York indicated, without actually holding, that the risks of exposure to the virus might warrant permitting the government's witnesses to testify remotely.³⁶ The district court observed that if the government made such a motion, it "would not be dead on arrival" in light of the Second Circuit's analysis in *United States v. Gigante*³⁷—a standard which, although controlling in that district, has not been accepted by other federal circuit courts of appeal.³⁸ In *United States v. Davis*, the U.S. District Court for the District of Delaware found no controlling authority in the Third Circuit, where the court sits, and relied on the reasoning of *Gigante* and the dicta from *Donziger* in ruling that seven witnesses could testify remotely at trial.³⁹ The district court in *Davis* inexplicably made no mention of *Maryland v. Craig*,⁴⁰ which North Carolina cases have recognized as the controlling standard here.⁴¹

State Law on Remote Testimony

Assuming that constitutional concerns can be assuaged, a remaining question is whether state law allows a judge to take remote testimony. In North Carolina, the General Assembly has specifically addressed the subject of remote video testimony in criminal trials. The General Statutes permit its use in limited circumstances, such as with child witnesses under the age of 16 and only after the court has made specified findings of fact.⁴²

34. No. 1981CR0307, 2020 WL 4743019, at *2 (Mass. Super. Ct. Aug. 10, 2020).

35. *Id.* at *5 (noting that the "calculus of conducting such an evidentiary hearing . . . [was] very different than the similar calculus regarding . . . jury trials"); see also *United States v. Sheppard*, No. 5:17-CR-00026-TBR, 2020 WL 6534326, at *2 (W.D. Ky. Nov. 5, 2020) (allowing expert witnesses to testify via Zoom at pretrial hearing to determine admissibility of their testimony and observing that "[t]he defense has not convinced this Court that the Sixth Amendment confrontation right should apply with equal force in a Daubert hearing as it does in a trial setting").

36. No. 11-CV-691 (LAK), 2020 WL 4747532, at *3 (S.D.N.Y. Aug. 17, 2020).

37. *Gigante* is discussed *supra* note 14.

38. *Donziger*, 2020 WL 4747532, at *3; see cases cited *supra* notes 13–14. *Donziger* recognizes that even under the Second Circuit's *Gigante* standard, remote testimony is permissible in "exceptional circumstances" only.

39. *Davis*, No. 19-101-LPS, 2020 WL 6196741, at *5 (D. Del. Oct. 22, 2020).

40. 497 U.S. 836 (1990).

41. See cases cited *supra* notes 8, 11–12.

42. See, e.g., G.S. 15A-1225.1(b) (permitting child witnesses in criminal proceedings to testify outside defendant's presence if court finds that "child witness would suffer serious emotional distress, not by the open forum in general, but by testifying in the defendant's presence, and . . . [t]hat the child's ability to communicate with the trier of fact would be impaired"); see also *State v. Phachoumphone*, 257 N.C. App.

Trial judges still may possess the inherent authority to permit remote testimony.⁴³ Courts have allowed remote testimony in some instances without an authorizing statute.⁴⁴ Trial judges should remain mindful of the practical issues involved in taking remote testimony as well as the interests protected by the Confrontation Clause.

Waiver

Criminal defendants may waive their confrontation rights and consent to the taking of remote testimony.⁴⁵ As with other constitutional rights, the waiver must be knowing, intelligent, and voluntary.⁴⁶ This kind of express waiver is the most reliable, and potentially the only, means by which a criminal trial court can permit the use of remote video testimony outside of the exceptions discussed above.

In *Melendez-Diaz v. Massachusetts*, the U.S. Supreme Court recognized that defendants also may waive their right to confrontation “by failure to object to the offending evidence; and States may adopt procedural rules governing the exercise of such objections.”⁴⁷ In response to this invitation, North Carolina has adopted a series of “notice and demand” statutes for certain forensic reports, under which the failure of a defendant to file a timely objection to the State’s notice of intent to offer the reports without face-to-face testimony constitutes a waiver of the

848, 853–55 (2018) (stating that “a trial court may authorize a child victim to testify remotely” pursuant to G.S. “15A-1225.1’s express requirements”); *State v. Lanford*, 225 N.C. App. 189, 204–08 (2013) (finding no error in decision to permit CCTV testimony of child sexual assault victim, where trial court made appropriate and sufficiently supported findings of fact as required under G.S. 15A-1225.1).

43. *State v. Davis*, 317 N.C. 315, 318 (1986) (“The trial judge has inherent authority to supervise and control trial proceedings.”); *Shute v. Fisher*, 270 N.C. 247, 253 (1967) (“When there is no statutory provision or well recognized rule applicable, the presiding judge is empowered to exercise his discretion in the interest of efficiency, practicality and justice”). *But see* Michael Crowell, *Inherent Authority*, ADMINISTRATION OF JUSTICE BULLETIN No. 2015/02, at 2 (UNC Sch. Gov’t, Nov. 2015) (“When the legislature has addressed a subject, the court does not have inherent authority to act just because the court concludes that the legislative act is inadequate.”).

44. *In re Stradford*, 119 N.C. App. 654 (1995) (in case before adoption of G.S. 15A-1225.1, holding that trial judge had authority to allow remote testimony by child victim of sexual assault); *Horn v. Quarterman*, 508 F.3d 306, 319–20 (5th Cir. 2007) (concluding that trial court that permitted the remote testimony of terminally ill state’s witness from hospital in Ohio did not unreasonably apply the law or violate defendant’s right of confrontation despite the absence of “a statute providing for such a procedure when a witness is ill”); *cf. State v. Sewell*, 595 N.W.2d 207, 211–12 (Minn. Ct. App. 1999) (holding that remote video testimony of prosecution witness who “would risk paralysis if he traveled to Minnesota” did not violate defendant’s confrontation rights in absence of statute providing for remote testimony where the “trial court viewed the use of [interactive television] as an extension of the rules authorizing the use of depositions in criminal cases”).

45. *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 314 n.3 (2009).

46. *See Maryland v. Shatzer*, 559 U.S. 98, 104 (2010) (“To establish a valid waiver, the State must show that the waiver was knowing, intelligent, and voluntary under the ‘high standar[d] of proof for the waiver of constitutional rights [set forth in] *Johnson v. Zerbst*, 304 U.S. 458[] (1938).’ ”); *see also* Jessica Smith, *Understanding the New Confrontation Clause Analysis: Crawford, Davis, and Melendez-Diaz*, ADMINISTRATION OF JUSTICE BULLETIN No. 2010/02, at 21 (UNC Sch. Gov’t, Apr. 2010).

47. 557 U.S. at 314 n.3.

right to confrontation.⁴⁸ The absence of similar statutes governing the broader kinds of remote testimony discussed here makes it unlikely that the State could simply give notice of its intent to offer such testimony and treat a defendant's failure to object as a waiver. A defendant also would not waive the right to confrontation by failing to call or subpoena the witness to testify. As *Melendez-Diaz* makes clear, the burden is on the prosecution to produce its witnesses or establish grounds for not having to do so.⁴⁹ Consequently, the State most likely will need to make a motion for the taking of remote testimony, at which time the trial judge will need to determine whether remote testimony is permissible if the defendant is unwilling to waive the right to confrontation.

48. See, e.g., Shea Denning, *Amendments to Notice and Demand Provisions for DWI Cases*, N.C. CRIM. L. BLOG (UNC Sch. Gov't, June 22, 2016); Jessica Smith, *Notice and Demand—One More Time*, N.C. CRIM. L. BLOG (UNC Sch. Gov't, July 25, 2012); Jessica Smith, *North Carolina's Notice and Demand Statute for Chemical Analyses in Drug Cases Is Constitutional*, N.C. CRIM. L. BLOG (UNC Sch. Gov't, Jan. 6, 2010).

49. 557 U.S. at 324.