CRAWFORD PRIMER: THE NEW CONFRONTATION CLAUSE ANALYSIS

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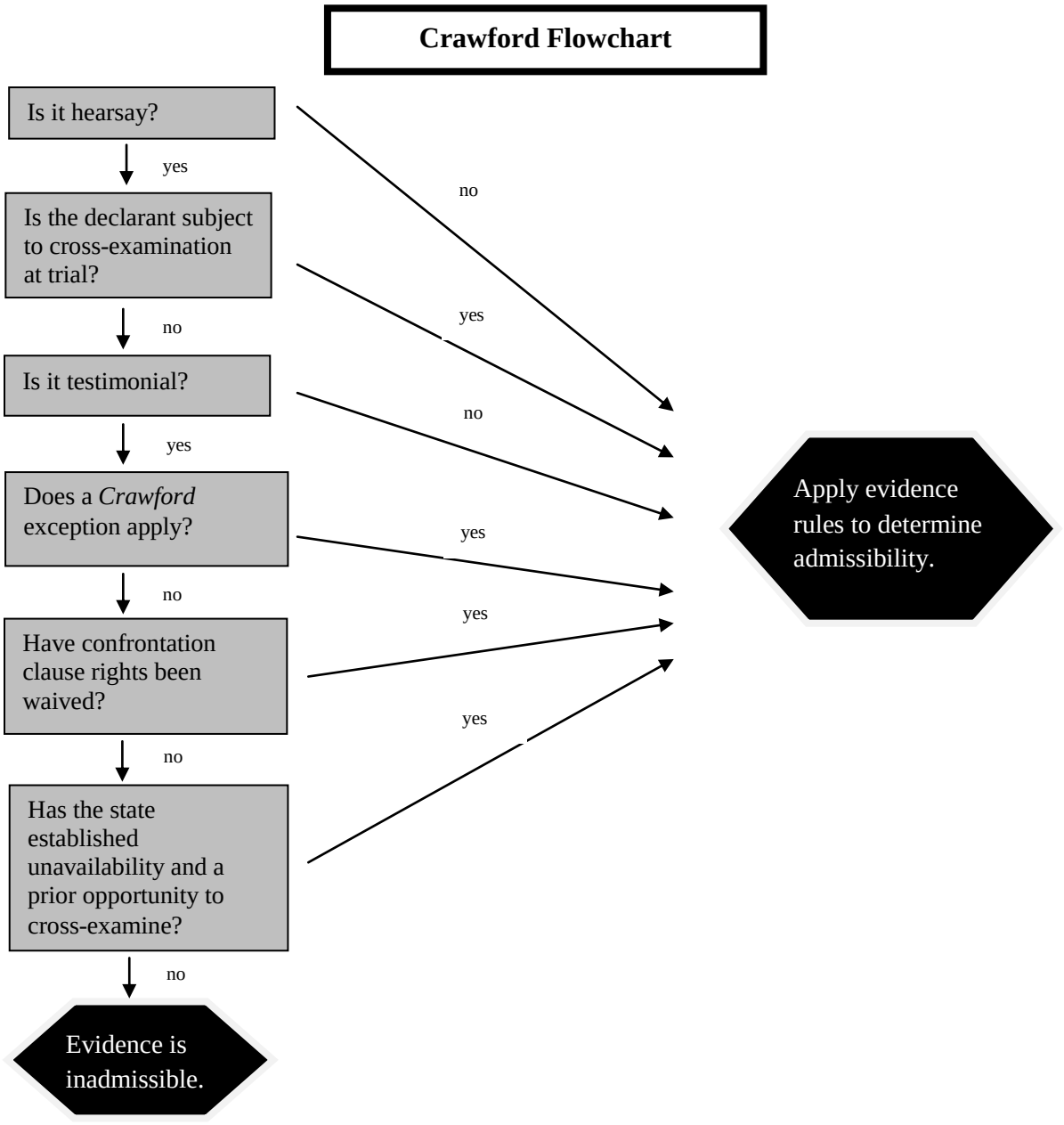

For more detailed information regarding all of the topics covered in this outline, see the following online publications:

Crawford v. Washington: Confrontation One Year Later, available online at: http://shopping.netsuite.com/s.nl/c.433425/it.A/id.79/.f

Emerging Issues in Confrontation Litigation: A Supplement to *Crawford v. Washington*: Confrontation One Year Later, available online at: http://shopping.netsuite.com/s.nl/c.433425/it.A/id.973/.f

Evidence Issues in Criminal Cases Involving Child Victims and Child Witnesses, pp. 14-34, available online at: http://shopping.netsuite.com/s.nl/c.433425/it.I/id.369/.f

Melendez-Diaz & the Admissibility of Forensic Laboratory Reports & Chemical Analyst Affidavits in North Carolina Post-*Crawford*, available online at: http://www.sog.unc.edu/programs/crimlaw/faculty.htm

The North Carolina General Assembly's Response to *Melendez-Diaz*, available online at: http://www.sog.unc.edu/programs/crimlaw/faculty.htm

I. Introduction

A. A new analysis. The United States Supreme Court's decision in *Crawford v. Washington*, 541 U.S. 36 (2004), radically revamped confrontation clause analysis. *Crawford* overruled the *Ohio v. Roberts*, 448 U.S. 56 (1980), reliability test for confrontation clause analysis and set in place a new, stricter standard for admission of hearsay statements under the confrontation clause.

B. When *Crawford* issues arise. The new *Crawford* rule potentially comes into play whenever the state seeks to introduce hearsay statements of a witness who is not subject to cross-examination at the defendant's criminal trial.

C. Relationship to hearsay rules. Under the old *Roberts* test, confrontation clause analysis collapsed into hearsay analysis. *Crawford* rejected this approach, creating a separate standard for admission under the confrontation clause. However, *Crawford* did not affect the hearsay rules. Thus, after *Crawford*, the state has two hurdles to leap before hearsay statements by nontestifying witnesses may be admitted at trial: (1) the new *Crawford* rule and (2) the hearsay rules.

II. The *Crawford* rule.

At issue in *Crawford* was whether the trial court's admission of a statement made by a suspect during a police interrogation violated the defendant's confrontation clause rights. The Court held that it did and articulated what has come to be known as 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.

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A. Meaning of the term "testimonial"

1. **No comprehensive definition.** The *Crawford* Court declined to comprehensively define the term testimonial. Instead, it gave a few examples of nontestimonial statements (offhand remarks, casual remarks to acquaintances, business records, and statements in furtherance of the conspiracy) and a few examples of testimonial statements (prior testimony, plea allocutions, and police interrogations; *Crawford* itself involved statements made during a police interrogation). Having categorized these few types of evidence, the Court left to the lower courts the difficult task of categorizing the many other types of evidence offered in criminal trials.
   a. ***Davis v. Washington.*** The lack of a comprehensive definition of the key term "testimonial" resulted in significant litigation in the lower courts. It did not take long for additional cases to reach the high Court or for the Court to agree to hear them. In 2006, the Court issued a decision in *Davis v. Washington*, 547 U.S. 813 (2006), which was a consolidation of two separate domestic violence cases, both raising questions about the testimonial nature of statements by victims to police officers and their agents. *Davis* 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.

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2. **Some open questions regarding the testimonial/nontestimonial distinction**
   a. **Does *Crawford* apply outside of the context of police interrogation?** Both *Crawford* and *Davis* involved police questioning—in *Crawford* the questioning was of a suspect at a station house after *Miranda* warnings had been given; in *Davis* the questioning was of domestic violence victims at the scene. Thus, one open question is how and if *Crawford* applies to statements made to people other than the police or their agents, such as family members, social workers, and medical professionals.

i. **Statements to family, friends, 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 these statements.

ii. **Statements to medical personnel.** The vast majority of cases apply the *Davis* primary purpose test to statements made to medical personnel, such as emergency room doctors and SANE nurses.

iii. **Statements to social workers.** The testimonial nature of statements by child victims to social workers is a hotly litigated area of confrontation clause analysis. For a detailed discussion of this issue, see the child evidence publication noted at the beginning of this outline.

b. Who is a police agent? *Crawford* clearly applies whenever questioning is done by the police or a police agent (in *Davis*, the Court assumed but did not decide that a 911 operator was a police agent). Factors that post-*Davis* decisions have cited 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
- 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

c. What is an emergency? Another open question is: what constitutes an ongoing emergency and when does it end? The case law in this area is still evolving.

i. **Ongoing emergency.** The following factors support the conclusion that an emergency was ongoing:

- The perpetrator remains at the scene and is not in law enforcement custody
- The perpetrator is at large and presents a present or continuing threat
- Physical violence is occurring
- The location is disorderly
- The location is unsecure
- Medical attention is needed or the need for it is not 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

ii. No ongoing emergency. The following factors support the conclusion that an emergency ended or did not exist:

- The perpetrator has fled and is unlikely to return
- The perpetrator is in law enforcement custody
- No physical violence is occurring
- The location is calm
- The location is secure
- 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. What is the primary purpose of the interrogation? *Davis* requires the decision-maker to determine the primary purpose of the interrogation. It is not clear how the statements will be categorized if the primary purpose of the interrogation was something other than meeting an ongoing emergency or establishing past facts, or if there was a dual, evenly weighted purpose for the interrogation.

e. How does *Crawford* apply to reports and affidavits? There has been a significant amount of post-*Crawford* litigation over whether various reports and affidavits are testimonial or not, particularly with regard chemical analysts' reports in impaired driving cases, blood tests, lab reports identifying a substance as a controlled substance, and autopsy reports. The United States Supreme Court recently settled the issue in *Melendez-Diaz v. Massachusetts,* 557 U.S. __, 129 S. Ct. 2527 (June 25, 2009), ruling that forensic laboratory reports are testimonial and subject to *Crawford.* For a more complete discussion of that case and its implications in North Carolina, see *Melendez-Diaz* & the Admissibility of Forensic Laboratory Reports & Chemical Analyst Affidavits in North Carolina Post-*Crawford,* available online at: http://www.sog.unc.edu/programs/crimlaw/faculty.htm.

i. *State v. Locklear.* In *State v. Locklear,* ___ N.C. ___, ___ S.E.2d ___ (Aug. 28, 2009), the State Supreme Court held, in the first post-*Melendez* appellate case in North Carolina, that a *Crawford* violation occurred when the trial court admitted opinion testimony of two non-testifying experts regarding a victim's cause of death and identity. The testimony was admitted through the Chief Medical Examiner, an expert in forensic pathology, who appeared to have read the reports of the non-testifying experts into evidence, rather than testifying to an independent opinion based on facts or data reasonably relied upon by experts in the field. Had the expert testified to an independent opinion based on the reports of the non-testifying preparers, the reports likely would have been non-testimonial because they would have been offered for a purpose other than the truth of the matter asserted i.e., as a basis of the

expert's opinion. For a discussion of this exception to the *Crawford* rule, see section III.A. below.

B. Subject to cross-examination at trial. *Crawford* does not apply when the witness is subject to cross-examination at trial. Normally, a witness is subject to cross-examination when the witness is placed on the stand, put under oath, and responds willingly to questions.

2. Memory loss. Both pre- and post-*Crawford* cases 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.

3. 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.

4. *Maryland v. Craig* procedures for child witnesses. In *Maryland v. Craig*, 497 U.S. 836 (1990), the United States Supreme Court upheld, in the face of a confrontation clause challenge, a Maryland statute that allowed a child witness to testify through a closed-circuit television. In upholding the statute, the *Craig* Court required that certain findings be made before such a procedure could be employed. Most courts that have addressed the issue have upheld *Maryland v. Craig* procedures post-*Crawford.* This issue, however, is still open.

C. Unavailability. If the statement is testimonial and the witness is not subject to cross-examination at trial, state must show unavailability and prior opportunity to cross-examine in order to satisfy *Crawford.*

1. Good faith effort. The case law suggests that a witness is not unavailable unless the state has made a good-faith effort to obtain the witness's presence at trial.

2. 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.

D. Prior opportunity to cross-examine. If the statement is testimonial and the witness has not testified at trial, state must show unavailability and prior opportunity to cross-examine in order to satisfy *Crawford*.

1. Prior trial. If a case is being retried and the witness testified at the first trial, the defendant had a prior opportunity to cross-examine the witness.

2. Pre-trial deposition. One open issue is whether a pre-trial deposition constitutes a prior opportunity to cross-examine for purposes of the confrontation clause.

III. Exceptions to the *Crawford* Rule

A. Offered for a purpose other than the truth of the matter asserted. *Crawford* only comes into play when the state seeks to introduce hearsay statements of a witness who is not subject to cross-examination at trial. If the statement is offered for purpose other than the truth of the matter asserted, it is not hearsay and there is no *Crawford* issue. Examples of purposes other than the truth of the matter asserted include: for impeachment and corroboration, as the basis of an expert's opinion, and to explain the course of an investigation.

B. Forfeiture by wrongdoing. Forfeiture by wrongdoing is an equitable doctrine. In this context, it applies when a defendant engages in wrongful acts that silence the witness. When the doctrine applies, the defendant is deemed to have forfeited his or her

confrontation clause rights. Put another way, if the defendant is responsible for the witness's absence, he or she cannot then complaint of that absence. A classic scenario is when the defendant successfully intimidates a witness with the result that the witness does not appear at trial.

1. **Intent to silence required.** In *Giles v. California,* 128 S. Ct. 2678 (2008), the U.S. Supreme Court clarified that for the doctrine to apply, the state must establish that the defendant engaged in the wrongdoing with an intent to silence the witness.
2. **Procedural issues.**
   a. **Evidence required.** When the state argues for application of forfeiture by wrongdoing, the trial judge will have to hear evidence on the issue.
   b. **Standard.** Although the U.S. Supreme Court has not ruled on the issue, a vast majority of courts apply a preponderance of the evidence standard to the forfeiture by wrongdoing inquiry.

C. **Dying declarations.** Although *Crawford* acknowledged cases supporting a dying declaration exception, it declined to rule on the issue. While many lower courts have recognized a dying declaration exception to the *Crawford* rule, that conclusion is not unanimous.

IV. Waiver. Confrontation clause rights, like constitutional rights generally, may be waived, provided that the waiver is knowing, voluntary, and intelligent. In *Melendez-Diaz,* discussed in section II.A.3.e. above, the United States Supreme Court indicated that a valid waiver of confrontation clause rights may be obtained through "notice and demand" statutes. Under these statutes, the State gives the defendant notice that it intends to introduce at trial a testimonial forensic report, without the presence of the report's preparer. The defendant then has a period of time to object. If an objection is lodged, the State must produce the preparer. If the defendant fails to object, the defendant is deemed to have waived his or her confrontation clause rights. North Carolina has several such notice and demand statutes, all of which were recently amended to bring them into compliance with the statutes endorsed by the *Melendez-Diaz* Court. For a full discussion of these statutes and the recent amendments to them, see *Melendez-Diaz* & the Admissibility of Forensic Laboratory Reports & Chemical Analyst Affidavits in North Carolina Post-*Crawford,* available online at: http://www.sog.unc.edu/programs/crimlaw/faculty.htm, and The North Carolina General Assembly's Response to *Melendez-Diaz*, available online at: http://www.sog.unc.edu/programs/crimlaw/faculty.htm

V. Hearsay rules still apply. Even if a testimonial hearsay statement satisfies *Crawford*, it must be otherwise admissible to come into evidence. The same thing applies to nontestimonial hearsay. At a minimum, this will involve establishing that the hearsay statements fall within a hearsay exception.

VI. Retroactivity

A. **Retroactivity of *Crawford.*** The United States Supreme Court has held that *Crawford* is not retroactive under the rule of *Teague v. Lane*, 489 U.S. 288 (1989). *See* Whorton v. Bockting, 549 U.S. 406 (2007) (*Crawford* was a new procedural rule but not a watershed rule of criminal procedure). Later, in *Danforth v. Minnesota,* 128 S. Ct. 1029 (2008), it 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 have argued that North Carolina judges now are 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. As I explained in a recent Blog Post, available online at http://sogweb.sog.unc.edu/blogs/ncclaw/?p=565, that argument is not on solid ground in the state's trial courts in light of the North Carolina Supreme Court's decision in *State v. Zuniga*, 336 N.C. 508 (1994) (adopting the *Teague* test for determining whether new federal rules apply retroactively in state court motion for appropriate relief proceedings).

B. Retroactivity of *Melendez-Diaz.* As noted above, *Melendez-Diaz* held that forensic laboratory reports are testimonial and thus subject to *Crawford.* And as noted above, the United States Supreme Court has held that *Crawford* is not retroactive under the *Teague* rule. The *Teague* anti-retroactivity rule applies to new rules of federal criminal procedure. One of the arguments being asserted by defense lawyers is that *Melendez-Diaz* is not a new rule but rather was mandated by *Crawford v. Washington*, 541 U.S. 36 (2004). If that is correct, *Melendez-Diaz* would apply retroactively at least back to the date *Crawford* was decided, March 8, 2004. *See Whorton*, 549 U.S. at 416 (old rules apply retroactively). For more detail on this issue, see my Blog Post online at: http://sogweb.sog.unc.edu/blogs/ncclaw/?p=545

VII. Proceedings to which *Crawford* applies. By its terms, the sixth amendment applies to "criminal prosecutions." It thus clearly applies to criminal trials. Cases have held that it applies to the penalty phase of a capital trial but not to non-capital sentencing proceedings.