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EMERGING ISSUES IN CONFRONTATION LITIGATION: A SUPPLEMENT TO *CRAWFORD V. WASHINGTON*: CONFRONTATION ONE YEAR LATER

■ Jessica Smith*

In *Crawford v. Washington*,¹ the United States Supreme Court worked a sea change in confrontation clause analysis, overruling the *Ohio v. Roberts*² and adopting a new confrontation clause test. Under the *Roberts* confrontation clause test, admissibility of hearsay evidence had turned on whether the evidence fell within a firmly rooted hearsay exception or bore particularized guarantees of trustworthiness. Rejecting that approach, *Crawford* held that “testimonial” statements by witnesses who do not appear at trial may not be admitted unless the witness is unavailable to testify and there has been a prior opportunity for cross examination. In part because the Court declined to comprehensively define the operative term “testimonial,” *Crawford* resulted in a myriad of lower court judicial decisions, often reaching diverse conclusions on what is and is not admissible under the new analysis.³ My monograph, *Crawford v. Washington: Confrontation One Year Later* (School of Government, University of North Carolina at Chapel Hill, April 2005) [hereinafter *Confrontation One Year Later*] (on-line at: www.sog.unc.edu/pubs/electronicversions/pdfs/crawford.pdf), discusses *Crawford* in more detail and collects many of the published cases decided in the year after it was

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¹. 541 U.S. 36 (2004).

². 448 U.S. 56 (1980), *overruled by Crawford v. Washington*, 541 U.S. 36 (2004).

³. This result was predicted by then-Chief Justice Rehnquist. *See Crawford*, 448 U.S. at 60, 75-76 (Rehnquist, C.J., concurring).

decided. This paper supplements that monograph and is designed as a reference for North Carolina judges and litigants. Section I begins with a discussion of *Davis v. Washington*,⁴ the United States Supreme Court's first decision interpreting *Crawford*. Section II discusses a number of key issues that remain open even after *Davis*. Finally, Section III summarizes significant *Crawford* cases decided since publication of *Confrontation One Year Later*, and highlights how *Davis* might impact the confrontation clause analysis with regard to particular categories of evidence.

I. *Davis v. Washington*

A. Facts

Davis was the Court's first opportunity to apply its new *Crawford* test. The decision involved two cases: *Davis v. Washington* and *Hammon v. Indiana*. The fact that both cases involved domestic violence is no coincidence. Because victims often fail to testify in domestic violence cases, this category of cases—along with child abuse cases where the same problem occurs—was dramatically impacted by the *Crawford* decision.⁵

Davis involved a confrontation clause objection to statements made by a victim during a 911 call. During the call, the following conversation occurred:

911 Operator: Hello.
 Complainant: Hello.
 911 Operator: What's going on?
 Complainant: He's here jumpin' on me again.
 911 Operator: Okay. Listen to me carefully. Are you in a house or an apartment?
 Complainant: I'm in a house.
 911 Operator: Are there any weapons?
 Complainant: No. He's usin' his fists.
 911 Operator: Okay. Has he been drinking?
 Complainant: No.
 911 Operator: Okay, sweetie. I've got help started. Stay on the line with me, okay?
 Complainant: I'm on the line.

⁴ 126 S. Ct. 2266 (2006).

⁵ See *id.* at 2279-80 (acknowledging that domestic violence cases are "notoriously susceptible to intimidation or coercion of the witness to ensure that she does not testify at trial").

911 Operator: Listen to me carefully.
 Do you know his last name?
 Complainant: It's Davis.
 911 Operator: Davis? Okay, what's his first name?
 Complainant: Adrian.
 911 Operator: What is it?
 Complainant: Adrian.
 911 Operator: Adrian?
 Complainant: Yeah.
 911 Operator: Okay. What's his middle initial?
 Complainant: Martell. He's runnin' now."⁶

The conversation continued and the operator learned that Davis had run out after hitting the victim, and was leaving in a vehicle. When the victim started talking, the operator cut her off, saying, "Stop talking and answer my questions." The operator gathered more information about Davis, including his birthday and why he had come to the house. The victim described the assault and the operator told her that the police would first try to find Davis and then come to her house. The police arrived within four minutes and saw that the victim was shaken, had fresh injuries, and was frantically gathering her belongings and children to leave the residence.

The State charged Davis with felony violation of a domestic no-contact order. At trial, the victim did not testify. The State's only witnesses were the police officers who responded to the scene. Over Davis's confrontation clause objection, the trial court admitted a recording of the 911 call. Davis was convicted, and he appealed. On appeal, the confrontation clause issue was limited to that portion of the 911 call in which the victim identified Davis as the perpetrator.⁷

Hammon involved a police response to a reported disturbance at the home of Hershel and Amy Hammon. The police found Amy alone on the front porch, appearing somewhat frightened; however, Amy told the officers that nothing was the matter. After receiving Amy's permission to enter the home, one officer saw a flaming gas heating unit and pieces of glass in front of the heater. Hershel, who was in the kitchen, told the police that he and Amy had argued but that everything was fine and the argument never became physical. An officer again asked Amy what had happened. Hershel made several attempts to intervene in this conversation, became angry when an officer stopped him from doing so, and had to be "forcibly" prevented from interfering.⁸ Amy told the

⁶ *Id.* at 2271.

⁷ *Id.* at 2277.

⁸ *Id.* at 2278.

officer that Herschel got angry with her, broke a number of household items, including the heater, threw her down into the glass of the heater, and punched her twice in the chest. The officer then asked Amy to fill out and sign a battery affidavit, on which she recounted what she had told the officer. The State charged Herschel with domestic battery and with violating his probation. Amy did not appear at trial. Instead, the State called the officer who had questioned her, and asked him to recount what Amy told him and to authenticate the affidavit. Herschel was found guilty at trial and appealed. The Indiana Supreme Court held that the affidavit was testimonial but that Amy's oral statements to the officers were nontestimonial. When the case came before the United States Supreme Court, at issue was the testimonial nature of Amy's oral statements to the officer.

B. The Court's Analysis and Holding

The *Davis* Court began by noting that in *Crawford*, it held that statements taken by the police in the course of interrogations qualify under any definition of the term testimonial. It also noted that the facts of *Crawford* made it relatively easy to conclude that the statements were taken in the course of police interrogation because in that case, the statements were made and recorded while the declarant was in police custody and after *Miranda* warnings had been given. *Davis* and *Hammon*, however, were not as clear and required the Court to "determine more precisely which police interrogations produce testimony."⁹ Declining to craft a comprehensive classification of all statements in response to police interrogation, the Court stated:

[I]t suffices to decide the present cases to hold as follows: Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.¹⁰

⁹. *Id.* at 2273.

¹⁰. *Id.* at 2273-74.

Applying this standard to the *Davis* case, the Court held that the victim's statements during the 911 call were nontestimonial. The Court first noted that the victim was speaking about events "*as they were actually happening*," not describing past events.¹¹ Second, the Court concluded, that "any reasonable listener" would recognize that the victim was facing an "ongoing emergency."¹² Acknowledging that a person *might* call 911 to report a crime when there is no immediate danger, the Court stated that here, the victim's call "was plainly a call for help against bona fide physical threat." Third, the Court stated, "the nature of what was asked and answered . . . was such that the elicited statements were necessary to be able to resolve the present emergency, rather than simply to learn (as in *Crawford*) what had happened in the past."¹³ The Court expressly noted this also was true of the operator's effort to establish the identity of the perpetrator, because the responding officers would need to know whether they might encounter a violent felon.¹⁴ Fourth, the Court found a "striking" difference in the level of formality between the interview in *Crawford* and that in *Davis*.¹⁵ The Court noted that in *Crawford*, the declarant responded calmly, at the station house, to a series of questions, with the interrogating officer tape-recording and making notes of her answers. In *Davis*, by contrast, the victim's frantic answers were provided over the phone, in an environment that was not tranquil or safe. It then held:

[T]he circumstances of [the victim's] interrogation objectively indicate its primary purpose was to enable police assistance to meet an ongoing emergency. She simply was not acting as a *witness*; she was not *testifying*. What she said was not a "weaker substitute for live testimony at trial" No "witness" goes into court to proclaim an emergency and seek help.¹⁶

¹¹. *Id.* at 2276 (emphasis in original). This, it noted, contrasted to the declarant's statements in *Crawford*, which were made hours after the events she described had occurred. *Id.*

¹². *Id.* Again, the Court contrasted the case before it with the facts of *Crawford*. *Id.*

¹³. *Id.* (emphasis in original).

¹⁴. *Id.*

¹⁵. *Id.* at 2276-77.

¹⁶. *Id.* at 2277 (emphasis in original) (citations omitted).

The Court went on to note that a conversation that begins as an interrogation to determine the need for emergency assistance can “evolve into testimonial statements.”¹⁷ Considering the case before it, the Court concluded that the emergency appeared to have ended when Davis left the premises. At this point, the operator told the victim to be quiet, and proceeded to pose a battery of questions. “It could readily be maintained” the Court stated, that from this point on, the victim’s statements were testimonial.¹⁸ As noted above, however, the only issue before the Court was the victim’s early statements identifying Davis as her assailant. Thus, the Court was not required to determine whether the victim’s subsequent statements were testimonial.

Turning to *Hammon*, the Court concluded that Amy’s statements to the police were “not much different” from those found to be testimonial in *Crawford*.¹⁹ The Court found it “entirely clear” that the interrogation was part of an investigation into possible criminal past conduct.²⁰ It noted that there was no ongoing emergency, the interrogating officer heard no arguments and saw no violence, and Amy had told the officers everything was fine when they arrived at the scene. The challenged statements were obtained during a second questioning, in which the officer was not seeking to determine “what is happening,” but rather “what happened.”²¹ The Court concluded: “Objectively viewed, the primary, if not indeed the sole, purpose of the interrogation was to investigate a possible crime—which is, of course, precisely what the officer *should* have done.”²² Finally, the Court found the lack of formality associated with Amy’s statement—at least as compared to the statement in *Crawford*²³—not to be dispositive. The Court found it “formal enough” that the interrogation was done in a separate room, away from the alleged perpetrator, with the officer taking Amy’s replies for use in the investigation.²⁴ In the end, it found the “striking resemblance” that the statements in *Crawford* bore to civil-law *ex parte* examinations, shared by Amy’s statement. It noted that both declarants were actively separated from the alleged perpetrator, both statements deliberately

17. *Id.*

18. *Id.*

19. *Id.* at 2278.

20. *Id.*

21. *Id.*

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

23. In *Crawford*, the interrogation followed a *Miranda* warning, was tape-recorded, and took place at a station house.

24. *Davis*, 126 S. Ct. at 2278.

recounted, in response to questioning, how potentially criminal past events began and progressed, and both took place some time after the events in question ended. It concluded: “Such statements under official interrogation are an obvious substitute for live testimony, because they do precisely *what a witness does* on direct examination; they are inherently testimonial.”²⁵

The central holding of *Davis* is that when determining whether statements produced by police interrogation are testimonial, the key inquiry is: What is the primary purpose of the interrogation, assessed under an objective standard? If the primary purpose of the interrogation is to enable the police to meet an ongoing emergency, the statements are nontestimonial. If the primary purpose is to establish or prove past events potentially relevant to later criminal prosecution, they are testimonial.

Additionally, *Davis* rejected the notion that testimonial statements are limited to “statements of the most formal sort,” such as prior court proceedings or formal depositions.²⁶ The Court found it inconceivable that the confrontation clause would be interpreted in a way that its protections could be evaded simply by having “a note-taking policeman *recite* the unsworn hearsay statement of the declarant, instead of having the declarant sign a deposition.”²⁷ Concluding that “formality is indeed essential to testimonial utterance,”²⁸ it is enough, the Court indicated, that a solemn declaration is made to establish or prove past facts.²⁹ In the Court’s view, such solemnity always attaches to statements to the police, because making a false statement to an officer is a criminal offense.³⁰ Additionally, it stated that indicators of formality—such as the fact that the statement is tape-recorded, given after *Miranda* warnings, or reduced to writing and signed by the declarant—can help to assess the primary purpose of the questioning.³¹

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

26. *Id.* at 2275-76.

27. *Id.* at 2276 (emphasis in original).

28. *Id.* at 2278 n.5.

29. *Id.* at 2276.

30. *Id.* at 2278 n.5 (“It imports sufficient formality, in our view, that lies to such officers are criminal offenses”); *id.* at 2276 (“The solemnity of even an oral declaration of relevant past fact to an investigating officer is well enough established by the severe consequences that can attend a deliberate falsehood”).

31. *Id.* at 2278 (noting that the formality associated with the statement in *Crawford* “certainly strengthened the statements’ testimonial aspect—made it more objectively

Davis also rejected the notion that the testimonial/nontestimonial determination turns on whether the statements are in response to “initial inquiries” at the scene by officer.³² In the Court’s view, responses to initial inquiries might be testimonial and they might not, depending on the circumstances objectively viewed and evaluated under the inquiry stated above.³³

C. Implications for North Carolina Post-Crawford Case Law

Before *Davis*, the most significant *Crawford* case to have been decided in North Carolina was the state Supreme Court’s decision in *State v. Lewis*.³⁴ *Lewis* involved on-the-scene questioning of a victim by a patrol officer, as well as later questioning of the victim at a hospital by an investigating detective, including a request to identify the defendant from a photo lineup. *Lewis* held that the on-the-scene questioning by the patrol officer was nontestimonial and that the questioning by the detective at the hospital was testimonial. However, the United States Supreme Court granted *certiorari* in *Lewis* and vacated and remanded in light of *Davis*. Although the North Carolina Supreme Court has yet to issue a decision on remand, *Davis* clearly requires the North Carolina Supreme Court to revisit its analysis. The *Lewis* Court had held that the key factor in determining whether statements to police officers are testimonial is whether “structured police questioning” occurred; *Davis*, of course, requires an inquiry into whether the primary purpose of the interrogation is to deal with an ongoing emergency or establish a past fact.³⁵

apparent, that is, that the purpose of the exercise was to nail down the truth about past criminal events”).

³². *Id.* at 2279.

³³. *Id.*

³⁴. 360 N.C. 1 (2005), *cert. granted and judgment vacated by*, 126 S. Ct. 2983 (2006).

³⁵. North Carolina cases dealing with victim’s statements to the police not included in Confrontation One Year Later and decided before *Lewis* include: *State v. Moore*, 173 N.C. App. 494 (2005) (prior rape victim’s identification of defendant as her assailant during photographic lineup was testimonial); *State v. Champion*, 171 N.C. App. 716 (2005) (victim’s statements to police on the day of the attack were testimonial); *State v. Allen*, 171 N.C. App. 71 (2005) (statements of witness and victim to officer 20 minutes after incident were testimonial); witness’s identification of a perpetrator from a

Davis also calls into question a post-*Lewis* Court of Appeals case dealing with a murder victim’s statements to a probation officer and to officers who were investigating the victim’s earlier complaints that the defendant was forging checks and fraudulently using her credit cards. That decision held, without analysis, that the statements at issue were nontestimonial.³⁶

II. Open Issues

Davis was the Court’s first case refining the *Crawford* test. However, *Davis*, like *Crawford*, expressly declined to “produce an exhaustive classification of all conceivable statements—or even all conceivable statements in response to police interrogation.”³⁷ Thus, even after *Davis*, many issues remain unresolved. Additionally, there are a number of questions that were not at issue in *Davis* and thus were not resolved by that case. In this section, I highlight some of the most significant open issues under the new confrontation clause analysis.

- **What constitutes an emergency and when does an emergency end?**

In *Davis*, the Court stated in dicta that the emergency ended when the victim told the operator that Davis had left the residence. In *Hammon*, it concluded that when the officers arrived at the residence, there was no ongoing emergency, noting that the officers did not hear any arguments or crashing or see anyone throw or break anything, and that Amy initially told the officers everything was fine. The Court did not think it significant that Herschel tried to intervene during the police questioning of Amy, and had to be “forcibly prevented” from interfering,³⁸ or that unlike *Davis*, Herschel had not left the scene. The Court did not spell out other factors that might be relevant to the determination whether an emergency is ongoing, nor did it suggest how the factors it did consider

photographic lineup, made one day after the crime, was testimonial); *State v. Sutton*, 169 N.C. App. 90 (2005) (victim’s statements to officers were testimonial; police had approached the victim and questioned her, her statement was neither spontaneous nor unsolicited, it was the second statement given to police that night, and an objective witness would reasonably believe that the statement would be available for use at trial).

³⁶. *State v. Scanlon*, __ N.C. App. __, 626 S.E.2d 770 n.1 (Mar. 7, 2006).

³⁷. *Davis*, 126 S. Ct. at 2273.

³⁸. *Id.* at 2278.

should be weighed. As such, it appears that the inquiry will be fact- and case-dependent. Factors that might be relevant to the analysis are listed below. However, which of these factors should be given priority and how they should be balanced remains unclear, as demonstrated by their application in the cases discussed in Part III.³⁹

Factors supporting 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

Factors supporting 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

• **How should a trial judge determine the primary purpose of a police interrogation?**

In a dissent in *Hammon*, Justice Thomas characterized the primary purpose test as an unpredictable one that will be difficult for trial courts to apply.⁴⁰ Noting the mixed motives officers might

³⁹. In particular, see pages 19-22 (discussing victims' statements to police officers and 911 calls).

⁴⁰. *Davis*, 126 S. Ct. at 2280 (Thomas J., dissenting).

have when engaged in questioning, he argued that “[a]ssigning . . . primacy requires constructing a hierarchy of purpose that will rarely be present—and not reliably discernible. It will inevitably be, quite simply, an exercise in fiction.”⁴¹

Among the purposes officers might have when conducting an interrogation could be:

- Protecting victims
- Protecting bystanders and the public
- Protecting themselves
- Determining whether a crime occurred
- Determining if medical assistance is required and securing such assistance
- Gathering evidence of a crime
- Identifying the perpetrator
- Apprehending the perpetrator

As Justice Thomas indicated, parsing out which purpose was primary will be another difficult task for which the Court gave little guidance.

• **How is the “primary purpose” test to be reconciled with the Court’s emphasis on the declarant’s statements?**

Davis set out a “primary purpose” test that focuses on the objectively determined purpose of the interrogation. However, *Davis* also stated that “it is in the final analysis the declarant’s statements, not the interrogator’s questions that the Confrontation Clause requires us to evaluate.”⁴² This language suggests that the declarant’s intent is relevant. How this language can be reconciled with the primary purpose test remains to be determined. For example, how would a trial judge decide a case in which he or she determines that an objective interrogator would conclude that no emergency existed but it is uncontroverted that when the declarant made the statements he or she actually believed himself or herself to be in imminent danger?

• **Who are agents of the police for purposes of police interrogation?**

Davis assumed, but did not decide, that the acts of the 911 operator were acts of the police.⁴³ Thus, it did not provide guidance on how a trial judge should determine whether other individuals should be considered agents of the police. This issue already has arisen in post-*Davis* cases from other jurisdictions with regard to child forensic

⁴¹. *Id.* at 2283.

⁴². *Id.* at 2274 n.1.

⁴³. *Id.* at 2274 n.2.

interviewers and investigators⁴⁴ and medical personnel.⁴⁵ Factors that post-*Davis* decisions have cited when determining that particular actors were acting as agents of the police include that following:

- the police directed the victim to the interviewer or requested or arranged for the interview;⁴⁶
- the interview was a forensic interview;⁴⁷
- a law enforcement officer observed the interview from another room;⁴⁸
- a law enforcement officer videotaped the interview;⁴⁹
- the person consulted with a prosecution investigator before the interview;⁵⁰
- the person consulted with a law enforcement officer during the interview;⁵¹

⁴⁴. See, e.g., *State v. Blue*, 717 N.W.2d 558, 564 (N.D. 2006) (holding, in part, that “like the 911 operator in *Davis*, we conclude the forensic interviewer in this case was either acting in concert with or as an agent of the government”).

⁴⁵. See, e.g., *Medina v. State*, 143 P.3d 471 (Nev. 2006) (SANE nurse was a “police operative”), *petition for cert. filed* (Nov 17, 2006); *State v. Hooper*, __ P.3d __, 2006 WL 2328233 (Idaho App., Aug. 11, 2006) (Sexual Trauma Abuse Response nurse was acting “in concert with or at the behest of the police”), *review granted* (Jan. 18, 2007).

⁴⁶. See *Hooper*, __ P.3d __, 2006 WL 2328233 (police directed victim’s mother to take child victim to Sexual Trauma Abuse Response Center, where child was interviewed); *People v. Sharp*, __ P.3d __, 2006 WL 3635393 (Col App. Dec. 14, 2006) (police detective arranged for interview); *State v. Krasky*, 721 N.W.2d 916 (Minn. Ct. App. 2006) (interview was at the request of a child protection worker and investigating officer), *review granted* (Dec. 20, 2006).

⁴⁷. See *State v. Justus*, 205 S.W.3d 872 (Mo. 2006) (child was referred to interviewer for a “forensic interview”); *Hooper*, __ P.3d __, 2006 WL 2328233 (interviewing nurse described herself as a “forensic interviewer and sexual assault nurse examiner”); *Medina*, 143 P.3d 471 (nurse testified that she was a “forensics nurse”).

⁴⁸. See *Blue*, 717 N.W. 2d 558; *Hooper*, __ P.3d __, 2006 WL 2328233; *Sharp*, __ P.3d __, 2006 WL 3635393.

⁴⁹. See *State v. Pitt*, 147 P.3d 940 (Or. App. 2006).

⁵⁰. See *State v. Buda*, 912 A.2d 735 (N.J. Super. 2006).

- the person asked questions at the behest of a law enforcement officer;⁵²
- the purpose of the interview was to further a criminal investigation;⁵³
- the lack of a non-law enforcement purpose to the interview;⁵⁴ and
- the fact that law enforcement was provided with a videotape of the interview after the interview concluded.⁵⁵

• **How much formality is required in order for the statement to be testimonial?**

As noted above, *Davis* concluded that although the confrontation clause’s protections covered more than statements of the most formal sort, “formality is indeed essential to testimonial utterance.”⁵⁶ And as noted, it found that statements to the police always have the requisite level of formality because criminal consequence attach to false statements to officers. These conclusions provide little guidance as to the level of formality that will be required of statements given outside of the context of police interrogations.

⁵¹. See *Hooper*, __ P.3d __, 2006 WL 2328233; *Sharp*, __ P.3d __, 2006 WL 3635393.

⁵². See *Hooper*, __ P.3d __, 2006 WL 2328233; *Sharp*, __ P.3d __, 2006 WL 3635393.

⁵³. See *Pitt*, 147 P.3d 940 (interview was conducted for the express purpose of furthering a police investigation); *Sharp*, __ P.3d __, 2006 WL 3635393; *State v. Krasky*, 721 N.W.2d 916 (Minn. Ct. App. 2006) (child protection worker and investigating officer determined that the interview was “the best way to proceed with the investigation”); see also *Buda*, 912 A.2d 735 (Department of Youth and Family Services worker was called to the hospital to conduct and investigation because the examining physician suspected wrongdoing).

⁵⁴. See *Hooper*, __ P.3d __, 2006 WL 2328233 (court notes that there was no evidence that the interview had a diagnostic, therapeutic, or medical purpose); *Krasky*, 721 N.W.2d 916 (court notes that there was no identified medical reason for the interview).

⁵⁵. See *State v. Blue*, 717 N.W. 2d 558 (N.D. 2006); *Krasky*, 721 N.W.2d 916.

⁵⁶. *Davis*, 126 S. Ct. at 2278 n.5.

- **Should the primary purpose test be applied to questioning by individuals other than the police or their agents?**

Davis expressly stated that its holding made it unnecessary to consider whether and when statements made to someone other than law enforcement personnel or their agents are testimonial.⁵⁷ Thus, after *Davis*, it is not clear whether the primary purpose test applies, for example, to a parent’s questioning of a child, when the parent suspects the child has been the victim of child abuse. Under most post-*Crawford* cases, conversations between private individuals have been held to be nontestimonial.⁵⁸ Conceivably, however, the parent could have a primary purpose of establishing past facts—e.g., establishing what happened for the purpose of pursuing criminal prosecution of the perpetrator.⁵⁹ If the primary purpose test applies in this context, the statements in the example given would be testimonial. It is worth noting that in *Davis*, the Court discussed an early English case, *King v. Brasier*,⁶⁰ in which a young rape victim told her mother, immediately upon coming home, the circumstances of her injury. The defendant argued that this case supported his assertion that the 911 call was testimonial. The Court rejected this argument stating: “The case would be helpful to *Davis* if the relevant statement had been the girl’s screams for aid as she was being chased by her assailant. But by the time the victim got home, her story was an account of past events.”⁶¹ This discussion can be read as suggesting that the Court will be willing to apply the primary purpose test to statements to family, friends, and other private parties. In part citing this authority, one post-*Davis* case from another jurisdiction remanded on the issue of whether a domestic violence victim’s statements to a private onlooker were testimonial.⁶²

⁵⁷ *Id.* at 2274 n.2.

⁵⁸ See *Confrontation One Year Later*, at p. 19; see also *infra* at pp. 22-23.

⁵⁹ Additional purposes could be: protecting the child from further abuse, as well as gathering facts to obtain medical treatment.

⁶⁰ 1 Leach 199, 168 Eng. Rep. 202 (1779).

⁶¹ *Davis*, 126 S. Ct. at 2277.

⁶² *State v. Mechling*, 633 S.E.2d 311, 323-24 & n.10 (W. Va. 2006) (“we interpret the Court’s remarks to imply that statements made to someone other than law enforcement personnel may also be properly characterized as testimonial”).

- **Will the primary purpose test be applied to tests and related materials?**

Crawford issues have arisen in many contexts, including with regard to drug test reports, autopsy reports, and maintenance records on testing equipment. It is not clear whether *Davis* has any implications for these types of evidence. In fact, one has to look very hard at the *Davis* decision to find any reference to these types of items. However, a reference is there. Specifically, *Davis* supported its conclusion that the confrontation clause applies only to testimonial evidence by noting that “[w]ell into the 20th century, our own Confrontation Clause jurisprudence was carefully applied only in the testimonial context.”⁶³ Among the cases it offered in support of this statement was *Dowdell v. United States*, a decision it described 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.”⁶⁴ Although it might be reading too much into this oblique reference, one could assert that with this citation, the Court was indicating that official documents not relating to guilt or innocence are nontestimonial. That would suggest that documents such as maintenance records on testing equipment would be nontestimonial. It also would suggest that a report identifying a substance as a controlled substance in a drug case—which does relate to guilt or innocence—would be testimonial.

The testimonial or nontestimonial nature of test reports and related affidavits is a hotbed of litigation around the country. On pages 13-19, I discuss the cases on point.

- **How should a trial judge evaluate statements that are volunteered to the police?**

Crawford and *Davis* involved questioning by the police or people assumed to be police agents. Noting this, *Davis* stated: “This is not to imply, however, that statements made in the absence of any interrogation are necessarily nontestimonial. The 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 examination.”⁶⁵ This suggests

⁶³ *Davis*, 126 S. Ct. at 2274-75.

⁶⁴ *Id.* at 2275.

⁶⁵ *Id.* at 2274 n.1 (noting that part of the evidence in the case against Sir Walter Raleigh was a letter from Lord

that actual questioning by the police is not required for a statement to be testimonial, as when for example, officers are dispatched to a scene to gather evidence and a witness approaches them and spontaneously identifies the perpetrator.

- **How should a trial judge apply the forfeiture by wrongdoing exception?**

Although forfeiture by wrongdoing was not raised in the cases before the Court, *Davis* went out of its way to discuss the doctrine and essentially invite its application. While stating that it would “take no position on the standards necessary to demonstrate . . . forfeiture,”⁶⁶ the court noted that federal and state courts have “generally held the [prosecution] to a preponderance-of-the-evidence standard.”⁶⁷ Other than these tidbits, the case provides little guidance to trial judges on this issue. For further discussion of forfeiture by wrongdoing, see page 25 below.

- **Do pre-trial depositions provide a prior opportunity for cross-examination?**

Suppose that a defendant is scheduled for trial on felony assault charges in June 2007. In statements to an officer at the hospital after the crime, the victim identified the defendant as her attacker. The prosecutor plans to have the victim identify the defendant at trial. In February 2007, however, the prosecutor learns that the victim is dying of cancer. Because her death is imminent, she will be unavailable at trial. If she does not testify, the only evidence the state has identifying the defendant as the perpetrator are the victim’s statements to the officer at the hospital—statements that are testimonial under *Davis*. Suppose the prosecutor is able to arrange for a pre-trial deposition of the victim.⁶⁸ Would that deposition satisfy the requirement of a prior opportunity for cross-examination?

Some have argued that a pretrial discovery deposition does not constitute a constitutionally adequate prior opportunity to cross-examine. As one litigant asserted, the purpose of a pretrial discovery deposition (as opposed to a for-trial deposition) is to search out the state’s evidence and as such, defense

Cobham, which “was plainly *not* the result of sustained questioning”).

⁶⁶ *Id.* at 2280.

⁶⁷ *Id.*

⁶⁸ Unlike other states, North Carolina has no statutory procedure for pretrial depositions. This question assumes that a pretrial deposition could be held in North Carolina notwithstanding this lack of statutory authority.

counsel will avoid being “confrontational,” in an effort to encourage the state’s witness to reveal as much as possible.⁶⁹ Thus, the argument continues, such a deposition should not be viewed as an adequate prior opportunity to cross-examine.⁷⁰ For-trial depositions have been attacked on grounds that later-acquired evidence can undercut the adequacy of the earlier examination.⁷¹

Post-*Crawford* cases from Florida reveal that courts in that state are split on the issue.⁷² Decisions from several other jurisdictions that have considered this issue post-*Crawford* have held that a pretrial deposition provides an adequate opportunity for cross-examination. Some of those decisions are annotated in Confrontation One Year Later at page 31. Others are listed below.

Howard v. State, 853 N.E.2d 461 (Ind. 2006) (discovery deposition provided an opportunity for cross examination; although the defendant argued that the deposition was for discovery only, counsel “conducted a vigorous and lengthy examination;” all that is required is the “opportunity” for cross examination; as the court put it: “Whether, how, and to what extent the opportunity for cross-examination is used is within the control of the defendant”) [Author’s note: an earlier version of this case is annotated in Confrontation One Year Later at page 31].

People v. Jurado, 131 P.3d 400 (Cal. 2006) (pretrial conditional examination of witness, held because the witness’s life was in jeopardy, satisfied the confrontation clause’s requirements,

⁶⁹ *Howard v. State*, 853 N.E.2d 461, 469 n.6 (Ind. 2006) (defense counsel unsuccessfully asserted this argument).

⁷⁰ *See id.* at 468.

⁷¹ *See People v. Jurado*, 131 P.3d 400 (Cal. 2006) (defense counsel unsuccessfully asserted this issue), *cert. denied*, 127 S. Ct. 383 (2006).

⁷² Compare *Corona v. State*, 929 So. 2d 588 (Fla. Dist. Ct. App. 2006) (confrontation satisfied) and *Blanton v. State*, 880 So.2d 798 (Fla. Dist. Ct. App. 2004) (same), with *Belvin v. State*, 922 So.2d 1046 (Fla. Dist. Ct. App. 2006) (confrontation not satisfied), *review granted*, 928 So.2d 336 (Fla. April 28, 2006) and *Lopez v. State*, 888 So.2d 693 (Fla. Dist. Ct. App. 2004) (a discovery deposition cannot be regarded as a prior opportunity for cross examination) and *Contreras v. State*, 910 So.2d 901 (Fla. Dist. Ct. App. 2005) (so holding but recognizing that there could be some circumstances in which the pretrial deposition could satisfy the confrontation clause), *review granted*, 924 So.2d 810 (Fla. Mar. 3, 2006).

even though defense lawyers later acquired information that would have been helpful in the cross-examination), *cert. denied*, 127 S. Ct. 383 (2006).

State v. Griffin, 202 S.W.3d 670 (Mo. Ct. App. 2006) (videotaped deposition of child victim provided the defendant with a prior opportunity to cross examine the victim, even though the defendant was barred from attending the deposition, where a break was taken so the defendant could confer with counsel and a statute put the defendant on notice that the deposition constituted his opportunity to cross-examine the victim; the court relied on *Maryland v. Craig*, 497 U.S. 836 (1990), and a pre-*Crawford* state supreme court opinion upholding the statutory procedure).

Another issue presented with regard to pretrial depositions is this: assuming that a procedure is available for the defendant to demand a pretrial deposition, does a failure to request such a deposition waive confrontation rights at trial? At least one court has rejected that argument.⁷³ However, the cases discussed in the section that follows, finding waiver when a defendant fails to subpoena a witness or demand that the state offer the witness, may cut the other way.

A related question is whether other pre-trial procedures might be deemed to satisfy the confrontation clause's requirement of a prior opportunity for cross-examination. At least one post-*Crawford* case has held that certain interrogatories can adequately serve that purpose.⁷⁴

- **Do procedures allowing for the admission of testimonial evidence unless the defendant subpoenas the witness or makes a demand for the witness's attendance survive *Crawford*?**

One of the ways that prosecutors have sought to avoid *Crawford* is by arguing that by failing to undertake certain procedures, defendants have waived their confrontation rights. This issue was discussed above with respect to pretrial depositions.

⁷³ *Belvin*, 922 So.2d 1046; *see also Lopez*, 888 So. 2d 693 (dicta).

⁷⁴ *See State v. Rangle*, 199 S.W.3d 523 (Tex. Ct. App. 2006) (defendant waived confrontation clause rights by failing to take advantage of statutory procedure of submitting written interrogatories to child after child was deemed unavailable), *petition for discretionary review granted* (Dec. 20, 2006).

Another context in which it arises is with respect to a defendant's failure to subpoena a witness for trial. The North Dakota case *State v. Campbell*,⁷⁵ illustrates the issue neatly. In that case, at issue was the admission of a state crime laboratory report identifying certain evidence as being marijuana, when the forensic scientist who prepared the report did not testify at trial. Although a North Dakota statute allowed the defendants to subpoena the scientist, the defendants did not do so. The *Campbell* court held that by failing to exercise their right to subpoena the witness, the defendants waived their confrontation clause rights as to the report.⁷⁶ A variation on the subpoena procedure is one by which the defendant must demand that the state produce a witness, who would then testify as part of the prosecution's case.⁷⁷ In North Carolina, the following variations on both procedures exist:

1. G.S. 20-139.1(e1) provides for the use of a chemical analyst's affidavit in impaired driving cases in district court. Under the statute, a sworn affidavit is admissible in evidence without further authentication with regard to, among other things, alcohol concentration or the presence of an impairing substance. If a defendant wants the chemical analyst to testify in person, the defendant may subpoena the analyst and conduct examination as if the analyst were an adverse witness. The subpoena must be properly filed and served at least five days before trial, along with an affidavit specifying the factual grounds on which the defendant believes the chemical analysis was not properly administered and the facts that the chemical analyst will testify about and stating that the presence of the analyst is necessary for the proper defense of the case. The district court then determines if there are grounds to believe that the presence of the analyst requested is necessary for the proper defense.⁷⁸

⁷⁵ 719 N.W.2d 374 (N.D. 2006), *cert. denied*, ___ S. Ct. ___, 2007 WL 135712 (Jan. 22, 2007).

⁷⁶ *Id.* at 378.

⁷⁷ *See, e.g., Howard v. United States*, 902 A.2d 127 (D.C. 2006) (although described as a subpoena procedure, the court made clear that when the defense subpoenas the witness, the government presents the witness in its case-in-chief).

⁷⁸ This procedure is a "subpoena plus" procedure in that the defendant must assert grounds justifying the subpoena that must satisfy a judge. This "plus"—the fact

2. G.S. 20-139.1(c1) provides for the use of chemical analyses of blood or urine in any court. It provides that the results of a chemical analysis of blood or urine by certain specified laboratories are admissible in any court without further authentication. However, if the defendant objects at least five days before trial in superior court or an adjudicatory hearing in juvenile court, the admissibility of the report must be determined and governed by the appropriate rules of evidence.⁷⁹
3. G.S. 90-95(g) provides for the use of chemical analyses in drug cases. The statute provides that when matter is submitted to certain specified laboratories for chemical analysis to determine the presence of a controlled substance, the report of that analysis is admissible without further authentication in district and superior court as evidence of the identity, nature, and quantity of the matter analyzed. For the report to be admissible in a criminal proceeding in superior court, the state must notify the defendant of its intent to introduce the report into evidence and provide a copy of the report to the defendant. A timely objection by the defendant precludes admissibility.

Many state subpoena and demand procedures survived confrontation clause challenges pre-*Crawford*. In fact, an earlier version of the subpoena procedure in G.S. 20-139.1(e1) was upheld by the North Carolina Supreme Court in 1984 in *State v. Smith*.⁸⁰ *Smith* relied on two grounds. First, relying on *Roberts*, the court held that the reports were sufficiently reliable so as to satisfy the confrontation clause. Of course, the old *Roberts* reliability test is no longer the law and thus, while this part of the *Smith* decision has not been addressed by the North Carolina Supreme Court post-*Crawford*, it is questionable in light of that holding. Second, *Smith* held that any confrontation clause right that the defendant has to cross-examine the chemical analyst is fully protected by the right to a trial *de novo* in superior court, where G.S. 20-139.1(e1) is inapplicable. Although that aspect of the holding is

that grounds must be asserted—was enacted in 2006. See S.L. 2006-253, sec. 16.

⁷⁹. This provision was enacted in 2006. See S.L. 2006-253, sec. 16.

⁸⁰. 312 N.C. 361 (1984).

unaffected by *Crawford*, it cannot be asserted in support of G.S. 20-139.1(c1) or G.S. 90-95(g) when they are applied in superior court. Significantly, *Smith* also held that in district court, the defendant has the right to subpoena the analyst and that failure to exercise this right results in a waiver of the right to examine the analyst.

Post-*Crawford*, a number of procedures have been scrutinized anew under the new, more rigorous confrontation clause analysis. Although there are no published North Carolina post-*Crawford* cases on point, litigation in other jurisdictions indicates that the issue is likely to arise in this state. At least four courts have upheld the procedure at issue post-*Crawford*. In *State v. Campbell*,⁸¹ the court, as noted above, upheld the procedures on non-*Crawford* waiver grounds. Similarly, the Nevada Supreme Court rejected the argument that a state statute providing that an affidavit of a person who withdraws a blood sample is admissible to prove certain facts was unconstitutional under *Crawford*.⁸² That court held that nothing in *Crawford* compelled it to depart from its pre-*Crawford* determination that the statute, which allowed for the defendant to demand attendance of the witness who signed the affidavit, was constitutional on waiver grounds. So too in Louisiana, where the state supreme court upheld the statute at issue, finding that *Crawford* was not controlling and that the statute constituted a permissible “formalized means of effectuating a stipulation.”⁸³ And finally, Oregon has decided the issue similarly, concluding that neither *Crawford* nor *Davis* called into question the state supreme court’s earlier decision upholding the state’s demand procedure in the face of a confrontation clause challenge.⁸⁴

⁸¹. 719 N.W.2d 374 (N.D. 2006), *cert. denied*, ___ S. Ct. ___, 2007 WL 135712 (Jan. 22, 2007).

⁸². *City of Las Vegas v. Walsh*, 124 P.3d 203 (Nev. 2005), *cert. denied*, 126 S. Ct. 1786 (2006).

⁸³. *State v. Cunningham*, 903 So.2d 1110 (La. 2005). Interestingly, the Louisiana statute, which applied to both defendants and the state, imposed on the defendant only a requirement to certify an intention to conduct cross-examination in good faith. See *id.* at 1122. The court noted that unless this burden is “featherweight,” it might adversely impact confrontation clause rights. See *id.*; see also *supra* n. 78 [discussing the “subpoena plus” procedure in G.S. 20-139.1(e1)].

⁸⁴. See *State v. Miller*, 144 P.3d 1052 (Or. Ct. App. 2006), *opinion adhered to on reconsideration*, 149 P.3d 1251 (Or. Ct. App. 2006); *State v. Wells*, 144 P.3d 1077 (Or. Ct. App. 2006).

In contrast to these cases is *Belvin v. State*,⁸⁵ which held that a defendant's right to subpoena a breath test operator as an adverse witness at trial did not adequately preserve his confrontation rights. The court stated: "Not only does a defendant have no burden to produce constitutionally necessary evidence of guilt, but he has the right to stand silent during the state's case in chief, all the while insisting that the state's proof satisfy constitutional requirements."⁸⁶ Other decisions take more of a middle ground, accepting the procedures, provided that certain requirements are satisfied. One court would require that if the defendant subpoenas the witness, the prosecution must call the witness as part of its case, as opposed to testifying as a defense witness.⁸⁷ That same court would require that if a failure to subpoena a witness is to be considered a waiver, the waiver must be constitutionally valid.⁸⁸ Specifically, it indicated that the best course for the prosecution would be to obtain an express waiver. However, the court conceded that a waiver could be inferred when a represented defendant is provided with the report that is sought to be introduced without the preparer's testimony and is advised of the consequences of failure to request the preparer's attendance.⁸⁹ Along these lines, at least one court has struck down its state's notice and demand statute because it failed to provide a bare minimum of notice, which that court stated would consist of notice of the contents of the report and the likely consequences of a failure to request the preparer's testimony.⁹⁰ Without such notice, the court concluded "there is no reasonable basis to conclude that the defendant's failure to request the testimony constituted a knowing, intelligent, and voluntary waiver of his confrontation rights."⁹¹

Of course, a confrontation clause issue only arises if the underlying evidence is testimonial. For a discussion regarding the testimonial or nontestimonial nature of documents such as analysts' affidavits, see *infra* pages 13-19.

⁸⁵. 922 So.2d 1046 (Fla. Dist. Ct. App. 2006), *review granted*, 928 So.2d 336 (Fla. April 28, 2006).

⁸⁶. *Id.* at 1054 (quotation omitted).

⁸⁷. *Thomas v. United States*, 914 A.2d 1 (D.C. 2006).

⁸⁸. *Id.*

⁸⁹. *Id.*

⁹⁰. *State v. Caulfield*, 722 N.W.2d 304 (Minn. 2006).

⁹¹. *Id.*

- **Is it constitutional for a prosecutor to produce a witness in court but not put the witness on the stand, thereby requiring the defendant to call the witness or waive his or her confrontation rights?**

A question related to the discussion immediately above is whether a confrontation clause violation occurs when the state seeks to introduce a testimonial statement, produces the witness in court but declines to call the witness to the stand, leaving it to the defendant to put the witness on the stand as part of the defendant's case if the defendant wishes to examine the witness. Without analysis, the North Carolina Court of Appeals held that in such a situation, the defendant's failure to call the witness constituted a waiver of the defendant's confrontation clause rights.⁹² At least one other jurisdiction has rejected this procedure.⁹³ Another held that the fact that a trial court gave a defendant the option to subpoena a state's fact witness at trial did not satisfy the confrontation clause.⁹⁴ By contrast, the Georgia Court of Appeals held that the procedure did not violate *Crawford*.⁹⁵

Arguably, this procedure is problematic under the new *Crawford* rule. Under *Crawford*, in order to admit testimonial evidence, the state must show that the witness is unavailable and that the defendant had a prior opportunity to cross-examine the witness. By making the witness available for the defendant to call to the stand, the state has established that the witness is *not unavailable*. Additionally, none of the cases on

⁹². *State v. Brigman*, 171 N.C. App. 305 (2005) [because child witnesses were available to testify (although neither the State nor the defendant called them to testify), defendant waived her right to confront these witnesses].

⁹³. *Bratton v. State*, 156 S.W. 3d 689, 693-94 (Tex. Ct. App. 2005) ("[W]e find nothing in *Crawford* or elsewhere suggesting that a defendant waives his right to confront a witness whose testimonial statement was admitted into evidence by failing to call him as a witness at trial. In fact, as the party seeking to admit [the witnesses'] statements, it was the State's burden to show their statements were admissible, that is, that [the witnesses] were *unavailable* and that [the defendant] had been afforded a prior opportunity to cross-examine them. By the State's own admission though, [the witnesses] were available to testify, and nothing in the record suggests, nor does the State contend, that [the defendant] was afforded a prior opportunity to cross-examine them).

⁹⁴. *State v. Cox*, 876 So.2d 932 (La. Ct. App. 2004).

⁹⁵. *Starr v. State*, 604 S.E.2d 297 (Ga. Ct. App. 2004); see [Confrontation One Year Later](#) at page 29 for a fuller discussion of *Bratton* and *Starr*.

point address the question whether a procedure that allows a defendant to examine the witness as an adversarial witness as a part of his or her case is a constitutionally sufficient opportunity for “cross-examination.”⁹⁶ A point supporting the argument that this procedure is not constitutionally sufficient is *Crawford*’s statements that the confrontation clause “commands . . . that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.”⁹⁷

III. Recent Cases

The material in this section supplements Confrontation One Year Later and is organized using the section headings of that monograph. Like Confrontation One Year Later, this paper focuses on North Carolina law, although many cases of interest from other jurisdictions are included.

Section III.A. The Testimonial/Nontestimonial Distinction

2. Co-Defendants’ and Accomplices’ Statements During Police Interrogation or While in Custody (Confrontation One Year Later, at p. 7.)

Because statements made during police interrogation fall within even the narrowest reading of *Crawford*, it is no surprise that the North Carolina Court of Appeals continues to hold that co-defendants’ and accomplices’ statements during police interrogation or while in custody are testimonial.⁹⁸

4. Business Records and Affidavits (Confrontation One Year Later, at p. 9.)

The testimonial nature of business and public records created for law enforcement purposes has been the subject of considerable debate. Because the issue was not addressed directly in *Davis*, the best source of post-*Crawford* law on point for North Carolina judges remains the North Carolina cases.⁹⁹ In that regard, there are four relevant cases. All were decided

⁹⁶. See *Thomas*, 914 A.2d 1 (holding, in a subpoena procedure case, that if a defendant subpoenas a witness, the witness must testify as a part of the prosecution’s case).

⁹⁷. *Crawford*, 541 U.S. at 61.

⁹⁸. See, e.g., *State v. Garcia*, 174 N.C. App. 498 (2005).

⁹⁹. See *supra* p. 8 (discussing hints the Court provided in *Davis* with respect to reports and related documents).

before *Davis*. As noted above, it is not clear what impact, if any, *Davis* will have on these cases.

In the first case, *State v. Windley*,¹⁰⁰ the court held, with little analysis, that a fingerprint card created upon defendant’s arrest and contained in the Automated Fingerprint Identification System (AFIS) database was a nontestimonial business record.

In the second case, *State v. Cao*,¹⁰¹ the defendant was convicted of drug crimes arising from an undercover operation. The substances obtained during undercover purchases were submitted for testing for the presence of cocaine. The laboratory technician who performed the testing did not testify at trial. Rather, a detective read the test results to the jury. The defendant appealed, arguing that allowing this evidence violated his confrontation rights under *Crawford*.

The *Cao* court began by noting that it could not find “any meaningful distinction” between the detective’s request for the test in the case at hand and the detective’s request in the now-vacated *Lewis* case for the victim to identify the defendant from a photographic lineup. The court explained: “The sole purpose of [the detective’s] request was to obtain evidence to support the charges at trial, and a reasonable lab technician would expect that his or her conclusions would be used at the subsequent trial.” The court noted, however, that *Crawford* suggested that business records may be nontestimonial. It also noted that in *State v. Smith*,¹⁰² the North Carolina Supreme Court determined that a chemical analyst’s affidavit stating the results of a Breathalyzer test was precisely the sort of evidence that the business records exception to the hearsay rule intended to make admissible. *Smith* had stressed: “The analyst is at no time called upon to render an opinion or to draw conclusions. The analyst is required at the time of testing to record the alcohol concentration as indicated by the machine” Considering this authority, *Cao* held “that laboratory reports or notes of a laboratory technician prepared for use in a criminal prosecution are nontestimonial business records only when the testing is mechanical, as with the Breathalyzer test, and the information contained in the documents are objective facts not involving opinions or conclusions drawn by the analyst.” It continued: “While cross-examination may not be necessary for blood alcohol concentrations, the same cannot be said for fiber or DNA analysis or ballistics comparisons, for example.” Applying that rule to the case before it, the court concluded that the laboratory report’s specification of the substance’s weight

¹⁰⁰. 173 N.C. App. 187 (2005).

¹⁰¹. 175 N.C. App. 434 (2006).

¹⁰². 312 N.C. 361 (1984).

would likely qualify as an objective fact obtained through mechanical means. However, the record on appeal was insufficient as to the laboratory procedures involved in identifying the presence of cocaine in a substance in order to allow the court to determine whether that portion of the testing met the same criteria. It went on to conclude that even assuming error, the error was harmless beyond a reasonable doubt.

The third case, *State v. Melton*,¹⁰³ was a statutory rape case in which the child victim tested positive for genital herpes. The issue presented was whether admission of a laboratory report confirming that the defendant tested positive for genital herpes, without the testimony of the laboratory technician, violated the defendant's confrontation rights. Applying the *Cao* standard, the court found the record insufficient to determine whether the procedures employed by the testing company were mechanical. However, the court concluded that even if admission of the report was error, it was harmless beyond a reasonable doubt.

The final case, *State v. Forte*,¹⁰⁴ is the only one decided by the North Carolina Supreme Court. In *Forte*, the defendant was prosecuted for several murders. SBI Special Agent Spittle participated in testing related to the murders. Specifically, after swabs were collected from the victims during autopsies, they were received by Spittle at the SBI for analysis. Spittle examined the samples, identified the fluids, and referred the material to other investigators for analysis. In both cases, another agent did the DNA testing on the samples. Agent Spittle did not testify at trial and his reports were admitted as business records. On appeal, the defendant argued that admission of these reports violated his confrontation rights. The court rejected this argument, concluding that the reports were nontestimonial. Noting that *Crawford* contained dicta stating that business records are nontestimonial, the court held:

[T]he reports . . . do not fall into any of the categories that the Supreme Court defined as unquestionably testimonial. These unsworn reports, containing the results of Agent Spittle's objective analysis of the evidence, along with routine chain of custody information, do not bear witness against the defendant. Instead, they are neutral, having the power to exonerate as well as convict. Although we acknowledge

¹⁰³. 175 N.C. App. 733 (2006).

¹⁰⁴. 360 N.C. 427 (2006), *cert. denied*, 127 S. Ct. 557 (2006).

that the reports were prepared with the understanding that eventual use in court was possible or even probable, they were not prepared exclusively for trial and Agent Spittle had no interest in the outcome of any trial in which the records might be used.¹⁰⁵

Although *Forte* was decided almost four months after *Cao*, *Forte* did not mention the *Cao* case. However, *Forte* clearly calls *Cao* into question. As discussed above, *Cao* held that reports are only nontestimonial when they are mechanical. *Forte*, however, held a non-mechanical report to be nontestimonial.

Litigation over the testimonial nature of various law enforcement-related records, as well as tests, reports, and records has been a hotbed of litigation nationally. Before turning to a summary of cases of interest from other jurisdictions, a note is in order. Although *Crawford* declined to comprehensively define the term "testimonial," it offered business records as an example of one type of evidence that is nontestimonial. Latching onto this language, some courts conclude that records are nontestimonial because they fall into the business record exception to the state's hearsay rule.¹⁰⁶ Such an analysis may be at odds with *Crawford*'s determination that the scope of the confrontation clause could not depend on the "vagaries" of the rules of evidence.¹⁰⁷ Thus, to the extent that business records fall within an exception to *Crawford*, it may be improper to use state hearsay rules as the standard for determining whether a document is a business record.¹⁰⁸ Cases of interest from other jurisdictions are presented below.

¹⁰⁵. *Id.* at 435 (citation omitted).

¹⁰⁶. *See, e.g.*, *People v. Meekins*, __ N.Y.S.2d __, 2006 WL 3438279 (N.Y. App. Div. Nov. 28, 2006).

¹⁰⁷. *Crawford v. Washington*, 541 U.S. 36, 61 (2004).

¹⁰⁸. *See, e.g.*, *State v. Miller*, 144 P.3d 1052, 1060 (Or. Ct. App. 2006) (looking to the history of the shop book rule and concluding that laboratory reports produced at the request of law enforcement for use in a criminal prosecution "are not the sort of 'business records' referred to in . . . *Crawford*"), *opinion adhered to on reconsideration*, 149 P.3d 1251 (Or. Ct. App. 2006); *Martin v. State*, 936 So.2d 1190 (Fla. Dist. Ct. App. 2006) (concluding that regardless of whether a laboratory report was a business record under state hearsay rules, the report was testimonial); *Card v. State*, 927 So.2d 200 (Fla. Dist. Ct. App. 2006) ("developing case law informs us that some business records may be testimonial hearsay").

DNA, Blood, Bodily Fluids, and Alcohol Testing Documents

Cases Holding That DNA, Blood, Bodily Fluids, And Alcohol Testing Documents Are Testimonial

City of Las Vegas v. Walsh, 124 P.3d 203 (Nev. 2005) (nurse's affidavit, admitted to prove certain facts relating to the withdrawal of blood for testing in a driving under the influence of alcohol case, was testimonial; although the affidavit documented standard procedures, it was made for use at a later trial or legal proceeding), *cert. denied*, 126 S. Ct. 1786 (2006) [Author's note: an earlier decision in this case is discussed in Confrontation One Year Later at p. 10].

State v. Crager, 844 N.E.2d 390 (Ohio Ct. App. 2005) (report of a forensic DNA scientist at the state Bureau of Criminal Identification and Investigation was testimonial; rejecting the argument that the report was not covered by *Crawford* because it was a business record), *appeal allowed*, 846 N.E. 2d 533 (Ohio 2006).

People v. Lonsby, 707 N.W.2d 610 (Mich. Ct. App. 2005) (notes and lab report of non-testifying state police crime lab serologist were testimonial; another serologist who did testify did not do so as an expert, rather he was offered to introduce the non-testifying serologist's statements; the documents were not business or public records).

State v. Miller, 144 P.3d 1052 (Or. Ct. App. 2006) (lab reports confirming the presence of methamphetamine in the defendant's urine and in a smoking device were testimonial), *opinion adhered to on reconsideration*, 149 P.3d 1251 (Or. Ct. App. 2006).

Belvin v. State, 922 So.2d 1046 (Fla. Dist. Ct. App. 2006) (material in breath test affidavit pertaining to the procedures the technician followed in administering the breath test and his or her observations was testimonial; rejecting the state's argument that because the statute allowing for the admissibility of the affidavits deems them to be public records, they are excepted from *Crawford*), *review granted*, 928 So. 2d 336 (Fla. 2006).

State v. Berezansky, 899 A.2d 306 (N.J. Super. Ct. App. Div. 2006) (admission of a laboratory

certificate indicating that a sample of the defendant's blood contained a blood-alcohol level of .33% without testimony of report's preparer violated the defendant's confrontation clause rights; rejecting the state's reliance on the business or government record exceptions to the hearsay rule).

State v. Renshaw, ___ A.2d ___, 2007 WL 419621 (N.J. Super. Ct. App. Div. Feb. 9, 2007) (holding, in an impaired driving case, that a "Uniform Certification for Bodily Specimens Taken in a Medically Acceptable Manner," completed by a nurse after drawing the defendant's blood for testing was testimonial; "a certification prepared for purposes of trial, and indeed only for purposes of trial, can be nothing other than testimonial"; the certification could not qualify as a business record because it was prepared specifically for purposes of litigation).

Cases Holding That DNA, Blood, Bodily Fluids, And Alcohol Testing Documents Are Nontestimonial

United States v. Ellis, 460 F.3d 920 (7th Cir. 2006) (medical records establishing the presence of methamphetamine in the defendant's blood and urine were nontestimonial business records; the tests were requested by a law enforcement officer, with the reason for them listed as "Reasonable Suspicion/Cause;" a written certification attesting to the authentication of the record also was nontestimonial).

State v. Musser, 721 N.W.2d 734 (Iowa 2006) (in case involving conviction of criminal transmission of HIV, lab reports from the University of Iowa Hygienic Laboratory were nontestimonial; the tests were not requested by law enforcement and were done two years before the crime at issue was committed; "[a]lthough lab personnel possibly realized the report could be used in a later prosecution for criminal transmission of HIV, that use would be rare and certainly collateral to the primary purpose of providing the defendant and his medical providers with the information they needed to make informed treatment decisions").

Commonwealth v. Lampron, 839 N.E.2d 870 (Mass. App. Ct. 2005) (hospital medical records indicating that the defendant was intoxicated and positive for cocaine were made for purpose of

medical diagnosis and treatment and thus were nontestimonial).

State v. Meekins, 828 N.Y.S.2d 83 (N.Y. App. Div. 2006) (because independent private laboratory's DNA report created from a rape kit was a business record under state hearsay rules, it was nontestimonial).

People v. Brown, 801 N.Y.S.2d 709 (N.Y. Sup. Ct. 2005) (lab reports that were used by prosecution's expert as the basis of her DNA analysis were nontestimonial; although rejecting the argument that the reports were admitted for a purpose other than the truth of the matter asserted, the court found that they were business records).

See the discussion of the North Carolina case, *State v. Forte*, above on page 14. For additional cases, see Confrontation One Year Later at page 10.

Autopsy Reports

Cases Holding that Autopsy Reports Are Nontestimonial

United States v. Feliz, 467 F.3d 227 (2d Cir. 2006) (post-*Davis* case holding that autopsy reports are nontestimonial business records or public records, as defined by the federal rules of evidence), *petition for cert. filed* (Jan. 5, 2007).

State v. Cutro, 618 S.E.2d 890 (S.C. 2005) (admission of autopsy reports did not violate the defendant's confrontation clause rights).

State v. Craig, 853 N.E.2d 621 (Ohio 2006) (post-*Davis* case holding that an autopsy report was a nontestimonial business record), *petition for cert. filed* (Dec. 19, 2006).

People v. Durio, 794 N.Y.S.2d 863 (N.Y. Sup. Ct. 2005) (routine findings recited in an autopsy report were nontestimonial).

State v. Anderson, 942 So.2d 625 (La. Ct. App. 2006) (post-*Davis* case holding that an autopsy report was nontestimonial: "The information in the autopsy report was routine, descriptive, and non-analytical; i.e., it was nontestimonial").

Cases Holding that Autopsy Reports Contain Both Testimonial and Nontestimonial Evidence

State v. Lackey, 120 P.3d 332 (Kan. 2005) (factual, routine, descriptive and non-analytical findings in an autopsy report are nontestimonial; contested opinions speculations and conclusions drawn from the objective findings in the report are testimonial), *cert. denied*, 126 S. Ct. 1653 (2006).

For additional cases, see Confrontation One Year Later at page 10.

Lab Reports Identifying an Item as a Controlled Substance

Cases Holding That Lab Reports Identifying an Item as a Controlled Substance Are Testimonial

See the discussion of the North Carolina case *State v. Cao*, above on pages 13-14.

State v. Caulfield, 722 N.W.2d 304 (Minn. 2006) (lab report identifying substance as cocaine was testimonial).

Thomas v. United States, 914 A.2d 1 (D.C. 2006) (Drug Enforcement Administration chemist's written report identifying substance as a controlled substance was testimonial).

State v. Miller, 144 P.3d 1052 (Or. App. Ct. 2006) (lab reports confirming the presence of methamphetamine in the defendant's urine and in a smoking device were testimonial), *opinion adhered to on reconsideration*, 149 P.3d 1251 (Or. Ct. App. 2006).

Johnson v. State, 929 So.2d 4 (Fla. Dist. Ct. App. 2005) (Florida Department of Law Enforcement lab report establishing illegal nature of substance was testimonial), *review granted*, 924 So.2d 810 (Fla. Mar. 6, 2006).

Martin v. State, 936 So.2d 1190 (Fla. Dist. Ct. App. 2006) (Florida Department of Law Enforcement lab report identifying substance as contraband was testimonial).

Commonwealth v. Carter, 861 A.2d 957 (Pa. Super. Ct. 2004) (not mentioning *Crawford* and holding that admission of a report by the

Pennsylvania State Police crime laboratory identifying a substance as containing cocaine without testimony from the report's preparer violated the defendant's confrontation rights), *appeal granted*, 877 A.2d 459 (Pa. 2005).

Cases Holding That Lab Reports Identifying an Item as a Controlled Substance Are Nontestimonial

Commonwealth v. Verde, 827 N.E.2d 701 (Mass. 2005) (analysis showing weight of cocaine was not testimonial).

People v. Salinas, 53 Cal.Rptr.3d 302 (Cal. Ct. App. 2007) (laboratory report identifying the five rocks found in the defendant's pocket as methamphetamine was nontestimonial).

People v. Hinojos-Mendoza, 140 P.3d 30 (Colo. Ct. App. 2005) (laboratory report identifying evidence as containing cocaine was nontestimonial), *cert. granted*, 2006 WL 2338141 (Col. Aug. 14, 2006).

Pruitt v. Alabama, __ S.2d __, 2006 WL 1793732 (Ala. Crim. App. June 30, 2006) (certificate of analysis from forensic scientist who performed an analysis on drug evidence was nontestimonial).

State v. March, __ S.W.3d __, 2006 WL 1791336 (Mo. Ct. App. June 30, 2006) (laboratory report concluding that rocks were crack cocaine was nontestimonial), *cause ordered transferred to Mo. S. Ct.* (Sept. 26, 2006).

For additional cases, see [Confrontation One Year Later](#) at page 11.

Equipment Testing and Maintenance Records

Cases Holding That Equipment Testing and Maintenance Records Are Testimonial

Shiver v. State, 900 So.2d 615 (Fla. Dist. Ct. App. 2005) (portion of breath test affidavit pertaining to breath testing machine's maintenance was testimonial).

Cases Holding That Equipment Testing and Maintenance Records Are Nontestimonial

Rackoff v. State, 637 S.E.2d 706 (Ga. 2006) (inspection certificate of instrument used to conduct the defendant's breath test was nontestimonial).

Commonwealth v. Walther, 189 S.W.3d 570 (Ky. 2006) (certified copy of a breath-alcohol machine's maintenance and test records was nontestimonial).

State v. Carter, 114 P.3d 1001 (Mont. 2005) (certification reports demonstrating that the Intoxilyzer machine was working properly when it was used to test the defendant are nontestimonial; the reports were not substantive evidence but rather were foundational evidence necessary for the admission of substantive evidence, in this case the test results).

State v. Fischer, 726 N.W. 2d 176 (Neb. 2007) (simulator solution was used by a testifying witness to calibrate the breath testing device that in turn was later used to test the defendant's breath, in an impaired driving case; certificate verifying the concentration of the simulator solution, prepared by the company that supplied the solution, was nontestimonial; "[T]he primary purpose for which the statements . . . were generated and provided to the [police] was to assure that the solution used to calibrate and test breath testing devices was of proper concentration. The statements made in the certificate were required to be made as an administrative function whether or not the statements would eventually be used in any criminal prosecution.").

Bohsancurt v. Eisenberg, 129 P.3d 471 (Ariz. Ct. App. 2006) (maintenance and calibration records of breath-testing machine were nontestimonial business records).

State v. Godshalk, 885 A.2d 969 (N.J. Super. Ct. 2005) (breathalyzer inspection certificates are nontestimonial business records).

Napier v. State, 827 N.E.2d 565 (Ind. Ct. App. 2005) (breath test instrument and operator certifications were nontestimonial), *cert. denied*, 126 S. Ct. 1437 (2006) [Author's note: an earlier version of this case is discussed in [Confrontation One Year Later](#) at page 10].

Rembusch v. State, 836 N.E.2d 979 (Ind. Ct. App. 2006) (breath test machine certification documents are nontestimonial).

Jarrell v. State, 852 N.E.2d 1022 (Ind. Ct. App. 2006) (following *Napier* and *Rembusch*, discussed immediately above).

State v. Norman, 125 P.3d 15 (Or. Ct. App. 2005) (documents certifying that an Intoxilyzer machine had been tested for accuracy were nontestimonial).

Green v. DeMarco, 812 N.Y.S.2d 772 (N.Y. Sup. Ct. 2005) (in a case seeking declaratory relief collaterally attacking a ruling of a local criminal court, *People v. Orpin*, 796 N.Y.S.2d 512 (Irondequoit Town Ct. 2005), that had held certification records to be testimonial, the court held that breathalyzer service and test records were nontestimonial business records; citing other New York decisions on point).

People v. Lebrecht, 823 N.Y.S.2d 824 (N.Y. Sup. Ct. App. Term 2006) (holding, in an impaired driving case, that certified copies of a simulator solution certification and the calibration/maintenance record of the breath test instrument used to test the defendant's breath were nontestimonial).

People v. Kim, 859 N.E.2d 92 (Ill. App. Ct. 2006) (affidavit certifying testing of breath machine was nontestimonial).

Hospital and Medical Records

Cases Holding That Hospital and Medical Records are Nontestimonial

State v. Musser, 721 N.W.2d 734 (Iowa 2006) (in case involving a conviction for criminal transmission of HIV, lab reports from the University of Iowa Hygienic Laboratory were nontestimonial; the tests were not requested by law enforcement and were done two years before the crime at issue was committed; “[a]lthough lab personnel possibly realized the report could be used in a later prosecution for criminal transmission of HIV, that use would be rare and certainly collateral to the primary purpose of providing the defendant and his medical providers with the information they needed to make informed treatment decisions”).

Commonwealth v. Lampron, 839 N.E.2d 870 (Mass. App. Ct. 2005) (hospital medical records indicating that the defendant was intoxicated and positive for cocaine were made for purpose of medical diagnosis and treatment and thus were nontestimonial).

Department of Correction and Jail Records

Cases Holding That Department of Correction and Jail Records Are Testimonial

Russeau v. State, 171 S.W.3d 871 (Tex. Crim. App. 2005) (incident and disciplinary reports concerning the defendant's behavior in prison were testimonial), *cert. denied*, 126 S. Ct. 2982 (2006).

Cases Holding That Department of Correction and Jail Records Are Nontestimonial

Desue v. State, 908 So.2d 1116 (Fla. Dist. Ct. App. 2005) (Department of Corrections computer printouts are admissible, as nontestimonial business records, to show a prisoner's release date).

Peterson v. State, 911 So.2d 184 (Fla. Dist. Ct. App. 2005) (Department of Corrections records were nontestimonial business records).

Driving Records and Related Documents

Cases Holding That Driving Records and Related Documents Are Testimonial

People v. Pacer, 847 N.E.2d 1149 (N.Y. 2006) (to show that the defendant knew that his driving privileges had been revoked in a prosecution for felony first-degree aggravated unlicensed operation, the state introduced a document entitled “Affidavit of Regularity/Proof of Mailing” from a Department of Motor Vehicles official; the affidavit, which purported to explain the Department's ordinary mailing procedures for revocation notices and contained a statement on “information and belief” that the ordinary procedures had been followed in the defendant's case, was testimonial).

Cases Holding That Driving Records and Related Documents Are Nontestimonial

Card v. State, 927 So.2d 200 (Fla. Dist. Ct. App. 2006) (holding, in an appeal of a conviction for driving while license revoked as an habitual offender, that a self-authenticating driving record was nontestimonial).

Sproule v. State, 927 So.2d 46 (Fla. Dist. Ct. App. 2006) (in an appeal from a conviction for habitual driving while license revoked, the court held that a driving record was nontestimonial).

State v. Kronich, 128 P.3d 119 (Wash. Ct. App. 2006) (an order revoking defendant's driver's license and a letter from the Department of Licensing certifying that the license had not been reinstated were nontestimonial business records), *review granted*, 139 P.3d 349 (Wash. 2006).

State v. N.M.K., 118 P.3d 368 (Wash. Ct. App. 2005) (in an appeal from a finding of guilty of driving without a valid operator's license, the court held that a letter from the Department of Licensing stating that the defendant did not have a driver's license was nontestimonial), *review granted*, 136 P.3d 758 (Wash. 2006).

Fingerprint Cards

Cases Holding That Fingerprint Cards Are Nontestimonial

See the discussion of *State v. Windley*, above on page 13. See also *Confrontation One Year Later* at page 9.

People v. Jambor, ___ N.W.2d ___, 2007 WL 29698 (Mich. Ct. App., Jan. 4, 2007) (fingerprint cards prepared during the investigation of a crime scene were nontestimonial business records and alternatively did not violate *Crawford* because they contained no subjective statements).

Postal Records

Cases Holding That Postal Records Are Nontestimonial

United States v. Baker, 458 F.3d 513 (6th Cir. 2006) (in a mail fraud case, the court held that postal records are nontestimonial business records).

5. Test Reports and Related Affidavits (Confrontation One Year Later, at p. 10.)

See the section immediately above.

6. Victim's Statements to Police Officers (Confrontation One Year Later, at p. 11.)

The case *State v. Forrest*, discussed on page 11 of *Confrontation One Year Later* has been vacated.¹⁰⁹

See the discussion in Section I of *Davis v. Washington*¹¹⁰ and its implications on North Carolina law. A non-comprehensive list of post-*Davis* cases of interest from other jurisdictions is provided below.

Cases Holding That Victim's Statements To Police Officers Are Testimonial

State v. Kirby, 908 A.2d 506 (Conn. 2006) (after holding that a kidnapping victim's statements to an officer at her home after she had fled from the defendant were spontaneous utterances for purposes of the hearsay rule, the court applied *Davis* and held those same statements to be testimonial; the fact that at the time the statements were made an officer was present and that the alleged perpetrator was located some distance away rendered the primary purpose of the interaction investigatory; contrasting the case at hand with one where the statements were "near contemporaneous" with a shooting spree, numerous perpetrators were at large, and the safety of the citizens in the vicinity "was still immediately at issue").

¹⁰⁹. *State v. Forrest*, 360 N.C. 642 (2006). The North Carolina Supreme Court vacated and dismissed the case as moot due to the defendant's death. The case was before the Court on remand from the United States Supreme Court for further consideration in light of *Davis*.

¹¹⁰. 126 S. Ct. 2266 (2006).

State v. Mechling, 633 S.E.2d 311 (W.Va. 2006) (domestic violence victim’s statements to sheriff’s deputies who arrived within fifteen minutes of a call about a domestic dispute were testimonial; interrogation was part of an investigation into possibly past criminal conduct, there was no emergency in progress, and the defendant had “clearly” left the scene).

State v. Wright, __ N.W.2d __, 2007 WL 177690 (Minn. 2007) (victims’ statements made to police at the scene were testimonial; the interviews occurred after the emergency ended, it was conducted in order to establish past events potentially relevant to a future prosecution, and the defendant was in police custody).

Commonwealth v. Galicia, 857 N.E.2d 463 (Mass. 2006) (statements made by a domestic violence victim at the scene to officers who responded less than five minutes after the victim’s 911 call were testimonial; the court concluded: “Viewed objectively, the victim’s statements to officers occurred separate and apart from the danger she sought to avert, both temporally and physically.”).

Cases Holding That Victim’s Statements to Police Officers Are Nontestimonial

United States v. Clemmons, 461 F.3d 1057 (8th Cir. 2006) (victim’s statements to an officer were nontestimonial; statements were made when the officer arrived on the scene and found the victim lying in front of a neighbor’s house and suffering from multiple gunshot wounds; the primary purpose of the officer’s questions was to enable him to “assess the situation and meet the needs of the victim”).

State v. Warsame, 723 N.W.2d 637 (Minn. Ct. App. 2006) [(1) as an officer was responding to a 911 call to a home, a woman flagged down his car and said: “My boyfriend just beat me up”; the parties agreed, and the court held, that this initial statement was nontestimonial; (2) the victim’s narrative account of the alleged assault that followed her spontaneous statement and was in response to police questioning also was nontestimonial; at the time, the police were dealing with an ongoing emergency situation potentially extending to three separate locations: the street curb where the victim was being attended to, the house nearby where one of the victim’s sisters, who had tried to rescue the

victim, remained, and a fleeing vehicle driven by the defendant in which another sister who had intervened was a passenger).

State v. Washington, 725 N.W.2d 125 (Minn. Ct. App. 2006) (domestic violence victim’s statements at the scene to officers who responded about five minutes after the victim’s 911 call were nontestimonial; at the time, the assailant was still at large and posed an ongoing threat; the statements conveyed information that allowed the officers to reasonably respond to the “emergent situation”).

7. 911 Calls (*Confrontation One Year Later*, at p. 16.)

See section I, above, for a discussion of the United States Supreme Court’s decision in *Davis v. Washington*,¹¹¹ a case involving a 911 call. Post-*Davis* cases dealing with 911 calls are annotated below.

Cases Holding That 911 Call Statements Are Testimonial

State v. Kirby, 908 A.2d 506 (Conn. 2006) [a kidnapping victim’s statements during a 911 call were testimonial; at the time of the call, “the emergency had been averted and the complainant no longer was under any threat from the defendant because she already had escaped and had left him stranded on the side of the road,” notwithstanding that the defendant had the victim’s house keys; the court noted that although the victim might have needed emergency medical assistance (she had described injuries and chest pains), “the bulk of her conversation with [the operator] . . . consisted of her account of a crime that had happened to her in the past”].

Cases Holding That 911 Call Statements Are Nontestimonial

United States v. Thomas, 453 F.3d 838 (7th Cir. 2006) (anonymous caller’s statements in a 911 call were nontestimonial; the caller described an emergency as it happened, told the operator that a person had been shot, restated her concern that help was needed and stated, “there’s somebody runnin’ around with a gun, somewhere”).

¹¹¹ *Id.*

State v. Wright, ___ N.W.2d ___, 2007 WL 177690 (Minn. 2007) (all statements made during the victims' 911 call placed after the defendant had left the scene were nontestimonial, even those made after the operator relayed that the suspect was in police custody; the primary purpose of the call after the defendant was apprehended was not to prove past facts but to reassure the victims about their safety and encourage them to return to the apartment and wait for the police).

Commonwealth v. Galicia, 857 N.E.2d 463 (Mass. 2006) (statements made during a victim's 911 call were nontestimonial; the call was concerning an assault that was occurring at the time, including the statements "My husband's[sic] beating me up right now! . . . Ow! . . . Ow!"; questions posed about the identity and location of the caller and about the alleged perpetrator were asked to resolve a present emergency, and occurred in an informal 911 call setting).

Harkins v. State, 143 P.3d 706 (Nev. 2006) (after being shot, the victim ran to his neighbor's house and the neighbor called 911; the dispatcher gave the neighbor instructions on how to care for the victim until help arrived and asked the neighbor if the victim knew who shot him; when the neighbor asked this question of the victim, the victim responded: "[the defendant] shot me and he was paid to do it"; the court held that the statement was a dying declaration excepted from *Crawford* and that it was nontestimonial).

State v. Camarena, 145 P.3d 267 (Or. Ct. App. 2006) (a domestic violence victim called 911 and hung up about one minute after an assault and after the defendant had left; the operator called back and asked "Is there a problem there?" and then posed questions about the nature and seriousness of the victim's injuries; the victim's statements were nontestimonial; although the statements were not made as the events were occurring as in *Davis*, they were made, unlike *Hammon*, "immediately after the assault occurred," at a time when the "danger of a renewal of the domestic assault had not necessarily or fully abated" because the defendant could have returned before the police arrived; the operator's questions were calculated to determine if an emergency existed and the victim's need for assistance; and finally, the victim's answers were "frantic" and the environment was not tranquil).

State v. Washington, 725 N.W.2d 125 (Minn. Ct. App. 2006) (statements made during a 911 call were nontestimonial; the caller reported that the defendant had just assaulted her, she was assaulted a second time during the 911 call, and then reported that her assailant ran out; "[a]lthough the operator requested more detail about the assailant than was requested in *Davis* the questions sought and obtained descriptive information necessary for the police to identify the suspect and resolve the ongoing emergency").

Jackson v. State, 931 So.2d 1062 (Fla. Dist. Ct. App. 2006) (911 call was nontestimonial because the victim described events as they were happening).

Cook v. State, 199 S.W.3d 495 (Tex. Ct. App. 2006) (after observing the defendant gesture obscenely and throw a beer bottle at his truck, the witness called 911 and reported that the defendant was intoxicated; the witness's statements during the 911 call were nontestimonial; the witness initiated contact with the police to inform them of a potential crime in progress, the contact was informal, and occurred at the beginning of the investigation).

State v. Williams, 150 P.3d 111 (Wash. Ct. App. 2007) (burglary victim's 911 call was nontestimonial; the call was made "very shortly" after the incident took place and the victim's statements "clearly demonstrate that her overriding purpose for calling 911 was to secure police assistance to ensure her safety and the safety of her children"; the questions asked were designed to gather information necessary to enable the police to respond to the emergency situation).

People v. Conyers, 824 N.Y.S.2d 301 (N.Y. App. Div. 2006) (witness's two 911 calls requesting police assistance and requesting an ambulance were nontestimonial because they were made to obtain police assistance).¹¹²

Williams v. State, ___ So.2d ___, 2006 WL 3008133 (Miss. Ct. App. 2006) (statements made during the defendant's wife's 911 call reporting the abduction of her companion were

¹¹². See also *People v. Drummond*, 824 N.Y.S.2d 126 (N.Y. App. Div. 2006) (concluding, without analysis, that 911 call was nontestimonial); *People v. Mitchell*, 826 N.Y.S.2d 144 (N.Y. App. Div. 2006) (same).

nontestimonial; the wife called 911 to initiate an investigation and “in desperation to find her friend, whom she believed had been abducted by [the defendant]”).

8. Victim’s Statements to Medical Personnel (Confrontation One Year Later, at p. 17)

As discussed above, one issue that may arise with respect to medical personnel is whether they are acting as agents of the police.¹¹³ There are no recent North Carolina cases on point. A non-comprehensive list of cases from other jurisdictions dealing with statements to medical personnel is provided below. For cases dealing with statements by child victims to medical personnel, see *infra* at page 24.

Cases Holding That Statements to Medical Personnel Are Testimonial

Medina v. State, 143 P.3d 471 (Nev. 2006) [rape victim’s statements to Sexual Assault Nurse Examiner (“SANE”) were testimonial; SANE nurse was a “police operative” who gathered evidence for the prosecution], *petition for cert. filed* (Nov. 17, 2006).

Cases Holding That Statements to Medical Personnel Are Nontestimonial

State v. Kirby, 908 A.2d 506 (Conn. 2006) (kidnapping victim’s statements to a volunteer emergency medical technician were nontestimonial, even though the victim’s earlier statements to an officer at the same scene were testimonial and an officer observed the technician’s questioning; the victim did not identify the defendant as her assailant and her statements about the crimes were relevant to the technician’s determination of the origin of her injuries).

State v. Stahl, 855 N.E.2d 834 (Ohio 2006) [statements to a nurse practitioner at a hospital Developing Options for Violent Emergencies (“DOVE”) unit by a rape victim identifying the defendant were nontestimonial; the statements were made to a medical professional at a medical facility for the primary purpose of medical treatment and not investigating past events; the court noted that although the DOVE unit gathers forensic evidence for potential criminal

¹¹³. See *supra* pp. 6-7.

prosecutions, its primary purpose is to provide medical attention to its patients; an officer had transported the victim to the DOVE unit following her statement to the police and remained in the room while the nurse took the victim’s incident history].

10. Informants’ Statements and Statements to Informants [revised subtitle] (Confrontation One Year Later, at p. 18.)

In *Davis*, the Court indicated that statements made unwittingly to a government informant are nontestimonial.¹¹⁴

11. Statements to Friends, Family, and Similar Private Parties (Confrontation One Year Later, at p. 19.)

North Carolina cases continue to hold that statements to family, friends, and similar private parties are nontestimonial.¹¹⁵ As noted in Section II, there is some question as to how this area of the law will develop, and whether the *Davis* primary purpose test will apply in this context.¹¹⁶

State v. Brigman,¹¹⁷ is one case that might be impacted by an expansion of the primary purpose test or the “agents of the police” inquiry.¹¹⁸ *Brigman* involved child sexual abuse. In *Brigman*, two child

¹¹⁴. See *Davis*, 126 S. Ct. at 2275 (offering *Bourjaily v. United States*, 483 U.S. 171, 181-84 (1987), as a case involving statements that were “clearly nontestimonial”).

¹¹⁵. *State v. Scanlon*, __ N.C. App. __, 626 S.E.2d 770 n.1 (Mar. 7, 2006) (victim’s statements to her sister and nephew); *State v. Lawson*, 173 N.C. App. 270 (2005) (witness’s statement to her boyfriend, the victim, identifying defendant as the perpetrator of the assault were nontestimonial; witness made the statement to her boyfriend in a private conversation while the boyfriend was being transported to the hospital).

¹¹⁶. See *supra* p. 8.

Note that in *Davis*, the Court characterized a case involving statements from one prisoner to another as implicating statements that were “clearly nontestimonial.” *Davis*, 126 S. Ct. at 2275.

¹¹⁷. 171 N.C. App. 305 (2005).

¹¹⁸. See *supra* pp. 6-7 (discussing the fact that *Davis* provided no guidance on how trial courts should determine who are agents of the police). At least one other jurisdiction has suggested that *Brigman* was been “discredited” by *Davis*. See *State v. Hooper*, __ P.3d __, 2006 WL 2328233 (Idaho App. Ct. Aug. 11, 2006), *review granted* (Jan. 18, 2007).

victims were removed from their home and placed with a Mrs. M. When the children's behavior and statements suggested sexual abuse, Mrs. M. made a report to the county social services department. After making the report, Mrs. M. continued to talk with the children and attempted to tape-record the conversation. Although the tape turned out to be inaudible, Mrs. M. wrote down notes of her conversation with the children immediately after it occurred. Mrs. M. testified to all of this at trial, including recounting what the children told her about the defendant. The defendant was convicted and appealed. The court of appeals rejected the defendant's *Crawford* challenge with respect to this testimony, holding that the child's statements were nontestimonial. The court was not persuaded by the defendant's arguments that Mrs. M. was acting in a quasi-governmental role; instead, it noted, among other things, that the statements were made to Mrs. M., not the police, the victim was less than six years old, and it was highly implausible that he believed the statements would be used prosecutorially.¹¹⁹

Post-*Davis* cases of interest from other jurisdictions involving victims' statements to private parties are annotated below.

Cases Holding That Statements to Private Parties Are Nontestimonial

Medina v. State, 143 P.3d 471 (Nev. 2006) (rape victim's statements to a neighbor who found her after the sexual assault were not testimonial), *petition for cert. filed* (Nov. 17, 2006).

Patano v. State, 138 P.3d 477 (Nev. 2006) (child victim's statements to her father in response to questioning regarding possible sexual abuse were nontestimonial), *cert. denied*, 127 S. Ct. 957 (2007).

Fields v. State, __ S.E.2d __, 2007 WL 29519 (Ga. Ct. App. Jan. 5, 2007) (robbery victim's statements to the manager of a nearby store, made immediately after the crime, were nontestimonial).

State v. Buda, 912 A.2d 735 (N.J. Super. 2006) (statement, "Daddy beat me," blurted out by child to his mother was nontestimonial).

¹¹⁹. See also *State v. Brigman*, __ N.C. App. __, 632 S.E.2d 498 (2006) (case related to the one discussed in the text).

Other Cases of Interest Involving Statements to Private Parties

State v. Mechling, 633 S.E.2d 311, 323-24 & n.10 (W. Va. 2006) (remanding on the issue whether a domestic violence victim's statements to a private onlooker were testimonial).

13. Excited Utterances (Confrontation One Year Later, at p. 19.)

The North Carolina Court of Appeals has stated that "after *Crawford*, whether a statement qualifies as an excited utterance is not a factor in our Confrontation Clause analysis."¹²⁰ As noted above, however,¹²¹ the declarant's demeanor might be relevant to the determination whether there is an ongoing emergency.

14. Children's Statements

b. Statements to Social Workers, Child Protective Services Workers, and Forensic Interviewers [new title] (Confrontation One Year Later at p. 22).

The Minnesota case, *State v. Bobadilla*, noted on page 23 of *Confrontation One Year Later* was reversed by that state's supreme court. In a pre-*Davis* decision, the Minnesota Supreme Court held that statements by a child in a risk-assessment interview conducted by a child protection worker were nontestimonial.¹²²

Post-*Davis* cases of interest from other jurisdictions are annotated below.

Cases Holding That Children's Statements to Social Workers, Child Protective Services Workers, and Forensic Interviewers Are Testimonial

State v. Justus, 205 S.W.3d 872 (Mo. 2006) (child victim's statements to an individual who investigated child abuse and neglect for the division of family services as well as those to another individual who performed a forensic interview of the child were testimonial).

¹²⁰. *State v. Allen*, 171 N.C. App. 71 at n.2 (2005).

¹²¹. See *supra* p. 6.

¹²². *State v. Bobadilla*, 709 N.W.2d 243 (Minn. 2006), *cert. denied*, 127 S. Ct. 382 (2006).

State v. Blue, 717 N.W.2d 558 (N.D. 2006) (child's statements to a forensic interviewer at a child advocacy center were testimonial because they were made with police involvement).

Rangel v. State, 199 S.W.3d 523 (Tex. Ct. App. 2006) (child's statements to a child protective services investigator were testimonial), *review granted* (Dec. 20, 2006).

State v. Pitt, 147 P.3d 940 (Or. App. 2006) (children's statements to the director of a county child advocacy center and self-described child forensic interviewer were testimonial).

People v. Sharp, __ P.3d __, 2006 WL 3635393 (Col App. 2006) (child's statements made during a videotaped interview at a child advocacy center by a private forensic interviewer were testimonial; the interview was the functional equivalent of police interrogation in that the police arranged and to a certain extent directed the interview, even though an officer was not physically present in the room, moreover its purpose was to elicit statements that would be used at a later criminal trial).

State v. Buda, 912 A.2d 735 (N.J. Super. 2006) (statements of a non-testifying child to a Department of Youth and Family Services worker who interviewed the child at a hospital after a third incident of alleged child abuse were testimonial; the worker talked with the prosecutor's investigator before the interview, and was called to the hospital to conduct an investigation because the examining physician suspected wrongdoing).

c. Statements to Medical Personnel (Confrontation One Year Later, at p. 23.)

In the North Carolina case *State v. Richard Brigman*,¹²³ the court held that a statement by a sex abuse victim, who was not quite three years old, to a doctor was nontestimonial. In the statement, the child described the sexual abuse. The court held: "We cannot conclude that a reasonable child under three years of age would know or should know that his statements might later be used at a trial. Therefore, we hold [the child's] statement to [the doctor] was not testimonial."¹²⁴ Although *Brigman* was decided one day after the *Davis* decision was issued, it did not

¹²³ __ N.C. App. __, 632 S.E.2d 498 (2006).

¹²⁴ *Id.* at 506.

cite that case; instead, *Brigman* cited the North Carolina Supreme Court's post-*Crawford* decision in *Lewis* which has now been vacated and remanded by the United States Supreme Court.¹²⁵ As discussed in Section II, it is not yet clear whether *Davis*'s primary purpose test will impact the confrontation clause analysis of these types of statements.

The holding in the Colorado case, *People v. Vigil*, discussed on page 24 of Confrontation One Year Later was reversed by the Colorado Supreme Court. The pre-*Davis* decision by that state's high court held that a child's statements to a physician during a sexual assault examination were nontestimonial.¹²⁶ In another pre-*Davis* development, the Minnesota Supreme Court affirmed the decision in *State v. Scacchetti*, also discussed on page 24, holding that a child victim's statements to a pediatric nurse practitioner employed by a children's resource center were nontestimonial.¹²⁷

Post-*Davis* cases of interest from other jurisdictions are annotated below.

Cases Holding That Children's Statements to Medical Personnel Are Testimonial

State v. Krasky, 721 N.W.2d 916 (Minn. Ct. App. 2006) (statements made by a child victim during an interview with a nurse practitioner at a child resource center were testimonial; the events in question were at least two years old, the child had been removed from the defendant's home, and there was no evidence of any ongoing concern for the child's safety or welfare), *review granted* (Dec. 20, 2006).

State v. Hooper, __ P.3d __, 2006 WL 2328233 (Idaho App. Ct. 2006) (child's statements to Sexual Trauma Abuse Response nurse were testimonial), *review granted* (Jan. 18, 2007).

¹²⁵ *See supra* p. 5.

¹²⁶ *People v. Vigil*, 127 P.3d 916 (Colo. 2006), *cert. denied*, 127 S. Ct. 86 (2006).

¹²⁷ *State v. Scacchetti*, 711 N.W.2d 508 (Minn. 2006).

*d. Statements to Family and Friends
(Confrontation One Year Later,
at p. 24.)*

See pages 22-23 for a discussion of this type of evidence.

18. Miscellaneous Cases (Confrontation One Year Later, at p. 26.)

State v. Ferebee, __ N.C. App. __, 630 S.E.2d 460 (2006) (in a resist, delay and obstruct prosecution, admission of an officer's statement "campus police officer, stop," yelled during pursuit of the defendant, was nontestimonial).

Section III.B. Exceptions to the Crawford Rule

*1. Forfeiture by Wrongdoing
(Confrontation One Year Later, at p. 26.)*

As noted in Section I, the *Davis* Court essentially invited application of the forfeiture by wrongdoing exception to the *Crawford* rule. Justice Brady did the same in the now-vacated North Carolina *Lewis* decision. For a discussion of issues related to application of the doctrine post-*Crawford*, see James Markham. *The Forfeiture by Wrongdoing Exception to the Confrontation Rule* (July 2006) (paper by UNC-Chapel Hill School of Government summer law clerk, available on-line at: <http://www.ioqcriminal.unc.edu/crawfordforfeituremarkham2006.pdf>). Additional cases of interest decided since publication of that paper are annotated below.

United States v. Carson, 455 F.3d 336 (D.C. Cir. 2006) (forfeiture by wrongdoing applies to a defendant whose co-conspirator renders the witness unavailable, as long as the misconduct was within the scope of the conspiracy and reasonably foreseeable to the defendant), *petition for cert. filed* (Jan. 19, 2007).

People v. Costello, 53 Cal.Rptr.3d 288 (Cal. App. 2007) (in a case in which the defendant was being tried for, among other things, the murder of the declarant-victim, the court applied the forfeiture by wrongdoing exception because of the defendant's misconduct in killing the victim; the court rejected the argument that there must be evidence that the defendant committed the murder to prevent the victim from testifying).

People v. Vasquez, __ P.3d __, 2006 WL 3437552 (Colo. App. 2006) (holding, in an appeal from convictions for violations of bail

bond conditions and a restraining order, that the defendant forfeited his confrontation rights by killing the declarant; rejecting the argument that for forfeiture to apply, the defendant must have intended to prevent the witness from testifying in the case in which the hearsay testimony is offered).

*2. Statements Offered for a Purpose Other Than Truth of the Matter Asserted
(Confrontation One Year Later, at p. 27.)*

In a number of North Carolina cases, defendants have challenged the admission of various forensic reports when a person other than the one who prepared the report testified at trial. The courts have held that when the reports are admitted as a basis of a testifying expert's opinion, no *Crawford* violation occurs. They reason that when the reports are admitted for this purpose, they are admitted for a purpose other than the truth of the matter asserted and thus are excepted from the *Crawford* rule. The cases are summarized below and supplement the bullet on page 27 of Confrontation One Year Later on this issue. Note that in these cases, the reports were not admitted as substantive evidence.

State v. Shelly, __ N.C. App. __, 627 S.E.2d 287 (Mar. 21, 2006) (no *Crawford* violation when testifying forensic chemistry expert's opinion was based on gunshot residue reports done by non-testifying SBI agent).

State v. Durham, __ N.C. App. __, 625 S.E.2d 831 (Feb. 21, 2006) (no *Crawford* violation when forensic pathologist's expert testimony was based on an autopsy performed by another non-testifying pathologist).

State v. Bunn, 173 N.C. App. 729 (2005) (no *Crawford* violation when expert in forensic drug examination relied on chemical analyses performed by non-testifying chemist).

State v. Bethea, 173 N.C. App. 43 (2005) (no *Crawford* violation when expert in forensic firearms identification based opinion on tests and report done by a non-testifying forensic firearm examiner).

State v. Watts, 172 N.C. App. 58 (2005) (testimony of forensic molecular geneticist that relied upon DNA analysis conducted by a non-testifying colleague did not violate *Crawford*), *temp. stay allowed*, 360 N.C. 77 (2005).

State v. Lyles, 172 N.C. App. 323 (2005) (no confrontation clause violation when expert in forensic chemistry testified that substance was cocaine, based on findings made by another chemist).

State v. Delaney, 171 N.C. App. 141 (2005) (no *Crawford* violation when testifying expert relied upon non-testifying colleague's analyses in forming his opinions that substances were controlled substances).

State v. Walker, 170 N.C. App. 632 (2005) (no *Crawford* violation when forensic firearms expert based opinion on ballistic report done by another non-testifying agent).¹²⁸

Other North Carolina cases have applied the "purposes other than the truth of the matter asserted" exception in the following circumstances:

- to explain a witness's course of action;¹²⁹
- to explain the course of an investigation;¹³⁰ and
- for corroboration.¹³¹

In a related case, the court of appeals held that no *Crawford* violation occurred when a detective testified that as a result of an interview with a non-testifying individual, he considered that individual to be a material witness against the defendant.¹³² The court reasoned: "[The] testimony did not convey to the jury any specific statement [the individual] made to [the detective]. Rather, as a result of his

¹²⁸. *But see* *People v. Brown*, 801 N.Y.S.2d 709 (N.Y. Sup. Ct. 2005) (rejecting the prosecutor's argument that DNA records were not offered for their truth but to show the basis of a testifying expert's opinion: "This court does not credit the People's contention that the records were not offered for their truth because the facts contained in the records were taken to be true by the People's expert and were relied upon by her in formulating her opinions).

¹²⁹. *State v. Byers*, 175 N.C. App. 280 (2006) (witness's statements regarding what victim told him were admitted not for the truth of the matter asserted but rather to explain why, at the time defendant assaulted the victim, the witness chose to run in fear for his life, seek law enforcement assistance before returning to the scene, and chose not to confront the defendant alone).

¹³⁰. *State v. Alexander*, ___ N.C. App. ___, 628 S.E.2d 434 (2006); *State v. Leyva*, ___ N.C. App. ___, ___ S.E.2d ___ (Feb. 6, 2007).

¹³¹. *State v. Walker*, 170 N.C. App. 632 (2005).

¹³². *State v. Medina*, 174 N.C. App. 723 (2005).

investigation, [the detective] testified that [the individual] would have been a material witness." Note that even if the detective had testified to the specific statements, if they were admitted solely to explain the course of the investigation, they would have fallen under the *Crawford* exception for evidence admitted for a purpose other than the truth of the matter asserted.¹³³

For a discussion of case law holding that certain forensic reports may qualify as business records, see "Business Records and Affidavits," above.

3. Dying Declarations (*Confrontation One Year Later*, at p. 28.)

Additional cases on the whether dying declarations are excepted from the *Crawford* rule are annotated below.

Harkins v. State, 143 P.3d 706 (Nev. 2006) (after being shot, the victim ran to his neighbor's house and the neighbor called 911; the dispatcher gave the neighbor instructions on how to care for the victim until help arrived and asked the neighbor if the victim knew who shot him; when the neighbor asked this question of the victim, the victim responded: "[the defendant] shot me and he was paid to do it"; the court held that the statement was a dying declaration excepted from *Crawford* and that it was nontestimonial).

State v. Martin, 695 N.W.2d 578 (Minn. 2005) (recognizing and applying the dying declaration exception to the confrontation clause).

People v. Gilmore, 828 N.E.2d 293 (Ill. App. Ct. 2005) (recognizing the dying declaration exception).

People v. Durio, 794 N.Y.S.2d 863 (N.Y. Sup. Ct. 2005) (adopting the dying declaration exception).

United States v. Mayhew, 380 F. Supp. 2d 961 (S.D. Ohio 2005) (rejecting the argument that dying declarations are excepted from the confrontation clause but finding that the defendant had forfeited his confrontation clause rights).

¹³³. See *Confrontation One Year Later* at 27; *Alexander*, ___ N.C. App. ___, 628 S.E.2d 434.

Section III.C. Availability for Cross-Examination (Confrontation One Year Later, at p. 28.)

Crawford does not apply when the witness testifies at trial. One recent North Carolina case on point is *State v. Burgess*.¹³⁴ In that case, the defendant argued that his Sixth Amendment confrontation rights were violated when the trial court denied his motion to suppress videotaped interviews between medical personnel and the child victims. The court rejected the defendant's argument because the victims each took the stand at trial and were available for cross-examination, although the defendant did not avail himself of the opportunity to question them.

See also *supra* pages 12-13 for a discussion of whether the state must actually proffer the witness in order to provide the opportunity for cross examination required by the confrontation clause.

On page 30 of Confrontation One Year Later, there is a discussion of whether the procedure upheld in *Maryland v. Craig*,¹³⁵ allowing a child victim to testify at trial through a closed-circuit television survives *Crawford*. Additional post-*Crawford* cases holding that the *Craig* procedure still is viable after *Crawford* are noted in the footnote below.¹³⁶ Notwithstanding these cases, a question remains as to

¹³⁴. __ N.C. App. __, 639 S.E.2d 68 (January 2, 2007).

¹³⁵. 497 U.S. 836 (1990).

¹³⁶. *State v. Henriod*, 131 P.3d 232 (Utah 2006) (rejecting the defendant's argument that *Crawford* abrogated *Craig*); *State v. Blanchette*, 134 P.3d 19 (Kan. Ct. App. 2006) (same); see also *United States v. Kappell*, 418 F.3d 550 (6th Cir. 2005) (citing *Craig* and holding that the child victims were available for cross-examination at trial, even though they testified from a separate room by closed-circuit television), *cert. denied*, 126 S. Ct. 1651; *State v. Griffin*, 202 S.W.3d 670 (Mo. Ct. App. 2006) (concluding that *Crawford* did not affect preexisting state law relying on *Craig* and upholding a state procedure for pretrial depositions of child victims in lieu of live testimony at trial); *State v. Hooper*, __ P.3d __, 2006 WL 2328233 (Idaho App. Ct., Aug. 11, 2006) (not mentioning *Craig* in a case holding that a child's statements to a Sexual Trauma Abuse Response Nurse were testimonial, but stating: "This is not to say . . . that the only permissible method of child testimony is live, in-court presentation at trial. What is necessary is an opportunity for cross-examination. Trial courts may be able to formulate alternatives that accommodate a child's capabilities and fears while also protecting the accused's constitutional rights"), *review granted* (Jan. 18, 2007).

whether the balancing test applied in *Craig* survives in the new confrontation clause analysis.¹³⁷

Other cases of interest dealing with availability for trial are annotated below.

United States v. Kappell, 418 F.3d 550 (6th Cir. 2005) (rejecting the defendant's argument that because the child witnesses were unresponsive or inarticulate at times, the defendant could not effectively cross-examine them), *cert. denied*, 126 S. Ct. 1651 (2006).

State v. Price, 146 P.3d 1183 (Wash. 2006) (notwithstanding memory lapses, child witness was available for cross examination at trial).

Pantano v. State, 138 P.3d 477 (Nev. 2006) (child victim's negative answers or "I don't know" responses when asked to identify to whom she spoke did not render cross-examination ineffective), *cert. denied*, 127 S. Ct. 957 (2007).

Section III.D. Establishing Unavailability (Confrontation One Year Later, at p. 30.)

If the state seeks to introduce testimonial evidence by a non-testifying witness, it must establish unavailability and a prior opportunity for cross examination. One additional North Carolina case continues the trend in the case law of requiring the state to present adequate evidence of unavailability, on the record. That case is summarized below.

State v. Ash, 169 N.C. App. 715 (2005) (unavailability of autopsy doctor was not established; the only information in the record regarding unavailability was that prior to playing the doctor's videotaped deposition, the trial court informed the jury that for the convenience of the doctor, the videotape had been made).

An emerging issue, particularly in cases involving child victims, is whether a witness can be physically available but psychologically unavailable, at a level that does not suggest incompetency. Put another way: can a prosecutor successfully assert that based on the trauma suffered the child cannot testify at trial? Although one court has answered this

¹³⁷. *Crawford*, 541 U.S. at 67-68 ("By replacing categorical constitutional guarantees with open-ended balancing tests, we do violence to their design.").

question in the negative,¹³⁸ the issue will continue to be litigated in other jurisdictions.

Other cases of interest on unavailability are annotated below.

Howard v. State, 853 N.E.2d 461 (Ind. 2006) (child victim was not shown to be unavailable when she was emotionally upset when called to testify but there was no testimony by a medical or mental health professional about her condition, nor was there a finding that she could not participate for medical reasons or because she was legally incompetent).

Corona v. State, 929 So.2d 588 (Fla. Dist. Ct. App. 2006) (state's efforts to secure a witness for trial who had seemed cooperative until shortly before trial were sufficient to establish unavailability; the state sought a certificate of interstate extradition but the witness's mother evaded service; the state also sought a material witness warrant, which could not be served).

Section III.F. Waiver and Invited Error (Confrontation One Year Later, at p. 31.)

The North Carolina cases emphasize the importance of raising *Crawford* issues at trial. Several cases have held that constitutional errors not raised at trial will not be considered for the first time on appeal.¹³⁹ Others have evaluated *Crawford* claims under the demanding plain error rule.¹⁴⁰ Other waiver-related cases are summarized below.

State v. Byers, __ N.C. App. __, 623 S.E.2d 357 (Jan. 3, 2006) (by failing to object to arguably testimonial evidence, defendant lost the benefit of objections made to similar evidence).

State v. Medina, __ N.C. App. __, 622 S.E.2d 176 (Dec. 6, 2005) (no confrontation violation when defense counsel initiated testimony concerning statements of non-testifying individual during cross-examination; this opened

¹³⁸. *Contreras v. State*, 910 So.2d 901 (Fla. Dist. Ct. App. 2005) (stating that the confrontation clause requires physical unavailability), *review granted*, 924 So. 2d 810 (Fla. 2006).

¹³⁹. *See, e.g.*, *State v. Grant*, __ N.C. App. __, 632 S.E.2d 258 (2006); *State v. Alexander*, __ N.C. App. __, 628 S.E.2d 434 (2006); *State v. Jones*, __ N.C. App. __, 627 S.E.2d 265 (2006).

¹⁴⁰. *State v. Sutton*, 169 N.C. App. 90 (2005); *State v. Cao*, 175 N.C. App. 434 (2006).

the door for the State to elicit any alleged statements made by the non-testifying witness).

State v. Brigman, 171 N.C. App. 305 (2005) [because child witnesses were available to testify (although neither the State nor the defendant called them to testify), defendant waived her right to confront these witnesses].

State v. English, 171 N.C. App. 277 (2005) (defendant waived his Sixth Amendment right to confront preparer of laboratory report identifying the substance at issue as cocaine by stipulating to the report).

See also pages 10-13 above, discussing subpoena and demand procedures and whether failure to call an available witness constitutes a waiver of confrontation clause rights.

Section III.G. Retroactivity (Confrontation One Year Later, at p. 32.)

Since publication of *Confrontation One Year Later*, the United States Supreme Court has held that *Crawford* does not apply retroactively to cases already final on direct appeal.¹⁴¹

Section III.H. Proceedings to Which Crawford Applies (Confrontation One Year Later, at p. 33.)

2. Noncapital Sentencing (Confrontation One Year Later at p. 33)

State v. Sings, __ N.C. App. __, __ S.E.2d __ (Mar. 6, 2007) (declining to extend *Crawford* to noncapital sentencing hearings).

6. Termination of Parental Rights (new subheading)

In re D.R., 172 N.C. App. 300 (2005) (*Crawford* does not apply to a civil termination of parental rights proceeding).

7. Preliminary examination (new subheading)

Sheriff v. Witzenburg, 145 P.3d 1002 (Nev. 2006) (confrontation rights do not apply at a preliminary examination in which a probable cause determination is made).

¹⁴¹. *Whorton v. Bockting*, 549 U.S. __ (February 28, 2007).

***Section III.I. Harmless Error Review
(Confrontation One Year Later, at p. 34.)***

North Carolina cases continue to hold that *Crawford* errors are subject to harmless error analysis.¹⁴²

***Section III.J. Confrontation Test for
Nontestimonial Evidence (Confrontation One
Year Later, at p. 34.)***

In *Davis*, the United States Supreme Court concluded that the confrontation clause applies only to testimonial hearsay and not to nontestimonial hearsay. Thus, the Court resolved any uncertainty that remained as to the continued applicability of *Roberts* to nontestimonial hearsay. After *Davis*, nontestimonial hearsay, “while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause.”¹⁴³ In light of this, the suggestion in *State v. Blackstock*, discussed on page 34 on Confrontation One Year Later, that *Roberts* continues to apply to nontestimonial evidence has been overruled.

The fact that the confrontation clause does not apply to nontestimonial evidence does not mean that the constitutional challenges to this type of evidence are over. The possibility remains that nontestimonial evidence will be challenged on due process grounds. Whether this argument will gain traction and produce a second wave of post-*Crawford* litigation is unclear.

¹⁴² *State v. Lewis*, 360 N.C. 1 (2005) (error harmless), *vacated on other grounds*, 126 S.Ct. 2983 (2006); *State v. Shelly*, __ N.C. App. __, 627 S.E.2d 287 (2006) (same); *State v. Cao*, 175 N.C. App. 434 (2006) (same); *State v. Melton*, __ N.C. App. __, 625 S.E.2d 609 (2006) (same); *State v. Garcia*, __ N.C. App. __, 621 S.E.2d 292 (2005) (same); *State v. Moore*, 173 N.C. App. 494 (2005) (same); *State v. Champion*, 171 N.C. App. 716 (2005) (same); *State v. Allen*, 171 N.C. App. 71 (2005) (same); *State v. Ash*, 169 N.C. App. 715 (2005).

¹⁴³ *Davis*, 126 S. Ct. at 2273; *see also Bockting*, 549 U.S. __ (Feb. 28, 2007).

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