UNC SCHOOL OF GOVERNMENT
THE UNIVERSITY of NORTH CAROLINA at CHAPEL HILL

ADMINISTRATION OF JUSTICE BULLETIN 2010/02 | APRIL 2010

Understanding the New Confrontation Clause Analysis: *Crawford, Davis,* and *Melendez-Diaz*

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Introduction

I first analyzed the United States Supreme Court Case *Crawford v. Washington*,[1] its implications for criminal proceedings, and case trends in North Carolina and around the country five years ago.[2] Since then I have published numerous articles and written several blog posts on additional Supreme Court cases related to *Crawford* as well as the emerging trends and significant North Carolina decisions and legislation.[3] In this bulletin I bring together all of that material in an effort to provide litigants and decision makers with a comprehensive guide for dealing with confrontation clause issues. While this article presents the current state of the law, a number of issues remain unresolved, and additional cases are expected.[4]

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1. 541 U.S. 36 (2004).

2. Jessica Smith, *Crawford v. Washington*: Confrontation One Year Later (April 2005), available at http://shopping.netsuite.com/s.nl/c.433425/it.A/id.79/.f [hereinafter Confrontation One Year Later].

3. Jessica Smith, Emerging Issues in Confrontation Litigation: A Supplement to *Crawford v. Washington*: Confrontation One Year Later (March 2007), available at http://shopping.netsuite.com/s.nl/c.433425/it.A/id.973/.f) [hereinafter Emerging Issues]; Jessica Smith, *Evidence Issues in Criminal Cases Involving Child Victims and Child Witnesses*, Admin. of Justice Bulletin 2008/07 at 32–33 (Dec. 2008) [hereinafter *Evidence Issues*]; Jessica Smith, *Melendez-Diaz* & the Admissibility of Forensic Laboratory Reports & Chemical Analyst Affidavits in North Carolina Post-*Crawford* (UNC School of Government faculty paper, July 2, 2009), available at http://www.sog.unc.edu/programs/crimlaw/faculty.htm [hereinafter *Melendez-Diaz* & Forensic Lab Reports]; Jessica Smith, The North Carolina General Assembly's Response to *Melendez-Diaz* (UNC School of Government faculty paper, Aug. 27, 2009), available at http://www.sog.unc.edu/programs/crimlaw/faculty.htm [hereinafter General Assembly's Response to *Melendez-Diaz*]; Jessica Smith, *State v. Locklear* and the Admissibility of Forensic Reports (blog post, Sept. 1, 2009), available at http://sogweb.sog.unc.edu/blogs/ncclaw/?p=673 [hereinafter *State v. Locklear* Blog Post]; Jessica Smith, *Galindo* and "Substitute Analysts" After *Melendez-Diaz* (blog post, Oct. 22, 2009), available at http://sogweb.sog.unc.edu/blogs/ncclaw/?p=797 [hereinafter *Galindo* Blog Post]; Jessica Smith, *State v. Mobley*: Green Light to the Use of Substitute Analysts (blog post, Nov. 4, 2009), available at http://sogweb.sog.unc.edu/blogs/ncclaw/?p=830 [hereinafter *State v. Mobley* Blog Post]; Jessica Smith, Retroactivity of *Melendez-Diaz* (blog post, July 20, 2009), available at http://sogweb.sog.unc.edu/blogs/ncclaw/?p=545 [hereinafter Retroactivity of *Melendez-Diaz*]; Jessica Smith, Retroactivity of *Melendez-Diaz* (Again) (blog post, July 27, 2010), available at http://sogweb.sog.unc.edu/blogs/ncclaw/?p=565 [hereinafter Retroactivity Blog Post].

4. *See, e.g.*, Michigan v. Bryant, ___ S. Ct. ___ (No. 09-150, Mar. 1, 2010) (granting petition for writ of certiorari on the question of whether statements by a wounded victim to police officers concerning the perpetrator and the circumstances of the shooting are testimonial or not).

The New *Crawford* Rule

The Sixth Amendment's confrontation clause provides that "[i]n all criminal prosecutions the accused shall enjoy the right . . . to be confronted with the witnesses against him."[5] This protection applies to the states by way of the Fourteenth Amendment.[6]

In *Crawford*, the Court radically revamped the analysis that applies to confrontation clause objections. *Crawford* overruled the reliability test for confrontation clause objections and set in place a new, stricter standard for admission of hearsay statements under the confrontation clause. Under the old *Ohio v. Roberts*[7] reliability test, the confrontation clause did not bar admission of an unavailable witness's statement if the statement had an adequate indicia of reliability.[8] Evidence satisfied that test if it fell within a firmly rooted hearsay exception or had particularized guarantees of trustworthiness.[9] *Crawford* rejected the *Roberts* analysis, concluding that although the ultimate goal of the confrontation clause is to ensure reliability of evidence, "it is a procedural rather than a substantive guarantee."[10] It continued: The confrontation clause "commands, not that the evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination."[11] *Crawford* went on to hold that testimonial statements by declarants who do not appear at trial may not be admitted unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant.[12]

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

When *Crawford* Issues Arise

The confrontation clause applies both to in-court testimony against the accused and to out-of-court statements offered at trial for the same purpose.[13] A confrontation clause issue arises with respect to in-court testimony when, for example, the trial judge restricts defense cross-examination of a witness for the state. The new *Crawford* rule focuses on the second category of evidence, out-of-court statements. *Crawford* issues arise whenever the state seeks to introduce hearsay statements of a witness who is not subject to cross-examination at trial. For example, *Crawford* issues arise when the state seeks to admit:

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

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5. U.S. Const. amend. VI.
6. Melendez-Diaz v. Massachusetts, 557 U.S. ___, slip op. at 3 (June 25, 2009).
7. 448 U.S. 56 (1980).
8. *Crawford*, 541 U.S. at 40 (describing the *Roberts* test).
9. *Id*.
10. *Id*. at 61.
11. *Id*.
12. For a more detailed discussion and analysis of *Crawford*, see Confrontation One Year Later, *supra* note 2.
13. *Crawford*, 547 U.S. at 50–51.

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

Framework for Analysis

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

Application to Defendant's Own Statements or Evidence

Because the confrontation clause confers a right to confront witnesses against the accused, the defendant's own statements do not implicate the clause or the new *Crawford* rule.[14] Similarly, the confrontation clause has no applicability to evidence presented by the defendant.[15]

Relationship to Hearsay Rules

Under the old *Roberts* test, evidence that fell within a firmly rooted hearsay exception was deemed sufficiently reliable for confrontation clause purposes.[16] In this way, under the old test, confrontation clause analysis collapsed into hearsay analysis. *Crawford* rejected this approach, creating a separate standard for admission under the confrontation clause.[17] Notwithstanding contrary statements in some unpublished post-*Crawford* North Carolina cases,[18] *Crawford* made it clear that constitutional confrontation standards cannot be determined by reference to state evidence rules.[19]

At the same time, *Crawford* did not affect the hearsay rules, and these rules remain in place for both testimonial and nontestimonial evidence. Thus, after *Crawford*, the state has two hurdles to leap before testimonial hearsay statements by nontestifying witnesses may be admitted at trial: (1) the new *Crawford* rule and (2) the evidence rules. For nontestimonial evidence, the

14. State v. Richardson, ___ N.C. App. ___, 673 S.E.2d 883 (2009) (unpublished) ("*Crawford* is not applicable if the statement is that of the defendant"); *see also* Confrontation One Year Later, *supra* note 2, at 28 & n.156.

15. Giles v. California, 128 S. Ct. 2678, 2692 n.7 (2008) (confrontation clause limits the evidence that the state may introduce but does not limit the evidence that a defendant may introduce).

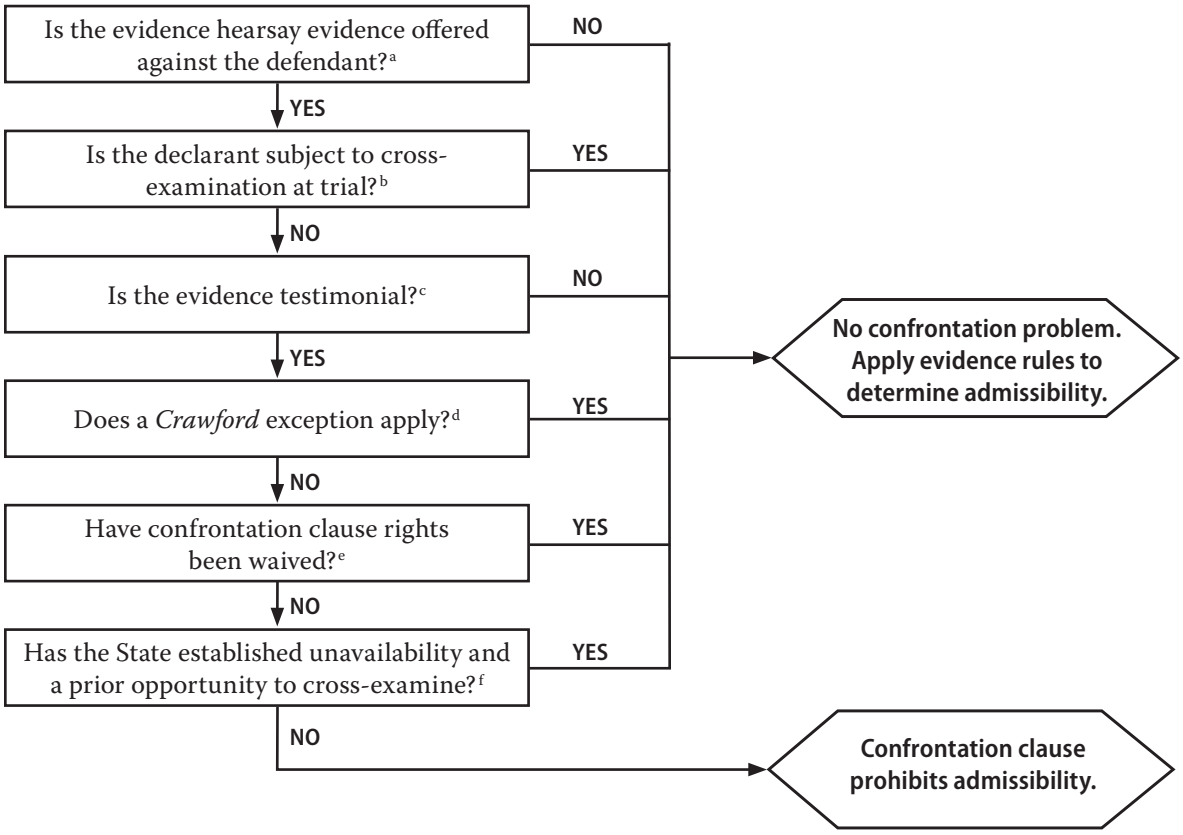
16. Crawford v. Washington, 541 U.S. 36, 40 (2004).

17. *See id.* at 50–51 (rejecting the view that confrontation clause analysis depends on the law of evidence).

18 *See, e.g.*, State v. Umanzor, ___ N.C. App. ___, 682 S.E.2d 248 (2009) (unpublished) (because the hearsay statement at issue fell within a firmly rooted hearsay exception, the confrontation clause was not violated).

19. *Crawford*, 541 U.S. at 61 (the Framers did not intend to leave the Sixth Amendment protection "to the vagaries of the rules of evidence").

Figure 1. *Crawford* flowchart



a. *See* the sections of this bulletin entitled "Application to Defendant's Own Statements or Evidence" and "Relationship to Hearsay Rules."
b. *See* the section of this bulletin entitled "Subject to Cross-Examination at Trial."
c. *See* the section of this bulletin entitled "Meaning of 'Testimonial'."
d. *See* the section of this bulletin entitled "Exceptions to the *Crawford* Rule."
e. *See* the section of this bulletin entitled "Waiver."
f. *See* the section of this bulletin entitled "Unavailability" and "Prior Opportunity to Cross-Examine."

confrontation clause is no bar to admission, and the state need only satisfy the evidence rules.[20] Although there was some confusion on the latter point after *Crawford*, the United States Supreme Court's decision in *Davis v. Washington*[21] made it clear that nontestimonial hearsay is not subject to the confrontation clause.[22] Thus, any pre-*Davis* North Carolina cases applying the old *Roberts* confrontation clause test to nontestimonial hearsay are no longer good law on that issue.[23]

Finally, *Crawford* comes into play only when hearsay statements—out-of-court statements offered for their truth—are proffered. Thus, if the statements are not offered for their truth, they

20. *Id*. at 68; Davis v. Washington, 547 U.S. 813, 821 (2006).
21. 547 U.S. 813 (2006).
22. *Id*. at 821.
23. *See*, e.g., State v. Lawson, 173 N.C. App. 270 (2005) (applying *Roberts* to nontestimonial hearsay).

are not hearsay and *Crawford* is not implicated. Although it is not technically an exception, this issue is discussed in the "Exceptions to the *Crawford* Rule" section below.

Subject to Cross-Examination at Trial

Crawford does not apply when the declarant is subject to cross-examination at trial.[24] Normally, a witness is subject to cross-examination when he or she is placed on the stand, put under oath, and responds willingly to questions. In *Melendez-Diaz v. Massachusetts*,[25] the United States Supreme Court foreclosed any argument that a witness is subject to cross-examination when the prosecution produces the witness in court but does not call that person to the stand.[26]

Memory Loss

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

Privilege

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

Maryland v. Craig Procedures

In *Maryland v. Craig*,[29] the United States Supreme Court upheld, in the face of a confrontation clause challenge, a Maryland statute that allowed a child witness to testify through a one-way, closed-circuit television. In upholding the statute, the *Craig* Court required that certain findings be made before such a procedure can be employed. Most courts that have addressed the issue after *Crawford* have upheld *Craig* procedures.[30] This issue is still open, however.[31]

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24. *Crawford*, 541 U.S. at 59 n.9 ("when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use if his prior testimonial statements"); State v. Burgess, 181 N.C. App. 27 (2007) (no confrontation violation when the victims testified at trial); State v. Harris, 189 N.C. App. 49 (2008) (same); State v. Lewis, 172 N.C. App. 97 (2005) (same); *see also* Confrontation One Year Later, *supra* note 2, at 28 & n.157; State v. Hardy, 186 N.C. App. 132 (2007) (unpublished) (same); State v. Harrell, 177 N.C. App. 565 (2006) (unpublished) (same); State v. Ford, 176 N.C. App. 768 (2006) (unpublished) (same); State v. Painter, 173 N.C. App. 448 (2005) (unpublished) (same).

25. 129 S. Ct. 2527 (June 25, 2009).

26. *Id*., slip op. at 19 ("the Confrontation Clause imposes a burden on the prosecution to present its witness's, not on the defendant to bring those witnesses into court"); *see also* D.G. v. Louisiana, ___ S. Ct. ___ (No. 09-6208) (Mar. 1, 2010) (vacating and remanding in light of *Melendez-Diaz*, a state court decision that found no confrontation violation when the declarant was present in court but not called to the stand by the state).

27. *See* Confrontation One Year Later, *supra* note 2, at 28–29 & n.159.

28. *See id*. at 28 & n.158.

29. 497 U.S. 836 (1990).

30. *See* Confrontation One Year Later, *supra* note 2, at 30; Emerging Issues, *supra* note 3, at 27.

31. For further discussion, see *Evidence Issues, supra* note 3, at 32–33.

Meaning of "Testimonial"

The new *Crawford* rule, by its terms, applies only to testimonial evidence. In addition to classifying as testimonial the particular evidence at issue (a suspect's statements during police interrogation), the Court suggested that the term had broader application (see the "Police Interrogation of Suspects, Victims, and Witnesses" subsection below). Specifically, the Court clarified that the confrontation clause applies to those who "bear testimony" against the accused.[32] "Testimony," it continued, is "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact."[33] Foreshadowing its later ruling in *Davis*, the Court suggested that an accuser who makes a formal statement to government officers bears testimony within the meaning of the confrontation clause.[34] However, the Court expressly declined to comprehensively define the key term, "testimonial."[35] The meaning of that term is explored throughout the remainder of this section, focusing on guidance provided by the Court in *Crawford* and later cases and on North Carolina appellate decisions.

Prior Trial, Preliminary Hearing, and Grand Jury Testimony

Crawford stated: "[w]hatever else the term [testimonial] covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial."[36] It is thus clear that this type of evidence is testimonial.

Plea Allocutions

Crawford classified plea allocutions as testimonial evidence.[37]

Deposition Testimony

Davis suggests that deposition testimony is testimonial.[38]

Police Interrogation of Suspects, Victims, and Witnesses

As discussed in greater detail in Confrontation One Year Later, *supra* note 2, *Crawford* held that recorded statements made by a suspect to the police during a custodial interrogation and after *Miranda* warnings had been given qualified "under any conceivable definition" of the term interrogation.[39] The Court noted that when classifying police interrogations as testimonial[40] it used the term "interrogation" in its "colloquial, rather than any technical, legal sense."[41] Since *Crawford*, several North Carolina courts have held that suspect statements made during police interrogation are testimonial.[42]

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32. Crawford v. Washington, 541 U.S. 36, 51 (2004).
33. *Id.* (quotation omitted).
34. *Id.*; *see* Davis v. Washington, 547 U.S. 813 (2006) (holding, in part, that a victim's statements to responding officers were testimonial).
35. *Crawford*, 541 U.S. at 68.
36. *Id.*
37. *Id.* at 64.
38. *Davis*, 547 U.S. at 825 & n.3.
39. *Crawford*, 541 U.S. at 53 n.4.
40. *Id.* at 68 ("[w]hatever else the term [testimonial] covers, it applies . . . to police interrogations").
41. *Id.* at 53 n.4.
42. State v. Garcia, 174 N.C. App. 498 (2005) (co-defendant's written confession); State v. Morton, 166 N.C. App. 477 (2004) (suspect's statements during a police interview); State v. Pullen, 163 N.C. App. 696 (2004) (confession of co-defendant).

Davis extended the *Crawford* rule from police questioning of suspects to police questioning of victims. Specifically, *Davis* dealt with two sets of statements: first, a domestic violence victim's statements during a 911 call; second, a domestic violence victim's statements to first-responding police officers. *Davis* also refined the *Crawford* analysis as it applies to police interrogation. 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.[43]

Applying that test to the statements at issue, the Court held that the first victim's statements to a 911 operator were nontestimonial but that the second victim's statements to the first-responding officers were testimonial.[44]

The *Davis* Two-Pronged Test for Police Interrogation

Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency.

Statements are testimonial when the circumstances objectively indicate that there is no such ongoing emergency and that the primary purpose of the interrogation is to establish or prove past facts potentially relevant to later criminal prosecution.

The United States Supreme Court's recent grant of a petition for a writ of certiorari in *Michigan v. Bryant*[45] suggests that the Court will have more to say on this issue. The particular question presented in *Bryant* is as follows:

> Should certiorari be granted to settle the conflict of authority as to whether preliminary inquiries of a wounded citizen concerning the perpetrator and circumstances of the shooting are nontestimonial because "made under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency," that emergency including not only aid to a wounded victim, but also the prompt identification and apprehension of an apparently violent and dangerous individual?

43. *Davis*, 547 U.S. at 822.
44. A detailed discussion of the Court's analysis in *Davis* is presented in Emerging Issues, *supra* note 3.
45. ___ S. Ct. ___ (No. 09-150) (Mar. 1, 2010).

North Carolina courts have had several occasions to apply the *Davis* test to victims' statements to the police.[46] Pre-*Davis* cases applying some other analysis to determine the testimonial nature of a victim's statements to the police are no longer good law.

For confrontation clause purposes, there seems to be no reason to treat police questioning of witnesses any differently from police questioning of suspects and victims.[47]

Ongoing Emergency

Determining whether there is an ongoing emergency is central to the *Davis* inquiry, and the case law is still evolving in this area. The following factors may support the conclusion that an emergency is 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 has not been 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.
- The declarant is speaking about the events as they are occurring.

The following factors may support the conclusion that an emergency has ended or did not exist:

- The perpetrator has fled and is unlikely to return.
- The perpetrator is in law enforcement custody.

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46. *See* State v. Lewis, 361 N.C. 541 (2007) (holding, on remand by the United States Supreme Court for reconsideration in light of *Davis*, that a victim's statements in response to on-the-scene questioning by a first-responding patrol officer as well as her later statement at the hospital to an investigating detective were testimonial); State v. Calhoun, 189 N.C. App. 166 (2008) (applying *Davis* and holding that a victim's statements identifying the shooter to a homeowner while an officer was present were nontestimonial; even if the statements had been made to the officer, they would have been nontestimonial because the primary purpose of the questioning was to deal with an ongoing emergency; a homeowner and the responding officer found the victim inside the homeowner's residence; while the officer was present, the homeowner asked the victim who had shot him; establishing the identity of an assailant so that officers might know whether they would be encountering a violent felon was relevant to resolving an emergency); *see also* Emerging Issues, *supra* note 3, at 19–20 (collecting post-*Davis* cases from around the country involving the testimonial nature of victims' statements to the police); State v. Ramirez, ___ N.C. App. ___, 688 S.E.2d 551 (2009) (unpublished) (applying *Davis* and holding that a domestic violence victim's statement to a responding officer was testimonial; the victim, though injured, was not facing an immediate threat; the officer tried to learn about past events; the interaction, which occurred in a yard, was sufficiently formal); State v. Craig, 188 N.C. App. 166 (2008) (unpublished) (applying *Davis* and holding that the victim's statements to officers responding to emergency calls were nontestimonial; although the defendant was not present, the officers could not assess the risk to the victim or themselves without questioning; questioning never went beyond an initial informal interview to establish the facts surrounding the call and to determine if there was a risk of harm).

47. *See* State v. Baldwin, 183 N.C. App. 156 (2007) (unpublished) (witnesses' statements to police were testimonial).

- No physical violence is occurring.
- The location is not disorderly.
- 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.
- The relevant event is complete.

Primary Purpose of Police Interrogation

Davis requires the decision maker to determine the primary purpose of the interrogation. It is not clear how the statements are to be categorized if the primary purpose of the interrogation was something other than meeting an ongoing emergency or establishing past facts, or if there was a dual, evenly weighted purpose for the interrogation.[48]

Volunteered Statements

Both *Crawford* and *Davis* involved interrogations by the police or their agents; the later case of *Melendez-Diaz v. Massachusetts*,[49] discussed below, did not. Noting this distinction, the *Melendez-Diaz* Court rejected it as significant to the *Crawford* analysis, reiterating what it said in *Davis*: "[t]he Framers were no more willing to exempt from cross-examination volunteered testimony or answers to open-ended questions than they were to exempt answers to detailed interrogation."[50] This language calls into doubt earlier North Carolina decisions in which the courts held that the testimonial nature of the statements at issue turned on whether or not they were volunteered to the police.[51]

911 Calls

In *Davis*, the Court assumed but did not decide that the 911 call operator was an agent of the police. It went on to treat the acts of the operator as acts of the police.[52] Thus, when the 911 operator is an agent of the police, the 911 call should be analyzed as if it was a police interrogation. At least two post-*Davis* North Carolina appellate cases have dealt with 911 calls, and both held the statements to be nontestimonial.[53]

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48. *See* Emerging Issues, *supra* note 3, at 6.

49. 557 U.S. ___, 129 S. Ct. 2527 (June 25, 2009).

50. *Melendez-Diaz*, slip op. at 10–11 (quoting *Davis*, 547 U.S. at 822–23 n.1).

51. *See, e.g.*, State v. Hall, 177 N.C. App. 463 (2006).

52. *Davis*, 547 U.S. at 823 n.2.

53. State v. Hewson, 182 N.C. App. 196 (2007) (victim's 911 call was nontestimonial; victim stated that her husband was shooting her; victim was clearly asking for assistance, and the questioning was not done to establish a past fact); State v. Coleman, ___N.C. App.___, 671 S.E.2d 597 (2008) (unpublished) (911 call was nontestimonial; although the robbery ended about an hour earlier, the call was delayed because the victim had to escape from restraints; victim identified the perpetrators, said they had threatened to kill him and had a gun and that he was scared and needed help; victim was asking for assistance, not responding to questions aimed at establishing a past fact); *see also* Emerging Issues, *supra* note 3, at 20–22 (collecting post-*Davis* 911 call cases from around the country).

Other Statements to Police Agents

Davis made clear that statements to police agents (in that case, a 911 operator) are to be analyzed as if they were made during police interrogation.[54] However, the Court gave no guidance as to when a person should be deemed to be a police agent. Some factors that might suggest that an actor was a police agent include the following:

- The police directed the victim to the interviewer or requested or arranged for the interview.
- The interview was forensic.
- A law enforcement officer was present during the interview.
- A law enforcement officer observed the interview from another room.
- A law enforcement officer videotaped the interview.
- The interviewer consulted with a prosecution investigator before or during the interview.
- The interviewer consulted with a law enforcement officer before or during the interview.
- The interviewer asked questions at the request of a law enforcement officer.
- The purpose of the interview was to further a criminal investigation.
- The interview lacked a non–law enforcement purpose.
- Law enforcement was provided with a videotape of the interview after it concluded.

Statements to Informants

Statements made unwittingly to government informants are nontestimonial.[55]

Statements in Furtherance of a Conspiracy

Statements in furtherance of a conspiracy are nontestimonial.[56]

Casual or Offhand Remarks

Crawford indicated that "offhand, overheard remark[s]" and "casual remark[s] to an acquaintance" bear little relation to the types of evidence that the confrontation clause was designed to protect and thus are nontestimonial.[57] A casual or offhand remark would include, for example, a victim's statement to a friend: "I'll call you later after I go to the movies with Defendant."

Statements to Family, Friends, and Similar Persons

As noted above, *Crawford* classified a casual remark to an acquaintance as nontestimonial. Since *Crawford*, courts have had to grapple with classifying as testimonial or nontestimonial statements made to acquaintances, family, and friends that are decidedly not casual remarks.[58] An example of such a statement is one made by a domestic violence victim to friends and neighbors about the defendant's abuse and intimidation. It is not surprising, in light of conflicting language in the Supreme Court's opinions, that some uncertainty exists as to how to classify this category

54. *Davis*, 547 U.S. at 823 n.2.

55. *Id*. at 825.

56. Crawford v. Washington, 541 U.S. 36, 56 (2004); *see also* Giles v. California, 128 S. Ct. 2678, 2691 n.6 (2008).

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

58. *See* Confrontation One Year Later, *supra* note 2, at 19 (collecting cases); Emerging Issues, *supra* note 3, at 22–23 (same).

of statements.[59] North Carolina courts both before and after *Davis* have, without exception, treated statements made to private persons as nontestimonial.[60]

Statements to Medical Personnel

The United States Supreme Court has indicated that "statements to physicians in the course of receiving treatment" are nontestimonial.[61] However, if the medical personnel are acting as police agents, then the statements would be analyzed as if they occurred during police interrogations.[62]

Statements to Social Workers

The testimonial nature of statements by child victims to social workers is a hotly litigated area of confrontation clause analysis. For a detailed discussion of this issue, see *Evidence Issues*, *supra* note 3, at 15–21 (discussing and annotating many cases dealing with the testimonial nature of statements by child victims to social workers).

Forensic Reports

In *Melendez-Diaz v. Massachusetts*,[63] the United States Supreme Court held that a forensic laboratory report identifying a substance as a controlled substance was testimonial. *Melendez-Diaz* was a drug case. At issue was the admissibility of three "certificates of analysis" showing the results of the forensic analysis performed on the seized substances. The certificates reported the weight of the items and stated that the substance contained cocaine. The certificates were sworn

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59. *Compare Davis*, 547 U.S. at 825 (citing *Dutton v. Evans*, 400 U.S. 74 (1970), a case involving statements from one prisoner to another, as involving nontestimonial statements), *and Giles*, 128 S. Ct. at 2692–93 (suggesting that "[s]tatements to friends and neighbors about abuse and intimidation" would be nontestimonial), *with Davis*, 547 U.S. at 828 (noting that the defendant offered *King v. Brasier*, 1 Leach 199, 168 Eng. Rep. 202 (1779), as an example of statements by a "witness" in support of his argument that the victim's statements during the 911 call were testimonial; *Brasier* involved statements of a young rape victim to her mother immediately upon coming home; the *Davis* Court suggested that the case might have been helpful to the defendant had it involved the girl's scream for aid as she was being chased; the Court noted that "by the time the victim got home, her story was an account of past events.").

60. Cases decided after *Davis* include: State v. Calhoun, 189 N.C. App. 166 (2008) (victim's statement to homeowner identifying the shooter was a nontestimonial statement to a "private citizen" even though a responding officer was present when the statement was made); State v. Williams, 185 N.C. App. 318 (2007) (applying the *Davis* test and holding that the victim's statement to a friend made during a private conversation before the crime occurred was nontestimonial); *see also* State v. McCoy, 185 N.C. App. 160 (2007) (unpublished) (victim's statements to her mother after being assaulted by the defendant were nontestimonial); State v. Hawkins, 183 N.C. App. 300 (2007) (unpublished) (victim's statements to family members were nontestimonial).

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

61. *Giles*, 128 S. Ct. at 2693.

62. *See* the "Other Statements to Police Agents" subsection above; *see also Evidence Issues, supra* note 3, at 22–26 (discussing and annotating many cases dealing with the testimonial nature of statements by child victims to medical personnel).

63. 557 U.S. ___, 129 S. Ct. 2527 (June 25, 2009).

to by state analysts before a notary public. Over the defendant's objection, the certificates were admitted as "prima facie evidence of the composition, quality, and the net weight of the narcotic . . . analyzed." In a 5–to–4 decision, the Court held that the certificates were testimonial. Writing for the majority, Justice Antonin Scalia found the case to be a "straightforward application of . . . *Crawford*." He noted that *Crawford* itself categorized affidavits in the core class of testimonial statements covered by the confrontation clause and concluded that "[t]here is little doubt that the documents at issue . . . fall within [this core class]." The Court noted that although the documents were called "certificates," they were clearly affidavits in that they contained declarations of fact written down and sworn to by the declarants. As such they were "incontrovertibly" solemn declarations or affirmations made for the purpose of establishing or proving some fact. The fact in question, the Court explained, was that the substance seized was cocaine—the precise testimony that the analysts would be expected to provide if called at trial. As such, the certificates were functionally equivalent to live, in-court testimony. Moreover, the Court noted, "not only were the affidavits made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial," but also their sole purpose was to provide evidence as to the composition, quality, and weight of the substances at issue.[64]

*Pre-*Melendez-Diaz *North Carolina Cases*

Before *Melendez-Diaz*, North Carolina appellate courts had decided a number of cases dealing with the testimonial nature of laboratory reports and related documents, with most resolving favorably to the state, at least as compared to the later *Melendez-Diaz* decision.[65] In light of *Melendez-Diaz*, these cases are no longer good law.

The "Basis of the Expert's Opinion" Work-Around

As discussed in greater detail below, North Carolina courts repeatedly have held—before and after *Melendez-Diaz*—that the confrontation clause is not violated when a forensic report is admitted not for the truth of the matter asserted but as a basis of a testifying expert's opinion (see "Basis of Expert's Opinion Post-*Melendez-Diaz*" subsection below).

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64. For a more detailed discussion of the case, see *Melendez-Diaz* & Forensic Lab Reports, *supra* note 3.

65. *See* State v. Forte, 360 N.C. 427 (2006) (SBI special agent's report identifying fluids collected from the victim was nontestimonial; relying, in part on the fact that the reports contained chain of custody information); State v. Cao, 175 N.C. App. 434 (2006) (laboratory report identifying the substance as cocaine and notes of a laboratory technician are nontestimonial when the testing is mechanical and the information constitutes objective facts not involving opinions or conclusions drawn by the analyst; the court concluded that the report's statement regarding weight likely would be an objective fact obtained through mechanical means but that the record was insufficient to determine whether the procedures used to identify the substance as cocaine were mechanical); State v. Melton, 175 N.C. App. 733 (2006) (record was insufficient to determine whether testing done on the defendant to ascertain whether he had genital herpes was mechanical); State v. Heinricy, 183 N.C. App. 585 (2007) (affidavit by a chemical analyst containing the defendant's blood-alcohol level was nontestimonial); State v. Hinchman, 192 N.C. App. 657 (2008) (chemical analyst's affidavit was nontestimonial when it was limited to an objective analysis of the evidence and routine chain of custody information).

The "Notice and Demand" Work-Around

The North Carolina General Assembly responded to *Melendez-Diaz* by amending existing and adopting new notice and demand statutes (see the "Notice and Demand Statutes" subsection below). Briefly put, these statutes set up a mechanism for the state to obtain a defendant's waiver of his or her confrontation rights with respect to certain forensic reports.

Medical Reports and Records

Melendez-Diaz indicated that "medical reports created for treatment purposes . . . would not be testimonial under our decision today."[66] However, if the medical record was prepared not for treatment purposes but at the request of a law enforcement officer, for example, a blood draw solely to determine blood-alcohol level, an issue of police agency arises. (See "Other Statements to Police Agents" subsection above.)

Other Business and Public Records

Crawford offered business records as an example of nontestimonial evidence.[67] In *Melendez-Diaz*, the Court was careful to clarify: "Business and public records are generally admissible absent confrontation not because they qualify under an exception to the hearsay rules, but because—having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial—they are not testimonial."[68] Also, the Court has suggested that documents created to establish guilt are testimonial, whereas those unrelated to guilt or innocence are nontestimonial.[69]

Records Regarding Equipment Maintenance

Melendez-Diaz stated that "documents prepared in the regular course of equipment maintenance may well qualify as nontestimonial records."[70] This statement is in accord with many post-*Crawford* cases from around the country.[71]

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66. *Melendez-Diaz*, slip op. at 6 n.2; *see also* State v. Smith, ___ N.C. App. ___, 673 S.E.2d 168 (2009) (unpublished) (hospital reports and notes prepared for purposes of treating the patient were nontestimonial business records).

67. Crawford v. Washington, 541 U.S. 36, 56 (2004) (business records are "by their nature" not testimonial).

68. *Melendez-Diaz*, slip op. at 18; *see also Crawford*, 541 U.S. at 61 (confrontation rights cannot turn on the "vagaries" of state evidence rules).

69. *See* Davis v. Washington, 547 U.S. 813, 825 (2006) (citing *Dowdell v. United States*, 221 U.S. 325 (1911), and describing it as holding that "facts regarding [the] conduct of [a] prior trial certified to by the judge, the clerk of court, and the official reporter did not relate to the defendants' guilt or innocence and hence were not statements of 'witnesses' under the Confrontation Clause"). *Compare* Melendez-Diaz v. Massachusetts, 557 U.S. ___ (June 25, 2009) (report identifying a substance as a controlled substance in a drug case—a fact that established guilt—is testimonial), *with id.* at slip op. at 5 n.1 (maintenance records on testing equipment—which do not go to guilt—are nontestimonial).

70. *Melendez-Diaz*, slip op. at 5 n.1.

71. *See* Emerging Issues, *supra* note 3, at 17–18.

Police Reports

Melendez-Diaz suggests that when police reports are used to establish a fact at trial they are testimonial.[72]

Fingerprint Cards

In one pre-*Melendez-Diaz* case, the North Carolina Court of Appeals held, with little analysis, that a fingerprint card contained in the Automated Fingerprint Identification System (AFIS) database was a nontestimonial business record.[73] After *Melendez-Diaz*, a report of a comparison between a fingerprint taken from the crime scene and an AFIS card used to identify the perpetrator is almost certainly testimonial. However, it is not clear how *Melendez*-Diaz applies to the fingerprint card itself. Of course, if the fingerprint card is admitted not for its truth but as a basis of a testifying expert's opinion as to identity, it falls within an exception to *Crawford*. (See subsection "Offered for a Purpose Other Than the Truth of the Matter Asserted" below.)

911 Event Logs

In another pre-*Melendez-Diaz* case, the North Carolina Court of Appeals cited the now discredited *State v. Forte* case[74] and held that a 911 event log was a nontestimonial business record.[75] The log detailed the timeline of a 911 call and the law enforcement response to it.[76] To the extent that such a log is kept for administrative purposes and not to establish guilt at trial, the state may be able to argue that such logs are nontestimonial even after *Melendez-Diaz.* However, if such logs are determined to be like police reports, they probably will be held to be testimonial.[77]

Private Security Firm Records

In *State v. Hewson*,[78] again relying on *Forte*, the North Carolina Court of Appeals held that a "pass on information form" used by security guards in the victim's neighborhood was a nontestimonial business record. The forms were used by the guards to stay informed about neighborhood events. Analysis of the testimonial nature of such records after *Melendez-Diaz* likely will proceed as with 911 event logs (see previous subsection).

Detention Center Incident Reports

In a pre-*Melendez-Diaz* case, the North Carolina Supreme Court held that detention center incident reports were nontestimonial.[79] The court reasoned that the reports were created as internal documents concerning administration of the detention center, not for use in later legal proceedings. This analysis appears consistent with classifying business records "created for the

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72. *See Melendez-Diaz*, slip op. at 10 (officer's investigative report describing the crime scene is testimonial).

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

74. *See* the "Pre-*Melendez-Diaz* North Carolina Cases" subsection above discussing why *Forte* is no longer good law.

75. State v. Hewson, 182 N.C. App. 196 (2007).

76. *Id.* at 201.

77. *See Melendez-Diaz*, slip op. at 10 (officer's investigative report describing the crime scene is testimonial).

78. 182 N.C. App. 196 (2007).

79. State v. Raines, 362 N.C. 1 (2007).

administration of an entity's affairs" as nontestimonial and those created for the purpose of establishing or proving a fact at trial as testimonial.[80]

Certificates of Nonexistence of Records

Melendez-Diaz indicates that certificates of nonexistence of records are testimonial.[81] An example of a certificate of nonexistence of record (from an identity fraud case involving an allegedly fraudulent driver's license) is a certificate from a DMV employee stating that there is no record of the defendant ever having been issued a North Carolina driver's license.

Court Records

The United States Supreme Court has suggested that statements regarding a prior trial that do not relate to the defendant's guilt or innocence are nontestimonial.[82]

Chain of Custody Evidence

Melendez-Diaz indicates that chain of custody information is testimonial.[83] However, the majority took issue with the dissent's assertion that "anyone whose testimony may be relevant in establishing the chain of custody . . . must appear in person as part of the prosecution's case."[84] It noted that while the state has to establish a chain of custody, gaps go to the weight of the evidence, not its admissibility.[85] It concluded: "It is up to the prosecution to decide what steps in the chain of custody are so crucial as to require evidence; but what testimony *is* introduced must (if the defendant objects) be introduced live."[86] This language from *Melendez-Diaz* calls into question earlier North Carolina cases suggesting that chain of custody information is nontestimonial.[87]

Finally, North Carolina has several notice and demand statutes pertaining to chain of custody information. As discussed in the "Notice and Demand Statutes" subsection below, these statutes set up procedures by which the state can secure a waiver by the defendant of confrontation clause rights with regard to chain of custody evidence.

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80. *Melendez-Diaz*, slip op. at 18.

81. *Id*. at 17.

82. Davis v. Washington, 547 U.S. 813, 825 (2006) (citing *Dowdell v. United States*, 221 U.S. 325 (1911), for the proposition that facts regarding the conduct of a prior trial certified to by the judge, the clerk of court, and the official reporter did not relate to the defendant's guilt or innocence and thus were nontestimonial); *Melendez-Diaz*, slip op. at 17 n.8 (same).

83. *Melendez-Diaz*, slip op. at 5 n.1.

84. *Id.*

85. *Id*.

86. *Id*; *see also* State v. Biggs, ___ N.C. App. ___, 680 S.E.2d 901 (2009) (unpublished) (the defendant's confrontation clause rights were not violated when the state called only one of two officers who were present when the victim's blood was collected and did not call the nurse who drew the blood; to establish chain of custody, the state called a detective who testified that he was present when the sample was taken, he immediately received the sample from the other detective present and who signed for the sample, he kept the sample securely in a locker, and he transported it to the lab for analysis).

87. *See* State v. Forte, 360 N.C. 427 (2006) (SBI special agent's report identifying fluids collected from the victim was nontestimonial; relying, in part, on the fact that the reports contained chain of custody information); State v. Hinchman, 192 N.C. App. 657 (2008) (chemical analyst's affidavit was nontestimonial when it was limited to an objective analysis of the evidence and routine chain of custody information).

Exceptions to the *Crawford* Rule

Offered for a Purpose Other Than the Truth of the Matter Asserted

Crawford comes into play only when the state seeks to introduce a hearsay statement into evidence. If the statement is offered for a purpose other than the truth of the matter asserted, it is not hearsay and there is no *Crawford* issue.[88] This category of evidence is not technically an exception from the *Crawford* rule; it is more precise to say that it is not covered by the *Crawford* rule.

*Basis of Expert's Opinion Post-*Melendez-Diaz

As noted above, *Melendez-Diaz* held that forensic reports are testimonial and subject to the *Crawford* rule. Given the number of cases involving forensic reports and, in some instances, the number of analysts who prepare reports on a single piece of evidence, *Melendez-Diaz* created logistical problems for the state in terms of being able to produce laboratory analysts at trial. Two developments mitigate this problem. First, North Carolina's new and amended notice and demand statutes (discussed in the "Notice and Demand Statutes" subsection below). These statutes set up procedures by which the state can procure a defendant's waiver of confrontation clause rights as to certain forensic reports. Second, North Carolina cases have held that when a report of a nontestifying analyst is used only as the basis of a testifying expert's opinion and is not offered for the truth of the matter asserted, *Crawford* does not apply.[89] These cases are in accord with the post-*Crawford*, pre-*Melendez-Diaz* North Carolina decisions.[90] Note that for this exception to apply, the state must produce an expert who testifies to an opinion that reasonably relies on the forensic report, as opposed to simply reading the underlying report into evidence.[91]

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88. Crawford v. Washington, 541 U.S. 36, 59 (2004) ("The [Confrontation] Clause does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.").

89. State v. Mobley, ___ N.C. App. ___, 684 S.E.2d 508 (2009) (no *Crawford* violation occurred when a substitute analyst testified to her own expert opinion, formed after reviewing data and reports prepared by nontestifying expert; for a more detailed discussion of this case, see *State v. Mobley* Blog Post, *supra* note 3; State v. Hough, ___ N.C. App. ___, ___ S.E.2d ___ (Mar. 2, 2010) (following *Mobley* and holding that no *Crawford* violation occurred when reports by nontestifying analyst as to composition and weight of controlled substances were admitted as the basis of a testifying expert's opinion on those matters; the testifying expert performed the peer review of the underlying reports, and the underlying reports were offered not for their truth but as the basis of the testifying expert's opinion).

90. *See* State v. Little, 188 N.C. App. 152 (2008) (no confrontation clause violation when the state's expert testified to an opinion formed after reviewing DNA analysis performed by nontestifying colleague); State v. Thompson, 188 N.C. App. 102 (2008) (same: chemical laboratory test); State v. Pettis, 186 N.C. App. 116 (2007) (same: DNA tests); State v. Hocutt, 177 N.C. App. 341 (2006) (same: DNA tests); State v. Shelly, 176 N.C. App. 575 (2006) (same: gunshot residue tests); State v. Durham, 176 N.C. App. 239 (2006) (same: autopsy); State v. Bunn, 173 N.C. App. 729 (2005) (same: chemical analyses of drugs); State v. Bethea, 173 N.C. App. 43 (2005) (same: forensic firearms identification); State v. Watts, 172 N.C. App. 58 (2005) (same: DNA analysis); State v. Lyles, 172 N.C. App. 323 (2005) (same: analysis of drugs); State v. Delaney, 171 N.C. App. 141 (2005) (same: analyses of drugs); State v. Walker, 170 N.C. App. 632 (2005) (same: ballistics report).

91. *See* State v. Locklear, 363 N.C. 438 (2009) (a *Crawford* violation occurred when the trial court admitted opinion testimony of two nontestifying experts regarding a victim's cause of death and identity; the testimony was admitted through the chief medical examiner, an expert in forensic pathology, who appeared to have read the reports of the nontestifying experts into evidence rather than testify to an independent opinion based on facts or data reasonable relied upon by experts in the field; for a more

To Explain the Course of an Investigation

Sometimes statements of a nontestifying declarant are admitted to explain an officer's action or the course of an investigation. When this is the case, the statements are not admitted for their truth and there is no *Crawford* issue.[92]

To Explain a Listener's Reaction or Response to the Statements

If statements are introduced not for their truth but to show a listener's reaction or response, there is no confrontation issue.[93]

As Illustrative Evidence

One unpublished North Carolina case held that when evidence is admitted as illustrative evidence, it is not admitted for the truth of the matter asserted and the confrontation clause is not implicated.[94]

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detailed discussion of this case, see *State v. Locklear* Blog Post, *supra* note 3; State v. Galindo, ___ N.C. App. ___, 683 S.E.2d 785 (2009) (a *Crawford* violation occurred when the state's expert, in a drug trafficking case, gave an opinion as to the weight of the cocaine at issue based "solely" on a laboratory report by a nontestifying analyst; for a more detailed discussion of this case, see *Galindo* Blog Post, *supra* note 3; *see also* State v. Conley, ___ N.C. App. ___, ___ S.E.2d ___ (Jan. 19, 2010) (unpublished) (confrontation clause violation occurred when the state's expert in forensic glass analysis offered testimony based on testing done by a nontestifying analyst; the testifying expert's "conclusions were not formed through any sort of independent review and analysis on the part of [the testifying expert] as required under our holding in *Mobley*; rather, the record shows that [the expert] merely summarized [the nontestifying expert's] findings").

92. State v. Batchelor, ___ N.C. App. ___, ___ S.E.2d ___ (Mar. 2, 2010) (statements of a nontestifying informant to a police officer were nontestimonial; statements were offered not for their truth but rather to explain the officer's actions); State v. Hodges, ___ N.C. App. ___, 672 S.E.2d 724 (2009) (declarant's consent to search vehicle was nontestimonial because it was admitted to show why the officer believed he could and did search the vehicle); State v. Tate, 187 N.C. App. 593 (2007) (declarant's identification of "Fats" as the defendant was not offered for the truth but rather to explain subsequent actions of officers in the investigation); State v. Wiggins, 185 N.C. App. 376 (2007) (informant's statements offered not for their truth but to explain how the investigation unfolded, why the defendants were under surveillance, and why an officer followed a vehicle; noting that a limiting instruction was given); State v. Leyva, 181 N.C. App. 491 (2007) (to explain the officers' presence at a location).

93. State v. Miller, ___ N.C. App. ___, 676 S.E.2d 546 (2009) (purported statements of co-defendants and others contained in the detectives' questions posed to the defendant were not offered to prove the truth of the matters asserted but to show the effect they had on defendant and his response; the defendant originally denied all knowledge of the events but when confronted with statements from others that implicated him, the defendant, knowing about the plan to rob the victim, admitted that he was present at the scene and that he went to the victim's house with the intent of robbing him); State v. Byers, 175 N.C. App. 280 (2006) (statement offered to explain why witness ran, sought law enforcement assistance, and declined to confront defendant single-handedly).

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

For Corroboration

When evidence is admitted for purposes of corroboration, it is not admitted for the truth of the matter asserted and thus presents no *Crawford* issue.[95]

Limiting Instructions

When evidence is admitted for a limited purpose, a limiting instruction should be given.[96]

Forfeiture by Wrongdoing

The United States Supreme Court has recognized a forfeiture by wrongdoing exception to the confrontation clause that extinguishes confrontation claims on the equitable grounds that a person should not be able to benefit from his or her wrongdoing.[97] Forfeiture by wrongdoing applies when a defendant engages in a wrongful act that prevents the witness from testifying, such as threatening, killing, or bribing the witness.[98] When the doctrine applies, the defendant is deemed to have forfeited his or her confrontation clause rights. Put another way, if the defendant is responsible for the witness's absence at trial, he or she cannot complain of that absence.

Intent to Silence Required

In *Giles v. California*,[99] the United States Supreme Court held that for the doctrine of forfeiture by wrongdoing to apply, the prosecution must establish that the defendant engaged in the wrongdoing with an intent to silence the witness. It is not enough that the defendant engaged in a wrongful act, for example, killing the witness; the act must have been undertaken with an intent to make the witness unavailable for trial.

Conduct Triggering Forfeiture

Examples of conduct that likely will result in a finding of forfeiture include the defendant threatening, killing, or bribing a witness.[100] However, *Giles* suggests that the doctrine has broader reach. Addressing domestic violence, the Court stated:

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

95. State v. Walker, 170 N.C. App. 632 (2005) (report of nontestifying agent who performed ballistics analysis corroborated testimony of testifying expert); *see also* State v. Cannady, 187 N.C. App. 813 (2007) (unpublished) (following *Walker* with regard to analysis of controlled substances).

96. N.C. R. Evid. 105; *see also Wiggins*, 185 N.C. App. 376 (noting that a limiting instruction was given when evidence was admitted for a limited purpose).

97. Giles v. California, 128 S. Ct. 2678 (2008); Crawford v. Washington, 541 U.S. 36, 62 (2004); Davis v. Washington, 547 U.S. 813, 833 (2006); *see also* State v. Lewis, 361 N.C. 541, 549 (2007) (inviting application of the doctrine on retrial).

98. *Giles*, 128 S. Ct. at 2686.

99. 128 S. Ct. 2678 (2008).

100. *Id*. at 2686.

> threats of abuse, intended to dissuade the victim from resorting to outside help would be highly relevant to this inquiry, as would evidence of ongoing criminal proceedings at which the victim would have been expected to testify.[101]

Wrongdoing by Intermediaries

The *Giles* Court also suggested that forfeiture applies not only when the defendant personally engages in the wrongdoing that brings about the witness's absence but also when the defendant "uses an intermediary for the purpose of making a witness absent."[102]

Procedural Issues

Hearing. When the state argues for application of forfeiture by wrongdoing, a hearing may be required. There is some support for the argument that at a hearing, the trial judge may consider hearsay evidence, including the unavailable witness's out-of-court statements.[103]

Standard. Although the United States Supreme Court has not ruled on the issue, most courts apply a preponderance of the evidence standard to the forfeiture by wrongdoing inquiry.[104]

Dying Declarations

Although *Crawford* acknowledged cases supporting a dying declaration exception to the confrontation clause, it declined to rule on the issue.[105] However, the North Carolina Court of Appeals has since recognized such an exception to the *Crawford* rule.[106]

Waiver

Confrontation clause rights, like constitutional rights generally, may be waived.[107] To be valid, a waiver of a constitutional right must be knowing, voluntary, and intelligent.[108]

Notice and Demand Statutes

Melendez-Diaz indicated that states are free to adopt procedural rules governing the exercise of confrontation objections.[109] The Court discussed "notice and demand" statutes as one such procedure, noting that in their simplest form these statutes require the prosecution to give the defendant notice that it intends to introduce at trial a testimonial forensic report. The defendant then has a period of time in which to object to the admission of the evidence absent the analyst's

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101. *Id.* at 2693.

102. *Id.* at 2683.

103. *Davis*, 547 U.S. at 833.

104. *Cf. Giles*, 128 S. Ct. 2678 (Souter, J., concurring) (assuming that the preponderance standard governs).

105. Crawford v. Washington, 541 U.S. 36, 56 n.6 (2004); *see also Giles*, 128 S. Ct. at 2682 (noting that dying declarations were admitted at common law even though unconfronted).

106. State v. Bodden, 190 N.C. App. 505 (2008); State v. Calhoun, 189 N.C. App. 166 (2008).

107. Melendez-Diaz v. Massachusetts, 557 U.S. ___ (June 25, 2009), slip op. at 8 n.3 ("The right to confrontation may, of course, be waived.").

108. Maryland v. Shatzer, 130 S. Ct. 1213 (2010).

109. *Melendez-Diaz*, slip op. at 8 n.3.

appearance live at trial.[110] The Court went on to note that these simple notice and demand statutes are constitutional.[111]

North Carolina's Notice and Demand Statutes

During its 2009 session, the North Carolina General Assembly responded to *Melendez-Diaz* by passing legislation amending existing notice and demand statutes and enacting others.[112] The new law became effective October 1, 2009, and applies to offenses committed on or after that date. Table 1 summarizes North Carolina's notice and demand statutes as amended by the new law and described in greater detail in the subsections that follow.

Forensic analysis generally. Section 8-58.20 of the North Carolina General Statutes (hereinafter G.S.) sets out a notice and demand procedure for a laboratory report of a written forensic analysis, including one of the defendant's DNA. It provides that in any criminal proceeding a laboratory report that states the results of the analysis and is signed and sworn to by the person performing the analysis is admissible in evidence without the testimony of the analyst who prepared the report. The State must give notice of its intent to use the report no later than five business days after receiving it or thirty business days before any proceeding in which the report may be used against the defendant, whichever occurs first. The defendant then has fifteen business days to file a written objection to its use. If the defense fails to file an objection, the report is admissible without the testimony of the analyst, subject to the presiding judge ruling otherwise. If an objection is filed, the special admissibility provision in the statute does not apply.

Chain of custody for forensic analysis generally. G.S. 8-58.20(g) contains a simple notice and demand procedure for a chain of custody statement for evidence that has been subjected to forensic testing as provided in G.S. 8-58.20. Under this subsection, the State must notify the defendant at least fifteen business days before the proceeding of its intention to introduce the statement into evidence without the testimony of the preparer and must provide the defendant with a copy of the statement. The defendant is required to file a written objection at least five business days before the proceeding. Alternatively, the State may include its notice with the laboratory report, as described above. If the defense fails to file an objection, the statement may be admitted without a personal appearance by the preparer. If an objection is made, the special admissibility provision in the statute does not apply.

Chemical analyses of blood or urine. G.S. 20-139.1(c1) provides for the use of chemical analyses of blood or urine in any court without the testimony of the analyst. It applies to cases tried in both district and superior courts as well as to adjudicatory hearings in juvenile court. Under this provision, the State must notify the defendant at least fifteen business days before the proceeding of its intent to introduce the report into evidence and provide a copy of the report to the defendant. The defendant has until five business days before the proceeding to file a written objection with the court. If the defendant fails to object, then the evidence may be admitted without the testimony of the analyst. If the defense objects, the special admissibility provision in the statute does not apply. As of this writing, the North Carolina Administrative Office of the Courts (AOC) was working on a new form to implement this statute.

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110. *Id.* at 21.

111. *Id.* at 22 n.12; *see also* State v. Steele, ___ N.C. App. ___, ___ S.E.2d ___ (Jan. 5, 2010) (notice and demand statute in G.S. 90-95(g) is constitutional under *Melendez-Diaz*).

112. S.L. 2009-473 (S 252); *see* General Assembly's Response to *Melendez-Diaz*, *supra* note 3, for a detailed discussion.

Table 1. North Carolina's Notice and Demand Statutes

Statute	Relevant Evidence	Proceedings	Time for State's Notice	Time for Defendant's Objection/Demand
G.S. 8-58.20(a)–(f)	Laboratory report of a written forensic analysis	Any criminal proceeding	No later than 5 business days after receipt or 30 days before the proceeding, whichever is earlier	Within 15 business days of receiving the State's notice
G.S. 8-58.20(g)	Chain of custody statement for evidence subject to forensic analysis	Any criminal proceeding	At least 15 business days before the proceeding	At least 5 business days before the proceeding
G.S. 20-139.1(c1)	Chemical analysis of blood or urine	Cases tried in district and superior court and adjudicatory hearings in juvenile court	At least 15 business days before the proceeding	At least 5 business days before the proceeding
G.S. 20-139.1(c3)	Chain of custody statement for tested blood or urine	Cases tried in district and superior court and adjudicatory hearings in juvenile court	At least 15 business days before the proceeding	At least 5 business days before the proceeding
G.S. 20-139.1(e1)–(e2)	Chemical analyst affidavit	Hearing or trial in district court	At least 15 business days before the proceeding	At least 5 business days before the proceeding
G.S. 90-95(g)	Chemical analyses in drug cases	All proceedings in district and superior court	At least 15 business days before the proceeding	At least 5 business days before the proceeding
G.S. 90-95(g1)	Chain of custody statement in drug cases	All proceedings in district and superior court	At least 15 days before trial	At least 5 days before trial

Note: For offenses committed on or after October 1, 2009.

Chain of custody for tested blood or urine. G.S. 20-139.1(c3) creates a simple notice and demand statute for chain of custody statements for tested blood or urine. It applies in district and superior court and in adjudicatory hearings in juvenile court. The State must notify the defendant at least fifteen business days before the proceeding at which the statement will be used of its intention to introduce the statement and must provide a copy of the statement to the defendant. The defendant has until five business days before the proceeding to object. If the defendant fails to object, the statement is introduced into evidence without a personal

appearance of the preparer. If the defense objects, the special admissibility provision in the statute does not apply. As of this writing, the AOC was working on a new form to implement this statute.

Chemical analyst's affidavit in district court. G.S. 20-139.1(e1) provides for the use of a chemical analyst's affidavit in district court. Under this statute, a sworn affidavit is admissible in evidence, without further authentication and without the testimony of the analyst, with regard to, among other things, alcohol concentration or the presence of an impairing substance. G.S. 20-139.1(e2) sets out a simple notice and demand procedure for this evidence. Specifically, the State must provide notice to the defendant at least fifteen business days before the proceeding that it intends to use the affidavit and must provide the defendant with a copy of that document. The defendant must file a written objection to the use of the affidavit at least five business days before the proceeding at which it will be used. Failure to file an objection will be deemed a waiver of the right to object to the affidavit's admissibility. If an objection is timely filed, the special admissibility provision does not apply. However, the case must be continued until the analyst can be present and may not be dismissed due to the failure of the analyst to appear, unless the analyst willfully fails to appear after being ordered to do so by the court. As of this writing, the AOC was working on a new form to implement this statute.

Chemical analyses in drug cases. G.S. 90-95(g) contains a simple notice and demand procedure for the use of chemical analyses in drug cases that applies in all court proceedings. It requires the State to provide notice fifteen business days before the proceeding at which the report will be used. The defendant has until five business days before the proceeding to object. If no objection is filed, the report is admissible without the testimony of the analyst. If an objection is filed, the special admissibility provision does not apply. In *State v. Steele*,[113] the North Carolina Court of Appeals held that this notice and demand statute was constitutional under *Melendez-Diaz*.[114]

Chain of custody in drug cases. G.S. 90-95(g1) contains a notice and demand statute that applies to chain of custody of drug evidence. Although this subsection was erroneously deleted from all 2009 Lexis/Nexis statutory publications,[115] it is good law. The full text of subsection (g1) is reproduced on page 25. Put simply, it provides that in order for the statement to be introduced without the testimony of the preparer, the State must notify the defendant at least fifteen days before trial of its intention to introduce the statement and must provide a copy of it to the defendant. The defendant must file an objection at least five days before trial.

Implications of the New Statutes

As noted, notice and demand statutes set up procedures by which the State may procure the defendant's waiver of his or her confrontation clause right with regard to forensic laboratory reports, chemical analyst affidavits, and certain chain of custody evidence. If a defendant declines to waive that right—by filing a timely objection—*Crawford* and *Melendez-Diaz* apply. The gold standard prosecution response to a defense objection under the notice and demand statutes is to produce the analyst in court. In impaired driving cases where the arresting officer also is the chemical analyst, this should present no particular problems. But when the analyst is,

113. ___ N.C. App. ___, ___ S.E.2d ___ (Jan. 5, 2010).

114. *See also* State v. Garibay, 177 N.C. App. 463 (2006) (unpublished) (valid waiver was procured through G.S. 90-95(g)).

115. This includes the green annotated statute books and the "Red Book," the Lexis/Nexis compilation of North Carolina criminal statutes.

Section 90-95(g1) of the North Carolina General Statutes

(g1) Procedure for establishing chain of custody without calling unnecessary witnesses.—

(1) For the purpose of establishing the chain of physical custody or control of evidence consisting of or containing a substance tested or analyzed to determine whether it is a controlled substance, a statement signed by each successive person in the chain of custody that the person delivered it to the other person indicated on or about the date stated is prima facie evidence that the person had custody and made the delivery as stated, without the necessity of a personal appearance in court by the person signing the statement.

(2) The statement shall contain a sufficient description of the material or its container so as to distinguish it as the particular item in question and shall state that the material was delivered in essentially the same condition as received. The statement may be placed on the same document as the report provided for in subsection (g) of this section.

(3) The provisions of this subsection may be utilized by the State only if:

a. The State notifies the defendant at least 15 days before trial of its intention to introduce the statement into evidence under this subsection and provides the defendant with a copy of the statement, and

b. The defendant fails to notify the State at least five days before trial that the defendant objects to the introduction of the statement into evidence.

(4) Nothing in this subsection precludes the right of any party to call any witness or to introduce any evidence supporting or contradicting the evidence contained in the statement.

for example, with the North Carolina State Bureau of Investigation, producing the analyst may present logistical problems that the prosecution will need to address before trial. In the event that the analyst is not available, the prosecution's fallback position will be to produce the analyst who performed peer review at the time the report was prepared or some other expert who can form an independent opinion as to the relevant issue—for example, that tests revealed the substance to be cocaine—based on facts or data reasonably relied upon by experts in the field. (See the "Basis of Expert's Opinion Post-*Melendez-Diaz*" subsection above.)

Failure to Call or Subpoena Witness

The *Melendez-Diaz* Court rejected the argument that a confrontation clause objection is waived if the defendant fails to call or subpoena a witness, ruling that "the Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court."[116] Any support for a contrary conclusion in *State v. Brigman*[117] is now questionable.[118]

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116. *Melendez-Diaz*, slip op. at 19; *see also* D.G. v. Louisiana, ___ S. Ct. ___ (No. 09-6208) (Mar. 1, 2010) (vacating and remanding in light of *Melendez-Diaz*, a state court decision that found no confrontation violation when the declarant was present in court but not called to the stand by the state).

117. 171 N.C. App. 305 (2005)

118. *See* Emerging Issues, *supra* note 3, at 12 (discussing this aspect of *Brigman*).

Some viewed the Court's grant of certiorari in *Briscoe v. Virginia*[119] four days after *Melendez-Diaz* was decided as an indication that the Court might reconsider its position on this issue. The question presented in that case was as follows: If a state allows a prosecutor to introduce a certificate of a forensic laboratory analysis, without presenting the testimony of the analyst who prepared the certificate, does the state avoid violating the confrontation clause by providing that the accused has a right to call the analyst as his or her own witness? However, in January of 2010, the Court, in a two-sentence per curiam decision, vacated and remanded for "further proceedings not inconsistent with the opinion in *Melendez-Diaz*."[120] Since that per curiam decision, the court has taken other action confirming its position on this issue.[121]

Stipulation

In *State v. English*,[122] the North Carolina Court of Appeals held that a defendant had waived a confrontation clause challenge to a laboratory report identifying a substance as a controlled substance by stipulating to the admission of the report without further authentication or testimony.[123] In that case, after defense counsel stipulated to the report, the trial judge confirmed the defendant's stipulation through "extensive questioning of defendant."[124]

Unavailability

If the statement is testimonial and the witness is not subject to cross-examination at trial, *Crawford* requires that the state show unavailability and prior opportunity to cross-examine. The case law suggests that a witness is not unavailable unless the state has made a good faith effort to obtain the witness's presence at trial.[125] To make the showing, the state must put on evidence to establish the steps it has taken to procure the witness for trial.[126]

Prior Opportunity to Cross-Examine

As noted in the previous section, if the statement is testimonial and the witness is not subject to cross-examination at trial, *Crawford* requires that the state show unavailability and prior opportunity to cross-examine. If a case is being retried and the witness testified at the earlier trial, the first trial afforded the defendant a prior opportunity to cross-examine.[127] Whether a pretrial

119. 129 S. Ct. 2858 (2009).

120. Briscoe v. Virginia, 130 S. Ct. 1316 (2010).

121. *See supra* note 116 (discussing *D.G. v. Louisiana*).

122. 171 N.C. App. 277 (2005).

123. *Id*. at 283–84.

124. *Id.* at 282.

125. *See* Confrontation One Year Later, *supra* note 2, at 30 and Emerging Issues, *supra* note 3, at 27; *see also* State v. Allen, 179 N.C. App. 434 (2006) (unpublished) (state presented evidence establishing that it had made a good faith effort to obtain the presence of the witnesses).

126. *See* Confrontation One Year Later, *supra* note 2, at 30; *see also* State v. Ash, 169 N.C. App. 715 (2005) ("Without receiving evidence on or making a finding of unavailability, the trial court erred in admitting [the testimonial evidence].").

127. Confrontation One Year Later, *supra* note 2, at 30–31; *see also Allen*, 179 N.C. App. 434.

deposition constitutes a prior opportunity to cross-examine for purposes of the confrontation clause is an open issue.[128]

Retroactivity

Whenever the United States Supreme Court decides a case, its decision applies to all future cases and to those pending and not yet decided on appeal.[129] Whether the decision applies to cases that became final before the new decision was issued is a question of retroactivity.

Retroactivity of *Crawford*

The United States Supreme Court has held that *Crawford* is not retroactive under the rule of *Teague v. Lane*.[130] Later, in *Danforth v. Minnesota*,[131] the Court held that the federal standard for retroactivity does not constrain the authority of state courts to give broader effect to new rules of criminal procedure than is required under the *Teague* test. Relying on *Danforth*, some defense lawyers have argued that North Carolina judges are now free to disregard *Teague* and apply a more permissive retroactivity standard to new federal rules of criminal procedure—such as *Crawford*—in state court motion for appropriate relief proceedings. As discussed in Retroactivity Blog Post, *supra* note 3, that argument is not on solid ground in light of the North Carolina Supreme Court's decision in *State v. Zuniga*.[132]

Retroactivity of *Melendez-Diaz*

As noted above, *Melendez-Diaz* held that forensic laboratory reports are testimonial and thus subject to *Crawford.* Some have argued that *Melendez-Diaz* is not a new rule but, rather, was mandated by *Crawford*. If that is correct, *Melendez-Diaz* would apply retroactively at least back to the date *Crawford* was decided, March 8, 2004.[133] For more detail on this issue, see Retroactivity of *Melendez-Diaz*, *supra* note 3. For a discussion of the related issue of whether North Carolina might hold *Melendez-Diaz* to be retroactive in state motion for appropriate relief proceedings under *Danforth*, see Retroactivity Blog Post, *supra* note 3 (suggesting that North Carolina courts are bound by prior case law to apply the *Teague* test to retroactivity analysis in state motion for appropriate relief proceedings).

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128. For a discussion of this issue, see Confrontation One Year Later, *supra* note 2, at 31 and Emerging Issues, *supra* note 3, at 9–10.

129. *See generally* Jessica Smith, *Retroactivity of Judge-Made Rules*, Admin. of Justice Bulletin No. 2004/10 (2004), available at http://shopping.netsuite.com/s.nl?c=433425&sc=7&category=107&search=retroactivity); *see also* State v. Morgan, 359 N.C. 131 (2004) (applying *Crawford* to a case that was pending on appeal when *Crawford* was decided); State v. Champion, 171 N.C. App. 716 (2005) (same).

130. 489 U.S. 288 (1989). *See* Whorton v. Bockting, 549 U.S. 406 (2007) (*Crawford* was a new procedural rule but not a watershed rule of criminal procedure).

131. 552 U.S. 264 (2008).

132. 336 N.C. 508 (1994) (adopting the *Teague* test for determining whether new federal rules apply retroactively in state court motion for appropriate relief proceedings).

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

Proceedings to Which *Crawford* Applies

Criminal Trials

By its terms, the Sixth Amendment applies to "criminal prosecutions." It is thus clear that the confrontation protection applies in criminal trials.[134]

Sentencing

Although *Crawford* applies at the punishment phase of a capital trial,[135] it does not apply in a noncapital sentencing proceeding.[136]

Termination of Parental Rights

Crawford does not apply in proceedings to terminate parental rights.[137]

Juvenile Delinquency Proceedings

In an unpublished opinion, the North Carolina Court of Appeals applied *Crawford* in a juvenile adjudication of delinquency.[138] More recently the United States Supreme Court took action indicating that *Crawford* applies in these proceedings.[139]

Harmless Error Analysis

If a *Crawford* error occurs at trial, the error is not reversible if the state can show that it was harmless beyond a reasonable doubt.[140] This rule applies on appeal as well as in postconviction proceedings.[141]

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134. *See, e.g.*, Crawford v. Washington, 541 U.S. 36 (2004).

135. State v. Bell, 359 N.C. 1 (2004) (applying *Crawford* to such a proceeding).

136. State v. Sings, 182 N.C. App. 162 (2007); *see also* State v. McPhail, 184 N.C. App. 379 (2007) (unpublished) (following *Sings*).

137. *In Re* D.R., 172 N.C. App. 300 (2005); *see also In Re* G.D.H., 186 N.C. App. 304 (2007) (unpublished) (following *In Re* D.R.).

138. *In Re* A.L., 175 N.C. App. 419 (2006) (unpublished).

139. *See* D.G. v. Louisiana, ___ S. Ct. ___ (No. 09-6208) (Mar. 1, 2010) (reversing and remanding a juvenile delinquency case for consideration in light of *Melendez-Diaz*).

140. *Compare* State v. Lewis, 361 N.C. 541 (2007) (error not harmless), *with* State v. Morgan, 359 N.C. 131 (2004) (error was harmless in light of overwhelming evidence of guilt); *see generally* Section 15A-1443 of the North Carolina General Statutes (hereinafter G.S.) (harmless error standard for constitutional errors).

141. *See* G.S. 15A-1420(c)(6) (incorporating into motion for appropriate relief procedure the harmless error standard in G.S. 15A-1443).