John Rubin
919-962-2498
rubin@sog.unc.edu
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Child Evidence Issues

I. TESTIMONY BY CHILDREN

A. Competency

A person is disqualified as a witness if the court determines that the person is incapable of (1) expressing himself or herself or (2) understanding the duty of a witness to tell the truth. There is no fixed age below which a person is considered too young to testify. *See* Evidence Rule 601(b); *see also* State v. Gordon, 316 N.C. 497 (1986) (stating that Rule 601(b) is consistent with prior North Carolina case law, under which witness is competent if he or she has sufficient capacity to understand and relate facts that would assist fact finder and understands obligation of oath or affirmation).

The standard of incompetency under Rule 601 is not the same as unavailability under North Carolina's hearsay rules. *See In re* Faircloth, 137 N.C. App. 311 (2000) (incompetency is not same as unavailability under Evidence Rule 804; finding of unavailability does not preclude defendant from calling child as witness).

The court must make an adequate inquiry, generally involving personal observation of the witness, to determine the competency of a witness. *See* State v. Fearing, 315 N.C. 167 (1985) (court improperly accepted stipulation of parties that child was incompetent; trial judge should have made independent finding after personally examining or observing child on voir dire); State v. Pugh, 138 N.C. App. 60 (2000) (court disqualified four-year-old from testifying without making adequate inquiry; court's voir dire questions were insufficient to determine competency of witness); State v. Spaugh, 321 N.C. 550 (1998) (court states that primary concern in *Fearing* was that trial court exercise its independent discretion in deciding competency after observation of child and not particular procedure used by trial court in conducting its observation; trial court's observation of witness while she testified was adequate without separate voir dire); State v. Roberts, 18 N.C. App. 388 (1973) (testimony of parents, teachers, and others might prove helpful to trial judge in determining competency of child witness but was not required); *see also In re* M.G.T.-B, 177 N.C. App. 771 (2006) (DSS and GAL raised child's competency to testify in support of motion to quash respondent-mother's subpoena for child and, following telephone conversation between trial court and child's therapist about child's ability to testify, trial court found child incompetent and quashed subpoena; appellate court declined to address whether trial court applied proper standard of competency, finding that respondent made no offer of proof regarding what child's testimony would have been and how it would have been inconsistent with other testimony; defendant therefore failed to preserve for appellate review the exclusion of the child's testimony).

B. Examination of Child Witnesses

1. Closed Circuit Television

   Maryland v. Craig, 497 U.S. 836 (1990) (upholding constitutionality of procedure upon proper findings; Justice Scalia, dissenting, argued that the procedure violated the defendant's right to face-to-face confrontation under the Sixth Amendment); *In re* Stradford, 119 N.C. App. 654 (1995) (finding that judge has authority to order testimony by closed circuit television upon proper findings); *compare* Coy v. Iowa, 487 U.S. 1012 (1988) (placement of screen obscuring defendant's view of child sexual assault victims during testimony violated defendant's confrontation clause rights).

2. Excluding Bystanders

   State v. Burney, 302 N.C. 529 (1981) (permissible for court to exclude everyone from courtroom except court personnel and those engaged in trial of case); State v. Jenkins, 115 N.C. App. 520 (1994) (court erred in closing courtroom without making proper findings); State v. Smith, 180 N.C. App.86 (2006) (court acted within discretion in closing courtroom in statutory sex offense case; although trial court did not hold hearing or make findings on issue, defendant never objected to closing of courtroom).

3. Allowing Presence of Parent

   State v. Stanley, 310 N.C. 353 (1984) (permissible for court to order sequestration of witnesses other than parent or guardian of child even though parent or guardian may later testify); State v. Dorton, 172 N.C. App. 759 (2005) (permissible to sequester all of state's witnesses except child's mother); G.S. 15A-1225 (stating court's authority); *see also* State v. Reeves, 337 N.C. 700 (1994) (permissible to allow child to sit on stepmother's lap while testifying).

4. Leading Questions

   State v. Greene, 285 N.C. 482 (1974) (leading questions are permitted on direct examination if witness has difficulty in understanding questions because of immaturity, age, infirmity, or ignorance or if inquiry is into subject of delicate nature such as sexual matters).

5. Anatomical Dolls

   State v. Fletcher, 322 N.C. 415 (1988) (permissible to use anatomically-correct dolls to illustrate child's testimony).

6. Use of Own Terms

   State v. Watkins, 318 N.C. 498 (1986) (seven-year-old child's testimony that

defendant stuck his finger in her "coodie cat" and her indication of her vaginal area through use of anatomically correct dolls constituted sufficient evidence of penetration to support conviction of first-degree sexual offense).

7. Questioning by Court

State v. Ramey, 318 N.C. 457 (1986) (not improper for court to ask questions of eight-year-old witness where questions were intended to clarify witness's answers on delicate subject and did not express opinion by judge).

8. Recesses

State v. Higginbottom, 312 N.C. 760 (1985) (permissible for court to order recess during child's direct testimony when child became upset).

8. Use of Prior Statements

If used for the following purposes, prior statements are not considered substantive evidence.

To Refresh Recollection

A witness may refer to a writing or object during or before his or her testimony to refresh recollection. If the witness does so during his or her testimony, the adverse party has a right to have the writing or object produced; if this occurs before the witness testifies, production is in the judge's discretion. *See* Evidence Rule 612.

To Impeach

A party may impeach his or her own witness with prior statements if impeachment is not a mere subterfuge for using the prior statements. *See* Evidence Rule 607; State v. Hunt, 324 N.C. 343 (1989) (state may not call witness that it knows will not reiterate prior statement for purpose of impeaching witness with that statement); State v. Riccard, 142 N.C. App. 298 (2001) (to introduce extrinsic evidence of inconsistent statement as opposed to merely examining witness about statement, impeachment must concern matter that is not collateral).

To Corroborate

If a person testifies, a party may offer prior consistent statements to corroborate the person's testimony. *See* 1 KENNETH S. BROUN, BRANDIS & BROUN ON NORTH CAROLINA EVIDENCE § 165, at 527–34 (6th ed. 2004) ("prior 'consistent statements' are admissible only when they are in fact consistent with the witness's trial testimony"); State v. Yearwood, 147 N.C. App. 662 (2001) (videotape of therapy session with child admissible to corroborate child's in-court testimony).

II. OUT-OF-COURT STATEMENTS BY CHILDREN

A. Confrontation Clause

1. In a criminal case, a "testimonial" statement obtained before trial is admissible under the Confrontation Clause only if the declarant is subject to cross-examination at trial or, if unavailable at trial, was subject to cross-examination before trial. *See* Crawford v. Washington, 541 U.S. 36 (2004). Below are some of the key points about the *Crawford* opinion. A flow chart regarding the admissibility of statements under *Crawford* is at the end of this paper.

2. If the declarant is subject to cross-examination at trial, admission of the declarant's out-of-court statements do not violate the Confrontation Clause, whether they are considered testimonial or nontestimonial. 541 U.S. at 59 n.9. If, however, the declarant successfully invokes a privilege against testifying or the judge unduly interferes with cross-examination, then the declarant would not be subject to cross-examination and the Confrontation Clause would not be satisfied. The out-of-court statements would still need to satisfy North Carolina's rules of evidence.

3. If the statement's are "testimonial," they are inadmissible unless they meet one of the exceptions identified in *Crawford,* discussed under 4. below. The court gave the following as possible definitions of testimonial statements: *ex parte* in-court testimony or its functional equivalent, extrajudicial materials contained in formalized testimonial materials, and statements made under circumstances that would lead an objective witness reasonably to believe that the statement would be available for use at a later trial. The Court gave the following examples of statements that are testimonial: prior testimony at a preliminary hearing, before a grand jury, or at a former trial; affidavits and depositions; police interrogations (used in a colloquial rather than technical, legal sense); and plea allocutions. 541 U.S. at 51–52, 68; *see also* Davis v. Washington, 547 U.S. 813 (2006) (considers circumstances in which questioning by police and agents of police results in testimonial statements).

4. A testimonial statement does not satisfy the Confrontation Clause merely because it falls within a firmly-rooted exception to the hearsay rule within the meaning of *Ohio v. Roberts,* 448 U.S. 56 (1980), which the *Crawford* court overruled with respect to testimonial statements. 541 U.S. at 60–61. If testimonial, a statement is admissible only if it satisfies certain exceptions identified in *Crawford*—namely, the declarant is unavailable for trial and was subject to prior cross-examination (541 U.S. at 53), the defendant forfeited the right of confrontation by wrongdoing (541 U.S. at 62), or the statement is not offered for its truth (541 U.S. at 59 n.9). The *Crawford* court also stated without deciding the issue that testimonial dying declarations might be admissible but found that such statements are *sui generis* and did not adopt any other hearsay exceptions as grounds for admitting testimonial statements. 541 U.S. at 56 n.6. The Court found it questionable that "testimonial" evidence would be admissible merely because it satisfied the typical exception for excited utterances. 541 U.S. at 58 n.8.

5. The Court gave the following as examples of nontestimonial statements—an off-hand, overhead remark; a casual remark to an acquaintance; business records; and statements in furtherance of a conspiracy. 541 U.S. at 51, 55.

6. In *Crawford*, the Court did not resolve whether the Confrontation Clause continues to apply to non-testimonial statements. 541 U.S. at 68. The North Carolina Court of Appeals thereafter held that non-testimonial statements remain subject to the test for admissibility under *Ohio v. Roberts*, 448 U.S. 56 (1980). *See* State v. Blackstock, 165 N.C. App. 50 (2004). Under *Roberts*, the Confrontation Clause barred admission of an unavailable witness's statement if the statement does not bear "adequate indicia of reliability." To meet that test, the evidence must either fall within a "firmly rooted hearsay exception" or bear "particularized guarantees of trustworthiness." The U.S. Supreme Court has since indicated that non-testimonial statements are not subject to the Confrontation Clause. *Davis*, 547 U.S. at 821. The admissibility of such evidence may still be governed by the Due Process Clause (as well as a state's own hearsay and other evidence rules).

7. Some factors in determining whether a statement is testimonial or nontestimonial may include the formality of the questioning and statement given, the questioner's affiliation with the government, the purpose of production of the statement, the declarant's awareness of the purpose of production, and the nature of the information provided. *See also Davis*, 547 U.S. at 822 (establishing test for determining whether questioning by police and their agents results in testimonial or non-testimonial statements).

8. The *Crawford* ruling does not apply to the defendant's use of "testimonial" evidence. By its terms, the Confrontation Clause only guarantees to the defendant the right to confront the witnesses against him or her.

9. The Confrontation Clause applies to criminal prosecutions only. *See In re* D.R., 172 N.C. App. 300 (2005) (admission of statements by child to DSS workers and others did not violate Sixth Amendment right to confrontation, which does not apply to a proceeding to terminate parental rights, a civil action). Due Process also affords a person the right to confront the witnesses for the state, but the extent of this Due Process right is not clear. *See In re* Pamela A.G., 134 P.3d 746 (N.M. 2006) (Confrontation Clause, as interpreted in *Crawford*, does not apply in abuse and neglect case, but Due Process requires that " parents be given a reasonable opportunity to confront and cross-examine a witness, including a child witness"; no violation where parents failed to show how admission of hearsay statement of child and lack of cross-examination of child increased risk of erroneous deprivation of their relationship with child); Commonwealth v. Given, 808 N.E.2d 788 (Mass. 2004) (in proceeding to commit respondent as sexually dangerous person, trial court admitted police report containing allegations by victim against respondent regarding prior offense; in 4 to 3 decision, court holds that test for admissibility of hearsay in civil commitment proceedings is whether evidence is reliable under Due Process clause; majority recognizes that in determining reliability it followed the U.S. Supreme Court's Confrontation Clause analysis in *Ohio v. Roberts*, but majority holds that *Crawford* decision has no bearing on case because Confrontation Clause doesn't apply to civil commitment proceedings; dissent argues that even though

Crawford applies to criminal and not civil cases, its reasoning regarding the reliability of out-of-court statements should apply); *In re* A.S.W., 834 P.2d 801 (Alaska 1992) (recognizing Due Process right to confront witnesses in civil child protection proceeding and finding that hearsay rules adequately protected parent's right; case decided before *Crawford*); Smallwood v. State Dept. of Human Resources, 716 So.2d 684 (Ala. Civ. App. 1998) (recognizing Due Process right to confront witnesses in civil proceeding to revoke daycare license on grounds of child abuse and finding hearsay admissible where judge inquired into whether hearsay had particularized guarantees of trustworthiness; case decided before *Crawford*).

10. There have been several post-*Crawford* cases in North Carolina and other jurisdictions, involving such evidence as statements to officers, statements to non-officers, reports and tests, and expert opinion. For a discussion of these cases and a more in-depth analysis of *Crawford* developments, *see* Jessica Smith, *Crawford v. Washington: Confrontation One Year Later* (Apr. 2005), at http://www.iog.unc.edu/pubs/electronicversions/pdfs/crawford.pdf, and Jessica Smith, *Emerging Issues in Confrontation Litigation: A Supplement to Crawford v. Washington*: Confrontation One Year Later (Mar. 2007), at http://www.sog.unc.edu/pubs/electronicversions/pdfs/crawfordsuppl.pdf.

B. Rationale for Hearsay Rule

"We are interested in the declarant's credibility . . . when the out-of-court statement is being used to prove the truth of the assertion. In that circumstance, the evidence's value depends on the *credibility of the out-of-court declarant.*" ROBERT P. MOSTELLER ET AL., NORTH CAROLINA EVIDENTIARY FOUNDATIONS (hereinafter EVIDENTIARY FOUNDATIONS) § 11-1, at 11-3 (emphasis added). Cross-examination of the declarant therefore may be necessary to expose possible errors of perception, memory, or sincerity.

"On the other hand, if the proponent does not offer the out-of-court declaration for its truth, the opponent does not need to cross-examine the declarant. If the declaration is logically relevant on some other theory, the evidence's value usually depends on the *credibility of the in-court witness.*" *Id.* (emphasis added). Cross-examination of the in-court witness is therefore usually sufficient to establish whether he or she heard and remembered the statement correctly and is telling the truth about the statement.

C. Definition of Hearsay

1. Assertive Statement

   Yes: He hit me.
   He touched me.

   No: Ouch (exclamation).
   Don't (imperative). *See* EVIDENTIARY FOUNDATIONS, *supra*, § 11-2(A)(1), at 11-5 to 11-7 (imperative statement is not hearsay unless proponent's purpose

is to elicit assertion embodied in statement); *see also* State v. Smith, 152 N.C. App. 29 (2002) (statements "Shut up" and "Hush" admissible as present sense impression under R. 803(1)).

2. Made Outside Current Proceeding

3. Offered for Truth of Assertion

   Yes: He hit me.
   I'm afraid of him.

   No: Mother testifies that she told father that child broke several things shortly before father allegedly struck child. Statement offered not to show child had actually broken items but rather to show father's state of mind. *See* 2 KENNETH S. BROUN, BRANDIS & BROUN ON NORTH CAROLINA EVIDENCE § 195, at 101–04 (6th ed. 2004) (declarations of one person may be admitted to prove state of mind of another person who heard them).

D. Hearsay Exceptions: Unavailability Irrelevant

1. Rationale

   The hearsay exceptions in Rule 803 are recognized because they deal with statements that carry an inference of reliability or sincerity; therefore, the availability or unavailability of the witness is not as critical.

2. Rule 803(2): Excited Utterance

   Problems

   In the following examples, are the statements admissible under the exception for excited utterances?

   a. Grandma seeks to testify that her granddaughter told her three days after an alleged rape what her father had done. The testimony is that the child said: "I have something to tell you. I want you to come in the room. I want to tell you what daddy did to me." The child then told the grandmother about the father's actions.

   b. In the above case, a social worker seeks to testify that she interviewed the child the day following the child's conversation with the grandmother and the child described the rape that the child had told the grandmother about and other sexual acts by the father.

   Factors to consider include: lapse of time between event and statement, location of statement (at or away from scene of event), whether statement was spontaneously uttered or in response to inquiry, appearance of declarant, nature of event and

statement, and declarant's conduct after event.

Illustrative Cases

State v. Fullwood, 323 N.C. 371 (1988) ("to fall within this hearsay exception there must be (1) a sufficiently startling experience suspending reflective thought and (2) a spontaneous reaction, not one resulting from reflection or fabrication"; statement made one hour after shooting inadmissible as excited utterance), *vacated on other grounds,* 494 U.S. 1022 (1990).

State v. Smith, 315 N.C. 76 (1985) (in prosecution for rape of child, although four-year-old and five-year-old victims' out-of-court statements were made two to three days after rape, statements were admissible because of the special characteristics of young children that prolong stress, fear, and spontaneity); *In re* J.S.B., ___ N.C. App. ___, 644 S.E.2d 580 (2007) (in termination of parental rights case, statement of child to police officer constituted excited utterance in circumstances of case).

3. Rule 803(3): State of Mind

Problems

In the following examples, are the statements admissible under the exception for statements of then existing mental, emotional, or physical condition?

a. Mom seeks to testify that her child told her that she was afraid of Daddy because Daddy had touched her.

b. Mom seeks to testify that her child told her that Daddy touched her about a month ago and that the child looked afraid.

Illustrative Cases

State v. Hipps, 348 N.C. 377 (1998) ("[e]vidence tending to show the state of mind of a victim is admissible as long as the declarant's state of mind is a relevant issue and the potential for unfair prejudice in admitting the evidence does not substantially outweigh its probative value"; court finds that murder victim's statement that she feared defendant was relevant to show status of victim's relationship with defendant).

Compare State v. Lesane, 137 N.C. App. 234 (April 4, 2000) ("[O]ur courts have created a sort of trichotomy in applying Rule 803(3). Statements that recite only emotions are admissible under the exception; statements that recite emotions and the facts underlying those emotions are likewise admissible; but statements that merely recite facts do not fall within the exception.") *with* State v. Jones, 137 N.C. App. 221 (April 4, 2000) ("our courts have repeatedly found admissible under Rule 803(3) a declarant's statements of fact that indicate her state of mind, even if they do not explicitly contain an accompanying statement of the declarant's state of mind").

4. 803(4): Medical Diagnosis or Treatment

Problems

In the following examples, are the statements admissible under the exception for statements for purposes of medical diagnosis or treatment?

a. Approximately two weeks after a report of sexual abuse and a medical exam, child was interviewed by clinical psychologist. The psychologist's purpose was to gather information for the examining physician but this purpose was not explained to the child. Psychologist seeks to testify about statements made by child about sexual abuse.

b. Approximately two weeks after the incident, child told her mother that defendant had rubbed her private parts and that it had hurt. Mother seeks to testify to child's statements.

c. Child exited the bathroom pulling at her panties and told her mother that the defendant had rubbed her private parts. Mother took the child to the emergency room, and doctor seeks to testify to statements made by child.

Factors to consider include: explanation of purpose to child, person to whom child was speaking, setting of interview (child-friendly vs. exam room), nature of questions (leading or non-leading), and time of interview (whether in need of medical attention).

Illustrative Cases

State v. Hinnant, 351 N.C. 277 (Feb. 4, 2000) (proponent of evidence must establish (1) that the declarant made the statements understanding that they would lead to medical diagnosis or treatment and (2) that the statements were reasonably pertinent to diagnosis or treatment; corroborating physical evidence no longer a viable consideration in determining admissibility).

In re Clapp, 137 N.C. App. 14 (Mar. 21, 2000) (child's statements to doctor at emergency room were for purposes of medical diagnosis and treatment; court also states, without explanation, that medical exception allowed doctor to testify to child's statements to mother prior to emergency room visit).

State v. Waddell, 351 N.C. 413 (Apr. 7, 2000) (on facts similar to *Hinnant*, court finds child's statement to psychologist inadmissible under medical exception to hearsay rule).

State v. McGraw, 137 N.C. App. 726 (May 2, 2000) (statements made to person other than medical doctor may constitute statements for purposes of medical diagnosis or treatment, but there was nothing to indicate that child made statements to mother with

understanding that they would lead to medical diagnosis or treatment, the first requirement of *Hinnant*; however, although inadmissible under medical exception, statements were admissible for corroborative purposes because child testified).

State v. Bates, 140 N.C. App. 743 (Dec. 5, 2000) (on facts similar to *Hinnant*, court finds child's statements to psychologist inadmissible under medical exception to hearsay rule; statements could not be treated as corroborative evidence even though child testified because trial court did not treat testimony as corroborative evidence and did not limit its use).

State v. Watts, 141 N.C. App. 104 (Dec. 19, 2000) (child's statements to nurse, chief medical examiner, and chief mental health examiner three months after initial medical examination were inadmissible under medical exception; child did not show any awareness of why she was there).

State v. Stancil, 146 N.C. App. 234 (Sept. 18, 2001) (child's statements to physician, nurse, and social worker at hospital were admissible under medical exception; father took child to hospital within hours of incident, interviews were for purposes of diagnosis, and child testified that she went to hospital because defendant had "hurt her privacy"), *aff'd on other grounds*, 355 N.C. 266 (2002).

State v. Isenberg, 148 N.C. App. 29 (Dec. 28, 2001) (child's statements to pediatric nurse and physician who conducted physical examination of child were admissible under medical treatment exception, even though one of potential purposes of examination was further prosecution of defendant; case decided before *Crawford*, discussed in II.A., above); *compare* State v. Stafford, 317 N.C. 568 (1986) (witness's statements to pediatrician concerning symptoms she had experienced earlier were not made for purposes of diagnosis or treatment but rather for purpose of preparing and presenting State's "rape trauma syndrome" theory at rape trial; statements did not qualify under medical diagnosis and treatment exception); State v. Reeder, 105 N.C. App. 343 (1992) (exam was for purpose of evaluating whether child was sexually abused, not for purposes of diagnosis or treatment, so child's statements to doctor were inadmissible under this exception).

In re T.C.S., 148 N.C. App. 297 (Jan. 15, 2002) (doctor's testimony about child's statements to social worker, which social worker had relayed to doctor, was inadmissible, even though statements were used by doctor for purposes of diagnosis).

State v. Thornton, 158 N.C. App. 645 (July 1, 2003) (statements by child to social worker who was conducting examination with pediatrician were admissible under this exception in circumstances presented).

State v. Gattis, 166 N.C. App. 1 (Sept. 7, 2004) (defendant's statement to nurse that defendant's wound was result of accidental discharge of gun during fight was not reasonably pertinent to medical diagnosis or treatment, the second *Hinnant* requirement; statement regarding gun going off accidentally was relevant only to

fault, and according to commentary to Rule 803(4) such statements ordinarily do not qualify for admission).

State v. Lewis, 172 N.C. App. 97 (August 2, 2005) (videotapes of interview satisfied *Hinnant* and were admissible as substantive evidence; interviews were in medical center by registered nurse, children signed form stating they understood that nurse would share information with doctor, and nurse testified that she explained to children that she would share information with doctor, who would perform medical examination).

5. 803(6): Records of Regularly Conducted Activity

Business records are admissible "unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness." Evidence Rule 803(6); *see also* State v. Galloway, 145 N.C. App. 555, 566 (2001) ("fact that a record qualifies as a business record does not necessarily make everything contained in the record sufficiently reliable to justify its use as evidence at trial").

The employee who enters the information in the record, or the witness who presents the record in court, is not required to have personal knowledge of the facts or events recorded, but the record nevertheless must be based on information provided by a person with personal knowledge of the fact or event. Evidence Rule 803(6) commentary; Donavant v. Hudspeth, 318 N.C. 1 (1986) (though evidence of practice is sufficient to establish prima facie that record was prepared from personal knowledge, opponent presented evidence that information in report was not based on personal knowledge; record not admissible as business record).

The person who provides the information also must have a duty to report accurately to the business. Information provided by third parties who do not have such a duty are generally inadmissible under the business records exception. To be admissible, such statements must qualify under another hearsay exception. *See* 2 KENNETH S. BROUN, BRANDIS & BROUN ON NORTH CAROLINA EVIDENCE § 225, at 202 n.476 (6th ed. 2004) ("[t]he underlying theory of the exception [is] that the business environment encourages the making of accurate records by those with a duty to the enterprise"); *see also* State v. Reeder, 105 N.C. App. 343 (1992) (statement in medical report by child identifying defendant as perpetrator was not admissible under business records exception); *but see* State v. Scott, 343 N.C. 313 (1996) (intake form of home for abused women and children, filled out by resident after she arrived, was properly admitted even though resident had no business duty in filling out form).

Exclusion is not automatically required of records prepared in anticipation of litigation. If, however, the court finds the record untrustworthy, the court has discretion to exclude it. *See* EVIDENTIARY FOUNDATIONS, *supra*, § 11-4(B), at 11-37 to 11-38 (court may exclude such records if suspect or unreliable); Palmer v. Hoffman, 318 U.S. 109 (1943) (accident report in which company recorded employees' version of accident for use at trial was not sufficiently reliable to be

admitted under business records exception); State v. Wood, 306 N.C. 510 (1982) (factor in evaluating reliability of business record is whether it was prepared for litigation).

Ordinarily, statements in business records are factual in nature, but Rule 803(6) relaxes this requirement by allowing appropriate "opinions . . . or diagnoses." *See Galloway*, 145 N.C. App. at 565–66 (statement by doctor in hospital record that patient had psychiatric problems was not admissible because sources of information on which doctor based opinion were not reliable and doctor was not qualified to render psychiatric opinion); *see also* 2 JOHN W. STRONG, MCCORMICK ON EVIDENCE § 293, at 321–22 (6th ed. 2006) (although federal version of Rule 803(6), like North Carolina's version, includes opinions and diagnoses, such opinions may still be inadmissible if they lack trustworthiness or their probative value outweighs their prejudicial effect under Rule 403; courts also may be reluctant to enter verdict based on opinion in business record without allowing opponent opportunity to cross-examine person who gave opinion).

6. 803(8): Public Records and Reports

The requirements for admission of a public record are similar to those for business records, although not identical. *See In re* J.S.B., ___ N.C. App. ___, 644 S.E.2d 580 (2007) (trial court allowed admission of autopsy report under business records exception; appellate court upheld admission under public records exception). One reason for having separate exceptions for business and government records is to prevent the use of the business records exception to admit certain police records in criminal cases. *See* Evidence Rule 803(8) & official commentary (rule provides that police investigative reports are not admissible under public records exception against defendant in criminal case; commentary notes that records that are not admissible under public records exception are not admissible as business records); State v. Harper, 96 N.C. App. 36 (1989) (investigating officer's summaries of third parties' declarations to him as to where to obtain drugs constituted inadmissible hearsay in criminal case; matters observed by officer and contained in his report were excluded from hearsay exception for public records and reports); *but cf.* State v. Wise, 178 N.C. App. 154 (2006) (court finds that notice of pending registration and sex offender registration worksheet were admissible as records of regularly conducted activity under Rule 803(6)).

E. Hearsay Exceptions: Unavailability Required

1. Rationale

The hearsay exceptions in Rule 804 depend to a greater degree on a showing of necessity; therefore, the proponent must show that the declarant is unavailable.

2. Unavailability

Rule 804(a) lists the five grounds for a finding of unavailability. A possible ground of unavailability in cases involving child witnesses is in Rule 804(a)(4), which provides that unavailability includes situations in which the declarant is unable to testify because of then-existing physical or mental illness or infirmity. Before finding a child witness unavailable under this rule, the court may have to determine whether various accommodations (discussed in part I., above) would enable the child to testify.

For examples of cases under Rule 804(a)(4) (witness is unavailable because of then-existing mental illness or infirmity), *see* State v. Carter, 338 N.C. 569 (1994) (trial judge did not err in finding witness unavailable where witness refused to testify and witness's former psychiatrist testified that compelling her to testify would exacerbate her depression, for which she had previously been hospitalized, and could lead to suicide); State v. Chandler, 324 N.C. 172 (1989) (four-year-old child victim unavailable to testify when she was so overcome with fear that she was unable to respond to prosecutor's questions).

For cases under Rule 804(a)(2) (witness is unavailable if he or she persists in not testifying despite court order to do so), *see* State v. Linton, 145 N.C. App. 639 (2001) (for child to be considered unavailable as witness under R. 804(a)(2), child must refuse to testify after court orders child to do so).

For cases under Rule 804(a)(3) (witness is unavailable if he or she testifies to lack of memory of subject matter of statement), *see* State v. Miller, 330 N.C. 56 (1991) (as long as witness remembers general subject matter, lack of memory as to details does not make hearsay admissible).

3. 804(b)(5): Residual Hearsay

Although North Carolina's evidence rules contain a residual hearsay exception that does not require unavailability (Rule 803(24)), evidence is more likely to be admissible under this exception if the witness is shown to be unavailable. *See* 2 KENNETH S. BROUN, BRANDIS & BROUN ON NORTH CAROLINA EVIDENCE § 241, at 248 (6th ed. 2004); State v. Stutts, 105 N.C. App. 557 (1992) (in determining trustworthiness, court must consider unavailability of witness as defined in Rule 804(a)).

To be admitted under Rule 804(b)(5), the court must find that six conditions are satisfied. *See* State v. Smith, 315 N.C. 76 (1985) (notice; hearsay not covered elsewhere; trustworthy; material; more probative than other evidence reasonably obtainable; interests of justice); State v. Carrigan, 161 N.C. App. 256 (2003) (proponent did not give sufficient notice of intent to offer evidence under residual hearsay exception).

In considering whether a statement has sufficient guarantees of trustworthiness,

courts consider various factors. *See* Idaho v. Wright, 497 U.S. 805 (1990) (noting that courts have considered spontaneity of statements, consistent repetition, mental state of declarant, use of terminology unexpected of child of similar age, and lack of motive to fabricate); State v. Isenberg, 148 N.C. App. 29 (2001) (court should consider among other factors: (1) assurances of declarant's personal knowledge of underlying events, (2) declarant's motivation to speak truth or otherwise, (3) whether the declarant has ever recanted statement, and (4) practical availability of the declarant at trial for meaningful cross-examination).[1]

For examples of the residual hearsay rule in cases involving child witnesses, *see* State v. Wagoner, 131 N.C. App. 285 (1998) (child's incompetence to testify satisfied unavailability requirement but did not render statements to social worker too untrustworthy to be admitted under this exception; case decided before *Hinnant*); State v. Stutts, 105 N.C. App. 557 (1992) (court found child unavailable as witness on ground that child could not tell truth from fantasy; child's statements inadmissible under residual hearsay exception); State v. Richard Brigman, 178 N.C. App. 78 (2006) (court found statements by children to foster parents to be sufficiently trustworthy to be admitted under residual hearsay exception; in prior related case of State v. Kimberly Brigman, 171 N.C. App. 305 (2005), court found that the statements did not violate the Confrontation Clause because the age of the child raised the question as to whether he was even capable of reasonably believing that his statements would be used at trial).

III. EXPERT TESTIMONY ABOUT CHILDREN[2]

A. Foundational Requirements

In *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440 (2004), the North Carolina Supreme Court rejected the test for determining the scientific reliability of expert testimony in federal cases, adopted in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). Reaffirming the test set forth in *State v. Goode*, 341 N.C. 513 (1995), our Supreme Court stated that trial courts must conduct a three-step inquiry to determine the admissibility of expert testimony, considering: (1) whether the expert's proffered method of proof is sufficiently reliable as an area for expert testimony; (2) whether the witness is qualified as an expert in that area of testimony; and (3) whether the expert's testimony is relevant. *Accord* State v. Speight, 166 N.C. App. 106 (2004) (applying *Howerton* to uphold admission of expert testimony by accident reconstruction expert and expert on blood testing analysis), *aff'd on other grounds*, 359 N.C. 602 (2005), *vacated on other grounds*, ___ U.S. ___, 126 S. Ct. 2977 (2006). The general thrust of *Howerton* is that

1. If the hearsay is "testimonial" within the meaning of *Crawford v. Washington*, 541 U.S. 36 (2004), it is not sufficient under the Confrontation Clause for the evidence to bear particularized guarantees of trustworthiness; the evidence must satisfy other conditions to be admissible. *See* II.A., above.

2. For a discussion of an indigent person's right to seek funds for expert assistance, *see* 1 NORTH CAROLINA DEFENDER MANUAL, Ch. 5 (May 1998), at www.ncids.org; *In re* D.R., 172 N.C. App. 300 (2005) (discussing right in termination of parental rights case).

trial courts should not be as exacting in assessing the scientific validity or reliability of an expert's methodology, but the extent to which the *Howerton* and *Daubert* tests differ is not entirely clear. The steps set forth in *Howerton,* as well as other potential requirements for admissibility, are reviewed below in the sequence in which they commonly arise.

1. Qualifications of Witness

   The expert must be qualified to give an opinion on the particular subject. *See Howerton* (discussing evidence that satisfies this requirement); Evidence Rule 702 (setting forth general test); State v. Ware, ___ N.C. App. ___, 656 S.E.2d 662 (2008) (licensed clinical social worker was sufficiently qualified as an expert to give opinion that it was common for children who have been abused by a parental figure to "have a dilemma" about reporting the abuse).

2. Reliability of Expert's Method of Proof

   Howerton states that in determining reliability, trial courts may, among other things, look to the expert's testimony relating to reliability, take judicial notice, or use a combination of the two. The trial court should also look to precedent for guidance. When precedent justifies recognition of a scientific theory or technique, such as DNA analysis, the trial court should favor admissibility assuming the other requirements for admissibility are satisfied. When precedent shows that theories or techniques are unreliable, they are ordinarily inadmissible. *See, e.g.*, State v. Helms, 348 N.C. 578 (1998) (HGN test inadmissible in impaired driving prosecution); State v. Berry, 143 N.C. App. 187 (2001) (barefoot impression analysis inadmissible); State v. Spencer, 119 N.C. App. 662 (1995) (penile plethysmograph results inadmissible). When there is no precedent or the theory or technique is not established, the trial court should consider the following indices of reliability: the expert's use of established techniques, the expert's professional background in the field, the use of visual aids before the jury so that the jury is not asked to sacrifice its independence by accepting the scientific hypothesis on faith, independent research conducted by the expert, and any other pertinent information.

   Howerton cautions that in making its reliability determination, the court need not find that the methodology is conclusively reliable or indisputably valid. Once the trial court makes a preliminary determination of reliability, lingering questions or disputes about the quality of the expert's conclusions go to the weight of the testimony, not its admissibility.

3. Relevance of Testimony

   Evidence Rule 401 states the general rule of relevance. The court in *Howerton* stated that in judging relevancy, expert testimony is properly admissible when the testimony would assist the jury in understanding the evidence or determining a fact in issue. *See also* Evidence Rule 702 (expert testimony must assist trier of fact). A judge typically would find that expert testimony would assist the trier of fact when the subject is

beyond a layperson's understanding or the expert can draw a substantially more reliable conclusion than a layperson. *See generally* EVIDENTIARY FOUNDATIONS, *supra*, § 10-3(B), at 10–14.

4. Other Possible Requirements

Adequacy of Factual Basis

See Evidence Rule 703 (facts or data on which expert bases opinion may be those perceived or made known to him or her at or before the hearing; if of a type reasonably relied on by experts in field, facts or data need not be admissible in evidence); *see also* State v. McCall, 162 N.C. App. 64 (2004) (expert opinion was based on facts and data of type reasonably relied on by experts and was admissible although expert had not examined child).

Degree of Certainty of Opinion

North Carolina does not require that an expert state his or her opinion with complete certainty but only to the degree of certainty that he or she believes. If uncertain, however, the opinion may be insufficient to support a finding. *See* 2 KENNETH S. BROUN, BRANDIS & BROUN ON NORTH CAROLINA EVIDENCE § 189, at 85–86 (6th ed. 2004); State v. Robinson, 310 N.C. 530 (1984) (expert's testimony that insertion of male sexual organ "could" have caused vaginal condition insufficient to support rape charge). Courts have excluded an expert's testimony altogether if too speculative or equivocal. *See* State v. Clark, 324 N.C. 146, 160 (1989).

Permissible Topics and Purposes

The courts have found that certain topics are off limits for expert testimony—for example, the credibility of a witness, identity of the perpetrator, or conclusions about abuse in the absence of evidence of physical injuries. The admissibility of particular types of opinions relating to sexual abuse are discussed further below under Categories of Expert Testimony. *See also* State v. Smith, 315 N.C. 76 (1986) (expert may testify to ultimate issue in case but not in form of legal conclusion; court finds that it was permissible for expert to testify that injuries were caused by male sex organ or object of similar size or shape but that it would have been improper for expert to testify that victim had been raped, a legal conclusion). These rulings could be construed as establishing additional limits on expert testimony or they could be construed as applying the three-step inquiry for admissibility of expert testimony described above (although not all of the cases explicitly use that approach in finding the testimony impermissible).

Although admissible, some opinions may be admissible for a limited purpose only—for example, to corroborate or explain—and may be inadmissible as substantive evidence and insufficient to support a finding. *See* discussion of categories, below.

Rule 403 Balancing

Howerton noted that the trial court has the inherent authority to exclude evidence, including expert testimony, under Evidence Rule 403 (otherwise admissible evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence").

B. Categories of Expert Testimony

1. Credibility

An expert may not testify that a child is believable or is telling the truth. *See* State v. Aguallo, 318 N.C. 590 (1986) (improper under Evidence Rules 405 and 608 for expert to testify that child was believable; new trial ordered), *on appeal after remand,* 322 N.C. 818 (1988) (not impermissible comment on child's truthfulness for expert to testify that physical injuries were consistent with what child had told expert); State v. Heath, 316 N.C. 337 (1986) (improper for prosecutor to ask expert whether child had mental condition that would cause her to make up story about sexual assault and for expert to testify that child had no record of lying); *compare* State v. Baymon, 336 N.C. 748 (1994) (expert witness may not testify that child is believable or is not lying, but otherwise inadmissible evidence may be admissible in some circumstances if the door has been opened by opposing party's cross-examination of witness; because defendant's cross-examination of doctor suggested that child had been coached by others, doctor could testify that he did not perceive that child had been coached or told what to say); State v. Thaggard, 168 N.C. App. 263 (2005) (noting *Baymon* but finding that state improperly elicited expert's opinion on credibility on direct examination); State v. Richard Brigman, 178 N.C. App. 78 (2006) (expert improperly testified about child's credibility when she testified about child's disclosure that defendant had "put his hand in his bottom and it hurt," as follows: "where a child not only says what happened but also can tell you how he felt about it is pretty significant because it just verifies the reliability of that disclosure").

An expert may testify generally, however, that children do not lie about sexual abuse. *See* State v. Oliver, 85 N.C. App. 1 (1987).

2. Identity of Perpetrator

An expert may not testify that a particular person is the perpetrator or is guilty. *See* State v. Figured, 116 N.C. App. 1 (1994) (improper under Evidence Rules 405, 608, and 702); *accord* State v. Bush, 164 N.C. App. 254 (2004); State v. Richard Brigman, 178 N.C. App. 78 (2006).

An expert may testify, however, that a child said that a particular person was the perpetrator if the statement is admissible under the hearsay exception for statements for purposes of medical diagnosis or treatment. *See Figured* and cases cited therein;

State v. Lewis, 172 N.C. App. 97 (2005); *but see* Robert P. Mosteller, *The Maturation and Disintegration of the Hearsay Exception for Statements for Medical Examination in Child Sexual Abuse Cases*, 65 LAW & CONTEMPORARY PROBLEMS 47, 94–95 (2002) (questioning admissibility of statement by child identifying perpetrator when child is not shown to have perceived statement as contributing to treatment); *In re* Mashburn, 162 N.C. App. 386 (2004) (in case against mother for neglect of child, trial court allowed, under medical diagnosis and treatment exception, statement by child to doctor that mother did not believe child about sexual abuse; dissent finds that statement was not reasonably pertinent to medical diagnosis and treatment and should not have been admitted); *see also* State v. Gattis, 166 N.C. App. 1 (2004) (defendant's statement to nurse that defendant's wound was result of accidental discharge of gun during fight was not reasonably pertinent to medical diagnosis or treatment, the second *Hinnant* requirement; statement regarding gun going off accidentally was relevant only to fault, and as stated in commentary to Rule 803(4) such statements ordinarily do not qualify under that exception).

3. Cause of Physical Injuries

A qualified expert may give an opinion about the cause of injuries, such as "injuries were caused by insertion of blunt object," "injuries were intentionally inflicted, not accidental or self-inflicted," or possibly even "injuries were caused by sexual abuse." *See* State v. Kennedy, 320 N.C. 20 (1987) (medical expert testified that injuries were not self-inflicted or accidental); State v. Smith, 315 N.C. 76 (1986) (medical expert testified that injuries were caused by male sex organ or object of similar size and shape); State v. Fuller, 166 N.C. App. 548 (2004) (relying on *Howerton*, court found that SANE (sexual assault nurse examiner) nurse was properly qualified as expert to offer opinion about her examination of child at hospital emergency room; court also found that SANE nurse and doctor were properly permitted to testify that physical findings concerning victim were consistent with vaginal penetration and someone kissing the child's breast); State v. Dick, 126 N.C. App. 312 (1997) (medical expert testified that injuries were result of sexual mistreatment).

An expert also may testify that a child suffers from battered child syndrome, which is a diagnosis that a pattern of physical injuries was the result of physical abuse and not accidental. *See* Robert P. Mosteller, *Syndromes and Politics in Criminal Trials and Evidence Law*, 46 DUKE L. J. 461 (1996) (distinguishing battered child syndrome from other types of syndrome testimony not involving physical injuries); *see also* State v. Stokes, 150 N.C. App. 211 (2002) (upholding admission of expert testimony about battered child syndrome), *rev'd on other grounds*, 357 N.C. 220 (2003).

4. Testimony not Dependent on Physical Injuries

Syndromes

With a proper foundation, a qualified expert may testify that a child suffered from post-traumatic stress syndrome to explain or corroborate, but such testimony is not

admissible as substantive evidence. *See* State v. Stancil, 355 N.C. 266 (2002) (requiring "proper foundation"); State v. Hall, 330 N.C. 808 (1992) (admissible to explain or corroborate only); State v. Richard Brigman, 178 N.C. App. 78 (2006) (error to admit expert testimony about PTSD for substantive purposes); Robert P. Mosteller, *Syndromes and Politics in Criminal Trials and Evidence Law*, 46 DUKE L. J. 461 (1996) (psychological syndrome evidence has not been proven to be diagnostic—that is, to establish cause—but it may be useful in explaining typical human behavior in response to certain conditions).

Testimony about child sexual abuse accommodation syndrome, if admissible, is likewise admissible only to corroborate or explain. *See* State v. Stallings, 107 N.C. App. 241 (1992).

Characteristics

With a proper foundation, a qualified expert may testify that a child exhibited characteristics consistent with sexual abuse (without identifying a particular syndrome), but the cases suggest that such evidence may be admissible only to explain or corroborate. *See* State v. Kennedy, 320 N.C. 20 (1987); State v. Stancil, 355 N.C. 266 (2002) (requiring "proper foundation"); State v. Ewell, 168 N.C. App. 98 (2005) (error to allow testimony by doctor that it was "probable" that child was victim of sexual abuse where opinion was not based on any physical evidence or behaviors consistent with sexual abuse); State v. Couser, 163 N.C. App. 727 (2004) (error to allow state's medical expert to offer opinion that victim had suffered "probable sexual abuse" when there was insufficient physical evidence to support opinion and there was no evidence that the victim's behavior or symptoms were consistent with being sexually abused); State v. Wade, 155 N.C. App. 1 (2002) (permissible for professional psychologist, who had treated child on a weekly basis for ten months, to testify that child exhibited characteristics consistent with sexual abuse; two-judge concurrence finds that psychologist's testimony that child had in fact been sexually abused was improper in absence of evidence of physical injuries but that admission of testimony was not plain error).

Cause

Based on characteristics/behaviors/statements of a child, may a qualified expert testify that the child was the victim of sexual abuse?

If there is no or inadequate evidence of physical injuries, the expert may not give such an opinion. *See* State v. Stancil, 355 N.C. 266 (2002) (expert may not testify that child was victim of sexual abuse in absence of physical injuries); State v. Goforth, 170 N.C. App. 584 (2005) (sufficient physical evidence to support doctor's opinion of repeated sexual abuse); State v. Delsanto, 172 N.C. App. 42 (2005) (error to allow doctor's opinion that child was sexually abused; only physical manifestation of injury was child's statement of pain, which is subjective and not independently verifiable); State v. Ewell, 168 N.C. App. 98 (2005) (error to allow testimony by doctor that it

was probable that child was victim of sexual abuse; only physical evidence of any sexual activity was sexually transmitted disease); State v. Couser, 163 N.C. App. 727 (2004) (error to allow state's medical expert to offer opinion that victim had suffered "probable sexual abuse"; physical evidence consisted of two abrasions on either side of introitus, which expert admitted could have been caused by something other than sexual abuse); State v. Bush, 164 N.C. App. 254 (2004) (in absence of physical evidence, plain error to allow doctor's opinion that victim had been sexually abused; opinion not admissible based on doctor's testimony that physical evidence is not always present and that absence is absolutely consistent with abuse of prepubertal child); State v. Dixon, 150 N.C. App. 46 (applying *Stancil*), *aff'd per curiam*, 356 N.C. 428 (2002); *In re* Morales, 159 N.C. App. 429 (2003) (expert opinion that sexual abuse had occurred was improper absent any evidence of physical injury, but admission of testimony was not prejudicial because judge did not rely on it); *see also* State v. Grover, 142 N.C. App. 411 (pre-*Stancil* case reaches similar result because of absence of evidence of physical injury; court also reasons that psychological testing was contrary to that of sexually abused children in that answers to 54-question trauma symptom checklist administered to child showed that child was not in clinical range for any symptoms), *aff'd per curiam*, 354 N.C. 354 (2001); State v. Bates, 140 N.C. App. 743 (2000) (to same effect as *Stancil*).

This prohibition is based on concerns about scientific reliability and vouching for the credibility of the child. It applies to opinions of both medical and psychological experts. Prior decisions allowing an expert to testify that a child was the victim of sexual abuse in the absence of physical injuries no longer appear to be good law. *See* State v. Youngs, 141 N.C. App. 220 (2000) (upholding admission of psychologist's opinion about sexual abuse in absence of physical injuries because her conclusion derived from evaluation during course of treatment of child; case decided before *Stancil*); *but cf. In re B.D.*, 174 N.C. App. 234 (2005) (assuming that interpretation of evidence rules in criminal cases applies to termination proceedings, court finds that they did not bar admission of experts' opinions concerning sexual abuse on facts presented).

IV. PRIVILEGE AGAINST SELF-INCRIMINATION

A. Right

Under the Fifth Amendment of the U.S. Constitution and Art. I, § 23 of the North Carolina Constitution, a person has the right not to incriminate himself or herself. The privilege applies in both civil and criminal matters and overrides G.S. 7B-310, which purportedly recognizes no privileges in child abuse proceedings other than the attorney-client privilege.

B. Effect

A court may not override the assertion of the privilege and compel a witness to testify in

civil or criminal proceedings unless the court finds no possibility that answering might tend to incriminate the witness. *See* 1 KENNETH S. BROUN, BRANDIS & BROUN ON NORTH CAROLINA EVIDENCE § 126, at 417 (6th ed. 2004). The Fifth Amendment does not forbid the drawing of an adverse inference against a party who invokes the privilege in a civil proceeding,[3] but an adverse inference may not be the sole basis for an adverse action. *See* Baxter v. Palmigiano, 425 U.S. 308 (1976).

C. Immunity

If the prosecutor grants a person immunity under G.S. 15A-1051, the person may be compelled to answer.

3. The "civil" label must be disregarded if the statutory scheme is so punitive that it negates the state's intention to make the proceeding civil, but this burden is difficult to meet. *See* Allen v. Illinois, 478 U.S. 364 (1986) (proceeding resulting in compulsory hospitalization of sexually dangerous person is civil for Fifth Amendment purposes); 1 JOHN W. STRONG, MCCORMICK ON EVIDENCE § 122, at 531 (6th ed. 2006) (lower courts have found proceedings to terminate parental rights to be civil).

Crawford v. Washington, 541 U.S. 36 (2004): Flow Chart

Prepared by John Rubin, Institute of Government, with thanks to Professor Robert Mosteller, Duke Law School

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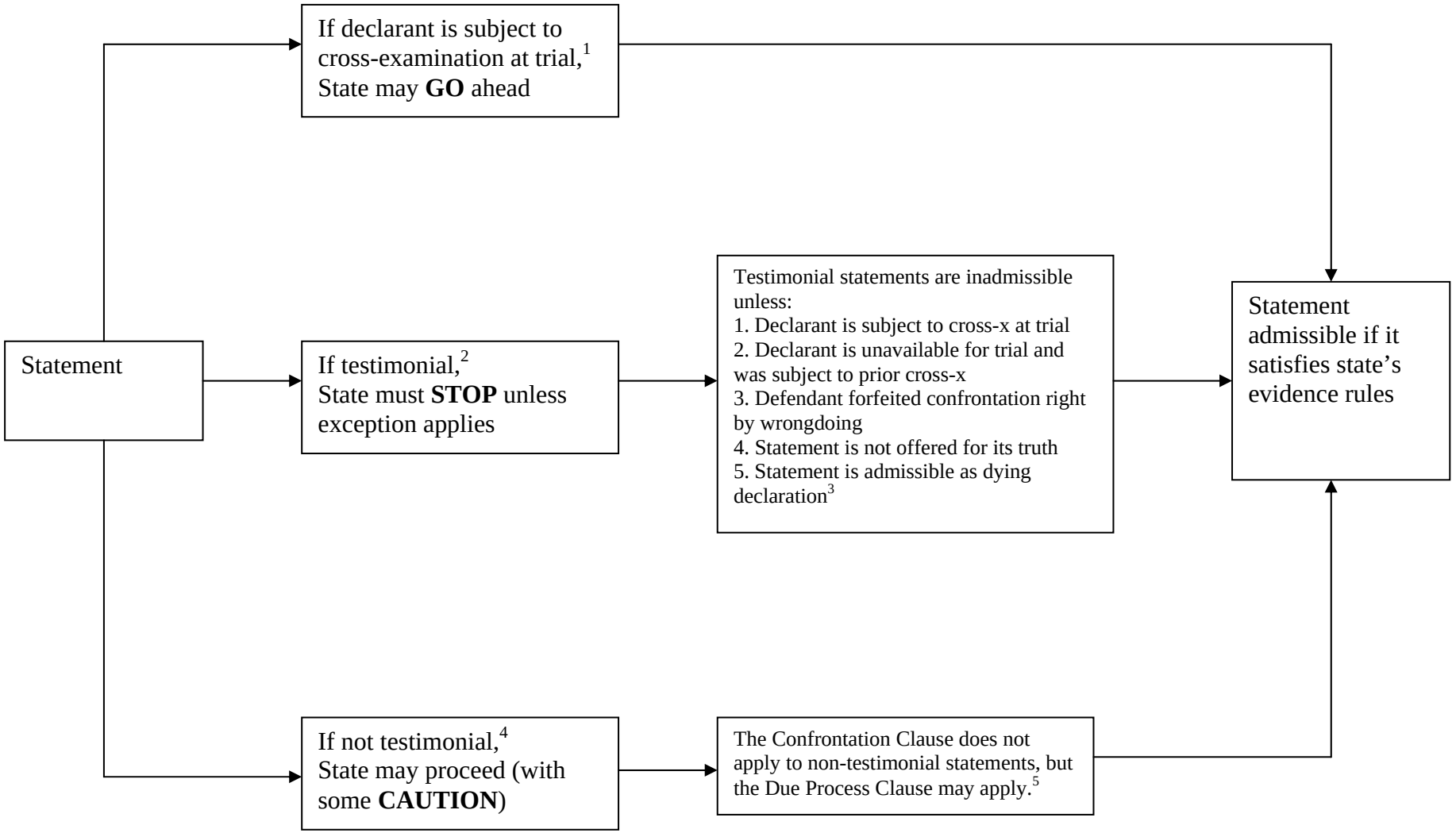

Notes to *Crawford* Flow Chart

1. If the declarant successfully invokes a privilege against testifying or the judge unduly interferes with cross-examination, then the declarant would not be subject to cross-examination and the Confrontation Clause would not be satisfied.

2. The *Crawford* court gave the following as possible definitions of testimonial statements: *ex parte* in-court testimony or its functional equivalent, extrajudicial materials contained in formalized testimonial materials, and statements made under circumstances that would lead an objective witness reasonably to believe that the statement would be available for use at a later trial. The Court gave the following examples of statements that are testimonial: prior testimony at a preliminary hearing, before a grand jury, or at a former trial; affidavits and depositions; police interrogations (used in a colloquial rather than technical, legal sense); and plea allocutions. *See also* Davis v. Washington, 547 U.S. 813 (2006) (considers circumstances in which questioning by police and agents of police results in testimonial statements).

3. A testimonial statement does not satisfy the Confrontation Clause merely because it falls within a firmly-rooted exception to the hearsay rule. If testimonial, a statement is admissible only if it satisfies one of the exceptions identified in *Crawford.* The *Crawford* court stated (without deciding the issue) that testimonial dying declarations might be admissible but found that such statements are *sui generis* and did not adopt any other hearsay exceptions as grounds for admitting testimonial statements.

4. The *Crawford* court gave the following as examples of non-testimonial statements: an off-hand, overhead remark; a casual remark to an acquaintance; business records; and statements in furtherance of a conspiracy.

5. In *Ohio v. Roberts*, 448 U.S. 56 (1980), the U.S. Supreme Court held that the Confrontation Clause bars admission of an unavailable witness's statement if the statement does not bear "adequate indicia of reliability." To meet that test, the evidence either had to fall within a "firmly rooted hearsay exception" or bear "particularized guarantees of trustworthiness." The *Crawford* court overruled the *Roberts* test for testimonial statements but did not resolve whether that test continued to apply to non-testimonial statements. The U.S. Supreme Court has since held that non-testimonial statements are not subject to the Confrontation Clause. *See Davis*, 547 U.S. at 821. The admissibility of such evidence may still be governed by the Due Process Clause (as well as a state's own hearsay and other evidence rules).

For an in-depth analysis of developments since the issuance of *Crawford*, *see* Jessica Smith, *Crawford v. Washington: Confrontation One Year Later* (Apr. 2005), and *Emerging Issues in Confrontation Litigation: A Supplement to Crawford v. Washington*: Confrontation One Year Later (Mar. 2007), posted at www.sog.unc.edu/programs/crimlaw/faculty.htm