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June 4, 2004

**[Note: Since this memorandum was published, the North Carolina Court of Appeals discussed the admissibility of a chemical analyst's affidavit in State v. Cao, ___ N.C. App. ___, 626 S.E.2d 301 (17 January 2006). The North Carolina Supreme Court in State v. Forte, ___ N.C. ___, ___ S.E.2d ___ (5 May 2006), referred to State v. Smith, 312 N.C. 361 (1984), discussed in this memorandum, in deciding a *Crawford* issue. You should read these cases and conduct any additional research relevant to this issue.]**

## Constitutionality of G.S. 20-139.1(e1) (Use of Chemical Analyst's Affidavit in District Court) After *Crawford v. Washington*, ___ U.S. ___, 124 S. Ct. 1354 (2004)

The United States Supreme Court's ruling in *Crawford v. Washington*, ___ U.S. ___, 124 S. Ct. 1354 (2004), established a new approach to the Confrontation Clause. This memorandum discusses the potential impact of the *Crawford* ruling on the admissibility of a chemical analyst's affidavit in district court and a prior North Carolina Supreme Court ruling upholding its admissibility.

In *State v. Smith*, 312 N.C. 361 (1984), the North Carolina Supreme Court upheld the constitutionality of G.S. 20-139.1(e1), which makes admissible in district court a chemical analyst's affidavit containing evidence of several matters, including a defendant's alcohol concentration or the presence or absence of an impairing substance. The statute also provides that if a defendant desires that the chemical analyst personally testify in district court, the defendant may subpoena the analyst and examine the analyst as if he or she were an adverse witness.

The court's ruling in *Smith* rested on two separate grounds. First, the court determined that the statute effectively created a hearsay exception similar to business and public records hearsay exceptions, and the information contained in the affidavit was sufficiently reliable to satisfy the defendant's right to confrontation under the United States and North Carolina

constitutions. Among the cases cited by the court to support its ruling was *Ohio v. Roberts*, 448 U.S. 56 (1980). The United States Supreme Court ruled in *Roberts* that a statement made by an unavailable witness is admissible under the Confrontation Clause only if it contains adequate indicia of reliability, which means that the statement must (1) fall within a firmly-rooted hearsay exception, or (2) bear particularized guarantees of trustworthiness.

In *Crawford v. Washington*, ___ U.S. ___, 124 S. Ct. 1354 (2004), the United States Supreme Court rejected the *Roberts* test in determining the admissibility of a "testimonial" statement offered by the state to prove the truth of the matter asserted in the statement. The Court ruled that the government may not introduce a testimonial statement made by a witness unless it shows that the witness is unavailable and that the defendant had had a prior opportunity to cross-examine the witness (or the statement satisfies some other limited exception identified by the Court). The Court did not set out a complete definition of testimonial statement. However, it ruled that such a statement includes, at a minimum, prior testimony at a preliminary hearing, testimony before a grand jury or at a former trial, police interrogation, and a plea allocution showing the existence of a conspiracy. The opinion also gave other examples without explicitly ruling that they are testimonial statements. The examples relevant to a chemical analyst's affidavit include: (1) affidavits or similar pretrial statements that declarants would reasonably expect to be used prosecutorially; (2) extrajudicial statements contained in formalized testimonial materials, such as affidavits; and (3) 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.

Several factors suggest that a chemical analyst's affidavit would be considered testimonial under *Crawford*. A chemical analyst in North Carolina is either a law enforcement

officer or a person employed by a law enforcement agency. The analyst's affidavit contains, among other things, evidence of a defendant's alcohol concentration or the presence or absence of an impairing substance that is often an element of the offense being prosecuted or is used to prove an element of an offense. In using the possible relevant definitions of a testimonial statement set out above in *Crawford*, (1) the analyst preparing the affidavit would reasonably expect it to be used prosecutorially; (2) the affidavit contains an extrajudicial statement in formalized testimonial material; and (3) the statement in the affidavit is made under circumstances that would lead an objective witness reasonably to believe that the statement would be available for use at a later trial. Therefore, it is highly likely the United States Supreme Court would rule that the affidavit (at least the information revealing the defendant's alcohol concentration or the presence or absence of an impairing substance) is a testimonial statement under *Crawford*. On the other hand, the Court in *Crawford* noted that a business record is not a testimonial statement, and the North Carolina Supreme Court in *Smith* likened the chemical analyst's affidavit to a business or public record. Thus it is possible, although highly unlikely, that the United States Supreme Court would rule that the affidavit is not a testimonial statement. Therefore, the first ground on which *Smith* rested is likely no longer a sufficient basis for admitting the chemical analyst's affidavit.

The second ground on which the North Carolina Supreme Court in *Smith* upheld the constitutionality of G.S. 20-139.1(e1) may remain relevant, however. The court in *Smith* reasoned as follows: Assuming that the defendant has a right to cross-examine the chemical analyst under the Confrontation Clause, that right is fully protected under the trial *de novo* system. At the district court level, the defendant is entitled to subpoena the analyst and to cross-examine him or her as an adverse witness. The court rejected the defendant's argument that this

procedure unfairly shifts the burden to a defendant to prove non-compliance with some aspect of the chemical testing procedure and does not "cure" the alleged constitutional error. The court reasoned that unless information in the affidavit is challenged, it is presumed correct (a presumption apparently based on the analyst's following a regular procedure with an instrument such as an Intoxilzyer that requires minimal operator assistance). Failure to subpoena the analyst results in a waiver of any right to examine the analyst and contest the findings. And the defendant's right to confront the analyst is ultimately guaranteed by the right to trial *de novo* in superior court, where G.S. 20-139.1(e1) is inapplicable.

In addition to its own prior case law, the court's second ground for its ruling relied on three United States Supreme Court rulings concerning the trial *de novo* system: *Ludwig v. Massachusetts*, 427 U.S. 618 (1976) (Massachusetts trial *de novo* system did not deprive defendant of right to jury trial when first trial is before judge only); *North v. Russell*, 427 U.S. 328 (1976) (Kentucky defendant was not denied due process when tried before non-lawyer police court judge with a later trial *de novo*); *Justices of Boston Municipal Court v. Lydon*, 466 U.S. 294 (1984) (court adopted continuing double jeopardy theory in Massachusetts trial *de novo* system and found no constitutional error when defendant was not able to obtain review of insufficiency of evidence to support conviction at first level). The court did not find persuasive the defendant's reliance on the United States Supreme Court ruling in *Ward v. Monroeville*, 409 U.S. 57 (1972) (violation of defendant's right to neutral and detached judge at first trial in trial *de novo* system was not cured by defendant's ability to appeal for trial *de novo*).

There have not been any pertinent United States Supreme Court or North Carolina appellate court rulings on the trial *de novo* system since the *Smith* ruling to disturb the ruling on this second ground, and thus it would appear to remain the law in North Carolina state courts.

Although the *Crawford* ruling directly concerns the right to confront witnesses, the flexibility that the United States Supreme Court has otherwise accorded states with trial *de novo* systems concerning constitutional guarantees lacking at the first level—the lack of a right to a jury trial (*Ludwig*), the use of a non-lawyer judge (*North*), and no review of the sufficiency of evidence to support a conviction (*Judges of Boston Municipal Court*)—would appear to apply equally to the use of a chemical analyst's affidavit in district court.