A GUIDE TO CRAWFORD AND THE CONFRONTATION CLAUSE

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I. 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.”¹ This protection applies to the states by way of the Fourteenth Amendment.² In Crawford v. Washington,³ 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 former Ohio v. Roberts⁴ reliability test, the confrontation clause did not bar admission of an unavailable witness’s statement if the statement had an adequate indicia of reliability.⁵ Evidence satisfied that test if it fell within a firmly rooted hearsay exception or had particularized guarantees of trustworthiness.⁶ 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.”⁷ 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.”⁸ 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.⁹

¹. U.S. CONST. amend. VI.
⁴. 448 U.S. 56 (1980).
⁵. Crawford, 541 U.S. at 40 (describing the Roberts test).
⁶. Id.
⁷. Id. at 61.
⁸. Id.
⁹. Id. at 68. For a more detailed discussion and analysis of Crawford, see JESSICA SMITH, CRAWFORD V. WASHINGTON: CONFRONTATION ONE YEAR LATER (UNC School of Government 2005) (http://shopping.netuse.com/s.nl/c.433425/it.A/id.4164/f).
A Guide to Crawford

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.

A. When Crawford Issues Arise. Crawford issues arise whenever the State seeks to introduce 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;
- 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 an evidence custodian to establish chain of custody, when the custodian does not testify at trial.

B. 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.

II. Statement Offered For Its Truth Against the Defendant. As noted in Figure 1, the first step in the analysis is to determine whether the statement is offered for its truth against the accused.

A. Offered for Its Truth. Crawford is implicated only if the out of court statement is offered for its truth.10

1. Crawford Analysis Is Not Tied to Hearsay Rules. As noted above, Crawford is implicated only if the statement is offered for its truth. And as noted below, Crawford only comes into play when the statement is made by one who does not testify at trial. Because hearsay is defined as an out of court statement offered for its truth,11 one might be tempted to assume that the Crawford analysis involves a hearsay analysis. That assumption is incorrect. Crawford made clear that the confrontation clause analysis is not informed by the hearsay rules.12 This is an important analytical change. Under the old Roberts test, evidence that fell within a firmly rooted hearsay exception was deemed sufficiently reliable for confrontation clause purposes. In this way, under the old test,

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10. See, e.g., Melendez-Diaz v. Massachusetts, 557 U.S. 305, 310 (2009) (testimonial statements are solemn declarations or affirmations “made for the purpose of establishing or proving some fact.”) (quoting Crawford, 541 U.S. at 51).
11. N.C. R. Evid. 801(c).
12. Crawford, 541 U.S. at 50-51 (rejecting the view that confrontation analysis depends on the law of evidence).
confrontation clause analysis collapsed into hearsay analysis. *Crawford* rejected this approach, creating a separate standard for admission under the confrontation clause, and making clear that constitutional confrontation standards cannot be determined by reference to federal or state rules of evidence.  

However, *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: the new *Crawford* rule and the evidence rules.

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13. *Id.* at 61 (the Framers did not intend to leave the Sixth Amendment protection “to the vagaries of the rules of evidence.”).
2. **Offered for a Purpose Other Than the Truth.** If a statement is offered for a purpose other than for its truth, it falls outside of the confrontation clause.\(^4\)

   a. **Impeachment.** If the out of court statement is offered for impeachment, it is offered for a purpose other than its truth and is not covered by the *Crawford* rule.\(^5\)

   b. **Basis of an Expert’s Opinion.** Prior to the Court’s decision in *Williams v. Illinois*,\(^6\) the North Carolina appellate courts, like many courts around the nation, held that a statement falls outside of the *Crawford* rule when offered as the basis of a testifying expert’s opinion.\(^7\) They reasoned that when offered for this purpose, a statement is not offered for its truth. While *Williams* is a fractured opinion of questionable precedential value, it is significant in that five Justices rejected the reasoning of the pre-existing North Carolina cases. Thus, while *Williams* did not overrule North Carolina’s decisions on point, they clearly are on shaky ground. *Williams* is discussed in more detail below in the section below on Forensic Reports.

   c. **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. Some cases have held that such statements are not admitted for their truth and thus present no *Crawford* issue.\(^8\) It is not yet clear whether the Court’s rejection of the “basis of the expert’s opinion” rationale in *Williams* will impact these cases.\(^9\)

   d. **To Explain a Listener’s Reaction or Response.** Some cases have held that if a statement is introduced to show a listener’s reaction or response, it is not offered for its truth and there is no

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14. *Crawford*, 541 U.S. at 59 n.9 ("The [Confrontation] Clause . . . does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.").


17. See, e.g., State v. Mobley, 200 N.C. App. 570, 576 (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); State v. Hough, 202 N.C. App. 674, 680 (2010) (following *Mobley* and holding that no *Crawford* violation occurred when reports by a 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).

18. See, e.g., State v. Batchelor, 202 N.C. App. 733, 736-37 (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, 195 N.C. App. 390, 400 (2009) (declarant's consent to search vehicle was admitted to show why the officer believed he could and did search the vehicle); State v. Tate, 187 N.C. App. 593, 600-01 (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, 383-84 (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, 500 (2007) (to explain the officers’ presence at a location).

19. See section II.A.2.b above.
confrontation issue. It is not yet clear whether the Court’s rejection of the “basis of the expert’s opinion” rationale in Williams will impact these cases.

e. As Illustrative Evidence. One unpublished North Carolina case held that when evidence is admitted as illustrative evidence, it is not admitted for its truth and the confrontation clause is not implicated. It is not yet clear whether the Court’s rejection of the “basis of the expert’s opinion” rationale in Williams will impact these cases.

f. For Corroboration. North Carolina cases have held that when a statement is admitted for purposes of corroboration, it is not admitted for its truth and thus presents no Crawford issue. It is not yet clear whether the Court’s rejection of the “basis of the expert’s opinion” rationale in Williams will impact these cases.

g. Limiting Instructions. Assuming that a statement is admitted for a proper “not for the truth” purpose, a limiting instruction should be given.

B. Offered Against the Defendant. 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 Crawford rule. Similarly, the confrontation clause has no applicability to evidence presented by the defendant.

III. Subject to Cross-Examination at Trial. As indicated in Figure 1, Crawford does not apply when the declarant is subject to cross-examination at trial. Normally, a witness is subject to cross-examination when he or she is placed on the stand, put under oath, and

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20. See, e.g., State v. Castaneda, ___ N.C. App. ___, 715 S.E.2d 290, 293-94 (2011) (officer's statements during an interrogation repeating what others had told the police were not admitted for their truth but rather to provide context for the defendant's responses); State v. Miller, 197 N.C. App. 78, 87-91 (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 the defendant and his response; the defendant originally denied all knowledge of the events but when confronted with statements from others implicating him, the defendant 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, 289 (2006) (statement offered to explain why witness ran, sought law enforcement assistance, and declined to confront defendant single-handedly).

21. See section II.A.2.b above.


23. See section II.A.2.b above.

24. See, e.g., State v. Mason, ___ N.C. App. ___, 730 S.E.2d 795, 800-01 (2012) (the defendant’s confrontation rights were not violated when an officer testified to the victim’s statements made to him at the scene through the use of a telephonic translation service; the defendant argued that his confrontation rights were violated when the interpreter's statements were admitted through the officer’s testimony; the statements were not admitted for the truth of the matter asserted but rather for corroboration); State v. Ross, ___ N.C. App. ___, 720 S.E.2d 403, 409-10 (2011) (Crawford does not apply to evidence admitted for purposes of corroboration).

25. See section II.A.2.b above.

26. N.C. R. Ev., 105; see also Wiggins, 185 N.C. App. at 384 (noting that a limiting instruction was given).

27. State v. Richardson, 195 N.C. App. 786 (2009) (unpublished) (“Crawford is not applicable if the statement is that of the defendant...”). See also CONFRONTATION ONE YEAR LATER, supra note 9, at 28 & n.156.

28. Giles v. California, 554 U.S. 333, 376 n.7 (2008) (confrontation clause limits the evidence that the state may introduce but does not limit the evidence that a defendant may introduce).

29. See, e.g., 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 of his prior testimonial statements.”); State v. Burgess, 181 N.C. App. 27, 34 (2007) (no confrontation violation when the victims testified at trial); State v. Harris, 189 N.C. App. 49, 54-55 (2008) (same); State v. Lewis, 172 N.C. App. 97, 103 (2005) (same).
responds willingly to questions.

A. 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.  

B. 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.

C. Maryland v. Craig Procedures For Child Abuse Victims. In Maryland v. Craig, 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. Upholding the statute, the Craig Court balanced the defendant's confrontation rights against the important state interest in protecting child witnesses from the trauma of testifying in child abuse cases. It also required certain findings to be made before such a procedure can be employed. Although Crawford called into question the continued validity of Maryland v. Craig procedures, at least one North Carolina court has held that Craig procedures remain constitutional after Crawford.

D. Making the Witness “Available” to the Defense. In Melendez-Diaz v. Massachusetts, the United States Supreme Court seemed to foreclose any argument that a witness is subject to cross-examination when the prosecution informs the defense that the witness will be made available if called by that side or when the prosecution produces the witness in court but does not call that person to the stand.

IV. Testimonial Statements. Step three in the Crawford analysis asks whether the evidence is testimonial. The Crawford rule, by its terms, applies only to testimonial evidence; non-testimonial evidence falls outside of the confrontation clause and need only satisfy the Evidence Rules for admissibility. In addition to classifying as testimonial evidence.

30. See CONFRONTATION ONE YEAR LATER, supra note 9, at 28–29 & n.159.
33. See Crawford, 541 U.S. at 67-68 (“By replacing categorical constitutional guarantees with open-ended balancing tests, we do violence to their design”); JESSICA SMITH, EMERGING ISSUES IN CONFRONTATION LITIGATION: A SUPPLEMENT TO CRAWFORD v. WASHINGTON: CONFRONTATION ONE YEAR LATER 27 (UNC School of Government 2007) (http://shopping.netsuite.com/s.nl/c.433425/it.A/id.4165/f).
34. See Crawford, 541 U.S. at 67-68.
35. See Crawford, 541 U.S. at 67-68. (By replacing categorical constitutional guarantees with open-ended balancing tests, we do violence to their design”); JESSICA SMITH, EMERGING ISSUES IN CONFRONTATION LITIGATION: A SUPPLEMENT TO CRAWFORD v. WASHINGTON: CONFRONTATION ONE YEAR LATER 27 (UNC School of Government 2007) (http://shopping.netsuite.com/s.nl/c.433425/it.A/id.4165/f).
36. See Crawford, 541 U.S. at 67-68. (By replacing categorical constitutional guarantees with open-ended balancing tests, we do violence to their design”); JESSICA SMITH, EMERGING ISSUES IN CONFRONTATION LITIGATION: A SUPPLEMENT TO CRAWFORD v. WASHINGTON: CONFRONTATION ONE YEAR LATER 27 (UNC School of Government 2007) (http://shopping.netsuite.com/s.nl/c.433425/it.A/id.4165/f).
37. See Crawford, 541 U.S. at 67-68. (By replacing categorical constitutional guarantees with open-ended balancing tests, we do violence to their design”); JESSICA SMITH, EMERGING ISSUES IN CONFRONTATION LITIGATION: A SUPPLEMENT TO CRAWFORD v. WASHINGTON: CONFRONTATION ONE YEAR LATER 27 (UNC School of Government 2007) (http://shopping.netsuite.com/s.nl/c.433425/it.A/id.4165/f).
the particular statements at issue (a suspect’s statements during police interrogation at the station house), the *Crawford* Court suggested that the term had broader application. Specifically, the Court clarified that the confrontation clause applies to those who “bear testimony” against the accused.38 “Testimony,” it continued, is “[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.”39 Foreshadowing its analysis in *Davis v. Washington*40 and *Michigan v. Bryant*41, the Court suggested that an accuser who makes a formal statement to government officers bears testimony within the meaning of the confrontation clause.42 However, the *Crawford* Court expressly declined to comprehensively define the key term, “testimonial.”43 The meaning of that term is explored throughout the remainder of this section.

A. 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.”44 It is thus clear that this type of evidence is testimonial.

B. Plea Allocutions. *Crawford* classified plea allocutions as testimonial.45

C. Deposition Testimony. *Davis* suggests that deposition testimony is testimonial.46

D. Police Interrogation. *Crawford* held that recorded statements made by a suspect to the police during a custodial interrogation at the station house and after *Miranda* warnings had been given qualified “under any conceivable definition” of the term interrogation.47 The *Crawford* Court noted that when classifying police interrogations as testimonial it used the term “interrogation” in its “colloquial, rather than any technical, legal sense.”48 Additionally, the term police interrogation includes statements that are volunteered to the police. The Court has stated: “[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.”49 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.50

1. Of Suspects. As noted, *Crawford* held that recorded statements made by a suspect to the police during a tape-recorded custodial interrogation done after *Miranda* warnings had been given were testimonial.

2. Of Victims. *Crawford* did not indicate whether its new rule was limited to police interrogation of suspects or whether it extended to questioning of

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38. *Crawford*, 541 U.S. at 51.
39. Id. (quotation omitted).
40. 547 U.S. 813, 829-30 (2006) (holding, in part, that a victim’s statements to responding officers were testimonial).
41. ___U.S. ___, 131 S. Ct. 1143, 1167 (2011) (shooting victim’s statements to first responding officers were nontestimonial).
42. *Crawford*, 541 U.S. at 51.
43. Id. at 68.
44. Id.
45. Id. at 64.
46. *Davis*, 547 U.S. at 824 n.3, 825.
47. *Crawford*, 541 U.S. at 53 n.4.
48. Id.
victims as well. The Court answered that question two years later in *Davis v. Washington*,\(^{51}\) clarifying that the new *Crawford* rule extends to questioning of victims. In 2011, the Court again addressed the testimonial nature of a victim’s statements to law enforcement officers in *Michigan v. Bryant*.\(^{52}\) The guidance that emerged from those cases is discussed below.

**a. *Davis v. Washington* and the Emergence of a “Primary Purpose” Analysis.** *Davis* was a consolidation of two separate domestic violence cases, both involving statements by victims to police officers or their agents. The Court held that statements by one of the domestic violence victims during a 911 call were nontestimonial but that statements by the other domestic violence victim to first-responding officers were testimonial. In so doing the *Davis* Court adopted a primary purpose test for determining the testimonial nature of statements made during a police interrogation. Specifically, it articulated a two-part rule for determining the testimonial nature of statements to the police or their agents: (a) statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency; and (b) statements are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past facts potentially relevant to later criminal prosecution.

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**The *Davis* Rules:**

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.

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**b. *Michigan v. Bryant* and Ascendency of the Ongoing Emergency Factor in the Primary Purpose Analysis.** In *Michigan v. Bryant*,\(^{53}\) the Court held that a mortally wounded shooting victim’s statements to first-responding officers were nontestimonial. The Court noted that unlike *Davis*, the case before it

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53. *Id.*
involved a non-domestic dispute, a victim found in a public location suffering from a fatal gunshot wound, and a situation where the perpetrator’s location was unknown. These facts required the Court to “confront for the first time circumstances in which the ‘ongoing emergency’ . . . extends beyond an initial victim to a potential threat to the responding police and the public at large,” and to provide additional clarification on how a court determines whether the primary purpose of the interrogation is to enable police to meet an ongoing emergency. It concluded that when determining the primary purpose of an interrogation, a court must objectively evaluate the circumstances of the encounter and the statements and actions of both the declarant and the interrogator. It further explained that the existence of an ongoing emergency “is among the most important circumstances informing the ‘primary purpose’ of an interrogation.”

Applying this analysis, the Court began by examining the circumstances of the interrogation to determine if an ongoing emergency existed. Relying on the fact that the victim said nothing to indicate that the shooting was purely a private dispute or that the threat from the shooter had ended, the Court found that the emergency was broader than those at issue in Davis, encompassing a threat to the police and the public. The Court also found it significant that a gun was involved. “At bottom,” it concluded, “there was an ongoing emergency here where an armed shooter, whose motive for and location after the shooting were unknown, had mortally wounded [the victim] within a few blocks and a few minutes of the location where the police found [the victim].”

c. Determining Whether an “Ongoing Emergency” Exists. As noted, Bryant made clear that the existence of an ongoing emergency is among the most important circumstances to consider when assessing the primary purpose of an interrogation. However, even after Bryant, there are no clear rules on what constitutes an ongoing emergency. The following factors would seem to support the conclusion that an emergency was ongoing:

- The perpetrator remains at the scene and is not in law enforcement custody
- The dispute is a public, not a private one
- The perpetrator is at large
- The perpetrator’s location is unknown
- The perpetrator’s motive is unknown
- The perpetrator presents a continuing threat
- A gun or other weapon with a “long reach” is involved

54. Id. at 1156.
55. Id. at 1160.
56. Id. at 1162.
57. Id. at 1164.
58. Id.
59. Id.
- The perpetrator is armed with such a weapon
- Physical violence is occurring
- The location is disorderly
- The location is unsecure
- The victim is seriously injured
- Medical attention is needed or the need for it is not yet 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

On the other hand, the following factors would seem to support the conclusion that an emergency ended or did not exist:

- The perpetrator has fled and is unlikely to return
- The dispute is a private, not a public one
- The perpetrator is in law enforcement custody
- The perpetrator’s location is known
- The perpetrator’s motive is known and does not extend beyond the current victim
- The perpetrator presents no continuing threat
- A fist or another weapon with a “short reach” is involved
- The perpetrator is not armed with a “long reach” weapon
- No physical violence is occurring
- The location is calm
- The location is secure
- No one is seriously injured
- No medical attention is needed
- The victim and others are safe
- There is a significant lapse of time between the event and the questioning
- No call for assistance is made
- The victim or others are calm
- Officers are at the scene

d. Other Factors Relevant to the Primary Purpose Analysis. In addition to clarifying that whether an ongoing emergency exists is one of the most important circumstances informing the primary purpose analysis, *Bryant* made clear that the analysis must also examine the statements and actions of both the declarant and the interrogators and the formality of the statement itself. The Court did just that in *Bryant*, determining that given the circumstances of the emergency, it could not say that a person in the victim’s situation would have had the primary purpose of

60. *Id.* at 1160.
61. *Id.* at 1166.
establishing past facts relevant to a criminal prosecution. As to the motivations of the police, the Court concluded that they solicited information from the victim to meet the ongoing emergency. Finally, it found that the informality of the situation and interrogation further supported the conclusion that the victim’s statements were nontestimonial.

e. **Equally Weighted or Other Purposes.** The primary purpose test requires the decision-maker to determine the primary purpose of the interrogation. It is not clear how the statements should be categorized if the primary purpose of the interrogation was something other than meeting an ongoing emergency or establishing past facts, or if the interrogation had a dual, evenly weighted purpose.

f. **Objective Determination.** As the Court stated in *Davis* and reiterated in *Bryant*, when determining the primary purpose of questioning, courts must objectively evaluate the circumstances.

g. **Post-Bryant North Carolina Cases.** To date North Carolina has only one published post-*Bryant* case on point. In *State v. Glenn*, the court of appeals held that a victim’s statement to a law enforcement officer was testimonial. The court distinguished *Bryant* and reasoned in part that there was no ongoing emergency when the statement was made.

3. **Of Witnesses.** For confrontation clause purposes, there seems to be no reason to treat police questioning of witnesses any differently from police questioning of victims.

4. **Interrogation By Police Agents.** *Crawford* clearly applies whenever questioning is done by the police or a police agent (in *Davis*, the Court assumed but did not decide that the 911 operator was a police agent). Factors cited by post-*Davis* decisions when determining that actors were agents of the police include the following:

- The police directed the victim to the interviewer or requested or arranged for the interview
- The interview was forensic
- A law enforcement officer was present during the interview
- A law enforcement officer observed the interview from another room
- A law enforcement officer videotaped the interview
- The interviewer consulted with a prosecution investigator before or during the interview
- The interviewer consulted with a law enforcement officer before or during the interview
- The interviewer asked questions at the behest of a law enforcement officer
- The purpose of the interview was to further a criminal investigation

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62. *Id.* at 1164.
63. *Id.* at 1165-66.
64. *Id.* at 1166.
65. *Id.* at 1150; *Davis*, 547 U.S. at 822.
The lack of a non-law enforcement purpose to the interview
The fact that law enforcement was provided with a videotape of the interview after it concluded

E.  Statements To People Other Than the Police or Their Agents.  *Crawford, Davis,* and *Bryant* all involved questioning by the police or their agents. Although the high Court has not expressly stated that statements to people other than the police or their agents can be testimonial, it has suggested that to be so. In *Whorton v. Bockting*, 67 the Court held that the new *Crawford* rule did not apply retroactively. In that case, the defendant had asserted that his confrontation clause rights were violated when the trial court admitted statements by a child victim to both an officer and to her mother. In its decision the Court gave no indication that the child’s statements to her mother fell outside of the protections of the confrontation clause. Additionally, the *Davis* Court’s discussion of an old English case suggests that statements to family members can be testimonial. 68 The lower courts have applied *Crawford* to statements made to persons other than the police and their agents. The sections below discuss those cases.

1.  **Statements to Family, Friends, and Other Private Persons.** While many cases seem to adopt a *per se* rule that statements to family, friends, and other private persons are nontestimonial, some cases have applied the *Davis* primary purpose test to such remarks. As noted below, *Crawford* classified a casual remark to an acquaintance as nontestimonial. Since *Crawford*, courts have had to grapple with classifying statements made to acquaintances, family, and friends that are decidedly not casual. 69 An example is a statement made by a domestic violence victim to friends and neighbors about the defendant’s abuse and intimidation. North Carolina courts both before and after *Davis* have, without exception, treated statements made to private persons as nontestimonial. 70

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68.  *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.").  *But see Davis*, 547 U.S. at 825 (citing *Dutton v. Evans*, 400 U.S. 74, 87-89 (1970), a case involving statements from one prisoner to another, as involving nontestimonial statements); *Giles*, 554 U.S. at 376-373 (suggesting that "[s]tatements to friends and neighbors about abuse and intimidation" would be nontestimonial).
69.  See *CONFRONTATION ONE YEAR LATER*, supra note 9, at 19 (cataloging cases); *EMERGING ISSUES*, supra note 33, at 22–23 (same).
70.  North Carolina cases decided after *Davis* include: *State v. Calhoun*, 189 N.C. App. 166, 170 (2008) (victim’s statement to a homeowner identifying the shooter was a nontestimonial statement to a "private citizen" even though a responding officer was present when the statement was made), and *State v. Williams*, 185 N.C. App. 318, 325 (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, 426 n.1 (2006) (victim’s statements to her sister were nontestimonial); *State v. Lawson*, 173 N.C. App. 270, 275 (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, 313 (2005) (victims’ statements to foster parents were nontestimonial); and *State v. Blackstock*, 165 N.C. App. 50, 62 (2004) (victim’s statements to wife and daughter about the crimes were nontestimonial).
2. **Statements to Medical Personnel.** The United States Supreme Court has indicated that “statements to physicians in the course of receiving treatment” are nontestimonial.\(^71\) Notwithstanding this statement, there has been a significant amount of litigation about the testimonial nature of statements to medical providers such as pediatricians, emergency room doctors, and sexual assault nurse examiners (SANE nurses).\(^72\) Although the law is still developing, recent cases tend to focus on whether the services have a medical purpose (as opposed to, for example, a purely forensic purpose).\(^73\)

3. **Statements to Social Workers.** The testimonial nature of statements by child victims to social workers has been a hotly litigated area of confrontation clause analysis\(^74\) and the law is still evolving. The Fourth Circuit recently weighed in on the issue in *United States v. DeLeon*,\(^75\) holding that although no ongoing emergency existed, the child’s statements to a social worker were nontestimonial based on an objective analysis of the primary purpose and circumstances of the interview.\(^76\)

4. **Statements to Informants.** The *Davis* Court indicated that statements made unwittingly to government informants are nontestimonial.\(^77\)

5. **Statements in Furtherance of a Conspiracy.** The Supreme Court has indicated that statements in furtherance of a conspiracy are nontestimonial.\(^78\)

6. **Casual or Offhand Remarks to An Acquaintance.** *Crawford* indicated that “off-hand, 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.\(^79\) 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.”

F. **Forensic Reports.** Because of the ubiquitous nature of forensic evidence in criminal cases, a tremendous amount of post-*Crawford* litigation has focused on the testimonial nature of forensic reports, such as chemical analysts affidavits, drug test reports, autopsy reports, DNA reports and the like.\(^80\) The sections that follow explore how *Crawford* applies to this type of evidence.

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71. *Giles*, 554 U.S. at 376.
72. See *e.g.*, [CONFRONTATION ONE YEAR LATER, supra note 9, at 23-24 (cataloging cases); EMERGING ISSUES, supra note 33, at 22 (same)].
73. See, *e.g.*, [State v. Miller, 264 P.3d 461, 490 (Kan. 2011) (surveying the law on point from around the country and concluding that a child’s statements to a SANE nurse were nontestimonial)].
75. 678 F.3d 317 (4th Cir. May 15, 2012).
77. *Davis*, 547 U.S. at 825.
78. *Crawford*, 541 U.S. at 56; see also *Giles*, 554 U.S. at 374, n.6 (2008).
79. *Crawford*, 541 U.S. at 51.
80. See [CONFRONTATION ONE YEAR LATER, supra note 9, at 10-11 (cataloging cases); EMERGING ISSUES, supra note 33, at 13-17 (same); Jessica Smith, Understanding the New Confrontation Clause Analysis: Crawford, Davis, and Melendez-Diaz, ADMIN. OF JUSTICE BULL. 2010/02 (UNC School of Government) (April 2010) (same)](http://sogpubs.unc.edu/electronicversions/pdfs/aobj1002.pdf).
1. **Forensic Reports Are Testimonial.** In a pair of cases, the United States Supreme Court held that forensic reports are testimonial. First, in *Melendez-Diaz v. Massachusetts* the Court held to be testimonial a report, sworn to before a notary by the preparer, stating that the substance at issue was cocaine. The Court further held that the defendant’s confrontation clause rights were violated when the report was admitted into evidence to prove that the substance was cocaine without a witness to testify to its contents. Then, in *Bullcoming v. New Mexico*, the Court applied *Melendez-Diaz* and held that the defendant’s confrontation clause rights were violated in an impaired driving case. Evidence against the defendant included a forensic laboratory report certifying that his blood-alcohol concentration was above the threshold for aggravated impaired driving. At trial, the prosecution did not call the analyst who signed the certification. Instead, the State called another analyst who was familiar with the laboratory’s testing procedures, but had neither participated in nor observed the test on the defendant’s blood sample. That witness read the report into evidence. Of course, if the analyst who prepared the report testifies at trial, no confrontation clause violation occurs. At least one North Carolina case held that no confrontation clause violation occurred when the person who directly supervised the report’s preparation testified at trial.

2. **Substitute Analysts.** Neither *Melendez-Diaz* nor *Bullcoming* addressed the issue of whether substitute analyst testimony is consistent with the confrontation clause. For these purposes the term substitute analyst testimony refers to when the State presents an expert witness who testifies to an independent opinion based on information in a non-testifying analyst’s forensic report. North Carolina had endorsed the use of substitute analysts, distinguishing *Melendez-Diaz* and *Bullcoming* and reasoning that in this scenario, the underlying report is not being used for its truth but rather as the basis of the testifying expert’s opinion. However, the United States Supreme Court’s most recent case in this line, *Williams v. Illinois*, calls this reasoning into question. Like *Melendez-Diaz* and *Bullcoming*, before it, *Williams* dealt with the status of forensic reports under the confrontation clause. *Williams* held that the defendant’s confrontation clause rights were not violated when the State’s DNA expert testified to an opinion based on a report done by a non-testifying analyst. However, the *Williams* decision is a fractured one in which no one line of reasoning garnered a five-justice majority. The fractured nature of the decision has resulted in confusion and uncertainty with regard to substitute analyst testimony. Adding to the confusion in North Carolina is the fact that five of the Justices in *Williams* expressly rejected the “not for

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83. Id. at 131 S. Ct. 2710. See also State v. Locklear, 363 N.C. 438, 452 (2009) (a *Crawford* violation occurred when the trial court admitted opinion testimony of two non-testifying experts regarding a victim’s cause of death and identity; the testimony was admitted through the Chief Medical Examiner, an expert in forensic pathology, who appeared to have read the reports of the non-testifying experts into evidence); State v. Burrow, __N.C. App. __, 721 S.E.2d 356. 359 (2012) (error to allow in a forensic report identifying a substance as oxycodone when the preparer did not testify at trial).
84. State v. Harris, __N.C. App. __, 729 S.E.2d 99, 105 (July 17, 2012) (a trainee prepared the DNA report under the testifying expert’s direct supervision and the findings in the report were the expert’s own).
the truth” rationale that had been used by the North Carolina courts to validate this procedure.96

G. **Medical Reports and Records.** *Melendez-Diaz* indicated that “medical reports created for treatment purposes . . . would not be testimonial under our decision today.”97 Medical reports prepared for forensic purposes obviously are not prepared for treatment purposes; forensic reports are prepared for the very purpose of establishing or proving some fact at trial. See "Forensic Reports," above.

H. **Other Business and Public Records.** *Crawford* offered business records as an example of nontestimonial evidence.98 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.”99 Also, the Court has suggested that documents created to establish guilt are testimonial, whereas those unrelated to guilt or innocence are nontestimonial.100

1. **Records Regarding Equipment Maintenance.** *Melendez-Diaz* stated that “documents prepared in the regular course of equipment maintenance may well qualify as nontestimonial records.”90 Consistent with this statement, a number of cases have held that such records are nontestimonial.102

2. **Police Reports.** *Melendez-Diaz* suggests that police reports are testimonial when they are used to establish a fact at trial.103

3. **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.104 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.

88. *Crawford* 541 U.S. at 56 (business records are “by their nature” not testimonial).
89. *Melendez-Diaz*, 557 U.S. at 324; see also *Crawford*, 541 U.S. at 61 (confrontation rights cannot turn on the “vagaries” of federal or state evidence rules).
90. See *Davis*, 547 U.S. at 825 (citing *Dowdell v. United States*, 221 U.S. 325, 330-31 (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”); *Melendez-Diaz*, 557 U.S. at 323 n.8. Compare *Melendez-Diaz*, 557 U.S. 305 (affidavit identifying a substance as a controlled substance in a drug case—a fact that established guilt—is testimonial), with id. at 311 n.1 (records of equipment maintenance on testing equipment—which do not go to guilt—are nontestimonial).
92. See EMERGING ISSUES, supra note 33, at 17–18.
93. See *Melendez-Diaz*, 557 U.S. at 316 (suggesting that an officer’s investigative report describing the crime scene is testimonial); see also id. at 321-22 (police reports do not qualify as business records because they are made essentially for use in court).
However, it is not clear how Melendez-Diaz applies to the fingerprint card itself.

4. **911 Event Logs.** In a pre-Melendez-Diaz case, the North Carolina Court of Appeals cited a now discredited North Carolina Supreme Court case and held that a 911 event log was a nontestimonial business record. The log detailed the timeline of a 911 call and the law enforcement response to it. To the extent that such a log is kept for administrative purposes and not to establish guilt at trial, the logs may be nontestimonial even after Melendez-Diaz. However, if such logs are determined to be like police reports, they probably will be held to be testimonial.

5. **Private Security Firm Records.** In *State v. Hewson*, relying again on the same discredited North Carolina Supreme Court case, 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.

6. **Detention Center Incident Reports.** In a pre-Melendez-Diaz case, the North Carolina Supreme Court held that detention center incident reports were nontestimonial. 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 administration of an entity’s affairs” as nontestimonial and those created for the purpose of establishing or proving a fact at trial as testimonial.

7. **Certificates of Nonexistence of Records.** Melendez-Diaz indicates that certificates of nonexistence of records are testimonial. 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.

8. **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.

I. **Chain of Custody Evidence.** Melendez-Diaz indicates that chain of custody information is testimonial. However, the majority took issue with the dissent’s

97. See Melendez-Diaz, 557 U.S. at 316 (suggesting that an officer’s investigative report describing the crime scene is testimonial); see also id. at 321-22 (police reports do not qualify as business records because they are made essentially for use in court).
100. Melendez-Diaz, 557 U.S. at 324.
101. Id. at 323.
102. Davis, 547 U.S. at 825 (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, 557 U.S. at 323 n.8 (same).
103. Melendez-Diaz, 557 U.S. at 311 n.1.
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.”

It noted that while the state has to establish a chain of custody, gaps go to the weight of the evidence, not its admissibility. 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.” This language from calls into question earlier North Carolina cases suggesting that chain of custody information is nontestimonial.

V. Exceptions to the Crawford Rule. As indicated in Figure 1, if an exception applies, even testimonial evidence may be admissible. This section discusses the exceptions to the Crawford rule.

A. 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. 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. 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. At least one published North Carolina case has applied the doctrine.

1. Intent to Silence Required. In Giles v. California, the United States Supreme Court held that for forfeiture by wrongdoing to apply, the prosecution must establish that the defendant engaged in the wrongdoing with an intent to make the witness unavailable. 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.

104. Id.
105. Id.
106. 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).
107. State v. Forte, 360 N.C. 427, 435 (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, 664-65 (2008) (chemical analyst’s affidavit was nontestimonial when it was limited to an objective analysis of the evidence and routine chain of custody information).
110. State v. Weathers, ___ N.C. App. ___, 724 S.E.2d 114, 117 (2012) (the trial court properly applied the forfeiture by wrongdoing exception where the defendant intimidated the witness).
112 Id. at 367.
2. **Conduct Triggering Forfeiture.** Examples of conduct that likely will result in a finding of forfeiture include threatening, killing, or bribing a witness. 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 or forfeiture doctrine. Earlier abuse, or 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.

3. **Wrongdoing by Intermediaries.** The *Giles* Court 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.”

4. **Conspiracy Theory.** A recent Fourth Circuit case applied traditional principles of conspiracy liability to the forfeiture by wrongdoing analysis, concluding that the exception may apply when the defendant’s co-conspirators engage in the wrongdoing that renders the defendant unavailable. The court noted that mere participation in the conspiracy is not enough to trigger liability; rather the defendant must have (1) participated directly in planning or procuring the declarant’s unavailability through wrongdoing; or (2) the wrongful procurement was in furtherance, within the scope, and reasonably foreseeable as a necessary or natural consequence of an ongoing conspiracy.

5. **Procedural Issues.**
   i. **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. One North Carolina case held that forfeiture can be found even if the threatened witness fails to testify at the forfeiture hearing.

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113. Id. at 365.
114. Id. at 377.
115. Id. at 360.
117. Id. at __ (finding both prongs of the test met in this case).
118. Davis, 547 U.S. at 833.
119. State v. Weathers, __N.C. App. __, 724 S.E.2d 114, 117 (2012) (rejecting the defendant’s argument that application of the doctrine was improper because the witness never testified that he chose to remain silent out of fear;
ii. **Standard.** Although the United States Supreme Court has not ruled on the issue, many courts apply a preponderance of the evidence standard to the forfeiture by wrongdoing inquiry.\(^{120}\)

B. **Dying Declarations.** Although *Crawford* acknowledged cases supporting a dying declaration exception to the confrontation clause, it declined to rule on the issue.\(^{121}\) However, the North Carolina Court of Appeals has recognized such an exception to the *Crawford* rule.\(^{122}\)

VI. **Waiver.** The next step in the confrontation analysis asks whether confrontation rights have been waived.

A. **Generally.** Confrontation clause rights, like constitutional rights generally, may be waived.\(^{123}\) To be valid, a waiver of confrontation rights, like a waiver of any constitutional right, must be knowing, voluntary, and intelligent.\(^{124}\) Waivers may be expressed or implied. Except in connection with guilty pleas, defendants do not typically expressly waive confrontation rights.\(^{125}\) The sections below explore implied waivers of those rights.

B. **Notice and Demand Statutes.**

1. **Generally.** *Melendez-Diaz* indicated that states are free to adopt procedural rules governing the exercise of confrontation objections.\(^{126}\) 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 a testimonial forensic report at trial without the testimony of the preparer. The defendant then has a period of time in which to object to the admission of the evidence absent the analyst’s appearance live at trial.\(^{127}\) The Court went on to note that these simple notice and demand statutes are constitutional.\(^{128}\)

2. **North Carolina’s Notice and Demand Statutes.** In 2009, the North Carolina General Assembly responded to *Melendez-Diaz* by passing

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\(^{120}\) Cf. *Giles*, 554 U.S. 353, 379 (Souter, J., concurring) (assuming that the preponderance standard governs); see, e.g., *Dinkins*, __F.3d.__ (4th Cir. Aug. 14, 2012).

\(^{121}\) *Crawford*, 541 U.S. at 56 n.6; *see also Giles*, 554 U.S. at 357-59 (noting that dying declarations were admitted at common law even though unconfronted); *Bryant*, 131 S. Ct. 1143, (Ginsburg, J., dissenting) (“were the issue tendered here, I would take up the question whether the exception for dying declarations survives our recent Confrontation Clause decisions.”).


\(^{123}\) *Melendez-Diaz* v. Massachusetts, 557 U.S. 305, 314 n.3 (2009), (“The right to confrontation may, of course, be waived.”).


\(^{125}\) *But see State v. English*, 171 N.C. App. 277, 282-84 (2005) (the defendant 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”; the judge confirmed the defendant’s “stipulation” through “extensive questioning”).

\(^{126}\) *Melendez-Diaz*, 557 U.S. at 314 n.3.

\(^{127}\) *Id.* at 326-27.

\(^{128}\) *Id.* at 327 n.12; *see also State v. Steele*, 201 N.C. App. 689, 696 (2010) (notice and demand statute in G.S. 90-95(g) is constitutional under *Melendez-Diaz*).
legislation amending existing notice and demand statutes and enacting others. These statutes set up procedures by which the State may procure a waiver of confrontation rights with regard to forensic laboratory reports, chemical analyst affidavits, and certain chain of custody evidence. Table 1 summarizes North Carolina’s notice and demand statutes. The statutes apply to offenses committed on or after October 1, 2009, and are described in greater detail in the subsections that follow.

i. **Effect of the Statutes.** If the State gives proper notice under a notice and demand statute and the defendant fails to timely file an objection, a waiver of the confrontation right occurs. However, if the defendant files a timely objection, there is no waiver and *Crawford* applies.

ii. **Notice.** For all of the statutes, the State must give notice to defense counsel or directly to the defendant if he or she is unrepresented. Also, the notice is not valid unless the State provides the defendant with a copy of the relevant report.

iii. **Hearing.** The court of appeals has indicated that the trial court should conduct a hearing to determine whether a waiver occurred.

iv. **Specific Statutes.** North Carolina has seven notice and demand statutes, as described below.

*Forensic analysis generally.* G.S. 8-58.20 applies to laboratory reports from accredited laboratories of a written forensic analysis, including DNA reports. It provides, in part, that in any criminal proceeding a laboratory report “that states the results of the analysis and that is signed and sworn to by the person performing the analysis may be admissible in evidence without the testimony of the [preparing] analyst.” 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. Of North Carolina’s seven notice and demand statutes, this one puts the prosecution on the tightest leash with regard to the time to give notice. In offices where no procedures are in place to inform

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130. See, e.g., G.S. 8-58.20(f); G.S. 8-58.20(g)(5); see also State v. Jones, __ N.C. App. __, 725 S.E.2d 910, 912 (2012) (a report identifying a substance as cocaine was properly admitted; the State gave notice under the G.S. 90-95(g) and the defendant failed to object).
131. See, e.g., G.S. 8-58.20(f) (if an objection is filed, the notice and demand provisions do not apply); G.S. 8-58.20(g)(6) (same).
132. State v. Blackwell, 207 N.C. App. 255, 259 (2010) (in a drug case, the trial court erred by admitting reports regarding the identity, nature, and quantity of the controlled substances where the State provided improper notice; instead of sending notice directly to the defendant, who was pro se, the State sent notice to a lawyer who was not representing the defendant at the time); see also G.S. 8-58.20(d).
133. State v. Whittington, __ N.C. App. __, 728 S.E.2d 385, 388 n.1 (2012) (in a drug case, the State failed to give proper notice when it failed to prove that it provided the defendant with a copy of the lab report; the court rejected the notion that the State’s discovery materials, indicating that a copy of the report “will be delivered upon request,” satisfied the statute, stating: “the State may not shift the burden to Defendant by requiring Defendant to request a lab report that the State intends to introduce at trial;” the court also rejected the State’s argument that the defendant bore the burden of showing that the State did not send the report; the court determined that the burden of proving that the defendant received the report rests with the State).
134. Id. at 388.
prosecutors that forensic reports have been received, the notice period could lapse inadvertently and preclude use of the statute. The defendant has fifteen business days to file a written objection. If the defense fails to file an objection, the report may be admitted into evidence without the testimony of the analyst. If an objection is filed, the special admissibility provision does not apply.

Chain of custody for forensic analysis generally. G.S. 8-58.20(g) applies to a chain of custody statement for evidence that has been subjected to forensic testing as provided in G.S. 8-58.20. 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. Alternatively, the State may include its notice with the laboratory report, as described above. The defendant must file a written objection at least five business days before the proceeding. If the defense fails to do so, the statement may be admitted without a personal appearance by the preparer. If an objection is made, the special admissibility provision 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 by an accredited laboratory 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. 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 does not apply. Form AOC-CR-344 (side two) is designed to implement the statute.

Chain of custody for tested blood or urine. G.S. 20-139.1(c3) applies to 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 does not apply. Form AOC-CR-344 (side two) is designed to implement the statute.

Chemical analyst's affidavit in district court. G.S. 20-139.1(e1) applies to a chemical analyst's affidavit in district court. It provides
that 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 the relevant procedure. 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 constitutes 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. Form AOC-CR-344 (side one) is designed to implement the statute.

*Chemical analyses in drug cases.*** G.S. 90-95(g) pertains to chemical analyses by specified laboratories in drug cases. It applies in all court proceedings and 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.

*Chain of custody in drug cases.*** G.S. 90-95(g1) applies to chain of custody of drug evidence. 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.
C. 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.” Any support for a contrary conclusion in earlier North Carolina cases is now questionable.

Some viewed the Court’s grant of certiorari in Briscoe v. Virginia, issued 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

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135. Melendez-Diaz, 557 U.S. at 324; see also D.G. v. Louisiana, 130 S. Ct.1729 (2010) (No. 09-6208) (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).  
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 Melendez-Diaz. Since that per curiam decision, the Court has taken other action confirming its position on this issue.  

VII. **Unavailability.** The next step in the *Crawford* analysis is to determine whether the declarant is unavailable.

A. **Good faith effort.** A witness is not unavailable unless the State has made a good-faith effort to obtain the witness's presence at trial.

B. **Evidence required.** To make the showing, the State must put on evidence to establish the steps it has taken to procure the witness for trial.

VIII. **Prior Opportunity to Cross-Examine.** The next step in the analysis is to determine whether there has been a prior opportunity to cross-examine the declarant.

A. **Prior Trial.** If a case is being retried and the witness testified at the first trial, the prior trial provided the defendant with a prior opportunity to cross-examine the witness.

B. **Probable Cause Hearing.** At least one North Carolina case has held that defense counsel's cross-examination of a declarant at a probable cause hearing satisfies *Crawford*'s requirement of a prior opportunity to cross-examine.

C. **Pre-Trial Deposition.** One open issue is whether a pre-trial deposition constitutes a prior opportunity to cross-examine.

IX. **Retroactivity.**

A. **Generally.** 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. Whether the decision applies to cases that became final before the new decision was issued is a question of retroactivity.

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139. See D.G., 130 S. Ct. 1729 (No. 09-6208) (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 prosecution).
140. Hardy v. Cross, 565 U.S. __, 132 S. Ct. 490, 494 (2011) (the state court was not unreasonable in determining that the prosecution established the victim’s unavailability for purposes of the confrontation clause).
141. See CONFRONTATION ONE YEAR LATER, supra note 9, at 30; see also State v. Ash, 169 N.C. App. 715, 727 (2005) (“Without receiving evidence on or making a finding of unavailability, the trial court erred in admitting [the testimonial evidence].”).
142. CONFRONTATION ONE YEAR LATER, supra note 9, at 30–31; see also Allen, 179 N.C. App. 434 (unpublished)
144. For a discussion of this issue, see CONFRONTATION ONE YEAR LATER, supra note 9, at 31 and EMERGING ISSUES, supra note 33, at 9–10.
B. Retroactivity of *Crawford*. The United States Supreme Court has held that *Crawford* is not retroactive under the rule of *Teague v. Lane*.

Later, in *Danforth v. Minnesota*, 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 argue 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. However, that argument is not on solid ground in light of the North Carolina Supreme Court’s decision in *State v. Zuniga*. In *Zuniga*, the North Carolina Supreme Court expressly adopted the *Teague* test for determining whether new federal rules apply retroactively in state court motion for appropriate relief proceedings. In so ruling it specifically rejected the argument that the state retroactivity rule of *State v. Riven* should apply in motion for appropriate relief proceedings. Instead, persuaded by concerns of finality, the court adopted the *Teague* rule. Although *Zuniga* is a pre-*Danforth* case, it is the law in North Carolina; although the North Carolina Supreme Court might come to a different conclusion if the issue is raised again, the lower courts are bound by the decision.

C. 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. For more detail on this issue, see the paper noted in the footnote.

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 the section immediately above.

X. Proceedings to Which *Crawford* Applies.

A. Criminal Trials. By its terms, the Sixth Amendment applies to “criminal prosecutions.” It is thus clear that the confrontation protection applies in criminal trials.

B. Sentencing. *Crawford* applies at the punishment phase of a capital trial.
respect to non-capital sentencing, the North Carolina Court of Appeals has clarified that Crawford applies only to Blakely-style sentencing proceedings in which the jury makes a factual determination that increases the defendant’s sentence.155

C. Termination of Parental Rights. Crawford does not apply in proceedings to terminate parental rights.156

D. Juvenile Delinquency Proceedings. In an unpublished opinion, the North Carolina Court of Appeals applied Crawford in a juvenile adjudication of delinquency.157 More recently the United States Supreme Court took action indicating that Crawford applies in these proceedings.158

XI. 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.159 This rule applies on appeal as well as in postconviction proceedings.160

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155. State v. Hurt, 208 N.C. App. 1, 6 (2010) (Crawford applies to all "Blakely" sentencing proceedings in which a jury makes the determination of a fact or facts that, if found, increase the defendant's sentence beyond the statutory maximum; here, the trial court's admission of testimonial hearsay evidence during the defendant's non-capital sentencing proceeding violated the defendant's confrontation rights, where at the sentencing hearing the jury found the aggravating factor that the murder was especially heinous, atrocious, or cruel and the trial judge sentenced the defendant in the aggravated range; the court distinguished State v. Sings, 182 N.C. App. 162 (2007) (declining to apply the confrontation clause in a non-capital sentencing hearing), on the basis that it involved a sentencing based on the defendant's stipulation to aggravating factors not a Blakely sentencing hearing and limited the decision's holding to its facts).


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