CRAWFORD & THE CONFRONTATION CLAUSE

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Contents

I. The *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 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. Roberts*[4] 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 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]

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, unless the defendant has waived or forfeited the right to confrontation.

1. U.S. CONST. AMEND. VI.
2. Melendez-Diaz v. Massachusetts, 557 U.S. 305, 309 (2009).
3. 541 U.S. 36 (2004).
4. 448 U.S. 56 (1980).
5. *Crawford*, 541 U.S. at 40 (quotation omitted) (describing the *Roberts* test).
6. *Id*.
7. *Id*. at 61.
8. *Id*.
9. *Id.* at 68.

A. When *Crawford* Issues Arise.

Crawford issues may arise whenever the State seeks to introduce statements of a witness who is not subject to cross-examination at trial.[10] For example, *Crawford* issues arise when the State seeks to admit:

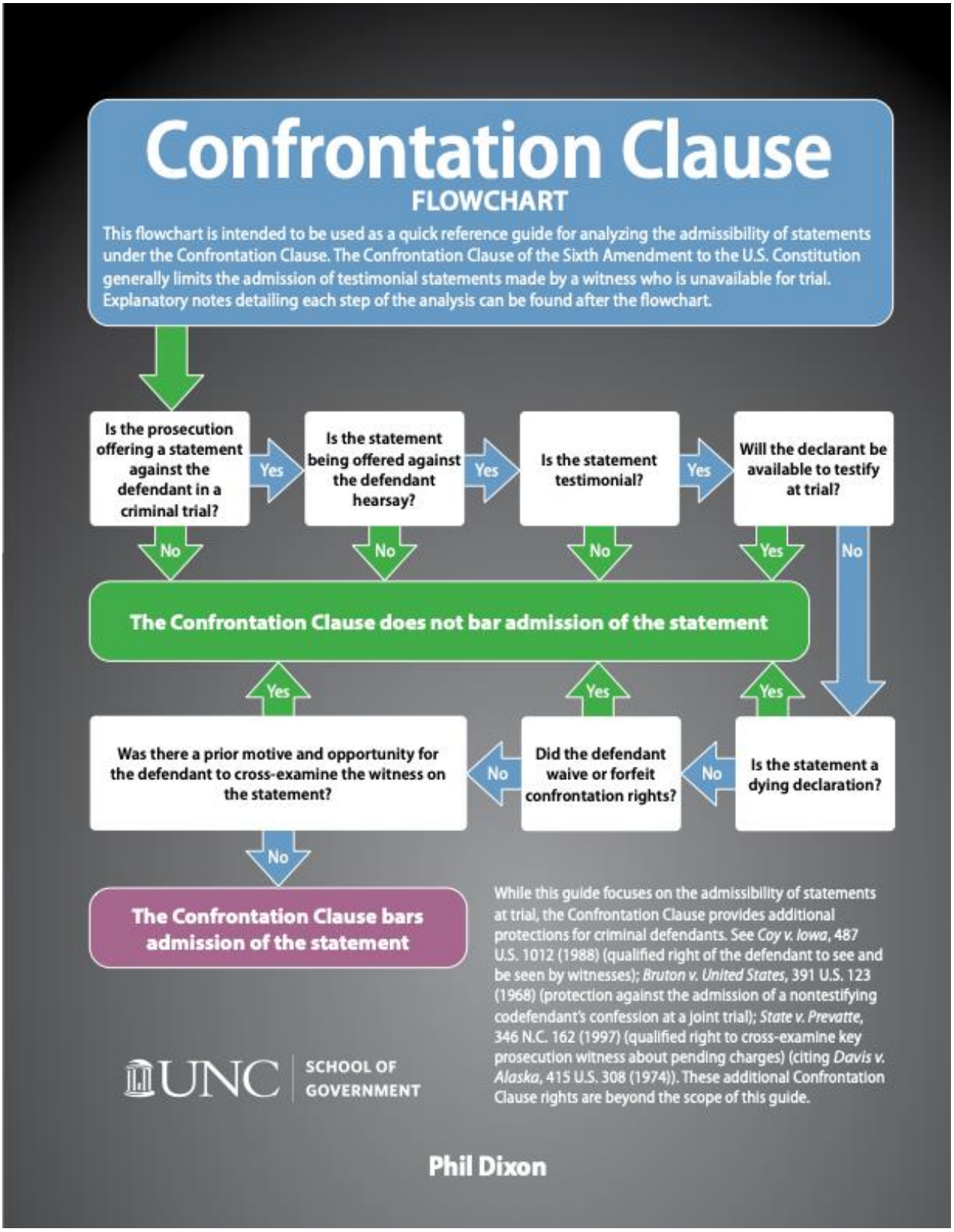
- out-of-court statements of a nontestifying domestic violence victim to first-responding officers or to a 911 operator;
- out-of-court statements of a nontestifying child sexual assault victim to a family member, social worker, or doctor;
- a forensic report by a nontestifying analyst identifying a 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 does not testify 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 below sets out a framework for analyzing *Crawford* issues. The steps of this analysis are fleshed out in the sections that follow.

10. When no out-of-court statement is offered, the Confrontation Clause is not implicated. State v. Carter, 237 N.C. App. 274, 280-81 (2014) (where the defendant failed to identify any testimony by the investigating officer that repeated an out-of-court statement of the confidential source, the defendant's Confrontation Clause argument was without merit).

Figure 1. Confrontation Clause Flowchart



II. Statement Offered For Its Truth Against the Defendant.

A. For Its Truth.

Crawford is implicated only if the out of court statement is offered for its truth.[11]

1. Role of Hearsay Rules.

Many statements implicate both *Crawford* and evidentiary rules concerning hearsay because each body of law deals with out of court statements offered for their truth.[12] The central point of *Crawford*, however, is that the Confrontation Clause analysis is independent of the hearsay rules.[13] Notwithstanding this clear separation of the constitutional and evidentiary analyses, in more recent cases the Court has stated that "in determining whether a statement is testimonial, 'standard rules of hearsay, designed to identify some statements as reliable, will be relevant.'"[14] The analysis for determining if a statement is testimonial is discussed below in Section IV.

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.[15]

- **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 Confrontation Clause.[16]
- **b. Corroboration.** When the evidence is admitted for the purpose of corroboration, cases hold that it is not offered for its truth and therefore falls outside of the scope of the Confrontation Clause.[17]
- **c. To Explain the Course of Conduct.** Sometimes statements of a nontestifying declarant are admitted to explain a course of conduct, such as an officer's action or the course of an investigation. Cases hold that statements introduced for this purpose are not admitted for their truth and thus present no Confrontation Clause issue.[18]
- **d. To Explain a Listener's or Reader's Reaction or Response.** Cases hold that when a statement is introduced to show the reaction or response of a listener or reader, it is not offered for its truth and the Confrontation Clause is not implicated.[19]

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11. *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." (emphasis added)).
12. N.C. R. EVID. 801(c). Nontestimonial hearsay statements do not implicate the Confrontation Clause and are controlled solely by the evidence rules.
13. *Crawford*, 541 U.S. at 50-51, 61 (overruling the Court's prior approach under *Ohio v. Roberts* where confrontation analysis depended on hearsay exceptions under the law of evidence; the Framers did not intend to leave the Sixth Amendment protection "to the vagaries of the rules of evidence").
14. Ohio v. Clark, 576 U.S. 237, 245 (2015) (quoting Michigan v. Bryant, 562 U.S. 344, 358-59 (2011)).
15. *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.").
16. Five Justices agreed on this issue in *Williams v. Illinois*, 567 U.S. 50 (2012); *id.* at 105-06 (Thomas, J., concurring) (calling this a "*legitimate* nonhearsay purpose"); *id*. at 127 (Kagan, J., dissenting).
17. *See, e.g.*, State v. Lindsay, 292 N.C. App. 641, 651 (2024) (out of court statements offered to corroborate the victim's in-court testimony were not hearsay and did not implicate the defendant's confrontation rights).
18. *See, e.g.*, State v. Steele, 260 N.C. App. 315, 320 (2018) (statements of confidential informant to law enforcement used explain the course of the officer's subsequent conduct were not offered for their truth); State v. Garner, 252 N.C. App. 393 (2017) (similar).
19. State v. Hayes, 239 N.C. App. 539, 544 (2015) (the trial court did not err by admitting into evidence a forensic psychologist's report prepared in connection with a custody proceeding regarding the defendant's and the victim's children or by allowing the psychologist to testify about her report; although the psychologist's report and testimony contained third party statements from non-testifying witnesses who were not subject to cross-examination at trial, the

e. Basis of an Expert's Opinion. Prior to the Court's 2024 decision in *Smith v. Arizona*,[20] 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.[21] They reasoned that when offered for this purpose, a statement is not offered for its truth. This approach was supported by a plurality of justices in a 2012 case, *Williams v. Illinois*.[22] The issue would most commonly arise with substitute forensic analysts—that is, when a forensic analyst testifies to the results of testing or analysis performed by another analyst who does not testify. The U.S. Supreme Court squarely rejected this approach in *Smith* holding that the statement of a nontestifying expert is offered for its truth when used as a basis of opinion by a testifying expert. Thus, such substitute analyst testimony implicates the Confrontation Clause when the statement of the non-testifying analyst is testimonial under the primary purpose test. *Smith* and substitute expert testimony is discussed in more detail in Section V. below.

f. Limiting Instructions. When a statement is admitted for a proper "not for the truth" purpose, a limiting instruction should be given.[23]

B. 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.[24] Similarly, the Confrontation Clause has no applicability to evidence presented by the defendant.[25]

III. Subject to Cross-Examination at Trial.

Crawford does not apply when the declarant is subject to cross-examination at trial.[26] Normally, a witness is subject to cross-examination when he or she is placed on the stand, put under oath, and responds willingly to questions.

A. Memory Loss.

While no published North Carolina decision has addressed the issue of memory loss of a testifying witness in the context of confrontation rights, cases from other

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evidence was not admitted for the truth of the matter asserted but rather to show how reading it affected the defendant's state of mind with respect to a custody dispute with his wife); State v. Castaneda, 215 N.C. App. 144, 148 (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).

20. 602 U.S. 779 (2024).

21. *See, e.g.*, State v. Mobley, 200 N.C. App. 570, 576 (2009) (holding, prior to *Smith*, that no *Crawford* violation occurred when a substitute analyst testified to her own expert opinion, formed after reviewing data and reports prepared by nontestifying expert).

22. 567 U.S. 50 (2012).

23. N.C. R. EVID. 105; *see also* State v. Garner, 252 N.C. App. 393, 400 (2017) (noting that a limiting instruction was given); *Wiggins*, 185 N.C. App. at 384 (same).

24. State v. Richardson, 195 N.C. App. 786, *5 (2009) (unpublished) ("*Crawford* is not applicable if the statement is that of the defendant . . . .").

25. Giles v. California, 554 U.S. 353, 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); State v. Womble, 297 N.C. App. 547, 557(2024) (no Confrontation Clause error where challenged statement came from defendant's witness).

26. *See, e.g.*, *Crawford*, 541 U.S. at 59 n.9 ("[W]hen the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements.").

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

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. This is what happened in *Crawford*, where state marital privilege barred the witness from testifying at trial.[28]

C. *Maryland v. Craig* Procedures for Child Abuse Victims.

In the pre-*Crawford* case *Maryland v. Craig*,[29] the United States Supreme Court upheld a Maryland statute that allowed a judge to receive, through a one-way closed-circuit television system, the testimony of an alleged child abuse victim. The child witness was cross-examined in the separate room, while a video monitor recorded and displayed the child's testimony to those in the courtroom.[30] Throughout the procedure, the defendant remained in electronic communication with defense counsel, and objections were made and ruled on as if the witness were testifying in the courtroom.[31]

Upholding the Maryland procedure, the *Craig* Court held that while "the Confrontation Clause reflects a preference for face-to-face confrontation . . . that [preference] must occasionally give way to considerations of public policy and the necessities of the case."[32] It went on to explain that "a defendant's right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured."[33]

The Court made clear that the State must make a case-specific showing of necessity. Specifically, the trial court must:

(1) "hear evidence and determine whether use of the one-way closed-circuit television procedure is necessary to protect the welfare of the particular child witness who seeks to testify";
(2) "find that the child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant"; and
(3) "find that the emotional distress suffered by the child witness in the presence of the defendant is more than de minimis, i.e., more than mere nervousness or excitement or some reluctance to testify."[34]

27. United States v. Kappell, 418 F.3d 550 (6th Cir. 2005) (rejecting defendant's argument that because the child witnesses were unresponsive or inarticulate at times, the defendant could not effectively cross-examine them); State v. Price, 146 P.3d 1183 (Wash. 2006) (en banc) (notwithstanding memory lapses, child witness was available for cross examination at trial); Patano v. State, 138 P.3d 477 (Nev. 2006) (child victim's negative answers or "I don't know" responses when asked to identify to whom she spoke did not render cross-examination ineffective).
28. *Crawford*, 541 U.S. at 40.
29. 497 U.S. 836 (1990).
30. *Id*. at 841–42.
31. *Id.* at 842.
32. *Id*. at 849 (citations and internal quotation marks omitted).
33. *Id.* at 850.
34. *Id.* at 855–56 (citations and internal quotation marks omitted).

Although the United States Supreme Court has not yet considered whether the type of procedure sanctioned in *Craig* for child victims survives *Crawford*, the North Carolina courts and others have held that it does.[35]

D. Remote Testimony.

Relying on *Maryland v. Craig,* some have argued that when a witness testifies remotely through a two-way audio-visual system the witness is subject to cross-examination at trial and the requirements of the Confrontation Clause are satisfied. To date, courts have been willing to uphold such a procedure only when the prosecution can assert a pressing public policy interest, such as:

- protecting child sexual assault victims from trauma,
- national security in terrorism cases,
- combating international drug smuggling,
- protecting a seriously ill witness's health, and
- protecting witnesses who have been intimidated.

At the same time, courts have either held or suggested that the following rationales are insufficient to justify abridging a defendant's confrontation rights:

- convenience,
- mere unavailability,
- cost savings, and
- general law enforcement.

Of course, if confrontation rights are waived, remote testimony is permissible. G.S. 15A-1225.3(b) and G.S. 20-139.1(c5) allow remote testimony by forensic analysts in certain circumstances after a waiver of confrontation rights by the defendant through notice and demand statutes.[36] Other North Carolina statutes allow for remote testimony of child witnesses,[37] and witnesses with intellectual or developmental disabilities.[38] In 2021, the North Carolina General Assembly enacted G.S. 7A-49.6, permitting remote testimony in all types of proceedings under certain circumstances, including a knowing and voluntary waiver of confrontation rights by a defendant or juvenile in criminal or

35. State v. Jackson, 216 N.C. App. 238, 244-47 (2011) (in a child sexual assault case, the defendant's confrontation rights were not violated when the trial court permitted the child victim to testify by way of a one-way closed circuit television system; the court held that *Craig* survived *Crawford* and that the procedure satisfied *Craig*'s procedural requirements; the court also held that the child's remote testimony complied with the statutory requirements of G.S. 15A-1225.1); State v. Lanford, 225 N.C. App. 189, 204-08 (2013) (following *Jackson*, the court held that the trial court did not err by removing the defendant from the courtroom and putting him in another room where he could watch the child victim testify on a closed circuit television while staying connected with counsel through a phone line; the trial court's findings of fact about the trauma that the child would suffer and the impairment to his ability to communicate if required to face the defendant in open court were supported by the evidence); *see also* United States v. Maynard, 90 F.4th 706, 711 (4th Cir. 2024) (rejecting the argument that *Crawford* overruled *Craig*).

36. *See generally* Section VII.B. below, discussing notice and demand statutes.15A-1225.3(b1) also permits remote forensic analyst testimony in district court proceedings without regard to the defendant's waiver when the prosecution complies with certain notice and disclosure requirements. *See* Shea Denning, *Remote Testimony by Lab Analysts Authorized in District Court – Even Without the Defendant's Consent*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Dec. 6, 2021).

37. G.S. 15A-1225.1; *see generally* State v. Phachoumphone, 257 N.C. App. 848, 853 (2018) (although the trial court erred by failing to follow the statutory procedure, the defendant failed to show prejudice).

38. G.S. 15A-1225.2.

delinquency proceedings.[39] Remote testimony is further addressed in Section VII.B., below.

E. Making the Witness "Available" to the Defense.

In *Melendez-Diaz v. Massachusetts*,[40] the United States Supreme Court foreclosed 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.

The *Crawford* rule, by its terms, applies only to testimonial evidence; nontestimonial evidence falls outside of the Confrontation Clause and need only satisfy the Evidence Rules for admissibility.[41] Though it did not offer an exhaustive definition of the term, the *Crawford* Court described a testimonial statement as "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact at trial."[42] In a series of cases following *Crawford*, the United States Supreme Court developed what has become known as the "primary purpose test" for determining whether a statement is testimonial.[43] Under this test, a court must objectively evaluate all of the relevant circumstances to determine whether the principal reason for making a statement was its potential use in a future criminal proceeding.[44] If a statement was made with such a primary purpose, it is testimonial and may not be offered at trial for its truth against the defendant unless the defendant is provided an opportunity to cross-examine the declarant.[45]

A. Factors Relevant to the Primary Purpose Analysis.

1. Ongoing Emergency.

The primary purpose test was first articulated in *Davis v. Washington*,[46] a consolidation of two separate domestic violence cases, *Davis v. Washington* and *Hammon v. Indiana.* Both cases involved 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 for help while being assaulted by her boyfriend were nontestimonial but that statements by the other domestic violence victim to first-responding officers concerning her husband's past conduct and made while there was no immediate threat to the victim were testimonial. In distinguishing the two cases, the *Davis* Court focused on whether the primary purpose of the

39. S.L. 2021-47 sec. 9(a).
40. 557 U.S. 305 (2009).
41. Michigan v. Bryant, 562 U.S. 344, 354 (2011) ("We . . . limited the Confrontation Clause's reach to testimonial statements . . . ."); Whorton v. Bockting, 549 U.S. 406, 420 (2007) ("Under *Crawford* . . . the Confrontation Clause has no application to [nontestimonial] statements . . . ."); Ohio v. Clark, 576 U.S. 237, 244-45 (2015) (quoting *Bryant*).
42. 541 U.S. at 51.
43. *See* Davis v. Washington, 547 U.S. 813, 822 (2006) ("[Statements] are testimonial when the circumstances objectively indicate . . . that the primary purpose . . . is to establish or prove past events potentially relevant to later criminal prosecution."); Ohio v. Clark, 576 U.S.237, 244 (2015) (*Davis* "[a]nnounc[ed] what has come to be known as the 'primary purpose' test").
44. *See* Smith v. Arizona, 602 U.S. 779, 800-802 (2024) (so synthesizing the Court's "varied formulations" of the primary purpose test).
45. *Id.* at 802-03.
46. 547 U.S. 813 (2006).

statements was to meet an ongoing emergency, and held that statements made with such a primary purpose are not testimonial.[47]

In *Michigan v. Bryant*, the Court made clear that an ongoing emergency may include circumstances that extend "beyond an initial victim to a potential threat to the responding police and the public at large."[48] In *Bryant*, the Court held that a mortally wounded shooting victim's statements to first-responding officers were nontestimonial.[49] The Court noted that the victim was found in a public location suffering from a fatal gunshot wound and the perpetrator's location was unknown.[50] The Court observed that the "duration and scope of an emergency may depend in part on the type of weapon employed," with emergencies involving unarmed assailants more easily resolved than those involving firearms.[51]

Though assessments of whether a situation involved an ongoing emergency have been prominent recurring features of the case law, the Supreme Court has emphasized that the existence of an ongoing emergency is not the "touchstone" of the analysis; rather it is just one factor in the primary purpose analysis, and courts should consider other factors.[52]

2. Formality of the Setting or the Statement.

The level of formality associated with the statement is a factor in the primary purpose analysis.[53] In the context of police questioning, "[a] 'formal station-house interrogation,' like the questioning in *Crawford*, is more likely to provoke testimonial statements, while less formal questioning is less likely to reflect a primary purpose aimed at obtaining testimonial evidence against the accused."[54]

3. Timing and Substance of Statements.

The primary purpose analysis must examine the timing and substance of the statements of both the declarant and the interrogators.[55] In *Bryant*, for example, immediately upon arriving at the scene of the ongoing

47. 547 U.S. at 822-32.
48. 562 U.S. 344, 359 (2011).
49. *Id*. at 372-74.
50. *Id*. North Carolina cases on the ongoing emergency factor include *State v. Miller*, 371 N.C. 273, 283 (2018) (statements of victim to law enforcement officer made outside of her apartment regarding the defendant breaking into her home, assaulting her, and restraining her were nontestimonial when the defendant's location was unknown, it was unclear whether the defendant was still inside of the victim's home and whether he still posed a threat; while the statements relayed past events, the statements were made in an informal setting in response to an ongoing emergency), *State v. Guy*, 262 N.C. App. 313, 318-19 (2018) (statements to law enforcement officer regarding the circumstances of a recent armed robbery were nontestimonial when the location of the suspects was unknown and the suspects posed an ongoing threat to the public; statements were primarily made to assist in the apprehension of the suspects), and *State v. Glenn*, 220 N.C. App. 23, 29-32 (2012) (statements by sexual assault victim to law enforcement officer were testimonial where the victim was voluntarily released following the assault, the assailant used a knife and not a gun, there was no indication that the suspect was nearby, and no indication that the suspect posed a threat to the victim, law enforcement, or the public; any emergency was over at the time the statements were made).
51. 562 U.S. at 364; *see also* State v. McKiver, 369 N.C. 652, 656 (2017) (ongoing emergency where 911 caller reported a dispute outside the caller's home involving a man brandishing a gun).
52. *Bryant*, 562 U.S. at 374.
53. *Id*. at 356-58.
54. Ohio v. Clark, 576 U.S. 237, 245 (2015). *See also* State v. Miller, 371 N.C. 273, 284 (2018) (discussion between officer and victim was "clearly informal and took place in an environment that cannot be reasonably described as 'tranquil.'").
55. *Bryant*, 562 U.S. at 367.

emergency, the officers asked "what had happened, who had shot [the victim], and where the shooting occurred," thus soliciting information necessary for them to assess the threat to their own safety and that of the victim and the public.[56] The Court referenced its prior observation in *Davis* that "initial inquiries" made during ongoing emergencies "may 'often . . . produce nontestimonial statements.'"[57] Note, however, that *Davis* stressed that in the absence of an ongoing emergency initial inquiries are not especially likely to produce nontestimonial statements.[58]

4. Actions of the Declarant and the Person to Whom Statements Were Made.

The actions taken by the declarant and the person to whom the statements were made are factors in the primary purpose analysis.[59] For example, in finding a domestic violence victim's statements nontestimonial in *State v. Miller*,[60] the North Carolina Supreme Court emphasized that the statements caused an officer to enter the victim's house and check the surrounding area in order to ensure that the defendant was no longer present.

5. Identity of the Declarant and Person to Whom Statements Were Made.

Crawford, Davis, and *Bryant* all involved questioning by the police or their agents. In *Ohio v. Clark,*[61] the Court held that a child abuse victim's statements to his preschool teachers were nontestimonial. Significantly, the Court declined to adopt a categorical rule excluding statements made to persons other than law enforcement officers or their agents from the scope of the Sixth Amendment. It did state however that "such statements are much less likely to be testimonial than statements to law enforcement officers."[62]

Courts have considered whether *Crawford* applies to statements made to a variety of people who do not qualify as the police and their agents. The sections below discuss those cases.

a. Statements by Very Young Children.

The Court in *Clark* declared that "[s]tatements by very young children will rarely, if ever, implicate the Confrontation Clause."[63]

b. Statements to Family, Friends, Co-Workers, and Other Private Persons.

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.[64] Every North Carolina

56. *Id*. at 376.
57. *Id*.
58. *Davis*, 547 U.S. at 832.
59. *Bryant*, 562 U.S. at 367.
60. 371 N.C. 273, 283 (2018); *see also* State v. McKiver, 369 N.C. 652, 656 (2017) (911 caller made nontestimonial statements in reporting that a man outside the caller's home was brandishing a gun; caller retreated into her home away from windows and responding police officer armed himself with his patrol rifle before entering the scene).
61. 576 U.S. 237 (2015).
62. 576 U.S. at 246.
63. *Id.* at 248.
64. *Crawford*, 541 U.S. at 51.

appellate case that has considered the issue has treated statements made to private persons as nontestimonial.[65]

c. Statements to Medical Personnel.

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). The cases focus on whether the services have a medical purpose as opposed to, for example, a purely forensic purpose.[66]

d. Statements to Teachers.

As discussed, the Court in *Clark*[67] held that a child abuse victim's statements to his preschool teachers were nontestimonial. Note that the Court rejected the defendant's argument that Ohio's mandatory reporting statutes made the child's statements testimonial, concluding: "mandatory reporting statutes alone cannot convert a conversation between a concerned teacher and her student into a law enforcement mission aimed primarily at gathering evidence for a prosecution."[68]

e. Statements to Social Workers.

The testimonial nature of statements by child victims to social workers has been hotly litigated.[69] The Fourth Circuit weighed in on the issue in *United States v. DeLeon,*[70] 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.[71]

B. Statements with Mixed Purposes.

In *Davis*, the Court recognized the possibility that a situation may involve both testimonial and nontestimonial statements, such as when an ongoing emergency

65. *See, e.g.*, State v. Roberts, 268 N.C. App. 272, 279-80 (jail phone calls were casual remarks to acquaintances and were nontestimonial); State v. Call, 230 N.C. App. 45, 48 (2013) (in a larceny by merchant case, statements made by a deceased Wal-Mart assistant manager to the store's loss prevention coordinator were nontestimonial; the loss prevention coordinator was allowed to testify that the assistant manager had informed him about the loss of property, triggering the loss prevention coordinator's investigation of the matter); 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); 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).

66. *See, e.g.*, State v. McLaughlin, 246 N.C. App. 306, 320-24 (2016) (a child sexual assault victim's statements to a Children's Advocacy Center nurse were made for the primary purpose of safeguarding the child's mental and physical health and thus were nontestimonial; the court rejected the defendant's argument that the statutory duty to report suspected child abuse rendered the statements testimonial).

67. 576 U.S. 237 (2015).

68. *Id.* at 249. *See also McLaughlin*, 246 N.C. App. at 322-24 (rejecting the defendant's argument that statutory duty to report suspected child abuse rendered child victim's statements to nurse testimonial)

69. Jessica Smith, *Evidence Issues in Criminal Cases Involving Child Victims and Child Witnesses*, ADMIN. JUST. BULL. No. 2008/07 at 14-34 (UNC School of Government Dec. 2008) (cataloging cases), *available at* https://benchbook.sog.unc.edu/sites/default/files/pdf/EvidenceIssuesinCriminalCasesInvolvingChildVictimsandChildWitnesses.pdf.

70. 678 F.3d 317 (4th Cir. 2012), *reversed on other grounds*, 133 S. Ct. 2850 (2013).

71. *Id.* at 324-26. *See also* Jessica Smith, *4th Circuit Ruling: Child's Statements to Social Worker Are Non-testimonial*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (June 13, 2012).

is resolved and the focus shifts to gathering evidence.[72] The Court likewise noted in *Smith v. Arizona* that forensic reports may contain both testimonial and nontestimonial components.[73] In a situation involving both testimonial and nontestimonial statements, only the testimonial statements will be objectionable under the Confrontation Clause.[74]

C. Categorically Testimonial Statements.

Crawford declared statements made under certain circumstances to be categorically testimonial. It seems likely that the same result would be reached under the primary purpose test.

1. Prior Trial, Preliminary Hearing, and Grand Jury Testimony.

Crawford stated that "prior testimony at a preliminary hearing, before a grand jury, or at a former trial" is testimonial.[75]

2. Plea Allocutions.

Crawford classified plea allocutions as testimonial.[76]

3. Deposition Testimony.

Davis suggests and state cases hold that deposition testimony is testimonial.[77]

4. Custodial Interrogation following *Miranda* Warnings.

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.[78] The Court noted that when classifying police interrogations as testimonial it used the term "interrogation" in its "colloquial, rather than any technical, legal sense,"[79] and broadly stated that "[w]hatever else the term [testimonial] covers, it applies at a minimum to . . . police interrogations."[80] Despite this language, subsequent Supreme Court cases have made it clear that *Crawford*, to the extent that it announces a categorical rule for police interrogations, should be read narrowly to include within this rule only formal custodial interrogations involving *Miranda* warnings; the Court has consistently applied the primary purpose test to police interrogations not involving *Miranda* custody.[81]

D. Reports, Records, and Logs.

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72. 547 U.S. at 828-29 ("In this case, for example, after the operator gained the information needed to address the exigency of the moment, the emergency appears to have ended . . .. It could readily be maintained that, from that point on, [the victim's] statements were testimonial, not unlike the 'structured police questioning' that occurred in *Crawford*.").
73. 602 U.S. 779, 802 (2024). Forensic Reports are discussed in more detail below.
74. *Davis*, 547 U.S. at 828-29; *Smith*, 602 U.S. at 802.
75. 541 U.S. at 68; *see also Clark,* 576 U.S. at 243-44 (so describing *Crawford*).
76. *Crawford, 541 U.S.* at 64; *see also* Hemphill v. New York, 595 U.S. 140 (2022) (categorizing transcript of guilty plea as testimonial).
77. *Davis*, 547 U.S. at 824 n.3, 825; *see, e.g.,* State v. Clonts, 254 N.C. App. 95, 126 (2017) (witness's deposition testimony "clearly" is testimonial), *aff'd per curiam*, 371 N.C. 191 (2018).
78. *Crawford*, 541 U.S. at 53 n.4. *See also Davis*, 541 U.S. at 813, 837-38 (Thomas, J., concurring in part) ("*Miranda* warnings, by their terms, inform a prospective defendant that anything he says can be used against him in a court of law.").
79. 541 U.S. at 53 n.4.
80. *Id*. at 68.
81. *See, e.g.*, *Davis*, 547 U.S. at 827-32.

Crawford, *Davis*, and *Bryant* all involved oral statements made to police officers. In *Melendez-Diaz v. Massachusetts*,[82] the Court applied *Crawford* beyond that context, examining the testimonial nature of a forensic report, an issue discussed in specific detail in Section V., below. The following subsections explore other types of reports, records, and logs. The Court in *Melendez-Diaz* observed that many such materials are created primarily for a purpose other than use in a criminal proceeding and thus are nontestimonial. A trial court should be mindful that the relevant inquiry is the primary purpose of the material at the time of its creation, not at the time at which it is provided in response to a subpoena.[83]

1. Medical Reports and Records.

Melendez-Diaz indicated that "medical reports created for treatment purposes . . . would not be testimonial under our decision today."[84] Medical reports prepared for forensic purposes obviously are not prepared for treatment purposes; as noted, forensic reports are discussed in more detail below.

2. Business and Public Records.

Crawford offered business records as an example of nontestimonial evidence.[85] In *Melendez-Diaz*, the Court was careful to clarify: "Business and public records are generally admissible absent confrontation 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."[86]

3. Records Regarding Equipment Maintenance.

Melendez-Diaz stated that "documents prepared in the regular course of equipment maintenance may well qualify as nontestimonial records."[87]

4. Machine Generated Raw Data.

The North Carolina Supreme Court has held that computer generated cellular phone records are nontestimonial because "a computer's pure output is not made for the 'primary purpose of establishing or proving past events potentially relevant to later criminal prosecution.'"[88] Note, though, that an expert opinion interpreting such raw data is testimonial.[89] Other examples of machine-generated data include automatically created cell phone records, seismograph monitoring outputs, and flight data recorder data, and other information created by a computer without human involvement. Machine generated data associated with forensic reports is discussed in more detail below.

82. 557 U.S. 305 (2009).
83. State v. Lester, 387 N.C. 90, 102 (2025) ("[T]he 'primary purpose' test focuses on why a statement was made in the first place—not why it was later retrieved and turned over.").
84. *Melendez-Diaz*, 557 U.S. at 312 n.2; *see also State v. Romano, 268 N.C. App. 440, 452 (2019) (blood test results in medical records were nontestimonial where the statements were primarily created for purposes of medical treatment and qualified as business records made in the course of the hospital's ordinary operations).*
85. *Crawford*, 541 U.S. at 56 (business records are "by their nature" not testimonial); *see also* State v. Graves, 296 N.C. App. 414, 423 (2024) (social media direct messages were nontestimonial business records "created for the administration of [the] entity's affairs and not for the purpose of establishing or proving some past fact at trial").
86. *Melendez-Diaz*, 557 U.S. at 324.
87. *Melendez-Diaz*, 557 U.S. at 311 n.1.
88. State v. Lester, 387 N.C. 90, 101 (2025).
89. *Id.*

5. Police Reports.
Melendez-Diaz suggests that police reports are testimonial when they are used to establish a fact at trial.[90]

6. 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.[91] After *Melendez-Diaz*, a report of a comparison between a fingerprint taken from the crime scene and an AFIS card used to identify the perpetrator is almost certainly testimonial. However, it is not clear how *Melendez-Diaz* applies to the fingerprint card itself.

7. 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.[92] The log detailed the timeline of a 911 call and the law enforcement response to it.[93] 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.[94]

8. Private Security Firm Records.
In *State v. Hewson*,[95] 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.

9. Detention Center Incident Reports.
In a pre-*Melendez-Diaz* case, the North Carolina Supreme Court held that detention center incident reports were nontestimonial.[96] 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.[97]T

90. *See Melendez-Diaz*, 557 U.S. at 316, 321-22 (suggesting that an officer's investigative report describing the crime scene is testimonial and stating that police reports do not qualify as business records because they are made essentially for use in court).
91. State v. Windley, 173 N.C. App. 187, 194 (2005).
92. State v. Hewson, 182 N.C. App. 196, 207 (2007). *Hewson* cited *State v. Forte*, 360 N.C. 427, 435-36 (2006), in support of its holding. *Forte* was later abrogated by *Melendez-Diaz*.
93. *Hewson*, 182 N.C. App. at 201.
94. *See Melendez-Diaz*, 557 U.S. at 316, 321-22 (suggesting that an officer's investigative report describing the crime scene is testimonial and stating that police reports do not qualify as business records because they are made essentially for use in court).
95. 182 N.C. App. 196, 208 (2007).
96. State v. Raines, 362 N.C. 1, 16-17 (2007).
97. *Melendez-Diaz*, 557 U.S. at 324.

10. Certificates of Nonexistence of Records.
Melendez-Diaz indicates that certificates of nonexistence of records are testimonial.[98] 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.

11. Department of Motor Vehicle (DMV) Records.
The North Carolina Court of Appeals has held, in a driving while license revoked case, that certain DMV records were nontestimonial.[99] In that case, the documents at issue included a copy of the defendant's driving record, certified by the DMV Commissioner; two orders indefinitely suspending his drivers' license; and a document attached to the suspension orders and signed by a DMV employee and the DMV Commissioner. In the last document, the DMV employee certified that the suspension orders were mailed to the defendant on the dates as stated in the orders, and the DMV Commissioner certified that the orders were accurate copies of the records on file with DMV. The court held that the records, which were created by the DMV during the routine administration of its affairs and in compliance with its statutory obligations to maintain records of drivers' license revocations and to provide notice to motorists whose driving privileges have been revoked, were nontestimonial.

12. GPS Tracking Records of Supervised Defendants.
In a sex offender residential restriction case, the North Carolina Court of Appeals held that GPS tracking reports generated in connection with electronic monitoring of a defendant, who was on post-release supervision for a prior conviction, were nontestimonial business records.[100] The court reasoned: "[T]he GPS evidence … was not generated purely for the purpose of establishing some fact at trial. Instead, it was generated to monitor defendant's compliance with his post-release supervision conditions."[101]

13. 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.[102]

E. Chain of Custody Evidence.
Melendez-Diaz indicates that chain of custody information is testimonial.[103] However, the majority took issue with the dissent's assertion that "anyone whose testimony may be relevant in establishing the chain of custody … must appear in person as part of the prosecution's case."[104] It noted that while the state has to establish a chain of custody, gaps go to the weight of the evidence, not its admissibility.[105] It concluded: "It is up to the prosecution to decide what steps in

98. *Id*. at 323.
99. State v. Clark, 242 N.C. App. 141 (2015).
100. State v. Gardner, 237 N.C. App. 496, 500-01 (2014).
101. *Id.*
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.
104. *Id.*
105. *Id*.

the chain of custody are so crucial as to require evidence; but what testimony *is* introduced must (if the defendant objects) be introduced live."[106] This language calls into question earlier North Carolina cases suggesting that chain of custody information is nontestimonial.[107]

V. Forensic Reports.

Because of the ubiquitous nature of forensic evidence in criminal cases, a lot of post-*Crawford* litigation has focused on the admissibility of forensic reports, such as chemical analysts' affidavits, drug test reports, autopsy reports, DNA reports and the like. As noted above, *Melendez-Diaz* was the United States Supreme Court's first application of the *Crawford* rule to forensic reports. The sections that follow explore how *Crawford* applies to this type of evidence.

A. Whether a Forensic Report is Offered for its Truth.

As with other evidence, a forensic report implicates the Confrontation Clause only if it is offered for its truth against the defendant. In practice, this prerequisite is often satisfied because the evidentiary value of a forensic report usually depends directly upon its contents being true and incriminating.[108] Additionally, in *Smith v. Arizona*[109] the United States Supreme Court rejected the not-for-the-truth rationale that for many years was most frequently used to support the introduction of a forensic report without an opportunity to confront the author: the report serving as the basis for an independent expert opinion from a substitute analyst.[110] Nevertheless, it is conceivable that a forensic report could be offered for a purpose other than its truth, such as to explain a course of conduct.

B. Whether a Forensic Report is Testimonial.

Because forensic reports tend to be offered for their truth against the defendant, their admissibility under the Confrontation Clause usually turns on whether they are testimonial under the primary purpose test.[111] By their nature,[112] most forensic reports are created specifically for the purpose of establishing or proving a fact in a criminal proceeding and thus are testimonial.[113] In some limited situations, however, courts have found that forensic reports were prepared for a nontestimonial purpose.[114]

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106. *Id.*

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). *Forte* and *Hinchman* were later abrogated by *Melendez-Diaz*.

108. *See* Smith v. Arizona, 602 U.S. 779, 795 (2024) ("[T]he truth of [a forensic report] is what makes it useful to the prosecutor. . ..").

109. *Id*.

110. Substitute analyst testimony is discussed in greater detail below.

111. *Smith*, 602 U.S. at 799.

112. *See* Forensic Science, Black's Law Dictionary (12th ed. 2024) ("A broad range of evidence-related disciplines . . ..").

113. *Melendez-Diaz*, 557 U.S. at 311 (drug test reports were created for the "sole purpose" of use at the defendant's criminal trial and thus were testimonial); Bullcoming v. New Mexico, 564 U.S. 647, 663-64 (2011) (describing the blood alcohol analysis report at issue as resembling the report in *Melendez-Diaz* in "all material respects"). North Carolina cases in accord with *Melendez-Diaz* and *Bullcoming* on this issue include *State v. Craven*, 367 N.C. 51, 57 (2013) (drug test reports) and *State v. Clark*, 296 N.C. App. 718, 723 (2024) (same).

114. *See, e.g.*, Williams v. Illinois, 567 U.S. 50 (2012) (plurality of four justices found DNA report was nontestimonial because it was created with an eye towards locating an at-large rapist and not to create evidence for use at any specific defendant's later trial), *abrogated on other grounds by* Smith v. Arizona, 602 U.S. 779 (2024); State v. Tate, 299 N.C. App. 507, 530-32 (2025) (following the *Williams* plurality).

In *Smith* the Court indicated that applying the primary purpose test to forensic reports requires that a court carefully consider "exactly which . . . statements are at issue," as some statements may be contained in records associated with a forensic report that do not necessarily constitute testimonial hearsay even if the report itself does.[115] *Smith* involved state crime lab drug testing and the Court noted that it was disputed whether the statements at issue were from the analyst's notes documenting her lab work or from her signed report of ultimate findings; it also was disputed whether the notes and report were treated as a unified single record by the witness who relayed the statements at trial.[116] A primary purpose assessment should be made "as to each record" whose substance is conveyed at trial."[117]

C. Surrogate Testimony.

Bullcoming v. New Mexico,[118] makes clear that "surrogate testimony"—when the testifying analyst simply reads into evidence testimonial statements by a non-testifying analyst—is impermissible. North Carolina case law is in accord with *Bullcoming.*[119] At least one North Carolina case has held that the person who directly supervised the report's preparation may testify in lieu of the testing analyst,[120] and the United States Supreme Court has left open the possibility that such a procedure may be acceptable.[121]

D. Substitute Analysts.

Substitute analyst testimony arises when an expert witness who did not create a forensic report offers an independent opinion based on a non-testifying analyst's work. The practice has some support from Rule 703 of the North Carolina and Federal Rules of Evidence which permits an expert to rely on facts or data in support of their opinion when the information is of a type reasonably relied upon by other experts in the field, even if the information is inadmissible under the Evidence Rules.[122] The U.S. Supreme Court first addressed whether substitute analyst testimony comports with the Confrontation Clause in *Williams v. Illinois*.[123] There, a private laboratory conducted testing on the sexual assault victim's vaginal swabs for the presence of male DNA at the request of law enforcement. Police later matched the DNA profile found by the private lab to the defendant in a state-maintained DNA database, leading to his prosecution. A state forensic analyst, who was not involved in the testing by the private lab, was permitted to testify at the defendant's trial that the DNA profile created by the private lab matched the defendant's DNA in the state database. In a fractured plurality decision, the Court affirmed the trial court's admission of the testimony.

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115. *Smith*, 602 U.S. at 801-02.
116. *Id*. at 802.
117. *Id*. (suggesting that lab records created to comply with accreditation requirements or to facilitate internal review and quality control as examples of records that would not be testimonial).
118. 564 U.S. 647 (2011).
119. State v. Craven, 367 N.C. 51, 53 (2013) (applying *Bullcoming* and holding that the defendant's confrontation rights were violated when the testifying analyst did not give her own independent opinion, but rather gave "surrogate testimony" that "parroted" the testing analysts' opinions as stated in their lab reports).
120. State v. Harris, 221 N.C. App. 548, 556 (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).
121. *Smith*, 602 U.S. at 799. *See* Shea Denning, *Smith v. Arizona and So Many Unanswered Questions*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Oct. 25, 2024).
122. Fed. R. EVID. 703; N.C. R. EVID. 703.
123. 567 U.S. 50 (2012).

Four justices agreed that the report was not offered for its truth and did not offend the Confrontation Clause, noting that the underlying DNA report by the private lab was not admitted into evidence; it was merely used as the basis of the testifying analyst's opinion. A fifth justice concurred in result only and would have ruled that the DNA report, while hearsay, was nontestimonial because it lacked sufficient formality. The same plurality of four justices alternatively held that the DNA report was not testimonial, although for different reasons than the concurring justice. They ruled that the report was nontestimonial because it was not primarily created to be used as evidence at a later criminal trial, but rather to help locate an unknown rape suspect—the test results were created with an eye towards locating an at-large rapist and not to create evidence for use at any specific defendant's later trial.

The *Williams* decision resulted in years of confusion and uncertainty about substitute analyst testimony. Before and after *Williams*, North Carolina courts and others endorsed the practice of substitute analyst testimony by distinguishing *Melendez-Diaz* and *Bullcoming*, adopting the reasoning of the *Williams* plurality that the underlying forensic report was not hearsay as basis of the testifying expert's opinion. So long as an adequate foundation was laid in which the testifying analyst confirmed (at a minimum) that the underlying report was one of a type reasonably relied upon by other experts in the field and that the testifying expert had formed an independent opinion about the results, such substitute analyst testimony was liberally admitted.

In 2024, the U.S. Supreme Court decided *Smith v. Arizona*,[124] which squarely rejected this "basis of opinion" logic and found that the underlying report in such situations is in fact offered for its truth. "When an expert conveys an absent analyst's statements in support of his opinion, and the statements provide that support only if true, then the statements come into evidence for their truth."[125] While a substitute analyst with personal knowledge may properly testify about nontestimonial generalities, such as best practices, the significance of lab accreditation, lab standards and procedures, or hypothetical questions, *Smith* makes clear that a substitute analyst may not rely on the testimonial portions of the forensic report of another as a nonhearsay basis of opinion. While *Smith* declined to address which portions of the substitute analyst testimony in the case were testimonial (an issue not presented in the case), earlier cases like *Melendez-Diaz* and *Bullcoming* hold that the ultimate conclusion of a forensic report prepared for use at trial will be testimonial and that the defendant must have an opportunity to cross examine the person who performed the testing. *Smith's* holding overrules North Carolina cases permitting substitute analyst testimony under the "basis of expert opinion" logic.[126]

However, *Smith* also endorsed the idea that a forensic lab report may contain statements not primarily created for use at trial and that those statements, while still hearsay, would not offend the Confrontation Clause as nontestimonial statements. For example, the Court noted that certain statements within a report may be created "primarily to comply with laboratory accreditation requirements or to facilitate internal review and control," or "be written simply as reminders to self."[127] For statements like these, the primary purpose of the

124. 602 U.S. 779 (2024).
125. *Id*. at 783.
126. Cases overruled on this basis include *State v. Ortiz-Zape*, 367 N.C. 1 (2013) and *State v. Brewington*, 367 N.C. 29 (2013).
127. 602 U.S. at 802.

statements is not on use at a later prosecution and would therefore not be considered testimonial.

1. North Carolina Cases After Smith v. Arizona.

In the first state case to address the impact of *Smith*, the Court of Appeals found a Confrontation Clause violation and granted a new trial based on the prosecution's reliance on substitute analyst testimony. In *State v. Clark*,[128] a forensic analyst tested a suspected controlled substance and determined that the substance was methamphetamine. The testing analyst was not available at trial and the prosecution called a different analyst, one who had no involvement in the testing process. His opinion, like that of the substitute analyst in *Smith*, was entirely based on the statements within the absent analyst's report. While the report itself was not admitted into evidence, the substitute analyst's expert opinion identifying the substance as contraband was allowed over the defendant's Confrontation Clause objection. In granting the defendant a new trial, the *Clark* court held that the situation was identical to that of the defendant in *Smith* and that the trial court erred in permitting the substitute analyst testimony. Like the report in *Smith*, the statements in the forensic report only had evidentiary value insofar as they were true and were therefore hearsay. The statements were also testimonial under state and federal law, because they were only created for use against the defendant in a criminal prosecution.

One post-*Smith* case relied on the alternative holding of *Williams* to affirm the use of a DNA profile at trial to help match a suspect in an unsolved sexual assault case without the defendant having an opportunity to cross-examine the person who prepared the profile. While recognizing that *Smith* abrogated the basis of opinion part of *Williams*, the Court of Appeals found that the part of *Williams* finding the DNA report nontestimonial was unaffected by *Smith*. In *State v. Tate*,[129] the Court of Appeals held that a DNA profile generated by a private lab and later matched to the defendant by a state crime lab analyst was nontestimonial, because the defendant was not a known suspect at the time the DNA profile was created and the profile was created for purposes of determining whether there was any DNA in the rape kit other than the victim's, not primarily for use at a future prosecution. According to the *Tate* court:

> [The victim's] test kit was delivered to [the private lab] for the sole purpose of identifying the potential presence of any DNA other than her own, not to identify a potential suspect. [The private lab's] DNA profile was not testimonial in nature since it was not generated 'solely to aid in the police investigation' of Defendant.[130]

The *Tate* court distinguished this situation from the testing of controlled substances where the defendant's identity is known, and the forensic report is generated with a clear eye towards use at the defendant's

128. 296 N.C. App. 718 (2024), *review allowed*, ___ N.C. ___, 923 S.E.2d 225 (2025).
129. 299 N.C. App. 507, 531 (2025).
130. *Id*.

trial.[131] *Tate* also recognized the unsettled landscape of substitute analyst testimony in the wake of *Smith* and held in the alternative that any confrontation error here was harmless on the facts of the case.[132]

If the *Tate* decision is correct that this much of *Williams* survived the *Smith* decision, it recognizes an exception to the general rule that forensic reports prepared for trial are testimonial: when the forensic report is created to determine if unknown DNA is present in a sample, before any suspect is identified, the report is nontestimonial. The same would be true for a forensic report created for some other purpose, such as medical treatment or the establishment of paternity, where the primary purpose behind the creation of the report is not for use at a later prosecution. In other situations where a DNA profile or other forensic report *is* created primarily for use at a specific defendant's trial, the report would presumably be testimonial under *Melendez-Diaz*.

E. Machine Generated Data Associated with Forensic Reports.

One pre-*Smith* North Carolina case suggests that "machine-generated" raw data associated with a forensic report is not testimonial. In *State v. Ortiz-Zape*,[133] the court stated in dicta that "machine-generated raw data," such as a printout from a gas chromatograph, is nontestimonial.[134] While *Smith v. Arizona* abrogated the primary holding of *Ortiz-Zape* permitting substitute analyst testimony as nonhearsay basis of expert opinion, North Carolina courts have continued to hold that purely machine generated data is nontestimonial post-*Smith*.[135] Note, though, that an expert opinion interpreting such raw data is testimonial.[136] Notwithstanding the language in *Ortiz-Zape* and subsequent cases to the contrary, data generated by human-operated lab equipment like gas chromatography machines may be distinguishable from other types of data created without human involvement in light of *Smith v. Arizona,* where the Court suggested that the defendant should be permitted to cross-examine the person who performed the steps necessary to generate such data.[137]

VI. 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

131. *Id*.
132. *Id*. *See also* Shea Denning, *State v. Tate: DNA Analysis, the Confrontation Clause, and Testimonial Hearsay*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Jul. 17, 2025).
133. 367 N.C. 1 (2013).
134. *Id.* at 9-10.
135. State v. Lester, 387 N.C. 90, 101 (2025) (so holding with respect to cell phone call logs and suggesting that the same is true in the context of forensic reports); State v. Robinson, ___ N.C. App. ___, 2026 WL156649 (Jan. 21, 2026) (holding that drug screening toxicology data produced by liquid chromatography "are not out-of-court 'statements' within the meaning of the Confrontation Clause"; thus, no confrontation violation for forensic toxicologist to testify to his expert opinion of the toxicology report performed by other forensic chemists). *See also* Shea Denning, *State v. Tate: DNA Analysis, the Confrontation Clause, and Testimonial Hearsay*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Jul. 17, 2025).
136. *Id.*
137. *Smith*, 602 U.S. at 799-800. *See* Phil Dixon, *Machine-Generated Data, Lab Tests, and the Confrontation Clause*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Mar. 4, 2025).

wrongdoing.[138] Forfeiture by wrongdoing applies when a defendant engages in a wrongful act designed to prevent the witness from testifying, such as threatening, killing, or bribing the witness.[139] When the doctrine applies, the defendant is deemed to have forfeited his or her Confrontation Clause rights. Put another way, if the defendant intends to cause the witness's absence at trial, he or she cannot complain of that absence. At least two published North Carolina case have applied the doctrine.[140]

1. Intent to Silence Required.

In *Giles v. California*,[141] 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.[142] 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.

2. Conduct Triggering Forfeiture.

Examples of conduct that likely will result in a finding of forfeiture include threatening, killing, or bribing a witness.[143] However, *Giles* suggests that the doctrine has broader reach. Addressing domestic violence, the Court stated:

> Acts of domestic violence often are intended to dissuade a victim from resorting to outside help, and include conduct designed to prevent testimony to police officers or cooperation in criminal prosecutions. Where such an abusive relationship culminates in murder, the evidence may support a finding that the crime expressed the intent to isolate the victim and to stop her from reporting abuse to the authorities or cooperating with a criminal prosecution—rendering her prior statements admissible under the forfeiture doctrine. Earlier abuse, or 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.[144]

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."[145]

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138. Giles v. California, 554 U.S. 353, 359 (2008); *Crawford*, 541 U.S. at 62 (2004); *Davis*, 547 U.S. at 833; *Clark*, 576 U.S. at 246 (dicta); *see also* State v. Lewis, 361 N.C. 541, 549-50 (2007) (inviting application of the doctrine on retrial).
139. *Giles*, 554 U.S. at 359, 365.
140. State v. Allen, 265 N.C. App. 480 (2019) (the trial court properly applied the forfeiture by wrongdoing exception where the defendant intimidated witnesses); State v. Weathers, 219 N.C. App. 522, 525-26 (2012) (same).
141. 554 U.S. 353 (2008).
142. *Id.* at 367.
143. *Id*. at 365.
144. *Id*. at 377.
145. *Id.* at 360.

4. Conspiracy Theory.

A 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 declarant unavailable.[146] 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.[147]

5. Procedural Issues.

a. Hearing. When the State argues for application of forfeiture by wrongdoing, a hearing may be required. One North Carolina case held that forfeiture can be found even if the threatened witness fails to testify at the forfeiture hearing.[148]

b. Standard. Although the United States Supreme Court has not ruled on the issue, North Carolina and other courts apply a preponderance of the evidence standard to the forfeiture by wrongdoing inquiry.[149]

B. Dying Declarations.

Although *Crawford* acknowledged cases supporting a dying declaration exception to the Confrontation Clause, it declined to rule on the issue.[150] However, the North Carolina Court of Appeals has recognized such an exception to the *Crawford* rule.[151]

C. Opening the Door.

In *Hemphill v. New York*, the Court considered whether an exception to the Confrontation Clause exists where the defendant has opened the door to rebuttal evidence by presenting incomplete or misleading arguments.[152] In *Hemphill,* police initially suspected Morris of murder after finding both 9-millmeter and .357-caliber bullet casings in his apartment. The victim had been killed with a 9-millimeter bullet. Morris ultimately pleaded guilty to possession of a .357 revolver in exchange for dismissal of the murder charge. DNA evidence later led police to

146. United State v. Dinkins, 691 F.3d 358, 384-85 (4th Cir. 2012) (citing similar holdings from other circuits).
147. *Id.* at 385-86 (finding both prongs of the test met in this case).
148. State v. Weathers, 219 N.C. App. 522, 526 (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; "It would be nonsensical to require that a witness *testify against a defendant* in order to establish that the defendant has intimidated the witness into *not* testifying. Put simply, if a witness is afraid to testify against a defendant in regard to the crime charged, we believe that witness will surely be afraid to finger the defendant for having threatened the witness, itself a criminal offense.").
149. *State v. Allen 265* at 487-89 (2019); *see also Giles*, 554 U.S. 353, 379 (Souter, J., concurring) (assuming that the preponderance standard governs); *Dinkins*, 691 F.3d. at 383 (using the preponderance standard); United States v. Johnson, 767 F.3d 815, 822-23 (9th Cir. 2014) (explicitly holding that the preponderance standard governs).
150. *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*, 562 U.S. at 395 (Ginsburg, J., dissenting) ("[W]ere the issue properly tendered here, I would take up the question whether the exception for dying declarations survives our recent Confrontation Clause decisions.").
151. State v. Bodden, 190 N.C. App. 505, 514 (2008); State v. Calhoun, 189 N.C. App. 166, 172 (2008).
152. Hemphill v. New York, 595 U.S. 140 (2022).

charge Hemphill with the murder. At trial, the defendant elicited testimony from a prosecution witness that 9-millimeter ammunition had been found in Morris's apartment, implicating Morris as the shooter. Morris was not available to testify, and the prosecution sought to introduce his plea transcript to rebut the implication that Morris had been involved in the killing. The trial court allowed the plea transcript to be entered into evidence over the defendant's confrontation objection, reasoning that the defendant had opened the door to that evidence by presenting misleading evidence of Morris's guilt. The U.S. Supreme Court reversed, finding that the admission of Morris's plea transcript without an opportunity for the defendant to cross-examine Morris violated the Confrontation Clause. According to the Court:

> For Confrontation Clause purposes, it was not for the judge to determine whether Hemphill's theory that Morris was the shooter was unreliable, incredible, or otherwise misleading in light of the State's proffered, unconfronted plea evidence. Nor, under the Clause, was it the judge's role to decide that this evidence was reasonably necessary to correct that misleading impression. Such inquiries are antithetical to the Confrontation Clause.[153]

The *Hemphill* Court also rejected the notion that the defendant could open the door to evidence that would otherwise violate the Confrontation Clause. "[T]he Court has not held that defendants can 'open the door' to violations of constitutional requirements merely by making evidence relevant to contradict their defense."[154]

D. Rule of Completeness.

Hemphill noted that the Court's decision did not affect the common-law rule of completeness,[155] where the party against whom a written or recorded statement is offered may be permitted to offer the entire statement in the interest of fairness and to provide the full context of the remarks to the factfinder. Because here, the prosecution offered the statements in the plea transcript against the defendant, the rule of completeness was inapplicable. The Court declined to opine whether or when a testimonial hearsay statement could be offered against a defendant under the rule of completeness but did not rule out that possibility. Justice Alito, joined by Justice Kavanaugh, believed that the rule of completeness, when applicable to the defendant, would act as an implied waiver of confrontation rights. In Justice Alito's words:

> By introducing part or all of a statement by an unavailable declarant, a defendant has made a knowing and voluntary decision to permit that declarant to appear as an unconfronted witness. As a result, the defendant cannot consistently maintain that the remainder of the declarant's statement or the declarant's other statements on the same subject should not be admitted due to the impossibility of cross-examining the declarant. The

153. *Id*. at 152-53.
154. *Id*. at 154.
155. This common law rule has been adopted and codified in both the North Carolina and Federal Rules of Evidence. See N.C. R. EVID. 106 & FED. R. EVID. 106.

> defendant's decision to present the statement of an unavailable declarant is inconsistent with the simultaneous assertion of the Sixth Amendment right to subject that declarant to cross-examination.[156]

While this language was not adopted by the majority, it provides support for the idea that a defendant may implicitly waive confrontation rights by introducing part of a testimonial hearsay statement against the prosecution at trial.

VII. Waiver.

A. Generally.

Confrontation clause rights, like constitutional rights generally, may be waived.[157] To be valid, a waiver of confrontation rights, like a waiver of any constitutional right, must be knowing, voluntary, and intelligent.[158] Waivers may be expressed or implied. The sections below explore waiver of confrontation 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.[159] 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.[160] The Court went on to note that these simple notice and demand statutes are constitutional.[161]

2. North Carolina Statutes Allowing for Admission of Forensic Reports without Testimony by Analysts.

Table 1 below summarizes North Carolina's notice and demand statutes. 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.

a. 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.[162] When this occurs, the trial judge is required to admit the report without the

156. *Hemphill*, 595 U.S. at 158 (Alito, J., concurring).
157. Melendez-Diaz v. Massachusetts, 557 U.S. 305, 314 n.3 (2009) ("The right to confrontation may, of course, be waived.").
158. Maryland v. Shatzer, 559 U.S. 98, 104 (2010) (citing Johnson v. Zerbst, 304 U.S. 458 (1938)).
159. *Melendez-Diaz*, 557 U.S. at 314 n.3.
160. *Id*. at 326-27.
161. *Id*. at 327 n.12; *see also* State v. Whittington, 367 N.C. 186, 192-93 (2014) (if the defendant fails to object after notice is given under G.S. 90-95(g), a valid waiver of the defendant's constitutional right to confront the analyst occurs); 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*).
162. *See, e.g.*, G.S. 8-58.20(f); G.S. 8-58.20(g)(5); *see also* State v. Jones, 221 N.C. App. 236, 238-39 (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).

presence of the preparer.[163] If the defendant files a timely objection, there is no waiver and *Crawford* applies.[164]

b. **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.[165] In its notice, the State must provide the defendant with a copy of the relevant report.[166] While the notice need not contain proof of service or a file stamp,[167] following those procedures eliminates any question about whether notice was properly received.

c. **Constitutionality.** As noted above, the United States Supreme Court opined in *Melendez-Diaz* that simple notice and demand statutes are constitutional. Since that case was decided, the North Carolina Court of Appeals has upheld the constitutionality of G.S. 90-95(g), the notice and demand statute that applies in drug cases.[168] That holding is likely to apply to North Carolina's other similarly worded notice and demand statutes.

3. **North Carolina Statutes Allowing for Remote Testimony.** In 2014, the North Carolina General Assembly enacted legislation allowing for remote testimony by forensic analysts in certain circumstances after a waiver of confrontation rights by the defendant through a notice and demand statute.[169] In 2021, the legislature also enacted G.S. 7A-49.6, which permits judicial officials to conduct "all types of proceedings" by way of audio and video transmission. Under the law, the parties, the presiding official, and any other participants must be able to see and hear each other throughout the remote proceeding, and each party must have the ability to communicate fully and confidentially with counsel. For criminal and juvenile delinquency proceedings, remote testimony is not permitted when the right to be present or to confront

163. In 2013, the notice and demand statutes were amended, providing that when notice is given and no objection is made, the report "shall" be admitted into evidence without the presence of the preparer. S.L. 2013-171. The earlier versions of the statutes provided that upon a finding of waiver the court may, but was not required to, admit the evidence.

164. *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).

165. 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 not represented by an attorney, the State sent notice to an attorney who was not representing the defendant at the time); *see also* G.S. 8-58.20(d).

166. State v. Whittington, 367 N.C. 186, 192 (2014) (the State's notice was deficient in that it failed to provide the defendant a copy of the report and stated only that "[a] copy of report(s) will be delivered upon request").

167. State v. Burrow, 227 N.C. App. 568, 570-71 (2013) (notice was properly given under G.S. 90-95(g) even though it did not contain proof of service or a file stamp; the argued-for service and filing requirements were not required by *Melendez-Diaz* or the statute; the notice was stamped "a true copy"; it had a handwritten notation saying "ORIGINAL FILED," "COPY FAXED," and "COPY PLACED IN ATTY'S BOX" and the defendant did not argue that he did not in fact receive the notice).

168. 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*).

169. S.L. 2014-119 sec. 8(a) & (b) (enacting G.S. 15A-1225.3 and G.S. 20-139.1(c5) respectively).Under G.S.15A-1225.3(b1) and G.S.20-139.1(c6), remote testimony by forensic analysts is permitted in district court so long as the full forensic report has been provided to the defendant or to defense counsel and the defendant is given notice of the prosecution's intent to use remote testimony at least 15 business days before the proceeding at which it will be used, without regard to any waiver of confrontation rights by the defendant. The constitutionality of this provision is an open question. *See* Shea Denning, *Remote Testimony by Lab Analysts Authorized in District Court Prosecutions – Even Without the Defendant's Consent*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Dec. 6, 2021).

witness is implicated unless the defendant or juvenile knowingly, voluntarily, and intelligently waives the rights to presence and confrontation.

Table 1. North Carolina's Notice and Demand Statutes for Forensic Reports & Chain of Custody Evidence

Statute	Relevant Evidence	Proceedings	Time for State's Notice	Time for Defendant's Objection or Demand	AOC Form
G.S. 8-58.20(a)-(f)	Laboratory report of a written forensic analysis	Any criminal proceeding	No later than 5 business days after receipt or 30 days before the proceeding, whichever is earlier	Within 15 business days of receiving the State's notice	None
G.S. 8-58.20(g)	Chain of custody statement for evidence subject to forensic analysis	Any criminal proceeding	At least 15 business days before the proceeding	At least 5 business day before the proceeding	None
G.S. 20-139.1(c1)	Chemical analysis of blood or urine	Cases tried in district and superior court and adjudicatory hearings in juvenile court	No later than 15 business days after receiving the report and at least 15 business days before the proceeding[1]	At least 5 business days before the proceeding[1]	AOC-CR-344
G.S. 20-139.1(c3)	Chain of custody statement for tested blood or urine	Cases tried in district and superior court and adjudicatory hearings in juvenile court	No later than 15 business days after receiving the statement and at least 15 business days before the proceeding[1]	At least 5 business days before the proceeding[1]	AOC-CR-344
G.S. 20-139.1(e1)-(e2)	Chemical analyst affidavit	Hearing or trial in district court	No later than 15 business days after receiving the affidavit and at least 15 business days before the proceeding[1]	At least 5 business days before the proceeding[1]	AOC-CR-344
G.S. 90-95(g)	Chemical analyses in drug cases	All proceedings in district and superior court	At least 15 business days before the proceeding	At least 5 business days before the proceeding	None
G.S. 90-95(g1)	Chain of custody statement in drug cases.	All proceedings in district and superior court	At least 15 business days before trial	At least 5 business days before trial	None

1. If the proceeding is continued, the State's notice, the defendant's objection or failure to file a written objection remains effective at any subsequent calendaring of the proceeding. G.S. 20-139.1(c1); (c3); (e2). This means that the deadline for the defendant to file an objection in implied consent cases at least 5 business days before the next court date, whether or not the matter proceeds to trial then.

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."[170] The Court reiterated this position in *Smith v. Arizona*[171] and other cases. Any support for a contrary conclusion in earlier North Carolina cases is now questionable.[172]

D. Stipulations as Waivers.

North Carolina cases hold that a defendant waives 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 further testimony."[173] No personal colloquy between the trial court and the defendant is necessary for the defendant to stipulate to a lab report and waive any Confrontation Clause objections;[174] a written stipulation signed by the defendant and defense counsel will suffice. However, the Fourth Circuit Court of Appeals found reversible error where defense counsel signed a stipulation to the identity and weight of controlled substance in a drug prosecution over the defendant's express objection.[175]

E. Disruptive Behavior as Waiver.

The U.S. Supreme Court has long held that the right to confrontation is not absolute and may be lost due to disruptive, unruly, and disrespectful behavior by a defendant.[176] In *Illinois v. Allen*, the Court recognized that the loss of confrontation rights should last only so long as the defendant's disruptive behavior continues and that confrontation rights may be regained once the defendant is willing to conduct himself or herself respectfully.[177]

F. Failure to Raise Confrontation Objection.

Melendez-Diaz recognized that the right of confrontation may be waived by failure of the defendant to object on confrontation grounds.[178] North Carolina cases have cited this part of Melendez-Diaz with approval.[179] This approach to waiver by failure to raise is consistent with the state's longstanding rule that

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170. *Melendez-Diaz*, 557 U.S. at 324; *see also* D.G. v. Louisiana, 559 U.S. 967 (2010) (vacating and remanding, in light of *Melendez-Diaz*, a state court decision that found no confrontation violation when the declarant was present in court but not called to the stand by the state).
171. 602 U.S. 779, 792 n.3 (2024).
172. *See, e.g.*, State v. Brigman, 171 N.C. App. 305, 310 (2005).
173. State v. Perez, 260 N.C. App. 311, 314 (2018); State v. English, 171 N.C. App. 277, 282-84 (2005).
174. *Perez*, 260 N.C. App. at 314; *see also* State v. Loftis, 264 N.C. App. 652 (2019) (no personal colloquy with the defendant is necessary for the defendant to waive confrontation rights by stipulation to a forensic report). *But see, e.g.*, Clemmons v. Delo, 124 F.3d 944, 956 (8th Cir. 2011) (stating that the right of confrontation is "personal and fundamental" and may not be waived by defense counsel alone). *See also*, Phil Dixon, *Does a Stipulation to Lab Results Waive Confrontation Rights?*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (July 17, 2018).
175. U.S. v. Williams, 632 F.3d 129, 133 (2011) (stipulation entered over the defendant's objection was prejudicial error).
176. Illinois v. Allen, 397 U.S. 337, 343 (1970).
177. *Id.*
178. 557 U.S. at 314, n.3.
179. State v. Ward, 226 N.C. App. 386, 389 (2013).

constitutional issues not raised at trial will generally be waived for appellate review. [180]

G. Rule of Completeness.

As discussed in Section VI.D above, two justices of the U.S. Supreme Court have indicated that the rule of completeness can operate as an implied waiver of the defendant's confrontation rights. If the defendant offers part of a testimonial hearsay writing or recorded statement by an unavailable declarant against the prosecution witness, these justices believe that the defendant loses the opportunity to object on confrontation grounds to other parts of the same statement or other statements on the subject by the same declarant when offered by the prosecution in rebuttal. It is unclear whether this view would command a majority from the other justices, and the issue remains an open question.

VIII. Unavailability.

Under *Crawford*, out of court statements by witnesses who do not testify at trial are not admissible unless the prosecution shows that the witness is unavailable and that the defendant has had a prior opportunity to cross-examine the witness. This section explores what it means for a witness to be unavailable.

A. Standard.

A witness is not unavailable unless the State has made a good-faith effort to obtain the witness's presence at trial.[181] The relevant analysis may require the trial court to consider whether a reasonable continuance would allow for the witness's availability.[182] The Court of Appeals has clarified:

> [A] finding of unavailability is generally proper when there is *no possibility* the witness can be produced at trial, such as in cases when the witness has died or is terminally ill. A finding of unavailability *may* be proper when the State demonstrates that the witness is *highly unlikely* to be available for trial at any known date, such as when the witness has fled the country in an intentional effort to avoid testifying, or the State demonstrates that,

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180. *See, e.g.*, State v. Nobles, 350 N.C. 483, 495 (1999).

181. Hardy v. Cross, 565 U.S. 65, 70 (2011) (the state court was not unreasonable in determining that the prosecution established the victim's unavailability for purposes of the Confrontation Clause); *see also* State v. Clonts, 254 N.C. App. 95, 118(2017) (the State failed to show a good faith effort to procure the presence of a witness who was engaged in military service where, among other things, the State sent a subpoena to the witness but offered no evidence that the subpoena reached its destination, "much less that it reached its destination in time to have been meaningful"), *aff'd per curiam*, 371 N.C. 191 (2018).

182. *Clonts*, 254 N.C. App. at 124 (holding that the evidence did not support a finding of unavailability). In *Clonts,* the court noted that the trial court refused to continue the case until witness Whisman returned to the country and stated: "Our analysis is not confined to whether Whisman was unavailable for trial on the specific date of 15 June 2015, but whether Whisman was unavailable to testify at Defendant's trial, whenever that trial might have taken place, considering all relevant factors, rights, and policy considerations." *Id.* It concluded:

> We see no legitimate reason why a trial court should not continue a trial to *protect a defendant's confrontation rights* with the same flexibility that it offers the State when it agrees to continue a trial *in order for the State to present testimony of an important witness* at that trial. We find no compelling interest justifying the denial of Defendant's request to continue the trial to allow for Whisman's live testimony. The mere convenience of the State offers no such compelling interest[.]

Id. at 127.

> after making sufficient reasonable efforts, it has been unable to locate the witness. The common thread justifying entry of prior recorded testimony is that the witness is *either demonstrably unavailable for trial, or there is no evidence to support a finding that, with a good-faith effort by the State, the witness may be made available at some reasonable time in the future*.[183]

"By contrast," the court explained, "when a witness is unavailable for a *limited* period of time, courts have been reluctant to find that witness unavailable for Confrontation Clause purposes."[184] And with respect to unavailability due to military deployment, the court held: "in order for the State to show a witness is unavailable for trial due to deployment, the deployment must, *at a minimum*, be in probability long enough so that, with proper regard to the importance of the testimony, the trial cannot be postponed."[185]

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.[186]

C. Findings of Fact & Conclusions of Law.

Findings of fact and conclusions of law must be made on the issue on unavailability.[187]

IX. Prior Opportunity to Cross-Examine.

Under *Crawford*, out of court testimonial statements by witnesses who do not testify at trial are not admissible unless the prosecution shows that the witness is unavailable and that the defendant has had a prior opportunity to cross-examine the witness. *Crawford* did not affect existing United States Supreme Court precedent holding that a prior opportunity for cross-examination is inadequate to support later admission of testimonial statements absent confrontation if the defendant is not represented by counsel at the prior proceeding.[188] North Carolina cases decided after *Crawford* continue to indicate that representation by counsel is an essential component of a constitutionally meaningful prior opportunity for cross-examination,[189] and also indicate that a prior opportunity

183. *Id*. at 128 (footnotes omitted).
184. *Id.*
185. *Id.* at 130 (quotation omitted) (holding that the State failed to show a good faith effort to procure the witness and outlining steps that it could have undertaken to do so).
186. 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].").
187. State v. Clonts, 254 N.C. App. 95, 112-116 (2017) ("[t]he trial court was required to make sufficient findings of fact, based upon competent evidence, in support of any ruling" that the State made a good faith effort to obtain the witness's presence at trial; here, the trial court's findings of fact were insufficient to establish the witness's unavailability), *aff'd per curiam*, 371 N.C. 191 (2018).
188. Pointer v. Texas, 380 U.S. 400, 407 (1965) ("because the transcript of [the declarant's] statement offered against petitioner at his trial had not been taken at a time and under circumstances affording petitioner through counsel an adequate opportunity to cross-examine [the declarant], its introduction in a . . . criminal case against [the defendant] . . . [amounts] to denial of the privilege of confrontation guaranteed by the Sixth Amendment."). *See Crawford*, 541 U.S. at 57 (citing *Pointer* as a correct application of the Confrontation Clause).
189. State v. Ross, 216 N.C. App. 337, 345-46 (2011) (emphasizing that the defendant was represented by counsel at a probable cause hearing). State v. Clark, 165 N.C. App. 279, 287 (2004) (same in context of prior trial). Presumably a prior opportunity for cross-examination could be adequate under this analysis if a defendant validly waived the assistance of counsel, *cf.* State v. Joyner, 284 N.C. App. 681, 688 (2022) (holding that defendant waived confrontation right with respect to testimonial statements made at a hearing on a Chapter 50C no-contact order by

satisfies the Confrontation Clause only when the proceeding concerns the same subject matter that is at issue at trial.[190] The adequacy of a prior opportunity for cross-examination largely is a fact-specific inquiry. Note, however, that the facts controlling the analysis, namely whether the defendant was represented by counsel and whether the proceedings had the same subject matter, pertain to the characteristics of the opportunity to cross-examine, not whether the defendant actually exercised the opportunity by examining the declarant. The following subsections explore various settings where courts have considered what it means to have a prior opportunity for cross-examination.

A. Prior Trial.

If a case is being retried and the witness testified at the first trial, the prior trial may provide the defendant with a prior opportunity to cross-examine the witness.[191]

B. Probable Cause Hearing.

North Carolina cases have recognized that defense counsel's cross-examination of a declarant at a probable cause hearing may satisfy *Crawford's* requirement of a prior opportunity to cross-examine.[192] However, an unpublished case recognized that a probable cause hearing will not always provide the defendant an adequate opportunity to cross-examine the witness.[193] Where the State increased the severity of the defendant's charges between the probable cause hearing and trial, the defendant had not been provided discovery at the time of the probable cause hearing, and the court repeatedly sustained objections by the State to defense counsel's questions during the probable cause hearing, the hearing was insufficient to provide the defendant with a meaningful opportunity to cross-examine the witness and admission of the witness's testimony from the probable cause hearing at trial violated the defendant's Confrontation Clause rights.[194]

C. Plea Proceeding.

At least one North Carolina case has held that a witness's testimony at a prior plea proceeding afforded the defendant a prior opportunity to cross-examination.[195]

D. Related Civil Proceedings.

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failing to attend the hearing), though as a practical matter the prior proceeding may be one where there is not an affirmative right to counsel and thus counsel issues may not be salient as a procedural matter.

190. *Ross*, 216 N.C. App. at 345-46; State v. Joyner, 284 N.C. App. 681, 688 (2022). Note that the hearsay exception for former testimony of an unavailable declarant under Evidence Rule 804(b)(1) likewise requires a "similar motive" for cross-examination at a prior proceeding.

191. *Clark*, 165 N.C. App. at 287.

192. State v. Ross, 216 N.C. App. 337, 345-46 (2011).

193. State v. Smith, 287 N.C. App. 614, *10 (2023) (unpublished); see also, Daniel Spiegel, *When Can the State Use Testimony from the Probable Cause Hearing at Trial?*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Jan. 24, 2024).

194. *Id.*

195. State v. Rollins, 226 N.C. App. 129, 135 (2013) (no violation of the defendant's confrontation rights occurred when the trial court admitted statements made by an unavailable witness at a proceeding in connection with the defendant's *Alford* plea; the court concluded that the "defendant definitively had a prior opportunity to cross-examine" the witness during the plea hearing and "had a similar motive to cross-examine [the witness] as he would have had at trial").

One decision by the North Carolina Court of Appeals found that a defendant waived his confrontation rights concerning testimonial statements made at a prior hearing on a civil protective order by failing to attend the hearing.[196] In *State v. Joyner*, the defendant was charged with obtaining property by false pretenses and exploitation of an elder adult in relation to fraudulent home repair work. After the defendant was criminally charged, the victim sought and obtained a Chapter 50C protective order. The defendant had notice of that proceeding but chose not to attend. The victim subsequently died and her testimony from the 50C hearing was admitted at the later criminal trial. On appeal, the *Joyner* court reasoned that because the issues in the civil case and the criminal case were the same, the 50C hearing provided the defendant with a meaningful opportunity to cross-examine the witness, and held that the defendant implicitly waived his right to confront the witness by failing to attend the 50C hearing. As noted above, *Pointer v. Texas* and *State v. Ross* indicate that representation by counsel at a prior proceeding is a necessary condition for a constitutionally sufficient prior opportunity for cross-examination. *Joyner* cited *Ross* but did not directly address the issue of counsel. Thus, in cases not involving waiver by failure to appear, it is advisable to be cautious about extending *Joyner's* reasoning that a related civil hearing provides a meaningful opportunity for cross-examination.

X. Retroactivity.

The United States Supreme Court has held that *Crawford* is not retroactive under the rule of *Teague v. Lane*.[197] Neither the United States Supreme Court nor the North Carolina appellate courts have conclusively decided whether the confrontation principles announced in the forensic report cases (*Melendez-Diaz*, *Bullcoming*, and *Smith*) apply retroactively to cases that became final before they were decided. This issue turns on whether those cases announced new rules not dictated by precedent, in which case they almost certainly do not apply retroactively, or announced rules so clearly dictated by *Crawford* that they were apparent to all reasonable jurists, in which case they do apply retroactively.[198] The publication cited in the footnote discusses this issue in detail.[199]

XI. 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.[200]

B. Pretrial Proceedings.

196. State v. Joyner, 284 N.C. App. 681, 688 (2022); *see also* Phil Dixon, *Failure to Appear at Civil No-Contact Hearing Was a Prior Opportunity for Cross-Examination and Constituted an Implied Waiver of Confrontation Rights at Subsequent Criminal Trial*, N.C. Crim. L., UNC Sch. of Gov't Blog (Dec. 19, 2022).

197. 489 U.S. 288 (1989); State v. Zuniga, 336 N.C. 508 (1994) (expressly adopting the *Teague* test for purposes of retroactivity analysis of federal constitutional rules of criminal procedure in state court). *See* Whorton v. Bockting, 549 U.S. 406, 416-21 (2007) (*Crawford* was a new procedural rule but not a watershed rule of criminal procedure and did not apply retroactively). Note that the United States Supreme Court limited the theoretical avenues for retroactive application of constitutional rules in *Edwards v. Vannoy*, 593 U.S. 255, 272 (2021), by declaring that no rule of criminal procedure can satisfy the so-called "watershed exception" to *Teague's* general principle of anti-retroactivity for procedural rules.

198. *See* Jessica Smith, *Retroactivity of Melendez-Diaz*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (July 20, 2009). Note that this blog post was written prior to the Supreme Court's decision in *Edwards v. Vannoy* that foreclosed retroactive application of new criminal procedure rules.

199. Phil Dixon, *Smith v. Arizona and Retroactivity*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Aug. 14, 2024).

200. *See*, *e.g.*, *Crawford*, 541 U.S. at 43.

Neither *Crawford* nor any of the Court's subsequent cases address the question whether *Crawford* applies to pretrial proceedings. Nor is there a North Carolina post-*Crawford* published case on point. However, a look at post-*Crawford* published cases from other jurisdictions shows that the overwhelming weight of authority holds that *Crawford* does not apply in pretrial proceedings.[201]

C. Sentencing.

Crawford applies at the punishment phase of a capital trial.[202] The North Carolina Court of Appeals held that *Crawford* applies to *Blakely*-style non-capital sentencing proceedings in which the jury makes a factual determination that increases the defendant's sentence, such as habitual felon proceedings or sentencing hearings regarding the existence of aggravated factors.[203]

D. Termination of Parental Rights.

Crawford does not apply in proceedings to terminate parental rights.[204]

E. Juvenile Delinquency Proceedings.

North Carolina courts have assumed that confrontation rights apply to the adjudication stage of a juvenile delinquency proceeding.[205] The United States Supreme Court has taken action indicating that *Crawford* applies in these proceedings, and courts in other jurisdictions have so held.[206]

XII. 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.[207] This rule applies on appeal as well as in

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201. In pre-*Crawford* cases, the U.S. Supreme Court has emphasized that the Confrontation Clause is a trial right. *See, e.g.*, Ritchie v. Pennsylvania, 480 U.S. 39, 52 (1987). Lower courts have largely rejected applying confrontation rights to pretrial matters. *See, e.g.*, Peterson v. California, 604 F.3d 1166, 1169-70 (9th Cir. 2010) (rejecting confrontation rights at probable cause hearings); State v. Zamzow, 892 N.W.2d 637, 646 (Wisc. 2017) (same for suppression hearings); United States v. Morgan, 505 F.3d 332, 339 (5th Cir. 2007) (same for preliminary hearings on the admissibility of evidence at trial); United States v. Hernandez, 778 F. Supp. 2d 1211, 1219-27 (D.N.M. 2011) (same for pretrial release and detention hearings).

202. State v. Bell, 359 N.C. 1, 34-35 (2004) (applying *Crawford* to such a proceeding).

203. 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 that decision's holding to its facts), *reversed on other grounds* 367 N.C. 80 (2013).

204. *In Re* D.R., 172 N.C. App. 300, 303 (2005); *see also In Re* G.D.H., 186 N.C. App. 304, *4 (2007) (unpublished) (following *In Re* D.R.).

205. *In Re* J.D., 267 N.C. App. 11 (2019) (finding a violation of the juvenile's constitutional right to confrontation at a delinquency adjudication), *overruled on other grounds*, 376 N.C. 148 (2020); *see also In Re* A.L., 175 N.C. App. 419, *2-3 (2006) (unpublished).

206. *See* D.G. v. Louisiana, 559 U.S. 967 (2010) (reversing and remanding a juvenile delinquency case for consideration in light of *Melendez-Diaz*); *see also In Re* J.C., 877 N.W.2d 447, 452 (Iowa 2016) (stating that the "right of confrontation applies to juvenile delinquency proceedings" and conducting a *Crawford* analysis); *In Re* N.C., 105 A.3d 1199 (Pa. 2014) (finding a confrontation violation in a delinquency adjudication).

207. *Compare* State v. Lewis, 361 N.C. 541, 549 (2007) (error not harmless), *with* State v. Morgan, 359 N.C. 131, 156 (2004) (error was harmless in light of overwhelming evidence of guilt); *see generally* G.S. 15A-1443(b) (harmless error standard for constitutional errors).

post-conviction proceedings.[208]

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