

**Supplement to:**  
***Crawford v. Washington: Confrontation One Year Later***  
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This paper supplements Jessica Smith, *Crawford v. Washington: Confrontation One Year Later* (School of Government, April 2005) [hereinafter *Confrontation One Year Later*] (on-line at: [www.iog.unc.edu/pubs/electronicversions/pdfs/crawford.pdf](http://www.iog.unc.edu/pubs/electronicversions/pdfs/crawford.pdf)). Section I begins with a summary of *State v. Lewis*, a North Carolina case. Section II notes two *Crawford* cases from other jurisdictions now pending before the United States Supreme Court. Section III summarizes the published North Carolina *Crawford* cases decided since publication of *Confrontation One Year Later*.

**I. *State v. Lewis***

The most significant *Crawford* case to have been decided in North Carolina is the Supreme Court's decision in *State v. Lewis*.<sup>1</sup> The facts of *Lewis* were as follows. Early one evening, Officer Cashwell responded to a call at the apartment of victim Nellie Carlson. As soon as Cashwell arrived, one of Carlson's neighbors approached him and reported that after unsuccessfully trying to reach Carlson by phone, she went to Carlson's apartment and found her sitting in a chair in a "tore up" room. Cashwell, who noticed that Carlson was injured, spoke with her to find out if she needed help and what had happened. Carlson then described to Cashwell the crimes that occurred and her attacker.

Detective Utley was called to the scene later that evening. Cashwell briefed Utley and after additional work, the officers identified the defendant as the possible perpetrator. Later that evening, Utley interviewed Carlson at the hospital. When Utley showed Carlson a photographic lineup, Carlson identified the defendant as the perpetrator. Because Carlson died prior to trial (of

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<sup>1</sup>. 360 N.C. 1 (2005).

unrelated causes), the state called Cashwell and Utley to testify to Carlson’s statements to them. The statements were admitted and the defendant was convicted of armed robbery and other offenses.

The defendant appealed, arguing that admission of Carlson’s statement to officer Cashwell and her identification of the defendant from the photographic lineup violated *Crawford*. The *Lewis* court noted that while *Crawford* held that statements given during police interrogations were testimonial, *Crawford* declined to comprehensively define the term “testimonial.”<sup>2</sup> With regard to the determination whether statements to police officers are testimonial or not, *Lewis* held that “structured police questioning is a key consideration.”<sup>3</sup> It noted that such questioning or interrogation does not occur exclusively in a police station, and may occur in a field location, detention facility, or the Department of Correction.<sup>4</sup> Structured police questioning, the court explained, is different from the initial gathering of information and determination of whether a crime was actually committed.<sup>5</sup> Whether structured police questioning is present, the court continued, may depend on the status of the investigation, as evidenced by the role of the officer asking the questions.<sup>6</sup> As to the role of the officer, the court drew a clear distinction between uniformed patrol or field officers, who are likely to elicit non-testimonial statements, and officers in the investigations or detectives division, who are likely to elicit testimonial statements.<sup>7</sup> The court concluded: a line is crossed when police questioning shifts from mere preliminary fact-gathering to eliciting statements for use at a subsequent trial; when this line is crossed, any statements elicited are testimonial.<sup>8</sup>

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<sup>2</sup>. *Id.* at 13-14.

<sup>3</sup>. *Id.* at 20.

<sup>4</sup>. *Id.*

<sup>5</sup>. *Id.*

<sup>6</sup>. *Id.*

<sup>7</sup>. *Id.*

<sup>8</sup>. *Id.*

In addition to focusing on whether the statement resulted from structured police questioning, the *Lewis* court held that “an additional prong of the analysis for determining whether a statement is ‘testimonial’ is, considering the surrounding circumstances, whether a reasonable person in the declarant’s position would know or should have known his or her statements would be used at a subsequent trial.”<sup>9</sup> This determination, the court stated, should be made using an objective and not a subjective test.<sup>10</sup>

Finally, the court noted that a Minnesota case had articulated a non-exclusive list of factors to be considered and weighed in determining whether a statement is testimonial or not.<sup>11</sup> Those factors include: whether the declarant was a victim or an observer, the declarant’s purpose in speaking with the officer, the declarant’s emotional state when the statements were made, and the level of formality and structure of the conversation.<sup>12</sup> Expressly declining to adopt these interpretations of the term testimonial, the *Lewis* court stated that it did “find them instructive and helpful to the trial court.”<sup>13</sup>

Turning to the statements at issue, the court first held that Carlson’s statements to Cashwell were not testimonial. It stated:

Officer Cashwell's questioning of Carlson and other witnesses was not "structured police questioning" . . . . Cashwell was a patrol or field officer, rather than a detective or investigator. The focus of [his] interview . . . was to gather as much preliminary information as possible about the alleged incident, to determine if a crime had indeed been committed, to ascertain if medical attention was required, and to identify a potential perpetrator. When Officer Cashwell spoke with Carlson, he did not have a substantial amount of information about the alleged incident. Officer Cashwell was the first responder to the scene, and his presence did not create the "formality, command, and thoroughness" typically found in an interrogation setting. Therefore we find Officer Cashwell did not engage in "structured police questioning" . . . .

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<sup>9</sup>. *Id.* at 21.

<sup>10</sup>. *Id.*

<sup>11</sup>. *Id.* at 22 (discussing *State v. Wright*, 701 N.W.2d 802 (Minn. 2005)).

<sup>12</sup>. *Id.*

<sup>13</sup>. *Id.*

We also find Carlson's statements to Cashwell were not testimonial because we do not believe a person in Carlson's position would or should have reasonably expected her statements to be used at trial. . . . Carlson did not initiate the conversation with the police; the neighbors called the police without any direction from Carlson. Cashwell also interviewed Carlson at her home, and Cashwell was not the only person present when she made the statements, thus diminishing any formality that might be created by a police interview. Carlson was in a state of "shock" when Cashwell interviewed her, and she did not know the status of the investigation at the time of the interview. Although it is hard to discern Carlson's exact purpose in making her statements to Cashwell, it appears from these facts she did not know, nor should she have known, her statements would be used in a subsequent prosecution. Under these circumstances, her statements are more appropriately characterized as nontestimonial.<sup>14</sup>

Next, the court held that Carlson's identification of the defendant to Utley to be testimonial, stating:

By conducting the photographic lineup, Utley crossed the line between making preliminary observations about an alleged crime and structured police questioning. The lineup served as a continued investigation, based on and occurring after the preliminary investigation . . . . At the time of the lineup, Utley knew what allegedly happened to Carlson and had previously narrowed the scope of potential suspects. His purpose in conducting the interview was to establish probable cause to obtain a warrant specifically for Angela Deborah Lewis' arrest. Additionally, at the time of the interview, . . . Carlson knew an investigation was underway, and a reasonable person in Carlson's position would expect her statements could be used at a subsequent trial. Thus, the circumstances surrounding Utley's interview of Carlson at the hospital tip the scales in favor of the interview's being structured police questioning.<sup>15</sup>

The court went on to hold that the trial court's error in admitting this testimony was harmless beyond a reasonable doubt.<sup>16</sup>

*Lewis* also contained important dicta relevant to the *Crawford* analysis. The court expressly noted that these portions of its opinion were dicta, stating that it offered them as "guidance to our trial courts and litigants."<sup>17</sup> In relevant part, after noting that *Crawford* held that the term testimonial applies, at a minimum, to prior testimony at a preliminary hearing, before a

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<sup>14</sup>. *Id.* at 23.

<sup>15</sup>. *Id.* at 24.

<sup>16</sup>. *Id.* at 28.

<sup>17</sup>. *Id.* at 14.

grand jury, or at a former trial and to police interrogations, the court considered preliminary hearings in North Carolina.<sup>18</sup> The court noted that under *Crawford*, statements made by witnesses in preliminary hearings are “very likely” testimonial.<sup>19</sup> However, the court stated, not all preliminary hearings provide for testifying witnesses. Thus, the court continued, (1) the initial appearance before the magistrate immediately after the defendant’s arrest, (2) the first appearance in district court, and (3) the arraignment in superior court “do not appear to implicate *Crawford*.”<sup>20</sup> These hearings, the court explained, contrast with other preliminary hearings that may afford an opportunity for witness testimony, including (1) probable cause hearings, (2) additional pretrial hearings, such as motions to continue, motions to change venue, motions for a special venire, and motions to dismiss, and (3) suppression hearings.<sup>21</sup> Statements made at this latter group of hearings, the court explained, are likely to be testimonial.<sup>22</sup> Turning to grand jury proceedings, the *Lewis* court noted that since witness statements from these proceedings would typically not be available in a later trial, the issue of whether they would be considered testimonial is unlikely to arise.<sup>23</sup>

Additional dicta in *Lewis* discussed the forfeiture by wrongdoing exception to the *Crawford* rule.<sup>24</sup> After noting that the right to confrontation may be forfeited, the court discussed relevant case law, including a Kansas case stating that forfeiture can result even when the act with which the accused is charged is the same one by which he or she allegedly rendered the witness unavailable.<sup>25</sup> However, the court did not adopt any of these interpretations.

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<sup>18</sup>. *Id.* at 15.

<sup>19</sup>. *Id.*

<sup>20</sup>. *Id.*

<sup>21</sup>. *Id.* at 16.

<sup>22</sup>. *Id.*

<sup>23</sup>. *Id.*

<sup>24</sup>. *See id.* 26-28. *See generally Confrontation One Year Later* at p. 26-27 (discussing this exception).

<sup>25</sup>. *Lewis*, 360 N.C. at 27.

## II. Cases Pending Before the United States Supreme Court

The United States Supreme Court has granted certiorari and has heard argument in two *Crawford* cases from other jurisdictions. The Court's decisions in those cases are expected to clarify *Crawford's* new confrontation clause analysis and possibly affect North Carolina law, including *State v. Lewis*, discussed above. The first case, *Hammon v. State*,<sup>26</sup> involves a domestic violence victim's oral statements to a responding officer at the scene of an alleged crime. The second, *State v. Davis*,<sup>27</sup> involves an alleged victim's statements to a 911 call operator, in which the victim named her assailant.

## III. Recent North Carolina Cases

The material that follows supplements *Confrontation One Year Later* and is organized using the section headings of that monograph.

### *Section III.A. The Testimonial/Nontestimonial Distinction*

#### *2. Co-Defendants' and Accomplices' Statements During Police Interrogation or While in Custody*

Because statements made during police interrogation fall within even the narrowest reading of *Crawford*, it is no surprise that the court of appeals continues to hold that co-defendants' and accomplices' statements during police interrogation or while in custody are testimonial.<sup>28</sup>

#### *4. Business Records and Affidavits*

*State v. Cao*<sup>29</sup> sets out the standard that applies in North Carolina in determining whether laboratory tests are testimonial or not. In that case, the defendant was convicted of drug crimes arising from an undercover operation. The substances obtained during two undercover purchases

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<sup>26</sup>. 829 N.E.2d 444 (2005), *cert. granted*, Hammon v. Indiana, 126 S. Ct. 552 (2005).

<sup>27</sup>. 111 P.3d 844 (2005), *cert granted*, Davis v. Washington, 126 S. Ct. 547 (2005).

<sup>28</sup>. *State v. Garcia*, \_\_ N.C. App. \_\_, 621 S.E.2d 292 (Nov. 15, 2005).

<sup>29</sup>. \_\_ N.C. App. \_\_, 626 S.E.2d 301 (Jan. 17, 2006).

were submitted for testing for the presence of cocaine. The laboratory technician who performed the testing did not testify at trial. Rather, a detective read the test results to the jury. The defendant appealed, arguing that allowing this evidence violated his confrontation rights under *Crawford*.

The *Cao* court began by noting that it could not find “any meaningful distinction” between the detective’s request for the test in the case at hand and the detective’s request in *Lewis* for the victim to identify the defendant from a photographic lineup. The court explained: “The sole purpose of [the detective’s] request was to obtain evidence to support the charges at trial, and a reasonable lab technician would expect that his or her conclusions would be used at the subsequent trial.” The court noted, however, that *Crawford* itself suggests that business records may be nontestimonial. It also noted that in *State v. Smith*,<sup>30</sup> the North Carolina Supreme Court determined that a chemical analyst’s affidavit setting out the results of a Breathalyzer test was precisely the sort of evidence that the business records exception to the hearsay rule intended to make admissible. *Smith* had stressed: “The analyst is at no time called upon to render an opinion or to draw conclusions. The analyst is required at the time of testing to record the alcohol concentration as indicated by the machine . . . .”

Considering this authority, *Cao* held “that laboratory reports or notes of a laboratory technician prepared for use in a criminal prosecution are nontestimonial business records only when the testing is mechanical, as with the Breathalyzer test, and the information contained in the documents are objective facts not involving opinions or conclusions drawn by the analyst.” It continued: “While cross-examination may not be necessary for blood alcohol concentrations, the same cannot be said for fiber or DNA analysis or ballistics comparisons, for example.” Applying that rule to the case before it, the court concluded that the laboratory report’s specification of the

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<sup>30</sup>. 312 N.C. 361 (1984).

substance's weight would likely qualify as an objective fact obtained through mechanical means. However, the record on appeal was insufficient as to the laboratory procedures involved in identifying the presence of cocaine in a substance in order to allow the court to determine whether that portion of the testing met the same criteria. It went on to conclude that even assuming error, the error was harmless beyond a reasonable doubt.

After *Coa*, another case, *State v. Melton*,<sup>31</sup> dealt with whether admission of laboratory report confirming that the defendant tested positive for genital herpes, without testimony of the lab technician, violated the defendant's confrontation rights. *Melton* was statutory rape case in which the child victim tested positive for genital herpes. Applying the *Cao* standard, the court found the record insufficient to enable it to determine whether the procedures employed by the testing company were mechanical. However, the court concluded that even if admission of the report was error, it was harmless beyond a reasonable doubt.

A final case of interest is *State v. Windley*.<sup>32</sup> In that case, the court held that a fingerprint card created upon defendant's arrest and contained in the Automated Fingerprint Identification System (AFIS) database was a nontestimonial business record.

#### *5. Test Reports and Related Affidavits*

For a discussion of whether test reports can be deemed business records, see the section immediately above.

#### *6. Victims' Statements to Police Officers*

As discussed in detail in Section I above, the most significant *Crawford* case to have been decided in North Carolina is *State v. Lewis*, a case involving a victim's statements to an officer at a crime scene and her later identification of the defendant from a photo array.<sup>33</sup>

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<sup>31</sup>. \_\_\_ N.C. App. \_\_\_, 625 S.E.2d 609 (Feb. 7, 2006).

<sup>32</sup>. \_\_\_ N.C. App. \_\_\_, 617 S.E.2d 682 (Sept. 6, 2005).

Although arguably in conflict with *Lewis*, the North Carolina Court of Appeals subsequently held, without analysis, that a murder victim's statements to a probation officer and to officers who were investigating the victim's earlier complaints that the defendant was forging checks and fraudulently using her credit cards were nontestimonial.<sup>34</sup>

And finally, *Hammon v. Indiana*,<sup>35</sup> noted above in Section II and now pending before the Supreme Court, involves a victim's statements to an officer at a crime scene.

### *11. Statements to Friends, Family, and Similar Private Parties*

North Carolina cases continue to hold that statements to family, friends, and similar private parties are non-testimonial.<sup>36</sup> An interesting case in this regard is *State v. Brigman*,<sup>37</sup> a child sex case. In *Brigman*, two of the child victims were removed from their home and placed with a Mrs. M. When the children's behavior and statements suggested sexual abuse, Mrs. M. made a report to the county social services department. After making the report, Mrs. M. continued to talk with the children and attempted to tape-record the conversation. Although the tape turned out to be inaudible, Mrs. M. wrote down notes of her conversation with the children immediately after it occurred. Mrs. M. testified to all of this at trial, including recounting what the children told her about the defendant. The defendant was convicted and appealed. The court

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<sup>33</sup>. Pre-*Lewis* cases involving statements by victims to law enforcement officers include: *State v. Moore*, \_\_ N.C. App. \_\_, 620 S.E.2d 1 (Oct. 4, 2005) (prior rape victim's identification of defendant as her assailant during photographic lineup was testimonial); *State v. Champion*, \_\_ N.C. App. \_\_, 615 S.E.2d 366 (July 19, 2005) (victim's statements to police on the day of the attack were testimonial); *State v. Allen*, 171 N.C. App. 71 (2005) (statements of witness and victim to officer 20 minutes after incident were testimonial; witness's identification of a perpetrator from a photographic lineup, made one day after the crime, was testimonial); *State v. Sutton*, 169 N.C. App. 90 (2005) (victim's statements to officers were testimonial; police had approached the victim and questioned her, her statement was neither spontaneous nor unsolicited, it was the second statement given to police that night, and an objective witness would reasonably believe that the statement would be available for use at trial).

<sup>34</sup>. *State v. Scanlon*, \_\_ N.C. App. \_\_, 626 S.E.2d 770 n.1 (Mar. 7, 2006).

<sup>35</sup>. 829 N.E.2d 444 (2005), *cert. granted*, 126 S. Ct. 552 (2005).

<sup>36</sup>. *State v. Scanlon*, \_\_ N.C. App. \_\_, 626 S.E.2d 770 n.1 (Mar. 7, 2006) (victim's statements to her sister and nephew); *State v. Lawson*, \_\_ N.C. App. \_\_, 619 S.E.2d 410 (Sept. 20, 2005) (witness's statement to her boyfriend, the victim, identifying defendant as the perpetrator of the assault were nontestimonial; witness made the statement to her boyfriend in a private conversation while the boyfriend was being transported to the hospital).

<sup>37</sup>. 171 N.C. App. 305 (2005).

of appeals rejected the defendant's *Crawford* challenge with respect to this testimony, holding that the child's statements were non-testimonial. The court was not persuaded by the defendant's arguments that Mrs. M. was acting in a quasi-governmental role; instead, it noted, among other things, that the statements were made to Mrs. M., not the police, the defendant was less than six years old, and it was highly implausible that he believed the statements would be used prosecutorially.

### *13. Excited Utterances*

The Court of Appeals has stated that "after *Crawford*, whether a statement qualifies as an excited utterance is not a factor in our Confrontation Clause analysis."<sup>38</sup>

#### *Section III.B. Exceptions to the Crawford Rule*

##### *2. Statements Offered for a Purpose Other Than Truth of the Matter Asserted*

In a number of North Carolina cases, defendants have challenged the admission of various forensic reports when a person other than the one who prepared the report testifies at trial. The courts have held that when the reports are admitted as a basis of a testifying expert's opinion, no *Crawford* violation occurs. They reason that when the reports are admitted for this purpose, they are admitted for a purpose other than the truth of the matter asserted and thus are excepted from the *Crawford* rule. The cases are summarized below and supplement the bullet on page 27 of *Confrontation One Year Later* on this issue. Note that in these cases, the reports are not admitted as substantive evidence.

*State v. Shelly*, \_\_ N.C. App. \_\_, 627 S.E.2d 287 (Mar. 21, 2006) (no *Crawford* violation when testifying forensic chemistry expert's opinion was based on gunshot residue reports done by non-testifying SBI agent).

*State v. Durham*, \_\_ N.C. App. \_\_, 625 S.E.2d 831 (Feb. 21, 2006) (no *Crawford* violation when forensic pathologist's expert testimony was based on an autopsy performed by another non-testifying pathologist).

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<sup>38</sup>. *State v. Allen*, 171 N.C. App. 71 n.2 (2005).

State v. Bunn, \_\_ N.C. App. \_\_, 619 S.E.2d 918 (Oct. 18, 2005) (no *Crawford* violation when expert in forensic drug examination relied on chemical analyses performed by non-testifying chemist).

State v. Bethea, \_\_ N.C. App. \_\_, 617 S.E.2d 687 (Sept. 6, 2005) (no *Crawford* violation when expert in forensic firearms identification based opinion on tests and report done by a non-testifying forensic firearm examiner).

State v. Watts, \_\_ N.C. App. \_\_, 616 S.E.2d 290 (Aug. 2, 2005) (testimony of forensic molecular geneticist that relied upon DNA analysis conducted by a non-testifying colleague did not violate *Crawford*).

State v. Lyles, \_\_ N.C. App. \_\_, 615 S.E.2d 890 (Aug. 2, 2005) (no confrontation clause violation when expert in forensic chemistry testified that substance was cocaine, based on findings made by another chemist).

State v. Delaney, 171 N.C. App. 141 (2005) (no *Crawford* violation when testifying expert relied upon non-testifying colleague's analyses in forming his opinions that substances were controlled substances).

State v. Walker, 170 N.C. App. 632 (2005) (no *Crawford* violation when forensic firearms expert based opinion on ballistic report done by another non-testifying agent).

Other recent North Carolina cases have applied the *Crawford* “for purposes other than the truth of the matter asserted” exception in the following circumstances:

- to explain a witness's course of action;<sup>39</sup>
- to explain the course of an investigation;<sup>40</sup> and
- for corroboration.<sup>41</sup>

In a related case, the court held that no *Crawford* violation occurred when a detective testified that as a result of an interview with a non-testifying individual, he considered that individual to be a material witness against the defendant.<sup>42</sup> The court reasoned: “[The] testimony

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<sup>39</sup>. State v. Byers, \_\_ N.C. App. \_\_, 623 S.E.2d 357 (Jan. 3, 2006) (witness's statements regarding what victim told him were admitted not for the truth of the matter asserted but rather to explain why, at the time defendant assaulted the victim, the witness chose to run in fear for his life, seek law enforcement assistance before returning to the scene, and chose not to confront the defendant alone).

<sup>40</sup>. State v. Alexander, \_\_ N.C. App. \_\_, \_\_ S.E.2d \_\_ (Apr. 18, 2006).

<sup>41</sup>. State v. Walker, 170 N.C. App. 632 (2005).

<sup>42</sup>. State v. Medina, \_\_ N.C. App. \_\_, 622 S.E.2d 176 (Dec. 6, 2005).

did not convey to the jury any specific statement [the individual] made to [the detective]. Rather, as a result of his investigation, [the detective] testified that [the individual] would have been a material witness.” Note that even if the detective had testified to the specific statements, if they were admitted solely to explain the course of the investigation, they would have fallen under the *Crawford* exception for evidence admitted for a purpose other than the truth of the matter asserted.<sup>43</sup>

For a discussion of case law holding that certain forensic reports may qualify as business records, see “Business Records and Affidavits,” above.

### *Section III.C. Availability for Cross-Examination*

One debated issue has been whether the state must actually proffer the witness in order to satisfy *Crawford*'s availability for cross-examination requirement. Without analysis, one court of appeals case has held that it need not do so. In *State v. Brigman*,<sup>44</sup> the court held that because child witnesses were available to testify, even though neither the State nor the defendant called them to testify, defendant waived her right to confront these witnesses.

### *Section III.D. Establishing Unavailability*

One additional North Carolina case continues the trend in the case law of requiring the state to present adequate evidence of unavailability, on the record. That case is summarized below.

State v. Ash, 169 N.C. App. 715 (2005) (unavailability of autopsy doctor was not established; the only information in the record regarding unavailability was that prior to playing the doctor's videotaped deposition, the trial court informed the jury that for the convenience of the doctor, the videotape had been made).

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<sup>43</sup>. See *Confrontation One Year Later* at 27; State v. Alexander, \_\_ N.C. App. \_\_, \_\_ S.E.2d \_\_ (Apr. 18, 2006).

<sup>44</sup>. 171 N.C. App. 305 (2005).

### *Section III.F. Waiver and Invited Error*

The North Carolina cases emphasize the importance of raising *Crawford* issues at trial. At least two cases have held that constitutional errors not raised at trial will not be considered for the first time on appeal.<sup>45</sup> Others have evaluated *Crawford* claims under the demanding plain error rule.<sup>46</sup> Other waiver-related cases are summarized below.

State v. Byers, \_\_ N.C. App. \_\_, 623 S.E.2d 357 (Jan. 3, 2006) (by failing to object to arguably testimonial evidence, defendant lost the benefit of objections made to similar evidence).

State v. Medina, \_\_ N.C. App. \_\_, 622 S.E.2d 176 (Dec. 6, 2005) (no confrontation violation when defense counsel initiated testimony concerning statements of non-testifying individual during cross-examination; this opened the door for the State to elicit any alleged statements made by the non-testifying witness).

State v. Brigman, 171 N.C. App. 305 (2005) (because child witnesses were available to testify (although neither the State nor the defendant called them to testify), defendant waived her right to confront these witnesses).

State v. English, 171 N.C. App. 277 (2005) (defendant waived his Sixth Amendment right to confront preparer of laboratory report identifying the substance at issue as cocaine by stipulating to the report).

### *Section III.H. Proceedings to Which Crawford Applies*

#### *6. Termination of Parental Rights (new subheading)*

In re D.R., \_\_ N.C. App. \_\_, 616 S.E.2d 300 (Aug. 2, 2005) (*Crawford* does not apply to a civil termination of parental rights proceeding).

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<sup>45</sup>. State v. Alexander, \_\_ N.C. App. \_\_, \_\_ S.E.2d \_\_ (Apr. 18, 2006); State v. Jones, \_\_ N.C. App. \_\_, 627 S.E.2d 265 (Mar. 21, 2006) (not citing *Crawford* but rejecting defendant's confrontation clause claim with respect to the admission of a detective's testimony regarding certain statements made to him by the person who served as a store clerk during the robbery at issue; court stated that constitutional error not asserted at trial will not be considered for the first time on appeal).

<sup>46</sup>. State v. Sutton, 169 N.C. App. 90 (2005); State v. Cao, \_\_ N.C. App. \_\_, 626 S.E.2d 301 (Jan. 17, 2006).

*Section III.I. Harmless Error Review*

North Carolina cases continue to hold that that *Crawford* errors are subject to harmless error analysis.<sup>47</sup>

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<sup>47</sup> State v. Lewis, 360 N.C. 1 (2005) (error harmless); State v. Shelly, \_\_ N.C. App. \_\_, 627 S.E.2d 287 (Mar. 21, 2006) (same); State v. Cao, \_\_ N.C. App. \_\_, 626 S.E.2d 301 (Jan. 17, 2006) (same); State v. Melton, \_\_ N.C. App. \_\_, 625 S.E.2d 609 (Feb. 7, 2006) (same); State v. Garcia, \_\_ N.C. App. \_\_, 621 S.E.2d 292 (Nov. 15, 2005) (same); State v. Moore, \_\_ N.C. App. \_\_, 620 S.E.2d 1 (Oct. 4, 2005) (same); State v. Champion, \_\_ N.C. App. \_\_, 615 S.E.2d 366 (July 19, 2005) (same); State v. Allen, 171 N.C. App. 71 (2005) (same); State v. Ash, 169 N.C. App. 715 (2005).