

Nothing Ventured, Nothing Gained Confrontation of Lab Reports

**Ernest L. "Buddy" Conner
Greenville, NC**

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The State's boilerplate discovery response has notified the defense of its intent to introduce one or more lab reports. Questions are raised: Should we as defense attorneys, demand that the analyst appear and testify? Is such a demand, obstructionist, or zealous advocacy? How do we know when to demand the analyst appear? Does this lab report impact our defense discovery strategies? What if the analyst who did the test is not available? How do we handle the substitute analyst who did not perform the test, but is prepared to testify as to the results of the test? How do we attack or make the argument that the testifying agent just used the results arrived at by the other analyst as the basis of his/her opinion?

Essentially, what do we as defenders do to make certain our client's confrontation rights are protected in light of the recent developments in the law? The English judge, Lord Campbell summed this dilemma up best when he penned that "skilled witnesses come with such a bias in their minds to support the case in which they are embarked that hardly any weight should be given to their evidence." *Tracy Peerage Case*, 10 Cl. & F. 154, 191 (1884).

Most jurors do not share Lord Campbell's position, and once an expert (analyst) is brought into a case we must be concerned that all other evidence is diminished to the point that the analyst becomes the sole focus of the case, leading to a conviction. So the question becomes: should we demand the analyst's presence?

To answer this question, there are several factors to consider:

1. Is there overwhelming evidence of clients' guilt.

-If no, then this weighs toward requiring the analyst to appear and testify.

-If yes, then the defense should weigh the issue some more, considering that the seductive force of the analyst's testimony may well be stronger than the simple report itself setting along as an exhibit.

2. Will live testimony strengthen the State's case?

-If yes, then consider not objecting to the report.

3. Does the lab report contain errors?

-If yes, then you might want to exploit these errors in trial, and not give the State advance notice, but on the other hand, you may need the analyst in court to fully exploit the errors.

4. Does the lab report hurt your client, or case?

-If no, then don't worry about the report. If the report is boring, let the State be the one who bores the jury.

-If yes, then the defense probably wants to error on the side of requiring the analyst to testify to preserve client's constitutional protections.

5. Will you gain strategic advantage by not having the analyst?

-If no, then have the analyst appear, and prepare the case accordingly.

Lab reports say nothing about how the evidence was kept, before it arrived at the lab, or even while at the lab. Reports say nothing about how the evidence was collected, package, or re-packaged, or how the evidence was stored or if the evidence had any opportunity to be contaminated. If these issues are likely to be important, then you must have the analyst appear to inquire and attempt to resolve such matters.

-If yes, then don't require the analyst to appear.

Once you have asked these type questions you can determine if you need to require the analyst to appear. I usually consider these issues, but in the end often decide "nothing ventured, nothing gained," and thus require the analyst to appear.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

WE MUST OBJECT

The Defendant always has the burden of raising his Confrontational Clause objection. N.C.R. App. P. 10 (c)(1); *Melendez-Diaz v. Massachusetts*, 174 L.Ed.2d 314, 129 S.Ct. 2527, 2541 (2009). If defendant makes only general objections during the analyst's testimony, he has not properly preserved those arguments for appellate review. *State v. Steele*, 689 S.E.2d 155 (N.C. App. Jan. 5, 2010).

In *Steele* , the State expressly introduced the lab report at trial under N.C.G.S. § 90-95(g).

There was no evidence that the defendant objected to the admissibility of the lab report before trial, and the defendant admitted that he failed to object to the report at trial. Thus, defendant waived his right to confront the lab analyst under the Sixth Amendment. *Melendez-Diaz v. Massachusetts*, 174 L.Ed.2d 314, 323 n.3 (2009).

The United States Supreme Court has held that “the right to confrontation may ... be waived, including by failure to object to the offending evidence; and States may adopt procedural rules governing the exercise of such objections.” *Melendez-Diaz v. Massachusetts*, 174 L.Ed.2d 314, 323 n.3 (2009).

These procedural rules, also known as, ““notice-and-demand statutes” require the prosecution to provide notice to the defendant of its intent to use an analyst’s report as evidence at trial, after which the defendant is given a period of time in which he may object to the admission of the evidence absent the analyst’s appearance live at trial..” *Id.* at 174 L.E.2d 314, 331.

North Carolina’s relevant notice-and-demand statute provides, in part, that:

“a report is admissible in criminal proceeding in superior court ... only if: 1) The State notifies the defendant at least 15 days before trial of its intention to introduce the report into evidence under this subsection and provides a copy of the report to the defendant, and 2) The defendant fails to notify the State at least five days before trial that the defendant objects to the introduction of the report into evidence.

N.C. Gen. Stat. § 90-95(g).

If the objection is not properly preserved, North Carolina Rules of Appellate Procedure allows review for “plain error” in criminal cases “where the judicial action questioned is specifically and distinctly contended to amount to plain error.” *State v. Mobley*, 684 S.E.2d 508, 510 (N.C. App. 2009) (quoting N.C. R.App. P. 10 (c)(4)) (2010). The error must amount to a fundamental miscarriage of justice or had a probable impact on the jury’s verdict. *Id.*

CONFRONTATION CLAUSE

“The Sixth Amendment’s Confrontation Clause provides that, in all criminal prosecution, the accused shall enjoy the right ... to be confronted with the witnesses against him.” *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 1359 (2004). *Crawford* held that a criminal defendant has the right to confront those who “bear testimony” against him. *Id.* at 1364. Such testimonial statements include “extrajudicial statements”, such as affidavits, or “statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.” *Id.* At 1364.

The *Melendez-Diaz* Court revisited the holding of *Crawford* stating that “a witness’s

testimony against a defendant is ... inadmissible unless the witness appears at trial or, if the witness is unavailable and the defendant had a prior opportunity for cross-examination.” *Melendez-Diaz*, 174 L.Ed.2d 314, 129 S.Ct. at 2531.

In *Melendez-Diaz*, the State of Massachusetts presented at trial “certificates of analysis” that served as prima facie evidence of the composition, quality, and the net weight of the narcotics defendant was alleged to have possessed. *Id.* at 2531. There was no accompanying testimony of an expert witness at trial. *Id.* The court held that because the certificates were testimonial in nature, and the expert who performed the analysis was never subject to cross examination, the admission of the certificates was in error. *Id.* at 2542.

In *Locklear*, the State tendered the testimony of Dr. John Butts, the Chief Medical Examiner for North Carolina, who presented the results of an autopsy performed by Dr. Karen Chancellor and the forensic dental analysis performed by Dr. Jeffery Burkes. *State v. Locklear*, 363 N.C. 438, 452, 681 S.E.2d 293, 304 (2009). Dr. Butts did not testify to his own expert opinion; rather, he exclusively relayed the findings of Drs. Chancellor and Burkes. *Id.* The Court held that because the State sought to introduce evidence of forensic analyses performed by non-testifying experts, and the State failed to establish that the experts were unavailable to testify or had been subject to cross examination, the defendant’s right to confront the witnesses against him was violated. *Id.* at 452, 681 S.E.2d at 305.

NORTH CAROLINA SINCE LOCKLEAR

In *Galindo*, Michael Aldridge, a chemist with the Charlotte-Mecklenburg police department, testified that evidence seized from the crime scene was, in fact, marijuana and cocaine. Aldridge explained to the jury the custody procedures at the lab and stated that the test performed there were relied upon by experts in the field of forensic chemistry; however, his opinion regarding the substances seized was “solely” on the absent analyst’s lab report. *Id.* 683 S.E.2d at 787. (Emphasis added) (6th amendment rights had been violated, but the error was harmless beyond a reasonable doubt.) *State v. Galindo*, 683 S.E.2d 785, 787 (N.C. App. 2009).

In *Mobley*, the North Carolina Supreme Court distinguished *Locklear* and held that the defendant’s right to confrontation was not violated where “the testifying expert... testified not just to the results of other experts’ test, but to her own technical review of these tests, her own expert opinion of the accuracy of the non-testifying experts’ test, and her own expert opinion based on a comparison of the original data. The Court further distinguished *Melendez-Diaz*, stating that in that case the analysis at issue was prima facie evidence that the substance was cocaine, while in the *Mobley* case, the underlying report, which would be testimonial on its own, was used as a basis for the opinion of an expert who independently reviewed and confirmed the results, and was therefore not offered for the proof of the matter asserted under North Carolina case law. *State v. Mobley*, 684 S.E.2d 508, 511 (N.C. App. 2009).

In *Conley*, SBI Special Agent Crawford’s testimony consisted exclusively of summarizing the forensic glass analysis report prepared by another SBI agent, Agent Beth

Flanagan. This Court held that the trial court erred in admitting Agent Crawford's testimony, but concluded that the error is harmless beyond a reasonable doubt. The Court, in its findings, employed a four-part inquiry under *Melendez-Diaz* and *Mobley*:

- 1) whether the document at issue is testimonial;
- 2) if the document is testimonial, whether the declarant was unavailable at trial and the defendant was given prior opportunity to cross-examine the declarant;
- 3) if the defendant was not afforded the opportunity to cross-examine the unavailable declarant, whether the testifying expert was offering an independent opinion or merely summarizing another non-testifying expert's report or analysis; and
- 4) if the testifying expert summarized another non-testifying expert's report or analysis, whether the admission of the document through another testifying expert is reversible error. *State v. Conley*, 690 S.E.2d 558 unpublished opinion (Jan. 19, 2010, No. COA-09-456).

More recently, in the *Hough* case, the Court found the case to be analogous to *Mobley* and found no error, or plain error, in the admission of forensic chemist, Kamika Alloway's testimony. The Court concluded that her expert opinion was based on an "independent review" and confirmation of test results, unlike the situation presented in *Melendez-Diaz*, *Locaklear*, and *Galindo*. Ms. Alloway did not merely present the test results, or read verbatim from the non-testifying expert's report; rather she provided her "own analysis" and expert opinion regarding the accuracy of the reports based on her peer review. As it noted in *Mobley*, "well settled North Carolina case law allows an expert to testify to his or her own conclusions based on the testing of others in the field." *Mobley*, 684 S.E.2d at 511.

The *Hough* court further held that Alloway's testimony did not constitute inadmissible hearsay even though it was based, in part, on reports generated by another expert because evidence offered as the basis of an expert's opinion is not being offered for the truth of the matter asserted. *Mobley*, 684 S.E.2d at 511; *see also*, *State v. Berthea*, 173 N.C. App. 43, 55, 617 S.E.2d 687, 695 (2005). *State v. Hough*, 690 S.E.2d 285 (N.C. App. Mar. 2, 2010)

HOW TO HANDLE SUCH TESTIMONY IN TRIAL (Neutralize the Testimony)

Motions practice is helpful to prepare for such testimony, and attached are several sample motions and notices to aid in the preparation of the defense of such analysts' testimony. In essence, to counter the seductive force of the analyst's testimony you must neutralize the analyst as much as possible. This begs the earlier questions: What if the analyst who did the test is not available? How do we handle the substitute analyst who did not perform the test, but is prepared to testify as to the results of the test? How do we attack or make the argument that the testifying agent just used the results arrived at by the other analyst as the basis of her opinion?

The answer to these questions are the same as the key to any other part of your case:

Preparation. You don't have to know everything about the analyst's area or expertise be it: blood test, ballistics, abuse evaluations, examinations or psychology. You need an expert for that. However you must be thoroughly familiar with the theory, concepts and language. And you need to have several full, engaging and informative meetings with your own expert prior to conducting cross examination of the State's analyst.

In requiring the analyst to appear, focus on the Sixth Amendment, and what the analyst can't know.

The analyst typically is weak in the area of knowing: that the machine used for the test is an "established technique;" or how the machine has been recognized as a reliable testing method, by experts in the field. Additionally you should focus on issues discussed in *Goode and Howerton v. Arai Helmet*, 358 N.C. 440, 597 S.E.2d 674 (2004). Is the expert's proffered method of proof sufficiently reliable as an area for expert testimony? Is the witness testifying at trial qualified as an expert in that area of his or her testimony? Is the expert's testimony relevant? How familiar is the analyst with the machine's inner workings, such as the premises and basis for the machine's calculations? How the machine is calibrated, and the like?

For further preparation, have a theme to your case. With your case theme in mind have a theme for your cross examination. Use constructive cross to emphasize the points in favor of your theme, and merge your theme with what the machine cannot show, or how your client is unable to cross examine in regard to the manufacture, design and construction of the machine.

Where analysts are involved, there are a number of things to look at in your pre-trial investigation and preparation: Check the qualification of the analyst. Be aggressive in discovery. Look for what the State is failing to provide. Research previous testimony of the analyst. Research previous publications by the analyst.

1. Approach the cross examination of the analyst witness the same as you would any other witness. Your cross should be logical, make progressive sense with the appropriate foundation.
2. Prepare your cross. Learn the language and the area of expertise.
 - a. Know the subject matter;
 - b. Know the language;
 - c. Translate the testimony into layman's talk before the jury;
 - d. Reduce the logic of the analyst's opinion the same as you would for any other witness;
 - e. Know the case law, constitutional law, and rules of evidence (e.g. Rule 702, in regard to the machine, and the analyst's testimony).

3. Use your cross constructively to translate the favorable aspects into words the jurors can understand and appreciate.
4. Be careful about taking on the analyst in her own field of expertise with destructive cross examination. Lengthy cross examinations on the analyst's theory are usually disastrous and should rarely be attempted.
5. Trial concerns. Own the Good, The Bad and The Ugly of your case, including the analyst. Incorporate the good and the bad into your case theme, including jury voir dire.
6. Prepare your attack on the analyst, and test machinery and cross examination regarding such starting with jury voir dire. Obtain commitments from jurors not to give greater weight to the analyst or testing machine than any other evidence. Obtain commitment from jurors to hold analysts to meaningful and intelligent factual observations to which jurors can relate.

Jury Voir Dire Examples:

The state may call experts in one or more areas, including experts, or persons who work at the SBI Laboratory. What do you think [know] about analysts who work at the SBI Labs?

What have you heard about SBI Laboratory Child Advocacy clinics providing testimony?

I want to be the first one to tell you that the State is going to introduce many complicated details regarding the SBI lab's work evidence in this case. Why do you think the State intends to introduce this evidence?

I have this fear that if the analyst gets on the stand, and her testimony is complicated and/or confusing that you will want to convict [client] because the details are so complicated and confusing. What do you think about my concerns?

As the district attorney mentioned, you as a Juror are free to accept any of the analyst's testimony. You may accept all of such evidence. . . . some of such evidence. . . . or none of such evidence. This is the law of North Carolina. What do you think about this concept as it relates to drug testing evidence.

[Client]'s freedom is very important. Can you hold the analyst and medical experts to provide you with meaningful and intelligent opinion which is understandable to you as a juror?

Areas of Cross Examination:

1. Qualifications and the lack thereof

- a. Is this even a speciality?
 - b. If analyst is well qualified, consider no cross at all.
 - c. Review publication and prior testimony of the analyst, looking for possible conflicts.
2. Credibility
- a. Not the analyst who performed the tests.
 - b. Did not see the analyst perform the tests.
 - c. Earns income from this type of work.
3. Witness fees/payments
- a. You did this work for a fee
4. Defendant's cooperation
5. Conflicts/weaknesses in testing. (Is it reliable?)
- a. Prepare a time line to aid in this cross
 - b. Cross regarding inaccuracies in chain of custody
 - c. Collection and chain of custody facts not observed
 - d. Bias of person providing collection and chain of custody history
 - e. Lack of substantiation for evidence collection and chain of custody
 - f. How inaccurate collection or chain of custody history can affect opinion
 - g. Lack of history on relevant factual issues
 - h. Conflict in history between different witnesses and analyst
6. Conflicts/weaknesses in evidence collection history
- a. Use your time line to aid in this cross
 - b. Cross regarding inaccuracies in evidence collection
 - c. Key fact and crime scene contamination facts not observed
 - d. Impact of contamination issue on opinion
 - e. Bias of person providing crime scene/evidence collection history
 - f. Lack of substantiation for any history provided
 - g. Subjectiveness of testing issues
 - h. How inaccurate crime scene history or evidence collection can affect opinion
 - i. Lack of history on relevant issues
 - j. Conflict in different officers summaries
 - k. History between different witnesses and analyst
 - l. Learned treatises
7. Consider the "So what" cross.

Example of “So What” Cross: Michael E. Tigar’s I love America Cross:

You believe in America don’t you?

I understand what you have testified to here today, but you agree that the jury has to decide this case?

Because that is the American way?

And you don’t mind me asking you all these questions?

Because the jury needs to know all the facts that both sides bring out?

And you, I, and the DA will not be deciding this case?

In America that is the jury’s job?

To give both sides an equal, fair chance?

Then go into some case specific cross such as below:

8. Consider no cross.

Remember Professor’s Irvin’s Ten Commandments: 1) Be Brief. 2) Short plain questions. 3) Only leading questions. 4) Don’t ask a question to which you do not already know the answer. 5) Listen to the answer. 6) Do not quarrel. 7) Do not permit explanation. 8) Do not ask witness to repeat direct testimony. 9) Do not ask one question too many. 10) Save your explanation for closing argument.

Remember: Leading question, declarative questions only; and One fact, one question.

Checklist for Cross:

1. Know your subject matter. (Consider having your expert help you with preparing your cross)
2. Know the language of the analysts.
3. Review (with your expert) the records, the audio tapes, the video, the lab notes, and the protocol of the State’s analyst.
4. Reduce the cross examination testimony to layperson’s talk before the jury.

5. Treat the analyst as you would any other witness.
6. Reduce the logic of the analyst the same as you would any other witness.
7. Let the jury know the analyst is being paid by the State.

Cross examine on: 1)What the expert does not know; 2) The limitations of the history provided by the investigators; 3)The limitation of the crime scene evidence collection 4) Contamination issues; 5) What should have been done by each person in the process; 6) What was done; and 7) especially what was done improperly; 8) Bias

Generic Examples: You can't testify as to when the "evidence" " was left at the scene.

Normal conduct could have left the evidence?

The mere fact that there is evidence at a scene does not mean that a crime occurred?

If many people were around this crime scene, then each may have left the evidence?

Suggested Readings and References

David Ball, *Theater Tips and Strategies for Jury Trials* (NITA, 2001)

David Berg, *The Trial Lawyer*, (2005)

Peter Megaree Brown, *The Art of Questioning Thirty Maxims of Cross-Examination*, (Macmillan Publishing Company, 1987)

Donna Lee Elm, *Vouching A Defense Attorney's Guide to Witness Credibility, Law and Strategy*, (ABA, 2008)

Cecil C. Kuhne, III, *A Litigator's Guide to Expert Witnesses*, (ABA 2006)

John Nicholas Lannuzzi, *Cross-Examination: The Mosaic Art*, (Prentice Hall 1982)

Steven Lubet, *Modern Trial Advocacy, Analysis and Practice*, (NITA 1993)

Thomas A. Mauet, *Fundamentals of Trial Techniques*, (Little, Brown & Co.)

Edward Nichols, *False Allegations of Child Sexual Abuse (Attorney & Client Desk Reference, Fourth Edition*, (N.C.P.I., Inc. 2000)

Larry S. Pozner, Roger J. Dodd, *Cross-Examination, Science and Techniques* (2003 The Michie Company)

Alan T. Radnor, *Cross-Examining Doctors: A Practical Guide*, (ALI-ABA 1999)

Paul Mark Sandler, James K. Archibald, *Model Witness Examinations*, (ABA 1997)

Michael E. Tigar, *Examining Witnesses, 2nd ed.* , (ABA 2003)

Francis L. Wellman, *The Art of Cross-Examination, 4th Ed.* Dorset Press (1986)

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NORTH CAROLINA

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

BY _____

STATE OF NORTH CAROLINA

NOTICE OF OBJECTION
(N.C.G.S. SECTION 90-95(g)
and N.C.G.S Section 90-95(g1))


vs.

Defendant

NOW COMES the defendant [REDACTED] pursuant to N.C.G.S. Section 90-95(g), and hereby notifies the State of North Carolina that he objects specifically to the introduction into evidence of any and all laboratory reports prepared for the above-caption cases.

The defendant, pursuant to N.C.G.S. Section 90-95(g1) also specifically objects to the introduction into evidence of the chain of custody statement referenced in N.C.G.S. Section 90-95(g1) and hereby notifies the State that the defendant will require the State to prove chain of custody in the manner required by case law and the rules of evidence.

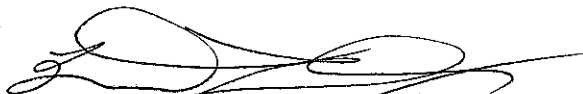
Respectfully submitted this the 20th day of January 2009.


ERNEST L. CONNER, JR.
Attorney for Defendant
102 East Arlington Boulevard, Suite 202-A
Greenville, NC 27858
Telephone: (252) 321-2848
Fax: (252) 321-7195

CERTIFICATE OF SERVICE

This is to certify that on this date the attached pleading or paper was served upon the State of North Carolina by hand delivery or by mailing a copy of said motion to the Office of the District Attorney, [REDACTED] North Carolina:

This the 20th day of January 2009.


Attorney for Defendant

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BY

FILM NUMBER:

NORTH CAROLINA

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

STATE OF NORTH CAROLINA

vs.

OBJECTION TO TESTIMONY
OF KATHRYN G. MOYSE, M.S.

Defendant

NOW COMES the defendant, by and through his attorneys, and respectfully requests the Court to prohibit the testimony of any alternate forensic DNA analyst on the grounds that such testimony would violate the defendant's rights under the Fifth, Sixth, Eight and Fourteenth Amendments of the United States Constitution and Article I, §§ 19, 23 & 27 of the North Carolina Constitution.

The Defendant is an indigent person charged in these matters with one count of first degree murder, three counts of second degree kidnaping, two counts of armed robbery and first degree burglary. The defendant faces life in prison without parole if convicted.

The Sixth Amendment to the United States Constitution, made applicable to the states through the Fourteenth Amendment, guarantees criminal defendants the right to confront the witnesses against them. Article I, Section 23 of the North Carolina Constitution contains a similar guarantee. At its core, the right of confrontation contemplates:

a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.

Mattox v. United States, 156 U.S. 237, 242-43 (1895). In the context of testimonial hearsay, the confrontation clause requires two prerequisites for the hearsay to be admissible. The Supreme Court recently redefined when statements made outside of the courtroom and without benefit of

cross-examination can be used. *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 1374 (2004).

The Supreme Court emphasized that the Confrontation Clause of the Sixth Amendment dictates “the manner in which witnesses give testimony in criminal trials,” *id.* at 1359, “command[ing], not that evidence be reliable, but that reliability be assessed . . . by testing in the crucible of cross-examination.” *Id.* at 1370. The Supreme Court revised the jurisprudence of the Confrontation Clause by emphasizing that testimonial statements may be admitted without the witness “only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine” the witness. *Crawford*, 541 U.S. at 59.

The Court held that even “firmly rooted” exceptions to the hearsay rule are not outside the Confrontation Clause, and still need to be tested by the adversary process. *Crawford*, 541 U.S. at 54, 56, 62; *see also (Michael) Thomas v. United States*, 914 A.2d 1 (2006) (“Thus, *Crawford* announced a *per se* rule: the Confrontation Clause bars the government from introducing testimonial statements at trial against a criminal defendant without calling the declarant to testify in person, unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant, regardless of how reliable the testimonial evidence is perceived to be or whether it fits within a recognized hearsay exception. . . .”).

While the Supreme Court did not define testimonial statements, but did suggest that they would include “‘material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially.’” *Crawford*, 124 S. Ct. at 1374; *see also Stancil v. United States*, 866 A.2d 799 (D.C. 2005). Whenever “testimonial evidence is at issue, . . . the only indicium of reliability sufficient to satisfy . . . [the Confrontation Clause] is the one the Constitution actually prescribes: confrontation.” *Crawford*, 124 S. Ct. at 1374. Testimonial evidence thus may be used at trial only if the testifying witness is available for cross examination, or if the government proves that the witness is unavailable. *Id.*; *see also (Michael) Thomas*, 914 A.2d 1 (“[T]he Confrontation Clause bar[s] the prosecution from introducing the report at appellant's trial without calling the chemist to testify in person, unless the chemist was unavailable and appellant had a prior opportunity to cross-examine the chemist.”). This Court further suggested that the reasoning would be applied to other similar forensic reports: “Although the government seeks in this case only to exempt DEA chemists' reports from the Confrontation Clause, its rationale would apply, or easily could be stretched to apply, to many other types of forensic scientific expertise. Given the widespread prosecutorial use of DNA test results, fingerprint identifications, ballistics reports, blood tests, hair and fiber analyses, toxicology reports, et cetera, acceptance of the government's argument could have a major impact on criminal prosecutions generally.” *Id.* at n.21.

There is no reasonable way to distinguish DNA analysis reports from DEA reports. It is illogical to suggest that *Crawford*, *Davis v. Washington*, 547 U.S. 813, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006), and *(Michael) Thomas* do not apply to DNA analysis reports.

The analysis in *(Michael) Thomas* of the *Crawford* decision applies equally to DNA analysis reports as it does to the DEA chemist's report. Substituting the words applicable to DNA analyses for the words applicable to chemical analyses, it is obvious that the reasoning would apply equally: "Under every definition of "testimony" and "testimonial" in *Crawford*, as well as the "primary purpose" test employed in *Davis*, [the file] in this case constituted a 'core' testimonial statement subject to the requirements of the Confrontation Clause. The [medical examiner], a forensic expert employed by a law enforcement agency, was tasked by the government to provide critical expert witness testimony for use against appellant at his criminal trial.... [The] ex parte [autopsy] report was designed to serve as this testimony. In form and content, the report was a formal and solemn 'attestation' – an affidavit, except that it was unsworn – introduced by the prosecution in lieu of the [medical examiner's] live testimony to prove an essential element of the charged offense. In this 'unsworn affidavit,' the [medical examiner] attested – in conclusory fashion – to the [manner of death] as revealed by [his] testing, chain of custody, [his] qualifications and duties as a [medical examiner], the reliability of [his] testing methods and procedures, their general acceptance in 'the forensic science community,' and the purity ... and the operability of the analytical instruments that [he] used in conducting [his] tests. The use of such ex parte affidavits to secure criminal convictions was 'the principal evil at which the Confrontation Clause was directed.' *Crawford*, 541 U.S. at 50. . . . '[I]t is difficult to imagine a statement more clearly testimonial.' *(Michael) Thomas*, 914 A.2d 1.

In this case, [REDACTED] ordered evidence to be tested for trace of DNA, and Sarah H. Harmon, M.S. was the Forensic DNA Analyst who performed the analysis. Here, the State offers Kathryn G. Moyses, M.S. to testify to the DNA analysis, and offer Sarah H. Harmon's analysis without offering her to testify and without proving that she was unavailable. As such, the DNA analysis report is inadmissible. Additionally, since Kathryn G. Moyses did not actually perform the analysis, any opinion from her would have to be come in as an expert opinion, and the defense has not been provided any report from the State as to Kathryn Moyses. It is error for the trial court to admit the DNA analysis report and the error will violate [REDACTED] constitutional right to confrontation, and due process rights inherent in the discovery laws of this State.

The North Carolina Supreme Court reaffirmed the unavailability requirement for prior sworn testimony to be admitted against a defendant in a criminal case consistent with the confrontation clause. *State v. Nobles*, 357 N.C. 433, 584 S.E.2d 765 (2003). In *State v. Finney*, 358 N.C. 79, 87, 591 S.E.2d 863, 868 (2004) the Supreme Court established that temporary unavailability of witness due to her refusal to testify in the absence of her attorney, who was sick, insufficient to establish constitutional unavailability..

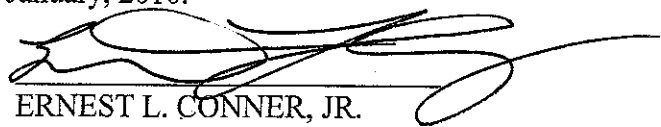
WHEREFORE, the Defendant respectfully prays unto this Honorable Court for the following relief:

1. That this Motion be treated as a verified affidavit for the purposes of all trials and hearings in this matter;

2. That this Honorable Court issue an Order allowing this objection and excluding any expert opinion testimony regarding the DNA analysis report other than testimony from the analyst who performed the DNA analysis.

3. For such other and further relief to which the Defendant may be entitled and which the Court may deem just and proper.

Respectfully submitted this the 15th day of January, 2010.



ERNEST L. CONNER, JR.
Attorney for Defendant
321 Evans Street, Suite 200
Greenville, NC 27858
Telephone: (252) 757-3535
Fax: (252) 757-3563

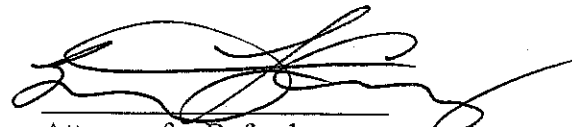
CERTIFICATE OF SERVICE

This is to certify that on this date the attached pleading or paper was served upon the State of North Carolina by hand delivery or by mailing a copy of said motion to the Office of the District Attorney, [REDACTED] North Carolina:

[REDACTED]
Assistant District Attorney

[REDACTED]
Post Office Box B
[REDACTED]

This the 15th day of January, 2010.



Attorney for Defendant

