

CONFRONTATION CLAUSE DISCUSSION

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***Michigan v. Bryant*, 131 S. Ct. 1143 (2011)**

In this case, police officers received a radio communication that a man had been shot. They found the victim lying on the ground. He had been shot in the abdominal area and seemed in pain. He had trouble speaking. The police asked what happened, who shot him, and where it happened. The victim identified defendant as the person who shot him, which he claimed happened about a half an hour before the officers found him. The shooting occurred at defendant's house. Emergency medical people came to the scene and the inquiry ended. The victim died several hours later. The officers were permitted to testify about what the victim told them.

After the conviction for murder, the defendant appealed. The Michigan Supreme Court reversed, finding the statements were admitted in violation of the confrontation clause under *Crawford v. Washington* and *Davis v. Washington*. The Supreme Court of the United States then reversed. In short, it concluded the statements were non-testimonial. Unlike *Davis*, the case was not a domestic dispute. The police found the victim in a public place having been shot. Perhaps most importantly, the [police did not know where the shooter was. The court found the situation to be an "ongoing emergency," creating a potential threat to both the public at large and the police. The court attempted to provide clarification of the "primary purpose" doctrine from *Davis*. Here, the primary purpose of the questioning was to enable the police to meet an "ongoing emergency." Using some of the basic analysis from *Davis*, the court explained a reviewing court must objectively examine all the circumstances involved, including the statements and actions of the people involved. The existence of an "ongoing emergency" is very important in determining the "primary purpose" of the interrogation. The inquiry should focus on both the person making the statement and the person asking the question.

The court looked at the circumstances to see if an "ongoing emergency" existed. The victim did not say anything about the shooting being part of a private dispute. It did not appear that the threat had ended. There might be possible risks to the public and to the police. The risks of continuing harm was different from *Davis*. A gun was involved, which meant a continuing emergency with an armed shooter. No one knew his motive or his location. Under these circumstances, the primary purpose of the statement or the questions was not to establish facts relevant to a criminal prosecution. The informality of the situation also supported the non-testimonial nature of the victim's statements.

In some respects, this decision is troubling. It develops a somewhat murky and incoherent approach to the *Crawford* rule about testimonial statements. In particular, it seems to leave unjustified gaps in which a court can characterize almost any type of statement as non-testimonial. Now, "primary purpose" is not simply a test to choose between whether a statement is testimonial or made in response to an "ongoing emergency." Rather, it appears, the accused now has the burden of establishing that the primary purpose of the conversation. Determining primary purpose is, of course, a very tricky matter, as Justice Thomas emphasized in his dissent in *Davis* and repeats here.

More problematic, the court adopts what it calls “a combined approach” to decide if the statement is testimonial: it looks to the purpose of both the speaker and the interrogator. There are some conceptual problems. First, because the court properly adopts an objective test, it cannot ask what the participants intended. It must use “reasonable” participants. But because it has phrased the test in terms of purpose rather than understanding, it has to ask a baffling question: What purpose would reasonable participants have had? The problem is that purpose is a matter of desire, not simply understanding, and equally reasonable people might have different desires in a given situation. The court also presents a new notion: the combined purpose of the interrogation. The court does not flesh out what this means. As Justice Scalia observed in his rather biting dissent, there is a serious problem if the speaker has one purpose and the questioner has another purpose, which seems very likely.

In addition, the analysis sounds like a return to the “inherent reliability” analysis from *Ohio v. Roberts*. The basic problem with the analysis under *Roberts* was its considerable leeway for a trial court to admit almost any statement, which was laudable restriction in the *Crawford* approach. The opinion hints a factor in future confrontation analysis may be the reliability of the statement and, even more questionable, a return to hearsay principles as a benchmark for admissibility.

***Melendez-Diaz v. Massachusetts*, 165 L.Ed.2d 429 (2009)**

This case presented one of the seemingly unanswered questions following the ground-breaking decision in *Crawford v. Washington*. *Melendez-Diaz* involved the admission, over confrontation-clause objections, of three “certificates of analysis” showing the results of forensic testing on multiple bags of substances taken by the police from the defendant’s car. The certificates, sworn to before a notary public, reported the substances were cocaine in certain weights. At trial, the prosecution introduced the bags containing the substances and the certificates. The analysts who performed the tests did not testify.

The Supreme Court, in a 5-4 decision, found “little doubt that the [certificates] fall within the ‘core class of testimonial statements’” under *Crawford*. 126 S.Ct. at 2532. “[T]he analysts’ affidavits were testimonial statements, and the analysts were ‘witnesses’ for purposes of the Sixth Amendment.” *Id.* Understanding why the bare majority found the issue so easily resolved flows from both *Crawford* and the later decision in *Davis v. Washington*.

Melendez-Diaz was little more than a straightforward application of *Crawford* and *Davis*. But it resolved an important lingering question upon which lower courts had attempted to limit the scope and application of these decisions to criminal prosecutions. One example involved the use of a hearsay exception, such as the one for business records, to exempt evidence from the ambit of confrontation. *State v. Forte*, 360 N.C. 427, 629 S.E.2d 137, cert. denied, 166 L.Ed.2d 413 (2006), examined the admissibility of expert testimony regarding physical evidence

connecting him to the crime. The agent who conducted a test on trace evidence did not testify at defendant's trial. His reports were introduced into evidence through the testimony of another agent, who had been his supervisor. The trial court admitted the reports into evidence as a business record under N.C. R. Evid. 803(6). Defendant challenged the admissibility of this report under *Crawford*. The Supreme Court of North Carolina found that the report was not testimonial. It did not fall into any of the categories in *Crawford* defined as unquestionably testimonial. The unsworn report contained the results of the agent's objective analysis of evidence as well as routine chain of custody information. It did not bear witness against the defendant. It was neutral. It could have exonerated as well as convicted. The reports were prepared with the understanding that they might eventually be used in court. However, it was not prepared exclusively for trial, and the agent had no interest in the outcome of any trial in which they might be used. *Forte* appears incorrect under *Melendez-Diaz*. It relied heavily on dicta in *Crawford* that business records are not testimonial and noted the tension between the exception for business records under Rule 803(6) and the provision in Rule 803(8)(C) that factual findings resulting from an investigation made pursuant to authority granted by law may not be introduced against a defendant in a criminal case. The latter provision only allows the admission of such evidence in civil cases and against the prosecution in criminal cases. The agent's report concerned routine, non-adversarial matters. It was prepared based on purely ministerial observations. Thus, the court concluded the report was made up of "purely 'ministerial observations'" so it was not inadmissible under either Rule 803(6) or Rule 803(8)(C).

Aside from its direct application showing the impermissibility of using the written report of a non-testifying expert through a witness who did not perform or observe the test, *Melendez-Diaz* is worth reading to see what arguments the state and the dissent used to defend this practice and how the majority dispensed with these positions. First, the majority pointedly rejected any suggestion that the reliability of the challenged evidence avoided any constitutional infirmity from a lack of confrontation. Second, the majority made it clear the burden of producing the absent witness rested solely on the government, not the defendant. Third, the majority dispensed with any distinction between witnesses, i.e. there is no such thing as an unconventional, technical, or neutral witness. Fourth, the majority rebuked the notion that the testing itself was neutral and therefore not subject to cross-examination. Fifth, the majority noted that the inconvenience caused by the right to confront witnesses would provide no basis for relaxing the Constitution. These explicit determinations in *Melendez-Diaz* are very important, as there have been suggestions in several post-*Crawford* opinions that the substance of the testimony might require less than rigorous enforcement of the constitutional right to confrontation.

***Crawford v. Washington*, 541 U.S. 36 (2004)**

In *Crawford*, the defendant was tried for assault and attempted murder of a man he contended tried to rape his wife. The police arrested defendant and interrogated both defendant and his wife, separately, on two occasions after giving both their Miranda warnings. The wife's tape-recorded interrogation contained a version of the fight between defendant and the victim that appeared inconsistent with the defendant's claim of self-defense. At trial, defendant invoked the state marital privilege and prevented the prosecution from calling his wife as a witness against him. Accordingly, the wife was unavailable. The prosecution then introduced the wife's tape-recorded statement to the police. The state courts affirmed the conviction, finding the tape-recorded interrogation had an adequate indicia of reliability and trustworthiness, making it admissible even the absence of confrontation. See *Ohio v. Roberts*, 448 U.S. 56 (1980). In a decision that radically reshapes the interpretation of the constitutional right to confrontation, the Supreme Court reversed.

The majority noted the chief evil against which the Confrontation Clause was directed concerned the use of *ex parte* examinations as evidence against an accused. The clause provides an absolute right of a criminal defendant to be confronted with the witnesses against him. Testimony is typically a solemn declaration or affirmation made for the purpose of establishing or proving some fact. An accuser who makes a formal statement to government officers mirrors testimony in the sense that person who makes a casual remark to an acquaintance does not. The focus of *Crawford* was on testimonial evidence. Although the court left for another day a comprehensive definition of what constitutes a testimonial statement, it explains that, at a minimum, the term testimonial statement applies to prior testimony at a preliminary hearing, before a grand jury, or at a formal trial; and to police interrogations. These modern practices mirror the closest kinship to the abuses to which the Confrontation Clause was directed. Critically, where testimonial statements are involved, *Crawford* creates an absolute prohibition against their admission. The court expressly overruled *Ohio v. Roberts*, thereby eliminating any inquiry by the trial court into whether such a testimonial statement is inherently reliable and, therefore, admissible even in the absence of confrontation. The clause commands not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.

Crawford allowed several preexisting methods of satisfying confrontation continues. First, if there is a prior opportunity for cross-examination rather than cross-examination at trial, then the testimony may be admitted if the declarant is unavailable. Second, if the declarant is not available because of some specific wrongdoing by the defendant, the defendant may have forfeited his right to confrontation, i.e. forfeiture by wrongdoing. The accused is held to have forfeited his right to confrontation if, for example, he kills a witness for the purpose of preventing that person from testifying at his trial. Third, testimonial statements may be admitted without confrontation if they are used for a purpose other than establishing the truth of the matter asserted in the statements. This principle continues the notion of using an out of court declaration for a non-hearsay purpose. Fourth, dying declarations, even if testimonial

in context, might be admissible on historical grounds. This exception would be extremely limited.

The critical inquiry became what constituted a testimonial statement. *Crawford* gave some examples of testimonial statements. These include prior testimony at a preliminary hearing, police interrogations, plea allocutions showing the existence of a conspiracy and, presumably, plea allocutions used to incriminate someone else. It is quite likely that formalized testimonial materials, such as affidavits, would be treated as testimonial statements. At the very least, it appears that most witness statements or recorded interviews taken by police officers will be treated as testimonial statements, and be inadmissible, under *Crawford*.

Crawford also gave some examples of statements that would not be considered testimonial. An off-hand, overheard remark would likely not be considered a testimonial statement because it bears little resemblance to the abuses the Confrontation Clause sought to prevent. In addition, business records and statements in furtherance of a conspiracy are by their nature not testimonial. *Crawford* also seems to exempt statements made for medical treatments. However, its favorable treatment of statements for the purposes of medical treatment was implicit. It did not specifically define them as not being testimonial.

After *Crawford*, statements became under intense scrutiny and litigation. These include statements during 911 calls to police, statements to social services investigators, statements during autopsy proceedings, and statements to police officers under less formal circumstances. Likewise, serious questions about admissibility without cross-examination will occur regarding forensic laboratory reports (such as blood, DNA, and drug tests), firearms and fingerprint examinations, and extra judicial statements contained in formal materials, such as affidavits.

***Davis v. Washington*, 126 S.Ct. 2516, 165 L.Ed.2d 429 (2006)**

Davis followed close on the heels of *Crawford*. This combined appeal involved defendants Davis and Hammon.

In *Davis*, a woman telephoned a 911 operator. The initial connection was terminated before anyone spoke. The 911 operator reversed the call. A woman answered and indicated she was involved in a domestic disturbance. She said, "He's here jumpin' on me again." He was "usin' his fists." The operator asked for the assailant's name, which the woman gave her. She also told the operator, "He's runn' now." He had left the apartment after hitting the woman and was leaving in a car with someone else. The operator told the woman, "Stop talking and answer my questions." The operator gathered more information about the assailant, including his birthday. Police arrived about four minutes later and found the woman in a shaken state with fresh injuries to her forearm and face, making a frantic effort to gather

her children and belongings so they could leave the residence. The woman did not testify at defendant's trial on a felony charge for violating a domestic no-contact order. The trial court admitted the 911 recording over defendant's objection. The jury convicted and the state appellate courts affirmed, holding the 911 conversation was not testimonial.

In *Hammon*, police responded to a reported domestic disturbance. The woman, who was standing on the front porch when they arrived, appeared "somewhat frightened" but told them "nothing was the matter." She allowed the police to come into the house, where they noticed a gas heater was broken with flames coming out and glass on the floor. One officer kept defendant in the kitchen, while the other officer interviewed the woman, defendant's wife, in another room. The defendant said he and his wife had been in an argument, but "everything was fine now." The defendant made several attempts to participate in his wife's conversations with the other officer, but was rebuffed. He got angry when the police would not let him in the room with his wife. The wife completed and signed a battery affidavit. She indicated the defendant broke the furnace and some lamps, shoved her onto broken glass, hit her in the chest, attacked her daughter, and "tore up my van where I couldn't leave." She did not appear at his trial, although she was subpoenaed. The trial court admitted her statements as present sense impressions and excited utterances. The state appellate court admitted her statements as excited utterances and an not being testimonial except for her affidavit. The affidavit was testimonial and should not have been admitted, but any error was harmless because it was a bench trial.

The Supreme Court began with an explanation of testimonial for the purposes of these situations. A statement is nontestimonial when it is made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. A statement is testimonial when circumstances objectively indicate that there is no such ongoing emergency and the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution. The court explained it referred to interrogations because these statements in these cases were the products of interrogations, which in some circumstances tend to generate testimonial responses. But statements made in contexts other than interrogations can be testimonial as well. Likewise, the court explained the acts of the 911 operator were acts of the police, but left open the possibility that statements made to someone other than law enforcement personnel could be testimonial.

The court reviewed anew the historical underpinning of the right to confrontation and the need for cross-examining witnesses face-to-face. The protections afforded by confrontation cannot "be evaded by having a note-taking policeman *recite* the unsworn hearsay testimony of the declarant, instead of having the declarant sign a deposition."

Turning to the situation involving Davis, the court noted a 911 call, at least the initial interrogation conducted in connection with a 911 call, is ordinarily not designed to establish or

prove some past fact. It is to describe current circumstances requiring police assistance. The woman was speaking of events as they were actually happening, unlike the wife in *Crawford*. “Any reasonable listener . . . would recognize she was facing an ongoing emergency.” It was “a call for help against bona fide physical threat.” The nature of what was asked and answered was necessary to resolve the present emergency, rather than to learn what had happened in the past, including the identity of the assailant so dispatched officers might know whether they were encountering a violent felon. The circumstances of the interrogation objectively indicated its primary purpose was to enable police assistance to meet an ongoing emergency.

The emergency ended when the assailant drove away from the scene. At that point, the operator told the woman to be quiet. At that point, when the operator continued the interrogation, the emergency had ceased and the resulting statements were testimonial as resulting from structured police questioning, as in *Crawford*.

Turning to the situation involving Hammon, the court noted “they were not much different from the statements we found testimonial in *Crawford*.” The interrogation was part of an investigation into possibly criminal past conduct. There was no emergency. When the officers first arrived, the wife said everything was fine. When the officer questioned her while her husband was in another room with a different officer, the investigator was seeking to determine what had happened, not what was happening. From an objective view, the purpose of the questioning was to investigate a possible crime. The resulting statement was testimonial.

***Giles v. California*, 554 U.S. 353 (2008)**

Giles involved the question of whether a hearsay exception for forfeiture by wrong-doing was an exception to the *Crawford* rule. In a sharply divided decision, the court said it was not. Writing for the majority, Justice Scalia focused on the notion that this exception, unlike a dying declaration, was not known at common law at the time the confrontation clause was adopted. Thus, it could not serve as an exception to the constitutional guarantee. He also explained the defendant would have to kill the victim for the purpose or with the motive of preventing her from testifying against him, rather than some other reason for the killing. Otherwise, there would be an exception to the *Crawford* rule in almost every homicide case.

***State v. Forrest*, 164 N.C. App. 272, 596 S.E.2d 22 (2004),
aff'd, 359 N.C. 424, 611 S.E.2d 833 (2005),
vacated and remanded, 126 S.Ct. 2977, 165 L.Ed.2d 984,
opinion vacated, dismissed as moot, 360 N.C. 642, 636 S.E.2d 565 (2006)**

North Carolina did not move easily into the post-*Crawford* world. In *Forrest*, police were dispatched to a house where they believed defendant was present and armed with a knife and gun. They observed defendant walk out onto the porch and ask a man to give him the victim's car keys. The victim walked out onto the porch and began to walk down the steps. Defendant grabbed her around the waist and walked her back into the house. About a half hour later, defendant and the victim walked back out onto the porch. Defendant had his arm around the victim's shoulder and held a knife to her. When a police car appeared, defendant told the victim he knew what they were looking for and drug her back into her house. Defendant and the victim came onto the porch later. He held the knife in one hand and restrained her with the other. They sat on the porch for a few minutes and went back inside the house. The pair came onto the porch a third time. Defendant held one knife to the victim's throat and the second knife in his other hand. Eventually police restrained him. The victim suffered small lacerations and bruises on her neck as well as a cut to her arm. An officer sustained an injury when defendant bit him.

The victim did not testify at defendant's trial. Rather, the prosecution introduced the testimony of a police detective who interviewed the victim after police had rescued her and secured the scene, including arresting defendant. The victim was interviewed by a detective who was attempting to gather evidence against defendant. The victim did not speak to the detective in an effort to obtain assistance. She gave the statement because she knew the police were there to gather evidence concerning the crime.

Nevertheless, the Court of Appeals found this hearsay statement was properly admitted, despite the then-recent decision in *Crawford*. The majority found that this statement was akin to a victim's telephone call to 911 for assistance. A 911 call is typically initiated by the victim of a crime, not by the police. The Court of Appeals determined that the victim's statements concerning her kidnapping and violent assault were non-testimonial. They were made immediately after her rescue by the police with no time for reflection or thought by the victim. The statements were initiated by the victim, like a 911 call. The detective testified she did not have to ask the victim questions because the victim "immediately abruptly started talking." The victim was nervous, shaking, and crying. Her demeanor never changed during the conversation with the detective. Accordingly, there was no constitutional violation.

Judge Wynn dissented on the *Crawford* issue. He explained *Crawford* applied because the victim's statement to the detective was testimonial. The victim gave a statement to law enforcement officers describing defendant's actions during the incident. Defendant had no opportunity to cross-examine her concerning these statements and she did not appear at trial. The detective who related the victim's statement testified it was the detective's responsibility to stand by near the area and then go to the location where the victim was secured and interview her. After police officers removed defendant from the scene and secured the area, the detective arrived and took the victim's statement that was used at trial. The detective's

sole purpose at the scene was to obtain the victim's statement. Furthermore, this detective was not the first police officer to encounter the victim at the scene. The victim did not make any statements to the other officers. She only made her statement to the detective designated to receive it. Importantly, the victim did not speak to the detective in an effort to obtain assistance, but gave a statement because she knew the police were there to gather evidence concerning the crime. Under these circumstances, the victim's statement was made knowing she was bearing witness against defendant and that her statement might impact future legal proceedings. The victim's demeanor when she made the statement and the length of time she had to reflect upon it have no bearing on whether the statement is testimonial. Judge Wynn believed the victim's statement to the detective was essentially testimonial in nature and violated *Crawford*.

The case moved to the Supreme Court of North Carolina because of Judge Wynn's dissent. The court affirmed per curiam. Then the Supreme Court of the United States vacated and remanded in light of *Davis*. This action signaled that *Davis* provided guidance for reconsideration of the result. On remand, the Supreme Court of North Carolina, in a per curiam decision, vacated the opinion of the Court of Appeals. It determined the matter was now moot because Willie Forrest was shot and killed during a courtroom appearance in an unrelated case. Because the Supreme Court of North Carolina vacated the opinion of the Court of Appeals, rather than merely dismissing the appeal as moot because of the intervening death of the defendant, it seems Judge Wynn's dissenting opinion explicates the proper confrontation analysis of the issue under *Crawford*.

***State v. Lewis*, 361 N.C. 541, 648 S.E.2d 824 (2008)**

Likewise, meandered its way through the state appellate system, to the Supreme Court, and back again to the Supreme Court of North Carolina. It involved two alleged violations of the constitutional right to confrontation: a statement by the victim both to a police officer at the scene and during a photographic line-up.

Defendant appealed his conviction for assault with a deadly weapon inflicting serious injury and robbery with a deadly weapon. On appeal, he challenged the introduction of a the victim's statements to a police officer at her apartment where the crime occurred and an to another police officer during a photographic line-up. Defendant challenged the admission of this evidence under *Crawford*. The trial court admitted an out-of-court statement identifying defendant from a photographic line-up and a statement by a non-testifying person that defendant committed the crime. Both the photographic identification and the statement had been given to the police in the course of an investigation and used for the purpose of identifying the alleged assailant.

According to the Court of Appeals, this evidence was testimonial. The statement to the police was highly dependent upon the victim's ability to recall the crime and the

photographic line-up is especially susceptible to being characterized as a response to structured police questioning. The details provided in the statement in the photographic identification were those that would have been probed and tested through cross-examination. This evidence constituted testimonial hearsay.

The Court of Appeals also concluded the admission of this evidence was not harmless beyond a reasonable doubt. Once the statement was excluded, there was no eyewitness testimony providing an account of the crime nor anyone who could place defendant with the victim during the crime. There was no forensic evidence such as fingerprints, hairs, or fibers placing defendant at the scene or otherwise implicating him. Defendant did not confess. At most, the prosecution did show defendant entered the apartment building on the day in question and had been seen on the premises begging for money on previous occasions. This remaining evidence was not sufficient to conclude that the victim's identification of defendant and her other testimony would have had no bearing on the jury's decision.

However, the Supreme Court of North Carolina initially reversed the Court of Appeals. It concluded the statement to a police officer by the victim in her apartment *was not testimonial* because it was not the result of structured police question aimed at developing evidence for use at a subsequent trial, which it deemed necessary to make the interrogation testimonial. It concluded the statement identifying the defendant in a photographic array *was testimonial* because it was the result of structured police questioning, but its admission was harmless beyond a reasonable doubt.

With regard to the statement at her apartment, the court focused on the role of the officer conducting the questioning and the state of mind of the person being questioned. It found the officer was merely trying to gather facts as part of his investigation of a suspected crime. He was not in the process of developing evidence for use at trial. Similarly, the victim likely did not think she was giving a statement for the purposes of future litigation, but only to provide information to be used in the investigation of the robbery. Since the statement was not testimonial, the right to confrontation as applied in *Crawford* was not implicated.

In contrast, the statement identifying the defendant during a photographic array was testimonial. The police officer was trying to develop evidence rather than merely investigate a crime. The victim would likely have understood that she was making a statement that would be used in subsequent legal proceedings. Thus, it was testimonial. However, the court found the constitutional violation harmless beyond a reasonable doubt.

As it did with *Forrest*, the Supreme Court of the United States vacated and remanded this case in light of *Davis*. The Supreme Court of North Carolina then reversed itself. After an extensive discussion of *Davis*, it analyzed each statement. First, the statement at the apartment was not testimonial. The victim was not speaking about events as they were happening. She was not calling for help while facing a physical threat or ongoing emergency.

The situation in which she found herself with the police officer was neither chaotic nor unsafe. Objectively, the officer was not responding to an emergency, but was establishing past events potentially relevant to a later criminal prosecution. The statement was testimonial. Second, the victim's identification of the defendant in the photographic array in her hospital room "clear[ly] . . . was testimonial." Because these constitutional errors were not harmless beyond a reasonable doubt, defendant was awarded a new trial.

***State v. Williams*, 702 S.E.2d 233 (N.C. App. 2010),
judgment stayed, 705 S.E.2d 382 (N.C. 2010)**

In this case, a forensic chemist testified about the laboratory processes for testing controlled substances. She explained, in some detail, about the preliminary color test after which a fraction of the drug is examined in a mass spectrometer. This machine creates a graph that she or another forensic chemist would interpret. She would consider time of retention. Each drug has a specific retention time. The graph from the machine would be compared with the known standard for a drug. Both of these tests were done by the analyst in the laboratory in this case. These were the tests the testifying chemist had done many times before and relied on in coming to an opinion about the type and weight of drugs. She also noted that other experts in the field would rely upon these tests when forming an opinion about the type and weight of drugs. Any determination by a forensic chemist is checked by peer review, which involves checking the description of the drug, the laboratory worksheet, the weight of the controlled substance. The reviewing chemist would also check the graph from the machine and determine if she concurred with the chemist's analysis and conclusions. In this case, the testifying chemist did a review similar to a peer review and agreed with the forensic chemist who had done the laboratory analysis. But she admitted not having analyzed the substance and was not present when the chemist in the laboratory did the testing. Under the circumstances, the testifying chemist did not offer her own separate, but only summarized the examining, non-testifying chemist's report. Accordingly, there was a confrontation violation under *Melendez-Diaz*.

***State v. Jones*, 703 S.E.2d 772 (N.C. App. 2010),
disc. rev. allowed, 706 S.E.2d 778 (N.C. 2011)**

[NOTE: This case will be the first decision by the Supreme Court of North Carolina since *Melendez-Diaz v. Massachusetts* and *Michigan v. Bryant*. It will likely provide some guidance as to the interpretation and application of several decisions of the North Carolina Court of Appeals dealing with the confrontation analysis, particularly in situations involving the admissibility of laboratory reports. However, because the evidence came without objection, review was for plain error. The decision could hinge on the standard of review.]

In this prosecution for a controlled substance offense and several related crimes, the prosecution introduced, without objection, the report of a chemical analysis done by a

non-testifying chemist that identified the controlled substance as cocaine. The “report detailed the chemical analysis [the chemist] did on the substance and her conclusion that the substance was cocaine.” The report was admitted during the testimony of the investigating officer who conducted the traffic stop. The report was testimonial under *Melendez-Diaz* and the earlier confrontation clause cases. Because there was a constitutional violation, the state bore the burden of proving the error was harmless beyond a reasonable doubt. The state could not bear the burden. The only other evidence of the nature of the substance was the officer’s visual identification. Lay testimony is insufficient to make this identification. See *State v. Ward*, 364 N.C. 133, 142-43, 694 S.E.2d 738, 743-44 (2010). Accordingly, the error was plain error requiring a new trial.

***State v. Locklear*, 363 N.C. 438, 681 S.E.2d 293 (2009)**

In *Locklear*, the prosecution offered an autopsy prepared by a non-testifying pathologist through the testimony of a properly qualified expert in forensic pathology who did not perform the autopsy. The witness testified and used the report. He stated “according to the autopsy report prepared by [the other pathologist],” the victim died from blunt force injuries. He also identified the victim based on a dental analysis performed by yet another non-testifying expert. In the state supreme court, the defendant challenged the testimony by an expert who had no personal knowledge of the testing and analysis under *Crawford*. Relying on *Melendez-Diaz*, the court rejected the state’s position and found the reports by the non-testifying experts were testimonial and violated the Confrontation Clause. It found a violation of *Crawford* because the prosecution did not demonstrate the non-testifying experts were unavailable and defendant had an earlier opportunity to cross-examine them.

A question remained in *Locklear* about whether the testifying expert was giving his own opinion, which he presumably based on the facts, data, and opinions in the reports, or whether he was reading the reports, including facts, data, and opinions, of the non-testifying experts to the jury. The latter would most assuredly violate *Crawford* because it would be the use of a testimonial statement without an opportunity for confrontation, as *Melendez-Diaz* makes clear.

But could the expert who did not perform the autopsy testify about his own opinion on the questions, relying solely on the reports of the two non-testifying experts? If so, the reports might arguably be nothing more than the basis for the opinion of the testifying expert. The reports would be offered not for the truth of the matter asserted in them, but as the basis for the testifying expert’s opinion. Even *Crawford* acknowledged the Confrontation Clause did not prevent the use of even testimonial statements if they were admitted for some reason other than the truth of the matter asserted in them. Since the opinion being offered as substantive evidence would be that of the testifying expert, who was subject to confrontation through cross-examination, there might not be a technical violation of *Crawford* and its progeny.

***State v. Galindo*, 691 S.E.2d 133 (N.C. App. 2009)**

In this drug trafficking prosecution, the prosecution called an expert witness who gave an opinion as to the weight of the cocaine based “solely” on a laboratory report prepared by an analyst who did not testify. To the extent the question had not been addressed by *Melendez-Diaz v. Massachusetts* or *State v. Locklear*, this decision made it answered it more clearly and showed this procedure is not acceptable. In *Galindo*, the police obtained evidence at the crime scene and submitted it to the crime laboratory. At the laboratory, an analyst identified the substance as cocaine and weighed it. At the trial, the state did not call the analyst who was working in South Carolina. Instead, the prosecutor called the chemist who had supervised the laboratory for twenty years. This witness gave an opinion based exclusively on the report prepared by someone else as to the nature of the substance and its weight. The Court of Appeals, relying on *Melendez-Diaz* and *Locklear* ruled the expert testimony based only on the report of the absent analyst was testimonial and inadmissible under *Crawford*.

Galindo seems to reject the use of opinion testimony by an expert who formed her opinion based on the report of an expert who does not testify. In *Galindo*, as in *Locklear*, the testifying expert merely parroted the findings and conclusion of the non-testifying expert. These decisions indicate that a party cannot change testimonial evidence into non-testimonial evidence for confrontation purposes merely by having the testifying but non-performing expert state his own opinion before simply reading the report of another person.

***State v. Hurt*, 702 S.E.2d 82 (N.C. App. 2010)**

In this case, the prosecution used evidence at sentencing that included testimony about the presence of blood and body fluids on defendant’s clothing and a cigarette butt. The DNA on the defendants’ clothing matched that of the victim. The saliva on the cigarette was consistent with defendant’s DNA. The testimony was based on reports done by people who did not testify. They were testimonial. Noting that *Melendez-Diaz* would not bar admissibility if the reports merely provided a basis for the testifying experts’ independent opinions, the court concluded that the reports were not limited to this permissible function. Although both Barker and Freeman performed peer review of the reports at issue, neither took part in any testing nor performed any independent analysis. In a footnote, the court distinguished this evidence from the testimony of Dr. Lantz, a forensic pathologist. The Court of Appeals applied the rule in *Crawford v. Washington* to a non-capital sentencing hearing. The court found *Melendez-Diaz v. Massachusetts* required the exclusion of reports by non-testifying forensic analysts. Lantz testified regarding an autopsy done by former forensic pathologist Dr. Winston. Lantz testified to the wounds described in the final autopsy diagnosis and to his opinion that six of the wounds hit vital organs and could have been fatal. He opined that because of the nature of the wounds, it might have taken several minutes for the victim to lose consciousness and several more minutes to die. Lantz’s opinion regarding the wounds’ impact and the time for loss of consciousness “was clearly based, not on the report at all, but on his own independent experience as a pathologist.”

***State v. Mobley*, 684 S.E.2d 508 (N.C. App. 2009)**

The testifying expert did not merely explain the results of tests performed other experts. Rather, she gave (1) her own technical review of these tests, (2) her own opinion about the accuracy of the tests done by others, and (3) her own expert opinion based on a comparison of the original data. The defendant did not challenge the propriety of the methods used by the other, non-testifying analysts. Thus, the testifying expert could rely on those tests in her analysis. Her first step in forming her opinion was to review the original data and controls of the underlying reports. She concluded each profile was properly done. She then used the data generated by the other two analysts to reach her own conclusion that the profile of the victim matched the profile of the defendant. North Carolina law allows one expert to testify to her own conclusions based on the testing of another expert in the field. Relying on the statement in *Crawford* that evidence offered for purposes other than proof of the matter asserted did not violate the Confrontation Clause, the court found the evidence was properly admitted. Here, the underlying report, which would be testimonial on its own, could be used as a basis for the opinion of an expert who independently reviewed and confirmed the results without offending the right to confrontation.

It is far from clear that this analysis is correct. The key question is whether the testifying expert rendered her own, independent opinion based on her examination of the physical evidence. If not, then the calculations of the non-testifying expert would constitute testimonial evidence that would violate the confrontation guarantee.