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The Defense Calls...the Accuser - State v. Brigman and How the North Carolina Court of Appeals Misconstrued Crawford's Application to Available Witnesses

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The Defense Calls . . . the Accuser? *State v. Brigman* and How the North Carolina Court of Appeals Misconstrued *Crawford*'s Application to Available Witnesses

On March 8, 2004, the United States Supreme Court addressed the admissibility of certain hearsay statements in criminal trials in *Crawford v. Washington*.[1] The decision signaled a significant change in the way courts should approach hearsay[2] challenges under the Confrontation Clause.[3] In its wake, *Crawford* left a sea of uncertainty as courts in North Carolina and across the country have struggled to resolve the issues it presented. The North Carolina Court of Appeals in *State v. Brigman*[4] added to the confusion by failing to apply the *Crawford* Confrontation Clause analysis to the hearsay statements of witnesses who were available to testify at trial.

The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."[5] In *Crawford*, the Court unanimously found that the introduction of certain hearsay statements violated the defendant's rights under the Confrontation Clause.[6] In reaching this result, the Court effectively overruled the previous framework for analyzing admissibility of

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1. 541 U.S. 36 (2004).

2. The Federal Rules of Evidence define hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." FED. R. EVID. 801(c); *see also* N.C. GEN. STAT. § 8C-1, Rule 801(c) (2005) (mirroring the federal definition of hearsay). "Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress." FED. R. EVID. 802; *see also* N.C. GEN. STAT. § 8C-1, Rule 802 (2005) ("Hearsay is not admissible except as provided by statute or by these rules.").

3. *See* State v. Lewis, 360 N.C. 1, 14, 619 S.E.2d 830, 839 (2005) ("*Crawford* represents a significant departure from the now well-established analytical framework set out in *Ohio v. Roberts*."), *vacated*, 126 S. Ct. 2983 (2006).

4. 171 N.C. App. 305, 615 S.E.2d 21 (2005), *discretionary review denied*, 360 N.C. 67 (2005).

5. U.S. CONST. amend. VI. The North Carolina Constitution has a similar provision. N.C. CONST. art. I, § 23 ("In all criminal prosecutions, every person charged with [a] crime has the right . . . to confront the accusers and witnesses with other testimony . . . ."). The effect of the state and federal clauses is similar: "Thus, it is apparent that we have relied heavily upon the United States Supreme Court's interpretation of the Confrontation Clause of the Sixth Amendment in cases in which defendants have also raised confrontation issues under the Confrontation Clause of the North Carolina Constitution." State v. Jackson, 348 N.C. 644, 653, 503 S.E.2d 101, 107 (1998).

6. *See Crawford*, 541 U.S. at 68–69.

hearsay statements.[7] The prior framework, created in *Ohio v. Roberts*,[8] provided that "when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate 'indicia of reliability.' "[9]

Justice Scalia, writing for the *Crawford* majority, found that the *Roberts* framework represented a "fundamental failure" to interpret the Confrontation Clause correctly[10] and departed from "historical principles."[11] Justice Scalia found the *Roberts* test both too broad and too narrow. The test was too broad by applying to all hearsay and too narrow by admitting testimonial hearsay on a showing of mere reliability.[12]

Seeking to remedy these deficiencies, Justice Scalia exhaustively examined historical concerns surrounding the Sixth Amendment and previous confrontation decisions.[13] Justice Scalia distinguished between testimonial and non-testimonial hearsay: where non-testimonial hearsay was at issue, the Court would defer completely to the states,[14] but where testimonial hearsay was at issue, the Court adopted "an absolute bar" to admission.[15] The Court allowed a narrow exception to this absolute bar where two conditions are met: a prior opportunity to cross-examine and unavailability.[16] With this

7. Chief Justice Rehnquist joined the Court's result, but filed a concurring opinion resolving the issue under the *Roberts* framework and prior case law, which had previously construed the rights granted under the Confrontation Clause. *See id.* at 76 (Rehnquist, C.J., concurring). O'Connor joined in this concurrence. *See id.* at 69.

8. 448 U.S. 56 (1980).

9. *Id.* at 66. To meet this test, "evidence must either fall within a 'firmly rooted hearsay exception' or bear 'particularized guarantees of trustworthiness.' " *Crawford*, 541 U.S. at 40 (quoting *Roberts*, 448 U.S. at 66).

10. *Crawford*, 541 U.S. at 67.

11. *Id.* at 60.

12. *See id.*

13. *See id.* at 42–56.

14. *See id.* at 68 (affording the states flexibility in their development of hearsay law). *Crawford* allowed a state to "exempt [non-testimonial hearsay] from Confrontation Clause scrutiny altogether." *Id.*; *see also* Robert P. Mosteller, Crawford v. Washington: *Encouraging and Ensuring the Confrontation of Witnesses*, 39 U. RICH. L. REV. 511, 617 (2005) (noting that the Confrontation Clause has "nothing whatsoever to say about non-testimonial hearsay").

15. *Crawford*, 541 U.S. at 61; *see also* United States v. Franklin, 415 F.3d 537, 545 (6th Cir. 2005) ("After *Crawford*, there is 'an absolute bar to statements that are testimonial, absent a prior opportunity to cross examine.' " (quoting *Crawford*, 541 U.S. at 61)).

16. *Crawford*, 541 U.S. at 59; *see also* State v. Lewis, 360 N.C. 1, 14, 619 S.E.2d 830, 839 (2005) ("[T]estimonial evidence is inadmissible against a criminal defendant unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant."), *vacated*, 126 S. Ct. 2983 (2006); State v. Staten, 610 S.E.2d 823, 836 (S.C. Ct. App. 2005) (noting the strict limitation *Crawford* places on testimonial statements by

new formulation, the Court shifted the focus from the reliability of the hearsay statement to the nature of the hearsay statement: admissibility turned on whether the hearsay statement was testimonial.[17] However, despite the clear future significance of its meaning, the Court did not formulate a "comprehensive definition of 'testimonial.' "[18] Through this new analysis, the Court addressed both problems with the *Roberts* framework: by removing any federal constraint on the use of non-testimonial evidence, the test was no longer too broad, and by creating an absolute bar to the use of testimonial hearsay, except in very limited circumstances, the test was also no longer too narrow.[19]

In his concurrence, Chief Justice Rehnquist cautioned that the *Crawford* decision would "cast[] a mantle of uncertainty over future criminal trials in both federal and state courts."[20] Certainly, courts in North Carolina and across the country have struggled to apply the *Crawford* analysis, particularly with formulating a workable definition of "testimonial."[21] Despite the ambiguities, the courts have remained clear that a confrontation challenge to the introduction of a hearsay statement should begin its inquiry with the issue of whether the hearsay statements were testimonial in nature. If the statements are non-testimonial, any *Crawford* analysis ends;[22] however, where the

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indicating "[t]he analysis of whether the admission . . . violated the Confrontation Clause begins with the question of whether the statements are testimonial, triggering *Crawford*'s per se rule against their admission").

17. *See Lewis*, 360 N.C. at 14, 619 S.E.2d at 839 ("Following *Crawford*, the determinative question with respect to confrontation analysis is whether the challenged hearsay statement is testimonial.").

18. *See Crawford*, 541 U.S. at 68 n.10 (acknowledging that the Court's "refusal to articulate a comprehensive definition in this case will cause interim uncertainty," but accepting it as such because "it can hardly be any worse than the status quo").

19. *See id.* at 68.

20. *Id.* at 69.

21. Thus, often the primary issue before courts is whether a statement qualifies as testimonial or not. *See, e.g.*, State v. Allen, 171 N.C. App. 71, 74–78, 614 S.E.2d 361, 364–67 (2005) (finding that statements made to a police officer were testimonial); State v. Forrest, 164 N.C. App. 272, 280, 596 S.E.2d 22, 27 (2004) (concluding that statements made by a victim at a crime scene were not testimonial), *vacated*, 126 S. Ct. 2977 (2006); State v. Pullen, 163 N.C. App. 696, 702, 594 S.E.2d 248, 252 (2004) (finding that statements of an accomplice during a police interrogation at a police station were testimonial).

22. *See Crawford*, 541 U.S. at 68 ("Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law—as does *Roberts*, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether."); State v. Blackstock, 165 N.C. App. 50, 62, 598 S.E.2d 412, 420 (2004) (holding that hearsay statements by murder victim to wife and daughter were non-testimonial, and thus admissible under *Crawford*), *discretionary review denied*, 359 N.C. 283, 610 S.E.2d 208 (2005). For federal court decisions, see, for example, Sandifer v. Lewis, 120 F. App'x 202, 204 n.1 (9th Cir. 2005)

statements are testimonial, the *Crawford* analysis applies, and the hearsay statements are presumptively barred.[23]

North Carolina courts have recognized that the inquiry into the testimonial nature of the hearsay statements is the first step in *Crawford*'s Confrontation Clause analysis by developing a standard approach to *Crawford* issues that begins with determining "whether the evidence admitted was testimonial in nature."[24] Furthermore, the Supreme Court of North Carolina has recently observed that, "[f]ollowing *Crawford*, the determinative question with respect to confrontation analysis is whether the challenged hearsay statement is testimonial."[25] The second step in the analysis bars admission unless the declarant is unavailable *and* the defendant had a prior opportunity to cross-examine the declarant; otherwise the evidence is inadmissible.[26] Despite the straightforward North Carolina standard, the court of appeals in *State v. Brigman* failed to apply the *Crawford* analysis to available declarants and ignored the testimonial inquiry of the analysis entirely. By admitting testimonial hearsay of available declarants solely on a misconstrued reading of the *Crawford* requirement of declarant unavailability, *Brigman* greatly confounds North Carolina's approach to *Crawford* issues.

("We, however, need not consider *Crawford*'s application to this case given the non-testimonial nature of the prosecutor's comments."); United States v. Cabral, 138 Fed. App'x 359, 360 (2d Cir. 2005) ("The introduction of certain hearsay testimony did not violate the Confrontation Clause, for the hearsay statements ... were decidedly non-testimonial under *Crawford* ...."). For academic discussion, see, for example, JESSICA SMITH, *CRAWFORD V. WASHINGTON*: CONFRONTATION ONE YEAR LATER 7 (2005), *available at* http://ncinfo.iog.unc.edu/pubs/electronicversions/pdfs/crawford.pdf ("Because *Crawford* applies only to 'testimonial' evidence, the central inquiry in any Crawford analysis will always focus on whether the evidence at issue is testimonial or non-testimonial."); Ralph Ruebner & Timothy Scahill, Crawford v. Washington, *the Confrontation Clause, and Hearsay: A New Paradigm for Illinois Evidence Law*, 36 LOY. U. CHI. L.J. 703, 715 (2005) ("If a statement is deemed 'non-testimonial,' the rule of *Crawford* cannot be applied to exclude the statement.").

23. *See supra* notes 15–16 and accompanying text.

24. State v. Clark, 165 N.C. App. 279, 283, 598 S.E.2d 213, 217 (2004). The remaining two issues to consider are "(2) whether the trial court properly ruled the declarant was unavailable; and (3) whether defendant had an opportunity to cross-examine the declarant." *Id.*; *see also* State v. Lewis, 166 N.C. App. 596, 600, 603 S.E.2d 559, 561 (2004) (citing *Clark* and applying the same analysis), *rev'd*, 360 N.C. 1, 619 S.E.2d 830 (2005), *vacated*, 126 S. Ct. 2983 (2006).

25. State v. Lewis, 360 N.C. 1, 14, 619 S.E.2d 830, 839 (2005), *vacated*, 126 S. Ct. 2983 (2006); *see also* State v. Forrest, 164 N.C. App. 272, 284, 596 S.E.2d 22, 29 (2004) (Wynn, J., dissenting) (" '[U]nder *Crawford*, ... analysis will usually turn on the question whether a particular statement is testimonial in nature or not.' " (quoting People v. Moscat, 777 N.Y.S.2d 875, 877 (2004))), *aff'd*, 359 N.C. 424, 611 S.E.2d 833 (2005), *vacated*, 126 S. Ct. 2977 (2006).

26. *See Lewis*, 360 N.C. at 14, 619 S.E.2d at 839.

This Recent Development focuses on *Brigman*'s discussion of *Crawford*'s application to available declarants:

> *Crawford* revised the standard for admissibility of hearsay evidence under the Confrontation Clause of the Sixth Amendment of the United States Constitution *only when the witness is unavailable. A defendant's right to confront defendant's accuser is not compromised when the declarant is available to testify.* However, a defendant may waive this right "by simply failing to exercise it at the trial." In the present case, [the two available declarants] were "available" to testify, although neither the State nor defendant called them to testify. Defendant therefore waived her right to confront [the available declarants], and defendant's arguments as they relate to the statements made by [the two available declarants] are overruled.[27]

The practical effect of the court's language in *Brigman* is to allow the prosecution to introduce testimonial evidence through hearsay, even when the declarant is available. This Recent Development argues that *Brigman* misconstrued the *Crawford* analysis by failing to apply it to all testimonial hearsay statements, regardless of declarant availability, and by failing to require the prosecution to either call an available testimonial declarant or to meet the strict *Crawford* standards. If North Carolina courts and prosecutors follow *Brigman*,[28] confrontation violations are certain. This Recent Development will first address *Brigman*'s decision to withhold *Crawford* analysis from available witnesses. Delving further into the *Crawford* issues, this Recent Development will then address whether a declarant's mere availability satisfies confrontation concerns. Finally, this Recent Development will examine whether the prosecution should be required to call an available declarant under the *Crawford* analysis or risk the declarant's statements being inadmissible.

The *Brigman* case involved the sexual abuse of three young boys.[29] Police initially found the three boys living in squalor while in

27. State v. Brigman, 171 N.C. App. 305, 310, 615 S.E.2d 21, 24 (2005), *discretionary review denied*, 360 N.C. 67, 621 S.E.2d 881 (2005).

28. While *Brigman* is recent, it has already been cited by the State for the proposition that *Crawford* does not apply to available witnesses. Brief for the State at 8, State v. Hall, No. COA05-654 (N.C. Ct. App. Aug. 24, 2005), *available at* http://www.ncappellatecourts.org/spool/docs/112507041352961143230046/05-654sb.pdf.

29. *See Brigman*, 171 N.C. App. at 306–08, 615 S.E.2d at 21–23.

the care of their mother, Kimberly Brigman.[30] Rowan County Child Protective Services placed the boys into foster care where the boys all told their separate foster parents stories of sexual abuse by both Brigman and their father.[31] At trial, none of the boys were called to testify;[32] instead, their foster parents testified, and the boys' statements were brought out under exceptions to the hearsay rule.[33]

On appeal, the defendant argued that the hearsay statements of the three children were testimonial and inadmissible under the *Crawford* analysis.[34] While *Brigman* purports to follow North Carolina's standard *Crawford* methodology, which first considers the testimonial nature of a statement,[35] the court instead decisively considered the declarant's availability.[36] The court overruled the defendant's *Crawford* arguments in relation to the two children found available to testify because, according to the court, the *Crawford* analysis does not apply to available witnesses, and the defendant's

30. *Id.* at 306, 615 S.E.2d at 21–22.

31. *Id.* at 306–07, 615 S.E.2d at 22.

32. *See id.* at 308, 615 S.E.2d at 23.

33. *See id.* at 310, 615 S.E.2d at 24. The court explained that

> the statements of [the two boys] were admissible hearsay under North Carolina Rule of Evidence 803(24), which provides that hearsay evidence may be admitted, "even though the declarant is available as a witness[,]" if it has "circumstantial guarantees of trustworthiness," and if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

Id. (quoting N.C. GEN. STAT. § 8C-1, Rule 803(24) (2004)).

34. *Id.* at 308–09, 615 S.E.2d at 23.

35. *See id.* at 309, 615 S.E.2d at 23 (reciting the *Clark* test).

36. *See id.* at 310, 615 S.E.2d at 24. The court addressed "the first question" by referring to "whether the evidence admitted was testimonial in nature," yet it proceeded to consider the availability of two of the witnesses instead. *Id.* at 309–10, 615 S.E.2d at 23–24. Furthermore, the State appears to have failed to anticipate the *Brigman* court's reading of *Crawford*, as evidenced by its brief, which contemplated the more standard North Carolina approach and did not address the witnesses' availability at all. *See* Brief for the State at 8–12, State v. Brigman, 171 N.C. App. 305, 615 S.E.2d 21 (2005) (No. COA04-563), *available at* http://www.ncappellatecourts.org/spool/docs/1095362221769428857908681/04-563sb.pdf. The State's brief argues, "Since the statements here were not testimonial, the issue of Defendant's opportunity to cross-examine the witnesses is irrelevant." *Id.* at 12. The State's brief finishes by responding only to the issue of prior-opportunity to cross-examine: "Even if it were relevant, however, Defendant has proffered no cogent reason why she was not able to confront the children with their prior allegations when they took the stand during the voir dire hearing." *Id.* Instead, the State discussed the testimonial nature of the statements and the sufficiency of prior-cross examination. *Id.*

confrontation rights were not violated when the witnesses were available.[37] Furthermore, after a thorough analysis, the court determined that the unavailable child's statements were non-testimonial and, as such, were admissible under *Crawford*.[38] Finding no Confrontation Clause violations, the court then affirmed the defendant's conviction.[39] This methodology left the nature of the statements of the two available boys completely ignored.[40] Had the court followed the correct approach, it is entirely possible that the statements would have been found testimonial and in violation of the defendant's rights under the Confrontation Clause.[41] The *Brigman* court explained its failure to apply the *Crawford* analysis to the available declarants by reasoning that "*Crawford* revised the standard for admissibility of hearsay evidence under the Confrontation Clause of the Sixth Amendment of the United States Constitution only when the witness is *unavailable*."[42] *Brigman* cited ten pages of the Supreme Court's opinion as authority for this claim.[43] The ten-page citation is entirely unrelated to the court of appeals' argument, as the cited

37. *Brigman*, 171 N.C. App. at 310, 615 S.E.2d at 24 ("*Crawford* revised the standard for admissibility of hearsay evidence under the Confrontation Clause of the Sixth Amendment of the United States Constitution only when the witness is *unavailable*. A defendant's right to confront defendant's accuser is not compromised when the declarant is available to testify." (citing Crawford v. Washington, 541 U.S. 36, 60–69 (2004))).

38. *Id.* at 310, 615 S.E.2d at 24.

39. *Id.* at 313, 615 S.E.2d at 26.

40. The court states in a footnote, "Though we only address defendant's arguments as they pertain to [the unavailable witness], we note that the analysis and resulting conclusions regarding the statements made by [the available witnesses] would be the same." *Id.* at 311 n.1, 615 S.E.2d at 24 n.1. This statement stands in stark contrast to the express language of the opinion, which completely foreclosed analysis of the available children's statements. *See id.* at 310, 615 S.E.2d at 24 ("First, we note that defendant's [confrontation challenges] only pertain to statements made by J.B. because he was the only witness determined to be unavailable by the trial court."). Regardless, this Recent Development proceeds by taking the court at its word: that the defendant's arguments with regard to the two available children were overruled because of their availability.

41. While the statements of all three children were likely made in the same manner, it is certainly possible for a court to find one declarant's statements testimonial, while finding another similar declarant's statements non-testimonial. *Crawford* inquiries "will usually turn on the question of whether a *particular* statement is testimonial or non-testimonial in nature" and should be taken on a case-by-case basis. State v. Blackstock, 165 N.C. App. 50, 62, 598 S.E.2d 412, 420 (2004) (emphasis added), *discretionary review denied*, 359 N.C. 283, 610 S.E.2d 208 (2005). The court's analysis of the testimonial nature of the unavailable child's statements was fact-specific and related to that child's particular experiences and impressions when making the statements. *See Brigman*, 171 N.C. App. at 310–13, 615 S.E.2d at 25–26. The court should have analyzed both available children's statements in the same fact-specific manner as the unavailable child.

42. *Brigman*, 171 N.C. App. at 310, 615 S.E.2d at 24.

43. *See id.* at 310, 615 S.E.2d at 24 (citing Crawford v. Washington, 541 U.S. 36, 60–69 (2004)).

section is exclusively concerned with the issue of a prior opportunity for cross-examination and repeatedly fails to make any mention of availability.[44] However, nothing in the section cited, or any other part of the *Crawford* opinion,[45] precludes application to available witnesses. Quite to the contrary, by requiring that a declarant be unavailable before testimonial hearsay can be admitted, *Crawford* expressly mandates that availability is an integral part of the analysis.

Further, jurisdictions across the country have applied the *Crawford* analysis to available witnesses. A federal district court in Pennsylvania applied *Crawford* to statements made by a witness who had recently become available and held that the statements could not "be admitted into evidence ... because the requirement of the Confrontation Clause that the declarant be unavailable [was] not met."[46] The Ninth Circuit,[47] the Texas Court of Criminal Appeals,[48] and the Mississippi Court of Appeals[49] all echoed this approach and

44. *See* Crawford v. Washington, 541 U.S. 36, 60–69 (2004) (discussing the problems under the *Roberts* framework as they relate to a prior opportunity to cross-examine). The concept of availability appears only once in the oft-quoted holding: "the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." *Id.* at 68. Ironically, this particular quotation may completely contradict the North Carolina Court of Appeals' finding that *Crawford* applies only to unavailable witnesses. *See infra* notes 63–66 and accompanying text (discussing whether mere availability satisfies the *Crawford* analysis or actually causes one of its requirements to fail).

45. *See infra* notes 74–77 and accompanying text (discussing the specific facts of *Crawford* involving a witness who was "available," but was not called based on spousal immunity).

46. United States v. Lafferty, 372 F. Supp. 2d 446, 461 (W.D. Pa. 2005), *reconsideration granted in part*, 387 F. Supp. 2d 500 (W.D. Pa. 2005).

47. *See* Bockting v. Bayer, No. 02-15866, 2005 U.S. App. LEXIS 9973, at *31 (9th Cir. June 1, 2005). In *Bockting*, a case factually similar to *Brigman*, the trial court admitted hearsay testimonial statements of a child-accuser found unavailable based on the child's refusal to cooperate at the preliminary hearing. *Id.* at *6. The Ninth Circuit found that the trial court violated *Crawford* due to the defendant's inability to cross-examine the child. *Id.* at *31. The court noted that *Crawford* requires "not only cross-examination but unavailability" and held that the preliminary hearing and subsequent findings were "truncated and conclusory at best," and thus, the determination of unavailability was "troubling." *Id.* The court refrained from ruling on this issue because the lack of cross-examination had already resulted in reversible error, but the language indicates that had the child been found available, *Crawford* would have excluded the evidence. *Id.*

48. *See* Bratton v. State, 156 S.W.3d 689, 693–94 (Tex. Crim. App. 2005) (applying *Crawford* to two nontestifying, available declarants and holding that the two declarants "were available to testify, and nothing in the record suggests ... that [the defendant] was afforded a prior opportunity to cross-examine them. As such, the statements were inadmissible ....").

49. *See* Elkins v. State, 918 So. 2d 828, 832 (Miss. Ct. App. 2005) (citing *Crawford*, 541 U.S. at 53–54, 68) (noting that "[u]nder *Crawford*, the confrontation clause is violated when a hearsay declarant is available to testify at the trial, but does not do so").

applied the *Crawford* analysis to available declarants to find Confrontation Clause violations. Even courts that eventually found no Confrontation Clause error still applied the *Crawford* analysis to available witnesses.[50] Finally, Judge Wynn of the North Carolina Court of Appeals recognized that the *Crawford* analysis applies to available witnesses and created an approach that correctly applies the *Crawford* decision:

> If the statement is testimonial, it must then be determined whether the declarant was unavailable and if there was a prior opportunity for cross-examination. *If the declarant was available or if there was not a prior opportunity for cross-examination, then Defendant's Sixth Amendment right to confront the witnesses against him was violated.* However, if the statement is characterized as nontestimonial, then the rules of evidence, including hearsay rules, apply.[51]

Thus, these courts have correctly concluded that the *Crawford* analysis applies to available declarants. However, *Brigman* incorrectly foreclosed the application of *Crawford* to available declarants, and North Carolina will violate the constitutional rights of defendants if it continues to interpret *Crawford* erroneously. Courts should instead continue to focus first on the nature of the statement, even in situations where the declarant is available. Nothing in the *Crawford* decision or in North Carolina's existing approach precludes the application of *Crawford's* Confrontation Clause analysis to declarants who are available to testify at trial. Judge Wynn's

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50. These jurisdictions found the available declarant's statements to be non-testimonial. *See, e.g.*, Smith v. State, 898 So. 2d 907, 916 (Ala. Crim. App. 2004) (finding that Crawford "does not appear to be implicated here because the evidence at issue is not testimonial"). One case does stand as an anomaly. The Georgia Court of Appeals applied *Crawford* to a witness who was, according to the prosecutor, "in the courthouse and 'available if necessary,' " but found no Confrontation Clause violation. *See* Starr v. State, 604 S.E.2d 297, 299 (Ga. Ct. App. 2004). The Georgia court assumed that the statements were testimonial, thus delving into the standard *Crawford* analysis, but ultimately found no *Crawford* violation because of its erroneous reading of *Crawford*. *Id.* For a discussion of this case and its rationale, see *infra* notes 56–60. Regardless of the outcome, the Georgia court still considered the defendant's argument under *Crawford*, which the *Brigman* court failed to do. *See Starr*, 604 S.E.2d at 299.

51. State v. Gonzales, No. COAO3-653, 2004 N.C. App. LEXIS 503, at *12 (N.C. Ct. App. Apr. 6, 2004) (Wynn, J., concurring) (emphasis added), *appeal denied and discretionary review denied*, 358 N.C. 547, 599 S.E.2d 566 (2004), *cert. denied*, 543 U.S. 1070 (2005). Strangely, by concurring in *Brigman*, Judge Wynn appears to have reversed course and abandoned his previous recommended approach to *Crawford* issues. *See* State v. Brigman, 171 N.C. App. 305, 313, 615 S.E.2d 21, 26 (2005), *discretionary review denied*, 360 N.C. 67, 621 S.E.2d 881 (2005).

methodology, quoted above, offers the most straightforward approach and should be followed to avoid any future confusion.

Brigman's language wrongly grants additional importance to the declarant's availability. The court incorrectly holds that the second requirement for the testimonial hearsay exception, a prior opportunity to cross-examine, is satisfied by the declarant's mere availability to testify.[52] While *Crawford* and reviewing courts have been clear that confrontation concerns are obviated when the declarant testifies and is cross-examined at trial,[53] *Brigman* takes one giant leap forward and holds that direct testimony and cross-examination are not required. According to *Brigman*, mere availability is enough:[54] "A defendant's right to confront defendant's accuser is not compromised when the declarant is available to testify."[55]

While *Brigman* remarkably offered no authority for this statement, the Georgia Court of Appeals found specific language in *Crawford* that purportedly showed that mere availability is sufficient. In *Starr v. State*,[56] the available declarant did not testify, and the court held that his mere availability satisfied the *Crawford* analysis.[57] As authority, *Starr* quoted a footnote from *Crawford* that

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52. *Brigman*, 171 N.C. App. at 310, 615 S.E.2d at 24.

53. *See* Crawford v. Washington, 541 U.S. 36, 59 n.9 (2004) ("[W]hen the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements."); *see also* State v. Thach, 106 P.3d 782, 789 (Wash. Ct. App. 2005) ("Crawford has no bearing on this case as the Supreme Court stated that the confrontation clause is not implicated when the declarant is available for cross-examination at trial. Ms. Thach appeared at trial and Binh was able to cross-examine her about her statements." (citations omitted)); Crawford v. State, 139 S.W.3d 462, 465 (Tex. Crim. App. 2004) ("The sole authority on which appellant relies simply does not apply when the declarant was available to, and did, testify at trial and was subject to cross-examination. The Clause does not bar admission of a statement so long as the declarant is present at trial to defend or explain it.").

54. *See Brigman*, 171 N.C. App. at 310, 615 S.E.2d at 24 ("A defendant's right to confront defendant's accuser is not compromised when the declarant is available to testify."). The United States Supreme Court has never directly spoken on the issue of whether mere availability is enough to survive a confrontation challenge. *See* Mosteller, *supra* note 14, at 578 (noting that the Court "has never decided whether prior statements of a witness can be admitted under the Confrontation Clause as a result of confrontation at the current trial, or whether the witness simply being available to be called and cross-examined by the defendant is sufficient").

55. *Brigman*, 171 N.C. App. at 310, 615 S.E.2d at 24.

56. 604 S.E.2d 297 (Ga. Ct. App. 2004).

57. *Id.* at 299 ("Although the victim did not testify, the record shows that she was available for cross-examination.... We therefore find no error with respect to this contention."). The *Starr* court addressed the *Crawford* issue cursorily, after having already reversed the trial court on other grounds. *See id.*

> explicitly stated ... that if a "declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements .... The Clause does not bar admission of a statement so long as the declarant is present at trial to defend or explain it."[58]

Thus, the *Starr* court equated " 'appear[ing] for cross-examination at trial' " or being " 'present at trial to defend or explain' " with mere availability.[59] However, the context of the quote from *Crawford* is one in which the declarant actually testifies, and this passage does not stand for the proposition that mere availability is sufficient.[60] Additionally, these phrases, "appear[ing]" and being "present at trial," have been used in countless North Carolina cases, consistently referring to a witness who actually testified.[61] Thus, *Crawford* and its

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58. *Id.* (quoting *Crawford*, 541 U.S. at 59 n.9).

59. *See id.* Scattered other authorities have read this language similarly. *See, e.g.*, Sherrie Bourg Carter & Bruce M. Lyons, *The Potential Impact of* Crawford v. Washington *on Child Abuse, Elderly Abuse and Domestic Violence Litigation*, THE CHAMPION, Sept.–Oct. 2004, at 24 ("At first glance, it may appear that Crawford would not affect [available declarants] given that the decision specifically states that ... 'when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements.' ").

60. The ellipsis in *Starr*'s quotation from *Crawford* masked an integral sentence that set the context of the paragraph as one in which the declarant actually testifies and is not merely available. The sentence notes that "[i]t is therefore irrelevant that the reliability of some out-of-court statements 'cannot be replicated, *even if the declarant testifies to the same matters in court.*' " Crawford v. Washington, 541 U.S. 36, 59 n.9 (2004) (citations omitted) (emphasis added). This omitted sentence quoted from Chief Justice Rehnquist's concurrence in which he voiced concern that *Crawford* might preclude the use of certain out-of-court statements that were reliable. *See id.* The *Crawford* majority was simply responding that if the declarant actually testifies, there is no limit to the use of his prior statements. *See id.* at 59. Courts have generally cited the section of *Crawford* pointed to by *Starr* when a defendant makes a confrontation challenge after a declarant who actually testifies is unresponsive on cross-examination. *See, e.g.*, State v. Harrell, No. COA05-1227, 2006 N.C. App. LEXIS 1066, at *9–10 (N.C. Ct. App. May 16, 2006) (citing *Crawford* to conclude that where a declarant actually testifies and is subject to "full and effective cross-examination," there are no limits on use of his prior statements); State v. Painter, No. COA04-896, 2005 N.C. App. LEXIS 2000, at *14 (N.C. Ct. App. Sept. 20, 2005) (citing *Crawford* to conclude that lack of responsiveness on the part of a declarant who actually testifies and is cross-examined is an insufficient ground on which to base a confrontation challenge).

61. *See Harrell*, 2006 N.C. App. LEXIS 1066, at *9–10 (using the phrase "appear[s] for cross-examination" to refer to a witness who actually testified and was cross-examined); *Painter*, 2005 N.C. App. LEXIS 2000, at *14 (using the phrase "appears for cross-examination" to refer to a witness who actually testified and was cross examined); State v. Lewis, 172 N.C. App. 97, 103, 616 S.E.2d 1, 5 (2005) (quoting the phrase "present at trial" immediately after the court noted that because "both [witnesses] testified at trial and were subject to cross-examination, there was no violation of defendant's right to confrontation"). Even cases which distinguish "appear" from "testify" refer to situations in which the witness is physically present in the courtroom. *See, e.g.*, Nat'l Labor

progeny provide no authority that mere availability of the declarant is sufficient.

In fact, *Crawford* holds that mere availability is *insufficient* to pass constitutional muster: where testimonial evidence is at issue, cross-examination is the rule.[62] Thus, testimonial hearsay is admissible only where the two conditions set forth in *Crawford* have been met.[63] The Court views these requirements as sufficient to meet the concerns of the Sixth Amendment.[64] Thus, mere availability, far from satisfying the *Crawford* analysis, actually causes one of *Crawford*'s two requirements to fail. To put it another way, the essential holding of *Crawford* is that "a nontestifying witness's out-of-court testimonial statement . . . may be admitted against an accused only if the witness is unavailable and the accused had an opportunity to cross-examine the witness."[65] Moreover, *Crawford* makes clear that the Confrontation Clause "is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination."[66] Thus, a declarant must take the stand, testify on direct, and face cross-examination to address the concerns of the Sixth Amendment and satisfy the *Crawford* analysis.

Yet *Brigman* argues further that "a defendant may waive this [confrontation] right 'by simply failing to exercise it at the trial.' "[67] Thus, the court reasoned, the defendant who fails to call an available declarant waives his Sixth Amendment right to confront the witness providing evidence against him.[68] The lone authority *Brigman* offers to support this conclusion is *State v. Splawn*.[69] In *Splawn*, the defendant challenged a stipulated agreement between defense counsel and the State to read into evidence the testimony and cross-examination of an SBI chemist who could not attend the trial.[70] The

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Relations Bd. v. Scrivener, 405 U.S. 117, 125 (1972) (referring to "an employee . . . who appeared but did not testify" in reference to a National Labor Relations Board hearing).

62. *See Crawford*, 541 U.S. at 61 ("[The Confrontation Clause] commands . . . that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.").

63. *See Crawford*, 541 U.S. at 68.

64. *See id.*

65. People v. Couillard, 131 P.3d. 1146, 1151 (Colo. Ct. App. 2005).

66. *Crawford*, 541 U.S. at 61.

67. State v. Brigman, 171 N.C. App. 305, 310, 615 S.E.2d 21, 24 (2005) (quoting State v. Splawn, 23 N.C. App. 14, 18, 208 S.E.2d 242, 245 (1974)), *discretionary review denied*, 360 N.C. 67, 621 S.E.2d 881 (2005).

68. *See id.*

69. 23 N.C. App. 14, 18, 208 S.E.2d 242, 245 (1974).

70. *Id.* at 17, 208 S.E.2d at 245.

court found that "the right to cross-examination itself may be waived by an accused's counsel by simply failing to exercise it at the trial."[71] A number of significant factors seriously undermine the application of *Splawn* to the facts in *Brigman.* In *Splawn*, the defendant's counsel fully cross-examined the witness one day before trial,[72] the defendant's counsel affirmatively consented to the reading of the testimony into evidence,[73] and the declarant's statements were not likely testimonial. None of these factors were present in *Brigman.* Additionally, neither *Crawford* nor *Roberts* had been decided in 1974 when *Splawn* was decided. Thus, the decision would seem hardly applicable as authority for interpreting the mandates of *Crawford*, and *Splawn* is particularly unpersuasive authority.

Even the specific facts of *Crawford* seem to foreclose *Brigman*'s idea that the defendant can waive his confrontation right by failing to call an available testimonial declarant. Crawford's wife was only "unavailable" by virtue of "the state marital privilege, which generally bars a spouse from testifying *without the other spouse's consent.*"[74] Thus, the defendant could have waived this privilege and consented to the wife's testimony. The Washington Supreme Court specifically rejected a claim by the State that, by failing to give consent, the defendant had waived his Sixth Amendment rights: "this court traditionally has 'not required a defendant to waive one right to preserve another.' "[75] The Supreme Court did not express any opinion on the issue, as the State did not object to that aspect of the Washington Supreme Court's holding;[76] however, by finding a violation and barring the statements, the Court clearly did not require the defendant to either call his wife as a witness or waive his

71. *Id.* at 18, 208 S.E.2d at 245.

72. *Id.* at 17, 208 S.E.2d at 245.

73. *Id.* ("The stipulation by which defendant's counsel agreed to this procedure was made in open court and entered into the record prior to call of the cases, and at the trial no objection to this procedure was interposed on behalf of the defendant.").

74. Crawford v. Washington, 541 U.S. 36, 40 (2004) (citing WASH. REV. CODE § 5.60.060(1) (1994)) (emphasis added). The privilege does not extend to out-of-court statements, and the prosecution relied on this exception to introduce certain statements that the defendant's wife made to police. *See id.*

75. State v. Crawford, 54 P.3d 656, 660 (Wash. 2002) (quoting State v. Crawford, No. 25307-1-II, 2001 Wash. App. LEXIS 1723, at *4 (Wash. Ct. App. July 30, 2001)), *rev'd*, 541 U.S. 36 (2004); *see also id.* at 659 ("Although [defendant], not [the declarant], invoked the privilege, the result is the same—[the declarant] was unavailable to testify.").

76. *Crawford*, 541 U.S. at 42 n.1 ("[The Washington Supreme Court] rejected the State's argument that guarantees of trustworthiness were unnecessary since petitioner waived his Confrontation Rights by invoking the marital privilege. It reasoned that 'forcing the defendant to choose between the marital privilege and confronting his spouse presents an untenable Hobson's choice.' " (quoting *Crawford*, 54 P.3d at 660)).

confrontation rights.[77] It follows that North Carolina should not similarly force the defendant to either call his accuser as his own witness or waive his confrontation rights.

While *Brigman* did not cite them, the rules of evidence provide perhaps the most persuasive authority for the position that the *Crawford* analysis need not apply to available declarants. Both the Federal Rules of Evidence and the North Carolina Rules of Evidence permit a party against whom hearsay evidence is introduced to call the declarant as a hostile witness.[78] By providing the opposing party an opportunity to call the declarant as a hostile witness, the drafters of these rules anticipate that a party might introduce hearsay statements of an available declarant. However, these evidentiary rules apply to all hearsay statements, and *Crawford* set out a clear distinction between testimonial hearsay, which is barred, and non-testimonial hearsay.[79] Additionally, the rules of evidence regarding testimonial hearsay are superseded by rights granted under the Confrontation Clause.[80] Under *Crawford*, a defendant should not be forced to call an available testimonial declarant as a hostile witness or be faced with waiving her confrontation rights.[81] In *State v. Cox*,[82] a Louisiana court found such a rule improper.[83] In *Cox*, the state argued that the defendant waived his confrontation right by failing to subpoena the declarant.[84] The court stated that this argument "beg[ged] the issue" and that the "[d]efendant should not be required to call [the declarant] as a witness simply to facilitate the State's introduction of evidence against the [d]efendant."[85]

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77. *See id.* at 68–69.

78. *See* FED. R. EVID. 806 ("If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination."); N.C. GEN. STAT. § 8C-1, Rule 806 (2005) (same).

79. *Crawford*, 541 U.S. at 68.

80. *Crawford* is "a reminder that even firmly established exceptions to the hearsay rule must bow to the right of confrontation." State v. Branch, 865 A.2d 673, 691 (N.J. 2005). Even the State's brief in *Brigman* acknowledged that *Crawford* made clear that "the Confrontation Clause could not be subjugated to the Rules of Evidence." *See* Brief for the State, *supra* note 36, at 9–10.

81. *See supra* notes 74–77 and accompanying text.

82. 876 So. 2d 932 (La. Ct. App. 2004).

83. *Id.* at 938–39. The court of appeals decision, which was decided a few months after *Crawford*, vacated the defendant's sentence and remanded the case to the trial court for a new trial due to confrontation violations. *See id.* at 940.

84. *Id.* at 938.

85. *Id.* An argument could be made that the defendant should call an available declarant, yet North Carolina has placed the burden of producing live testimony on the prosecution. *See infra* notes 92–97 and accompanying text (discussing North Carolina rule); *see also* Mosteller, *supra* note 14, at 583–86 (arguing for direct testimony of a witness

Arguably, *Crawford* actually requires the prosecution to call an available declarant upon whose testimony it intends to rely. In stark contrast, the practical effect of *Brigman* is to allow the prosecution to introduce testimonial evidence through hearsay when the declarant is available. This is contrary to the holding in *Crawford*, which requires that the prosecution must either call the available declarant to have the statements tested in open court, both on direct and on cross, or show that the two narrow conditions have been met.[86] Courts across the country have echoed this reading.[87] The Texas Court of Criminal Appeals, considering a defendant's confrontation claims[88] where the declarants were available to testify,[89] noted that the prosecution "as the party seeking to admit [the nontestifying witnesses'] statements" had the burden "to show their statements were admissible, that [the nontestifying witnesses] were *unavailable* and that [defendant] had been afforded a prior opportunity to cross-examine them."[90] The Maryland Court of Appeals, in a case factually similar to *Brigman*,

called by the prosecution followed by cross-examination and citing historical practices as evidence).

86. Crawford v. Washington, 541 U.S. 36, 61, 68 (2004).

87. *State v. Cox* held similarly: "Simply stated, if the State needed to have [the declarant's] testimony to enable the State to introduce the statement into evidence, the State could have called [the declarant] as a witness." *Cox*, 876 So. 2d at 939. An Indiana case, after finding the confrontation violation harmless, took time to caution the prosecution: "the State would be well-advised to avoid the tactic of introducing hearsay statements without calling the declarant to testify in cases where the declarant is in fact available to testify." Beach v. State, 816 N.E.2d 57, 60 (Ind. Ct. App. 2004); *see also* Appleton v. State, 740 N.E.2d 122, 124 (Ind. 2001) ("Trials should principally proceed on the basis of testimony given in court, not statements or affidavits obtained before trial."). A federal district court in Pennsylvania evaluated a defendant's *Crawford* claim against statements by a declarant made recently available and held that "if the Government wishes to have [the available declarant's] testimony admitted into evidence [the available declarant] will have to be called as a witness and testify at the trial in person." United States v. Lafferty, 372 F. Supp. 2d 446, 461 (W.D. Pa. 2005), *reconsideration granted in part*, 387 F. Supp. 2d 500 (W.D. Pa. 2005).

88. The dispute concerned certain statements by two of defendant's non-testifying accomplices in a robbery. Bratton v. State, 156 S.W.3d 689, 693–94 (Tex. Crim. App. 2005). The State did not dispute that the accomplice's statements were testimonial. *See id.* at 693.

89. *See id.* at 693–94 (noting that the accomplices were "available, present, and could have been confronted," and also noting that as the two had already pleaded guilty in the case, they were not entitled to Fifth Amendment protection, which might otherwise render them unavailable). The court found a *Crawford* violation, but did not overturn the conviction, finding the error harmless. *See id.* at 695 ("Given the record before us, we conclude beyond a reasonable doubt that the admission of [the co-conspirators'] statements did not contribute to [the defendant's] convictions.").

90. *Id.* at 694. Furthermore, the court held that "nothing in *Crawford* or elsewhere suggest[s] that a defendant waives his right to confront a witness whose testimonial statement was admitted into evidence by failing to call him as a witness at trial." *Id.*

held that "[i]n a criminal trial, the State is required to place the defendant's accusers on the stand so that the defendant both may hear the accusations against him or her stated in open court and have the opportunity to cross-examine those witnesses."[91]

Beyond the lack of support *Crawford* provides for the *Brigman* court's position, North Carolina has recognized a preference for live testimony that should require a prosecutor to introduce testimonial evidence through live testimony if the declarant is available.[92] Even before *Crawford*, North Carolina held that "the live testimony of the hearsay declarant will ordinarily be more probative than his prior statement" unless the State's diligent, good-faith efforts fail to produce the witness.[93] A post-*Crawford* case continued with this standard, noting that the State is required to "undertake good-faith efforts to secure the 'better evidence' of live testimony before resorting to the 'weaker substitute' of former testimony."[94] *Crawford* should have only strengthened any requirement when testimonial evidence is at issue.[95]

The prosecution is not required to produce a witness simply to ensure that the witness is available to testify. North Carolina has recognized a preference for live testimony, not just the *opportunity* for live testimony, partially based on a desire to allow the jury to

91. State v. Snowden, 867 A.2d 314, 332–33 (Md. 2005) (finding the statements of a four-year-old child, brought out by a social worker at trial, were testimonial and wrongly admitted under *Crawford*).

92. *See, e.g.*, State v. Nobles, 357 N.C. 433, 437, 584 S.E.2d 765, 769 (2003) (The North Carolina Supreme Court has "recognized the constitutional 'preference for live testimony.' " (quoting State v. Jackson, 348 N.C. 644, 654, 503 S.E.2d 101, 107 (1998)); State v. Smith, 315 N.C. 76, 95, 337 S.E.2d 833, 846 (1985) ("Usually, but not *always*, the live testimony of the declarant will be the more (if not the most) probative evidence on the point for which it is offered.").

93. State v. Fowler, 353 N.C. 599, 614, 548 S.E.2d 684, 695 (2001); *see also* Barber v. Page, 390 U.S. 719, 724–25 (1968) (noting that "a witness is not 'unavailable' for purposes of the foregoing exception to the confrontation requirement unless the prosecutorial authorities have made a good-faith effort to obtain his presence at trial").

94. State v. Bell, 359 N.C. 1, 35, 603 S.E.2d 93, 116 (2004) (quoting *Nobles*, 357 N.C. at 441, 584 S.E.2d at 771), *cert. denied*, 544 U.S. 1052 (2005).

95. North Carolina courts may have already found that *Crawford* further strengthens the requirement that the prosecution call the witness. Prior to *Crawford*, North Carolina found the State's burden of diligence and good faith met where it was "practically impossible to return [the declarant] to this country to testify." *See Fowler*, 353 N.C. at 614, 548 S.E.2d at 695. Yet, a post-*Crawford* case found the State failed to meet its burden in a very similar fact pattern, when it asserted that "[t]he [declarant] was a Hispanic and left, we tracked, pulled the record, hes [sic] left the state and possibly the country." *Bell*, 359 N.C. at 34, 603 S.E.2d at 115; *see also* State v. Jackson, 69 P.3d 722, 725 (Or. Ct. App. 2003) (noting, prior to *Crawford*, that if a hearsay declarant was available, allowing prosecution to introduce hearsay statements without calling the declarant would violate defendant's confrontation rights).

observe the witness's demeanor.[96] The live testimony of a witness allows for "exploration of weaknesses in the witness's perception, memory, and narration of the matters asserted within the statements."[97] Further, while *Crawford* does not explicitly say that actual cross-examination is necessary, it also does not indicate that mere availability for cross-examination would ever suffice. Robert P. Mosteller has considered this issue and convincingly argued that the Court "did not say that the declarant merely had to be available for cross-examination[,] ... which would have squarely put the responsibility for ensuring both testimony and cross-examination on the defense."[98] Instead, Mosteller argued that "the Court described the common law tradition, which provided the Framers with the concept of confrontation, as one of " 'live testimony in court subject to adversarial testing,' " which would not be satisfied unless evidence is brought out on direct and cross-examined by the opposing party.[99]

North Carolina's recognition that the prosecution must make good-faith efforts to secure the better evidence of live testimony, in addition to the benefits a jury receives from live testimony, must compel the State to call an available declarant upon whose testimony they intend to rely, particularly when the statements are testimonial.

The State of North Carolina has already begun citing *Brigman* for the proposition that *Crawford* does not apply to available declarants.[100] *Brigman*'s effect on North Carolina courts will be to

96. *See Smith*, 315 N.C. at 95 n.8, 337 S.E.2d at 846 n.8 (quoting United States v. Mathis, 559 F.2d 294, 298 (5th Cir. 1977)).

97. *Id.*

98. *See* Mosteller, *supra* note 14, at 579–80 ("Is it a requirement of the Confrontation Clause, or perhaps some combination of provisions in the Sixth Amendment, that the witness in such situations be called by the prosecution and testify in some fashion on direct examination? The answer must be yes."). Mosteller cites a historical analysis of the Confrontation Clause, other decisions of the Supreme Court, and even specific examples from *Crawford* to conclude that under the Sixth Amendment the burden to call an available declarant is the prosecution's. *Id.* at 578–85 (2005). Honorable Paul W. Grimm and Professor Jerome E. Deise disagreed with Professor Mosteller. *See* Paul W. Grimm & Jerome E. Deise, Jr., *Hearsay, Confrontation, and Forfeiture by Wrongdoing:* Crawford v. Washington, *a Reassessment of the Confrontation Clause*, 35 U. BALT. L.F. 5, 22 n.69 (2004) (concluding that "if the defendant fails to ask for a witness he knows is available to take the stand, he may be found to have had an adequate opportunity for cross-examination"). However, the two cases Grimm and Deise cited in support were both pre-*Crawford*, while the one case that finds a confrontation violation is post-*Crawford*. *See id.* (citing *In re* Personal Restraint of Suave, 692 P.2d 818 (Wash. 1985); State v. Salazar, 796 P.2d 773 (Wash. 1990); State v. Cox, 876 So. 2d 932 (La. Ct. App. 2004)).

99. Mosteller, *supra* note 14, at 578–79 (quoting Crawford v. Washington, 541 U.S. 36, 43 (2004)).

100. *See, e.g.*, Brief for the State, *supra* note 28, at 8 ("*Crawford* ... requires that where out-of-court testimonial evidence is involved, a determination must first be made by the

both discourage live testimony and violate the defendant's confrontation rights. Certainly, Kimberly Brigman is not a very sympathetic defendant. Indeed, many of the situations in which an available testimonial declarant will not be called are situations in which the witnesses are victims of child abuse. But the Confrontation Clause requires that the prosecution either call an available declarant, or show unavailability and a prior-opportunity to cross-examine. Anything short of this violates the defendant's rights under the Sixth Amendment.

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trial court whether the proffered hearsay evidence was testimonial in nature. If so, then, whether the declarant was unavailable at trial, and, if not, whether defendant had a prior opportunity to cross-examine the declarant." (citing Crawford v. Washington, 541 U.S. 36, 68 (2004); State v. Brigman, 171 N.C. App. 305, 310, 615 S.E.2d 21, 24 (2005))).

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