

## RIGHT OF CONFRONTATION

### **Defendant's Right to Confrontation Under Sixth Amendment Was Violated When State's Expert Testified to Analysis Performed by Non-Testifying Expert, Based on Facts in This Case**

*State v. Brewington*, \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (18 May 2010).

The court ruled, relying on *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009), *State v. Locklear*, 363 N.C. 438 (2009), *State v. Brennan*, \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (4 May 2010), and other cases, and distinguishing *State v. Mobley*, \_\_\_ N.C. App. \_\_\_, 684 S.E.2d 508 (3 November 2009), and *State v. Hough*, \_\_\_ N.C. App. \_\_\_, 690 S.E.2d 285 (2 March 2010), that the defendant's right to confrontation under the Sixth Amendment was violated when the trial court allowed a state's expert to testify to the identity of a substance as cocaine when the analysis of the substance was performed by a non-testifying expert. The court stated that it was clear that the testifying expert was not involved in testing the substance, nor did she conduct any independent analysis of the substance. The court rejected the state's argument that the expert's testimony was admissible as peer view under *Hough*.

### **Defendant's Right to Confrontation Under Sixth Amendment Was Violated When State's Expert Testified to Analysis Performed by Non-Testifying Expert, Based on Facts in This Case**

*State v. Brennan*, \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (4 May 2010).

The court ruled, relying on *State v. Locklear*, 363 N.C. 438 (2009), and distinguishing *State v. Mobley*, \_\_\_ N.C. App. \_\_\_, 684 S.E.2d 508 (3 November 2009), that the defendant's right to confrontation under the Sixth Amendment was violated when the trial court allowed a state's expert to testify to the identity of a substance as cocaine base when the analysis of the substance was performed by a non-testifying expert. The court stated that it was obvious from the testifying expert's testimony that she was merely reporting the results of the non-testifying expert.

### **Defendant's Right to Confrontation Under Sixth Amendment Was Not Violated When State's Expert Testified to Analysis Performed by Non-Testifying Expert, Based on Facts in This Case**

*State v. Hough*, \_\_\_ N.C. App. \_\_\_, 690 S.E.2d 285 (2 March 2010).

The court ruled, relying on *State v. Mobley*, \_\_\_ N.C. App. \_\_\_, 684 S.E.2d 508 (3 November 2009), and other cases, that the defendant's right to confrontation under the Sixth Amendment was not violated when the trial court allowed a state's expert to testify to an analysis that provided the composition and weight of the controlled substances found in the defendant's residence when the analysis was performed by a non-testifying expert. The expert's opinion was based on her independent review and confirmation of the test results. The court stated that it is not its position that every peer review will suffice to establish the testifying expert is testifying to his or her expert opinion; however, in this case, the testifying expert's testimony was sufficient to establish that her expert opinion was based on her own analysis of the lab reports.

### **Admission of Drug Lab Report Under G.S. 95-90(g) When Defendant Failed to Object Under Statute Did Not Violate Defendant's Sixth Amendment Right to Confrontation**

*State v. Steele*, \_\_\_ N.C. App. \_\_\_, 689 S.E.2d 155 (5 January 2010).

The court ruled that the admission of a drug lab report under G.S. 95-90(g) when the defendant failed to object under the statute did not violate the defendant's Sixth Amendment right to confrontation. The court noted that *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009), explicitly approved as constitutional notice-and-demand statutes and G.S. 95-90(g) qualifies as such a statute.

### **Lab Analyst's Testimony Concerning DNA Tests Performed by Other Non-Testifying Analysts Did Not Violate Confrontation Clause**

*State v. Mobley*, \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (3 November 2009).

The court ruled, distinguishing *State v. Locklear*, 363 N.C. 438 (2009), that a lab analyst's testimony concerning DNA tests performed by other non-testifying analysts did not violate *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009), and the Confrontation Clause. The analyst testified not just to the results of other experts' tests, but to her own technical review of these tests, her own expert opinion of the accuracy of the non-testifying experts' tests, and her own expert opinion based on a comparison of the original data. The court stated that *Crawford v. Washington*, 541 U.S. 36 (2004), noted that evidence offered for purposes other than proof of the matter asserted did not violate the Confrontation Clause. In this case, the underlying report by the non-testifying analysts was used as a basis for the opinion of the testifying expert who independently reviewed and confirmed the results and was therefore not offered for the proof of the matter asserted.

### **Lab Supervisor's Testimony, Based Solely on Lab Report Prepared By Non-Testifying Lab Analyst, That Tested Cocaine Weighed 1,031.83 Grams Violated Confrontation Clause in Cocaine Trafficking Trial**

*State v. Galindo*, \_\_\_ N.C. App. \_\_\_, 683 S.E.2d 785 (20 October 2009).

The defendant was convicted of trafficking in cocaine and another drug offense. The court ruled, relying on *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009), and *State v. Locklear*, 363 N.C. 438 (2009), that a laboratory supervisor's testimony, based solely on a laboratory report prepared by a non-testifying laboratory analyst, that the tested cocaine weighed 1,031.83 grams violated the Confrontation Clause. The court also ruled that the constitutional error was harmless beyond a reasonable doubt based on the other evidence admitted at the defendant's trial.

### **Defendant's Sixth Amendment Right to Confrontation Was Violated When State Laboratory Drug Analysis Report Was Introduced into Evidence to Prove Substance Was Cocaine and Analyst Did Not Testify**

*Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 173 L. Ed. 2d 955 (25 June 2009).

The defendant was on trial for trafficking in and distributing cocaine. The state placed into evidence bags containing a substance seized from the defendant and the police cruiser which he had occupied. It also introduced three certificates of

analysis, sworn to before a notary public, reporting that the bags have been examined and the substance in the bags was cocaine. The drug analyst did not testify. The Court ruled, relying on *Crawford v. Washington*, 541 U.S. 36 (2004), that the certificates of analysis, functionally identical to affidavits, were testimonial evidence under *Crawford* and their introduction to prove the substance was cocaine violated the defendant's Sixth Amendment right to confrontation when the analyst did not testify (nor had the analyst previously testified, been subject to cross-examination, and was now unavailable). The Court rejected various arguments offered by the state for the admissibility of the certificates of analysis, including that they qualified as official or business records or the defendant had the authority to subpoena the analyst if he had wanted to cross-examine the analyst. The Court did, however, approve in general statutory procedures by which the state provides notice to the defendant of its intent to use an analyst's report as evidence at trial, after which the defendant is given a period of time in which he or she may object to the admission of evidence absent the analyst's live appearance at trial. The Court stated that these notice-and-demand statutes simply govern the time within which a defendant must raise a confrontation objection, and states are free to adopt procedural rules governing objections. For an analysis of this ruling, see the online paper available at [http://www.sog.unc.edu/programs/crimlaw/menlendez\\_diaz.pdf](http://www.sog.unc.edu/programs/crimlaw/menlendez_diaz.pdf).

**(4) Admitting Lab Report With BAC Level and Witness's Testimony About Another's Chemical Analyst's Permit Did Not Violate Sixth Amendment Right to Confrontation Under *Crawford v. Washington*, 541 U.S. 36 (2004)**

*State v. Hinchman*, \_\_\_ N.C. App. \_\_\_, 666 S.E.2d 199 (16 September 2008).

The defendant was convicted of DWI. On June 23, 2004, a trooper arrested the defendant for DWI and transported him to a hospital to obtain a blood sample, which was then sent to the SBI for a chemical analysis. An SBI chemical analyst completed a lab report on August 30, 2004, indicating a BAC of 0.10. On September 16, 2004, the lab report was served on the defendant. The trooper filed an affidavit and revocation report with the district court on November 2, 2004. The district court entered a revocation order on November 5, 2004, revoking the defendant's driver's license for a minimum of 30 days under G.S. 20-16.5. The defendant surrendered his license and did not request an hearing to contest the validity of the revocation order as provided in G.S. 20-16.5(g). A district court judge issued an order dismissing the DWI charge because the 140-day delay in revoking his driver's license was punishment under the Double Jeopardy Clause that prohibited the DWI prosecution. The state appealed the district court judge's order to superior court, which vacated the ruling. The defendant was then convicted of DWI in district court and later in superior court. He then appealed to the North Carolina Court of Appeals. (4) The court ruled, relying on *State v. Heinrich*, 183 N.C. App. 585 (2007), and *State v. Forte*, 360 N.C. 427 (2006), that the admission into evidence of the lab report containing the defendant's BAC level and a

witness's testimony about another's chemical analyst's permit did not violate the defendant's Sixth Amendment right to confrontation under *Crawford v. Washington*, 541 U.S. 36 (2004).

## **(2) Dying Declaration Is Exception to Defendant's Right to Confrontation Under Sixth Amendment**

*State v. Bodden*, \_\_\_ N.C. App. \_\_\_, 661 S.E.2d 23 (20 May 2008).

The defendant was convicted of second-degree murder. (2) The court ruled, relying on the ruling in *State v. Calhoun*, 189 N.C. App. 166 (4 March 2008), that a dying declaration is an exception to a defendant's right to confrontation under the Sixth Amendment.

## **(2) Dying Declaration Is Exception to Defendant's Right to Confrontation Under Sixth Amendment**

*State v. Calhoun*, 189 N.C. App. 166, 657 S.E.2d 424 (4 March 2008).

The defendant was convicted of first-degree murder. The victim was shot in witness A's home when she was not there. Witness A and a law enforcement officer responded to the shooting and arrived at the home at the same time. The victim lay motionless on the living room floor. Witness A asked the victim who had shot him, and the victim told her it was "Chico" and "Worm." Witness A asked the victim to squeeze her hand to confirm that information, and the victim did so. The officer witnessed the identification. (2) The court alternatively ruled, relying on cases from other jurisdictions, that a dying declaration is an exception to a defendant's right to confrontation under the Sixth Amendment.

## **Evidence Victim's Statements to Law Enforcement Officer Responding to Crime Scene and Victim's Later Identification of Defendant at Photo Lineup Were Testimonial Statements Under *Davis v. Washington*, 126 S. Ct. 2266 (2006)**

*State v. Lewis*, 361 N.C. 541, 648 S.E.2d 824 (24 August 2007).

(Author's note: The North Carolina Supreme Court's initial decision in this case was reported at 360 N.C. 1 (2005). The defendant sought review with the United States Supreme Court, which remanded the case to the North Carolina Supreme Court for further consideration in light of *Davis v. Washington*, 126 S. Ct. 2266 (2006).] The defendant was convicted of felonious assault, armed robbery, and feloniously breaking and entering. The victim died before trial and thus did not testify and be subject to

cross-examination (the cause of death was not related to these crimes). The state was allowed at trial to offer her statements made to a law enforcement officer who had responded to the crime scene shortly after it was reported by neighbors, although apparently several hours after the crimes had been committed. The victim told the officer what had occurred. Several hours later, a detective showed a photographic lineup to the victim in which she identified the defendant's photo as the person who committed the crimes against her. The court ruled that the victim's statements and the photo identification were testimonial statements under *Davis v. Washington*, 126 S. Ct. 2266 (2006), and their admission violated the defendant's confrontation rights because the defendant had not been afforded an opportunity to cross-examine the victim. The court's analysis of the victim's statements to the law enforcement officer at the crime scene included: (1) the victim did not face an immediate threat to her safety (there was no ongoing emergency); (2) the officer sought to determine "what happened" rather than "what is happening"; (3) the investigation was formal and conducted outside the defendant's presence; (4) the victim's statements in response to questioning recounted how the crimes had begun and progressed; and (5) the questioning occurred some time after the crimes had been committed. The court ruled that it was also clear that the victim's later photo identification of the defendant was testimonial. The court ordered a new trial because it determined that the constitutional error in admitting the victim's statements was not harmless beyond a reasonable doubt. The court noted that the issue of the defendant's forfeiture of confrontation rights remained an issue that may be developed by the parties during the defendant's new trial.

### **1) Constitutional Law--Right of confrontation--Right to cross-examine child witness about school disciplinary record**

*In re: Oliver*, 159 N. C. APP. 451 (2003)

The trial court did not violate a juvenile's right to confrontation in a juvenile delinquency hearing by allegedly denying defendant's right to cross-examine a minor child witness about her school disciplinary record in an attempt to ascertain her credibility and whether she had any possible biases or motives because: (1) after seeing the witness's disciplinary record prior to the witness's testimony, defendant did not ask the witness about or direct the trial court's attention to anything contained therein that was of an impeaching nature; (2) the court correctly determined that confidentiality concerns are at issue when considering the release of a child's official student records; and (3) the fact that the witness had a disciplinary record cannot, in and of itself, establish the relevance of its content to determine possible credibility concerns.

**2) Constitutional Law--Right of confrontation--Right to cross-examine principal about child's school disciplinary record**

*In re: Oliver, 159 N. C. APP. 451 (2003)*

The trial court did not violate a juvenile's right to confrontation in a juvenile delinquency hearing by failing to allow the juvenile to cross-examine a principal about a minor child witness's behavior or the contents of her disciplinary record, because: 1) N.C.G.S. § 8C-1, Rule 608(b) prevents defendant from cross-examining the principal about specific instances of the child's conduct for the purpose of attacking the child's character for truthfulness if the principal has not already testified regarding that character, and nothing in the record suggests the principal testified as to the child's character prior to being cross-examined regarding it; and 2) defendant failed to overcome the confidentiality concerns raised by defendant's questions with respect to the child's official student records.

**3) Constitutional Law--Right of confrontation--Admission of school disciplinary record into evidence**

*In re: Oliver, 159 N. C. APP. 451 (2003)*

The trial court did not violate a juvenile's right to confrontation in a juvenile delinquency hearing by refusing to admit a minor child witness's disciplinary record into evidence, because: 1) defendant did not make an offer of proof whereby the disciplinary record was made a part of the court record to support defendant's theory of relevance; and 2) the Court of Appeals reviewed the disciplinary record and concluded that it was devoid of any relevant information that would weigh on the child's credibility in this case.