



North Carolina Criminal Law

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Failure to Appear at Civil No-Contact Hearing Was a Prior Opportunity for Cross-Examination and Constituted an Implied Waiver of Confrontation Rights at Subsequent Criminal Trial

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The Confrontation Clause of the Sixth Amendment generally guarantees a criminal defendant the right to confront and cross-examine his accusers in person. If a witness was available for an earlier trial or other proceeding and the defendant had an opportunity and motive to cross-examine the witness there, the witness testimony from the earlier proceeding may be admitted at a later criminal trial without offending the Confrontation Clause if the witness is unavailable at the time of trial. We have known for some time that this “prior opportunity for cross-examination” can be met at various stages of a criminal proceeding. *See State v. Rollins*, 226 N.C. App. 129 (2013) (testimony from plea hearing provided prior opportunity for cross); *State v. Ross*, 216 N.C. App. 337 (2011) (same for testimony at probable cause hearing); *State v. Ramirez*, (2003) (same for testimony at bond hearing, although the case was decided under hearsay rules and not expressly as a confrontation issue); *State v. Chandler*, 324 N.C. 172 (1989) (same for testimony from a prior trial); *State v. Giles*, 83 N.C. App. 487 (1986) (same for testimony from a juvenile transfer hearing). In all those cases, though, the defendant was present at the earlier proceeding, was represented by counsel, and the earlier proceedings could naturally be viewed as a part of the underlying criminal case. In *State v. Joyner*, 2022-NCCOA-525, ___ N.C. App. ___ (2022), the Court of Appeals expands the concept of prior opportunity to cross to a civil hearing where the defendant did not attend the hearing and was not entitled to counsel. Read on for the details.

Facts of *Joyner*. The defendant was accused of elder exploitation and obtaining property by false pretenses. He fraudulently represented to the 88-year-old victim in the case that her home needed repairs when it did not and billed her for the unnecessary work. After criminal charges were filed against the defendant, the woman sought a no-contact order under Chapter 50C of the North Carolina General Statutes. A **50C protective order** may be sought where a defendant stalks or has nonconsensual sexual contact with the plaintiff and the two parties are not in an intimate relationship with one another. The defendant in *Joyner* was served with the complaint and received notice that a hearing would be held but did not appear for the hearing. The woman testified and the 50C protective order was granted in the defendant's absence. Prior to trial, the woman died, rendering her unavailable to testify at trial. The trial court ruled over the defendant's objection that the woman's testimony from the 50C hearing was admissible at the defendant's criminal trial. The defendant was ultimately convicted.

***Joyner* Decision.** On appeal, the defendant challenged the admission of that testimony as a Confrontation Clause violation. He argued that the issue in the 50C case (whether the defendant stalked the plaintiff) was distinct from the issues in the criminal trial. He also pointed out that the civil case required the plaintiff only to show a preponderance of evidence in her favor, versus the higher beyond-a-reasonable-doubt standard in a criminal case.

These differences were not enough for the *Joyner* court to consider the matters as presenting distinct issues, and the ruling of the trial court admitting the 50C testimony at the criminal trial was unanimously affirmed. According to the court, the Confrontation Clause is satisfied merely by the *opportunity* to cross an adverse witness where the same motivation for cross examination is present at the earlier proceeding. Here, the court found that the defendant had the same motivation. "The no-contact order demonstrates that the same issues presented at the hearing were the issues subsequently presented at Defendant's criminal trial." *Joyner* Slip op. at 12. Because the defendant had an opportunity at the 50C hearing to cross the now-deceased victim but chose not to attend the hearing, he implicitly waived any right to complain of a Confrontation Clause violation.

The Same Issues? Finding that the issues between a civil and criminal case are the same for purposes of determining whether the defendant had a prior motive and opportunity to cross-examine a witness makes logical sense where the issues between the two cases are closely intertwined. Where, for instance, a 50C is sought against the defendant for stalking behavior and the defendant is also criminally charged with stalking, the issues are identical, or nearly so. A 50B

domestic violence restraining order likewise could present closely related issues where the conduct at issue in the civil case mirrors a related criminal allegation. The circumstances in *Joyner* proceedings—alleged stalking behavior and alleged fraudulent behavior that occurred at the plaintiff's home—do not align so neatly. Nonetheless, the court found that the issues were closely related enough that the defendant had the same motivation at the civil hearing as he would have in the criminal proceeding, and that opportunity to cross-examine sufficed to satisfy the Confrontation Clause. *Joyner* thus takes a broad view of what constitutes the “same issues” between a criminal case and related civil matter in the context of determining a prior opportunity for cross and subsequent implied waiver of confrontation, should the witness later become unavailable for trial. A different result may be possible where the issues within the civil and criminal matters more clearly diverge, such as with a child custody action and a criminal matter not relating to the children.

What About Other Civil Matters? As implied above, if a 50C hearing can constitute a prior opportunity for cross, it seems likely that a 50B hearing on a domestic violence protective order would as well (as would hearings on motions to renew either type of protective order). Similarly, hearings on termination of parental rights or abuse/neglect/dependency proceedings may provide a prior opportunity for cross in a related criminal case (although in these types of proceedings, the defendant is entitled to court-appointed counsel, unlike a defendant in a hearing on a civil protective order). The failure to attend one of these hearings, or the failure to cross-examine the witness at one of these hearings, could therefore constitute a waiver of confrontation rights at a later trial, should the witness become unavailable.

The rule likely extends to *any* civil action where the issues between the criminal matter and the civil case are considered the same. One can imagine many civil actions where the issues largely mirror those in the criminal matter. A tort action for assault and battery may provide a prior opportunity for cross for a related criminal assault case; same with a civil false imprisonment claim and a kidnapping charge, or a wrongful death suit where the defendant is also charged with homicide, or perhaps even a breach of contract or unfair trade practices claim alongside a criminal fraud charge. Indeed, those examples arguably present cleaner comparisons of what constitutes the same or similar issues (thus providing the defendant with a prior motive and opportunity to cross-examine the witness) compared to the criminal and civil proceedings at issue in *Joyner*. Given that criminal cases typically move more quickly than tort litigation (unlike

protective orders), this may be more of a speculative concern than a practical one, but *Joyner* strongly implies that the waiver rule could arise from this context too.

Advice for Defenders. How should defenders advise their clients and avoid this kind of implied waiver of confrontation rights? I have a few ideas. For one, the *Joyner* court roots its decision in a concurring opinion from Justice Alito in ***Hemphill v. New York***, 142 S. Ct. 681 (2022). In his concurrence (joined only by Justice Kavanaugh), Justice Alito describes various ways a defendant can be found to have impliedly waived the right to confront and cross-examine. These include disruptive conduct by the defendant necessitating his or her removal from the courtroom, failure to abide by notice and demand procedures, failure to raise confrontation as an issue, and foregoing cross-examination despite an opportunity to do so. While the *Joyner* court's application of that last category—foregoing an opportunity to cross—to a related civil matter is the law of North Carolina for the time being, it is far from clear to me that majority of the U.S. Supreme Court agrees with this (arguably expansive) view of implied waiver. In *Hemphill*, the majority opinion was authored by Justice Sotomayor and was joined by the Chief Justice, along with Justices Gorsuch, Barrett, Kagan, and Breyer. The majority opinion does not discuss implied waiver, and even Justice Alito's concurrence does not explicitly endorse the idea of testimony from prior hearing being an adequate opportunity for cross where the defendant did not have a right to counsel. I am not aware of any other U.S. Supreme Court precedent applying the prior opportunity to cross waiver rule to a related civil matter where the defendant did not attend the hearing and was not entitled to counsel. In fact, in a pre-*Crawford* case, the Court held that admission of testimony from a preliminary hearing where the defendant was not entitled to counsel was not an adequate opportunity for cross-examination. *Pointer v. Texas*, 380 U.S. 400 (1965). Defenders may therefore argue, *Joyner* notwithstanding, that use of testimony from an uncounseled hearing is not permissible as a matter of federal constitutional law and that the Sixth Amendment guarantee of confrontation demands more. Such an argument would be necessary to preserve the federal issue for review by the U.S. Supreme Court or in federal habeas.

Relatedly, the defendant in *Joyner* grounded his arguments in the federal constitution. Defenders should raise a claim under the Article I, Sec. 23 of the **state constitution** as well as the federal constitution and consider arguing that the state constitution provides even greater protection in this context than federal law. See, e.g., *State v. Kelliher*, 381 N.C. 558 (2022) (finding greater protections against cruel or unusual punishment under the state constitution than those provided by the federal constitution).

For another thought, consent orders or other dispositions of civil cases not requiring testimony will obviate this potential problem for defendants. A 50B protective order may be entered by consent and without findings of fact. While other types of civil matters may require findings or stipulations in lieu of live testimony, if there is no testimony in the civil matter, there is no prior opportunity for cross and therefore no waiver (although stipulations would likely be admissible against the defendant in a subsequent criminal trial as a party admission). Where there is a possibility that a witness in a current civil proceeding may not be available for an upcoming criminal trial, a defendant may have incentive to consent or otherwise settle a related civil matter in a way that avoids, or at least limits, testimony in the civil case.

Short of a consent order or other settlement that avoids testimony, defendants should hire counsel for the civil matter when possible and conduct a rigorous cross-examination in any civil proceedings related to the criminal matter. Where a defendant lacks the resources to hire civil defense counsel, he or she can at least consult with the criminal attorney to attempt to minimize any potential damage from the civil hearings spilling into the criminal case and approach the civil proceeding being fully apprised of the risks to the criminal case.

Finally, keep in mind that this issue only arises where the witness is unavailable. In *Joyner*, the elderly victim died before trial. In addition to death, invocation of privilege may render a witness unavailable for purposes of the Confrontation Clause. A witness merely failing to show up does not by itself demonstrate unavailability. Rather, the State has the burden to demonstrate good-faith efforts to locate a witness before a finding of unavailability can be made. *State v. Clonts*, 254 N.C. App. 95 (2017), *aff'd per curiam*, 371 N.C. 191 (2018).

As always, I can be reached at dixon@sog.unc.edu with any questions, concerns, or feedback.

This is our last post of the year. From all of us here at the SOG, happy holidays to all of you. See you back here in 2023!