

Evidentiary Issues in Implied Consent Cases

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Judge Marty McGee, District 19A

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Topics Covered

1. Confrontation Clause
2. Expert Testimony
3. Judicial Notice

Objectives

1. Understand and apply the new confrontation clause rules in implied consent cases
2. Understand and apply the rules applicable to expert testimony in implied consent cases
3. Understand and apply the rules governing judicial notice in implied consent cases

1. Confrontation Clause Analysis

Materials in Section 1 prepared by Jessica Smith,
School of Government, April 2010

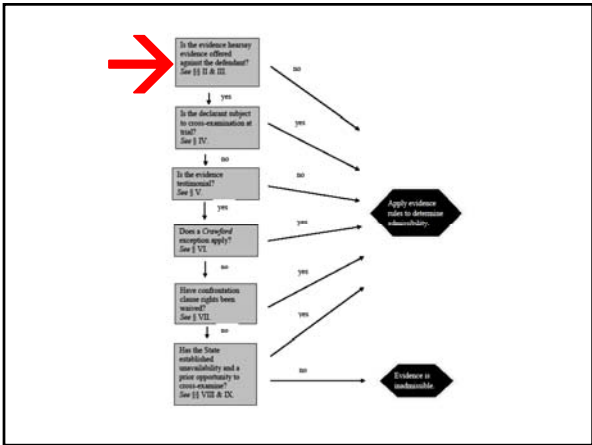
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“Testimonial” hearsay statements by declarants who do not testify at trial may not be admitted unless the declarant is unavailable and there has been a prior opportunity to cross examine.

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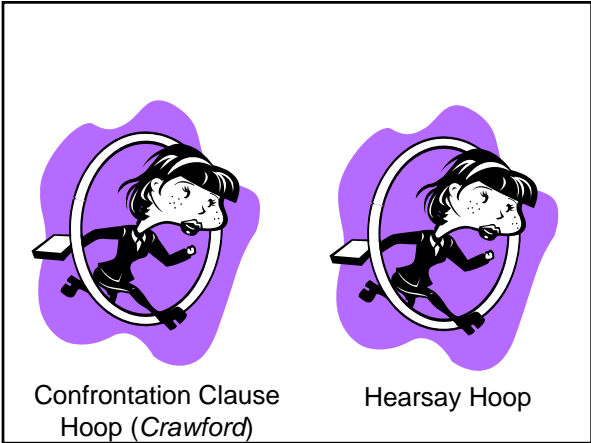
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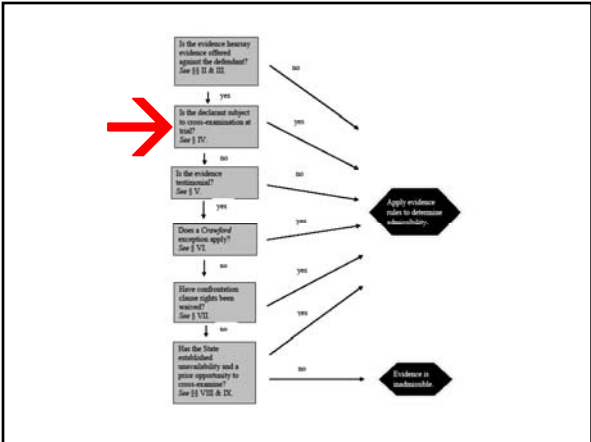
- Statements of DV V to 1st responding officers/911 operator
- Statements of child sexual assault V to a family member/social worker/doctor
- Forensic report identifying substance as a controlled substance/specifying weight
- Autopsy report on cause of death
- • Chemical analyst's affidavit in a DWI case
- • Record prepared by evidence custodian to establish chain of custody



- *Crawford* does not apply to D's own statements
- Nor does it apply to D's evidence

• *Crawford* analysis is separate from hearsay analysis





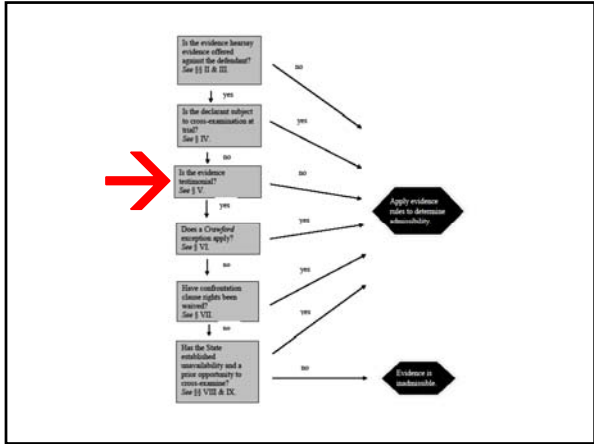
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 “Testimonial” hearsay statements by declarants who do not testify at trial may not be admitted unless the declarant is unavailable and there has been a prior opportunity to cross examine.

What does it mean to “be subject to cross-examination at trial”?

 Generally: Take the stand and willingly answer questions.

What does it mean to “be subject to cross-examination at trial”?

- W who asserts privilege is not subject to cross-examination
- W who has memory lapse is





Is it testimonial?

Crawford said:

- Includes statements by those who “bear testimony” against the accused
- Testimony = a solemn declaration used to establish or prove some fact

Is it testimonial?

However, *Crawford* declined to comprehensively define the term

Is it testimonial?

✓ Police interrogation
-of suspects
-of victims

Davis/Hammon Rule:

(1) Statements are *nontestimonial* when 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.*

Davis/Hammon Rule:

(2) They are *testimonial* when the circumstances objectively indicate that there is no such ongoing emergency, and that the *primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.*

Davis Holdings:

- (1) 911 call statements = nontestimonial
- V spoke about events as they were happening, not later
 - V facing ongoing emergency
 - Q&A necessary to resolve emergency (including ID of D)
 - Formality lacking

Davis Holdings:

- (2) V's statements to responding officers = testimonial
- Not much different from those in *Crawford*
 - Interrogation was investigation of past conduct
 - No ongoing emergency
 - 2nd questioning
 - Was "formal enough"

Is it testimonial?

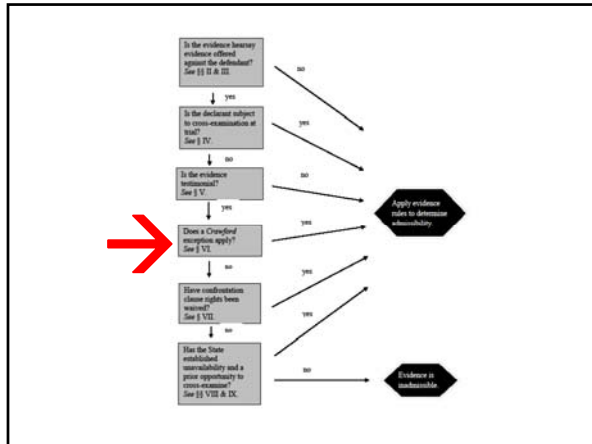
- ✓ Police interrogation
 - of suspects
 - of victims
 - of witnesses

Is it testimonial?

- ✓ Police interrogation
- ✓ Forensic reports & affidavits

Is it testimonial?

- ✓ Police interrogation
- ✓ Forensic reports & affidavits
- ✓ Chain of custody evidence
- X Business records
- X Equipment maintenance records
- X Casual remark to an acquaintance



Crawford Exceptions:

1. Offered for a purpose other than the truth of the matter asserted
2. Forfeiture by wrongdoing
3. Dying declarations

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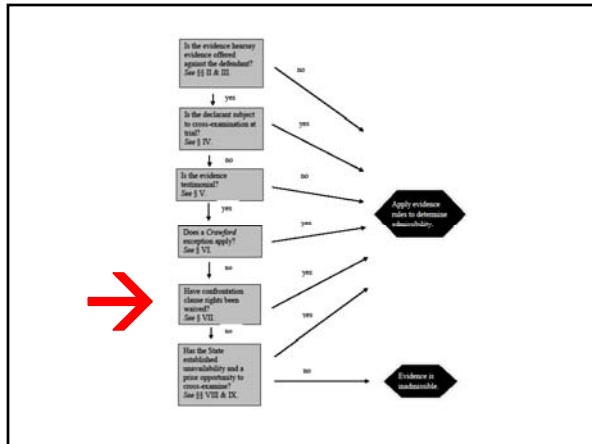
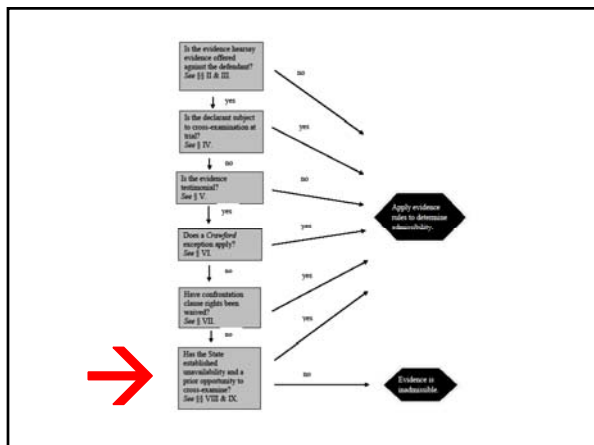


Table 1: North Carolina's Notice & Demand Statutes (for offenses committed on or after October 1, 2009)

Statute	Relevant Evidence	Proceedings	Time for State's Notice	Time for D's Objection/Demand
8-38.2(a)(1)	Laboratory report of a written forensic analysis	Any criminal proceeding	No later than 3 business days after receipt or 20 days before the proceeding, whichever is earlier	Within 13 business days of receiving the State's notice
8-38.2(a)	Chain of custody statement for evidence subject to forensic analysis	Any criminal proceeding	At least 15 business days before the proceeding	At least 3 business days before the proceeding
20-139.1(e)(1)	Chemical analysis of blood or urine	Cases tried in district & superior court & adjudicatory hearings in juvenile court	At least 15 business days before the proceeding	At least 5 business days before the proceeding
20-139.1(e)(2)	Chain of custody statement for urine blood or urine	Cases tried in district & superior court & adjudicatory hearings in juvenile court	At least 15 business days before the proceeding	At least 3 business days before the proceeding
20-139.1(e)(2a)	Chemical analysis of affidavit	Hearing or trial in district court	At least 15 business days before the proceeding	At least 3 business days before the proceeding
90-95(g)	Chemical analysis in drug cases	All proceedings in district & superior court	At least 15 business days before the proceeding	At least 3 business days before the proceeding
90-95(g)	Chain of custody statement in drug cases	All proceedings in district & superior court	At least 15 days before trial	At least 5 days before trial





Unavailability & Prior Opportunity to Cross-Examine

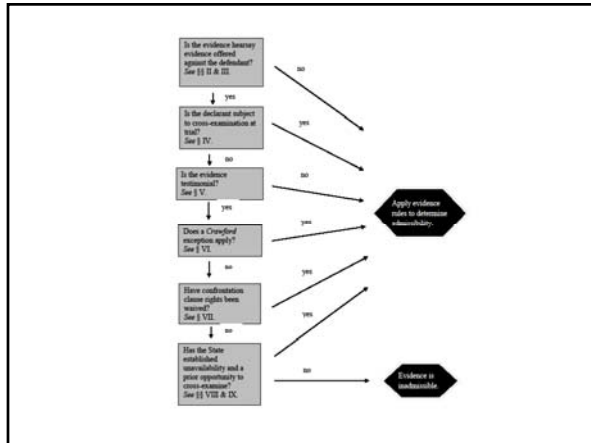
How does the State establish unavailability?

- Need to show a good faith effort to obtain the witness's presence at trial
- State needs to put on evidence.

Unavailability & Prior Opportunity to Cross-Examine

Prior Opportunity to cross-examine

- Prior trial
- Pretrial deposition?
- Probable cause hearing?



Rule 104(a)

- Rules of evidence (other than rules re privileges) do not apply to court's determination of preliminary questions concerning the admissibility of evidence

Motions in Implied Consent Cases

- G.S. 20-38.6: Motions to suppress and motions to dismiss must be filed before trial
- G.S. 15A-974(2): Requires suppression for
 - constitutional violations
 - substantial violations of G.S. 15A
- Denial of right to have a witness observe chemical analysis held to require suppression
 - E.g. State v. Myers, 118 N.C. App. 452

Substitute Analysts

- State v. Locklear: CC violation: Autopsy?
- State v. Galindo: CC violation: Mugshot weight
- State v. Mobley: no CC violation; DNA profile
- State v. Hough: no CC violation; DNA
- State v. Bre...
- State v. Bre...



2. Expert Testimony

Testimony by experts

Rule 702(a):

If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion.

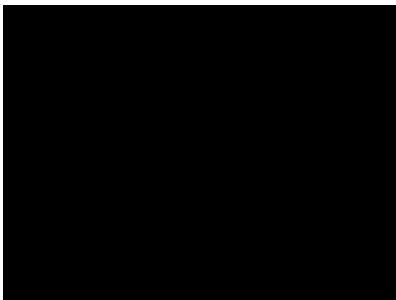
Seven horizontal lines for notes.

Howerton/Goode: Three-part test

- 1. Is expert's proffered method of proof sufficiently reliable?
- 2. Is the witness qualified as an expert?
- 3. Is the expert's testimony relevant?

Seven horizontal lines for notes.

HGN



Seven horizontal lines for notes.

HGN



- *State v. Helms*, 348 N.C. 578 (1998)
 - (error to permit officer with 40 hours of training in HGN to testify that nystagmus was associated with intoxication and that defendant demonstrated nystagmus in HGN test where state failed to proffer evidence that test was reliable)

HGN

Rule 702 (a1): A witness, qualified under subsection (a) of this section and with proper foundation, may give expert testimony solely on the issue of impairment and not on the issue of specific alcohol concentration level relating to the following:

- (1) The results of a Horizontal Gaze Nystagmus (HGN) Test when the test is administered by a person who has successfully completed training in HGN.

Drug Recognition Expert



Rule 702(a1) (2)

A witness, qualified under subsection (a) of this section and with proper foundation, may give expert testimony solely on the issue of impairment and not on the issue of specific alcohol concentration level relating to the following:

...

(2) Whether a person was under the influence of one or more impairing substances, and the category of such impairing substance or substances. A witness who has received training and holds a current certification as a Drug Recognition Expert, issued by the State Department of Health and Human Services, shall be qualified to give the testimony under this subdivision.

DRE Protocol

1. Breath alcohol test
2. Interview of arresting officer
3. Preliminary examination of suspect
4. Eye examination, including HGN
5. Divided Attention tests (Romberg Balance, walk and turn, one-leg stand, modified finger to nose)
6. Vital signs (pulse, blood pressure, temp)
7. Dark room examination of eyes, nose, mouth
8. Examination of muscle tone
9. Examination for injection sites
10. Confrontation with the suspect, advancing the DRE's opinion regarding the category of drugs affecting the suspect
11. Documentation of the DRE's opinion
12. Confirmation of the DRE's opinion by toxicology

3. Judicial Notice

- Rule 201
- Fact not subject to reasonable dispute b/c
 - Generally known within the territorial jurisdiction, or
 - Capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned
