Advanced Confrontation Clause Principles

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Confrontation Basics

♦ The Sixth Amendment gives the ∆ a right of confrontation for the in criminal trials and delinquency adjudications

♦ Comparable right in Article I, Sec. 23 of the N.C. Constitution



When does it apply?

In criminal trials and delinquency proceedings

 Where the right to confrontation under the Sixth Amendment does not apply (e.g., probation, probable cause hearings, suppression), a similar right to confrontation may exist as a matter of statute or due process

• *E.g.,* G.S. 15A-1345(d) (probation); G.S. 122C-268(e) (involuntary commitment)



Four Basic Aspects of Confrontation Rights

Qualified right to inquire about the witness's situation and motives

Qualified right to see and be seen by witnesses

Qualified protection from the admission of certain out of court statements

Qualified protection from use of a co-Δ's confession in a joint trial

Right to Inquire into Witness's Situation

♦ Alford v. U.S., 282 U.S. 687 (1931) ("Prejudice ensues from a denial of the opportunity to place the witness in his proper setting . . .)

♦ Davis v. Alaska, 415 U.S. 308 (1974) (improper to prohibit inquiry into star witness's juvenile adjudications and probationary status to show potential bias)

Right to Inquire into Witness's Situation

♦ "As in Alford, we conclude that the State's desire that Green fulfill his public duty and testify free from embarrassment and with his reputation unblemished must fall before the right of the petitioner to seek out the truth in the process of defending himself." Davis at 320.

Right to Inquire into Witness's Situation

♦ State v. Prevatte, 346 N.C. 162 (1997) (reversible error to disallow crossexamination into pending charges in same district of star witness, citing Davis)

♦ State v. Bowman, 372 N.C. 439 (2019) (applying Prevatte to charges in another district when evidence showed the two prosecutors discussed a deal for the witness in exchange for his testimony)

Right to See and be Seen by Witnesses

♦ Coy v. Iowa, 487 U.S. 1012 (1988) (reversible error to have minor victim of sexual assault testify behind an opaque screen, despite statutory authorization for the practice)

Maryland v. Craig, 497 U.S. 836 (1990) (right to face to face confrontation is not absolute; when evidence shows it is necessary to further an important policy interest and when the reliability of the testimony is otherwise assured, remote testimony may be permitted)

Remote Testimony Requirements

Justified by written findings based on evidence

Witness must be sworn and competent to testify

Process must allow the judge, jury, and defendant to see and hear the witness contemporaneously as they testify

Permit full cross-examination of the witness in real time

Preserve Δ's ability to confer with defense counsel

Remote Testimony

♦ Permissible Uses:

- Protection of child sexual assault victims from trauma
- Protection of national security interests in a terrorism trial
- Protecting a seriously ill witness's physical or mental health
- Protecting witnesses who have been intimidated

♦ Impermissible Uses:

♦ Mere Convenience

♦ Mere Unavailability

♦ Cost Savings

Remote Testimony Statutes

♦ G.S. 15A-1225.1 – children under 16 years old

♦ G.S. 15A-1225.2 – witnesses with intellectual or developmental disabilities

♦ G.S. 15A-1225.3 – forensic analysts (subject to notice and demand)

♦ G.S. 20-139.1(c5) – chemical analysts (subject to notice and demand)



The Confrontation Clause generally prohibits the admission of testimonial hearsay statements by an unavailable witness at trial <u>unless</u> the defendant had a prior motive and opportunity to cross examine the witness

Confrontation Clause Basic Rule

 Must determine if the statement is testimonial hearsay, if the witness is truly unavailable, and if the defendant had a prior opp. for cross of the witness (along with any potential waiver or forfeiture of the right to confront)

 No longer a question of "adequate indicia of reliability" (the pre-Crawford test under Ohio v. Roberts)

Testimonial Hearsay

Related but distinct concepts

Hearsay is an out of court statement offered for its truth. Hearsay statements must meet an exception or exemption (e.g., party admission, business record, excited utterance, statement of then existing mental or physical state of mind, etc.)

Confrontation looks at whether a hearsay statement is testimonial, and if so, whether the defendant had a prior opportunity to cross-examine the unavailable witness on the out-of-court statement

Confrontation and Hearsay

• Confrontation concerns only arise where the statement is offered for the truth of the matter against Δ (*i.e.*, a hearsay statement)

 Out of court statements used for purposes like impeachment, to explain the course of conduct, or to explain a listener's reaction are not hearsay and do not implicate confrontation rights

What's a Testimonial Statement?

- A statement that has the primary purpose of establishing or proving past facts for potential later use in a criminal prosecution
- If the primary purpose is not to establish past facts for use in a criminal prosecution, it is not testimonial
- Objective test based on all the circumstances of speaker and any person questioning the speaker
- Classic examples are sworn testimony and statements during formal police questioning

Primary Purpose Test Factors

- What was the purpose of the statement from the perspective of a reasonable person?
- Was there objectively an ongoing emergency?
- Was there an ongoing threat to first responders or the public?
- What was the declarant's medical condition?

Observe the circumstances under which the statement was made?

Testimonial versus Non-testimonial

♦ Testimonial statements include:

- Sworn testimony like grand jury testimony, trial or hearing testimony, and affidavits
- ♦ Statements to police during formal interrogation or otherwise produced with the help of gov't. officials
- Forensic reports and affidavits created for use at trial

♦ Non-Testimonial statements include:

- Statements made to help law enforcement deal with an ongoing emergency
- Statements in furtherance of a conspiracy
- ♦ Casual remarks to friends, family, partners
- Business records and purely machinegenerated data

State v. Miller, 317 N.C. 273 (2018)

- ♦ Report of domestic B/E, restraint, and assault:
 - Officer met victim outside of her apt.
 - \diamond Unknown whether Δ was still present inside the apt.
 - ♦ Informal setting of statement
 - ♦ Not a calm and stable environment

♦ Statements to officer were nontestimonial:

- Described past events, but primary purpose was to respond to emergency
- Statements were not primarily for information gathering, but to deal with potential threat

State v. Glenn, 220 N.C. App. 23 (2012)

- ♦ Report of Sexual Assault and Kidnapping:
 - Victim met officer at a Waffle House, where she was apparently safe
 - Her assailant had voluntarily released her after the assault and there was no reason to think he would return
 - Officer was not immediately concerned with finding the assailant; he was trying to document her story

♦ Statements to officer were testimonial:

- Described only past events
- ♦ Any emergency was over at that point
- No ongoing threat to victim, LEO, or the public

Examples of Non-Testimonial Statements

- Report of child abuse to teacher by young child
- Information about shooter by dying victim made to EMS where shooter's location was unknown
- Anonymous 911 report of man brandishing a gun in the street of a residential neighborhood

- Statements to nurse examiner made for medical diagnosis purposes
- GPS tracking records
- Phone records
- DMV records
- "Black box" data

Confrontation and Forensics

♦ Forensic lab reports primarily prepared for use at a criminal trial are testimonial; no 'forensic evidence exception' to confrontation rights. Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009).

♦ Analyst who did not sign lab certification and who did not participate or observe testing could not merely parrot the lab results of the absent analyst; no 'surrogate' testimony. *Bullcoming v. New Mexico*, 564 U.S. 647 (2011).

Along Comes Williams . . .

State crime lab analyst testified to DNA results of a private lab

♦ State invoked Evid. R. 703, basis of expert opinion, and argued that the probative value of the underlying report went to weight, not admissibility

♦ Dissenters from earlier cases carry the day by default in 4-4-1 opinion. Williams v. Illinois, 567 U.S. 50 (2012)



12 Years of Confusion Later . . . Smith v. AZ!

♦ The use of a forensic report of another is using the report for the truth it asserts, i.e., the report is hearsay.

♦ "The State may not introduce the testimonial out-of-court statements of a forensic analyst at trial, unless she is unavailable, and the defendant has had a prior chance to cross-examine her." Smith v. Arizona, 602 U.S. 779, 803-804 (2024)

Substitute Analyst Testimony

 Formal lab reports, certificates of analysis, affidavits are all <u>testimonial</u> when created in anticipation of use at trial

Open question how far Smith goes . . .



- Purely machine-generated data is not testimonial, but most labs are not automated and require human input
- Interpretation of machine data may require testimonial statements by a witness
- Safest approach is to require the testing analyst to appear and testify, or to retest with an available witnesses

Ok, so you have a testimonial statement . . .

- Is the witness available for trial? If so, no Confrontation Clause problem.
- Is the witness unavailable?
 - Death or seriously illness of the witness?
 - Unable to find the witness after reasonable efforts by the State?
 - Invocation of privilege by the witness or other refusal to testify despite a court order?
 - Incompetent or insane witness?
 - Lack of memory is <u>not enough</u> for unavailability*

Unavailability Can Be a High Bar

Unavailable means either no possibility of the witness testifying at trial, or highly unlikely to appear after good-faith efforts by the State to produce the witness

State's burden to show

Cannot claim witness is unavailable without reasonable efforts to produce

What's reasonable will depend on the circumstances of the case

State v. Clonts, 371 N.C. 191 (2018)

- ♦ Key witness for the State was deployed abroad
- ♦ State subpoenaed her for a pretrial deposition but she was released from that subpoena
- ♦ Transcript admitted at trial over objection
- ♦ TC found witness unavailable based on deployment

- **⋄** New trial
- ♦ Insufficient findings on question of availability
- Should have addressed efforts of the State to procure her for trial
- Should also explain why trial needs to proceed now, instead of being continued
- Even with better findings, witness wasn't unavailable without any real effort by the State to obtain her presence

If the statement is testimonial and the witness is unavailable . . .



Then the court must consider if the defendant had a prior motive and opportunity to cross-examine the witness on the statement or issues



Prior motive and opportunity for cross has been found at:

Earlier probable cause hearing
Sentencing hearing
Prior trial
Earlier Transfer hearing
Closely related civil case*
Probably earlier Bond hearings*

State v. Joyner

- 50C hearing on protective order
- D. did not attend
- Witness died before criminal trial
- Sufficient prior opp. for cross

Pointer v. TX

- PC hearing where Δ did not have counsel
- Not a sufficient prior opp. for cross
- Pre-*Crawford* case from U.S. Supreme Court

Waiver of the Right of Confrontation

- The defendant may waive the right of confrontation by:
 - Failure to comply with notice and demand statutes on forensic reports or remote testimony
 - Failure to object on confrontation grounds
 - By stipulating to admissibility
 - Failing to cross the witness when they had the chance
 - Behaving so disruptively as to disturb the ability of the trial to proceed

**No personal colloquy with the defendant is required; counsel's stipulation to evidence is sufficient to waive the right. *State v. Perez*, 260 N.C. App. 311 (2018)

Forfeiture of the Right of Confrontation by Wrongdoing

• The defendant may forfeit the right of confrontation by wrongdoing when Δ caused the witness to be unavailable and acted with the intent to prevent the witness's attendance at trial

 Simply killing or hurting the witness, without a showing that the defendant intended to prevent their testimony, is not enough for forfeiture

Forfeiture of the Right of Confrontation by Wrongdoing

- Threatening, killing, or bribing the witness in order to prevent testimony is enough
- Applies where Δ acts through a 3P or coconspirator in addition to personal acts of Δ
- State's burden to show by a preponderance of evidence

Use of Nontestifying Co-Δ's Confession Against Δ in Joint Trials

 \Leftrightarrow Bruton v. U.S., 391 U.S. 123 (1968) (admission of confession of co- Δ that plainly implicated Δ violated Confrontation Clause, even with a limiting instruction)

 \Leftrightarrow Samia v. U.S., 599 U.S. 635 (2023) (confession may be admitted when the is redacted to not directly implicate Δ and the jury is instructed to only consider as to co- Δ)

Use of Nontestifying Co-Δ's Confession Against Δ in Joint Trials

♦ Confession of nontestifying co- ∆ must be testimonial

Confession must implicate the other Δ

Rewriting is permitted when needed to sanitize the confession

Reference to "another person" in place of Δ's name OK







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