

# Confrontation Clause Basics & Beyond

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## The Sixth Amendment (& Article I, Sec. 23)

- “In all criminal proceedings, the accused shall enjoy the right . . . to be confronted with the witnesses against him.”



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When does it apply?

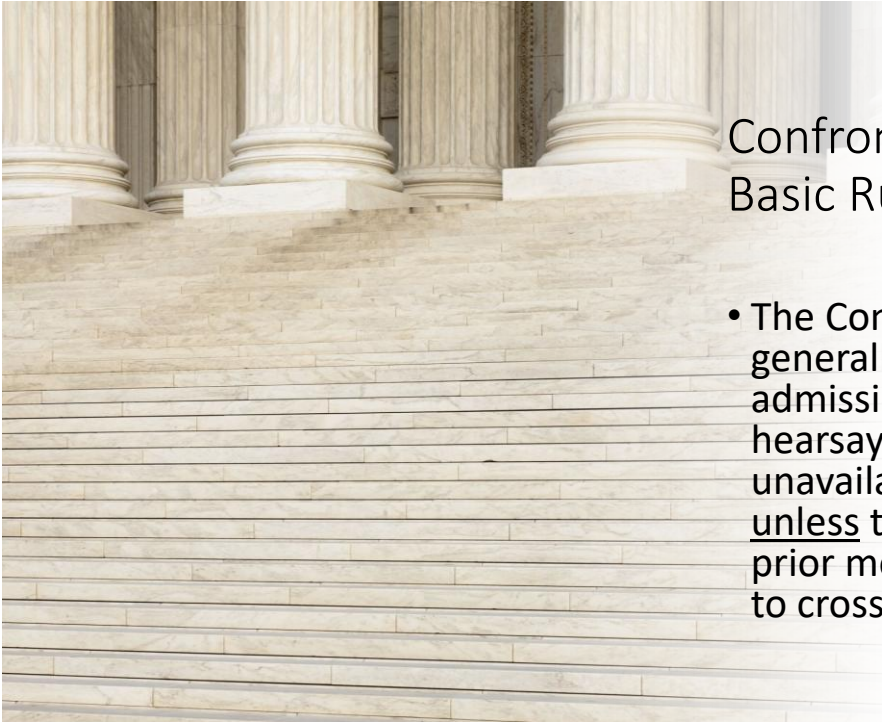
- In criminal trials and delinquency proceedings
- Where the right to confrontation under the Sixth Amendment does not apply (e.g., probation, probable cause hearings, suppression), a similar right to confrontation may exist as a matter of statute or due process
- *E.g.*, G.S. 15A-1345(d) (probation); G.S. 122C-268(e) (involuntary commitment)

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Who has a right to Confrontation?

- The defendant accused of a crime or the juvenile accused of delinquency
- The State has no right to confront witnesses under the federal or state constitutions

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## Confrontation Clause Basic Rule

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

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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

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## 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*)

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## Confrontation Clause Basic Rule

- Confrontation concerns only arise where the statement is offered for the truth of the matter against  $\Delta$  (*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

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# 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

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## 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 machine-generated data
- Dying declarations\*

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# 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?
- How formal or informal were the circumstances under which the statement was made?

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## Case examples of Testimonial Statements

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## *Crawford Case*

### **Testimonial**

- Interrogation at police dept.
- Hours after the crime
- Calm setting and tone of voice
- Only involved past events
- Formal setting

## *Davis Case*

### **Non-testimonial**

- Call to 911 for help in response to ongoing emergency
- Described events as they were happening
- Bona fide, ongoing threat to the caller
- Frantic nature of statements
- Less formal setting

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## 911 Calls can be Tricky!

- No categorical rule—911 calls may have mixed or dual purposes and have to be determined on a case-by-case basis
- Statements may have testimonial and nontestimonial portions

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## Is it a nontestimonial call for urgent help?

- Factors to consider:

- Is the declarant a bystander or the victim?
- Has the suspect been apprehended?
- Is the statement made in response to questioning or made spontaneously?
- Is the crime scene secured?
- Is the questioning being recorded, or is there other indicia of formality?
- Does the statement resemble in-court testimony?
- Are there other circumstances that suggest the declarant is being dishonest?

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## Examples of Non-Testimonial Statements

- |  |  |
|--|--|
| <ul style="list-style-type: none"> <li>• Report of child abuse to teacher by young child</li> <li>• Information about shooter by dying victim made to EMS where shooter's location was unknown</li> <li>• Anonymous 911 report of man brandishing a gun in the street of a residential neighborhood</li> </ul> | <ul style="list-style-type: none"> <li>• Statements to nurse examiner made for medical diagnosis purposes</li> <li>• GPS tracking records</li> <li>• Phone records</li> <li>• DMV records</li> <li>• "Black box" data</li> </ul> |
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## *State v. Miller, 317 N.C. 273 (2018)*

- Report of domestic B/E, restraint, and assault:
  - Officer met victim outside of her apt.
  - Unknown whether Δ was still present inside the apt.
  - Informal setting of statement
  - Not a calm and stable environment
- Statements to officer were non-testimonial:
  - Described past events, but primary purpose was to respond to emergency
  - Statements were not primarily for information gathering, but to deal with potential threat

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## *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

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## Special Rules for Small Children

- Under *Ohio v. Clark*, “statements of small children will rarely, if ever, implicate the Confrontation Clause”
- Here, report of child abuse to teachers by 3-year-old
- Primary purpose of teacher’s questions was to respond to ongoing emergency of child abuse
- Informal setting dissimilar from police interrogation
- Mandatory child abuse reporting laws do not change this

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## Substitute Analyst Testimony

- Formal lab reports, certificates of analysis, affidavits are all testimonial when created in anticipation of use at trial
- *Smith v. AZ*, 602 U.S. 779 (2024) shot down “basis of opinion” as a way of avoiding confrontation issues with substitute analyst
- Open question how far *Smith* goes
- Purely machine-generated data is not testimonial, but most labs are not automated and require human input
- Safest approach is to require the testing analyst to appear and testify



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## Ok, so you have a testimonial statement . . .

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- 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?
    - Lack of memory is not enough for unavailability

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## 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 just sit back and claim witness is unavailable without reasonable efforts

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

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## *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

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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\*

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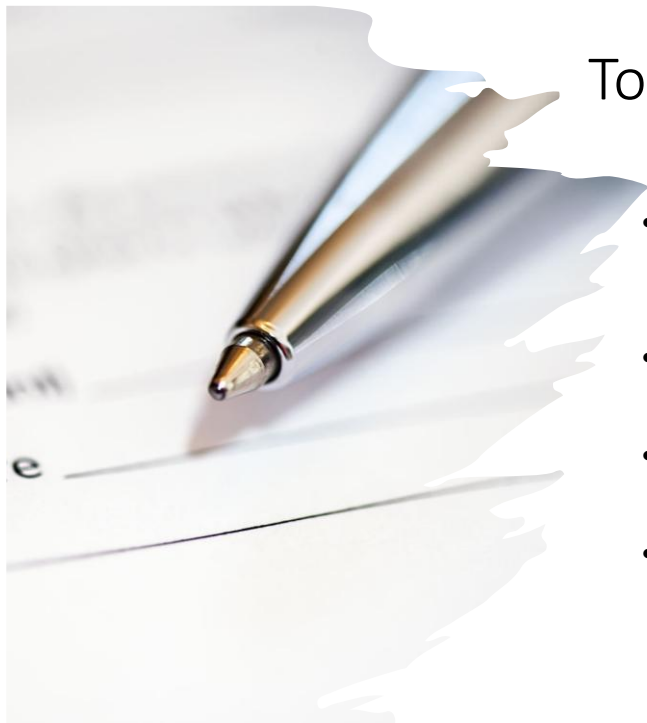
*State v. Joyner*

- 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

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## To review:

- Is there an out of court statement the State wishes to admit for its truth?
- Is the statement testimonial?
- If so, is the witness truly unavailable?
- If so, did the defendant have a prior opportunity to question the witness on the statement?

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## To review:

- If the statement is not testimonial hearsay, no Confrontation Clause issue
- If the witness is available for trial, no Confrontation Clause issue
- If the defendant previously had a chance and motive to cross-examine the witness on the statement, no Confrontation Clause issue\*

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## 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
  - 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)

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## Forfeiture of the Right of Confrontation by Wrongdoing

- The defendant may forfeit the right of confrontation by wrongdoing when  $\Delta$  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

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## Forfeiture of the Right of Confrontation by Wrongdoing

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

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## Remote Testimony and Confrontation

- Remote testimony may satisfy the Confrontation Clause in certain situations
  - *MD v. Craig* permitted this for a child victim in a child abuse case
  - Requires findings about significant public policy interests, impact on child of being in courtroom with Δ, and must allow for parties to see, hear, and cross the witness and otherwise assure reliability
  - NC courts have applied to child victims and seriously ill witnesses

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## Other Confrontation Rights


- Qualified right to cross-examine key prosecution witness on pending or dismissed charges. *State v. Prevatte*, 346 N.C. 162 (1997) (citing *Davis v. Alaska*, 415 U.S. 308 (1974)).
- Qualified right to see the witnesses in person. *Coy v. Iowa*, 487 U.S. 1012 (1988); *Maryland v. Craig*, 497 U.S. 836 (1990).
- Qualified protection against use of a non-testifying co-defendant's confession against other defendant in a joint trial. *Bruton v. U.S.*, 391 U.S. 123 (1968); *Samia v. U.S.*, 599 U.S. 635 (2023)


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Questions?

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