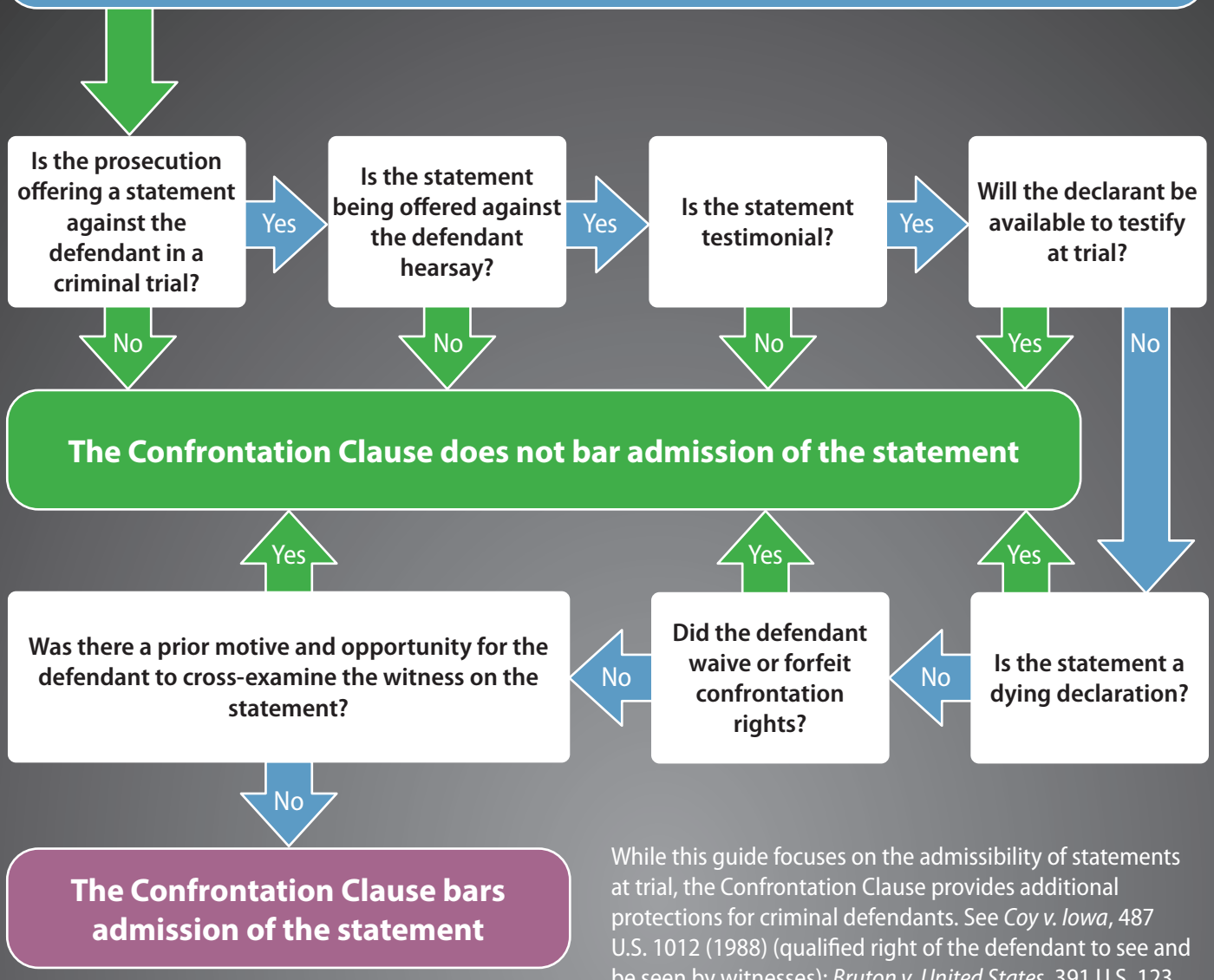
Confrontation Clause

FLOWCHART

This flowchart is intended to be used as a quick reference guide for analyzing the admissibility of statements under the Confrontation Clause. The Confrontation Clause of the Sixth Amendment to the U.S. Constitution generally limits the admission of testimonial statements made by a witness who is unavailable for trial. Explanatory notes detailing each step of the analysis can be found after the flowchart.



While this guide focuses on the admissibility of statements at trial, the Confrontation Clause provides additional protections for criminal defendants. See *Coy v. Iowa*, 487 U.S. 1012 (1988) (qualified right of the defendant to see and be seen by witnesses); *Bruton v. United States*, 391 U.S. 123 (1968) (protection against the admission of a nontestifying codefendant's confession at a joint trial); *State v. Prevatte*, 346 N.C. 162 (1997) (qualified right to cross-examine key prosecution witness about pending charges) (citing *Davis v. Alaska*, 415 U.S. 308 (1974)). These additional Confrontation Clause rights are beyond the scope of this guide.

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Phil Dixon

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FLOWCHART

Is the prosecution offering a statement against the defendant in a criminal trial?

The Confrontation Clause primarily protects against the admission of testimonial hearsay statements against a defendant in a criminal trial. *Crawford v. Washington*, 541 U.S. 36, 53 (2004). Confrontation rights stem from the Sixth Amendment to the U.S. Constitution and Article I, Section 23 of the North Carolina Constitution. The State does not have a comparable constitutional right to confrontation; confrontation rights belong to the defendant alone.

The Confrontation Clause may also apply to the adjudicatory phase of a delinquency trial. *See, e.g., In re Stradford*, 119 N.C. App. 654 (1995) (applying the Confrontation Clause to analyze remote testimony); *In re A.J.W.*, COA07-1229, 1923 N.C. App. 246 (unpublished) (applying Sixth Amendment confrontation rights in a delinquency case); G.S. 7B-2405 (statutory confrontation right in delinquency cases).

While there is no Sixth Amendment Confrontation Clause right in other proceedings, due process under the state and federal constitutions may provide similar protections in other types of cases, although the degree to which due process confrontation rights overlap with Sixth Amendment confrontation rights is unclear. State law sometimes codifies a confrontation right in other contexts. *See, e.g.*, G.S. 15A-1345(d) (probation); G.S. 122C-268(e) (involuntary commitment).

Is the statement being offered against the defendant hearsay?

A statement is hearsay if it is being offered for the truth of the matter it asserts. N.C. R. Evid. 801(c). A statement offered for purposes other than its truth is not hearsay and does not implicate the Confrontation Clause. Examples of a non-hearsay purpose include using a statement for impeachment, for corroboration, for illustrative purposes, to explain a course of conduct, or to show the statement's effect on a listener. Admissions by a party-opponent offered against that party are also excepted from the definition of hearsay. N.C. R. Evid. 801(d).

North Carolina courts have formerly held that a substitute expert's use of the statements in a forensic report of another, unavailable witness is not hearsay (and therefore does not implicate the Confrontation Clause) because the underlying report is being used for the basis of the testifying expert's opinion and not for its truth. *State v. Ortiz-Zape*, 367 N.C. 1 (2013). The U.S. Supreme Court squarely rejected this approach and held that the underlying report in this situation is being offered for its truth. *Smith v. Arizona*, 602 U.S. 779 (2024).

Is the statement testimonial?

The Confrontation Clause only protects against the admission of testimonial hearsay statements. A nontestimonial statement does not implicate the Confrontation Clause, although the statement still may be objectionable as inadmissible hearsay. *Smith v. Arizona*, 602 U.S. 779, 783 (2024).

A statement is testimonial when its primary purpose is to prove past facts for use in a future criminal prosecution. *Ohio v. Clark*, 576 U.S. 237, 245 (2015). A statement's primary purpose is determined by an objective examination of the words, actions, and circumstances of both the person making the statement and any person questioning the speaker. *Smith* at 800–01. Classic examples of testimonial statements are those given to law enforcement during a formal interrogation and statements made under oath, such as affidavits. *Crawford v. Washington*, 541 U.S. 36, 68 (2004). Forensic reports prepared solely for use at trial are also testimonial. *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 310–11 (2009); *State v. Craven*, 367 N.C. 51, 57 (2013).

A statement is nontestimonial when its primary purpose is not to prove facts relevant to a later prosecution, but rather to serve some other primary purpose. Classic examples of nontestimonial statements include 911 calls for immediate assistance and other requests for emergency aid, statements made to close friends or family, offhand or casual remarks, statements contained within business records, statements made in furtherance of a conspiracy, and statements by very young children. *Ohio v. Clark*, 576 U.S. 237 (2015). Purely machine-generated data is also nontestimonial, although an opinion interpreting such data will be testimonial when the opinion is created

for use at a later prosecution. *State v. Lester*, No. 293PA23-2, 2025 WL 350299 (N.C. Jan. 31, 2025).

A statement that begins as nontestimonial (a request for emergency assistance, for instance) can become a testimonial statement if the circumstances surrounding the making of the statement change, such as when the situation is no longer an emergency. *Michigan v. Bryant*, 562 U.S. 344, 365 (2011). Statements may contain both testimonial and nontestimonial components, with only the testimonial portions being objectionable under the Confrontation Clause. *Smith v. Arizona*, 602 U.S. 779, 802 (2024).

Will the declarant be available to testify at trial?

If the witness is available to testify and be cross-examined about the statement at trial, there is no Confrontation Clause problem.

If the witness is not available to testify at trial, there is a potential Confrontation Clause problem. A witness is unavailable when they will not be present and subject to cross-examination at trial after the State has undertaken reasonable, good-faith efforts to produce the witness for trial. *State v. Clonts*, 254 N.C. App. 95, 128 (2017). Classic examples of unavailability include death or serious illness of the speaker, invocation of privilege by the speaker, or instances where the speaker cannot be located.

The trial court must make findings of fact in support of a determination of unavailability. *Id.* at 115 (citing *State v. Triplett*, 316 N.C. 1 (1986)).

Is the statement a dying declaration?

Dying declarations are not subject to the Confrontation Clause and North Carolina treats such statements as a special exception to the Confrontation Clause, even when the statement is testimonial. *State v. Calhoun*, 189 N.C. App. 166 (2008). A dying declaration is a statement made by a person when the person believes their death is imminent and the statement concerns the cause or circumstances of what the person believed to be his or her impending death. N.C. R. Evid. 804(b)(2). The U.S. Supreme Court has not squarely ruled on the issue. *Michigan v. Bryant*, 562 U.S. 344, 395–96 (2011) (Ginsburg, J., dissenting) (so noting).

Did the defendant waive or forfeit confrontation rights?

Failure of a defendant to object on confrontation grounds results in a waiver of confrontation rights. *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 327 (2009).

Another common way that defendants waive their confrontation rights is by failing to comply with notice and demand statutes. When authorized by statute, the prosecution may serve the defendant with timely, written notice of intent to admit forensic reports, chemical analyst affidavits, and chain of custody statements of an unavailable witness, along with a copy of the report or statement. The defendant must respond by filing a timely, written demand for the attendance of the witness. If the defense fails to do so, the right to confront the witness has been waived and the statement at issue may be admitted without a live witness. North Carolina has a variety of notice and demand statutes, with different deadlines for notice and demand depending on the specific statute. *See* G.S. 8-58.20(a)–(g); G.S. 20-139.1(c1), (c3), (e1), and (e2); G.S. 90-95(g) and (g1).

Defendants may also waive their confrontation rights by stipulating to the admissibility of the statement. *State v. Loftis*, 264 N.C. App. 652 (2019). So long as the stipulation does not amount to an admission of guilt, the trial court does not err by accepting defense counsel's stipulation without personally addressing the defendant. *Id*. at 658.

A defendant implicitly waives confrontation rights through disruptive behavior that requires his or her removal from the courtroom. *Hemphill v. New York*, 595 U.S. 140, 151–52 (2022) (internal citation omitted).

A defendant forfeits confrontation rights when they are responsible for the absence of a witness at trial by misconduct designed to prevent the witness from appearing at trial. *Giles v. California*, 554 U.S. 353 (2008). Examples of forfeiture by wrongdoing may include killing or injuring a witness, bribing a witness, or intimidating a witness. It is not enough that the defendant committed misconduct against the witness, rendering the witness unavailable for trial. The misconduct must have been *intended to* prevent the witness's testimony at trial. *Id*. at 365. Misconduct intended to render a witness unavailable may be committed by the defendant or by others acting on the defendant's behalf. The prosecution must prove that the misconduct was committed with intent to prevent a witness from testifying by a preponderance of evidence. *State v. Allen*, 265 N.C. 480 (2019).

Was there a prior motive and opportunity for the defendant to cross-examine the witness on the statement?

If the defendant had the motive and opportunity to cross-examine the witness on a testimonial hearsay

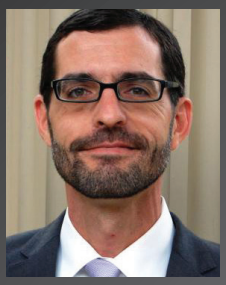
statement at some earlier time, the statement may be admitted without violating the Confrontation Clause. *Crawford v. Washington*, 541 U.S. 36, 59 (2004).

If the defendant has had no such prior opportunity, the statement may not be admitted consistent with the Confrontation Clause (absent waiver or forfeiture of the right).

North Carolina courts have found prior motive and opportunity to cross-examine in a variety of situations, including earlier trials, probable cause hearings, guilty plea hearings, and juvenile transfer hearings. *State v. Chandler,* 324 N.C. 172 (1989) (earlier trial); *State v. Ross*, 216 N.C. App. 337 (2011) (probable cause hearing); *State v. Rollins*, 226 N.C. App. 129 (2013) (plea hearing); *State v. Giles*, 83 N.C. App. 487 (1986) (juvenile transfer hearing).

The specifics of the testimony, the surrounding circumstances of the earlier opportunity, and its relation to the current trial are relevant factors in determining whether the prior opportunity to cross-examine sufficed to satisfy the Confrontation Clause. *Compare State v. Joyner,* 284 N.C. App. 681 (2022) (civil no-contact hearing provided defendant sufficient motive and opportunity to cross-examine the witness when the conduct at issue in the civil and criminal cases presented the same issues, despite the defendant not attending the civil hearing and having no entitlement to counsel) *with State v. Smith*, No. COA20-692, 287 N.C. App. 614 (2023) (unpublished) (probable cause hearing did not provide an adequate prior motive and opportunity to cross-examine the witness when the defendant was tried on different and more serious charges, had not been provided discovery at the probable cause hearing, and where the trial judge repeatedly sustained objections to defense counsel's questions during the hearing).

In a pre-*Crawford* case, the U.S. Supreme Court held that a preliminary hearing did not provide the defendant an adequate opportunity to cross-examine the witness when the defendant was not entitled to counsel at that stage of the proceedings. *Pointer v. Texas*, 380 U.S. 400 (1965).



Phil Dixon has primarily worked with public defenders and defense lawyers since joining the School of Government in 2017. In 2023, he was named director of the School's Public Defense Education group. In collaboration with Indigent Defense Services, he provides training and consultation to defenders and other court system actors, while also researching and writing on criminal law and related issues.

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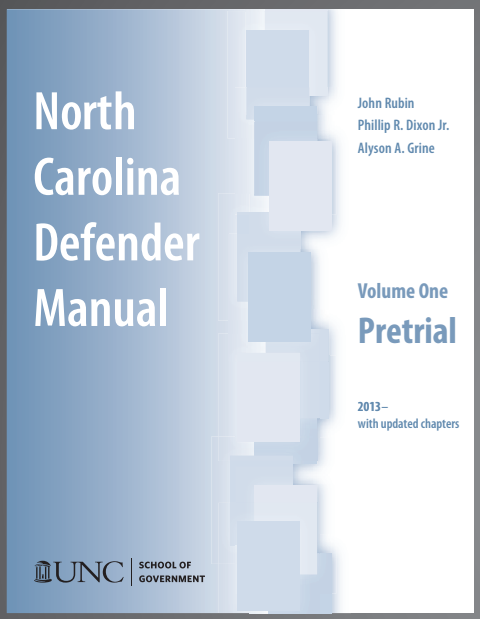

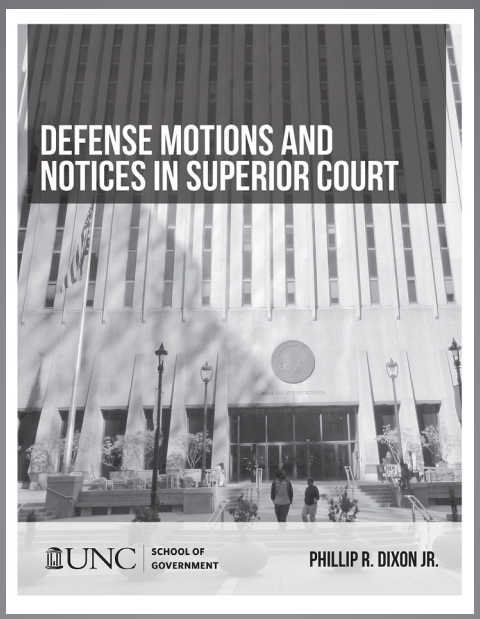

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