

21.2 Right to Confront Witnesses

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21.2 Right to Confront Witnesses

This section addresses the state and federal constitutional right to confront and cross-examine witnesses only. It does not discuss strategies or procedures relating to cross-examination. For a discussion of cross-examination, see *infra* § 29.6, Witness Examination. For a discussion of the constitutional implications of remote testimony—i.e., testimony given by a witness outside of the defendant’s physical presence by way of a “live,” closed-circuit television system—see *infra* § 29.8, Remote Testimony.

A. Basis of Right

Federal constitution. The Sixth Amendment to the U.S. Constitution guarantees a defendant the right to confront the witnesses against him or her. *See Crawford v. Washington*, 541 U.S. 36 (2004); *California v. Green*, 399 U.S. 149 (1970). “The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact.” *Maryland v. Craig*, 497 U.S. 836, 845 (1990). A criminal defendant is provided two types of protection under the Confrontation Clause—“the right physically to face those who testify against him, and the right to conduct cross-examination.” *Pennsylvania v. Ritchie*, 480 U.S. 39, 51 (1987); *see also Davis v. Alaska*, 415 U.S. 308 (1974). *But cf. infra* § 29.8, Remote Testimony (discussing permissibility of remote testimony by witnesses).

The Sixth Amendment right to confrontation is applicable to the states through the Fourteenth Amendment. This right is “[o]ne of the fundamental guarantees of life and liberty,” and “a right long deemed so essential for the due protection of life and liberty that it is guarded against legislative and judicial action by provisions in the Constitution of the United States and in the constitutions of most if not of all the States composing the Union.” *Pointer v. Texas*, 380 U.S. 400, 404 (1965) (citation omitted).

State constitution. Article I, section 23 of the N.C. Constitution has a guarantee of the right to confront similar to that set out in the Sixth Amendment. *State v. Chandler*, 324 N.C. 172 (1989). This section secures to the defendant the right to have his or her witnesses in court and to examine them on his or her behalf. It also secures to the defendant a fair opportunity to prepare and present his or her defense. *See State v.*

Hackney, 240 N.C. 230, 235 (1954) (discussing article I, section 11 of the N.C. Constitution of 1868, a precursor to article I, section 23 of the current version of the constitution).

The N.C. Supreme Court “has generally construed the right to confrontation under our state constitution consistent with the federal provision.” *State v. Fowler*, 353 N.C. 599, 614–15 (2001). The court “has repeatedly held that the right to confront is an affirmation of the rule of the common law that in criminal trials by jury the witness must not only be present, but must be subject to cross-examination under oath.” *State v. Perry*, 210 N.C. 796, 797 (1936).

B. Waiver

The right to confront is a personal privilege for the benefit of the defendant and, unlike the right to presence (discussed *supra* in § 21.1), is not a matter of public concern. Thus, the right to be confronted by witnesses may be waived, even in a capital case, by the defendant either by express consent or by a failure to assert the right in apt time. *State v. Braswell*, 312 N.C. 553 (1985); *State v. Moore*, 275 N.C. 198 (1969); *see also State v. Craven*, 312 N.C. 580 (1985) (by failing to request that a witness be recalled, defendant waived his right to confront her about her written note entered into evidence by the State after the witness had testified and left the courthouse).

This right may be waived by the defendant or by defense counsel acting on behalf of the defendant. *See State v. Splawn*, 23 N.C. App. 14 (1974) (right to confront waived by defense counsel’s stipulation in open court that the SBI chemist’s testimony could be taken, both on direct and cross-examination, on the day preceding the trial and then read to the jury at the trial by the court reporter).

C. Standard of Review on Appeal

The denial of a defendant’s right to confront the witnesses against him or her is subject to harmless error analysis. *See State v. Braswell*, 312 N.C. 553 (1985). If the defendant’s constitutional right to confrontation is violated and the error is preserved, the State bears the burden of showing that the error was harmless beyond a reasonable doubt. *See State v. Morgan*, 359 N.C. 131 (2004).

Practice note: When making an objection based on the denial of the defendant’s right to confrontation, be sure to object on both state and federal constitutional grounds. Also, when making an objection to hearsay, be sure to give both the constitutional and hearsay grounds. *See State v. Gainey*, 355 N.C. 73 (2002) (defendant’s confrontation claim not properly before the court on appeal because defendant objected at trial only on hearsay grounds).

D. Additional Resources

For further discussion of the right to confrontation and cross-examination, see Jessica

Smith, [*A Guide to Crawford and the Confrontation Clause*](#), N.C. SUPERIOR COURT JUDGES' BENCHBOOK (Aug. 2015).