

Due Process Rights and Children: Fifty Years of *In re Gault* – Part Four, the Right to Confrontation

The Confrontation Clause of the Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.” U.S. Const. amend. VI. This protection applies to state court criminal actions by virtue of the Fourteenth Amendment. It also applies to juvenile proceedings because of *In re Gault*, 387 U.S. 1 (1967). Simply put, the right to confrontation allows juveniles to face their accusers in court and dispute their testimony through cross-examination. It allows juveniles to challenge the state’s evidence and protects them from the improper admission of certain testimonial hearsay under *Crawford*. This post explains a juvenile’s right to confront and cross examine witnesses and how far it extends in juvenile court.

The Right to Confrontation

The allegations against Gerald Gault stemmed from an alleged lewd phone call to a neighbor. However, in none of the proceedings that led to Gerald’s ultimate confinement was the neighbor ever called to testify. There was no opportunity for Gerald to contest either the call being made or the substance of the alleged call through face-to-face confrontation. Explaining how the denial of this right, along with an invalid confession, impacted Gerald’s case, the Supreme Court stated:

[t]he Arizona Supreme Court held that sworn testimony must be required of all witnesses including police officers, probation officers and others who are part of or officially related to the juvenile court structure. We hold that this is not enough. No reason is suggested or appears for a different rule in respect of sworn testimony in juvenile courts than in adult tribunals. Absent a valid confession adequate to support the determination of the Juvenile Court, confrontation and sworn testimony by witnesses available for cross-examination were essential for a finding of delinquency and an order committing Gerald to a state institution for a maximum of six years.

387 U.S. at 56. Thus, confrontation includes the right to be present and to cross examine witnesses who testify under oath.

The court later explained in *Crawford v. Washington* that the primary purpose of confrontation is to ensure that evidence is reliable “by testing [it] in the crucible of cross-examination.” 541 U.S. 36, 61 (2004). This protection is particularly important in juvenile proceedings which often turn on a “he said – she said” scenario, where the trier of fact must determine the truth based on the credibility of witnesses and the content of their statements.

Because cross-examination is essential for assessing the reliability of evidence, the Confrontation Clause bars the admission of certain hearsay statements. Under *Crawford*, “testimonial”

statements made by witnesses who do not appear in court are not admissible unless the witness is unavailable and there has been a prior opportunity for cross-examination. *Id.* at 68. Testimonial statements include, at a minimum, prior testimony at a preliminary hearing, grand jury proceeding, or trial, and statements to police officers during interrogations. *Id.* For a more detailed discussion of the *Crawford* analysis, see Jessica Smith, *Understanding the New Confrontation Clause Analysis: Crawford, Davis, and Melendez-Diaz*, available at <http://sogpubs.unc.edu/electronicversions/pdfs/aojb1002.pdf>).

Confrontation in Juvenile Adjudication Hearings

In addition to confrontation rights under the state and federal constitutions, the Juvenile Code confers a statutory right to confront and cross examine witnesses in juvenile adjudication hearings. See [G.S. 7B-2405](#). In at least two unpublished decisions, the Court of Appeals has reversed adjudications based on violations of the juvenile's right to confrontation at trial. See [In re A.J.W., K.S.W.](#), No. COA07-1229 (N.C. Ct. App. Oct. 7, 2008) (the admission of testimonial statements made by non-testifying witnesses to a detective violated *Crawford*); [In re A.L.](#), No. COA04-1452 (N.C. Ct. App. Jan. 3, 2006) (the admission of the victim's "show up" identification of the juvenile as the offender was testimonial, and thus, violated *Crawford*). However, the Court of Appeals also held that statements are non-testimonial when made in response to preliminary questions by investigating officers during an ongoing emergency. See [In re A.L.](#), No. COA04-1452 (statements made by assault victim immediately upon the officer's arrival on the scene were non-testimonial). Non-testimonial hearsay does not violate the Confrontation Clause but must be admissible under the Rules of Evidence.

Confrontation rights apply not only to adjudication hearings but also to juvenile admissions. [G.S. 7B-2407](#) provides that an admission may be accepted only after the court is satisfied that the juvenile understands, among other rights, that the juvenile is waiving the right to be confronted by the witnesses against the juvenile. The court's failure to advise a juvenile regarding the waiver of confrontation rights before accepting the admission is reversible error. [In re P.L.N.](#), No. COA07-1414 (N.C. Ct. App. July 15, 2008) (unpublished); [In re M.A.M.](#), No. COA08-968 (N.C. Ct. App. April 7, 2009) (unpublished).

Confrontation Beyond the Adjudicatory Hearing

The Juvenile Code extends the right to confrontation beyond the adjudication hearing. For example, juveniles have the right to examine witnesses at secure and non-secure custody review hearings. [G.S. 7B-1906\(d\)](#). At probable cause hearings, juveniles "may testify, call, and examine witnesses" and "[e]ach witness shall testify under oath or affirmation and be subject to cross-examination." [G.S. 7B-2202\(b\)](#).

Although still unsettled, the right to confrontation likely applies to juvenile probation revocation hearings but not as a requirement of the Sixth Amendment or the Juvenile Code. The Juvenile

Code does not specifically require confrontation at probation hearings (although a hearing is required) and the Sixth Amendment does not apply because probation is not a stage of a criminal trial. See *State v. Belcher*, 173 N.C. App. 620 (2005). However, as a matter of due process under the Fourteenth Amendment, adult probationers are entitled “to confront and cross examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation.” *Gagnon v. Scarpelli*, 411 U.S. 778, 786 (1973). This limited right to confrontation is codified in [G.S. 15A-1345\(e\)](#).

Without specifically addressing whether *Gagnon* applies to juveniles, the N.C. Court of Appeals has implied that juveniles also have a due process right to confront witnesses at probation hearings. In an unpublished case, *In re D.W-S.*, No. COA12-233 (N.C. Ct. App. Oct. 2, 2012), the juvenile argued that his right to confrontation was violated when his court counselor testified about behavior reports prepared by staff members at a detention center where the juvenile was confined. The court counselor had no first-hand knowledge of the incidents described in the reports, and the staff members who wrote the reports did not testify. Without specifically holding that the juvenile’s right to confrontation was violated, the court applied harmless error analysis and found no prejudicial error in the admission of the evidence.

There are many unresolved questions about the scope of confrontation beyond the adjudication hearing. However, given the nature of juvenile probation revocation hearings, it would seem that juveniles are entitled to at least the same due process protections at probation revocation as adult defendants. Compare *In re O'Neal*, 160 N.C. App. 409, 413 (2003) (“the better view is to treat a juvenile probation violation as analogous to the revocation of probation in the criminal justice system[.]”).

*In collaboration with the NC Office of the Juvenile Defender, this post is the fourth in a series of posts related to *In re Gault* and its impact on due process rights for juveniles. The blog posts in this series will be posted to both the On the Civil Side Blog and the Juvenile Defender Blog.