

I. INTRODUCTION

In the criminal setting, the right to confront and cross-examine witnesses is fundamental. Although the fully panoply of right do not apply in the civil setting, the right to confront and cross-examine witnesses often still applies. Here, however, the due process clause, rather than the Sixth Amendment, protects the right. As we'll see, the right to confront and cross-examine witnesses is much more flexible in the civil arena.

II. THE TYPE OF PROCEEDING AND WHAT IS AT STAKE

The interest involved affects the right to confront and cross-examine witnesses. When the court views the deprivation as greater, it applies the right to confront and cross-examine more strictly. As a general proposition, however, “[i]n almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine witnesses.”¹

A. PROCEEDINGS AFFECTING THE RIGHT TO WORK

When a state denies a person a license that they need to participate in their profession, the right to cross-examine witnesses applies.² In non-criminal proceedings, the right to confront and cross-examine witnesses is part of procedural due process guaranteed by the Fifth and Fourteenth Amendments.³ For example, a state committee denies someone entry to the profession based on an anonymous letter, with no opportunity to confront the letter's author, due process is violated.⁴ When the government charges an

¹ *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970); *Baird v. Owczarek*, 93 A.3d 1222, 1227 (2014) (citations omitted); *Louisiana State Bar Ass'n v. Levy*, 292 So.2d 492, 494 (1974); see *Hyson v. Montgomery County Council*, 217 A.2d 578, 585-86 (1966); see *Matter of Alamance County Court Facilities*, 405 S.E.2d 125, 137 (1991) (indicating that even in civil proceedings substantive right to confront and cross-examine applies) (citations omitted); see *People ex rel. Bernat v. Bicek*, 91 N.E.2d 588, 596 (1950) (holding that a statute that precludes the right to cross-examine witnesses from whom evidence is taken would violate due process); but see *Gilmore v. Osborne-Bushelman*, 2011 WL 3805972, at *3 (holding that the right to cross-examine applies in criminal, not civil, cases).

² *Willner v. Committee on Character and Fitness*, 373 U.S. 96, 108 (1963); *Application of Burke*, 87 Ariz. 336, 340 (1960); *In re Crum*, 103 Or. 296, 301 (1922); *Moity v. Louisiana State Bar Ass'n*, 239 La. 1081, 1092 (1960); *Brown v. South Carolina State Bd. Of Educ.*, 301 S.C. 326, 329-30 (1990) (holding that a teacher has a right to confront and cross-examine witnesses when her teaching license is being revoked); see also *State v. Hollingsworth*, 103 Fla. 801, 803-04 (1931) (indicating that Florida protected this right by statute); but see *In re Disciplinary Proceeding Against Sanal*, 177 Wash.2d 743, 763 (2013) (indicating that the state has never decided whether the right to cross-examine applies in disciplinary proceedings).

³ *August v. Dep't of Motor Vehicles*, 264 Cal.App.2d 52, 60 (1968).

⁴ *Id.*

employee with a crime and the employee is not yet convicted, a license to practice in the profession cannot be revoked without an opportunity to confront and cross-examine witnesses.⁵ But an employee can be temporarily suspended from their practice during disciplinary proceedings.⁶ Courts have even found that some labor-management adjudications can so reflect criminal adjudications that only the traditional limitations on the right to confront and cross-examine witnesses apply.⁷

Even where an employee is discharged due to inefficiency and incompetence, the right to confront and cross-examine still applies.⁸ An employer cannot base its decision to discharge an employee on the ex parte communications of a superior.⁹ Although the employee was granted a review of his discharge, “where a party is precluded from exercising this fundamental right [confrontation and cross-examination], the review procedure is constitutionally defective”¹⁰

Courts have not held the right to confront and cross-examine to be absolute in this context.¹¹ First, some courts place weight on an employee’s timely and good-faith requests to confront and cross-examine witnesses.¹² Second, if the government can provide “good-cause” for denying confrontation and cross-examination, the court might be willing to deny the employee the right.¹³ If the government does not make this showing and the employer’s charges disqualify employees from future employment, however, procedural due process requires an opportunity to “refute the charges by confronting and cross-examining adverse witnesses.”¹⁴

But the employee does not have the right to confront and cross-examine witnesses at every stage

⁵ *In re Ming*, 469 F.2d 1352, 1356 (7th Cir. 1972); *but see Tucker v. Virginia State Bar*, 233 Va. 526, 532 (1987) (holding that the right to confront and cross-examine does not apply in civil cases), and *In re Sibley*, 256 F.3d 1335, 1341 (D.C.Cir. 2009) (holding that the right to cross-examine witnesses does not apply in attorney disciplinary proceedings).

⁶ *Conway v. State Bar*, 47 Cal.3d 1107, 1118 (1989).

⁷ *Jenkins v. McKeithen*, 395 U.S. 411, 428-29 (1969) (indicating that where the investigation was into criminal violations and the results of that investigation would be reported to the authorities, the traditional right to confront and cross-examine witnesses applied).

⁸ *Nevels v. Hanlon*, 656 F.2d 373, 376 (8th Cir. 1981).

⁹ *Id.*

¹⁰ *Id.* at 376.

¹¹ *McNeill v. Butz*, 480 F.2d 314, 325 (4th Cir. 1973).

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*; *see also Smith v. Everett*, 276 Ark. 430, 432 (1982) (holding that when the state’s basis for termination comes by way of affidavit and the employer could not subpoena the witness for cross-examination, the procedure violates due process).

in the litigation process.¹⁵ Where post-termination hearings exist, an employee is not entitled to confront and cross-examine witnesses in the pre-termination hearing.¹⁶ And when states require certain procedures for the right to confront and cross-examine to accrue, employees must follow those procedures.¹⁷ Further, just because an employee's attorney does not elicit all of the information the employee would like from a witness, due process is not violated.¹⁸ Finally, some courts do not extend the right to confront and cross-examine to police officers with the choice to either resign or submit to a polygraph.¹⁹

B. PAROLEES AND PRISONERS

Parole revocation constitutes a significant deprivation of liberty.²⁰ The same is true for prisoners granted parole but not yet released.²¹ Although this is not a criminal proceeding and the full panoply of rights does not apply, terminating parole constitutes a grievous loss of liberty, much similar to the criminal context. When the state makes its final evaluation of any contested relevant facts, minimum requirements for due process include the right to confront and cross-examine witnesses.²² This is especially true where the evidence the state relies on has not been shown to be reliable.²³ This is true unless the hearing officer finds good cause for not allowing confrontation.²⁴

¹⁵ *Catlett v. Woodfin*, 13 Fed.Appx. 412, 415 (2001); see *State ex. Rel. Florida Bar v. Grant*, 85 So.2d 232, 237-38 (1956) (*en banc*) (holding that, although the right to confront and cross-examine witnesses would apply, it did not apply at the early stages of the disciplinary proceeding).

¹⁶ *Id.* at 238.

¹⁷ *Riggins v. Board of Regents of University of Nebraska*, 790 F.2d 707, 712 (8th Cir. 1986); *Dragan v. Connecticut Medical Examining Bd.*, 223 Conn. 618, 635 (2011); *Holschen v. International Union of Painters & Allied Trades/Painters Dist. Council #2*, 598 F.3d 454, 464 (8th Cir. 2010); *Matter of Brady*, 186 Ariz. 370, 374 (1982) (failure to appear in disciplinary proceedings waives confrontation right).

¹⁸ *In re Vora*, 354 S.C. 590, 601 (2003); see also *Papapetropoulos v. Milwaukee Transport Services, Inc.*, 795 F.2d 591, 699 (7th Cir. 1986).

¹⁹ *Seattle Police Officers' Guild v. City of Seattle*, 80 Wash.2d 307, 325 (1972) (*en banc*) (Rosellini, dissenting) (indicating that the police officer will not have the opportunity to confront or cross-examine the individual performing the polygraph exam).

²⁰ *Morrissey v. Brewer*, 408 U.S. 471, 482 (1972).

²¹ *Green v. McCall*, 822 F.2d 284, 292 (2nd Cir. 1987) (holding that prisoner who had his release date set could not have that date moved without an opportunity to confront and cross-examine witnesses).

²² *Id.* at 291; *Brown v. Stoffel*, 141 F.3d 1174 (9th Cir. 1998) ("Prior to revoking parole, authorities must provide the parolee with certain constitutionally-mandated procedures" including confrontation and cross-examination); but see *Valdivia v. Schwarzenegger*, 599 F.3d 984, 989 (9th Cir. 2010) (indicating that the court will weigh the parolee's right to confrontation against the state's good cause for denying it).

²³ *State v. Wade*, 863 S.W.2d 406, 409 (1993); see also *Farrish v. Mississippi Parole Bd.*, 836 F.2d 969, 978 (5th Cir. 1988) (indicating that denial of opportunity to confront and cross-examine witnesses is a violation of clearly established law for purposes of determining whether government agent is entitled to qualified immunity).

²⁴ *Farrish*, 836 F.2d at 978; see also *Wade*, 863 S.W.2d 406, 410 (indicating also that parolee can waive confrontation right by failing to subpoena the relevant witness).

Not all courts conclude parolees are entitled to a full hearing, including a right to confront and cross-examine witnesses.²⁵ These courts believe that if parolees had a right to a full hearing prior to the state revoking parole, then parole would become cumbersome and inefficient.²⁶

In other civil contexts where there is a significant liberty interest, courts require confrontation and cross-examination.²⁷ For example, where the individual may end up confined as a result of the proceeding, due process requires confrontation and cross-examination.²⁸ When a state deprives an individual of their personal freedom, whether in the civil or criminal context, due process requires proper written notice and a hearing at which there is a right to confront and cross-examine witnesses.²⁹

Prison inmates have a significant interest in their “good-time” credits. These are credits that can reduce the inmate’s time spent in prison. As such, prisoners are entitled to due process before having these credits revoked.³⁰ Yet the complete right to confront and cross-examine witnesses creates potential for havoc inside the prison walls.³¹ Thus, courts sometimes leave matters of confrontation and cross-examination to the “sound discretion of the officials of state prisons.”³²

Courts have also recognized a due process applies before a prisoner’s participation in work release can be revoked.³³ This includes the right to confront and cross-examine witnesses.³⁴

C. SCHOOL DISCIPLINARY PROCEEDINGS

In school disciplinary proceedings, due process rights are not co-extensive with those of defendants in a civil or criminal trial.³⁵ Thus, due process may be satisfied through cross-examination, although not confrontation.³⁶

²⁵ *Williams v. Dunbar*, 377 F.2d 505, 506 (9th Cir. 1967).

²⁶ *Id.*

²⁷ *U.S. ex rel. Stachulak v. Coughlin*, 520 F.2d 931, 935 (7th Cir. 1975).

²⁸ *Id.*

²⁹ *In re Guardianship of Deere*, 708 P.2d 1123, 1126 (1985).

³⁰ *Wolff v. McDonnell*, 418 U.S. 539, 560 (1974); *U.S. ex rel Miller v. Twomey*, 479 F.2d 701, 715-16 (7th Cir. 1973) (holding that due process applies to the revocation of good time credits, but that the right to confront and cross-examine witnesses is not absolute).

³¹ *Wolff*, 418 U.S. at 567.

³² *Wolff*, 418 U.S. at 567; *see also Baxter v. Palmigiano*, 425 U.S. 308, 322-23 (1976); *Meyers v. Aldredge*, 492 F.2d 296, 304 (3rd Cir. 1974); *but see Williams v. Davis*, 386 So.2d 415, 419 (holding that, although the prison claimed presenting a specific witness would constitute a hazard to institutional safety goals, prisoners have a right to confrontation and cross-examination in this context).

³³ *Dicks v. Chow*, 382 Fed.Appx. 28, 30 (2nd Cir. 2010).

³⁴ *Id.*

³⁵ *Nash v. Auburn Univ.*, 812 F.2d 655, 664 (11th Cir. 1987); *see Smith v. Miller*, 213 Kan. 1, 7 (1973).

Even so, when the deprivation is serious enough, like expulsion, some courts hold that due process requires confrontation and cross-examination.³⁷

D. PROCEEDINGS AFFECTING THE FAMILY

Rights to a Child

When the proceeding concerns rights to a child, due process usually requires confrontation and cross-examination.³⁸ The court does, however, consider the length of the deprivation and the additional benefits from cross-examination.³⁹ But when the state denies direct confrontation in favor of an alternative form of cross-examination, there must be effective notice beforehand.⁴⁰

When the case involves child abuse, courts weigh the child's interests when making confrontation and cross-examination decisions.⁴¹ Yet not all courts conclude that the witness can testify outside the presence of the parent.⁴² Even when the attorney has the opportunity to cross-examine the child, "confrontation includes the right to be physically present during the presentation of testimony."⁴³

Deportation Proceedings

The state cannot deny a petition for immediate relative status without confrontation and cross-examination.⁴⁴ This is especially true where "the evidence consists of the testimony of individuals whose

³⁶ *Nash*, 812 F.2d at 664 (holding that due process was satisfied when the student's attorney could pose questions to the hearing officer, who would then pose the question to the witness); *Ashiegbu v. Williams*, 229 F.3d 1150, (6th Cir. 2000) (holding that the student had no constitutional right to confront his accusers); *Cloud v. Trustees of Boston Univ.*, 720 F.2d 721, 725 (1st Cir. 1983).

³⁷ *Black Coalition v. Portland School Dist. No. 1*, 484 F.2d 1040, 1045 (9th Cir. 1973).

³⁸ *In re Deleon J.*, 290 Conn. 371, 378-39 (2009) (citing *Gaiimo v. New Haven*, 257 Conn. 481, 512 (2001)); see also *Rivera v. Marcus*, 696 F.2d 1016, 1025-24 (2nd Cir. 1982) (holding that this foster parent had a biological connection to the children and thus had a liberty interest in remaining that relationship, which required confrontation and cross-examination before the state could terminate the relationship); but see *In Interest of Long*, 313 N.W.2d 473, 478 (1981) (indicating that the right of confrontation derives from the sixth amendment and applies to criminal or criminal proceeding, yet assuming that confrontation rights apply in rights to the child).

³⁹ *Gourley v. Gourley*, 158 Wash.2d 460, 468 (2006) (indicating that the deprivation was for only a year and the husband had admitted to the conduct that required the deprivation).

⁴⁰ *In re Danielle D.*, 257 Neb. 198, 206 (1999) (holding that where the child is allowed to testify in chambers the parents must receive notice beforehand); but see *In re Ty M.*, 265 Neb. 150, 171 (2003) (holding that parents can waive rights by not pursuing them), and *Mary E. v. State*, 2003 WL 22994469, at *10 (holding that it was not an abuse of discretion to deny a continuance when failure to do so meant the mother could only be present via telephone).

⁴¹ *South Carolina Dept. of Social Servs. v. Wilson*, 352 S.C. 445, 456 (2002).

⁴² *Wilson*, 352 S.C. at 458.

⁴³ *Wilson*, 352 S.C. at 458; but see *In re Kelley D.*, 256 Neb. 465, 477 (1999) (holding that the location of the witnesses denied confrontation, but still satisfied due process).

⁴⁴ *Ching v. Mayorkas*, 725 F.3d 1149, 1159 (9th Cir. 2013).

memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, jealous.”⁴⁵

Where an individual is being deported, the government must make reasonable efforts to afford the alien confrontation and cross-examination rights.⁴⁶ Thus, the government cannot rely on an affidavit when it could otherwise call the witness.⁴⁷ The government cannot shift the burden on the alien in this way.⁴⁸

E. GOVERNMENT BENEFITS

Procedural due process requires that people losing their Medicaid benefits have an opportunity to confront and cross-examine witnesses.⁴⁹

III. THE STAGE OF THE PROCEEDING

A. PRELIMINARY HEARING

The right to confront and cross-examine witnesses depends on the stage of the proceeding.⁵⁰ During pre-deprivation hearings, many courts hold that there is no due process right to confront and cross-examine witnesses.⁵¹ In these cases, the opportunity to confront and cross-examine witnesses in post-deprivation hearings often makes up for the lack of confrontation in pre-termination proceedings.⁵² If the pre-termination hearing constitutes the only available procedure, courts will often analyze the pre-termination hearing procedures as if they were post-termination procedures.⁵³ The availability of pre-termination hearings at all depends on the relevant issues in dispute: if the issues are factual, a pre-termination hearing is more likely.⁵⁴

⁴⁵ *Id.* at 1158

⁴⁶ *Saidane v. I.N.S.*, 129 F.3d 1063, 1065 (9th Cir. 1997).

⁴⁷ *Saidane*, 129 F.3d at 1066; *see also Cunanan v. I.N.S.*, 856 F.2d 1373, 1375 (9th Cir. 1988); *Baliza v. I.N.S.*, 709 F.2d 1231, 1234 (9th Cir. 1983).

⁴⁸ *Saidane*, 129 F.3d at 1066 (1997).

⁴⁹ *Doe v. South Carolina Dept. of Health and Human Servs.*, 398 S.C. 62, 87 (2011).

⁵⁰ *See generally Morrissey v. Brewer*, 408 U.S. 471 (1972); *see also Brock v. Roadway Exp., Inc.*, 481 U.S. 252, 262 (1986).

⁵¹ *Jamison v. State Dept. of Social Servs., Div. of Family Servs.*, 218 S.W.3d 399, 410 (2007); *Staples v. City of Milwaukee*, 142 F.3d 383, 387 (7th Cir. 1998).

⁵² *Catlett v. Woodfin*, 13 Fed.Appx. 412, 415 (2001); *Michalowicz v. Village of Bedford Park*, 528 F.3d 530, 537 (2008) (holding that due process was not violated by lack of confrontation at pre-termination hearing because there was an opportunity for confrontation in the post-deprivation hearing).

⁵³ *See generally McClure v. Independent School Dist. No. 16*, 228 F.3d 1205 (10th Cir. 2000).

⁵⁴ *See Mothers' and Childrens' Rights Org. v. Sterrett*, 467 F.2d 797, 799 (7th Cir. 1972).

B. AVAILABILITY OF POST-DEPRIVATION PROCEDURES

Post-deprivation hearings can compensate for a lack of confrontation in pre-termination proceedings.⁵⁵ Correspondingly, courts may analyze the pre-termination hearing procedures as if they were post-termination procedures, if the pre-termination hearing constitutes the only available procedure.⁵⁶

IV. COUNTERVEILING CONSIDERATIONS⁵⁷

A. DEPOSITIONS

In some cases, confrontation by deposition may satisfy due process.⁵⁸

B. WITNESSES THAT DO NOT TESTIFY

There is no right to cross examine a witness who does not testify.⁵⁹

C. WAIVER

Defendants can waive their right to confront and cross-examine witnesses.⁶⁰ Even when the right to confrontation exists, a party may have to subpoena the relevant witness; if the witness is not subpoenaed, it may constitute a waiver.⁶¹ Similarly, where the state has certain procedures in place before a party can confront and cross-examine witnesses, failure to abide by those procedures may waive confrontation rights.⁶² Additionally, if a party agrees that a specific witness will not testify, that same party cannot later assert a due process violation; at that point, the party waived the right to confront the witness.⁶³

⁵⁵ *Catlett v. Woodfin*, 13 Fed.App'x. at 415 (2001); *Michalowicz v. Village of Bedford Park*, 528 F.3d 530, 537 (2008) (holding that due process was not violated by lack of confrontation at pre-termination hearing because there was an opportunity for confrontation in the post-deprivation hearing).

⁵⁶ See generally *McClure*, 228 F.3d 1205.

⁵⁷ This article does not address situations where the court denies confrontation because the testimony would be cumulative, or where the court denies confrontation but the affected party has admitted to the conduct underlying the litigation.

⁵⁸ *Bhagat Singh v. McGrath*, 104 F.2d 122, 123 (9th Cir. 1939).

⁵⁹ *Pavlik v. U.S.*, 951 F.2d 220, 224 (9th Cir. 1991); see also *People v. Sarpas*, 225 Cal.App.4th 1539, 1555-56 (2014).

⁶⁰ *Matter of Brady*, 186 Ariz. 370, 373-74 (1996) (holding that by failure to appear, confrontation right was forfeited); *Riggins v. Board of Regents of University of Nebraska*, 790 F.2d 707, 712 (8th Cir. 1986); see *In the Matter of Pamela A.G.*, 139 N.M 459, 464 (2006) (indicating that, even if the parents had a right to confront the child, it would have been waived because the parents never called the child as a witness); see *Poison v. Meredith Pub. Co.*, 213 N.W.2d 520, 524 (1973) (indicating the plaintiff's prior counsel waived the right to cross-examine a particular witness).

⁶¹ See *State v. Wade*, 863 S.W.2d 406, 410 (1993); see also *Harriet Cotton Mills v. Local No. 578, Textile Workers union of America*, 251 N.C. 218, 229 (1959) (failing to object can also constitute a waiver); see also *West v. Grand County*, 967 F.2d 362, 370 (10th Cir. 1992); see also *People v. Sarpas*, 225 Cal.App.4th 1539, 1568-69 (2014).

⁶² See *Dragan v. Connecticut Medical Examining Bd.*, 223 Conn. 618, 631 (2011); *Holschen v. International Union of Painters & Allied Trades/Painters Dist. Council #2*, 598 F.3d 454, 464 (8th Cir.

F. CHILD WITNESSES

Courts sometimes fashion special rules for child witnesses. When confrontation and cross-examination may be hurtful to the child, courts look to see if other procedures are sufficient to satisfy due process.⁶⁴ For example, when the child’s out-of-court statements are sufficiently consistent, and the party seeking cross-examination has provided no explanation as to how confrontation would advance the fact-finding process, due process may not require confrontation and cross-examination.⁶⁵

IV. TYPE OF CROSS-EXAMINATION AND EXTENT OF CONFRONTATION AVAILABLE

A. CROSS EXAMINATION THROUGH COUNSEL

In some cases, courts find it appropriate to deny direct confrontation.⁶⁶ For example, in cases where witnesses may fear reprisal, abridging the confrontation right may be justified.⁶⁷

B. WITNESSES OUTSIDE THE PRESENCE OF DEFENDANT

Under special circumstances, due process is satisfied even when a witness testifies outside of the defendant’s presence.⁶⁸ Normally, the party denied confrontation must receive notice before the hearing that the witness will be unavailable for direct confrontation.⁶⁹ When a party receives notification of this procedure and has an opportunity to request direct confrontation, but fails to, his confrontation right has been waived.⁷⁰

2010); *Fliegler v. Commissioner of Social Security*, 117 Fed.Appx. 213, 216 (3rd Cir. 2004); *Finfer v. Caplin*, 344 F.2d 38, 41-42 (2nd Cir. 1965); *Jenkins v. Macy*, 357 F.2d 62, 69-70 (8th Cir. 1966).

⁶³ *Kerr v. Clary*, 37 P.3d 841, 844-45, 2001 OK 90 (2001) (“[H]e waived any right to confront his son when he agreed that his child would not be called as a witness.”)

⁶⁴ See *In the Matter of A.G.*, 139 N.M. 459, 464 (2006); but see *In re Danielle D.*, 257 Neb. 198, 206 (1999) (holding that the child’s testimony in chambers did not satisfy due process because no notice was given to the parents or counsel prior to the hearing).

⁶⁵ *In the Matter of A.G.*, *supra* note 63, at 464.

⁶⁶ *E.J.S. v. State, Dept. of Health & Social Servs*, 754 P.2d 749, 752 (1988).

⁶⁷ *Ohio Association of Public School Employees, AFSCME, AFL-CIO, et al. v. Lakewood City School Dist. Bd. of Edn.*, 624 N.E.2d 1043, 1047 (1994) (holding that due process was satisfied when employee’s attorney could confront and cross-examine the witness, but the employee could only see the witness through closed-circuit television).

⁶⁸ *Ohio Association of Public School Employees*, *supra* note 62, at 175 (testimony through closed-circuit television); but see *State ex rel State of Cal. V. Ramirez*, 99 N.M. 92, 95 (1982) (holding that only allowing cross-examination through written questions would be a deprivation of due process).

⁶⁹ *In re Danielle D.*, 257 Neb. 198, 206 (1999) (holding that due process was violated when parents did not receive notice that the child witness would testify in chambers).

⁷⁰ *Holschen v. International Union of Painters & Allied Trades/Painters Dist. Council #2*, 598 F.3d 454, 464 (8th Cir. 2010).

C. TESTIMONY IN CHAMBERS

If a witness will testify in chambers, then affected parties must receive proper notice beforehand.⁷¹

⁷¹ *In re Danielle D.*, 257 Neb. At 206.