



Lee Burgess: Welcome to the Law School Toolbox podcast. Today, we are doing another in our “Listen and Learn” series – this one is covering the Confrontation Clause. Your Law School Toolbox hosts are Alison Monahan and Lee Burgess, that’s me. We’re here to demystify the law school and early legal career experience, so you’ll be the best law student and lawyer you can be. We’re the co-creators of the [Law School Toolbox](#), the [Bar Exam Toolbox](#), and the career-related website [CareerDicta](#). Alison also runs [The Girl’s Guide to Law School](#). If you enjoy the show, please leave a review on your favorite listening app. And if you have any questions, don’t hesitate to reach out to us. You can reach us via the [contact form](#) on LawSchoolToolBox.com, and we’d love to hear from you. And with that, let’s get started.

Lee Burgess: Hello, and welcome back to the “Listen and Learn” series. Today we are going to be talking about the Sixth Amendment’s Confrontation Clause. The Confrontation Clause, as applied to the states via the Fourteenth Amendment, gives a criminal defendant the right to confront witnesses against them. Confrontation Clause issues are commonly tested in Evidence questions in both law school exams and bar exams, almost always alongside hearsay issues. That’s because, like [hearsay](#), the Confrontation Clause applies to out-of-court statements being introduced at trial. Unlike hearsay, however, the Confrontation Clause only applies to certain kinds of statements and only when introduced at criminal trials.

Lee Burgess: And with that in mind, let’s start by reviewing the rule. Under the Confrontation Clause, the use of an out-of-court statement (even if it falls within a hearsay exception or exemption) violates a defendant’s Sixth Amendment rights when, one, the statement is “testimonial”; two, the declarant is unavailable to be cross-examined at trial; and three, the defendant did not have an opportunity to cross-examine the declarant before trial. This prohibition is subject to some exceptions, such as dying declarations and wrongdoing by the defendant.

Lee Burgess: Now, courts have held that the following statements are testimonial in nature: (a) statements made to grand juries (and in other similar situations); and (b) certain statements made to the police.

Lee Burgess: Chances are you will not have to deal with a question involving grand jury statements, but rather with a statement or statements made to the police. In determining whether a statement made to the police is testimonial in nature, courts typically use the Primary Purpose Test. Under that test, a statement made to the police is considered testimonial where its primary purpose, when viewed objectively, is to collect testimony to be used at a later trial. In contrast, statements made to the police are not considered testimonial where the primary purpose of the questioning was to assist the police in an ongoing emergency.



- Lee Burgess: The U.S. Supreme Court set forth the following factors to determine the existence of an ongoing emergency: one, the nature of the dispute; two, the scope of the potential harm to the victim; three, the threat to additional identifiable victims; four, the existence of a more generalized threat to the public; five, the suspect's type of weapon; and six, whether the suspect remained "at large" or had been located, but not apprehended.
- Lee Burgess: Now that we've covered the rules, we're ready to move on to our hypos. As mentioned earlier, Confrontation Clause issues are typically intertwined with hearsay issues, and these hypos are no exception. You would certainly want to discuss the hearsay issues on an exam, but for the purpose of this episode, we're just going to focus on the Confrontation Clause issues.
- Lee Burgess: Alright, let's get to our first hypo. This one was adapted from the [February 2007 California bar exam](#). Wow, way back in the day! Even before I took the bar exam:
- Lee Burgess: "Officer Will, a police officer, stopped Calvin, who was driving a rental car at five miles an hour over the speed limit. Calvin gave legally valid consent to search the car. Officer Will discovered a substantial quantity of cocaine in the console between the two front seats and arrested Calvin. Calvin explained that he was driving the car for his friend, Donna. He said that Donna was going to meet him at a particular destination to collect her cocaine, which belonged to her. Hoping to obtain a favorable plea bargain, Calvin offered to cooperate with the police. The police then arranged for Calvin to deliver the cocaine. When Donna met Calvin at the destination, she got into the car with Calvin. She was then arrested. Each was charged with and tried separately for distribution of cocaine and conspiracy to distribute cocaine.
- Lee Burgess: Donna's trial began while Calvin's case was still pending. At Donna's trial, the prosecutor called Officer Will, who testified to Calvin's statements after his arrest concerning Donna's role in the transaction. Assuming that all the appropriate objections were made, should the testimony have been allowed? Discuss."
- Lee Burgess: Okay, the question tells us we're dealing with an out-of-court statement by Calvin, which is being offered at Donna's trial. That's certainly enough to trigger a hearsay discussion, but not enough by itself to trigger a discussion of the Confrontation Clause. So let's see what other information is provided. We know that the Confrontation Clause only applies in criminal trials, and that's what we have here – Donna is being tried for distribution of cocaine and conspiracy to distribute cocaine. We also know that Calvin is likely not available to be cross-examined due to his Fifth Amendment right against self-incrimination, and there is no indication that Donna had an opportunity to cross-examine Calvin before trial. Finally, we know that Calvin's statement was made to the police. At this



point, we should recognize that the Confrontation Clause is triggered, and move on to an analysis of whether the statement is testimonial.

Lee Burgess: In order to determine whether the statement is testimonial, we need to apply the Primary Purpose Test. As mentioned earlier, a statement made to the police is testimonial where its primary purpose was to collect testimony to be used at a later trial, and not testimonial where the primary purpose was to assist the police in an ongoing emergency.

Lee Burgess: Here, it is pretty clear that Calvin's statement was not intended to assist the police in an ongoing emergency, but rather to provide testimony to be used at trial. While Donna remained at large when the statement was made, the crime at issue involved no identifiable victims, no weapon, and there appeared to be no immediate generalized threat to the public. Calvin's statement identifying Donna as the owner of the cocaine appears to have been motivated solely by a desire to save himself. Indeed, we know that Calvin explicitly agreed to cooperate with the police in an attempt to obtain a favorable plea bargain. Therefore, Calvin's statement would likely be considered testimonial, and its admission under these circumstances would violate the Confrontation Clause.

Lee Burgess: Alright, let's do one more. This one is adapted from the [July 2018 California bar exam](#):

Lee Burgess: "Vic and Deb are married. Six months ago, Vic began having an affair with one of his coworkers. Last month, Deb confronted Vic about the affair when he got home from work. When Vic denied the affair, Deb shot him and yelled, "Your girlfriend's next!" Vic was severely injured but managed to flee. Vic called 911 about two minutes later and reported what happened. The police arrived shortly after and arrested Deb.

Lee Burgess: Deb was charged in state court with attempted murder. At trial, the prosecution called Vic as a witness. Vic asserted spousal privilege and refused to testify against Deb. The prosecution then moved the 911 tape into evidence and played it for the jury. Assuming all appropriate objections were timely made, should the court have admitted the 911 tape? Discuss."

Lee Burgess: Okay, once again we have an out-of-court statement to the police being introduced in a criminal trial. Moreover, we know that Vic is unavailable to be cross-examined by reason of spousal privilege, and there is no indication that Deb had a prior opportunity to cross-examine him. That's enough to trigger a discussion of the Confrontation Clause.

Lee Burgess: The next question, then, is whether the statement was testimonial. Here, while Vic's statement identifying Deb would certainly bolster the prosecution's case at trial, the facts suggest that its primary purpose was to assist the police in an



ongoing emergency. First, the statement was made to the police only a couple of minutes after the crime, and while Vic was still severely injured and fleeing the scene of the crime. Second, the scope of the potential harm to Vic was substantial, given that Deb might further attack Vic. Third, while there did not appear to be a generalized threat to the public, Deb did pose an ongoing threat to Vic's coworker, as demonstrated by Deb yelling, "Your girlfriend's next!" Fourth, Deb's crime involved a gun. Fifth, Deb had not yet been apprehended. Based on these facts, Vic's statement was likely not testimonial, and therefore, its admission at trial did not violate the Confrontation Clause.

Lee Burgess:

And that's all that we have for you today. We hope you found these hypos to be helpful examples of how to work through Confrontation Clause issues. If you enjoyed this episode of the Law School Toolbox podcast, please take a second to leave a review and rating on your favorite listening app. We'd really appreciate it. And be sure to subscribe so you don't miss anything. If you have any questions or comments, please don't hesitate to reach out to myself or Alison at lee@lawschooltoolbox.com or alison@lawschooltoolbox.com. Or you can always contact us via our website [contact form](#) at LawSchoolToolBox.com. Thanks for listening, and we'll talk soon!

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