FIRST DISTRICT APPELLATE PROJECT

KEEPING UP WITH THE CONFRONTATION CLAUSE

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October 2026

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PART ONE

Orientation

1. How to use these materials

These materials are built for record review. Part One tells you what to look for. Parts Two through Four explain the law behind each kind of claim. Part Five covers forfeiture by wrongdoing and related doctrines, preservation, standards of review, and prejudice, which determine the outcome of many confrontation appeals. Part Six covers proceedings where the clause does not apply, what replaces it, with a brief note on state habeas claims.[1]

2. One clause, two rights

The Sixth Amendment to the U.S. Constitution 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; see U.S. Const., amend. XIV; Cal. Const., art. I, § 15.) The confrontation clause binds the states through the Fourteenth Amendment. (*Pointer v. Texas* (1965) 380 U.S. 400, 406.) The clause protects two related rights, and the law of each has developed separately.

Branch A: the bar on testimonial hearsay. The prosecutor may not use a non-testifying declarant's testimonial, out-of-court statements (e.g., prior testimony, statements to police, forensic reports) against the defendant unless the person is unavailable and the defendant had a prior chance to cross-examine them. This doctrine, known as the *Crawford* rule, is discussed in § 4. (See *Crawford v. Washington* (2004) 541 U.S. 36, 68.) Whether a statement is "testimonial" depends on a fact-intensive assessment of its formality and purpose, as discussed in § 5. (See *People v. Lopez* (2012) 55 Cal.4th 569, 581-582; *People v. Dungo* (2012) 55 Cal.4th 608, 619.) Most Branch A cases turn on one question: is the statement testimonial?

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[1] Cross-references like "§ 6" point to the numbered sections of these materials. Undesignated statutory references are to the Evidence Code.

Branch B: the rights that attach to the witness who does testify. This branch covers two rights: the right to cross-examine, above all, on bias and motive (*Davis v. Alaska* (1974) 415 U.S. 308; *Delaware v. Van Arsdall* (1986) 475 U.S. 673; *Olden v. Kentucky* (1988) 488 U.S. 227), and the right to see the witness face-to-face in the courtroom (*Coy v. Iowa* (1988) 487 U.S. 1012; *Maryland v. Craig* (1990) 497 U.S. 836). Branch B issues come up when the trial court cuts off cross-examination, or lets a witness testify behind a screen, by video, or otherwise shielded from the defendant.

What the clause is not. It is a rule of criminal procedure, not a rule of evidence. (*Crawford*, *supra*, 541 U.S. at p. 61.) It applies only in criminal prosecutions (§ 17). It does not bar testimonial statements offered for a purpose other than their truth. (*Crawford*, *supra*, 541 U.S. at p. 59, fn. 9.) And when the declarant testifies and is cross-examined, the clause "places no constraints at all on the use of his prior testimonial statements." (*Ibid.*)

3. Reading the record for confrontation issues

These questions may help as you read the record. Each points to a section below.

1. **Did any witness relay what someone else said?** Officers reciting a victim's or bystander's account; 911 calls and body-camera audio; a detective summarizing an interview; a nurse or doctor repeating a patient's identification of the assailant; a probation officer reading a report. Consider whether the declarant testified, and if not, whether the statement was testimonial. (§§ 4–6.)
2. **Did an expert describe facts about this case that the expert did not personally observe?** Gang experts and police reports, field identification cards and Street Terrorism Enforcement and Prevention Act (STEP) notices; pathologists describing another pathologist's autopsy; DNA, toxicology and firearms analysts testifying from another analyst's work; any expert who "reviewed the file." Consider whether the facts were independently proved, and whether the underlying records were testimonial. (§§ 7–9.)

3. **Was any report, certificate or record admitted without its author?** Lab reports, autopsy reports, SART records, chain-of-custody forms, affidavits of nonexistence of records, certified rap sheets. (§§ 5, 8.)
4. **Did the court cut off cross-examination?** Relevant rulings include motions in limine limiting impeachment, sustained objections on bias or motive, and section 352 rulings on a witness's immigration benefits, pending charges, deals, prior false accusations, or relationship with another suspect. (§ 11.)
5. **Did a witness testify from behind a screen, by video, masked, or with the defendant removed?** The findings the court made, or did not make, are often key. (§ 12.)
6. **Did a codefendant's statement come in at a joint trial?** Consider whether it was testimonial and whether and how it was redacted. (§ 4.)
7. **Was the confrontation issue adequately preserved? What was the precise objection?** Hearsay alone may not preserve the federal claim. It helps to note whether counsel said "confrontation," "Sixth Amendment," or "*Crawford*," and whether the trial predated *Crawford* or *Sanchez*. (§ 14.)
8. **What did the prosecutor do with it?** Closing argument that leans on the unconfronted statement, or that argues the defense had no reason to doubt a witness it was barred from impeaching, go to prejudice (§ 16). Some prosecutorial statements relaying out-of-court statements can constitute confrontation violations in their own right.

PART TWO

Admissibility

4. The *Crawford* rule: hearsay and the clause

A hearsay violation does not automatically produce a confrontation clause violation, while admissibility under a hearsay exception does not necessarily satisfy the confrontation clause. A confrontation violation also does not depend on a hearsay violation.

The clause only applies to hearsay. The Sixth Amendment does not bar statements offered for a purpose other than their truth, i.e., non-hearsay. (*Crawford*, *supra*, 541 U.S. at p. 59, fn. 9; *People v. Blacksher* (2011) 52 Cal.4th 769, 808, fn. 23 [statements not offered for their truth "do not implicate the confrontation clause under the *Crawford* rule"]; *People v. Cage* (2007) 40 Cal.4th 965, 975, fn. 6 ["[T]here are no confrontation clause restrictions on the introduction of out-of-court statements for *nonhearsay* purposes."].) The basis of an expert's opinion is offered for its truth and therefore cannot qualify as non-hearsay. (See Part Three; *Sanchez*; *Smith v. Arizona*.)

But the hearsay *exceptions* do not obviate the clause. *People v. Sanchez* (2016) 63 Cal.4th 665 held that case-specific, testimonial hearsay relayed by an expert witness generally violates the confrontation clause, even if the statement would otherwise be admissible under a hearsay exception. (See §§ 6–7.)

The clause only applies to testimonial hearsay. "It is the testimonial character of the statement that separates it from other hearsay that, while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause." (*Davis v. Washington* (2006) 547 U.S. 813, 821.) Non-testimonial hearsay is governed by the Evidence Code alone. (*Id.* at p. 824.)

From reliability to confrontation. Before 2004, an unavailable declarant's statement came in if it bore "adequate indicia of reliability," meaning it fell within a firmly rooted hearsay exception or carried particularized guarantees of trustworthiness. (*Ohio v. Roberts* (1980) 448 U.S. 56, 66.) The *Crawford*

rule replaced that test, holding the confrontation clause demands that "reliability be assessed in a particular manner: by testing in the crucible of cross-examination." (*Crawford*, 541 U.S. at p. 61.) Thus, under *Crawford*, the confrontation clause "bars 'admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.'" (*Davis v. Washington*, *supra*, 547 U.S. at p. 821.)

"[T]he touchstone questions are whether a statement is hearsay offered against a criminal defendant, whether the statement is otherwise admissible under a hearsay exception, and, if so, whether the statement is testimonial." (*People v. Blacksher* (2011) 52 Cal.4th 769, 813.)

> **Consider pairing the claims.** Notwithstanding the foregoing distinctions, confrontation violations often involve state hearsay errors. (E.g., *People v. Livingston* (2012) 53 Cal.4th 1145, 1159.) Consider raising both, especially if both objections were made below. The hearsay claim survives even if the statement turns out to be non-testimonial, and the confrontation claim converts the prejudice standard from *Watson* to *Chapman* if it succeeds.

Note that pre-*Crawford* Supreme Court case law is still good law to an extent. (See *Crawford v. Washington* (2004) 541 U.S. 36, 60 ["Although the results of our decisions have generally been faithful to the original meaning of the Confrontation Clause, the same cannot be said of our rationales."].)

Aranda/Bruton after *Crawford.*

"Under the so-called *Aranda/Bruton* doctrine, a trial court may generally not allow a jury in a joint criminal trial of a defendant and codefendant to hear the unredacted confession of the codefendant that also directly implicates the defendant — even if the jury is instructed not to consider the confession as evidence against the defendant." (*People v. Washington* (2017) 15 Cal.App.5th 19, 22-23; see generally *People v. Aranda* (1965) 63 Cal.2d 518, 529-531; *Bruton v. United States* (1968) 391 U.S. 123, 128-136.)

After *Crawford*, "because the confrontation clause applies only to testimonial hearsay statements, the *Aranda-Bruton* doctrine's Sixth Amendment protections likewise apply only to testimonial hearsay statements." (*People v. Tran* (2022) 13 Cal.5th 1169, 1196; see also *People v. Cortez* (2016) 63 Cal.4th 101, 129.)

Cellmate conversations, and statements between codefendants in separate police interrogation rooms, are both nontestimonial. (*Tran*, at p. 1197 [codefendant did not know his cellmate was a confidential informant and did not anticipate that his statements would be used at trial]; *People v. Lamb* (2024) 16 Cal.5th 400, 431.) A non-testifying codefendant's (testimonial, hearsay) confession that does not directly inculpate the defendant is admissible if 1) the statement is modified to generalize any identifying statements, and 2) the jury is instructed to consider the statement only as to the declarant-codefendant. (*Samia v. United States* (2023) 599 U.S. 635, 655.)

5. Testimonial statements: California's two-part test

Not all hearsay statements are "testimonial" for confrontation clause purposes. California courts employ a two-part test. A statement is testimonial if (1) it was made with some degree of formality or solemnity, and (2) its primary purpose pertains in some fashion to a criminal prosecution. (*People v. Lopez* (2012) 55 Cal.4th 569, 581-582; *People v. Dungo* (2012) 55 Cal.4th 608, 619.) Thus, an out-of-court statement offered for its truth, but which was *not* made for prosecutorial or investigative purposes, may violate hearsay rules without violating the Sixth Amendment.

1. Formality.

To be considered testimonial, "the out-of-court statement must have been made with some degree of formality or solemnity." (*People v. Lopez* (2012) 55 Cal.4th 569, 581.) An oath is not required, though affidavits and sworn statements are sufficiently formal. A sworn certificate or a signed report is formal, but an initialed, unsigned lab notation is not. (Compare *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305, 310–311, with *Lopez*, 55 Cal.4th at pp. 584-585; see § 8.)

Responses to structured police questioning are also considered formal. (*Davis*, 547 U.S. at p. 830, fn. 5; *People v. Cage* (2007) 40 Cal.4th 965, 984; cf. *People v. Blacksher* (2011) 52 Cal.4th 769, 815 ["Inquiries that are conducted in a disorganized way and in turbulent circumstances are distinguishable[.]"].)

2. Primary purpose.

A statement's primary purpose is assessed objectively from all the circumstances, including the statements and actions of both the declarant and questioner. (*Michigan v. Bryant* (2011) 562 U.S. 344, 367.) Standard rules of hearsay are relevant to the determination. (*Id.* at pp. 358-359.)

"Generally speaking, a declarant's hearsay statement is testimonial if made 'with a primary purpose of creating an out-of-court substitute for trial testimony.'" (*People v. Fayed* (2020) 9 Cal.5th 147, 168, quoting *Bryant* at p. 358.) Statements may also be deemed testimonial if they were made "primarily to memorialize facts relating to past criminal activity, which could be used like trial testimony." (*People v. Sanchez* (2016) 63 Cal.4th 665, 689.) Statements that "deliberately recount, in response to police questioning, how potentially criminal past events began and progressed" are testimonial "because they do precisely what a witness does on direct examination." (*Davis*, 547 U.S. at p. 830.)

"Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency." (*Id.* at p. 822; e.g., *People v. Gann* (2011) 193 Cal.App.4th 994, 1008-1009 [declarant's conversation with police was "not structured or formal" and occurred on-scene shortly after her 911 call].) Whether an emergency is ongoing depends on the scope of the threat, whether and when it was neutralized, what type of weapons were involved, and whether the accused was in custody or at large.

> **Consider the totality of facts.** An ongoing emergency is only one factor when determining the purpose of police questioning. The declarant's condition (and victim or bystander status), the formality of the setting, whether the questions were designed to prompt a narrative, and what information the police already knew are all relevant to the primary purpose of an on-scene statement.

Both prongs of the two-part test must be met. Additionally, the test must be applied statement-by-statement, not declarant-by-declarant. (See, e.g., *People v. Banos* (2009) 178 Cal.App.4th 483, 497 [911 call and statement to responding officer non-testimonial; earlier police interviews testimonial]; *People v. Byron* (2009) 170 Cal.App.4th 657, 669 [911 call and scene statement nontestimonial; hospital statement to a deputy, videotaped interview and preliminary hearing testimony testimonial].)

By category

Statement	Testimonial?
Statements to family, friends, cellmates, acquaintances	Non-testimonial. (*People v. Griffin* (2004) 33 Cal.4th 536, 579, fn. 19; *People v. Lamb* (2024) 16 Cal.5th 400, 430-431.)
Child statements to teachers and other mandated reporters	It depends, but generally non-testimonial. (*Ohio v. Clark* (2015) 576 U.S. 237, 246.)
Child statements to police or forensic interviewers	Testimonial.(e.g., *People v. Sisavath* (2004) 118 Cal.App.4th 1396 [statements to victim-services interviewer coordinating with prosecution].)
Statements to undercover officers or informants	Non-testimonial. (*People v. Arauz* (2012) 210 Cal.App.4th 1394.)
911 calls and on-scene police interviews	It depends. (*Davis*, 547 U.S. at p. 822.)

By category	
Statement	**Testimonial?**
Off-scene police interviews	Testimonial. (*Crawford* at p. 68; *Cage*, 40 Cal.4th 965 [hospital and station interviews].)
Statements to treating medical providers	It depends. Statements are non-testimonial when pertinent to treatment or responsive to a question asked solely "to determine, in accordance with [] standard medical procedure, the exact nature of the wound, and thus the correct mode of treatment." (*People v. Cage* (2007) 40 Cal.4th 965, 986 [surgeon asked "what happened" in a neutral manner and to "deal with the immediate medical situation he faced"]; see also *People v. Nelson* (2010) 190 Cal.App.4th 1453, 1467 [firefighter in ambulance].) Statements are testimonial if the provider's purpose was to "collect evidence, ... document evidence, ... send the evidence to the crime lab, ... take photographs and ... testify in court." (*People v. Vargas* (2009) 178 Cal.App.4th 647, 660 [statements to forensic nurse during sexual assault examination].)
Hospital interdisciplinary notes (MDO)	Non-testimonial. (*People v. Nelson* (2012) 209 Cal.App.4th 698, 713.)
Forensic reports (drugs, blood alcohol, DNA, autopsy)	Testimonial under federal law when made for litigation, but narrowed in California by *Lopez* and *Dungo*. (See § 8.)

By category	
Statement	**Testimonial?**
Police reports; Street Terrorism Enforcement and Prevention Act (STEP) notices; field identification cards	Testimonial. (*Sanchez*, 63 Cal.4th 665 [police reports and signed portion of STEP notice]; *People v. Iraheta* (2017) 14 Cal.App.5th 1228, 1249-1250 [Field Investigation card statements prepared while investigating a man-with-a-gun call]; but see *id.* at p. 1249 [noting that statements gathered in informal contacts generally are not testimonial].)
Jail classification interviews	Non-testimonial. (*People v. Leon* (2016) 243 Cal.App.4th 1003, 1020.)
Prison packets (Pen. Code, § 969b), CLETS rap sheets, booking records	Non-testimonial. (*People v. Perez* (2011) 195 Cal.App.4th 801; *People v. Morris* (2008) 166 Cal.App.4th 363.)
Certificates of nonexistence of records; affidavits summarizing records	Testimonial. (*Melendez-Diaz*, 557 U.S. at pp. 322-323.) A bare certification of authenticity is non-testimonial for lack of formality however.
Machine-generated data and printouts; automated camera photos	Non-hearsay. (*Lopez*, 55 Cal.4th at p. 583 [not statements]; *People v. Goldsmith* (2014) 59 Cal.4th 258, 274 [same].) A human notation on the printout may be testimonial.
Published compilations and databases relied on by experts	Non-testimonial. (*People v. Veamatahau* (2020) 9 Cal.5th 16.)
Elder and dependent-adult statements under § 1380	Testimonial by the statute's own terms. (*People v. Pirwani* (2004) 119 Cal.App.4th 770.)

By category	
Statement	**Testimonial?**
Prior testimony (preliminary hearing, grand jury, prior trial)	Testimonial. (*Crawford*, 541 U.S. at p. 68.)
Plea allocutions and guilty pleas of others	Testimonial. (*Crawford* at p. 64; *Hemphill v. New York* (2022) 595 U.S. 140.)

> **Consider the hearsay grounds.** Several Evidence Code exceptions admit statements made to police or in anticipation of litigation: §§ 1228, 1231, 1350, 1360, 1370 and 1380. Several of these codified statements involve out-of-court statements of particular categories of witnesses – e.g., sexual assault and domestic violence victims; children; elders. A qualifying statement may be arguably *testimonial* for the same reason it does not violate hearsay rules.

6. Testimonial statements that don't violate the clause

Testimonial hearsay is generally admissible in five situations: the declarant testifies; the declarant is unavailable and was previously cross-examined; the defendant waived the right (§ 14); the defendant forfeited it by wrongdoing (§ 13); or the statement is a dying declaration. As a matter of state law, the rule of completeness may also result in the admission of unconfronted statements. (§ 13; see *People v. Vines* (2011) 51 Cal.4th 830, 860-861, overruled on other grounds in *People v. Hardy* (2018) 5 Cal.5th 56, 104.)

A. Available declarant (i.e., witness hearsay)

When the declarant appears for cross-examination, the clause generally places no constraints on the use of their prior testimonial statements. (*Crawford*, 541 U.S. at p. 59, fn. 9; *People v. Livingston* (2012) 53 Cal.4th 1145, 1161.)

Nevertheless, in some cases, an available declarant might be so recalcitrant as to render them unavailable, thus converting Branch B (adequate cross-examination) problem into a Branch A (introduction of hearsay) violation. (See *People v. Morgain* (2009) 177 Cal.App.4th 454, 463 ["A defendant's confrontation rights may be violated where a prosecutor examines a recalcitrant witness and poses questions that relate to prior statements made by that witness, in circumstances where the witness's recalcitrance effectively prevents cross-examination concerning those prior statements."]; § 240, subd. (a)(6).)

For example, in *People v. Murillo* (2014) 231 Cal.App.4th 448, 450, the victim refused to answer over a hundred leading questions about his prior testimonial statements during a photographic lineup. The questions created "the illusion of testimony" and were in fact "tantamount to devastating adverse testimony." (*Id.* at pp. 449, 456.) "Murillo's inability to confront [the prior] statements rendered his trial fundamentally unfair." (*Id.* at p. 455.)

B. Unavailable declarant who was previously confronted

Unavailability

A declarant's unavailability for confrontation clause purposes is coextensive with the Evidence Code's definition of unavailability. Thus, a person is "unavailable" if they are, in short: 1) exempted by privilege, 2) disqualified, 3) dead or disabled due to illness, 4) absent despite the prosecution's reasonable diligence, 5) absent for reasons beyond the court's process, or 6) recalcitrant despite being found in contempt. (§ 240, subds. (a)(1)-(6).) They are not unavailable if the proponent of the hearsay statement caused any of the foregoing conditions. (*Id.* § 240, subd. (b).)

Situation	**Unavailable?**
Declarant testifies but invokes a privilege	Yes. A witness who validly asserts the Fifth Amendment is unavailable (*People v. Williams* (2008) 43 Cal.4th 584, 618), as is one who asserts the marital privilege (*People v. Lucas* (2014) 60 Cal.4th 153, 248).
Declarant was deported	Yes. Where the state did not know of the deportation, the witness was unavailable. (*People v. Herrera* (2010) 49 Cal.4th 613.)
Declarant absconded	It depends. An in-custody witness allowed to abscond was available. (*Motes v. United States* (1900) 178 U.S. 458.) A witness released on her own recognizance and who promised to return was unavailable. (*People v. Bunyard* (2009) 45 Cal.4th 836.)
Declarant testifies but claims memory loss	It depends. Genuine memory loss may make a witness unavailable due to illness or infirmity (*People v. Alcala* (1992) 4 Cal.4th 742, 785), but a witness who testifies and is cross-examined is not unavailable for confrontation purposes, even if they cannot remember. (*U.S. v. Owens* (1988) 484 U.S. 554, 559–560; § 10.)
Declarant testifies but refuses to answer questions about the prior testimonial statements	It depends. If the questions were so extensive as to create an "illusion" of testimony, the witness may become an unavailable declarant. (*Murillo*, 231 Cal.App.4th at pp. 449-456 [comparing case to insufficient confrontation in *Douglas v. Alabama* (1965) 380 U.S. 415, 420].)
Efforts to obtain declarant's availability were belated or perfunctory	It depends on whether the prosecution went to "reasonable" lengths in making the declarant available. (*Ohio v. Roberts* (1980) 448 U.S. 56, 74; e.g., *People v. Cromer* (2001) 24 Cal.4th 889.)

The prosecution bears the burden of proving unavailability. The adequacy of its efforts to locate a declarant (especially one who testified at preliminary hearing) is one of the most frequently recurring confrontation clause issues. As with other mixed questions affecting a defendant's constitutional rights, appellate courts will "independently review a trial court's determination that the prosecution's failed efforts to locate an absent witness are sufficient to justify an exception to the defendant's constitutionally guaranteed right of confrontation at trial." (*People v. Cromer* (2001) 24 Cal.4th 889, 901.)

The "lengths to which the prosecution must go" in locating a witness is a question of reasonableness. (*Ohio v. Roberts* (1980) 448 U.S. 56, 74; see *People v. Cogswell* (2010) 48 Cal.4th 467, 478 [prosecution need not take "drastic" measures in every case].) Generally, this requires "persevering application, untiring efforts in good earnest, [and] efforts of a substantial character." (*People v. Wilson* (2005) 36 Cal.4th 309, 341; accord *People v. Pitts* (1990) 223 Cal.App.3d 1547, 1556 ["[W]hile there is no mechanical check list to be followed, reasonable diligence clearly requires looking where it is likely the witness will be found."].) In practice, relevant considerations include "the timeliness of the search, the importance of the proffered testimony, and whether leads of the witness's possible location were competently explored." (*Ibid*.)

> **Consider the record of diligence**. This is a fact -specific inquiry. Consider when the search began, what databases and contacts were exhausted, and whether a previously cooperative witness drifted away.

Timeliness itself "depends in part on the importance of the witness's testimony. If a witness is critical, the search must be started sooner and pursued with more energy than if the witness is less significant." (*People v. Ayala* (2024) 101 Cal.App.5th 62, 69.)

Additionally, if the prosecution previously had a reason to doubt the declarant would appear, belated efforts to secure their presence can fall short. For example, in *People v. Cromer* (2001) 24 Cal.4th 889, 904, the prosecution lost contact with the declarant shortly after the preliminary hearing and

later learned of her disappearance. Upon discovering "promising information" about her whereabouts, including her mother's home address, prosecution investigators waited two days to pursue the lead. (*Ibid.*) Even then, they visited the home only once and never attempted to speak with the declarant's mother. (*Ibid.*)

Compare *Cromer* with *People v. Friend* (2009) 47 Cal.4th 1, 68, where the prosecution had no reason to believe the declarant, who was homeless, would disappear. The Court rejected the argument that the declarant's transient lifestyle made him inherently at risk of becoming unavailable, because there was evidence that he "stayed within the general vicinity of Oakland" and maintained contact with his father and the prosecution investigators. (*Id.* at pp. 68-69.)

The prosecution's efforts should be commensurate with its knowledge of the declarant. If the declarant is known to use any aliases, the prosecution's search should not be limited to the person's government name. (See *People v. Pitts* (1990) 223 Cal.App.3d 1547, 1557.) Likewise, if the declarant is frequently involved in the criminal legal system, a search of court indices and jail rosters should be inclusive of neighboring counties. (*Id.* at pp. 1556-1557.) Any active criminal or probation matters should be investigated as potential leads. (*Ibid.*)

Prior opportunity and motive for cross-examination

Counsel must have been able to cross-examine on the same material with a similar motive. (*Mancusi v. Stubbs* (1972) 408 U.S. 204, 213-216; *People v. Hull* (2019) 31 Cal.App.5th 1003, 1030; cf. *People v. Valencia* (2008) 43 Cal.4th 268, 291-295.) Cross-examination by different counsel, in a different prosecution, is insufficient. (*Kirby v. United States* (1899) 174 U.S. 47, 55-56.)

However, the "motives need not be identical, only 'similar.'" (*People v. Samayoa* (1997) 15 Cal.4th 795, 850; e.g., *People v. Alcala* (1992) 4 Cal.4th 742, 784 [motives were sufficiently similar even though events after the first proceeding may have altered counsel's tactics].) Generally, "when a defendant has had an opportunity to cross-examine a witness at the time of his or her

prior testimony, that testimony is deemed sufficiently reliable to satisfy the confrontation requirement, regardless whether subsequent circumstances bring into question the accuracy or the completeness of the earlier testimony." (*People v. Wilson* (2005) 36 Cal.4th 309, 343, quoting *Samayoa* at pp. 851-852 [internal citations omitted]; see *California v. Green* (1970) 399 U.S. 149.)

For example, preliminary hearing testimony may be admissible at trial even in the event of later-discovered impeachment on which the defense did not cross-examine the witness. (*People v. Hull* (2019) 31 Cal.App.5th 1003, 1031; *People v. Jurado* (2006) 38 Cal.4th 72.) "In other words, the interest and motive for cross-examination does not necessarily change just because the defense develops information after the preliminary hearing about which it did not have the opportunity to cross-examine the witness." (*People v. Hull* (2019) 31 Cal.App.5th 1003, 1029.)

However, if the newly discovered material casts doubt on the veracity of the entire prior testimony (such as a recantation), there may be a confrontation clause violation. (Cf. *People v. Harris* (2005) 37 Cal.4th 310, 333 [motives for cross-examination at preliminary hearing and at trial were to challenge the declarant's credibility].)

C. Dying declarations

Dying declarations, as defined by the statutory hearsay exception, are statements "made by a dying person respecting the cause and circumstances of his death ... upon his personal knowledge and under a sense of immediately impending death." (§ 1242.) The exception derives from the common law. (*People v. Monterroso* (2004) 34 Cal.4th 743, 764, quoting *King v. Reason* (1722) 16 How. St. Tr. 1, 24-25.)

Thus, the California Supreme Court has held that under *Crawford*'s common law interpretation of the right of confrontation, "it follows that the common law pedigree of the exception for dying declarations poses no conflict with the Sixth Amendment." (*Monterroso* at pp. 764-765.) *Crawford* itself did not address dying declarations, deeming them *sui generis*. (*Crawford*, *supra*, 541 U.S. at p. 56, fn. 6; see *Bryant*, 562 U.S. at pp. 395-396 (dis. opn. of Ginsburg,

J.).) In California, both testimonial and nontestimonial dying declarations "pass[] constitutional muster." (*Monterroso* at p. 764; see also *People v. Johnson* (2015) 61 Cal.4th 734, 761; *People v. D'Arcy* (2010) 48 Cal.4th 257, 292.)

> **Consider the scope of the common law exception**. Insofar as *Crawford* brought confrontation jurisprudence into conformance with the common law, the dying declaration exception should be no broader than "at the time of the founding." (*Crawford*, *supra*, 541 U.S. at p. 54.) The common law admitted a dying declaration only on the same terms as live testimony, which required personal knowledge, as does Evidence Code section 1242. (See *Shepard v. United States* (1933) 290 U.S. 96, 101-102.) Some scholars argue the same should apply to the constitutional exception. (See Moran, *"Yes, You're About to Meet Your Maker, but Did You Really See That Guy?": The Common Law and the* Crawford *Dying Declaration Exception* (2024) 57 U.Mich. J.L. Reform 839, 840-843.) The common law exception was also limited to statements of actually-deceased declarants (although Evidence Code section 1242 is not). In a non-homicide case where the declarant's personal knowledge is thin, consider whether the statement should fall outside the common law exception, even if it passes hearsay muster.

PART THREE

Experts and forensic evidence

An expert who relays case-specific hearsay as the basis for an opinion is relaying it for its truth. *People v. Sanchez* (2016) 63 Cal.4th 665 and *Smith v. Arizona* (2024) 602 U.S. 779 established that point. Together they ended the "not for its truth" rationale that had shielded gang and forensic testimony from confrontation challenges.

But for-truth is only the first step. *Sanchez* also restated the purpose prong. Testimonial statements are made primarily to memorialize facts about past criminal activity. Nontestimonial statements address an ongoing emergency or some other purpose unrelated to preserving facts for trial. (*People v. Sanchez* (2016) 63 Cal.4th 665, 689.) California courts have continued to apply the formality prong after *Smith*, so a forensic claim needs to address both formality and purpose.

7. *Sanchez*: hearsay relayed in expert testimony

This section focuses on confrontation. For a fuller treatment of *Sanchez* and expert testimony, including sufficiency and forfeiture, see Megan Hailey-Dunsheath & Maria Leftwich, *Appellate Claims Related to Expert Testimony* (FDAP Oct. 2025) pp. 11–13, 20–23.

People v. Sanchez (2016) 63 Cal.4th 665 held that **when an expert relates case-specific out-of-court statements to explain the basis for an opinion, those statements are necessarily considered for their truth and are hearsay.** (*Id.* at p. 684.) The court disapproved the old procedure under which the expert recited the hearsay, the jury was told not to consider it for its truth, and section 352 did the rest. (*Id.* at pp. 679, 686, fn. 13; see *People v. Perez* (2020) 9 Cal.5th 1, 8–9.)

The line. An expert may testify to general background knowledge in the field. An expert may not supply "*case-specific* facts," meaning facts relating to the particular events and participants in the case, without personal knowledge of them. The opinion's examples mark the boundary: (1) an

accident reconstructionist may explain how skid marks are made and how an equation can estimate the car was traveling at 80 miles per hour, but not that there were skid marks at the scene unless someone with personal knowledge proves it; (2) a pathologist who did not perform the autopsy may explain what hemorrhaging in the eyes indicates but may not testify that this body showed it, a fact that must come from someone who saw it or from authenticated photographs; (3) a gang expert may explain that a gang adopted a diamond-shaped tattoo, but not that a particular person has it. (63 Cal.4th at pp. 676–677.) Evidence Code section 802 lets an expert describe generally the kind and source of the matter relied on, but not relate case-specific hearsay as true. (*Id.* at pp. 685–686.)

***Sanchez*'s distinct hearsay and confrontation holdings.** (63 Cal.4th at p. 686.)

1. **State hearsay law.** "What an expert *cannot* do is relate as true case-specific facts asserted in hearsay statements, unless they are independently proven by competent evidence or are covered by a hearsay exception."
2. **Federal confrontation law.** If a "prosecution expert seeks to relate *testimonial* hearsay there is a confrontation clause violation unless (1) there is a showing of unavailability and (2) the defendant had a prior opportunity for cross-examination, or forfeited that right by wrongdoing."

The two holdings are separate steps. A statement can satisfy the first (it fits a hearsay exception) and still fail the second. If it is testimonial, a hearsay exception does not satisfy the confrontation clause. (*Id*. at p. 680.)

What experts may still do. An expert may:

- Rely on background information and personal knowledge;
- Answer hypotheticals rooted in facts the prosecution proves separately (*People v. Vang* (2011) 52 Cal.4th 1038);
- Rely on nontestimonial hearsay admitted under an exception;

- Describe in general terms the kind of material relied on; and
- Use non-case-specific sources, such as a pharmaceutical database (*People v. Veamatahau* (2020) 9 Cal.5th 16, 22).

Hearsay offered for a non-hearsay purpose does not implicate *Sanchez*. (*People v. Wilson* (2021) 11 Cal.5th 259, 319, fn. 16.) And even before *Sanchez*, an expert could not simply relay another expert's conclusions. (*People v. Campos* (1995) 32 Cal.App.4th 304, 308; *People v. Azcona* (2020) 58 Cal.App.5th 504, 514.)

Gang cases. *Sanchez* reversed the gang enhancement findings because the expert relayed police reports and a Street Terrorism Enforcement and Prevention Act (STEP) notice, both testimonial. (63 Cal.4th at pp. 694–699.) *People v. Cardenas* (2025) 18 Cal.5th 797 (capital case) applied the same rule to proof of a predicate offense. The expert related a detective's statements and police reports, which were testimonial because they were compiled to investigate that offense. And because Assembly Bill 333 bars using the charged offense as a predicate, the remaining evidence did not show the required pattern of gang activity. (*Id.* at pp. 817–819; see also *People v. Iraheta* (2017) 14 Cal.App.5th 1228, 1248–1250 [field interview cards].)

Other applications. For more examples, see Megan Hailey-Dunsheath & Maria Leftwich, *supra*, pp. 12–13.

Case	**Holding**
People v. Presley (2021) 65 Cal.App.5th 1131	SVP commitment tried to the court: the judge is presumed to have disregarded inadmissible *Sanchez* material, and only proof that it "actually figured in the court's decision" overcomes the presumption (pp. 1142–1143). *Presley* is a state law *Sanchez* case; no Sixth Amendment confrontation right applies in SVP proceedings (§ 17).
People v. Camacho (2022) 14 Cal.5th 77	Drug-sale opinion based on another officer's report of a scale; inadmissible.

Case	Holding
People v. G.A. (2023) 93 Cal.App.5th 1126; *People v. Barnes* (2024) 107 Cal.App.5th 560	An opinion resting on unspecified or excluded documents is not substantial evidence.
People v. Barrett (2025) 17 Cal.5th 897 (capital case)	On the prosecutor's cross-examination, a defense witness (the defendant's former juvenile probation officer) related details of a juvenile assault from records: the court assumed the relayed material was testimonial hearsay without deciding the point (pp. 1020–1023).

Forfeiture. Failure to object at a trial held before *Sanchez* does not forfeit the claim. (*Perez*, *supra*, 9 Cal.5th at p. 9.) For later trials, an unraised objection is generally forfeited, and the fallback is ineffective assistance. (See *People v. Julian* (2019) 34 Cal.App.5th 878, 888; § 14.) *Sanchez* does not apply retroactively on state habeas. (*In re Ruedas* (2018) 23 Cal.App.5th 777; see § 18.)

8. Forensic reports and "surrogate" witnesses

A "surrogate" witness is *Bullcoming*'s term for an analyst who did not perform or observe the test but testifies about it in the original analyst's place. (*Bullcoming v. New Mexico* (2011) 564 U.S. 647, 652.)

The federal trilogy

Case	Holding
Melendez-Diaz v. Massachusetts (2009) 557 U.S. 305	Sworn certificates identifying a seized substance as cocaine are testimonial. There is no exception for neutral scientific testing. The prosecution must call its witnesses; the defense's power to subpoena is no substitute.

Case	Holding
Bullcoming v. New Mexico (2011) 564 U.S. 647	A blood-alcohol report with a testimonial certification cannot come in through an analyst who did not sign, perform, or observe the test. Surrogate testimony does not satisfy the clause. (Justice Sotomayor's concurrence identified open questions: an alternative purpose such as treatment; a witness with a personal connection to the test; an "independent" expert opinion; machine data explained by an expert.)
Williams v. Illinois (2012) 567 U.S. 50	No violation, 4-1-4, where an expert at a bench trial relied on an outside lab's DNA profile that was not admitted. The plurality reasoned the profile was not offered for its truth and was created before any suspect was identified; Justice Thomas concurred only because the report lacked solemnity and rejected the plurality's reasoning. There is no majority rationale. *Smith v. Arizona* (2024) 602 U.S. 779 later rejected the *Williams* plurality not-for-truth rationale.

California's 2012 answer: *Lopez*, *Dungo*, *Rutterschmidt*

The California Supreme Court addressed these questions in three opinions decided the same day in 2012. *Lopez* and *Dungo* decided the merits. *People v. Rutterschmidt* (2012) 55 Cal.4th 650 found any error harmless without reaching them.

***People v. Lopez* (2012) 55 Cal.4th 569.** Machine-generated gas-chromatograph data is not a statement. A lab assistant's notation linking the defendant's name to a sample number, though admitted for its truth, lacked the formality the high court requires: it was initialed, not sworn, certified or signed. (Justice Liu dissented. He argued that the majority looked only at the notation's form, not the process that produced it.)

***People v. Dungo* (2012) 55 Cal.4th 608.** A substitute pathologist reviewed the nontestifying pathologist's autopsy report and photographs, described the condition of the body to the jury, and gave his own opinion that the strangulation lasted more than two minutes. Neither the report nor the photographs came into evidence. The majority held that the objective anatomical observations were not testimonial. They were less formal than the pathologist's conclusions and comparable to a treating physician's notes. And an autopsy serves several purposes, including wrongful death claims, insurance, the public's interest in the cause of death, and answers for the family, so criminal investigation was not its primary purpose.

The holding is narrow. Because the substitute pathologist did not relay the original pathologist's conclusions and the report was not admitted, the court did not decide whether either would violate the clause. Justice Corrigan, joined by Justice Liu, dissented and would have found the observations testimonial.

After *Dungo*

California Supreme Court. A pathologist may rely on a colleague's autopsy report to form an independent opinion, but reciting the report's observations and conclusions raises confrontation concerns. (*People v. Leon* (2015) 61 Cal.4th 569, 603 [capital case].) In *People v. Turner* (2020) 10 Cal.5th 786 (capital case), a deputy medical examiner who did not perform the fetal autopsy related the report's findings on weight and gestational age as true. She then used those findings to support her opinion that the fetus was viable. (*Id.* at pp. 821–825.) The court found *Sanchez* error under state hearsay law and reversed the fetal murder conviction under *Watson*. It did not reach the confrontation claim. (*Id.* at p. 820, fn. 19.)

DNA testimony raises the same question. In *People v. Gonzalez* (2021) 12 Cal.5th 367 (capital case), a criminalist compared a reference profile to a DNA profile generated by a non-testifying colleague, and a report containing the colleague's analysis came into evidence. (*Id.* at pp. 396–400.) The court left the confrontation question open and found any error harmless beyond a

reasonable doubt. It has since described *Gonzalez* as assuming a violation. (*People v. Bertsch & Hronis* (2026) 19 Cal.5th 183, 273.)

Appellate opinions on forensic reports and similar documents. Unsworn, uncertified DNA reports were not testimonial because they lacked formality. (*People v. Holmes* (2012) 212 Cal.App.4th 431.) A technical reviewer who examined the raw data and reached the same conclusion as the absent analyst could testify. (*People v. Steppe* (2013) 213 Cal.App.4th 1116, 1119.) So could a lab director who testified about a departed analyst's DNA work under an independent-opinion theory. (*People v. Barba* (2013) 215 Cal.App.4th 712, 717.) But a coroner's investigator's statements, relayed by the medical examiner, failed both prongs and were testimonial. (*People v. Mercado* (2013) 216 Cal.App.4th 67, 84.) *People v. Ford* (2015) 235 Cal.App.4th 987 upheld admission of a redacted autopsy report, but noted that *Dungo*'s line between observations and conclusions may be hard to hold over time.

In *People v. Ogaz* (2020) 53 Cal.App.5th 280, 293, a forensic scientist's supervisor reviewed her drug analysis report and testified to its contents without independently corroborating the findings. The court distinguished *Lopez* and held that admitting the report without producing the scientist violated the Sixth Amendment.

9. *Smith v. Arizona* and questions it leaves open

The holding. Arizona's drug analyst left the lab before trial. A substitute analyst reviewed the original analyst's report and notes, described her observations and findings to the jury, and then gave his own "independent opinion" identifying the substances. The Supreme Court held that "[w]hen an expert conveys an absent analyst's statements in support of his opinion, and the statements provide that support only if true, then the statements come into evidence for their truth." (*Smith v. Arizona* (2024) 602 U.S. 779, 783.) State evidence rules do not define the clause's scope. (*Id.* at p. 794.) The U.S. Supreme Court cited the California Supreme Court's opinion in *Sanchez*

among the state decisions that had already rejected the not-for-truth rationale. (*Id.* at p. 789, fn. 2.)

What remains permissible. An expert from the same lab may testify from personal knowledge about its general practices. Any expert may describe forensic methods in general terms. Any expert may answer a hypothetical if the prosecution separately proves the assumed facts. Those are the same permissible uses *Sanchez* recognized. (*Id.* at p. 800.)

What was remanded. Whether the absent analyst's records were testimonial. Offering guidance for the remand, the Court said a record's primary purpose must have "a focus on court" to be testimonial, and noted that records kept for accreditation and quality control, or as reminders to self, may not qualify. (*Id.* at pp. 802–803.)

What *Smith* means for California cases. *Smith* resolved the for-truth question but not which records are testimonial. The California Supreme Court has cited *Smith* only on the for-truth point. (*Bankston*, *supra*, 19 Cal.5th at p. 835; *Barrera*, *supra*, 19 Cal.5th at p. 956.) So far, California courts have not yet addressed how *Smith* affects *Lopez* or *Dungo*. For now, both remain binding on the Court of Appeal, so it may help to address both prongs. But not all of it holds up equally well:

- *Barba*'s "independent opinion" rationale and Justice Chin's *Dungo* concurrence rested on the *Williams* plurality, which *Smith* (for truth) and *Sanchez* ("targeted individual") both rejected.
- *Dungo* is narrow: objective observations only, with the report not admitted and the conclusions not relayed. *Smith*'s focus on the "principal reason" each record was made leaves room to argue that a homicide autopsy is testimonial. The court has not extended *Dungo* since; it has assumed error instead (*Nadey*, *Barrera*, *Hazlett*).
- *Lopez*'s machine-data holding is untouched. Its formality holding may be vulnerable: *Smith* framed the test as primary purpose with no separate formality element, and *Ohio v. Clark* (2015) 576 U.S. 237, 245, treats formality as a factor.

The California Supreme Court's harmless-error forensic surrogate cases since *Gonzalez*.

Since 2024 the California Supreme Court has repeatedly assumed that a surrogate forensic expert relayed testimonial hearsay and affirmed on harmless-error grounds without deciding whether the records were testimonial. (*People v. Bertsch & Hronis* (2026) 19 Cal.5th 183, 273, traces that approach to *Gonzalez*.) The decisions in the below table are capital appeals where the court passingly considered the issue without expressly deciding whether the issues were testimonial.

Case	Result
People v. Nadey (2024) 16 Cal.5th 102 (capital)	Substitute pathologist testified from autopsy photographs and gave his own opinions (proper); assumed he also relayed testimonial hearsay from the report; harmless. (pp. 162–164).
People v. Lamb (2024) 16 Cal.5th 400 (capital)	Firearms examiner who reexamined the evidence also related the earlier, nontestifying examiner's conclusions; the court doubted *Sanchez* applied, assumed *Sanchez* or *Crawford* error; harmless (pp. 432–435).
People v. Bertsch & Hronis (2026) 19 Cal.5th 183 (capital)	DNA experts relayed technicians' work. The clause does not apply at *Kelly* hearings (pp. 267–269). At trial, violation assumed (the AG conceded error as to one expert); harmless (pp. 273–277). The court called the testimonial status of technical reports "an evolving area of the law" (p. 273).
People v. Barrera (2026) 19 Cal.5th 919 (capital)	Medical examiner relayed a nontestifying radiologist's findings, and the autopsy report reprinting them was admitted; violation assumed; harmless (pp. 952–960). The only one of these decisions to cite *Smith*, as accord to *Sanchez*.

Case	Result
People v. Hazlett (2026) 20 Cal.5th 904	Substitute pathologist related the deceased pathologist's time-of-death conclusion, and a death certificate by a nontestifying physician was admitted; admissibility not decided; harmless under both *Watson* and *Chapman*.

> **Consider whether the prejudice argument deserves the same care as the error argument.** The Supreme Court has often skipped the testimonial question and proceeded to resolve (and reject) the confrontation argument on harmless error grounds. *Cardenas* was reversed because the hearsay was the only proof of one of two predicates. *Dungo*'s dissent would have reversed because the opinion built on the hearsay was the only answer to heat of passion. A comprehensive prejudice analysis is beyond the scope of this article, and is addressed in other FDAP materials. We will add only these observations: it may help to show that the relayed material supplied an element, answered the defense theory, or was the only evidence on a contested point, and that the prosecutor used it in argument.

Open questions after *Smith*

These questions are drawn largely from Rothstein & Coleman, *Confrontation, the Legacy of* Crawford*, and Important Unanswered Questions* (2024) 57 U.Mich. J.L. Reform 731, 742–750. The article predates *Smith*, but most of its questions concern whether records are testimonial, which *Smith* largely left open. These are potential lines of argument, not holdings.

- **Which analyst must testify.** In multi-step forensic work, the initial analyst who handled the samples and the analyst who declared the match are the natural witnesses; interim handoffs may be less likely to be testimonial. Compare *Steppe*, *Barba* and *Ogaz*. (See Rothstein & Coleman, *supra*, p. 745 & fn. 56.)
- **The "surrogate-plus" witness.** Whether a supervisor or reviewer with substantial involvement in the specific test affords an adequate opportunity for cross-examination. *Smith* allows a same-lab expert to

describe general practices from personal knowledge; it did not necessarily decide whether a reviewer can vouch for the specific analysis. The record of what the witness actually did may decide the claim. (See Rothstein & Coleman, *supra*, at pp. 745–746 & fn. 60.)

- **How the report reached the jury.** Admitted as an exhibit, recited by the expert, or relied on silently. *Smith* treats the second as equivalent to the first. The third is hypothetical and it works only if the prosecution proved the underlying facts. (See Rothstein & Coleman, *supra*, at pp. 746–747.)
- **Bench trials.** The *Williams* plurality reasoned that a judge, unlike a jury, could be trusted to consider the outside lab's report only to evaluate the expert's opinion and not for its truth. (567 U.S. at p. 73 (plur. opn. of Alito, J.).) *Smith* takes that premise away. If the basic facts help the opinion only if they are true, there is no "limited purpose" left for the judge to confine them to. *People v. Presley* (2021) 65 Cal.App.5th 1131, an SVP case raising no confrontation issue, presumes the judge disregarded inadmissible *Sanchez* material at a court trial. Whether that presumption holds for testimonial material after *Smith* is untested, and it is weakest where the court's findings track the hearsay; in *Presley*, the court's explanation did not mention the challenged facts (*id.* at p. 1143). (Rothstein & Coleman, *supra*, at pp. 747–748.)
- **Records made before a suspect was identified.** The *Williams* plurality's "targeted individual" theory never commanded a majority, and *Sanchez* expressly rejected it (63 Cal.4th at pp. 691–694). The *Dungo* majority did not adopt it. An answer to the argument that DNA profiles developed before an arrest are not testimonial is that the record's purpose, not whether a suspect had been named, controls. (Rothstein & Coleman, *supra*, at pp. 742–745.)
- **Machine and software output.** *Lopez*, *supra*, 55 Cal.4th at p. 583, holds that machine data is not a statement. The line is human interpretation: an analyst's call, annotation or threshold choice is a

statement even if the instrument's output is not. (See Rothstein & Coleman, *supra*, at pp. 748-750.)

Checklist for identifying confrontation issues posed by expert testimony

- Which case-specific facts did the expert state, and where in the record was each independently proved? A fact not independently proved may be *Sanchez* hearsay.
- What was the underlying source? Police report, FI card, STEP notice, lab report, bench notes, autopsy report, medical record, another expert's conclusion. Was there any competent testimony on those underlying facts, beyond the testifying expert's hearsay?
- How formal was the source (signed, certified, sworn, on letterhead, prepared under a protocol that contemplates court use), and what was its purpose (accreditation, treatment, public record, or a focus on court)? Both prongs of *Lopez* turn on the answers.
- What was the objection? Hearsay only, or confrontation too? Did it reach the expert's own report if one was admitted? If the report came in without objection, an opposing argument may be that it was independently proved, defeating the state law claim. (See *People v. Barrera* (2026) 19 Cal.5th 919, 956–957 [raising the point without deciding it; the *Crawford* claim was not forfeited].)
- How was the material used? Did the prosecutor argue the relayed facts? Did the expert's opinion answer the defense theory? Was it the only evidence of an element?
- Was it a bench trial? Under *Presley*, the judge is presumed to have disregarded inadmissible material. Check whether the court's stated findings rely on it anyway.

PART FOUR

The witness who testifies

10. When does cross-examination satisfy the clause?

The clause guarantees "an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." (*U.S. v. Owens* (1988) 484 U.S. 554, 559, italics and internal citations omitted; see *People v. Carter* (2005) 36 Cal.4th 1114, 1172.) It does not protect a defendant against "testimony that is marred by forgetfulness, confusion, or evasion." (*People v. Blacksher* (2011) 52 Cal.4th 769, 803, citing *People v. Mayfield* (1997) 14 Cal.4th 668, 742.)

Situation	**How courts have ruled**
Declarant testified and denied making the prior statement	No violation found where the declarant is subject to full and effective cross-examination at trial. (See *Nelson v. O'Neil* (1971) 402 U.S. 622, 629–630 [codefendant denied the statement and testified favorably to the defendant on the underlying facts].)
Witness cannot remember the underlying events or the basis for a prior statement	No violation found: the memory loss itself can be explored on cross-examination. (*U.S. v. Owens* (1988) 484 U.S. 554, 559–560; *People v. Cowan* (2010) 50 Cal.4th 401, 468 ["Nothing in *Crawford* casts doubt on the continuing vitality of *Owens*"]; *People v. Rodriguez* (2014) 58 Cal.4th 587, 632.)

Witness refuses to answer (including by invoking a privilege) while the prosecutor reads or conveys the witness's prior statement to police	Branch A (testimonial hearsay) violation. The witness "could not be cross-examined on a statement imputed to but not admitted by him." (*Douglas v. Alabama* (1965) 380 U.S. 415, 419–420; *People v. Murillo* (2014) 231 Cal.App.4th 448, 456; compare *People v. Jasso* (2025) 17 Cal.5th 646, 681–683 (capital case) [distinguishing questions that did not purport to convey statements to police].) The same violation can occur when the prosecutor, cross-examining the defendant, quotes a nontestifying codefendant's statement. (*People v. Blackington* (1985) 167 Cal.App.3d 1216, 1222–1224; *Hardnett v. Marshall* (9th Cir. 1994) 25 F.3d 875, 878–879.)
Witness excused subject to recall before the prior statement is offered	No violation found. The ability to recall the witness satisfied the clause. (*Cowan*, *supra,* 50 Cal.4th at p. 463.)
Witness testifies but refuses to answer many substantive cross-examination questions	Branch B (testifying witness) violation where the refusals deny a full and fair opportunity to test the testimony; the testimony should be stricken. (*People v. Giron-Chamul* (2016) 245 Cal.App.4th 932, 965–969 [five-year-old refused about 150 substantive questions]; compare *People v. Homick* (2012) 55 Cal.4th 816, 861 (capital case) [no violation where adult witness's defiance let the jury assess his credibility].)

11. Limits on cross-examination

A trial court may limit cross-examination, but it may not prevent the defense from exposing a witness's bias or motive.

The federal framework

Cross-examination is "the principal means by which the believability of a witness and the truth of his testimony are tested." (*Davis v. Alaska* (1974) 415 U.S. 308, 316.) Cross-examination is exploratory; counsel need not state in advance what it will produce. (*Alford v. U.S.* (1931) 282 U.S. 687, 692.)

The *Van Arsdall* test. Trial courts keep "wide latitude" to impose reasonable limits on cross-examination based on harassment, prejudice, confusion, witness safety or questioning that is repetitive or only marginally relevant. But a defendant establishes a violation by showing he was barred from "otherwise appropriate cross-examination designed to show a prototypical form of bias." The test is whether "[a] reasonable jury might have received a significantly different impression of [the witness's] credibility had [defense] counsel been permitted to pursue his proposed line of cross-examination." (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 679–680.)

As with other constitutional errors, violation and prejudice are separate questions. Whether the clause was violated depends on the witness, not the verdict: "the focus of the prejudice inquiry in determining whether the confrontation right has been violated must be on the particular witness, not on the outcome of the entire trial." (*Id.* at p. 680.) Whether the error affected the verdict is decided separately, under *Chapman*. (*Id.* at p. 684.)

The defense may show why the witness is biased. The defense must be allowed to make a record from which to argue bias. (*Davis v. Alaska*, *supra*, 415 U.S. at p. 318.) Common sources of bias include:

- Probation or parole status (*Davis*).
- Pending charges (*People v. Coyer* (1983) 142 Cal.App.3d 839, 842).
- An expectation of leniency, even without a promise (*People v. Allen* (1978) 77 Cal.App.3d 924, 932).
- Fear of prosecution for departing from a prior statement (*Ortiz v. Yates* (9th Cir. 2012) 704 F.3d 1026, 1034 [federal habeas]).
- Immigration benefits (*Castaneda-Prado*; *Villa*, below).

- A relationship the witness wants to protect (*Olden*, below).

In *Olden v. Kentucky* (1988) 488 U.S. 227, 230–233 (per curiam), the defense was consent. The complaining witness's motive to lie was to protect her relationship with the man she first told about the rape, who had seen her get out of the defendant's car. The trial court barred evidence that the two lived together, reasoning that she was white and he was Black and the jury might hold it against her. The Court summarily reversed: "[s]peculation as to the effect of jurors' racial biases cannot justify exclusion of cross-examination with such strong potential to demonstrate the falsity of [the witness's] testimony." The error was not harmless (§ 16). California decisions have distinguished *Olden* where some inquiry into the motive was allowed. (*People v. Von Villas* (1992) 11 Cal.App.4th 175.)

No pretrial discovery right. The clause gives a right at trial to cross-examine a crucial witness for bias even on matters confidential under state law, but it does not require pretrial in camera review of a victim's privileged records. (*People v. Hammon* (1997) 15 Cal.4th 1117, 1124–1128; *Pennsylvania v. Ritchie* (1987) 480 U.S. 39, 52 (plur. opn.).) The pretrial route is due process under *Ritchie*.

California's two-step

People v. Castaneda-Prado (2023) 94 Cal.App.5th 1260 is the leading recent case. The trial court granted a motion in limine barring all cross-examination of the complaining witness about whether she believed accusing the defendant would help her mother obtain a U visa. The Court of Appeal reversed. It analyzed the ruling in two steps. (*Id.* at pp. 1282–1284.)

1. **The section 352 step.** Reviewed for abuse of discretion. Section 352 operates on a sliding scale: the more probative the evidence, the greater the prejudice needed to exclude it. Because bias evidence is unusually probative, the balance begins with "a sharp tilt on the sliding scale in favor of admissibility." (*Id.* at p. 1285.)
2. **The constitutional question.** If the ruling effectively made cross-examination futile, the court asks the *Van Arsdall* question. This is

> "akin to a mini-prejudice inquiry focused on the witness's cross-examination rather than the outcome of the trial as a whole," including "whether the defense had other means of impeachment." (*Id.* at pp. 1282–1283.) A limit is unlikely to violate the clause if other questions brought out the same bias. (*People v. Gonzalez* (2021) 12 Cal.5th 367, 406–407; *People v. Mendez* (2019) 7 Cal.5th 680, 707.) *Castaneda-Prado* reviewed this step de novo, though the Supreme Court generally speaks of abuse of discretion (§ 15). The impeachment the defense was allowed counts at both stages: for error, the focus is the witness; for prejudice, the verdict (§ 16).

The blanket exclusion was constitutional error and not harmless under *Chapman*, in part because the prosecutor argued in closing that there was no evidence the witness had any reason to lie.

***Villa*: exclusion upheld under section 352.** *People v. Villa* (2020) 55 Cal.App.5th 1042 agreed that a complaining witness's U-visa application is relevant impeachment but found no abuse of discretion in excluding it. The witness had given a police statement and sworn preliminary hearing testimony before she learned the program existed. Her trial testimony matched those accounts, physical evidence corroborated the abuse, and exploring the application would have required more witnesses. The court also found any error harmless given the physical evidence. (*Id.* at p. 1054.) *Villa* treated the constitutional right as bounded by section 352 and did not ask the *Van Arsdall* question separately. (See *Castaneda-Prado*, *supra*, 94 Cal.App.5th at p. 1291, fn. 16.)

> **Consider the prosecutor's closing.** When the defense was barred from a line of impeachment, the closing argument is worth reading closely for any suggestion that the witness had no reason to lie or that the defense offered no reason to doubt her. That argument exploits the ruling and can support prejudice under *Chapman*. (*Castaneda-Prado*, *supra*, 94 Cal.App.5th at pp. 1293–1294 ["Prosecutors should never assert or imply that there is no evidence on a certain point when they know such evidence exists but was excluded by the court"].)

Related doctrines

Prior false complaints. *People v. Tidwell* (2008) 163 Cal.App.4th 1447, 1454–1456, held that the Evidence Code section 782 procedure does not govern evidence of a complaining witness's prior false sexual assault complaints, which is credibility evidence. But a prior complaint bears on credibility only if it is shown to be false, and the court upheld exclusion under section 352 where falsity was not established and litigating it would have consumed undue time. (*Id*. at pp. 1456–1458.) *Tidwell* relied on *People v. Bittaker* (1989) 48 Cal.3d 1046, which upheld a similar exclusion because "[t]he value of the evidence as impeachment depends upon proof that the prior charges were false." (*Id.* at p. 1097.)

People v. Miranda (2011) 199 Cal.App.4th 1403 applied both cases to uphold exclusion where it was unclear whether the child made statements in a prior complaint, its falsity rested on a social worker's "unfounded" conclusion, and proving it would have meant litigating a custody dispute. Because the section 352 ruling was within the court's discretion, the confrontation claim failed too. (*Id*. at p. 1426.)

Right to present a defense. Erroneous exclusion of defense evidence is usually a state law question reviewed under *Watson*. (*People v. Linton* (2013) 56 Cal.4th 1146, 1183.) It becomes constitutional error where the excluded evidence was so vital that due process required its admission or the ruling amounted to a complete preclusion of a defense. (See *People v. Garcia* (2018) 28 Cal.App.5th 961, 971.) The federal source of the right, whether due process or the Sixth Amendment's compulsory process or confrontation clauses, is the guarantee of "'a meaningful opportunity to present a complete defense.'" (*Crane v. Kentucky* (1986) 476 U.S. 683, 690 [blanket exclusion of evidence about the circumstances of the defendant's confession], quoting *California v. Trombetta* (1984) 467 U.S. 479, 485.) This may pair with a confrontation claim when the excluded cross-examination went to the heart of the defense.

Reading the record on a bias claim

- **The witness's belief.** A defendant may show a motive to fabricate "even though there may be no reasonable basis for the existence of such a motive." (*People v. Allen* (1978) 77 Cal.App.3d 924, 931.) The defendant may also ask whether the witness expects a benefit, even if none was promised. (*Id*. at p. 932 [accomplice's expectation of leniency on other pending charges]; *Castaneda-Prado*, *supra*, 94 Cal.App.5th at pp. 1285, 1288; *People v. Pearson* (2013) 56 Cal.4th 393, 455, quoting *People v. Brown* (2003) 31 Cal.4th 518, 544.)
- **The foundation.** Counsel need not prove the bias exists; counsel needs a good-faith basis to ask. In *Castaneda-Prado* the complaining witness had testified at the preliminary hearing that she filed her declaration to help her mother obtain a U visa; that was enough, and the absence of proof that an application was ever filed did not matter. (94 Cal.App.5th at pp. 1273–1274, 1288–1289.) In *Pearson*, counsel had nothing beyond speculation, and the questions were properly excluded. (56 Cal.4th at pp. 455–456.) No offer of proof is required to preserve the exclusion of evidence sought on cross-examination (§ 354, subd. (c)), but a record of what the cross-examination would have shown is what makes the prejudice argument.

12. The right to face-to-face confrontation

Distinct from the *Crawford* rules on testimonial hearsay, this branch concerns courtroom practices that impair the defendant's face-to-face confrontation with an accusing witness: screens, remote testimony, masks, and seating arrangements. *Crawford* did not change these rules. (*People v. Gonzales* (2012) 54 Cal.4th 1234, 1266.)

The federal rule: *Coy* and *Craig*. In *Coy v. Iowa* (1988) 487 U.S. 1012, the Court found that the clause was violated by a screen placed between the defendant and child witnesses. (*Id.* at pp. 1020–1021.) Two years later, *Maryland v. Craig* (1990) 497 U.S. 836 upheld one-way closed-circuit testimony. Denying face-to-face confrontation was permissible because it was

necessary to further an important public policy, the testimony's reliability was otherwise assured, and the trial court made a case-specific finding. (*Id.* at pp. 850, 855–857.)

Pitts v. Mississippi (2025) 607 U.S. 1 relied on that rule. The trial court placed a screen between a child witness and the defendant because it believed the state screening statute was mandatory. The Court reversed. A trial court may not rely on a statute's generalized findings; it must hear evidence and find necessity in the case before it. The Court left harmlessness under *Chapman* to the state court on remand. As of October 2026, no published California decision has applied *Pitts*.

Case-specific findings: *Arredondo*. In *People v. Arredondo* (2019) 8 Cal.5th 694, the trial court raised a computer monitor on the witness stand so that three complaining witnesses, ages 18, 14 and 13, and the defendant could not see each other. (*Id.* at pp. 707–712.) The Supreme Court held that a *Craig* finding of the necessity of the physical restriction must be case specific. It must rest on trauma caused by the defendant's presence, not by the courtroom generally. An 18-year-old witness's crying and a short recess did not justify the accommodation. Trial courts normally should make these findings expressly. (*Id.* at p. 709, fn. 4.) The defense objected as to only one witness. As to the other two, the claim was forfeited, and counsel's failure to object was not ineffective. (*Id.* at pp. 710–712.)

Child witnesses: *Lujan*. In *People v. Lujan* (2012) 211 Cal.App.4th 1499, a child witness shown to be traumatized by face-to-face confrontation testified remotely, even though the child was not the victim of a separate crime by the defendant. The case specific trauma finding was what mattered. (*Id.* at pp. 1504–1506.)

Pandemic-era accommodations. In *People v. Coulthard* (2023) 90 Cal.App.5th 743, an adult witness abroad testified by two-way video on an adequate showing of necessity and reliability. The court assumed *Craig* governs two-way video. (*Id.* at pp. 769–775.) The complaint that no evidentiary hearing was held was forfeited. (*Id.* at p. 773.) In *People v.*

Alvarez (2022) 75 Cal.App.5th 28, witnesses testified wearing masks that covered their mouths and lower noses. (*Id.* at pp. 35–39.)

No barrier, no finding needed. In *People v. Bharth* (2021) 68 Cal.App.5th 801, an adult victim turned her chair away from the defendant, with no physical barrier. That did not deny face-to-face confrontation and required no *Craig* finding, though the court found the record justified it anyway. (*Id.* at pp. 817–818.)

The clause also does not bar removing a disruptive defendant. (*Illinois v. Allen* (1970) 397 U.S. 337, 343.)

> **Consider the findings.** Screens and remote testimony are often arranged by stipulation or on a bare claim of trauma. Check whether the court heard evidence and what it found. Under *Pitts* and *Arredondo*, the record must show a case-specific need based on trauma from the defendant's presence, not the courtroom generally. Check the objections too: failing to object or request a hearing can forfeit the claim. (§ 14.)

PART FIVE

Forfeiture, preservation, standards of review, and prejudice

13. Forfeiture doctrines

Forfeiture by wrongdoing does apply

A defendant who wrongfully keeps a witness from testifying forfeits the confrontation claim, but only if the defendant acted for that purpose. Causing the witness's absence is not enough. (*Crawford*, 541 U.S. at p. 62; *Giles v. California* (2008) 554 U.S. 353, 359-368; see also § 1390.) The prosecution must prove forfeiture by a preponderance. Many cases turn on whether the defendant targeted the witness's cooperation or testimony. (Compare *People v. Banos* (2009) 178 Cal.App.4th 483, 501 [substantial evidence the defendant killed the victim to prevent her cooperation and testimony] with *People v. Jones* (2012) 207 Cal.App.4th 1392, 1396 [threats if the witness testified; not limited to murdered witnesses] with *People v. Quintanilla* (2020) 45 Cal.App.5th 1039 [a violent, controlling relationship alone was not enough without a pending proceeding or a specific threat tied to reporting].)

Courts in several jurisdictions find forfeiture where a proceeding (such as a criminal charge, a protective order, or a contested divorce) was pending when the victim was killed. Where nothing was pending, they divide. (See Morrison, *Forfeiture by Wrongdoing in Domestic Homicide Cases: Where Are We Now?* (2024) 57 U.Mich. J.L. Reform 885, 890–895, 898–899 [surveying decisions from 2020 through 2023].)

Forfeiture by "opening the door" does not apply

In *Hemphill v. New York* (2022) 595 U.S. 140, 154, the U.S. Supreme Court held there is no exception to the confrontation clause when the trial court "believes unconfronted testimonial hearsay might be reasonably necessary to correct a misleading impression." (See also *People v. Bankston* (2026) 19 Cal.5th 786, 848.)

As the Court explained, the door-opening rule is a "substantive principle of evidence that dictates what material is relevant and admissible in a case." (*Id.* at p. 152.) Applying that principle to the procedural rules contained in the Sixth Amendment "would negate *Crawford*'s emphatic rejection of the reliability-based approach[.]" (*Id.* at p. 152; see *Crawford*, 541 U.S. at p. 61 [reliability must be assessed " by testing in the crucible of cross-examination"].) "For Confrontation Clause purposes, it was not for the judge to determine whether [the defense theory] was unreliable, incredible, or otherwise misleading in light of the State's proffered, unconfronted [ ] evidence. Nor, under the Clause, was it the judge's role to decide that this evidence was reasonably necessary to correct that misleading impression." (*Id.* at p. 153.) "Courts may not overlook its command, no matter how noble the motive." (*Id.* at p. 154.)

Notwithstanding its emphatic rejection of a door-opening exception, the *Hemphill* majority reserved whether the rule of completeness could provide a basis for admitting unconfronted testimonial hearsay. (*Hemphill*, 595 U.S. at p. 155.) "Under that rule, a party 'against whom a part of an utterance has been put in, may in his turn complement it by putting in the remainder.'" (*Ibid.* [internal citations omitted]; see § 356 ["Where part of [a statement] is given in evidence by one party, the whole on the same subject may be inquired into by an adverse party[.]"].) Justices Alito and Kavanaugh approvingly compared the rule of completeness to implied waiver. (*Hemphill*, at p. 158 (conc. opn. of Alito, J.) ["By introducing part or all of a statement made by an unavailable declarant, a defendant has made a knowing and voluntary decision to permit that declarant to appear as an unconfronted witness."].)

In a case predating *Hemphill*, the California Supreme Court held that statements admitted under Evidence Code section 356 (i.e., the rule of completeness) "generally are not made inadmissible by *Crawford*." (*People v. Vines* (2011) 51 Cal.4th 830, 860-861, overruled on other grounds in *People v. Hardy* (2018) 5 Cal.5th 56, 104.) Like Justice Alito eventually would, the Court likened the rule of completeness to forfeiture by wrongdoing, which "extinguishes confrontation claims on essentially equitable grounds; it does

not purport to be an alternative means of determining reliability." (*Id.* at p. 862, quoting 541 U.S. at p. 62; see also *Hemphill*, at p. 159 (conc. opn. of Alito, J.) ["When a defendant introduces the statement of an unavailable declarant on a given subject, he commits himself to the trier of fact's examination of what the declarant has to say on that subject."].)

14. Preservation

Federalization. The objection must be made on confrontation grounds to preserve the constitutional claim. (§ 353; *People v. Brown* (2003) 31 Cal.4th 518, 542; *People v. Arredondo* (2019) 8 Cal.5th 694, 710.) An objection on hearsay grounds alone does not necessarily preserve a confrontation claim. An objection that invokes *Sanchez* may arguably preserve both claims, since *Sanchez* decided both, though no published decision has addressed the point (yet).

Exceptions. A defendant tried before *Crawford* did not forfeit the claim by failing to object. (*People v. Rangel* (2016) 62 Cal.4th 1192, 1215.) The same is true of expert-basis claims at trials held before *Sanchez*. (*People v. Perez* (2020) 9 Cal.5th 1, 9.) An objection is also excused where it would have been futile under then-binding authority. (*Id.* at pp. 7–8, 14.)

Precision. A federal claim is preserved if the defense raised it in the trial court with fair precision and in time. No magic words are required, and once the claim is raised, counsel may make any supporting argument on appeal. (*Hemphill v. New York* (2022) 595 U.S. 140.) A hearsay objection alone, though, generally is not sufficient to preserve a confrontation claim. (*People v. Ochoa* (2017) 7 Cal.App.5th 575, 583–584.) If the record shows only a hearsay objection to a statement that appears testimonial, consider these three arguments for cognizability: 1) the objection was broad enough to cover confrontation, 2) an express objection would have been futile, and, 3) in the alternative, counsel was ineffective for not making one.

Ineffective assistance as the fallback. Where no confrontation objection was made, the alternative claim is ineffective assistance: deficient performance and a reasonable probability of a different result. (*Strickland v.*

Washington (1984) 466 U.S. 668, 687, 694; see *People v. Julian* (2019) 34 Cal.App.5th 878, 888.) On direct appeal, the claim generally succeeds only if the record shows counsel had no rational tactical purpose, counsel was asked for a reason and gave none, or no satisfactory explanation could exist. (*People v. Mai* (2013) 57 Cal.4th 986, 1009.)

However, an ineffective assistance claim based on a failure to "federalize" an objection may be more susceptible to review on direct appeal than other ineffective assistance claims based on lack of an objection. Where defense counsel *does* object to particular evidence (e.g., citing only hearsay), there is rarely any reasonable tactical ground for failing to identify the federal constitutional violation as well.

Otherwise an ineffective assistance claim may require a habeas petition, which may be filed while the appeal is pending. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266–267; see § 18.) Other FDAP materials address state habeas practice. See J. Bradley O'Connell, *Habeas Corpus Practice in California Criminal Appeals* (FDAP Oct. 2025) pp. 12–20.

Face-to-face claims. Failing to object to an accommodation or other courtroom practice which impairs a defendant's ability to view and "confront" a witness forfeits the claim as to that witness. (*People v. Arredondo* (2019) 8 Cal.5th 694, 710.) Failing to request an evidentiary hearing on necessity forfeits the complaint that none was held. (*People v. Coulthard* (2023) 90 Cal.App.5th 743, 773.)

Waiver. The right may be waived, including by failure to object, and states may adopt procedural rules governing objections. (*Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305, 314, fn. 3.) Simple notice-and-demand statutes are valid. (*Id.* at p. 326.) Requiring the *defendant* to subpoena the analyst is not a substitute for the prosecution calling that witness. (*Id.* at p. 324.)

15. Standards of review

"A trial court's finding of historical fact must be upheld if supported by substantial evidence. A trial court's determinations of state law issues are also reviewed for an abuse of discretion. [Citation.]" (*People v. Tatum* (2003) 108 Cal.App.4th 288, 296.) Whether the admission of hearsay evidence violated a defendant's Sixth Amendment right to confrontation is subject to *independent review*. (*People v. Mayo* (2006) 140 Cal.App.4th 535, 553.)

Question	**Standard courts have used**
Whether a statement is testimonial; whether the clause was satisfied	Independent review. (*People v. Giron-Chamul* (2016) 245 Cal.App.4th 932, 964.)
Unavailability (privilege)	Independent review. (*People v. Williams* (2008) 43 Cal.4th 584, 614.)
Prosecution's due diligence in making a declarant available	Deference to trial court's determination of the "historical facts" of the prosecution's efforts, and independent review of whether those efforts were reasonably diligent enough to sustain the unavailability finding. (*People v. Bunyard* (2009) 45 Cal.4th 836, 851.)
Forfeiture by wrongdoing	Substantial evidence for the trial court's finding. (See *People v. Banos* (2009) 178 Cal.App.4th 483, 501; *People v. Quintanilla* (2020) 45 Cal.App.5th 1039.)
Necessity finding for screens or remote testimony	De novo, deferring to the trial court's findings of historical fact. (*People v. Bharth* (2021) 68 Cal.App.5th 801; *People v. Coulthard* (2023) 90 Cal.App.5th 743.) The question is whether the record fully justifies the accommodation; the finding should normally be express. (*People v. Arredondo* (2019) 8 Cal.5th 694, 709 & fn. 4.)

Question	**Standard courts have used**
Discretionary state-law evidentiary rulings, including § 352 and expert admissibility	Abuse of discretion. (*People v. Lamb* (2024) 16 Cal.5th 400, 424 [capital case].) But legal questions within the ruling may get de novo review, such as what a hearsay exception means or whether undisputed facts meet a constitutional standard. Findings of historical fact are reviewed for substantial evidence. (*Cromer*, 24 Cal.4th at pp. 893–901 [mixed questions implicating a constitutional right]; *Tatum*, 108 Cal.App.4th at p. 296.)
Limits on cross-examination: § 352 step	Abuse of discretion. (*People v. Castaneda-Prado* (2023) 94 Cal.App.5th 1260, 1282.)
Limits on cross-examination: the *Van Arsdall* step	De novo (*Castaneda-Prado*, *supra*, 94 Cal.App.5th at p. 1283). The California Supreme Court has not squarely addressed the point and generally speaks of abuse of discretion. (*People v. Mendez* (2019) 7 Cal.5th 680, 703.) *Bertsch & Hronis* reviewed a limit on bias cross-examination under section 352 for abuse of discretion, without a separate *Van Arsdall* analysis. (*People v. Bertsch & Hronis* (2026) 19 Cal.5th 183, 296–298.)

16. Prejudice

As federal constitutional error, a confrontation clause violation is evaluated under *Chapman v. California* (1967) 386 U.S. 18, 24. (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 684.) That is, the prosecutor must prove the error was harmless beyond a reasonable doubt. (Accord *People v. Thomas* (2013) 218 Cal.App.4th 630, 633 [*Chapman* analysis required where appellant alleges federal constitutional error].) However, if trial counsel objected only on state-law grounds, the *Watson* standard applies.

Error	**Standard courts have used**
Sixth Amendment confrontation error, either branch	*Chapman v. California* (1967) 386 U.S. 18, 24. (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 684; *Cardenas*.) Trial error, not structural. (*Van Arsdall*, at pp. 681–682.)
Testimonial hearsay relayed through an expert	*Chapman*. (*People v. Capistrano* (2014) 59 Cal.4th 830, 873.)
State law hearsay error, including nontestimonial *Sanchez* error	*People v. Watson* (1956) 46 Cal.2d 818, 836. (*People v. Bertsch & Hronis* (2026) 19 Cal.5th 183, 269; *Hazlett*.)
Ordinary exclusion of defense evidence under § 352	*Watson*. (*People v. Garcia* (2018) 28 Cal.App.5th 961, 970–971.)

***Chapman* analysis.** The California Supreme Court asks whether "it is clear beyond a reasonable doubt that a rational jury would have reached the same verdict absent the error." (*Capistrano*, *supra*, 59 Cal.4th at p. 873; see *Neder v. United States* (1999) 527 U.S. 1, 18; *People v. Gonzalez* (2021) 12 Cal.5th 367, 398–399 [harmless where independent evidence of guilt was overwhelming].) That test asks the court to imagine a different trial. Another formulation looks at the verdict this jury actually returned. The question there "is not whether, in a trial that occurred without the error, a guilty

verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error." (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279.)

When the trial court cut off cross-examination, the question is whether, "*assuming that the damaging potential of the cross-examination were fully realized*, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt." (*Van Arsdall*, *supra*, 475 U.S. at p. 684 (italics added).) That assumption may work in the appellant's favor. It lets appellants argue the excluded line of questioning as if it had succeeded. *Van Arsdall* identifies multiple factors the reviewing court must weigh in its ultimate prejudice determination: "the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case." (*Ibid.*)

Where courts have found prejudice.

- The hearsay was the only proof of an element or predicate (*Cardenas*).
- The prosecutor exploited the ruling in closing (*Castaneda-Prado*).
- The excluded cross-examination went to the central witness in a case that was "far from overwhelming" (*Olden v. Kentucky* (1988) 488 U.S. 227, 233).
- The unconfronted material supplied the only answer to the defense theory (*Murillo*).
- The relayed statement was the only evidence of a contested fact (*Ogaz*).
- A face-to-face violation is judged on the remaining evidence, without the shielded witness's testimony, so convictions resting on that testimony fall (*Coy*, 487 U.S. at pp. 1021–1022; *Arredondo*, 8 Cal.5th at pp. 709–710).
- A child witness's refusals left the central testimony untested (*Giron-Chamul*).

Where courts have found harmlessness.

- The fact was undisputed or immaterial (*Nadey*; *Barrera*; *Hazlett*).
- The testifying expert's conclusions were independently reached and uncontroverted (*Lamb*).
- The facts were independently proved (*Bankston*).
- The defendant's own testimony disclosed the same or worse facts (*Barrett*).
- The jury learned the impeaching fact by other means (*People v. Garcia* (2022) 76 Cal.App.5th 887, 901 [ineffective assistance prejudice]).

Cumulative prejudice. Where the record shows several related errors, such as a confrontation violation, *Sanchez* error and hearsay error, consider arguing their cumulative effect as well as each one's. *Iraheta* reversed after weighing state law hearsay errors together with a confrontation violation under *Chapman*. (*People v. Iraheta* (2017) 14 Cal.App.5th 1228, 1252–1255.) A court that assumes each error and finds each harmless in isolation may not have weighed what the errors did together.

> **Consider your burden.** Always proactively address prejudice. As the appellant, you must establish error and should affirmatively address prejudice. In a confrontation claim, it may help to identify the single contested fact the unconfronted evidence proved, trace every reference to it in the prosecutor's argument, and show that nothing else in the record proved it. For more extensive discussion of prejudice, see J. Bradley O'Connell, *Prejudice 202: Tips, Tools, and Tirades for Arguing Prejudice Under Any Standard* (FDAP Apr. 2023); Jeremy Price, *Don't Give Up: Overcoming Standard of Review and Prejudice Obstacles* (FDAP Jan. 2020).

PART SIX

Applications

17. Where the clause applies and where it does not

The Sixth Amendment reaches "criminal prosecutions," which in practice means the trial. Outside it, the confrontation interest survives only as a due-process right, and *Sanchez*'s state-law hearsay limit does most of the work. For example: "*Crawford*'s holding is based squarely on the Sixth Amendment right to confront witnesses. P*robation revocation proceedings are not 'criminal prosecutions' to which the Sixth Amendment applies*." (*People v. Johnson* (2004) 121 Cal.App.4th 1409, 1411 [italics added].) The right is a trial right, not a rule of pretrial discovery. (*Pennsylvania v. Ritchie* (1987) 480 U.S. 39, 52 (plur. opn.).) Consequently, to the extent that the Constitution requires prosecutorial disclosure of evidence in some circumstances, it is through the due process clause, rather than confrontation. (E.g., *Brady v. Maryland* (1963) 373 U.S. 83, 87.)

Where the clause does not apply, three other protections usually do, though none is as strong: (1) the Evidence Code (unless a statute displaces it for that proceeding), (2) *Sanchez*'s state-law hearsay holding, and (3) due process. Due-process confrontation is softer-edged and can be outweighed, but it still bars, for example, letting a readily available witness testify by report where liberty is at stake. (See Friedman, Crawford *at 20: An Introduction to the Symposium* (2024) 57 U.Mich. J.L. Reform 717, 728, citing *Morrissey v. Brewer* (1972) 408 U.S. 471, 489.)

Proceeding	**Does the clause apply?**
Jury or court trial on guilt	Yes.

Proceeding	**Does the clause apply?**
Preliminary hearing	No. (*People v. Miranda* (2000) 23 Cal.4th 340, 350–353; Pen. Code, § 872, subd. (b).) Hearsay admitted at the preliminary hearing in place of live testimony is not admissible at trial if the witness fails to appear. (See *Miranda*, *supra*, 23 Cal.4th at p. 353.)
Pretrial discovery and motions	No. Due process governs access to records. (*Ritchie*; *Hammon*.)
Kelly hearings (and other in limine hearings)	No. (*People v. Bertsch & Hronis* (2026) 19 Cal.5th 183, 267–269.) The court did not decide whether the clause reaches other pretrial hearings. (*Id.* at p. 269, fn. 16.)
Competency hearings	Not settled. The defendant's presence was not required where counsel submitted on a court-appointed expert's report and did not seek to cross-examine; any error was also harmless. (*People v. Maldonado* (2026) 122 Cal.App.5th 563, 572–574.) Counsel may submit the competency question on expert reports, even over the client's objection. (*Bertsch & Hronis*, *supra*, 19 Cal.5th at pp. 229–230.)
Restitution hearings	No. Due process requires only notice and an opportunity to challenge. (*People v. Cain* (2000) 82 Cal.App.4th 81, 86–88.)
Probation, parole, and PRCS revocation	No. Due process applies. (*Johnson*, *supra*, 121 Cal.App.4th at p. 1411; *People v. Gray* (2023) 15 Cal.5th 152, 163–164.) See below.
Pen. Code, § 1172.6 evidentiary hearings	No. See below.

Proceeding	**Does the clause apply?**
Civil commitment (SVP, MDO, NGI extension, LPS, Welf. & Inst. Code, § 6500)	No. Due process and *Sanchez* apply. (*People v. Angulo* (2005) 129 Cal.App.4th 1349; *People v. Allen* (2008) 44 Cal.4th 843.) See below.
Delinquency: jurisdictional hearing	Yes, through due process. (*In re Gault* (1967) 387 U.S. 1, 56–57; Welf. & Inst. Code, § 701 [Evidence Code governs].) See below.
Delinquency: disposition, Welf. & Inst. Code § 777 violations, § 707 transfers	Due process and statute govern. See below.
Dependency	No. (See *J.H. v. Superior Court* (2018) 20 Cal.App.5th 530, 533.)

Probation revocation: *Gray*

A probationer's or parolee's right to confront witnesses at a revocation hearing comes from due process, not the Sixth Amendment, and gives way when the court finds good cause. (*Morrissey v. Brewer* (1972) 408 U.S. 471, 480, 489; *Gagnon v. Scarpelli* (1973) 411 U.S. 778, 782.) A preliminary hearing transcript cannot replace live testimony absent unavailability or other good cause. (*People v. Winson* (1981) 29 Cal.3d 711, 719.) Reliable documentary hearsay, like a signed rental invoice, can come in without a good-cause finding. (*People v. Maki* (1985) 39 Cal.3d 707, 709, 716–717.) *People v. Arreola* (1994) 7 Cal.4th 1144 limited *Maki* to documentary evidence and adopted a balancing test: the court weighs the defendant's interest in confrontation against the prosecution's reasons for not producing the witness. (*Id.* at pp. 1156–1157, 1159–1160.)

In *People v. Gray* (2023) 15 Cal.5th 152, the trial court admitted a non-testifying victim's body-camera statements as spontaneous statements without finding good cause. (*Id.* at pp. 160–161.) The California Supreme Court rejected the rule that spontaneous statements automatically satisfy

due process, disapproved *People v. Stanphill* (2009) 170 Cal.App.4th 61, and remanded for *Arreola* balancing. (*Gray*, *supra*, 15 Cal.5th at pp. 168–170, 173 & fn. 8.) *Crawford* does not apply, but the court relied on it to stress the importance of confrontation when testimonial statements are offered. (*Id.* at pp. 172–173.)

The balancing is holistic. The factors include the reason for the declarant's absence, the purpose for which the statement is offered, its importance to the violation finding, corroboration, and reliability. (*Gray*, *supra*, 15 Cal.5th at pp. 166, 169–170.) Reliability alone does not make testimonial hearsay admissible, and unavailability is neither a threshold requirement nor dispositive. (*Id.* at p. 173 & fn. 9.) *Gray* left open what due process requires for nontestimonial hearsay. (*Id.* at p. 172, fn. 7.)

Section 1172.6 evidentiary hearings

There is an extensive body of law on Penal Code section 1172.6 hearings, including their evidentiary rules. These materials address only limited confrontation and hearsay points.

Courts treat the hearing as an act of legislative lenity, not a criminal prosecution, so the Sixth Amendment does not apply. (*People v. Anthony* (2019) 32 Cal.App.5th 1102, 1156–1157 [jury trial]; *People v. Hill* (2024) 100 Cal.App.5th 1055, 1067–1068 [jury trial; a petitioner "does not possess many of the constitutional rights afforded to a criminal defendant at trial"].)

The Evidence Code governs, with an exception: the court may consider evidence admitted at any prior hearing or trial if it is "admissible under current law." (Pen. Code, § 1172.6, subd. (d)(3).) The statute contemplates that some evidence from the original trial will not qualify, such as case specific hearsay an expert related before *Sanchez*. (*People v. Cody* (2023) 92 Cal.App.5th 87, 104; *People v. Davenport* (2023) 95 Cal.App.5th 1150, 1158–1159.) The statute also expressly excludes officer hearsay admitted at the preliminary hearing under Proposition 115 (Pen. Code, § 872, subd. (b)), unless another hearsay exception applies. (Pen. Code, § 1172.6, subd. (d)(3); Davenport, *supra*, 95 Cal.App.5th at p. 1159.)

The prosecution need not show that a witness is unavailable before using the witness's prior trial or preliminary hearing testimony. (*Cody*, *supra*, 92 Cal.App.5th at pp. 103–104; *Davenport*, *supra*, 95 Cal.App.5th at pp. 1157–1160.) If the earlier cross-examination left gaps, the remedy is to subpoena the witness. (*Id.* at p. 1160.)

Whether grand jury transcripts qualify is now before the California Supreme Court. *People v. Robinson* (2024) 106 Cal.App.5th 854, review granted (S288606), said yes. *People v. Ocobachi* (2024) 105 Cal.App.5th 1174 and *People v. Dixon* (2026) 118 Cal.App.5th 116 said no. *Dixon* also held that police reports and probation incident reports are inadmissible at the hearing.

Civil commitment: no Sixth Amendment right, full *Sanchez*

A person facing civil commitment has no Sixth Amendment confrontation right in those proceedings. Due process applies instead, measured by fundamental fairness, and hearsay must bear "special indicia of reliability." (*Angulo*, *supra*, 129 Cal.App.4th at pp. 1367–1368; *People v. Orey* (2021) 63 Cal.App.5th 529, 559–560 [the defendant could have deposed the authors of the records].) Because the testimonial inquiry is not required, the analysis proceeds under state law and due process. (*People v. Bona* (2017) 15 Cal.App.5th 511, 520 [MDO]; see *J.H. v. Superior Court* (2018) 20 Cal.App.5th 530, 533 [dependency].) *Sanchez*'s hearsay holding applies. (*People v. Jeffrey G.* (2017) 13 Cal.App.5th 501, 504 [NGI]; *Conservatorship of K.W.* (2017) 13 Cal.App.5th 1274, 1282 [LPS].)

Courts have reversed where prosecution experts related hearsay about unproven conduct, both in an SVP commitment (*People v. Burroughs* (2016) 6 Cal.App.5th 378, 409–413) and at a probable cause hearing (*Walker v. Superior Court* (2021) 12 Cal.5th 177, 185, 208–209). Documentary hearsay may prove the details of qualifying prior convictions, but not nonpredicate offenses or conduct that did not lead to a conviction. (Welf. & Inst. Code, § 6600, subd. (a)(3); *Walker*, *supra*, at pp. 198–199; *Bennett v. Superior Court* (2019) 39 Cal.App.5th 862, 877, 880.) *Walker* left open whether due process gives SVP defendants a right to confront the witnesses behind contested hearsay. (*Id.* at p. 209, fn. 5.) On LPS records and on sufficiency, see Megan

Hailey-Dunsheath & Maria Leftwich, *Appellate Claims Related to Expert Testimony* (FDAP Oct. 2025) pp. 13, 21–22.

Delinquency: Jurisdictional hearing. The minor has a due process right to confrontation and cross-examination (*In re Gault* (1967) 387 U.S. 1, 56–57). Welfare and Institutions Code section 701 requires proof beyond a reasonable doubt "supported by evidence, legally admissible in the trial of criminal cases." (See *In re Winship* (1970) 397 U.S. 358.) Two court trial rules appear to apply: *Presley*'s presumption that the judge disregarded inadmissible material, and the different operation of *Aranda/Bruton* without a jury (*In re Jose M.* (1994) 21 Cal.App.4th 1470).

Delinquency: Section 777 probation violations. The standard is a preponderance, and "reliable hearsay" is admissible to the same extent as at an adult revocation hearing. (*In re Eddie M.* (2003) 31 Cal.4th 480; Welf. & Inst. Code, § 777, subd. (c); Cal. Rules of Court, rule 5.580(e).)

18. State habeas claims

This section covers state habeas. Federal habeas review applies different standards and is beyond the scope of these materials. For habeas practice generally, including timing, verification, investigation funding and the prima facie showing, see J. Bradley O'Connell, *Habeas Corpus Practice in California Criminal Appeals* (FDAP Oct. 2025) pp. 12–20.

If trial counsel did not object to clearly testimonial hearsay, the ineffective assistance claim usually belongs in a habeas petition filed while the appeal is pending, where counsel's reasons can be developed. (See § 14.)

Sanchez does not apply retroactively on state habeas. (*In re Ruedas* (2018) 23 Cal.App.5th 777.)

False expert evidence. Penal Code section 1473 allows habeas relief based on false evidence material to guilt or punishment. (Pen. Code, § 1473, subd. (b)(1)(A).) False evidence includes an expert opinion that the expert has since repudiated, or that later scientific knowledge, research or technology has undermined. (*Id.*)

Post-conviction discovery. The prosecution's duty to disclose exculpatory information continues after conviction. (*In re Steele* (2004) 32 Cal.4th 682, 694.) The Attorney General has a similar duty when answering a habeas petition that alleges a *Brady* violation. (*In re Jenkins* (2023) 14 Cal.5th 493, 515, 518.) Defendants serving specified serious sentences may also move for discovery under Penal Code section 1054.9. Any of these routes may help get the bench notes, lab files or reports behind testimony an expert relayed at trial.

APPENDIX A

Confrontation Clause Issue Spotter

The two-page flowchart that follows is a quick reference for record review. It addresses the questions in these materials in roughly the order you may encounter them in an appellate record. It gives case names but not full citations, which can be found in the sections noted below.

Start at the top. Two threshold questions come first: was the ruling made at trial (§ 17), and was the claim preserved or excused (§ 14)? If the answer to both is yes, follow every track available. One declarant can raise issues on more than one track.

- **Track A:** an out-of-court statement reached the jury. (§§ 4–9.)
- **Track B:** the defense could not test the witness. (§§ 10–11.)
- **Track C:** the witness did not face the defendant. (§ 12.)
- **Prejudice:** every track ends here. (§ 16.)

No chart can anticipate every record, and the law here is still moving. Use the flowchart as a guide, not a checklist. If your facts don't fit a box, a new decision changes the analysis, or you see an angle the chart doesn't cover, the issue may still be worth raising.

Confrontation Clause Issue Spotter

A record review flowchart for direct appeal. Authorities are in the written materials.

1 Was the ruling made at trial?

The Clause is a trial right.

NO No Sixth Amendment claim; the Evidence Code, *Sanchez*, and due process apply.

2 Did trial counsel object on confrontation grounds?

Hearsay alone generally does not preserve it; pre-*Crawford* and pre-*Sanchez* trials are excused.

NO Forfeited; the fallback is ineffective assistance.

PRESERVED OR EXCUSED → FOLLOW EVERY TRACK THE RECORD OPENS

A An out-of-court statement reached the jury

A1 Is it a person's statement, offered for its truth?

An expert's basis is offered for its truth (*Sanchez*; *Smith*).

→ **NO** The hearsay claim survives; consider raising if closing used the statement as true.

YES

A2 Is the statement testimonial? OPEN

Formality plus a primary purpose pertaining to prosecution (*Lopez*), judged statement by statement. The materials sort the common sources by category.

→ **NO** The Evidence Code alone governs (*Davis*); the hearsay claim survives. Consider raising if the source is more formal than the court credited.

YES

A3 Did the declarant testify and submit to cross?

A surrogate expert is not the declarant (*Bullcoming*). A witness who refuses to answer may become unavailable mid-testimony (*Murillo*).

→ **YES** Usually no issue; the Clause places no constraints on the prior statement. The hearsay claim and Track B survive.

NO

A4 Was the declarant unavailable, *and* previously crossed with a similar motive?

Both are required; the prosecution bears the burden (*Cromer*).

→ **YES, BOTH** Uphill: *Crawford*'s own exception. Consider raising if diligence was late or the earlier motive differed.

NO

A5 Does forfeiture by wrongdoing, a dying declaration, or waiver apply? OPEN

Forfeiture requires intent to keep the witness away (*Giles*). "Opening the door" is not an exception (*Hemphill*).

→ **YES** Uphill. Consider raising if nothing was pending and no threat was tied to reporting (*Quintanilla*).

NO

A6 ARGUABLE VIOLATION Testimonial hearsay admitted without confrontation

Pair the claim with its state hearsay twin.

→ **THEN** Prejudice, page 2.

The witness who testified

Then prejudice, for every track

B The defense could not test the witness

B1 Did the court restrict cross, or did the witness refuse on cross?

Refusals on cross call for striking the testimony.

→ **NO**
No Track B claim; a witness who stops answering is A3.

B2 Was the line aimed at bias, motive, or interest?

A charge, a deal, a relationship, a U visa (*Castaneda-Prado*). The witness's own belief in a benefit counts.

→ **NO**
§ 352 only. Consider raising if a benefit, fear, or relationship sits behind the "collateral" line.

THE TWO-STEP TEST (*CASTANEDA-PRADO*)

B3 Step one: under § 352, more than marginal impeachment?

Abuse of discretion, with "a sharp tilt" toward admitting bias evidence (*Castaneda-Prado*).

→ **NO**
Uphill; *Watson*. *Villa* stopped here.

B4 Step two: a "significantly different impression" of the witness? OPEN

The focus is the witness, not the verdict (*Van Arsdall*). The standard of review is unsettled.

→ **NO**
State-law error at most. Consider raising if closing argued "no reason to lie."

B5 ARGUABLE VIOLATION Cross-examination on bias denied

Assume the cross would have succeeded (*Van Arsdall*).

C The witness did not face the defendant

C1 Did a witness testify without facing the defendant?

Screens, monitors, and video count (*Arredondo*); a turned chair with no barrier did not (*Bharth*).

→ **NO**
Consider raising if the view was in fact blocked.

C2 Was there a case-specific finding of necessity, on evidence?

A statute cannot supply it (*Pitts*); trauma must come from the defendant's presence (*Arredondo*).

→ **YES**
Uphill. Consider raising if the finding rested on stipulation or skipped reliability.

C3 ARGUABLE VIOLATION Face-to-face denied without a finding

Forfeiture risk: an objection as to each witness (*Arredondo*).

P Prejudice: every track ends here

P2 Prejudice deserves as much care as error

Chapman for a Sixth Amendment violation. *Watson* for state hearsay, nontestimonial *Sanchez*, or § 352 error. State both.

Courts often assume the violation and affirm as harmless. Reversals have followed where the hearsay carried an element of the case (*Cardenas*) or the prosecutor exploited the ruling in closing (*Castaneda-Prado*).