

Summer 2022 Update: Note for Instructors

Learning Evidence: From the Federal Rules to the Courtroom (Fifth Edition)

**Deborah Jones Merritt
Ric Simmons**

Our Summer 2022 Update includes a brief discussion of just one opinion, *Hemphill v. New York*.¹ As we observe in the Update, the most notable aspect of that opinion is its reaffirmation of *Crawford*'s focus on cross-examination. At least for now, the Court has backed off earlier suggestions that it might return to *Roberts*' reliability standard.

Other aspects of *Hemphill* are rather technical for an introductory Evidence course, but we summarize them below in case you want to cover them in class. The full *Hemphill* opinion is also available in the "Quizzes, Updates, and Other Materials" folder of the Teacher Resources section of your eProducts bookshelf.

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The defendant in *Hemphill v. New York*² was charged with murder. At trial, he claimed that a third party (Nicholas Morris) was responsible for that murder. Morris was unavailable during Hemphill's trial, so the State could not call him to rebut Hemphill's defense. Instead, the State attempted to introduce a plea allocution Morris made several years earlier. That statement undermined Hemphill's third-party defense to some extent.

The State in *Hemphill* conceded that Morris's plea allocution was testimonial and that Hemphill had no opportunity to cross examine Morris. It argued, however, that Hemphill waived any Confrontation Clause objection to introduction of the allocution by attempting to blame Morris for the murder. Without introduction of Morris's allocution, the State argued, Hemphill's defense was misleading.

The Supreme Court rejected this argument, finding that Hemphill had not waived his Confrontation Clause rights simply by raising a third-party defense. The Court, however, left open the possibility that other conduct might explicitly or implicitly waive those rights. The common-law rule of completeness, for example, allows a party to supplement a partial statement introduced by an opponent in order to correct any misleading impression created by the partial statement.

The majority did not address the intersection of the rule of completeness and the Confrontation Clause, noting that the parties agreed that the rule did not apply in Hemphill's case. Justice Alito (joined by Justice Kavanaugh), however, wrote separately to argue that a defendant who

¹ 142 S. Ct. 681 (2022).

² 142 S. Ct. 681 (2022).

introduces evidence subject to the rule of completeness *would* waive their rights under the Confrontation Clause.

This discussion of the rule of completeness is particularly timely, because the Advisory Committee is considering an amendment to Rule 106—the modern equivalent of the common-law rule of completeness. As we explain in Chapter 24 (at p. 298), courts have split on whether Rule 106 is a rule of timing or of admissibility. Courts in the latter camp allow parties to introduce completing evidence even if that evidence would otherwise violate the rule against hearsay.

The proposed amendment to Rule 106 adopts the latter, broader view of Rule 106. If approved, the new Rule 106 might raise Confrontation Clause questions if the prosecution seeks to complete a statement introduced by a defendant. Even if approved, however, that amendment will not take effect until December 1, 2023 at the earliest. We will post any updates on the amendment and Confrontation Clause issues as they arise.