THE MODEST IMPACT OF THE MODERN CONFRONTATION CLAUSE

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The Sixth Amendment's Confrontation Clause grants criminal defendants the right "to be confronted with the witnesses against" them. A strict reading of this text would transform the criminal justice landscape by prohibiting the prosecution's use of hearsay at trial. But

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until recently, the Supreme Court's interpretation of the Clause was closer to the opposite. By tying the confrontation right to traditional hearsay exceptions, the Court's longstanding precedents granted prosecutors broad freedom to use out-of-court statements to convict criminal defendants.

The Supreme Court's 2004 decision in Crawford v. Washington *was supposed to change all that. By severing the link between the Sixth Amendment and the hearsay rules,* Crawford *"ushered in a revolution in the world of evidence and criminal prosecutions." But the excitement did not last. Shifting majorities filled in the details of* Crawford*'s lofty rhetoric, muddying the distinction between the new jurisprudence and what had gone before.*

*This Article takes stock of the "*Crawford *Revolution." First, it explores changes in confrontation doctrine since 2004 and examines, as a theoretical matter, how those changes map onto the state and federal hearsay exceptions that* Crawford *purportedly rendered irrelevant to constitutional analysis. This interplay between the hearsay rules and the Confrontation Clause is critical. The constitutional right would seem to have little significance if all it does is bar evidence that is already forbidden by nonconstitutional hearsay rules. Second, the Article reports the results of an empirical survey designed to test the theory by carefully cataloguing the hearsay pathways that generated Confrontation Clause challenges in hundreds of federal and state cases. The findings reveal an underappreciated role of the modern confrontation right, and changes to that role after 2004.*

INTRODUCTION

Criminal defendants' Sixth Amendment right "to be confronted with the witnesses against" them is one of the Constitution's most precise directives.[1] Yet its application is anything but straightforward.[2] Despite the Amendment's text, courts permit prosecutors to introduce some but not other statements of absent witnesses in criminal prosecutions. The only constant in longstanding efforts to interpret the Confrontation Clause is the difficulty of drawing the constitutional dividing line.

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1. U.S. CONST. amend. VI.

2. *See* John G. Douglass, *Confronting the Reluctant Accomplice*, 101 COLUM. L. REV. 1797, 1817 n.69 (2001) ("The problem of applying the Confrontation Clause to hearsay is among the most perplexing dilemmas of constitutional criminal procedure.").

The high-water mark for the confrontation right came early, appearing in the 1807 treason trial of Aaron Burr.[3] Presiding over the case, Chief Justice John Marshall rejected the prosecution's attempt to introduce the out-of-court statements of one of Burr's coconspirators.[4] Marshall thought the logic of this ruling was self-evident.[5] It made little sense for Burr to have a "constitutional claim to be confronted with the witnesses against him," Marshall explained, "if mere verbal declarations, made in his absence, may be evidence against him."[6]

Marshall also referenced a different source of authority to support his ruling: "The rule of evidence which rejects mere hearsay testimony[.]"[7] Then, as now, constitutional protections against the admission of out-of-court statements paralleled the hearsay rules that apply in all American jurisdictions.[8] For criminal defendants, these doctrines work in tandem when a prosecutor tries to introduce an out-of-court statement, such as a recorded 911 call that states that the suspect "had a gun." The defense can object that the statement is inadmissible hearsay *and* that its introduction violates the Confrontation Clause.[9] The defendant does not care which of these theories sways the court; success on either ground results in the statement's exclusion. By the same token, since the hearsay rules already prohibit many out-of-court statements, the confrontation right struggles for relevance. The right becomes redundant to the

3. United States v. Burr, 25 F. Cas. 187 (C.C.D. Va. 1807) (No. 14,694).

4. *Id.* at 193.

5. *Id.*

6. *Id.* Marshall considered a potential exception for coconspirator statements but rejected its application in that case where no conspiracy was charged. *Id.* at 193–95.

7. *Id.* at 193 ("The rule of evidence which rejects mere hearsay testimony, which excludes from trials of a criminal or civil nature the declarations of any other individual than of him against whom the proceedings are instituted, has been generally deemed all essential to the correct administration of justice.").

8. *See infra* Part II.

9. *See* Jonathan J. O'Konek, *To Object or Not Object, That Is the Question: A Criminal Law Practitioner's Guide to the "Five W's" of Evidentiary Objections*, 95 N.D. L. REV. 155, 172 (2020) (advising that "in situations where the prosecutor does not call a witness to testify at trial, but still attempts to admit this witness' testimonial out of court statement, defense attorneys should lodge both hearsay and Confrontation Clause objections"); *see also* Robert Bartels, *The Hearsay Rule, the Confrontation Clause, and Reversible Error in Criminal Cases*, 26 ARIZ. ST. L.J. 967, 978 (1994) (arguing that an objection on one ground should be automatically considered an objection on both for purposes of preserving the issue on appeal).

extent it simply bars evidence that is already inadmissible under nonconstitutional evidence rules.

Until 2004, redundancy was the primary critique of the Supreme Court's Confrontation Clause jurisprudence. The doctrine, crystallized in the 1980 case *Ohio v. Roberts*, permitted statements admitted under "firmly rooted hearsay exceptions" even without confrontation.[10] Since modern hearsay exceptions are modeled on longstanding common law analogues,[11] *Roberts* left little role for the confrontation right.[12] Already bound by hearsay rules, prosecutors were rarely troubled by the Confrontation Clause.[13]

The Supreme Court's 2004 decision in *Crawford v. Washington* sought to change all that.[14] *Crawford* rejected the proposition that "the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence[.]"[15] In a celebrated opinion authored by Justice Scalia, "the unlikely friend of criminal defendants,"[16] the Court fashioned a new framework that "ended the 'shotgun wedding' of hearsay and confrontation" and "detached the meaning of the Clause from the hearsay rule."[17] The Court insisted that the two sources of authority—hearsay rules and the confrontation right—spoke to distinct questions.[18] The hearsay rules sought to guarantee

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10. Ohio v. Roberts, 448 U.S. 56, 66 (1980) ("Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception.").

11. *See* FED. R. EVID. art. VIII advisory committee's introductory note; Jeffrey Bellin, *eHearsay*, 98 MINN. L. REV. 7, 33–35 (2013) (describing drafting of federal hearsay rules).

12. David Alan Sklansky, *Hearsay's Last Hurrah*, 2009 SUP. CT. REV. 1, 3 ("For a quarter century, in fact, the application of the Confrontation Clause closely tracked hearsay doctrine.").

13. *See* sources cited *infra* note 49 and discussion in text.

14. Michael S. Pardo, *Confrontation After Scalia and Kennedy*, 70 ALA. L. REV. 757, 758 (2019) ("Justice Scalia's 2004 opinion in *Crawford v. Washington* ushered in a revolution in the world of evidence and criminal prosecutions.").

15. Crawford v. Washington, 541 U.S. 36, 61 (2004).

16 Stephanos Bibas, *Originalism and Formalism in Criminal Procedure: The Triumph of Justice Scalia, the Unlikely Friend of Criminal Defendants*, 94 GEO. L.J. 183, 184 (2005) (noting that while Justice Scalia was "long the darling of tough-on-crime conservatives," he exhibited a "a libertarian, pro-defendant streak" demonstrated in *Crawford*).

17. Sklansky, *supra* note 12, at 4 ("Unlike the test it supplanted, the rule announced and applied in the *Crawford* line of cases has been roundly praised, in significant part because it is thought to have 'detached the meaning of the Clause from the hearsay rule.'") (citing Richard D. Friedman, *The Confrontation Right Across the Systemic Divide*, *in* CRIME, PROCEDURE AND EVIDENCE IN A COMPARATIVE INTERNATIONAL CONTEXT: ESSAYS IN HONOR OF PROFESSOR MIRJAN DAMAŠKA 266 (John Jackson et al. eds., 2008)).

18. *See Crawford*, 541 U.S. at 36.

the reliability of out-of-court statements introduced in trial proceedings. The Confrontation Clause "commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination."[19]

Commentators cheered the "*Crawford* revolution" as a victory for criminal defendants and a landmark reinvigoration of a long dormant constitutional right.[20] To build the *Crawford* majority, however, Justice Scalia left many details of the new jurisprudence for "another day."[21] In subsequent cases, the *Crawford* majority splintered.[22] The distinction between the Court's new approach and the reviled *Roberts* test began to blur.[23] While a new majority claimed to be faithfully applying *Crawford*, Justice Scalia detected something ominous. In a 2015 concurring opinion, he forecasted the revolution's demise—a fate he thought sealed by the new majority's cryptic hints at a renewed connection to the hearsay rules. Justice Scalia warned: "A suspicious mind (or even one that is merely not naïve) might regard this distortion as the first step in an attempt to smuggle longstanding hearsay exceptions back into the Confrontation Clause—in other words, an attempt to return to *Ohio v. Roberts*."[24]

As things stand, Justice Scalia's accusation is the last word in confrontation jurisprudence. The Supreme Court has not decided a confrontation case since 2015. It appears that the doctrine has settled. Or, more precisely, the Supreme Court has abandoned its unfinished business to the lower courts.[25] Five years later, it is time to assess where things stand.

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19. *Id.* at 61.

20. *See* Liesa L. Richter, *Don't Just Do Something: E-Hearsay, the Present Sense Impression, and the Case for Caution in the Rulemaking Process*, 61 AM. U. L. REV. 1657, 1691 (2012) (discussing the "Crawford Revolution"); sources cited *infra* note 54.

21. *Crawford*, 541 U.S. at 68.

22. Pardo, *supra* note 14, at 759 ("The decade following *Crawford*, however, produced sharp divisions and significant backlash within the Supreme Court's confrontation jurisprudence, as the Court struggled to implement further doctrinal details.").

23. *See* Jeffrey Bellin, *The Incredible Shrinking Confrontation Clause*, 92 B.U. L. REV. 1865, 1867 (2012) (chronicling negative consensus regarding *Roberts* and gradual blurring of distinction between the two doctrines).

24. Ohio v. Clark, 576 U.S. 237, 253 (2015) (Scalia, J., concurring).

25. *Cf.* David L. Noll, *Constitutional Evasion and the Confrontation Puzzle*, 56 B.C. L. REV. 1899, 1902–03 (2015) ("The leading academic proponent of *Crawford* suggests it may take decades for doctrine to reach a stable equilibrium. Others describe post-*Crawford* jurisprudence as a 'debacle,' 'train wreck,' and 'mess.'" (citations omitted)).

This Article explores, on a theoretical and empirical basis, whether the confrontation right has, as Justice Scalia suspected, once again become a paper tiger—a protection rendered largely redundant through its overlap with existing hearsay protections. Specifically, we analyze the numerous pathways through the hearsay rules that prosecutors can use to introduce out-of-court statements against criminal defendants. Then, we consider, as a theoretical matter, the likelihood that evidence introduced through those pathways would violate the Confrontation Clause as it is now interpreted by the Supreme Court. Our analysis reveals only one pathway that seems likely to lead to Confrontation Clause violations: the hearsay exception for statements against interest.[26] All other viable conduits for the admission of out-of-court statements appear likely to yield few (if any) statements whose admission would violate the narrowing confrontation right.

But that is just theory. To test how well this theory matches reality, we surveyed the case law since the last Supreme Court case on the topic in mid-2015. Specifically, we categorized every federal appellate decision, all published federal trial court decisions, and a sample of unpublished federal trial court decisions between mid-2015 and the end of 2020 that ruled on the admissibility of out-of-court statements under the Confrontation Clause. We also extended our survey to a sample of state cases. Our analysis of the resulting data set (over 400 cases overall) largely bore out the predictions of our theoretical framework, but it also offered a few surprises.

As predicted from the theoretical overlap of the hearsay rules and the modern confrontation right, we found few successful Confrontation Clause challenges to out-of-court statements properly admitted under the hearsay rules. Of historical interest, the most common modern Confrontation Clause challenge mirrors the challenge made by Aaron Burr in his treason trial. Defendants in our sample most frequently raised Confrontation Clause challenges to the admission of co-conspirator statements. But, unlike in the Burr trial, and as predicted by our theoretical analysis, the courts rejected every challenge to the admission of these "mere verbal declarations."[27]

In terms of the types of challenges and the likely success of those challenges, we detected intriguing patterns. Successful Confrontation Clause challenges regularly arose in scenarios where the admission of out-of-court statements also violated the nonconstitutional hearsay rules. In fact, almost every Confrontation Clause violation identified

26. *See* FED. R. EVID. 804(b)(3).

27. United States v. Burr, 25 F. Cas. 187, 193 (C.C.D. Va. 1807) (No. 14,694).

by our survey paralleled a violation of the jurisdiction's underlying hearsay rules. We found only one case where the admission of an out-of-court statement satisfied the jurisdiction's hearsay rules but nonetheless violated the Confrontation Clause. This finding suggests the same type of redundancy that existed under *Roberts*. But our study also shows that redundancy matters. The survey revealed a surprising number of Confrontation Clause violations that stemmed from trial court mistakes in interpreting aspects of hearsay doctrine, especially the public records hearsay exception and the hearsay definition.

Our findings raise several important implications. First, as a practical matter, *Crawford* has turned out to be more of a modest course correction than a revolution. Justice Scalia's accusation that the confrontation right is reverting to its familiar role as an understudy to the hearsay rules finds support in our survey. This reversion is troubling because it is non-transparent. Under *Roberts*, the jurisprudence explicitly tied the constitutional test to "firmly rooted hearsay exceptions";[28] modern confrontation doctrine reaches a similar result in a roundabout fashion. But we also find hints that the confrontation right has less visible but important effects, such as clearly cutting off a few discrete pathways for the admission of out-of-court statements.[29]

Our analysis also suggests that there are aspects of the evolving confrontation right that commentators like Justice Scalia overlooked. Once revealed, these aspects seem intuitive, but they are easy to miss. "Hearsay is commonly viewed as the most difficult topic in the rules of evidence, and one of the most perplexing in all of law."[30] Consequently, errors in trial courts' application of the hearsay rules should not be viewed as uninteresting outliers. To the extent such errors are common (and our survey suggests they are), the Confrontation Clause's backstop role becomes a significant feature of the evidentiary landscape.

Finally, we find that the type of backstop offered by *Crawford* differs from the one previously provided by *Ohio v. Roberts*.[31] Post-*Crawford* confrontation doctrine restricts the admission of relatively formal statements, typically generated by the government in

28. Ohio v. Roberts, 448 U.S. 56, 66 (1980) ("Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception.").

29. *See infra* Part IV.

30. 30B CHARLES A. WRIGHT & JEFFREY BELLIN, FEDERAL PRACTICE AND PROCEDURE, iii (2020 ed.).

31. *See infra* Part I.

anticipation of trial.[32] This focus comes through in the surprising number of Confrontation Clause violations we found that arose from evidence admitted (erroneously) under the public records hearsay exception.[33] When the public records exception is used improperly, an occurrence we found with surprising frequency, the product is an easily recognizable Confrontation Clause violation.[34] This would not have been the case under *Roberts*, which sought to exclude not formal out-of-court statements but unreliable ones. The benefit of this shift, from a defense perspective, is that it forces the government to introduce live testimony to prove critical elements of criminal offenses like a drunk driver's blood alcohol content or the chemical composition of an illegal narcotic. The cost is that *Crawford*'s new focus eliminates any remaining constitutional barriers to the admission of casual remarks like those uttered orally or in social media and text messages – the modern equivalent of Chief Justice Marshall's "mere verbal declarations."[35]

The Article proceeds in four parts. Part I offers a brief summary of confrontation doctrine, focusing on the transition from *Roberts* to *Crawford* and the narrowing of the reinvigorated confrontation right in the cases that followed.[36] Part II introduces the modern hearsay framework and highlights the pathways for admission of out-of-court statements in American trials.[37] It then analyzes these pathways to determine whether evidence that can be introduced under the hearsay rules is likely to result in a Confrontation Clause violation. This analysis generates specific predictions of what we would expect to find in criminal cases after 2015. Part III tests the hypothesis presented in Part II by presenting the results of our empirical survey of federal and state cases.[38] Finally, Part IV explores the implications of our findings.[39] Our study reveals a confrontation right that is playing a smaller role than either Chief Justice Marshall (circa 1807) or the *Crawford* opinion (circa 2004) envisioned. But the right still influences the evidentiary landscape in nuanced and underappreciated ways.

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32. *See infra* Part I.

33. *See* FED. R. EVID. 803(8).

34. *See, e.g.*, United States v. Barber, 937 F.3d 965, 969 (7th Cir. 2019); United States v. Cerda-Ramirez, 730 F. App'x 449, 452 (9th Cir. 2018); United States v. Esparza, 791 F.3d 1067, 1068–69 (9th Cir. 2015).

35. *See infra* Part I; *see also* United States v. Burr, 25 F. Cas. 187 (C.C.D. Va. 1807) (No. 14,694).

36. *See infra* Part I.

37. *See infra* Part II.

38. *See infra* Part III.

39. *See infra* Part IV.

I. THE HISTORY OF THE CONFRONTATION RIGHT

Chief Justice Marshall, sitting as a trial judge in Aaron Burr's treason trial, suggested that hearsay would rarely be admissible in a criminal trial.[40] Our empirical survey, however, shows the opposite, including prosecutors' regular use of the very type of hearsay Marshall condemned. This Part explains how American courts moved from Marshall's strict interpretation of the Confrontation Clause to a less restrictive modern reality.

The Supreme Court's first significant Confrontation Clause ruling came in 1895 in *Mattox v. United States*. There, the Court turned away a Confrontation Clause challenge to the admission of a transcript of a deceased witness's trial testimony.[41] Since the defendant in *Mattox* had previously cross-examined the absent declarant, the Court rejected "technical adherence to the letter of [the] constitutional provision" in favor of "the necessities of the case."[42] *Mattox*'s primary significance was its recognition that the confrontation right bars some, but not all, out-of-court statements offered against a defendant at trial.[43] The Supreme Court has navigated a middle course ever since.[44] Some hearsay is constitutionally prohibited, and some is permitted. The line separating the two has proven difficult to draw.

After a century of ad hoc decisions, the Supreme Court first offered a comprehensive dividing line in *Ohio v. Roberts* decided in 1980.[45] The 6-3 opinion declared that a judicial finding of reliability—which could be established through the application of a "firmly-rooted" hearsay exception—sufficed to overcome Confrontation Clause objections.[46] Under *Roberts*,

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40. *See, e.g.*, United States v. Burr, 25 F. Cas. 187 (C.C.D. Va. 1807) (No. 14, 694).

41. Mattox v. United States, 156 U.S. 237, 243–44 (1895).

42. *Id.*

43. *Mattox* supported its point by pointing to the admission of dying declarations. *Id.*

44. Crawford v. Washington, 541 U.S. 36, 50–51 (2004); Ohio v. Roberts, 448 U.S. 56, 66 n.9 (1980).

45. *Roberts*, 448 U.S. at 66.

46. *Id.*; *see* Leslie Cahill, *Witnesses in the Confrontation and Self-Incrimination Clauses: The Constitution's Fraternal Twins*, 46 AM. J. CRIM. L. 157, 160–61 (2019) ("*Roberts* thus equated the Confrontation Clause with the law of evidence, where a court's determination that a statement satisfied an established hearsay exception would simultaneously fulfill the constitutional mandate.").

> [P]rosecutors could generally assume that any evidence that could overcome a hearsay objection would similarly survive Confrontation Clause challenge. Federal courts deemed most hearsay exceptions contained in the Federal Rules of Evidence and analogous state evidence codes to be "firmly rooted." Even when that was not the case, the evidence was still easily admitted. Hearsay exceptions that were not firmly rooted in the historical record typically required something akin to the "particularized guarantees of trustworthiness" that served as an alternative route to satisfying *Roberts*' reliability test.[47]

The widely criticized *Roberts* framework left the confrontation right a pale shadow of the protection that Chief Justice Marshall envisioned. After *Roberts*, "mere verbal declarations"[48] could routinely be offered against the accused as long as they fit a traditional hearsay exception. This rendered the confrontation right largely redundant, backstopping the familiar state law hearsay prohibitions that long ago took root in American jurisdictions.[49]

Something unexpected happened in 2004. In *Crawford v. Washington*, the Supreme Court scrapped *Roberts*.[50] Liberal Justices joined with conservatives, signing onto an opinion crafted by Justice Scalia that breathed new life into the confrontation right.[51] "*Crawford* was a victory not just for criminal defendants, but for the Constitution as well."[52] Not only did the case raise the hurdles for prosecution evidence, it strengthened the doctrine's legitimacy by tying it to the Sixth Amendment text. In a remarkable development, considering

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47. WRIGHT & BELLIN, *supra* note 30, § 6704, at 25–26.

48. United States v. Burr, 25 F. Cas. 187, 193 (C.C.D. Va. 1807) (No. 14,694).

49. Jerry P. Coleman, *How A Conservative Supreme Court Justice Rocked the Criminal Evidence World by Giving Defendants New Constitutional Rights: The Legacy of 2004's* Crawford v. Washington, 53 U.S.F.L. REV. 1, 1 (2018) (former practitioner describing ease with which hearsay could be admitted under Roberts); Richard D. Friedman, *Rescued from the Grave and Then Covered with Mud: Justice Scalia and the Unfinished Restoration of the Confrontation Right*, 101 MINN. L. REV. HEADNOTES 39, 40 (2016) ("The *Roberts* doctrine, especially as it was developed by subsequent cases, virtually constitutionalized contemporary conceptions of the law of hearsay.").

50. Whorton v. Bockting, 549 U.S. 406, 416 (2007) ("The *Crawford* rule is flatly inconsistent with the prior governing president, *Roberts*, which *Crawford* overruled.").

51. *See* Crawford v. Washington, 541 U.S. 36 (2004).

52. Bellin, *supra* note 23, at 1867.

that the Court was overruling decades of precedent, seven Justices joined the opinion. No longer would the constitutional analysis turn on the hearsay rules or a judicial finding of reliability, the Court triumphantly announced: "The only indicium of reliability sufficient to satisfy constitutional demands, is the one the Constitution actually prescribes: confrontation."[53]

The ruling's potential was reflected in the excitement it generated among insiders. Defense attorneys and scholars celebrated the case.[54] Prosecutors warned that *Crawford* created major new obstacles to prosecutions for offenses ranging from drunk driving to drug offenses to domestic violence to murder.[55] The Court's response to these warnings was poignant. Obstacles to prosecution was a feature not a bug. "The Confrontation Clause may make the prosecution of

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53. *Crawford*, 541 U.S. at 69. *Crawford* emphasized that the Sixth Amendment's "core concerns" differed from those of the hearsay rules. *Id.* at 51; *see* Sklansky, *supra* note 12, at 4 (*Crawford* "ended the 'shotgun wedding' of hearsay and confrontation"). Writing before *Michigan v. Bryant* and *Ohio v. Clark*, Sklansky presciently noted that although *Crawford* "severed the *operational* link between hearsay and confrontation," the decision "left intact, and actually strengthened, the *historical* link between hearsay and confrontation: the idea that the Confrontation Clause and the hearsay rule share the same origins and the same thrust." *Id.* at 4–5.

54. *See, e.g.*, Bibas, *supra* note 16, at 192 (describing *Crawford* as "a successful blend of originalism and formalism" that announced a rule that "turns on simple, clear requirements of testimony, cross-examination, and unavailability, rather than ad hoc estimates of reliability"); Jeffrey L. Fisher, *Categorical Requirements in Constitutional Criminal Procedure*, 94 GEO. L.J. 1493, 1496 (2006) (describing *Crawford* as a "significant victor[y]" for the "criminal defense bar" that "restored clarity to confrontation law"); Richard D. Friedman, *Grappling with the Meaning of "Testimonial"*, 71 BROOK. L. REV. 241, 273 (2005) (arguing that *Crawford* "represent[s] a great and beneficial development"); Tom Lininger, *Prosecuting Batterers After* Crawford, 91 VA. L. REV. 747, 750, 767 (2005) (stating that *Crawford*'s "reasoning is difficult to refute, and its fealty to early constitutional history is admirable"; it is "a salutary development in confrontation law"); Robert P. Mosteller, Crawford v. Washington*: Encouraging and Ensuring the Confrontation of Witnesses*, 39 U. RICH. L. REV. 511, 512, 522 (2005) (explaining that *Crawford* has "given real teeth to the Confrontation Clause in several frequently encountered and important situations" and forecasting "a future in which substantially more confrontation may be provided"); Roger C. Park, *Purpose As a Guide to the Interpretation of the Confrontation Clause*, 71 BROOK. L. REV. 297, 297 (2005) ("I applaud the change from *Ohio v. Roberts* to *Crawford v. Washington* . . . ."); Robert M. Pitler, Crawford *and Beyond: Exploring the Future of the Confrontation Clause in Light of Its Past*, 71 BROOK. L. REV. 1, 12–13 (2005) (recounting post-*Crawford* exuberance among attorneys and scholars involved in the case, as well as in newspaper reports).

55. *See* Lininger, *supra* note 54, at 749 ("[W]ithin days—even hours—of the *Crawford* decision, prosecutors were dismissing or losing hundreds of domestic violence cases that would have presented little difficulty in the past." (footnote omitted)).

criminals more burdensome, but that is equally true of the right to trial by jury and the privilege against self-incrimination. The Confrontation Clause—like those other constitutional provisions—is binding, and we may not disregard it at our convenience."[56]

Crawford promised a reinvigorated confrontation right that could once again make a difference in criminal trials, since it would no longer simply parallel existing hearsay rules.[57] David Sklansky summarized the "conventional understanding" of *Crawford*: "No longer 'shrouded by the hearsay rule,' confrontation doctrine can develop independently—and, with luck, more sensibly."[58]

Crawford directed lower courts to determine whether hearsay offered by the prosecution was "testimonial," rather than whether it qualified for admission under "firmly rooted" hearsay rules.[59] For testimonial evidence, the Sixth Amendment required confrontation, with only a few historical exceptions.[60] By "testimonial evidence" the Court explained that it meant things like "*ex parte* in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially."[61] But in a critical omission, the Court did not define testimonial, stating: "We leave for another day any effort to spell out a comprehensive definition of 'testimonial.'"[62] The *Crawford* Court also declined to resolve the treatment of nontestimonial hearsay. Later cases gave a definitive answer. "[T]he Confrontation Clause has no application to such statements. . ."[63]

The Supreme Court's decision to severely restrict testimonial hearsay and leave non-testimonial hearsay completely unregulated placed massive pressure on the dividing line. In later cases, a narrow definition of "testimonial" emerged.[64] Although the Court offered

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56. Melendez-Diaz v. Massachusetts, 557 U.S. 305, 325 (2009).

57. Lininger, *supra* note 54, at 750 ("Statutory hearsay law is now misaligned with constitutional confrontation law . . . .").

58. Sklansky, *supra* note 12, at 4.

59. WRIGHT & BELLIN, *supra* note 30, § 6704, at 26 ("This formulation left no room for traditional hearsay rules.").

60. *See* Crawford v. Washington, 541 U.S. 36, 51 (2004).

61. *See id.*

62. *Id.* at 68.

63. Whorton v. Bockting, 549 U.S. 406, 420 (2007).

64. Bellin, *supra* note 23, at 1868 (2012) ("The current Supreme Court's conclusion that the Confrontation Clause addresses *only* 'testimonial' statements, in concert with its pointed narrowing of the definition of 'testimonial,' results in the

varying formulations, its most recent cases, *Michigan v. Bryant*[65] and *Ohio v. Clark*,[66] settle on a formula that favors the prosecution. The only statements that qualify as "testimonial" are those "procured with a primary purpose of creating an out-of-court substitute for trial testimony."[67] Although earlier opinions employed a more flexible standard, the Court's most recent Confrontation Clause opinion, *Ohio v. Clark*, repeats this "out-of-court substitute for trial testimony" formula in its introduction and conclusion,[68] summarizing that: "In the end, the question is whether, in light of all the circumstances, viewed objectively, the 'primary purpose' of the conversation was to 'creat[e] an out-of-court substitute for trial testimony.'"[69] As explained below, most out-of-court statements admissible under the hearsay rules do not meet this definition. Consequently, they will be admissible—as a constitutional matter—even when the defendant has no opportunity to confront the out-of-court declarant.

The "testimonial" definition does capture two important types of potential prosecution evidence: statements obtained during formal police interrogations and expert analysis offered in affidavit form, as in cases requiring proof of the chemical composition of an illegal narcotic or a defendant's blood alcohol content.[70] With one exception discussed below, out-of-court statements in these genres, however, are typically inadmissible under traditional hearsay rules. Thus, with respect to the bulk of *admissible* hearsay statements, this narrow "testimonial" definition dramatically reduces the significance of the confrontation right.

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elimination (not strengthening) of the constitutional restrictions on the bulk of admissible hearsay.").

65. Michigan v. Bryant, 562 U.S. 344, 358 (2011).

66. Ohio v. Clark, 576 U.S. 237, 245 (2015).

67. *Id.* at 245; *see also Bryant*, 562 U.S. at 358 ("[A] statement is not procured with a primary purpose of creating an out-of-court substitute for trial testimony."). "[C]ertain statements are, by their nature, made for a purpose other than use in a prosecution . . . ." *Bryant*, 562 U.S. at 362 n.9.

68. *Clark*, 576 U.S. at 245, 250–51 (quoting *Bryant*, 562 U.S. at 358) ("[W]e ask whether a statement was given with the 'primary purpose of creating an out-of-court substitute for trial testimony.'").

69. *Id.* at 245 (quoting *Bryant*, 562 U.S. at 358).

70. *See* Bullcoming v. New Mexico, 564 U.S. 647, 651–52, 657 (2011) (lab report reporting defendant's blood alcohol content); Melendez-Diaz v. Massachusetts, 557 U.S. 305, 308–09, 311, 329 (2009) (certificate attesting that the drugs were cocaine); *see also* Williams v. Illinois, 567 U.S. 50, 56–59 (2012) (the Court rejecting a constitutional challenge in a recent case involving expert analysis of a DNA sample, producing no majority opinion, and leaving the law in this area essentially unchanged).

Adding to the problem for criminal defendants, the most recent confrontation cases pair the narrow "testimonial" definition with hints at a renewed constitutional role for the hearsay rules. This language is most prominent in *Michigan v. Bryant*.[71] There, the shifting majority announced that: "In making the primary purpose determination, standard rules of hearsay, designed to identify some statements as reliable, will be relevant."[72] This followed an earlier passage in the majority opinion that tied the Confrontation Clause analysis to the elements of the excited utterance hearsay exception.[73] In a footnote, the Court further tethered the Confrontation Clause and hearsay analysis, stating, "[m]any other exceptions to the hearsay rules similarly rest on the belief that certain statements are, by their nature, made for a purpose other than use in a prosecution and therefore should not be barred by hearsay prohibitions."[74] The footnote signals that out-of-court statements admitted under these exceptions, including the exception for co-conspirator statements (as in the *Burr* trial) and statements against interest (relied on by the prosecution in *Crawford*), will be admissible without confrontation.[75] The *Bryant* majority must have been aware that this dicta resonated not with *Crawford*, but with the decision that case overruled, *Ohio v. Roberts*. It was no surprise, then, that the Court's clear effort to reconnect "the standard hearsay exceptions and exemption from the confrontation requirement" drew Justice Scalia's wrath.[76] Dissenting, Justice Scalia wrote:

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71. *Bryant*, 562 U.S. at 357–59.

72. *Id.* at 358–59.

73. *See id.* at 361.

> This logic is not unlike that justifying the excited utterance exception in hearsay law. Statements 'relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition' are considered reliable because the declarant, in the excitement, presumably cannot form a falsehood.

Id. (citations omitted).

74. *Id.* at 362 n.9.

75. *Id.* ("See, *e.g.*, Fed. Rules Evid. 801(d)(2)(E) (statement by a co-conspirator during and in furtherance of the conspiracy); 803(4) (statements for purposes of medical diagnosis or treatment); 803(6) (records of regularly conducted activity); 803(8) (public records and reports); 803(9) (records of vital statistics); 803(11) (records of religious organizations); 803(12) (marriage, baptismal, and similar certificates); 803(13) (family records); 804(b)(3) (statement against interest)" . . . .).

76. *Id.* at 392 (Scalia, J., dissenting).

> Is it possible that the Court does not recognize the contradiction between its focus on reliable statements and *Crawford*'s focus on testimonial ones? Does it not realize that the two cannot coexist? Or does it intend, by following today's illogical roadmap, to resurrect *Roberts* by a thousand unprincipled distinctions without ever explicitly overruling *Crawford*?[77]

Still buzzing four years later, Justice Scalia continued this critique in a concurring opinion in *Ohio v. Clark*: "A suspicious mind (or even one that is merely not naïve) might regard this distortion [of the post-Crawford jurisprudence] as the first step in an attempt to smuggle longstanding hearsay exceptions back into the Confrontation Clause—in other words, an attempt to return to *Ohio v. Roberts*."[78]

The late Justice's critique stands as the last word in the Supreme Court's Confrontation Clause jurisprudence. The unfinished interpretive task now shifts to the lower courts. It is in these courts that the charge levied by Justice Scalia must be evaluated. Has the doctrine developed the robust protections against prosecution hearsay envisioned in *Crawford*, reverted to the prosecution-friendly *Ohio v. Roberts* test, or evolved into something else entirely?

II. THE MODERN CONFRONTATION CLAUSE AND THE HEARSAY RULES

Ohio v. Roberts made the relationship between the hearsay rules and the Confrontation Clause straightforward. After *Crawford*, we get mixed messages. *Crawford* claimed to sever the connection.[79] Later cases, however, undermined that claim, drawing a rebuke from *Crawford*'s author.[80] This Part seeks to resolve the dispute, comprehensively analyzing the connection between the hearsay rules and the confrontation right as it stands after the Court's most recent confrontation decision in *Ohio v. Clark*.[81]

As explained below, our analysis concludes that few statements that are admissible under the traditional hearsay framework will be vulnerable to exclusion under the modern Confrontation Clause. The primary reason for the overlap of the confrontation right and the hearsay rules is the Supreme Court's narrow definition of

77. *Id.* at 392–93.
78. Ohio v. Clark, 576 U.S. 237, 253 (2015) (Scalia, J., concurring).
79. *See supra* Part I.
80. *See Bryant*, 562 U.S. at 379–95 (2011) (Scalia, J., dissenting).
81. *See Clark*, 576 U.S. at 237–56.

"testimonial." Consistent with both the Court's hints in *Bryant* and Justice Scalia's warning in the same case,[82] out-of-court statements admissible through traditional hearsay rules will rarely fit the definition of "testimonial." In addition, the Court has carved out a series of specific exceptions from the Confrontation Clause's protections even for testimonial statements. Those rulings further limit the likelihood that a statement will be admissible under the hearsay rules but barred by the Confrontation Clause. Finally, the Supreme Court also excludes out-of-court statements offered for something other than their truth—statements that do not constitute "hearsay" under traditional evidence rules—from Confrontation Clause scrutiny.[83]

Our analysis demonstrating the extensive overlap between the modern confrontation right and the hearsay rules is set out step by step below. Specifically, we apply a constitutional lens to every potential avenue a prosecutor can use to introduce out-of-court statements under nonconstitutional evidence rules. We use the Federal Rules of Evidence to model our analysis, as those rules apply to trials in federal courts and serve as the template for most state evidence rules.[84]

A. Statements Not Offered for the Truth of the Matter Asserted

The evidence rules in every American jurisdiction prohibit hearsay.[85] These rules define "hearsay" as an out-of-court statement offered to prove "the truth of the matter asserted" by the out-of-court speaker (the "declarant").[86] A corollary to this definition is that when an out-of-court statement is *not* offered to prove the truth of the matter asserted, it avoids the hearsay prohibition.[87] This logic creates

82. *See supra* Part I.

83. Crawford v. Washington, 541 U.S. 36, 60 n.9 (2004).

84. *See* Bennett Capers, *Evidence Without Rules*, 94 NOTRE DAME L. REV. 867, 872 (2018) ("[F]orty-five states and Puerto Rico have all adopted or modeled their own rules on the Federal Rules of Evidence.").

85. *See* Bellin, *supra* note 11 at 27 n.78 (2013) ("The now-codified prohibition, with its many discrete exceptions, is the most distinctive feature of American evidence law."); Edward J. Imwinkelried, *The Constitutionalization of Hearsay: The Extent to Which the Fifth and Sixth Amendments Permit or Require the Liberalization of the Hearsay Rules*, 76 MINN. L. REV. 521, 521 (1992) ("[E]very American jurisdiction currently recognizes a form of the rule against hearsay."); *cf.* Chambers v. Mississippi, 410 U.S. 284, 298 (1973) (referencing "[t]he hearsay rule, which has long been recognized and respected by virtually every State").

86. *See, e.g.*, FED. R. EVID. 801(c).

87. *See id.*

a common pathway for the admission of out-of-court statements made by absent (i.e., non-testifying) declarants.

Since, as we will see, even courts get this analysis wrong, it may be helpful to offer an example. Imagine that an anonymous 911 caller reports that, "a guy driving a blue car with an 'Abolish Police' bumper sticker just hit a bicyclist and drove away." A recording of the call would be hearsay if offered as evidence of the offense at a later hit-and-run trial. But if the defendant claimed that the police pulled him over to harass him for the "Abolish Police" bumper sticker, the call becomes relevant for another purpose. The prosecutor could introduce the call to explain why the police stopped the defendant's car as opposed to others in the vicinity of the collision. Whether or not the caller was being truthful, the call helps to explain why the police acted as they did. That means the recorded call is relevant for something other than "the truth of the matter asserted," and is not hearsay.[88]

Paralleling the hearsay rules' treatment of out-of-court statements, the Supreme Court states in a footnote in *Crawford* that, "The Clause also does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted."[89] Consequently, a common pathway for introducing out-of-court statements under the hearsay rules—offering statements like the 911 call described above for something other than the truth of the matter asserted—is not restricted by the Confrontation Clause.[90]

B. Statements of a Testifying Witness

Even when evidence fits the hearsay definition as an out-of-court statement offered for the truth of the matter asserted, there are

88. *See infra* Part III.B.6.

89. Crawford v. Washington, 541 U.S. 36, 60 n.9; *see also* Tennessee v. Street, 471 U.S. 409, 414 (1985) (emphasizing that the "*nonhearsay* aspect" of an out-of-court statement required confrontation only of the person who relayed the statement, not the statement's declarant). This was the rule under *Roberts* and has carried over after *Crawford*. *See* Ohio v. Roberts, 448 U.S. 56, 66 (1980) (explaining that the Confrontation Clause is triggered when a statement of "a hearsay declarant is not present for cross-examination at trial"). Interestingly, *Crawford*'s perspective shift to the understanding of the right at the time of the Framing complicates what was once a simple rule. The hearsay definition has narrowed between the time of the Framing and the modern era. *See* WRIGHT & BELLIN, *supra* note 30, § 6724, at 76, 78, 80–82 (2017) (describing changes). But the potential mismatch between the Confrontation Clause and the evidence rules' definitions of hearsay has not (yet) garnered any notice in the Supreme Court or lower court opinions.

90. *See infra* Part III.B.6.

numerous evidence rules that may permit its admission.[91] The first listed exemptions in the federal rules concern prior statements of testifying witnesses.[92] These exemptions for a witness's prior inconsistent and consistent statements, as well as prior statements of identification, all require the declarant to testify.[93]

Statements introduced under these rules face no resistance from the Confrontation Clause. The Supreme Court has long held that the out-of-court declarant's presence as a witness at trial resolves any Confrontation Clause objection.[94] The Court reaffirmed this point in *Crawford*, again in a footnote, stating that "when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements."[95] Consequently, hearsay admitted under the hearsay exemptions for prior statements of a testifying witness will not create any potential for a Confrontation Clause violation.[96]

C. Statements of a Party

A defendant's own statements are among the most damaging out-of-court statements prosecutors can offer at trial: "the trial equivalent of a deadly weapon."[97] These statements are typically introduced to prove the truth of the matter asserted (e.g., "I robbed the bank") and so are technically hearsay. Nevertheless, they are admitted in American jurisdictions, when offered by the prosecution, under a hearsay exemption for statements of an opposing party.[98]

Although the Supreme Court has not directly resolved this issue, it seems clear that there is no confrontation problem with offering the defendant's own statements even when the defendant does not testify at the trial. There are problems with the hearsay exemption as a

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91. *See, e.g.*, FED. R. EVID. 803.

92. *See* FED R. EVID. 801(d)(1). The rules define certain statements as "not hearsay" even if they fall within the hearsay definition. *Id.* Nothing turns on this nomenclature.

93. *See id.*

94. California v. Green, 399 U.S. 149, 162 (1970).

95. Crawford v. Washington, 541 U.S. 36, 60 n.9 (2004).

96. There is a small subset of cases that arise where a witness testifies, but due to lack of memory or other reasons is arguably not available for cross-examination. The Supreme Court largely closed off challenges along these lines in *United States v. Owens*, where it stated, "[o]rdinarily a witness is regarded as 'subject to cross-examination' when he is placed on the stand, under oath, and responds willingly to questions." 484 U.S. 554, 561 (1988).

97. United States v. McKeon, 738 F.2d 26, 32 (2d Cir. 1984).

98. *See, e.g.*, FED. R. EVID. 801(d)(2).

practical matter.[99] But it is hard to argue that the defendant has a constitutional claim to confront the declarant when the defendant *is* the declarant.

Importantly, the evidence rules admit not only direct statements of a party, but also a series of indirect opposing party statements, under subsections (A) through (E) of the party opponent rule.[100] The various subsections trigger distinct Confrontation Clause analysis. With respect to the first two provisions, statements of a party (A) and adopted admissions (B), there is no Confrontation Clause problem following the logic sketched above. The statements are admitted as the parties' own statements, and criminal defendants have never been afforded the right to confront themselves.

Few statements admitted under the next subsection (C)—statements "made by a person whom the party authorized to make a statement on the subject"[101]—could conceivably violate the Confrontation Clause. The exception can apply to circumstances where the party did not authorize the precise wording of an incriminating statement made by, for example, the defendant's broker or attorney. But even in those cases, the statement will likely not be testimonial (created as a substitute for trial testimony). And playing out the scenario, the universe of testimonial hearsay statements made by a defendant's spokesperson offered at trial *by the prosecution* in lieu of the actual declarant seems vanishingly small. A similar pattern repeats for statements of an employee or agent made during the course of employment, subsection (D) of the party opponent hearsay exemption.[102] With enough creativity, one can come up with a hypothetical scenario where the defendant's employee or agent utters a testimonial statement admissible under this rule, but again the universe of such statements (that are valuable to the prosecution) seems too small to be significant.

The last party opponent exemption, subsection (E), covers coconspirator statements.[103] This rule generates a wealth of prosecution evidence, but hearsay statements admitted under the exception will almost never be testimonial.[104] The rule requires that

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99. *See* Jeffrey Bellin, *The Evidence Rules that Convict the Innocent*, 106 CORNELL L. REV. 305, 307–11, 321, 330–31, 334–35, 338–39 (2021) (highlighting historical resistance to hearsay confessions and the largely forgotten evidence policy reasons that justified this resistance).

100. *See* FED. R. EVID. 801(d)(2).

101. *Id.* at 801(d)(2)(C).

102. *Id.* at 801(d)(2)(D).

103. *Id.* at 801(d)(2)(E).

104. *See infra* Part III.B.2.

qualifying statements be made "during and in furtherance of the conspiracy."[105] Outside of a John Grisham novel, it is hard to conceive of statements meeting this description that would fit the Court's definition of testimonial: statements made "with the 'primary purpose of creating an out-of-court substitute for trial testimony.'"[106]

D. Rule 803 Exceptions

Rule 803 contains twenty-three hearsay exceptions.[107] These exceptions can be invoked "regardless of whether the declarant is available as a witness."[108] The first four hearsay exceptions in the rule—present sense impressions,[109] excited utterances,[110] state of mind,[111] and statements for purposes of medical diagnosis or treatment[112]— typically concern contemporaneous expressions of feelings or observations. Statements admitted under these exceptions are unlikely to be testimonial in light of the disconnect between the contemporaneity requirements and the Court's narrow definition of testimonial described in Part I.[113]

Some statements admitted under the excited utterance exception may be testimonial, however, particularly in jurisdictions where courts stretch that exception to allow well-after-the-exciting-occurrence statements.[114] In fact, one of the post-*Crawford* cases where the Supreme Court found a confrontation violation, *Hammon v. Indiana*, involved the excited utterance exception.[115] But the application of that exception to the facts of *Hammon* illustrates the disconnect.[116] The statements in *Hammon* were taken by police "some

105. FED. R. EVID. 801(d)(2)(E).

106. Ohio v. Clark, 576 U.S. 237, 250–51 (2015) (quoting Michigan v. Bryant, 562 U.S. 344, 358 (2011)).

107. FED. R. EVID. 803.

108. *Id.*

109. *Id.* at 803(1).

110. *Id.* at 803(2).

111. *Id.* at 803(3).

112. *Id.* at 803(4).

113. *See supra* Part I. FED. R. EVID. 803(4) also admits statements describing past (i.e., non-contemporaneous) events if made for purposes of medical treatment or diagnosis, rendering them nontestimonial on the grounds discussed in the subsequent discussion.

114. *See* Davis v. Washington, 547 U.S. 813, 817–19, 828–29 (2006). The exception permits: "A statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused." FED. R. EVID. 803(2).

115. *Davis*, 547 U.S. at 819–20, 829–30 (*Hammon v. Indiana* was consolidated with *Davis v. Washington*).

116. *See id.* at 830.

time after the events described were over"; the emergency had passed and the victim "deliberately recounted, in response to police questioning, how potentially criminal past events began and progressed."[117] Of course, the application of Indiana evidence law was not before the Court. The statements were testimonial and, thus, prohibited by the Confrontation Clause.[118] This pattern can be expected to repeat, but only in circumstances like *Hammon*, where courts apply the excited utterance exception to statements on the exception's outer margins. In fact, in *Bryant* the Supreme Court suggested that few excited utterances will be testimonial.[119] There, the Court explained that post-*Crawford* case law suggesting that a statement is nontestimonial when uttered in response to an emergency "is not unlike that justifying the excited utterance exception in hearsay law."[120] The Court went on to deem the statements admitted as excited utterances in *Michigan v. Bryant* nontestimonial despite a context similar to *Hammon*: controlled police questioning that elicited statements of obvious value to a later prosecution.[121] The lower courts have picked up on this analysis, making blanket statements like: "We have held that 911 calls are admissible as nontestimonial statements when they are 'excited utterances.'"[122]

Further into Rule 803, Confrontation Clause violations become even less likely. Statements admitted as recorded recollections[123] will not violate the Confrontation Clause because that exception requires the declarant to testify.[124] The ten exceptions in the middle of Rule

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117. *Id.*
118. *Id.*
119. *See* Michigan v. Bryant, 562 U.S. 344, 361–62 (2011).
120. *Id.*

> Statements "relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition," are considered reliable because the declarant, in the excitement, presumably cannot form a falsehood. An ongoing emergency has a similar effect of focusing an individual's attention on responding to the emergency.

Id. (citations omitted).
121. *Id.* at 349–50, 377–78.
122. United States v. Robertson, 948 F.3d 912, 916 (8th Cir. 2020).
123. FED. R. EVID. 803(5).
124. WRIGHT & BELLIN, *supra* note 30, § 6853, at 338–39 (2017) ("Declarant Must Testify"); *see supra* Part II.B.

803,[125] covering records of business, family, religious and governmental organizations, will typically be nontestimonial because the exceptions apply to statements generated for specific purposes, none of which includes the purpose of creating a substitute for trial testimony.[126] In fact, courts interpret the business records hearsay exception to include an implicit requirement that qualifying documents must not be created for purposes of litigation.[127]

Public records, by contrast, can be generated for purposes of litigation.[128] For example, a government chemist's analysis of an illicit narcotic would certainly be testimonial.[129] But the public records hearsay exception does not permit records memorializing the observations of "law-enforcement personnel" to be introduced in a criminal case.[130] Thus, the very types of public records that would most likely violate the Confrontation Clause are not admissible under the public records hearsay exception.[131]

The exceptions that come at the end of Rule 803 are rarely invoked and will almost never generate testimonial statements. Ancient documents[132] typically predate any controversy and so will not be testimonial. Similarly, it is hard to imagine examples where market reports,[133] learned treatises,[134] various types of court judgements,[135] and reputation evidence[136] could be testimonial.

E. Rule 804 Exceptions

Rule 804 collects another five hearsay exceptions.[137] Each of the exceptions requires that the declarant be unavailable to testify.[138] Consequently, if the prosecutor invokes these exceptions, out-of-court statements will, by definition, be introduced against the defendant

125. FED. R. EVID. 803(6)–(15).
126. *See id.*
127. WRIGHT & BELLIN, *supra* note 30, § 6865, at 357–58 (2017) ("Anticipation of Litigation").
128. *See, e.g.*, Melendez-Diaz v. Massachusetts, 557 U.S. 305, 322–24 (2009).
129. *See id.* at 323 n.9.
130. FED. R. EVID. 803(8)(A)(ii); WRIGHT & BELLIN, *supra* note 30, § 6885, at 384–85.
131. FED. R. EVID. 803(8)(A)(ii).
132. *Id.* at 803(16).
133. *Id.* at 803(17).
134. *Id.* at 803(18).
135. *Id.* at 803(22)–(23).
136. *Id.* at 803(19)–(21).
137. *Id.* at 804.
138. *Id.* at 804(b).

without the declarant testifying at trial.[139] Still, only one of the Rule 804 exceptions appears likely to permit statements that could violate the Confrontation Clause as it is currently interpreted.[140]

The Rule 804 exception for former testimony will always permit the introduction of "testimonial" hearsay.[141] The exception requires, however, that the person against whom the hearsay is introduced had a previous opportunity to cross-examine the declarant.[142] As far back as *Mattox*, the Supreme Court established that this was sufficient to satisfy the Confrontation Clause.[143] The Court reiterated this notion in *Crawford*, stating: "[T]he Framers would not have allowed 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."[144] As the former testimony exception in Rule 804 requires precisely these conditions, statements that qualify for admission under the rule will not violate the Confrontation Clause.[145]

The next Rule 804 exception, for dying declarations, is one of two hearsay exceptions the Supreme Court singled out in *Crawford* as potentially consistent with the Confrontation Clause "on historical grounds."[146] Later in *Giles v. California*, the Supreme Court again suggested that it would recognize a confrontation exception for "declarations made by a speaker who was both on the brink of death and aware that he was dying."[147] This sounds like the familiar dying declaration hearsay exception found in Rule 804; in fact, it is slightly broader than that exception.[148] While it is possible that courts will

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139. As one of the forms of unavailability is memory loss, see FED. R. EVID. 804(a)(3), there is a possibility for the declarant to testify in unusual cases and nevertheless be deemed unavailable under this rule. In those circumstances, a Confrontation Clause challenge would likely be unsuccessful due to the declarant's presence at the trial. *See* California v. Green, 399 U.S. 159, 162 (1970); *supra* Part II.B.

140. *See* FED. R. EVID. 804(b)(1).

141. *Id.*

142. *Id.* at 804(b)(1)(B) ("[I]s now offered against a party who had . . . an opportunity and similar motive to develop it by direct, cross-, or redirect examination").

143. *See* Mattox v. United States, 156 U.S. 237, 249–50 (1895).

144. Crawford v. Washington, 541 U.S. 36, 53–54 (2004).

145. *See id.* at 54.

146. *Id.* at 56 n.6.

147. Giles v. California, 554 U.S. 353, 358 (2008).

148. *See* FED. R. EVID. 804(b)(2) ("In a prosecution for homicide or in a civil case, a statement that the declarant, while believing the declarant's death to be imminent, made about its cause or circumstances.").

sketch distinct contours for the dying declaration confrontation exception, for now the courts appear to be treating the hearsay and confrontation variants identically.[149] Consequently, out-of-court statements admissible under a dying declaration hearsay exception will rarely (if ever) violate the Confrontation Clause.

Rule 804 includes an exception for certain statements of a person's family history. It is difficult to imagine statements offered under this exception, to prove things like a person's "ancestry,"[150] playing a significant role in a criminal case. To the extent such statements are relevant to a criminal prosecution they will also typically be nontestimonial.[151]

This brings us to the exception most likely to capture statements whose admission would violate the Confrontation Clause: statements against interest.[152] This exception arises most frequently when a defendant commits an offense with the assistance of another person.[153] In those circumstances, the accomplice may later make a statement admitting guilt that also references the defendant. When the accomplice later refuses to testify or is otherwise unavailable, the prosecution can seek to introduce their out-of-court statement as a statement against interest.[154] The prosecutor will cite the portion of the rule that permits a hearsay statement of an unavailable declarant if the statement has "so great a tendency to . . . expose the declarant to . . . criminal liability" that "[a] reasonable person in the declarant's position would have made it only if the person believed it to be true[.]"[155]

The case law contains two common species of against-interest statements.[156] The first involves statements by an accomplice to police interrogators. Such statements are likely to be deemed testimonial and so inadmissible under the Confrontation Clause unless the declarant testifies. In fact, the prosecution invoked the statement-against-interest exception at trial in *Crawford* and the Supreme

149. *See* WRIGHT & BELLIN, *supra* note 30, § 6704, at 27–28 (making a similar point).

150. FED. R. EVID. 804(b)(4).

151. *See id.* at 804(b)(4)(A) (excepting certain statements about a person's "birth, adoption, legitimacy, ancestry, marriage, divorce, relationship by blood, adoption, or marriage, or similar facts of personal or family history").

152. *Id.* at 804(b)(3).

153. *See* WRIGHT & BELLIN, *supra* note 30, § 6995, at 557.

154. FED. R. EVID. 804(b)(3).

155. *Id.* at 804(b)(3)(A).

156. *See* WRIGHT & BELLIN, *supra* note 30, § 6996, at 559 ("The case law divides fairly evenly between against-interest statements made to confidantes and against-interest statements made to police.").

Court later ruled that the statement's admission violated the Confrontation Clause.[157] We would expect this pattern to repeat in the case law. The hearsay rule's requirements should work in concert with the "testimonial" definition to render the exception virtually useless to the prosecution. Either a statement will be uttered in a context where it is likely to be used as prosecution evidence, rendering it a valid statement-against-penal interest but barred by the Confrontation Clause because testimonial, or it will be uttered in a context where prosecution is unlikely, making it potentially nontestimonial but insufficiently against interest to qualify for admission under the hearsay exception.[158]

The second common species of statements against interest, however, may not trigger Confrontation Clause violations. Often prosecutors seek to introduce against-interest statements made by a defendant's accomplice to friends, acquaintances, or family members.[159] Many of these statements should not be admitted under the hearsay exception. In light of the friendly audience, such statements are, "when spoken, fairly unlikely from the declarant's perspective to be used in litigation."[160] Nevertheless, courts often admit these statements through the hearsay exception for statements against penal interest.[161] When this happens, the Confrontation Clause presents much less of an obstacle. As one of the authors has explained elsewhere, the two-step analytical process unfolds as follows:

> Courts deem a statement made to a confidante (or a spouse) to be against the declarant's interest due to the statement's theoretical potential to expose the declarant to criminal liability. The courts then pivot to say that the statement is admissible without confrontation because a statement "made to a confidential informant," etc., "is not 'testimonial' for Confrontation Clause purposes." This two-step is

157. Crawford v. Washington, 541 U.S. 36, 40, 68–69 (2004) ("[T]he State invoked the hearsay exception for statements against penal interest.").

158. WRIGHT & BELLIN, *supra* note 30, § 7000, at 577 ("Potential against-penal-interest statements will either not be sufficiently likely to result in prosecution to qualify for admission under [the hearsay exception] or will be so likely to trigger prosecution that they will be 'testimonial' and thus inadmissible under the Confrontation Clause.").

159. *Id.* § 6996, at 559–60.

160. *Id.* § 7000, at 577.

161. *Id.* § 6996, at 562.

> almost farcical. It is, in essence, a ruling that: (1) the statement survives a hearsay objection because the speaker would have contemplated its potential use as evidence at a later trial; and (2) the statement survives a Confrontation Clause objection because the speaker would not contemplate its use as evidence at a later trial.[162]

The two types of against interest statements generate distinct Confrontation Clause analysis. We can expect Confrontation Clause violations resulting from the admission of statements against interest that arise during police questioning. We do not expect to find Confrontation Clause violations arising from against-interest statements made to a non-police audience.

The final Rule 804 exception, the exception for forfeiture by wrongdoing,[163] is the second historical exception the Supreme Court has identified to the confrontation right. The exception received sustained scrutiny in *Giles v. California*.[164] There, "the Supreme Court reviewed the early history of American evidence law and interpreted the resulting constitutional doctrine in a manner that parallels the federal hearsay exception for forfeiture by wrongdoing."[165] The Court noted that it had previously described the federal hearsay exception "as a rule 'which codifies the forfeiture doctrine'"—tying the hearsay rule to the historical roots that drive its current Confrontation Clause jurisprudence.[166] In light of these parallels, it is likely that courts will interpret the two doctrines in concert. This means that statements admitted under a forfeiture by wrongdoing hearsay exception will also be permitted by the Confrontation Clause.

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162. *Id.* § 7000, at 577–78 (footnote omitted); *see, e.g.*, United States v. Pelletier, 666 F.3d 1, 8–9 (1st Cir. 2011) (finding the declarant's confession to a fellow jail inmate about a drug smuggling crime sufficiently against interest to qualify for admission because he "implicated himself in [a] conspiracy" but not testimonial because made "to a fellow inmate with a shared history, under circumstances that did not portend their use at trial").

163. *See* FED. R. EVID. 804(b)(6).

164. Giles v. California, 554 U.S. 353, 367 (2008).

165. WRIGHT & BELLIN, *supra* note 30, § 6704, at 27.

166. *Giles*, 554 U.S. at 367 (quoting Davis v. Washington, 547 U.S. 813, 833 (2006)).

F. The Residual Exception

The other common hearsay exception that may generate Confrontation Clause violations is the residual exception. Federal Rule of Evidence 807 permits hearsay statements that are reliable and necessary, triggering a limitless array of potential scenarios.[167] That said, key legislative history regarding the exception signals a limited role.[168] In enacting the exception, the Senate Judiciary Committee explained: "It is intended that the residual hearsay exceptions will be used very rarely, and only in exceptional circumstances."[169] Courts regularly rely on this legislative history and, "for the most part, internalize its spirit."[170] Consequently, while the residual exception has the potential to admit all manner of statements, including some that would violate the Confrontation Clause, we do not expect to find frequent instances in the case law.

G. Other Routes of Admissibility

There are a few other narrow pathways for the admission of out-of-court statements that could result in a Confrontation Clause violation. First, while States have largely adopted traditional hearsay frameworks modeled on the Federal Rules of Evidence,[171] some jurisdictions adopt eclectic hearsay exceptions that permit additional evidence. This was the scenario that gave rise to both *Ohio v. Clark*[172] and *Giles v. California*[173] where unusual state evidence rules permitted unconfronted statements to be introduced against a criminal defendant. To the extent such hearsay is testimonial, as in *Giles*[174] but not *Clark*,[175] the defendant's confrontation rights are

167. FED. R. EVID. 807. The rule was recently amended, although the substance was left intact. *See* FED. R. EVID. 807 advisory committee notes to 2019 amendment.

168. *See* S. REP. NO. 93-1277, at 20 (1974).

169. *Id.*

170. WRIGHT & BELLIN, *supra* note 30, § 7061, at 645.

171. *See* sources cited *supra* note 85.

172. Ohio v. Clark, 576 U.S. 237, 242 (2015) (noting the admission of the statements at issue "under Ohio Rule of Evidence 807, which allows the admission of reliable hearsay by child abuse victims").

173. Giles v. California, 554 U.S. 353, 357 (2008) (noting the admission of the statements at issue "under a provision of California law [CAL. EVID. CODE §1370] that permits admission of out-of-court statements describing the infliction or threat of physical injury on a declarant when the declarant is unavailable to testify at trial and the prior statements are deemed trustworthy").

174. *Id.* at 358.

175. *Clark*, 576 U.S. at 242.

threatened. Second, trial courts can incorrectly interpret the traditional hearsay rules discussed in the preceding sections, admitting out-of-court statements that should have been excluded.

As the survey results reported in the next Part show, the second route referenced above leads to an important, and almost completely overlooked, role for the Confrontation Clause. Hearsay is complicated. One of the underappreciated ways out-of-court statements come before a jury is that trial courts erroneously interpret the hearsay rules to admit statements that should have been excluded. One important area where this occurs is when courts admit hearsay statements to assist the jury in evaluating an expert's testimony.[176] This was the scenario that led to *Williams v. Illinois*, a 2012 Confrontation Clause case that caused the Supreme Court Justices to splinter without any majority opinion.[177] In that case, an Illinois trial court permitted a forensic specialist, Sandra Lambatos, to testify that a DNA sample obtained from the defendant, Sandy Williams, matched a semen sample obtained from a rape victim.[178] The problem was that a critical fact embedded in Lambatos' testimony—that the DNA profile that Lambatos ran through a computer database was derived from the rapist's semen—was hearsay. Lambatos learned that fact from another analyst who did not testify.[179] Recognizing the hearsay problem, the state prosecutor offered the evidence not for the truth of the matter asserted but only to allow the jury to evaluate the expert (Lambatos') testimony about the match.[180] Justice Alito, writing for a plurality of the Court, focused on this distinction in concluding that there was no Confrontation Clause violation.[181]

Justice Kagan, writing for the dissent, disagreed. She explained, "[F]ive Justices agree, in two opinions reciting the same reasons, that this argument has no merit: Lambatos's statements about Cellmark's report went to its truth, and the State could not rely on her status as an expert to circumvent the Confrontation Clause's requirements."[182]

176. *See, e.g.*, Williams v. Illinois, 567 U.S. 50, 50 (2012).

177. *Id.* at 55.

178. *Id.* at 60–61.

179. *Id.*

180. *See id.* at 63 ("Invoking Illinois Rule of Evidence 703, the prosecutor argued that an expert is allowed to disclose the facts on which the expert's opinion is based even if the expert is not competent to testify to those underlying facts." (footnote omitted)).

181. *See id.* at 78–79.

182. *Id.* at 126 (Kagan, J., dissenting).

Justice Kagan appears to get the better of this debate.[183] The fact that the DNA sample being analyzed came from the rapist was central to the relevance of Lambatos's testimony. Some statement to that effect had to be introduced for its truth, otherwise none of the testimony about a "match" mattered at all. Consequently, scenarios like *Williams v. Illinois* are another place to expect continuing Confrontation Clause controversy and violations.[184]

A second area where trial courts tend to erroneously admit hearsay involves statements offered to explain the course of conduct of investigating police officers. "Prosecutors frequently attempt to introduce out-of-court statements, like informant tips, to illustrate why the police took the investigative steps that led them to focus on a suspect or discover evidence."[185] As explained elsewhere, "[c]ourts could rely on this theory of admissibility to admit all manner of damning out-of-court hearsay allegations from absent and even anonymous declarants for the non-hearsay purpose of illustrating a police officer's course of action."[186] As courts have noted: "Allowing agents to narrate the course of their investigations, and thus spread before juries damning information that is not subject to cross-examination, would go far toward abrogating the defendant's rights under the sixth amendment and the hearsay rule."[187]

In sum, the analysis in Part II reveals surprisingly few places where the proper application of the standard American hearsay framework should result in the admission of out-of-court statements that violate the modern Confrontation Clause.[188] As noted above, the only compelling example of this phenomenon arises with a subset of "statements against interest." Other potential scenarios for Confrontation Clause violations involve statements offered under the

183. The reason this argument appeared in a dissent was that Justice Thomas who agreed with Justice Kagan on this point nevertheless viewed the evidence as nontestimonial based on his longstanding view that the Confrontation Clause only applies to evidence with an even higher degree of formality than the Court's current doctrine requires. *See id.* at 103–04 (Thomas, J., dissenting).

184. *Cf.* Stuart v. Alabama, 139 S. Ct. 36, 36 (2018) (Gorsuch, J., dissenting) (dissenting from denial of certiorari in a case along these lines).

185. WRIGHT & BELLIN, *supra* note 30, § 6720, at 55.

186. *Id.* § 6720, at 56.

187. United States v. Silva, 380 F.3d 1018, 1020 (7th Cir. 2004); *see also* United States v. Ransfer, 749 F.3d 914, 927 n.14 (11th Cir. 2014) (noting that courts "have raised serious concerns with overview witnesses, particularly when presented at the beginning of trial before the evidence summarized has been presented"); United States v. Mazza, 792 F.2d 1210, 1215 (1st Cir. 1986) (criticizing evidence offered as background to explain actions taken by government).

188. *See supra* Part II.

residual exception, idiosyncratic state hearsay exceptions, or at the margins of established hearsay exceptions. Finally, there is the possibility that statements erroneously admitted under state and federal hearsay rules will violate the Confrontation Clause. When appellate courts review these rulings, they may identify a violation of the Confrontation Clause alongside (or without considering) the underlying hearsay violation. At least, that's the theory. The next Part describes our effort to compare our theoretical analysis with reality.[189]

III. EMPIRICAL ANALYSIS

We conducted a comprehensive survey of lower court cases to test our hypothesis (described in Part II) that overlap between existing hearsay rules and modern Confrontation Clause jurisprudence would result in a relative absence of Confrontation Clause violations. As explained below, the survey results generally align with our predictions but also reveal a few illuminating surprises.

A. Methodology

We searched for opinions issued after the Supreme Court's last Confrontation Clause decision, *Ohio v. Clark*,[190] containing the phrase "Confrontation Clause." This phrase is the dominant label attached to challenges based on the Sixth Amendment right of the accused "to be confronted with the witnesses against him." For example, "Confrontation Clause" appears in the majority and dissenting opinion in *Crawford* thirty-one times, while "right to confrontation" appears three times and "confrontation right" appears only once.[191] This pattern continued into the most recent Supreme Court case, with the phrase "Confrontation Clause" appearing thirty-eight times in *Ohio v. Clark*; "right to confrontation" appears twice and "confrontation right" does not appear.[192]

Ohio v. Clark, decided on June 18, 2015, is the last time the Supreme Court interpreted the Confrontation Clause, allowing a significant body of case law to build up in the lower courts applying the Court's guidance.[193] We searched for cases decided after June 2015

189. *See infra* Part III.
190. Ohio v. Clark, 576 U.S. 237 (2015).
191. *See* Crawford v. Washington, 541 U.S. 36 (2004).
192. *See Clark*, 576 U.S. 237.
193. *See id.*

through the end of 2020, generating a database of just over five years' worth of lower court applications of stable Supreme Court precedent.

To try to capture all the relevant cases, we searched both Westlaw and LexisNexis. We included all decisions meeting our search criteria, both published and unpublished, from the federal courts of appeals. This provided our largest set of cases. We used the same search to find all published decisions issued by the federal district courts. We also analyzed a sample of unpublished federal district court opinions. The sample was necessary because there were more than 7,000 unpublished decisions that met our broad criteria. We arbitrarily selected two calendar months, February and July, and included every unpublished opinion available on Westlaw and LexisNexis that raised a Confrontation Clause claim in relation to hearsay evidence from those months throughout our date range.

The Confrontation Clause applies to proceedings in both federal and state courts.[194] Although our federal case sample included many reviews of state trials challenged in collateral proceedings, we also sought to expand our survey to the state courts themselves. We chose Texas, extending our survey to cases from the Texas Criminal Court of Appeals and the Texas Court of Appeals. We used the same broad search, looking for published cases on both Westlaw and LexisNexis that mentioned the phrase "Confrontation Clause," decided after June 2015.

Because our search inquiry (Confrontation Clause) was so broad, many of the cases we found were not of interest for our study. Our focus was on the admission of out-of-court statements at trial. Consequently, we excluded cases that did not concern that topic, but resolved other less-commonly-litigated aspects of Confrontation Clause doctrine, such as limitations on cross-examination of testifying witnesses,[195] or challenges to testimony from anonymous witnesses,[196] or the numerous cases where courts summarily rejected confrontation claims as inapplicable because the challenge occurred at sentencing,[197] or proceedings for revocation of supervised release,[198]

194. Pointer v. Texas, 380 U.S. 400, 406 (1965).

195. *See, e.g.*, United States v. Noel, 905 F.3d 258 (3d Cir. 2018).

196. *See, e.g.*, United States v. Rodriguez, 122 F. Supp. 3d 1258 (D.N.M. 2015).

197. *See, e.g.*, United States v. Vera, 893 F.3d 689, 692 (9th Cir. 2018) ("At sentencing, the Confrontation Clause does not apply[.]").

198. *See, e.g.*, United States v. Henry, 852 F.3d 1204, 1206 (11th Cir. 2017) ("[U]nder settled precedent the Confrontation Clause of the Sixth Amendment does not apply to supervised release revocation proceedings[.]").

or pretrial detention,[199] or were otherwise procedurally barred. We excluded many more cases, particularly those generated by the Lexis search, because they simply referenced the Confrontation Clause in a generic fashion without considering any claims that the Clause itself was violated.[200]

We also excluded all cases involving only so-called "*Bruton* challenges."[201] Prior to 1968, in joint trials involving a confession that was admissible against one co-defendant but not another, courts sometimes admitted the confession and instructed the jury to consider it only as evidence against the confessing co-defendant.[202] In *Bruton v. United States*, the Supreme Court rejected that practice for confessions that directly implicate both defendants.[203] Cases continue to arise involving the degree of redaction necessary in a *Bruton* situation, but these cases do not shed direct light on the questions explored in this Article.[204] The hearsay exception invoked is always the same—the statements are offered by the prosecution as statements of the opposing party (the co-defendant). For *Bruton* violations, no hearsay exception is involved for the non-confessing defendant. By definition, evidence that violates *Bruton* is inadmissible against the complaining party.[205] In addition, there is confusion among the circuits as to how the *Crawford* framework applies to confessions of a non-testifying codefendant—if at all.[206] The evolution of *Bruton* doctrine suggests that it may no longer be a

199. *See* United States v. Castanon-Perez, 347 F. Supp. 3d 661, 665 (D.N.M. 2018) (stating that the Confrontation Clause does not apply to a pre-trial decision hearing).

200. *See, e.g.*, United States v. Salazar, 690 F. App'x 457, 458 (8th Cir. 2017) (including the following at the end of a string cite: "*United States v. Watson*, 650 F.3d 1084, 1088 (8th Cir. 2011) (review of Confrontation Clause objections)").

201. Bruton v. United States, 391 U.S. 123 (1968).

202. *See id.*

203. *Id.* at 137.

204. *See, e.g.*, Gray v. Maryland, 523 U.S. 185, 188 (1998); Richardson v. Marsh, 481 U.S. 200 (1987).

205. *See Bruton*, 391 U.S. at 123.

206. *Compare* Lucero v. Holland, 902 F.3d 979, 986–88 (9th Cir. 2018) (collecting cases from circuit that have extended the *Crawford* framework to *Bruton*), *with* United States v. Hano, 922 F.3d 1272, 1287 (11th Cir. 2019) (acknowledging that the Eleventh Circuit has "yet to hold in a published opinion that *Bruton* applies only to testimonial statements"), *and* United States v. DeLeon, 287 F. Supp. 3d 1187, 1248 (D.N.M. 2018) ("The Supreme Court's decision in *Crawford v. Washington* undermines *Bruton v. United States*, because that decision indicates that introducing a non-testifying defendant's confession and using that confession against a codefendant does not offend the Confrontation Clause so long as the confession is nontestimonial.").

Confrontation Clause issue, but more of a due process concern.[207] All of this would make for interesting exploration but is a topic for a different article.

Despite our effort to cast a wide net, it is important to note some things our survey would miss. We did not capture confrontation rulings that were neither appealed nor memorialized in a written opinion. We simply could not come up with any practical way to capture things like oral rulings excluding statements on confrontation grounds. Our survey also did not capture evidence that was never offered (or cases never charged) because prosecutors anticipated an adverse ruling on admissibility. There is no reason to believe that our sample is skewed by these omissions. But, as discussed below, blind spots like these, which arise in any survey of written court decisions, must be considered when evaluating our results.[208]

Our findings are discussed in the sections that follow and memorialized in charts appended to this Article. As previously mentioned, our searches were over-inclusive; thus, the first step in gathering the results was to eliminate cases that did not involve the admissibility of out-of-court statements.[209] The charts included in the appendix reflect categorization of all the remaining cases. The charts identify the path to admission of the challenged out-of-court statement, for example the specific hearsay exception invoked by the prosecution and accepted by the trial court.[210] This information was typically referenced in the opinion, but sometimes required further research into the briefs or even transcripts of underlying proceedings. In a few cases, we were unable to determine from the available materials how a hearsay statement was admitted at trial. The chart goes on to reflect whether the reviewing court deemed the hearsay statements testimonial or non-testimonial; the court's Confrontation Clause ruling; and the ultimate disposition of the case.

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207. *See generally* Alfredo Garcia, *The Winding Path of* Bruton v. United States*: A Case of Doctrinal Inconsistency*, 26 AM. CRIM. L. REV. 401, 402 (1988) (arguing that *Bruton*'s protections were eroding long before *Crawford*).

208. As noted, we searched for opinions using the two most prominent sources. Opinions not captured by Lexis or Westlaw were not included. *See* Merrit McAlister, *Missing Decisions*, 169 UNIV. PENN. L. REV. 1101, 1139 (2021) (noting that Westlaw and Lexis do not include some unpublished decisions on merits terminations). Again, there is no reason to think that these omissions bias our sample.

209. *See supra* Part III.A (giving examples of the cases excluded from the survey).

210. Some cases involve challenges to state convictions. For these cases, the challenged evidence rules are often the state counterparts to the federal rules. For simplicity's sake, this article frames its discussion through the lens of federal rules because state rules generally track those rules.

B. Findings

The next sections discuss the patterns detected in our empirical survey of federal and state cases. Although we were most interested in successful Confrontation Clause challenges, we also discuss the most frequent challenges (even if unsuccessful) to illustrate the type of out-of-court statements prosecutors rely on in criminal cases. In our survey covering 437 cases, courts found 33 Confrontation Clause violations. Thus, the courts found a Confrontation Clause violation in about 8% of the cases where defendants raised the claim. In 48 cases, the courts declined to rule on the Confrontation Clause challenge because, in the courts' view, any error was "harmless," i.e., its effect on the outcome was not sufficient to warrant reversal. In the discussion that follows, we break down the challenges and outcomes by the type of courts although the patterns were largely the same throughout the three (federal appeals courts, federal district courts, and Texas courts) samples.

1. Overview

We begin our analysis with the federal appeals court opinions. These opinions provided the greatest number of Confrontation Clause challenges in our sample and the most thorough discussion of the circumstances generating those challenges and their resolution. Discussion of the district court and Texas cases follows, but that analysis largely serves to demonstrate that the federal appeals court decisions are not anomalous.

In the federal appeals courts, four hearsay exceptions generated the most Confrontation Clause challenges: statements by co-conspirators[211] (31); business records[212] (25); excited utterances[213] (15); and public records[214] (12). Consistent with our predictions in Part II, there were only 7 cases since mid-2015 where a federal appeals court found that an out-of-court statement admitted through a hearsay rule violated the Confrontation Clause.[215] In a surprise,

211. *See* FED. R. EVID. 801(d)(2)(E).

212. *See id.* at 803(6).

213. *See id.* at 803(2).

214. *See id.* at 803(8).

215. *See* United States v. Barber, 937 F.3d 965, 969 (7th Cir. 2019); United States v. Cruz-Ramirez, 782 F. App'x 531, 538–39 (9th Cir. 2019); United States v. Bates, 665 F. App'x 810, 815 (11th Cir. 2019); United States v. London, 746 F. App'x 317, 318 (5th Cir. 2018); United States v. Cerda-Ramirez, 730 F. App'x 449, 452 (9th Cir. 2018); United States v. Gutierrez-Salinas, 640 F. App'x 690, 693 (9th Cir. 2016); United States v. Esparza, 791 F.3d 1067, 1074 (9th Cir. 2015).

four of the seven cases involved evidence admitted under the hearsay exception for public records.[216] As explained below, however, all of the cases where statements admitted through a hearsay exception were found to have violated the Confrontation Clause involved flawed hearsay analysis.[217]

The survey of district courts reflected a similar pattern to the circuit courts, with one important distinction: the district courts seemed even less likely to find Confrontation Clause violations. Again, the most frequent challenges arose to statements made by a co-conspirator,[218] excited utterances,[219] and business records.[220] The district courts did not find any Confrontation Clause violations for statements admitted under these rules.

The Texas cases revealed a similar pattern, although with different areas of emphasis. Texas hearsay rules are modeled on the

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216. *See Barber*, 937 F.3d at 969; *London*, 746 F. App'x at 318; *Cerda-Ramirez*, 730 F. App'x at 452; *Esparza*, 791 F.3d at 1074.

217. *See Barber*, 937 F.3d at 969; *Cruz-Ramirez*, 782 F. App'x at 538-39; *Bates*, 665 F. App'x at 815; *London*, 746 F. App'x at 318; *Cerda-Ramirez*, 730 F. App'x at 452; *Gutierrez-Salinas*, 640 F. App'x at 693; *Esparza*, 791 F.3d at 1074.

218. United States v. Pirk, 284 F. Supp. 3d 398, 411 (W.D.N.Y. 2018); United States v. Braden, 328 F. Supp. 3d 785, 788 (M.D. Tenn. 2018); United States v. DeLeon, 287 F. Supp. 3d 1187, 1240–41 (D.N.M. 2018); Molina v. Frauenheim, No. 14-8686-R, 2018 WL 4223707, at *20–21 (C.D. Cal. July 27, 2018); Taylor v. Berghuis, No. 15-11687, 2018 WL 3428693, at *7 (E.D. Mich. July 16, 2018); Runyon v. United States, 228 F. Supp. 3d 569, 626–27 (E.D. Va. 2017); Powell v. Mackie, No. 1:15-cv-549, 2017 U.S. Dist. LEXIS 129771, at *21 (W.D. Mich. July 5, 2017); United States v. Nevatt, No. 16-00150-01-cr-w-dgk, 2017 WL 507234, at *3–4 (W.D. Mo. Feb. 7, 2017); United States v. Ford, 155 F. Supp. 3d 60, 68 (D.D.C. 2016).

219. *See* United States v. Colon-Perez, 412 F. Supp. 3d 123, 124 (D.P.R. 2019); Bowens v. Allbaugh, No. CIV-17-61-R, 2019 WL 943415, at *5 (W.D. Okla. Feb. 26, 2019); Frey v. Gilmore, No. 3:16-cv-2296, 2019 U.S. Dist. LEXIS 121611, at *36–37 (M.D. Pa. July 19, 2019); Lucas v. Inch, No. 18-60383, 2019 U.S. Dist. LEXIS 123523, at *26 (S.D. Fla. July 23, 2019); Chavis v. Nogan, No. 15-250, 2018 U.S. Dist. LEXIS 32025, at *22 (D.N.J. Feb. 28, 2018); Porter v. Madden, 2017 U.S. Dist. LEXIS 150370, at *1–2 (C.D. Cal. July 17, 2017); Davis v. Napel, No. 2:14-cv-10019, 2016 WL 795860, at *3 (E.D. Mich. Feb. 29, 2016); West v. Foster, No. 2:10-cv-02086-JAD-GWF, 2016 WL 409998, at *2 (D. Nev. Feb. 2, 2016).

220. Fulgiam v. Kenneway, 364 F. Supp. 3d 93, 98 (D. Mass. 2019); United States v. Al-Imam, 382 F. Supp. 3d 51, 52 (D.D.C. 2019); United States v. Abu Khatallah, 278 F. Supp. 3d 1, 2–3 (D.D.C. 2017); United States v. Ganesh, No. 16-cr-00211-LHK, 2018 WL 905941, at *10–11 (N.D. Cal. Feb. 15, 2018); United States v. Hunter, No. 15-19(1), 2018 U.S. Dist. LEXIS 23376, at *4 (D. Minn. Feb. 13, 2018); Sissac v. Montgomery, No. 16-cv-2287-BAS, 2018 WL 3375110, at *11 (S.D. Cal. July 11, 2018); United States v. Garcia, No. 16-20837, 2017 U.S. Dist. LEXIS 107357, at *3–4 (S.D. Fla. July 11, 2017).

federal rules.[221] The rule that led to the most Confrontation Clause challenges in the Texas cases was the excited utterance exception.[222] Out of the 31 cases in our sample, the Texas courts found 4 Confrontation Clause violations, 3 of which involved statements admitted under a hearsay exception.[223] As discussed below, the Texas cases finding Confrontation Clause violations fit the federal pattern of an aggressive, typically improper, use of a hearsay exception leading to a Confrontation Clause violation.

One of the big surprises in our survey was the number of Confrontation Clause challenges that arose from statements admitted on the grounds that they were not offered for the truth of the matter asserted. In the federal appeals courts, a total of 103 challenges fit this pattern, 10 of which resulted in a Confrontation Clause violation. Among the district court opinions, both published and unpublished, 32 statements were admitted as not being offered for the truth of the matter asserted, 2 of which led to Confrontation Clause violations. The Texas courts also reviewed 3 Confrontation Clause challenges based on statements admitted on the ground that they were offered for something other than the truth of the matter asserted but found no violations.

2. Co-Conspirator Statements

Consistent with the discussion in Part II, the federal appeals courts reacted uniformly to challenges to out-of-court statements admitted as co-conspirator statements. In 31 cases, the defendant challenged the admission of a co-conspirator statement, and in all 31, the appeals courts found no Confrontation Clause violation. The analysis was typically short and conclusory. To be admitted under the exception for coconspirator statements, a statement must be made "during and in furtherance of the conspiracy."[224] It would be highly unlikely that such a statement would be testimonial, i.e., made for the purpose of providing an out-of-court substitute for trial testimony. As the courts repeatedly state, "co-conspirator statements are 'by their

221. *Compare* TEX. R. EVID. 801–806, *with* FED. R. EVID. 801–807.

222. TEX. R. EVID. 803(2).

223. *See* Gutierrez v. State, 516 S.W.3d 593, 597 (Tex. App. 2017) (admitted under TEX. R. EVID. 803(2)); Kou v. State, 536 S.W.3d 535, 540 (Tex. App. 2017) (admitted under TEX. R. EVID. 803(4)); Gerron v. State, 524 S.W.3d 308, 325 (Tex. App. 2016) (admitted under TEX. R. EVID. 803(8)).

224. *See* FED. R. EVID. 801(d)(2)(E).

nature, not testimonial,' and thus not subject to the Confrontation Clause."[225]

It is curious that defendants raised this argument so frequently in light of the limited prospects for success. This may be a function of the high frequency with which such statements are introduced at trial. On appeal, defendants challenging the admissions of co-conspirator statements likely argue that the statements were improperly admitted under the hearsay exception *and* violated the Confrontation Clause.[226] This would explain why we see so many Confrontation Clause challenges to coconspirator statements, despite the predictable lack of success of those arguments.

The federal district courts cases and the Texas cases reflected the same pattern. Of the 11 district court cases that considered challenges to co-conspirator's statements, none resulted in a violation; in one the court made no determination, holding that any violation was harmless error.[227] The opinions contain the same cursory analysis, emphasizing that "co-conspirator statements in furtherance of the conspiracy" are not testimonial and, therefore, do not implicate the Confrontation Clause.[228] The Texas cases mirror those of the federal district courts. Neither of the two cases resulted in a violation.[229]

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225. United States v. Laureano-Pérez, 797 F.3d 45, 65 n.21 (1st Cir. 2015); *see also* United States v. Mathis, 932 F.3d 242, 256 (4th Cir. 2019) ("[A]ll the statements were made in furtherance of that criminal conspiracy and were not intended to be used as a substitute for trial testimony."); United States v. Mayfield, 909 F.3d 956, 962 (8th Cir. 2018) ("[C]o-conspirators' statements made in furtherance of a conspiracy . . . are generally non-testimonial and, therefore, do not violate the Confrontation Clause."); United States v. Torres, 742 F. App'x 244, 246 (9th Cir. 2018) ("The statement that Torres was his co-conspirator's 'right-hand man,' was not testimonial but rather a statement in furtherance of the conspiracy."); United States v. Davis, 687 F. App'x 75, 78 (2d Cir. 2017) (holding that statements admitted under co-conspirator exception did not violate Confrontation Clause); United States v. Onyenso, 615 F. App'x 734, 736 (3d Cir. 2015) ("Evidence constituting . . . 'statements in furtherance of a conspiracy' . . . are 'by their nature . . . not testimonial.'").

226. *See* sources cited *supra* note 9 (discussing overlapping objection strategy).

227. *See* Iona v. Smith, No. 16-cv-2708, 2019 WL 549019, at *2 (S.D.N.Y. Feb. 9, 2019).

228. United States v. Pirk, 284 F. Supp. 3d 398, 411 (W.D.N.Y. 2018); *see also* United States v. Braden, 328 F. Supp. 3d 785, 789 (M.D. Tenn. 2018) ("By definition, a conspirators' statements in furtherance of the conspiracy are not by their nature testimonial[.]" (internal quotation marks and alterations omitted)); United States v. Ford, 155 F. Supp. 3d 60, 68 (D.D.C. 2016) ("Statements satisfying the coconspirator non-hearsay rule under Federal Rule of Evidence 801(d)(2)(E) may be admitted against co-defendants without violating the Confrontation Clause." (internal quotation marks and alterations omitted)).

229. *See* Crawford v. State, 595 S.W.3d 792, 807 (Tex. App. 2019).

3. Excited Utterances

The excited utterances exception was the third most popular exception in our sample of federal appellate case law, arising in 15 cases. A court found a Confrontation Clause violation in one of those cases.[230] This is, again, consistent with the predictions in Part II.[231] While excited utterances can, at the margin, generate testimonial statements, the Supreme Court's recent narrowing of the "testimonial" definition makes this unlikely.[232]

One of the published district court opinions, *United States v. Colon-Perez*, illustrates the overlap between the hearsay rules and the Confrontation Clause.[233] There, the minor victim made statements to police after her car was pulled over.[234] The defendant had just beaten her, and she was covered in blood.[235] The victim said, "do not let them kill me, they have a gun."[236] Such a statement is clearly admissible under the excited utterance exception—it is generated by an exciting event and concerns that event.[237] As a "cry for help[,]" as opposed to a statement uttered to create a substitute for trial testimony, it was also not testimonial.[238]

The one federal case that found that a statement admitted as an excited utterance did violate the Confrontation Clause fits a distinct pattern that emerged from our study. The statement was not admitted at the margins of the exception, its admission violated the exception. In *United States v. Cruz-Ramirez*, an informant told police about a shooting.[239] As the informant regularly provided information to police, and the circumstances did not suggest any effort to seek assistance, the court deemed it testimonial.[240] The Ninth Circuit added that given the absence of urgency on the part of the informant, and the additional disqualifying fact that the informant lacked

230. *See* United States v. Cruz-Ramirez, 782 F. App'x 531, 539 (9th Cir. 2019) (holding challenged statements violated the Confrontation Clause); *see also, e.g.*, United States v. Mitchell, 726 F. App'x 498 (8th Cir. 2018); United States v. Clifford, 791 F.3d 884 (5th Cir. 2015).

231. *See supra* Part II.

232. *Id.*; *see, e.g.*, *Mitchell*, 726 F. App'x at 502; United States v. Smith, 637 F. App'x 708, 710 (4th Cir. 2016); Lisle v. Pierce, 832 F.3d 778, 781–83 (7th Cir. 2016); Rabb v. Sherman, 646 F. App'x 564, 564 (9th Cir. 2016).

233. United States v. Colon-Perez, 412 F. Supp. 123, 125 (D.P.R. 2019).

234. *Id.* at 124.

235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.* at 125–26.

239. *See* United States v. Cruz-Ramirez, 782 F. App'x 531, 539 (9th Cir. 2019).

240. *Id.*

firsthand knowledge,[241] the statement should not have been admitted as an excited utterance.[242]

The excited utterance exception was the vehicle for admission in 5 Texas cases.[243] In 4 cases, the confrontation claim was rejected through the straightforward analysis forecast in Part II. For example, in *Avant v. State*, the declarant's statements were admissible as excited utterances because she was "upset, crying, and scared" after having been assaulted,[244] and the statements were not testimonial because she was "scared and obviously distressed" and seeking help for an ongoing emergency.[245] By contrast, in *Gutierrez v. Texas*, the court found that the admission of an assault victim's statements to a police officer and her mother's description of the offense on a 911 call violated the Confrontation Clause.[246] The appeals court solely analyzed the Confrontation Clause aspects of the ruling. Its reasoning, however, applies to both the hearsay and constitutional analysis. The court noted that,

- "The evidence shows that both the 911 call and Emily's statements to Deputy Deliphose were focused on what had occurred in the past without any expressed concern or discussion of an ongoing emergency."[247]

- "No one expressed any concern that Appellant would return and the focus of the discussions in the 911 call and Emily's statements were on what had already happened as opposed to what was happening or might happen in the near future."[248]

- "For the 911 call, the 911 operator asked for the make, model, and color of Appellant's car, explaining she did not need the license plate. Even so, Emily spent some time going through

241. WRIGHT & BELLIN, *supra* note 30, § 6802, at 273–74 ("[P]ersonal knowledge constitutes an additional, unenumerated requirement for admissibility of hearsay offered under Federal Rules of Evidence 803, 804 and 807.")

242. *Cruz-Ramirez*, 782 F. App'x at 539 ("Nor was Acosta's call an excited utterance.").

243. *See* Villanueva v. State, 576 S.W.3d 400, 405 (Tex. App. 2019) (no violation); Gutierrez v. State, 516 S.W.3d 593, 599 (Tex. App. 2017) (violation); Davlin v. State, 531 S.W.3d 765, 771 (Tex. App. 2016) (no violation); Avant v. State, 499 S.W.3d 123, 129–30 (Tex. App. 2016) (no violation).

244. *Avant*, 499 S.W.3d at 129.

245. *Id.*

246. *Gutierrez*, 516 S.W.3d at 599.

247. *Id.* at 598.

248. *Id.* at 599.

> pictures on her phone to find the license plate number and give it to the operator."[249]

Thus, the *Gutierrez* case mirrored *Hammon*, where the Supreme Court found a Confrontation Clause violation based on evidence admitted at the margin of the excited utterance exception—a victim responding to police questioning about a crime well after an emergency had passed.[250]

4. Business and Public Records

In 25 cases in the federal appeals court sample, defendants made Confrontation Clause challenges to statements admitted under the business records hearsay exception. The courts found a Confrontation Clause violation in one of these cases.[251] In 21 cases, the courts found no violation of the Confrontation Clause. In the 3 remaining cases, the courts deemed any error to be harmless without deciding whether there was a Confrontation Clause violation.[252] The lopsided results are consistent with the analysis in Part II. Courts interpret the business records exception to require that qualifying records were created for "the administration of the [business's] affairs and not for the purpose of establishing or proving some fact at trial."[253] Thus, it should be rare that a proper application of the business records hearsay exception would result in the admission of a testimonial statement.

Even finding one court decision that ruled that a business record's admission violated the Confrontation Clause was surprising. The answer to this conundrum is that the trial court erred in its hearsay analysis. In *United States v. Bates*, the trial court admitted a series of documents related to investigations of child pornography, "ruling that they were regularly conducted records of law enforcement, and therefore admissible under the Federal Rule of Evidence 803(6) hearsay exception."[254] The appeals court correctly recognized that

249. *Id.* at 598–99.

250. *See* Davis v. Washington, 547 U.S. 813, 819–20 (2006).

251. *See* United States v. Bates, 665 F. App'x 810, 815 (11th Cir. 2019).

252. *See* United States v. Grecco, 728 F. App'x 32, 34 (2d Cir. 2018); United States v. Killen, 729 F. App'x 703, 714 (11th Cir. 2018); United States v. Castro, 704 F. App'x 675, 676 (9th Cir. 2017). The harmless error cases involved the introduction of an autopsy report, Kik records, and a custody receipt.

253. *See* United States v. Ayelotan, 917 F.3d 394, 403 (5th Cir. 2019) (quoting Melendez-Diaz v. Massachusetts, 557 U.S. 305, 324 (2009)).

254. United States v. Bates, 665 F. App'x 810, 814 (11th Cir. 2019); *see* FED. R. EVID. 803(6).

such records were both "impermissible hearsay as well as testimonial[.]"[255] Law enforcement records are properly analyzed under the public records hearsay exception, not the business records exception.[256] As noted in Part II, an explicit provision in the public records exception blocks the admission of law enforcement records in criminal cases.

The district court cases also reflected frequent challenges to business records. None led to a finding of a Confrontation Clause violation. Again, the number of challenges is more surprising than the lack of success. Challenged records included certifications of the authenticity of telephone records,[257] foreign phone records,[258] and Instagram records.[259] As predicted in Part II, courts found such records nontestimonial and their admission not to violate the Confrontation Clause.[260] This follows from the clear dichotomy in the hearsay rules between public and business records. Records generated to serve as evidence in a criminal trial, and thus potentially "testimonial" evidence, will typically be public not business records.[261]

The public records exception was the fourth most challenged rule in the federal appeals court sample and the most divisive. Out of the 12 statements that were admitted under the rule, the federal appeals

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255. *Bates*, 665 F. App'x at 814.

256. WRIGHT & BELLIN, *supra* note 30, § 6885, at 386 ("The Law Enforcement Exception") ("[L]aw enforcement records disqualified from admission under that rule cannot be admitted as 'business records' under Rule 803(6).").

257. United States v. Al-Imam, 382 F. Supp. 3d 51, 59 (D.D.C. 2019) (collecting cases from every circuit in which the court held that such certifications do not pose Confrontation Clause problems). The federal business records exception permits the foundation for the exception to be laid by a certificate rather than live testimony. FED. R. EVID. 803(6)(D). Relying on a passage in *Melendez-Diaz v. Massachusetts*, "[t]he appeals courts have so far rejected Sixth Amendment Confrontation Clause challenges to the certification procedure, even though the certification would appear to fall within the Supreme Court's definition of 'testimonial.'" WRIGHT & BELLIN, *supra* note 30, § 6863, at 354–355. Although the Court has not clarified the point, this seems to be another historical exception to the requirement that testimonial evidence must be confronted. *See Melendez-Diaz*, 557 U.S. at 322–23 (noting that as a historical matter, "[a] clerk could by affidavit *authenticate* or provide a copy of an otherwise admissible record").

258. United States v. Khatallah, 278 F. Supp. 3d 1, 11 (D.D.C. 2017).

259. United States v. Garcia, No. 16-20837, 2017 U.S. Dist. LEXIS 107357, at *4 (S.D. Fla. July 11, 2017) ("[T]he Instagram records were not hearsay because they were records of Garcia's regularly conducted business activity pursuant to Rule 803(6).").

260. *Khatallah*, 278 F. Supp. 3d at 11.

261. WRIGHT & BELLIN, *supra* note 30, § 6882, at 380 ("[R]ecords of a public agency will typically not be considered for admission separately under Rule 803(6).").

courts held that 7 did not violate the Confrontation Clause,[262] 4 did violate the Clause, and 1 was harmless error whether or not it constituted a violation.[263]

Finding cases where out-of-court statements admitted under the public records exception violated the Confrontation Clause was a surprise in light of our predictions in Part II. Only one type of public record would seem to fit the definition of "testimonial"—records generated for use as evidence in an adversarial proceeding. And those records appear to be excluded either under the law enforcement exception to the public records exception, or the rule's general trustworthiness clause.[264] Consequently, we discuss these cases in further detail below.

Three of the four cases where Confrontation Clause violations stemmed from the admission of public records neatly fit the theme that dominated our sample—a trial court error in interpreting the hearsay rules. The fourth case also fits this pattern although the question is closer. Each case is described below.

The most obvious error occurred in *United States v. London*, where the prosecution introduced correspondence from banks that had been robbed that stated that the banks were federally insured.[265] The letters were "specifically prepared for use at trial," and their effect "was to allow . . . an out-of-court witness not subject to cross-examination, to testify via 'certificate' to an essential element[.]"[266] That violates the Confrontation Clause *and* the public records hearsay exception. The letters were not "records of a public office" and the statements they contained were not observations made "while under a legal duty to report."[267] In *United States v. Cerda-Ramirez*, the hearsay error was equally obvious; the district court admitted a criminal complaint and accompanying affidavit under the public records exception. On its way to finding a Confrontation Clause violation, the Ninth Circuit observed that the documents "were inadmissible under Fed. R. Evid. 803(8) [the public records hearsay

262. *See* United States v. Noria, 945 F.3d 847, 860 (5th Cir. 2019); United States v. Lopez, 730 F. App'x 479, 480 (9th Cir. 2018); United States v. Fryberg, 854 F.3d 1126, 1136 (9th Cir. 2017); United States v. Gonzalez, 658 F. App'x 867, 869 (9th Cir. 2016); United States v. Hughes, 840 F.3d 1368, 1383 (11th Cir. 2016); United States v. de Jesus-Concepcion, 652 F. App'x 134, 140 (3d Cir. 2016).

263. *See* United States v. Barber, 937 F.3d 965, 969 (7th Cir. 2019).

264. *See* FED. R. EVID. 803(8)(A)(ii); FED. R. EVID. 803(8)(B).

265. United States v. London, 746 F. App'x 317, 321 (5th Cir. 2018).

266. *Id.* at 321–22.

267. *See* FED. R. EVID. 803(8)(A)(ii).

exception]" since they were prepared by law enforcement officials in an adversarial setting.[268]

Similarly, in *United States v. Barber*,[269] the Seventh Circuit considered a series of documents generated by Alcohol, Tobacco and Firearms (ATF) agents, introduced to support a federal firearms prosecution.[270] The court stressed that these documents went beyond merely providing relevant copies of licensing records, but included affidavits by ATF agents attesting to key facts in the case, such as "the purpose of the records" and explaining how they served "as proof that these are the records used for firearm licenses and that [a key figure in the case] was licensed during the relevant period."[271] Although the court did not discuss the application of the hearsay rule, again the court found a Confrontation Clause violation for reasons that would parallel a conclusion that the public records exception did not apply.[272] The challenged affidavits were prepared by law enforcement officials in an adversarial setting and were consequently ineligible for admission under both the hearsay rule and the Confrontation Clause.[273]

The fourth public records example, *United States v. Esparza*, is also best categorized as an error in hearsay analysis.[274] As the case presents a novel hearsay question regarding "outsider statements" in public records, a little background is required. Outsider statements in the business records context are statements by someone not a part of the business that are captured in the business' records.[275] Such statements are not admissible through the business records exception.[276] Because the public records exception is written to cover statements by public officials ("record[s] . . . of a public office" that include "matter[s] observed while under a legal duty to report"),[277] the issue of outsider statements rarely arises.[278]

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268. United States v. Cerda-Ramirez, 730 F. App'x 449, 452 (9th Cir. 2018).

269. United States v. Barber, 937 F.3d 965 (7th Cir. 2019).

270. *Id.* at 967–68.

271. *Id.* at 968. The criminal charge was "stealing firearms from a federally licensed firearms dealer." *Id.* at 967.

272. *Id.* at 969.

273. *Id.*

274. *See* United States v. Esparza, 791 F.3d 1067, 1068 (9th Cir. 2015).

275. *See* United States v. Vigneau, 187 F.3d 70, 76 (1st Cir. 1999) (discussing this issue).

276. *Id.* at 75.

277. FED. R. EVID. 803(8)(A)(ii).

278. See WRIGHT & BELLIN, *supra* note 30, § 6888, at 398–401 (discussing outsider statements in public records).

Cases like *Esparza* raise the question of the proper treatment of outsider statements in public records. While the hearsay analysis is complex, the facts are straightforward. Police intercepted Arturo Esparza as he drove across the border in a car "that had multiple packages of marijuana hidden in the gas tank and dashboard."[279] At his trial, the prosecution introduced a Notice of Transfer/Release of Liability (the Notice) signed by the registered owner of the car, Diana Hernandez. The Notice stated that Hernandez sold the car to the defendant six days before his arrest.[280] Since Hernandez forwarded this form to the Department of Motor Vehicles, the prosecutor offered, and the trial court admitted, the Notice as a public record.[281] The unusual circumstances that led to the creation of the Notice shed light on the determination that the record's introduction violated the Confrontation Clause.[282] These circumstances also suggest that the Notice should not have been admitted under the public records exception.

As the Ninth Circuit emphasized, "[p]rior to sending the Notice of Transfer/Release of Liability to the DMV, Hernandez was notified by CBP [Customs and Border Protection] that her car had been seized because it was used to smuggle more than 50 kilograms of marijuana."[283] Hernandez promptly filed the Notice claiming the car was not hers.[284] Thus, the statements introduced were not those of a public official, but rather a witness contacted by law enforcement about a crime, who responded with a formal filing exonerating herself and laying blame on the defendant:

> Hernandez was not an agency employee who prepared or maintained documents as part of her official duties. Nor was she a private citizen who, in the course of a routine sale, simply notified the DMV of the transfer of her car. Instead, her car had already been seized for serious criminal violations, and she sent the transfer form to the DMV only after receiving a Notice of Seizure from CBP.[285]

279. *Esparza*, 791 F.3d at 1068.
280. *Id.* at 1071.
281. *Id.* at 1073.
282. *See id.* at 1074–75.
283. *Id.* at 1073.
284. *Id.*
285. *Id.* at 1073–74.

While this makes it clear that the Notice was properly deemed testimonial, it also suggests it was improperly admitted as a public record. The evidentiary value of the Notice derived completely from the statement of a private citizen, not a government official. Thus, like an income tax return located in IRS files, it seems a poor fit for the public records hearsay exception.[286] In addition, the hearsay exception bars the admission of statements if "the source of information or other circumstances indicate a lack of trustworthiness."[287] The strong incentive for the declarant in *Esparza* to lie about ownership of the car provided an alternative, and equally compelling, basis to find that the Notice did not qualify for admission under the public records hearsay exception.

One of the few Texas cases finding a Confrontation Clause violation also involved misuse of the public records exception. In *Gerron v. State*, a trial court admitted a police officer's testimony about the identities and ages of underage girls who appeared in pornographic photographs possessed by the defendant.[288] The officer learned this information by speaking to other investigators and looking at various documents.[289] On appeal, the prosecution invoked the public records hearsay exception on the tenuous basis that some of those documents (which were not introduced) might have qualified as public records.[290] The Texas Court of Appeals determined that the admission of this testimony violated both the hearsay rules and the Confrontation Clause, although it went on to find the error to be harmless.[291] Again, the Confrontation Clause violation paralleled a clear violation of the hearsay rules.

5. Miscellaneous

Our sample also captured cases where defendants raised Confrontation Clause challenges to statements offered under other hearsay exceptions. Some cases involved predictably unsuccessful challenges to evidence admitted under a hearsay exception that would

286. WRIGHT & BELLIN, *supra* note 30, § 6888, at 399 ("[T]he courts have resisted the notion that a legal duty to file information with the government, such as the obligation to file a tax return, renders the filed document a public record admissible under Rule 803(8).").

287. FED. R. EVID. 803(8)(B).

288. Gerron v. State, 524 S.W.3d 308, 323 (Tex. App. 2016).

289. *See id.* at 323–324.

290. *Id.* at 324.

291. *Id.* at 325 (noting that the evidence was "generally not admissible. *See* TEX. R. EVID. 803(8)(B)").

rarely implicate the Confrontation Clause.[292] But we also found additional Confrontation Clause violations that arose from an erroneous application of the hearsay rules. This fits the familiar pattern: cases where a hearsay exception that would not be expected to admit evidence that would violate the Confrontation Clause was applied incorrectly, leading to a Confrontation Clause violation.

For example, in *United States v. Gutierrez-Salinas*, the district court admitted a statement signed by the defendant as a statement of a party opponent, leading to a successful Confrontation Clause challenge on appeal.[293] Typically, such a challenge would make little sense since the defendant has no right to confront himself.[294] However, in this case, law enforcement provided the defendant—who spoke another language—with the statement to sign without providing an interpreter who could explain the statement's contents to the defendant.[295] Thus, the statement was not, in fact, the defendant's statement, but a statement of a law enforcement official chronicling what had occurred.[296] This made the statement "inadmissible hearsay" since it was not, in fact, the party's own statement.[297] That explains how a statement admitted under the opposing party's statement hearsay exception could violate the Confrontation Clause.[298] The trial court got the hearsay analysis wrong.

Another Confrontation Clause violation arose in *Kou v. State*, where the trial court erred in applying the hearsay exception for statements made to obtain medical diagnosis and treatment.[299] There, a "Sexual Assault Nurse Examiner" who examined an assault victim requested lab analysis regarding the victim's condition, and later testified about the lab's findings during trial. The trial court allowed the testimony about the lab's findings under the hearsay exception for statements for purposes of medical diagnosis.[300] At the time of the

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292. *See, e.g.*, Labon v. Martel, No. CV 14-6500-DSF, 2016 WL 8470181, at *11 (C.D. Cal. July 21, 2016) (attempting to use an absent witness's report to refresh a witness's recollection).

293. United States v. Gutierrez-Salinas, 640 F. App'x 690, 693 (9th Cir. 2016).

294. *See* discussion *supra* Section II.C.

295. *Gutierrez-Salinas*, 640 F. App'x at 692.

296. *Id.* at 693.

297. *Id.*

298. *Id.* at 692–93.

299. Kou v. State, 536 S.W.3d 535, 545 (Tex. App. 2017).

300. *See* TEX. R. EVID. 803(4) ("A statement that: (A) is made for—and is reasonably pertinent to—medical diagnosis or treatment; and (B) describes medical history; past or present symptoms or sensations; their inception; or their general cause.").

nurse's examination, the victim "had already seen a doctor who had rendered a diagnosis and prescribed medication" and "the record does not show the lab test results were used for anything other than prosecution."[301] Consequently, the lab report was testimonial.[302] For the same reason—the report was obtained for prosecution not for diagnosis or treatment—its admission also violated the hearsay rules.[303]

In an unusually convoluted case, *State v. Jensen*, the Seventh Circuit vacated a state court conviction where the trial court admitted a letter from the deceased victim; the letter stated that if she died in suspicious circumstances her husband was the culprit.[304] The letter, a solemn accusation intended to be delivered to the authorities upon the victim's death, was testimonial.[305] How it was admitted under Wisconsin's hearsay rules is unclear.[306] On appeal, the parties fought over the applicability of the forfeiture by wrongdoing exception to the Confrontation Clause.[307] Wisconsin does not appear to have adopted forfeiture as a hearsay exception, however.[308] The briefing suggests that the trial court admitted the letter as a dying declaration.[309] If so, that was error, since the requisite unequivocal anticipation of imminent death was not present.[310] Thus, the familiar pattern emerges again. The letter, later deemed to have violated the Confrontation Clause, should never have been admitted under the jurisdiction's hearsay rules. This was another instance of the Confrontation Clause operating to correct an error in the application of the hearsay rules.

Finally, our Texas sample provided an example of a Confrontation Clause violation that stemmed from a local jurisdiction's unusual hearsay exception. Interestingly, once again the Confrontation Clause violation occurred, at least in part, because the exception was

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301. *Kou*, 536 S.W.3d at 545.

302. *Id.*

303. TEX. R. EVID. 803(4) (qualifying statements must be "made for . . . medical diagnosis or treatment").

304. State v. Jensen, 727 N.W.2d 518, 528–29 (2007).

305. *See id.*

306. *See id.* at 537.

307. *See id.*

308. *See* WIS. STAT. ANN. § 908.045 (West 2021) (collecting Rule 804 exceptions but not including forfeiture exception typically included at Rule 804(b)(6)).

309. *See* Brief and Appendix of Defendant-Appellant at 9, State v. Jensen, 727 N.W.2d 518 (2007) (No. 02-CF-314), 2009 WL 8596773, at *9.

310. *Id.*; Shepard v. United States, 290 U.S. 96, 100 (1933) (setting forth traditional requirement for exception that "death is near at hand, and what is said must have been spoken in the hush of its impending presence").

misapplied. Texas Criminal Code of Procedure Article 38.072 allows a child complainant's statements to be introduced into evidence by the first adult to whom the child described the offense.[311] In *In re P.M.*, the lower court allowed hearsay evidence as contemplated in this rule in a sexual assault case.[312] The rule requires, however, that the prosecution call the child to testify or demonstrate that doing so would harm the child.[313] The state did neither and so the evidence violated both Texas' hearsay rule and the Confrontation Clause.[314]

Other than *In re P.M.*, we did not find examples of testimonial statements being offered under unusual hearsay rules, such as ad hoc rules crafted as a convenience for government officials. This follows from the Supreme Court's post-*Crawford* scientific evidence cases, where the Supreme Court made it clear that prosecutors could not submit affidavits from government officials in lieu of their live testimony.[315] We found no evidence that this type of evidence continues to be offered against criminal defendants, suggesting a significant effect of the modern Confrontation Clause— which we discuss further in Part IV.[316]

6. Not for Truth

Our empirical survey uncovered a surprising number of Confrontation Clause challenges (138), and violations (12), arising from out-of-court statements introduced "not for the truth of the matter asserted."[317] As explained in Part II, the hearsay prohibition only bars out-of-court statements offered to prove the truth of the matter asserted.[318] In addition, only statements offered for the truth of the matter asserted can violate the Confrontation Clause.[319] The

311. *See In re* P.M., 543 S.W.3d 365, 377 (Tex. App. 2018).
312. *Id.* at 379.
313. *Id.* at 380–81.
314. *Id.* at 381. Recall that if the declarant testifies there is no Confrontation Clause violation. *See* discussion *supra* Section II.B. Consequently, only if the state relied on the "welfare of the child" provision of the exception, could proper application of this exception lead to a statement that violates the Confrontation Clause. *In re* P.M., 543 S.W.3d at 380–81.
315. *See* discussion *supra* Part I.
316. *See* discussion *supra* Part IV.
317. FED. R. EVID. 801(c).
318. *See* discussion *supra* Part II.
319. *See* discussion *supra* Part II.

overlap between these two propositions should be total.[320] Thus, a Confrontation Clause violation can only arise in this context when there is a parallel hearsay violation. Yet these cases generated many of the violations found by courts in our survey, supporting one of this Article's primary themes. The Confrontation Clause, as currently interpreted, serves an important and underappreciated role as a backstop to errors in the trial court's application of nonconstitutional hearsay rules.

The primary non-hearsay uses of challenged statements in our survey fit three patterns: statements offered to impeach a testifying witness,[321] statements offered to explain the basis for an expert's opinion,[322] and statements offered to explain the course of an investigation or some related background purpose.[323] The last of these, statements offered to explain the course of the investigation, was the most common scenario. It is also a well-established problem area in federal hearsay case law.

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320. In theory, the Supreme Court could fashion a constitutional "truth of the matter asserted" definition based on historical sources that deviates from the modern hearsay definition. James L. Kainen & Carrie A. Tendler, *The Case for A Constitutional Definition of Hearsay: Requiring Confrontation of Testimonial, Nonassertive Conduct and Statements Admitted to Explain an Unchallenged Investigation*, 93 MARQ. L. REV. 1415, 1417 (2010) ("*Crawford* requires a constitutionally mandated definition of hearsay that reflects the full scope of the confrontation right."). But until it does so, there is no sign that the lower courts will do so on their own initiative.

321. *See, e.g.*, United States v. John, 683 F. App'x 589, 594 (9th Cir. 2017); United States v. Hill, 659 F. App'x 707, 712 (3d Cir. 2016); United States v. Cotton, 823 F.3d 430, 436 (8th Cir. 2016); *see also* Wong v. Kernan, No. 17-00520-RGK (FFM), 2019 WL 1865161, at *2 (C.D. Cal. Feb. 28, 2019); Subasic v. United States, No. 5:09-CR-216-FL-3, 2018 WL 3631884, at *6 (E.D.N.C. July 31, 2018); Dickey v. Davis, 231 F. Supp. 3d 634, 711 (E.D. Cal. 2017).

322. *See, e.g.*, United States v. Smith, 919 F.3d 825, 839 (4th Cir. 2019); United States v. Lopez, 880 F.3d 974, 980 (8th Cir. 2018); United States v. Aguirra, 693 F. App'x 516, 519 (9th Cir. 2017); United States v. Lockhart, 844 F.3d 501, 511–12 (5th Cir. 2016); United States v. Rios, 830 F.3d 403, 418–19 (6th Cir. 2016); United States v. Bostick, 791 F.3d 127, 147 (D.C. Cir. 2015).

323. *See, e.g.*, United States v. Audette, 923 F.3d 1227, 1238 (9th Cir. 2019); United States v. Vo, 766 F. App'x 547, 549 (9th Cir. 2019); United States v. Barragan, 871 F.3d 689, 705 (9th Cir. 2017); Viavada v. McKee, No. 5:15-CV-12257, 2016 WL 393177, at *3 (E.D. Mich. Feb. 2, 2016); United States v. Onyenso, 615 F. App'x 734, 736 (3d Cir. 2015); *see also* United States v. Rodriguez-Landa, No. 2:13-cr-00484-CAS, 2019 WL 653853, at *30 (C.D. Cal. Feb. 13, 2019); United States v. Jones, 930 F.3d 366, 377 (5th Cir. 2019) ("[C]ourts must be vigilant in ensuring that these attempts to 'explain the officer's actions' do not allow the backdoor introduction of highly inculpatory statements . . . ." (quoting United States v. Kizzee, 877 F.3d 650, 659 (5th Cir. 2017)).

While there is a technically valid non-hearsay purpose for statements offered to explain the course of an investigation, there is also "breathtaking potential for abuse."[324] Many cases that led to reversals in our survey illustrate that problem. In *United States v. Jones*, the government did not dispute that the challenged statements, made by an informant to a police officer about the defendant's guilt, could not be used to prove the truth of the matter asserted.[325] It argued instead that the statements were introduced to "explain the actions of law enforcement officers."[326] The Fifth Circuit was not amused:

> A witness's statement to police that the defendant is guilty of the crime charged is highly likely to influence the direction of a criminal investigation. But a police officer cannot repeat such out-of-court accusations at trial, even if helpful to explain why the defendant became a suspect or how the officer was able to obtain a search warrant.[327]

The court went on to reverse the conviction.[328] As one of the authors of this Article has explained in the context of the hearsay rules: "Overreliance on out-of-court statements offered as background in this context is not an isolated problem. Courts that are typically reluctant to publicly criticize prosecutors have flagged the 'apparently widespread abuse' of the 'background exception to the hearsay rule.'"[329]

This pattern repeated in another reversal, *United States v. Kizzee*.[330] There, the prosecution introduced statements from an accomplice who, while being interrogated by police, confirmed the defendant's guilt.[331] The government claimed that it introduced the statements, not for their truth, but rather to explain the basis for obtaining a warrant and subsequent police conduct.[332] The appellate

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324. WRIGHT & BELLIN, *supra* note 30, § 6720, at 57.
325. *Jones*, 930 F.3d at 377.
326. *Id.*
327. *Id.*
328. *Id.*
329. WRIGHT & BELLIN, *supra* note 30, § 6720, at 60 (footnote omitted). Properly used, this would not be an "exception" but an application of the hearsay rule since qualifying statements would not be offered for the truth of the matter asserted and so wouldn't fall within the definition of hearsay.
330. United States v. Kizzee, 877 F.3d 650, 663 (5th Cir. 2017).
331. *Id.* at 655.
332. *Id.* at 659.

court rejected this argument, noting that these statements were "unquestionably testimonial hearsay."[333] The court explained that the prosecution can only introduce out-of-court statements like this when, as in the example offered in Part II.A, such context is relevant to a disputed issue in the case (such as an allegation of harassment).[334] In *Kizzee*, there was no such claim. Consequently, the statements were only relevant, and had been used, as an (improper) hearsay accusation of the defendant's guilt.[335] The court reversed the conviction. This pattern of appellate courts rejecting the admission of out-of-court statements purportedly—but not actually—offered to explain the course of the investigation arose with surprising frequency in our sample.[336]

McCarley v. Kelly illustrates a similar error, where the trial court permitted the introduction of out-of-court statements, not for their truth, but purportedly to explain the basis of an expert's opinion.[337] The Sixth Circuit held that the state court unreasonably applied clearly established Sixth Amendment law when it allowed a child psychologist to testify about statements made by a three-and-a-half-year-old declarant.[338] While not apparent from the court's opinion, the Appellee's brief noted that the state court admitted reports that contained the child's statements because they were not being offered

333. *Id.* at 656–57.

334. *Id.* at 659.

335. *Id.* at 660.

336. *See* Reiner v. Woods, 955 F.3d 549, 553 (6th Cir. 2020) (noting how the trial court erroneously permitted statements of deceased pawn shop owner that defendant attempted to pawn stolen merchandise, purportedly to explain officer's actions in going to pawn shop); United States v. Tuttle, 837 F. App'x 391, 395 (6th Cir. 2020) (noting how statement elicited by officer on body camera video from defendant's companion that an illicit weapon belonged to defendant, purportedly offered for completeness of video footage); United States v. Benamor, 937 F.3d 1182, 1190 (9th Cir. 2019) (noting how the trial court erred in admitting landlord's statement confirming defendant's guilt ostensibly offered to "to show their effect on [Officer] Thompson, not for the truth of the statements"); United States v. Vo, 766 F. App'x 547, 549 (9th Cir. 2019) ("The government argues that the informant's statements were not provided for their truth, but rather 'as context . . . .'"); United States v. Marquez, 898 F.3d 1036, 1047–48 (10th Cir. 2018) (accepting government's concession on appeal that statements elicited apparently to confirm investigatory steps was improperly admitted); Richardson v. Griffin, 866 F.3d 836, 840–41 (7th Cir. 2017) ("The state tried to justify the admission of Azcona's report of what Holden and the unnamed witness said as an account of the course of Azcona's investigation[.]"); *cf.* Kainen & Tendler, *supra* note 320, at 1419 ("[C]ourts routinely admit such testimonial statements for this non-hearsay purpose although the defendant did not question the investigators' actions.").

337. *See* McCarley v. Kelly, 801 F.3d 652, 656 (6th Cir. 2015).

338. *Id.* at 665.

for the "truth of the matters contained in the reports but only for the fact that the reports were made."[339] As the federal court's review was limited to constitutional questions, it concerned itself only with that analysis, finding that the statements "were deliberately elicited in an interrogation-like atmosphere" and thus testimonial.[340] But in analyzing the violation for harmless error, the court noted that a key aspect of the problem was that the statements were, in fact, "introduced—without a limiting instruction—to establish the truth of the matter asserted."[341] Thus, the court's conclusion that the statements violated the Confrontation Clause once again paralleled a conclusion that they were improperly admitted under the hearsay rules. A similar error involving expert testimony occurred in *Holland v. Rivard*, where a Michigan state court permitted an "expert witness . . . to relate the work that two of her non-testifying colleagues performed."[342] Again, this violated both the hearsay rules and the Confrontation Clause.[343]

In sum, all the violations discussed in this (not-for-the-truth-of-the-matter-asserted) section involved a Confrontation Clause violation that paralleled a hearsay rules violation. As noted at the outset, when out-of-court statements are offered for something other than the truth of the matter asserted they are both not hearsay and do not violate the Confrontation Clause. When, as in a surprising number of cases in our survey, the courts find a Confrontation Clause violation in this context, it is because the statements were, in fact, introduced to prove the truth of the matter asserted and thus violated the hearsay prohibition as well.

7. Harmless Error

Despite a large number of cases in our survey where courts held that the admission of out-of-court statements violated the Confrontation Clause, very few cases resulted in reversal. In our survey covering 437 total cases, and 33 total Confrontation Clause violations, only 8 cases ended with the court reversing a conviction: 4

339. Brief of Appellee at 10, McCarley v. Kelly, 801 F.3d 652 (6th Cir. 2015) (No. 22562).

340. *McCarley*, 801 F.3d at 665.

341. *Id.* at 666.

342. Holland v. Rivard, 800 F.3d 224, 232 (6th Cir. 2015).

343. *Id.* at 232, 243.

federal circuit court cases,[344] 2 federal district court cases,[345] and 2 Texas state court cases.[346] The reason for the discrepancy is the principle of harmless error. Out of the 33 violations in our sample, the courts concluded that 25 were harmless. This raises an important doctrinal point about the distinction between a violation of the hearsay rules and a violation of the Confrontation Clause.

Violations of the Confrontation Clause require stricter harmless error review than errors in applying the nonconstitutional hearsay rules. A violation of the hearsay rules is "evidentiary error," requiring reversal only if "there is a reasonable likelihood that [the errors] affected the defendant's substantial rights"; violations of the Confrontation Clause are constitutional error, requiring reversal unless "it is 'clear beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'"[347] The survey results suggest, however, that even the more stringent harmless error standard for constitutional error does not produce many reversals. This means that the influence of the Confrontation Clause, at least on appeal, is blunted by frequent findings that violations are harmless "beyond a reasonable doubt."

8. The Absence of Violations Involving Statements Against Interest

One of our most intriguing findings was the relative infrequency of cases involving the statement against interest exception. To the degree we expected to find Confrontation Clause violations in the

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344. *See* United States v. Jones, 930 F.3d 366, 381 (5th Cir. 2019); United States v. London, 746 F. App'x 317, 323–24 (5th Cir. 2018); United States v. Kizzee, 877 F.3d 650, 663 (5th Cir. 2017); Lambert v. Warden Greene SCI, 861 F.3d 459, 473 (3d Cir. 2017); *McCarley*, 801 F.3d at 668.

345. *See* United States v. Ackerly, 395 F. Supp. 3d 160, 164, 167, 168 (D. Mass. 2019); Dixon v. Pfister, 420 F. Supp. 3d 740, 764, 768 (N.D. Ill. 2019).

346. *See In re* P.M., 543 S.W.3d 365, 381, 383 (Tex. Ct. App. 2018); Gutierrez v. State, 516 S.W.3d 593, 599–600 (Tex. Ct. App. 2017).

347. United States v. Caraballo, 595 F.3d 1214, 1229 n.1 (11th Cir. 2010) (citations omitted). In addition, only constitutional errors are remediable in federal collateral review of state court convictions. *See* Swarthout v. Cooke, 562 U.S. 216, 220 (2011) ("The habeas statute 'unambiguously provides that a federal court may issue a writ of habeas corpus to a state prisoner only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.' We have stated many times that 'federal habeas corpus relief does not lie for errors of state law.'"(citations omitted)); Brantley v. Harry, No. 2:17-cv-13634, 2019 WL 2247733, at *7 (E.D. Mich. May 24, 2019) ("To the extent that Petitioner argues that the evidence should not have been admitted under Michigan hearsay rules as a statement against interest, his claim is not cognizable on habeas review.").

post-2015 case law, we expected them to occur most frequently with statements admitted under that exception. We found no such violations.

The absence of Confrontation Clause violations generated by the admission of against interest statements is partially explained by the discussion in Part II.E.[348] Our survey did capture cases involving confrontation challenges to the admission of statements against interest, but these cases involved statements that arose in conversations with friends and acquaintances. As noted in Part II.E, such statements are generally not testimonial and so their admission does not violate the Confrontation Clause. There is a real question about whether such statements should be admitted under the statement against interest exception. Statements to friends and acquaintances are not usually viewed by the speaker as likely to become prosecution evidence. Consequently, such statements are rarely so powerfully against interest that they must be true—as the hearsay exception requires.[349] But that would be an error in the hearsay analysis, not the application of the Confrontation Clause. And the Confrontation Clause does not backstop this type of hearsay error.

Two cases from our survey helpfully illustrate the phenomena described above. In *United States v. Taylor*, the prosecution introduced a statement by the defendant's accomplice to a jailhouse informant that implicated both the accomplice and the defendant in a murder.[350] The Second Circuit deemed the statements sufficiently against interest to qualify for admission under the hearsay exception, but determined that they were "not testimonial because [the declarant] was not aware that he was speaking to a confidential informant or that his statements could be used at a trial."[351] Note that if, in fact, the declarant did not anticipate "that his statements could be used" against him by authorities, it is unclear that the statements satisfied the hearsay exception's strongly-against-interest requirement.[352] But, again, this is a problem of hearsay law. The Confrontation Clause analysis is sound.

United States v. Alvarado concerned a similar scenario.[353] In fact, the defendant focused his arguments on this exact weakness, pointing out that the out-of-court statement in which the declarant "admitted

348. *See supra* Part II.E.

349. *See* FED. R. EVID. 804(b)(3)(A); *supra* Part II.E.

350. *See* United States v. Taylor, 802 F. App'x 604, 608 (2d Cir. 2020) (holding statement against interest to confidential informant not testimonial).

351. *Id.*

352. *See supra* Part II.E.

353. *See* United States v. Alvarado, 816 F.3d 242, 251 (4th Cir. 2016).

to purchasing heroin [from the defendant] was 'nominally against [the declarant's] penal interest'—although 'barely so' because [the declarant] Thomas was speaking 'only to other drug users and friends.'"[354] The court skipped over that complication, taking on the Confrontation Clause analysis instead. The court explained that: "[T]he challenged testimony included statements that Thomas made to his fiancée and to one of his best friends—in an informal setting—that he purchased his heroin from 'Fat Boy.' Because such statements were not testimonial, their admission did not implicate the Confrontation Clause."[355] Other cases in our survey followed this same pattern.[356]

By contrast to the cases above, the absence of cases involving statements against interest *made to law enforcement* is somewhat puzzling. Looking over the federal case law, we found a few instances of statements against interest to law enforcement whose admission, the courts recognized, violated the Confrontation Clause. But these occurred infrequently in unpublished district court opinions that did not meet the parameters of our survey.[357] One explanation for this absence is that the Confrontation Clause violation based on the admission of statements against interest to law enforcement is so clear that trial courts regularly exclude such statements or prosecutors do not offer them, resulting in little formalized litigation over their admission. Fairly clear guideposts exist in the case law, such as the *Crawford* case itself. The Seventh Circuit, for example, in an opinion endorsing the admission of an against-interest statement

354. *Id.*

355. *Id.* at 252.

356. *See* United States v. Veloz, 948 F.3d 418, 431 (1st Cir. 2020) (concluding that statements to acquaintances admitted as against interest were not testimonial); United States v. Klemis, 859 F.3d 436, 444 (7th Cir. 2017) ("McKinney's statements to Singleton and Libbra [admitted as statements against penal interest] reflect spontaneous attempts to borrow or steal from friends to pay a drug debt, not efforts to create an out-of-court substitute for trial testimony."); Brantley v. Harry, No. 2:17-cv-13634, 2019 WL 2247733, at *8 (E.D. Mich. May 24, 2019) ("The Michigan Court of Appeals correctly concluded that Stoudemire's statement to Wilson was nontestimonial. The statement was made from one friend to another in an informal setting soon after the shooting.") (Note: *Brantley* did not meet the parameters of the survey).

357. *See* Moore v. Hooper, No 17-1881, 2017 WL 704987, at *9 (E.D. La. Oct. 13, 2017) (concluding hearsay statement given to law enforcement admitted as statement against penal interest violated Confrontation Clause); Gaines v. Price, No. 2:15-cv-1822, 2017 WL 2296962, at *24–25 (N.D. Ala. May 2, 2017) (concluding similarly that hearsay statement given to law enforcement admitted as statement against penal interest violated Confrontation Clause).

to friends, explains that: "[S]tatements made to persons who are not law-enforcement personnel are 'much less likely to be testimonial than statements to law enforcement officers.'"[358] We only pause in fully endorsing this explanation because our survey revealed other fairly obvious errors. The frequent appearance of hearsay errors in the case law weakens the conclusion that prosecutors and trial courts conform their behavior to extant legal doctrine. Trial courts (and prosecutors) do appear to be permitting the introduction of evidence that violates the Confrontation Clause. They are just doing it through errors in applying the hearsay rules. That said, the question is one of degree, and the clarity of the guideposts in this context seem the most likely explanation. Consequently, we think the absence of statements against interest to law enforcement in our survey should be considered a sign of the effectiveness of *Crawford* in changing one part of the evidentiary landscape, most suitably in the scenario considered in *Crawford* itself.[359]

IV. THE STATE OF MODERN CONFRONTATION CLAUSE DOCTRINE

Having analyzed the possible pathways for the admission of out-of-court statements and provided a window into how those pathways interact with modern Confrontation Clause doctrine both as a theoretical and empirical matter, this Part explores the implications. As discussed in more detail below, Confrontation Clause doctrine remains vulnerable to a critique that it has reverted to a minor role reminiscent of its pre-2004 status. In some ways, the Confrontation Clause again appears redundant in light of existing hearsay prohibitions that cover much of the same ground. At the same time, we show that the critique must be softened since the Clause does appear to be blocking some pathways to the admission of out-of-court statements under the hearsay rules or potential extensions of those rules. More interestingly, we find that the Confrontation Clause, even in its currently weakened form, does more than screen evidence properly admitted under nonconstitutional evidence rules. And the Clause's important, and unappreciated, role as a backstop to faulty

358. *Klemis*, 859 F.3d at 444.

359. One other possibility is that statements-against-interest played a role in the *Bruton* cases we excluded from our survey to the extent the statements were uttered by co-defendants being jointly tried. *See, e.g.*, United States v. McCoy, 235 F. Supp. 3d 427, 435 (W.D.N.Y. 2017) (noting the issue of the admissibility of certain statements, including statements against interest, in consideration of *Bruton* claim related to motion to sever that was ultimately denied). We included cases that involved *Bruton* and Confrontation Clause analysis, however, so this should not be a major factor.

hearsay analysis is different from the backstopping role played by the same constitutional provision under the prior *Ohio v. Roberts* regime.

Most basically, our analysis supports the argument, voiced by Justice Scalia, that most of the modern Confrontation Clause's protections overlap with common, nonconstitutional evidentiary exclusions. As was the case under *Ohio v. Roberts*, the Confrontation Clause will rarely force today's prosecutors to abandon a valid pathway through a jurisdiction's hearsay rules. We draw this conclusion from our analysis of the overlap between the two sources of authority and the striking pattern that emerged in our empirical survey. We found almost no examples of admissible hearsay being excluded by the Confrontation Clause.[360] Instead, almost every court that found a Confrontation Clause violation did so in a context where a trial court applied the hearsay rules incorrectly.[361] These errors occurred in two frequently repeated scenarios: (1) a trial court permitted the prosecution to introduce an out-of-court statement under a hearsay exception, like the public records exception, that did not, in fact, apply;[362] or (2) a trial court allowed the prosecution to introduce hearsay ostensibly, but incorrectly, for something other than the truth of the matter asserted.[363] These findings support Justice Scalia's accusation to a point. For the most part, the Clause prohibits what is already prohibited (violations of traditional hearsay rules) and permits what is already permitted (admission of out-of-court statements through the traditional hearsay framework). On the surface, new Confrontation Clause doctrine looks a lot like old Confrontation Clause doctrine.

Contrary to Justice Scalia's critique, we also found signs of the Confrontation Clause's influence that are harder to detect. These signs suggest: (1) that some admissible hearsay is no longer being used against criminal defendants; and (2) that the doctrine does more than just regulate the admission of evidence that is otherwise admissible under a jurisdiction's hearsay rules. On the first point, the strongest example is the surprising absence from our survey of the paradigmatic type of statements against interest: statements by accomplices to law enforcement.[364] This suggests that Confrontation Clause doctrine has shifted at least one part of the evidentiary landscape. Either prosecutors are not offering, or trial courts are not

360. *See supra* Part III.
361. *See supra* Part III.
362. *See, e.g.*, United States v. Barber, 937 F.3d 965, 969 (7th Cir. 2019).
363. *See, e.g.*, United States v. Kizzee, 877 F.3d 650, 657–59, 661 (5th Cir. 2017).
364. *See supra* Part IV.

admitting, statements against interest made to law enforcement. As a result, cases considering this evidence do not appear in our survey.[365] The most likely explanation is a widely shared understanding that these statements are no longer permitted by the Confrontation Clause.[366]

The preceding discussion raises another area where the lack of cases in our survey suggests that the Confrontation Clause is likely having an impact: preventing legislatures from creating new hearsay exceptions as a matter of convenience for overworked government analysts. Prior to *Crawford*, affidavits by government officials could be offered in lieu of live testimony through ad hoc hearsay exceptions like the statutory provision successfully challenged in *Melendez-Diaz v. Massachusetts*.[367] These types of formal affidavits offered by government officials to support a prosecution are, after *Crawford* and the subsequent cases, clearly barred by the Confrontation Clause. The fact that we found no evidence of such statutes still being utilized suggests that trial courts, prosecutors, and legislators have internalized this shift in the constitutional landscape.[368] So, while the modern Confrontation Clause may be doing little to prevent prosecutors from introducing hearsay evidence under traditional hearsay frameworks (with the one exception noted above), it nevertheless resists legislative efforts to expand the traditional hearsay exceptions. This is consistent with our finding of few Confrontation Clause violations (or even challenges) resulting from statements admitted through unusual hearsay rules or aggressive applications of the residual hearsay exception.

The next point our analysis raises about the Confrontation Clause's hidden effects may be the most important and most overlooked. Reading high profile Supreme Court opinions crafted after months of deliberation and in response to comprehensive briefing, it is easy to forget that the rules governing hearsay are among the most complex in American law. In the fast paced, high stakes world of trial

365. *See supra* Part III.

366. *Compare supra* Part II.E (noting that the Confrontation Clause should preclude such statements), *with supra* Part III.B.8 (noting relative absence of such statements from the survey in contrast with frequent appearance of other types of statements against interest).

367. Melendez-Diaz v. Massachusetts, 557 U.S. 305, 308 (2009) (noting admission of certificate of analysis under MASS. GEN. LAWS, ch. 111, § 13, which has since been repealed).

368. Friedman, *supra* note 49, at 46 ("*Melendez-Diaz* and *Bullcoming* are still the law, and there is no majority opinion in *Williams*."); Pardo, *supra* note 14, at 783 ("[T]he confrontation right seems to be moving in different directions for experts and eyewitnesses.").

practice, attorneys and judges can be expected to make mistakes. This means that the Confrontation Clause matters not just through its effect on otherwise admissible hearsay evidence. The Clause also plays an important role when it excludes *inadmissible* hearsay admitted in error. The Confrontation Clause has narrowed in the cases after *Crawford*, but it continues to offer a few clear roadblocks. Our analysis reveals that those roadblocks come into play not just in barring evidence that is admissible under the hearsay rules, but also, and perhaps more importantly, to correct lower courts' errors in applying nonconstitutional hearsay rules. In theory, this should be particularly significant because a constitutional hook allows federal courts to review erroneous state evidentiary rulings and triggers a less forgiving version of harmless error review.[369] In practice, our survey shows that these factors are not leading to a substantial number of reversals due to the courts' willingness to find even constitutional errors to be harmless.[370]

Finally, it is important to note that the post-*Crawford* narrowing of the confrontation right should not be equated—as it was by Justice Scalia—with a return to *Ohio v. Roberts*. True, the cases that followed *Crawford* made modern Confrontation Clause doctrine less restrictive, but the respective doctrines' distinct emphases result in distinct vulnerabilities. Under *Roberts*, the focus was on reliability. This eased the admission of out-of-court statements like affidavits filed by government bureaucrats. Under *Crawford*, the exclusionary focus shifts to evidence generated as a substitute for trial testimony. Modern policymakers can craft new hearsay exceptions that admit hearsay of questionable reliability, like text messages and social media posts, but cannot allow more formal hearsay like affidavits of government chemists.[371] As our analysis shows, this impact may be most important not with respect to existing hearsay rules, but in preventing changes to those rules and *correcting errors in applying them*. Under *Roberts*, the Confrontation Clause was available to correct trial court errors in hearsay analysis that admitted unreliable

369. *See* Swarthout v. Cooke, 562 U.S. 216, 220 (2011); United States v. Caraballo, 595 F.3d 1214, 1229 n.1 (11th Cir. 2010); Brantley v. Harry, No. 2:17-cv-13634, 2019 WL 2247733, at *7 (E.D. Mich. May 24, 2019); *supra* Part III.B.7.

370. *See supra* Part III.B.7.

371. *See* Jeffrey Bellin, *Applying Crawford's Confrontation Right in A Digital Age*, 45 TEX. TECH L. REV. 33, 41-42 (2012) (noting limited application of modern Confrontation Clause to "the informal electronic communications that will increasingly dominate our discourse"); *cf.* Crawford v. Washington, 541 U.S. 36, 51 (2004) (contrasting hearsay and confrontation analysis of "off-hand, overheard remark[s]" and "*ex parte* examinations").

hearsay. Prime candidates for exclusion included casual statements to friends and acquaintances about later litigated events.[372] Under *Crawford*, such statements escape constitutional scrutiny.[373] Instead, modern Confrontation Clause doctrine backstops errors involving the admission of formal accusations.[374] While we should expect courts to continue to make errors throughout the hearsay framework, only errors that occur in connection with official records or solemn accusations will receive constitutional scrutiny.

CONCLUSION

The Sixth Amendment commands that the defendant in a criminal trial must "be confronted with the witnesses against him."[375] Nevertheless, the Supreme Court has long permitted prosecutors to introduce the out-of-court statements of absent declarants to convict criminal defendants. Twice, the Court has attempted to draw a clear line to distinguish those statements that can be admitted without confrontation from those that cannot. Commentators roundly criticized the line the Court drew in 1980 as redundant to existing nonconstitutional hearsay rules. The Court drew a new line in 2004. Our analysis reveals that the new line, as subsequently interpreted by the Supreme Court, is vulnerable to a similar charge.

Our analysis also reveals the importance of recognizing the Confrontation Clause's impact beyond its regulation of evidence admitted through existing hearsay pathways. Constitutional doctrine changes the options available to policymakers to expand hearsay exceptions beyond traditional bounds. Most importantly, it offers a critical backstop against trial courts' hearsay errors. The frequency of those errors revealed by our survey suggests that the shift from *Roberts* to *Crawford* with respect to which errors receive constitutional scrutiny is an important, and overlooked, aspect of the modern confrontation right.

In sum, the Confrontation Clause matters, but it matters in different ways and to a lesser degree than both the Supreme Court's rhetoric and modern scholarship celebrating the "Crawford revolution" suggest.

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372. *See supra* Part III.B.6, 8.
373. *See Crawford*, 541 U.S. at 51.
374. *Id.*
375. U.S. CONST. amend. VI.

APPENDIX: DATA TABLES

Federal Appeals Court Opinions

	No Violation	Yes, Violation	No Determination; if Error, Harmless Error	Total
Absence of Record	0	0	1	1
Then-Existing Mental State	1	0	0	1
Precedent	1	0	0	1
Dying Declaration	4	0	0	4
Present Sense Impression	10	0	0	10
Forfeiture-by-Wrongdoing	5	1	1	7
Statements Against Interest	6	0	0	6
Medical Treatment	6	0	0	6
Opposing Party's Statements	6	2	1	9
Public Records	7	4	1	12
Excited Utterance	14	1	0	15
Expert Testimony	15	3	2	20
No Objection; Invited Error	12	2	5	19
Business Records	21	1	3	25
Statements by Co-conspirators	31	0	0	31
Not Found	16	0	10	26
Not Hearsay	84	10	9	103

Federal Appeals Court Opinions (Cont.)

Past Recollection Recorded	1	0	0	1
Rule of Completeness	0	2	0	2
Total	**240**	**26**	**33**	**299**

Published Federal District Court Opinions

	No Violation	Yes, Violation	No Determination; if Error, Harmless Error	Total
Not Hearsay	8	1	0	9
Excited Utterance	1	0	0	1
Expert Testimony	3	0	0	3
Forfeiture-by-Wrongdoing	1	0	0	1
Statements by Co-conspirators	5	0	0	5
Business Records	3	0	0	3
Statements Against Interest	1	0	0	1
Opposing Party's Statements	2	0	0	2
Then-Existing Mental State	1	0	1	2
Invited Error	0	1	0	1
Not Found	5	0	0	5
Total	**30**	**2**	**1**	**33**

Unpublished Federal District Court Opinions

	No Violation	Yes, Violation	No Determination; if Error, Harmless Error	Total
Not Hearsay	21	1	1	**23**
Excited Utterance	7	0	0	**7**
Statements by Co-conspirators	5	0	1	**6**
Expert Testimony	13	0	2	**15**
Statements Against Interest	0	0	1	**1**
Present Sense Impression	3	0	0	**3**
Business Records	5	0	1	**6**
Public Records	1	0	0	**1**
Spontaneous Declarations	2	0	0	**2**
Then-Existing Mental State	3	0	0	**3**
Prior Inconsistent Statements	1	0	0	**1**
Res Gestae	1	0	0	**1**
Dying Declaration	3	0	0	**3**
Forfeiture-by-Wrongdoing	3	0	0	**3**
Prior Statements of Identification	1	0	0	**1**
Admission by Party Opponent	3	0	0	**3**
Adoptive Admission	1	0	0	**1**
No Objection Raised at Trial	1	0	0	**1**
Not Found	8	0	2	**10**
Medical Diagnosis	1	0	0	**1**
Prior Testimony	1	0	0	**1**
Total	**84**	**1**	**8**	**93**

Texas Appellate Courts

	No Violation	Yes, Violation	No Determination; if Error, Harmless Error	Total
Not Hearsay	3	0	2	5
Tex. R. Evid. 804(4): Medical Diagnosis	1	0	1	2
Tex. R. Evid. 803(2): Excited Utterance	4	1	0	5
Tex. Code Crim. Proc. Ann. Art. 38.072	3	1	0	4
Tex. R. Evid. 803(6): Business Records	2	0	0	2
Tex. Code Ann. Art. 38.49(c): Forfeiture-by-Wrongdoing	1	0	0	1
Tex. R. Evid. 803(8): Public Records	0	1	0	1
Tex. R. Evid. 801(e)(2): Statements by Co-conspirator	1	0	1	2
Expert Testimony	2	1	0	3
Not Found	4	0	2	6
Tex. R. Evid. 803(1): Present Sense Impression	1	0	0	1
Total	**22**	**4**	**6**	**32**