ISN'T THAT HEARSAY ANYWAY?

HOW THE FEDERAL HEARSAY RULE CAN SERVE AS A MAP TO THE CONFRONTATION CLAUSE

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ABSTRACT

This Article discusses federal precedent and legal theory to demonstrate that a hearsay statement that is admissible under the Federal Hearsay Rule is almost always admissible under the Confrontation Clause. This Article shows that *Crawford v. Washington* may not have been so revolutionary in its requirements, and that the Supreme Court may properly re-adopt the standard *Crawford* had overruled to eliminate the few inconsistencies that remain between the Federal Hearsay Rule and the Sixth Amendment, thereby alleviating procedural confusion while still upholding defendants' essential rights. In fact, the Supreme Court's jurisprudence may have already come almost full circle since *Crawford*, essentially limiting *Crawford* in subsequent decisions to the extent that *Crawford* and its progeny largely resemble the *Roberts* standard they were supposed to overrule.

I. INTRODUCTION

The Sixth Amendment of the United States Constitution states that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ."[1] This right to confront adverse witnesses only applies if their statements are testimonial.[2] Over the past thirteen years, these new rules brushed aside well-established principles that guided criminal defense attorneys and prosecutors alike in decades past. While the Federal Hearsay Rule may seem different from these two requirements, it too serves the important purpose of ensuring that an individual can cross-examine opposing witnesses and (with some exceptions) avoid trial based on entirely out-of-court statements.[3] Therefore, it should not be too surprising that a critical inspection of both the Confrontation Clause and the Federal Hearsay Rule shows that the Federal Hearsay Rule may serve as a map to the Confrontation Clause. In fact, that was the very thrust of the standard the Supreme Court overruled in 2004.[4] While the Court's twenty-first century alterations of its jurisprudence on the Confrontation Clause were somewhat revolutionary at their inception, this Article will show that the Court has, over time,

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

2. Massachusetts v. Melendez-Diaz, 557 U.S. 305 (2009); Giles v. California, 554 U.S. 353 (2008); Davis v. Washington, 547 U.S. 813 (2006); Crawford v. Washington, 541 U.S. 36 (2004).

3. FED. R. EVID. 801–807.

4. *See Crawford*, 541 U.S. 36.

almost completely returned to the very standard these new rules were intended to replace.

While showing that the Court has returned to past practices is an important portion of this work, this Article also evaluates the Supreme Court's Confrontation Clause jurisprudence and its application in state and federal prosecutions to establish that argument, thereby also serving as a useful practical guide to the Confrontation Clause. That is intentional: a comprehensive guide for prosecutors and defense counsel alike to navigating the sometimes murky waters of this clause of the Sixth Amendment is crucial in demonstrating that the United States Supreme Court may be retreating from the very jurisprudence that originally made these waters so murky. Some portions of this Article may seem like a map for prosecutors to overcome a Confrontation Clause objection. After all, the Confrontation Clause applies against the prosecution in a criminal trial and *not* against the defense.[5] However, this Article also serves as a guide for defense lawyers to prevent a prosecutor from introducing evidence at trial that the Sixth Amendment properly excludes.

Part II of this Article reviews the requirements that the Confrontation Clause formerly imposed on state and federal prosecutors and how the Supreme Court expanded those requirements in *Crawford, Giles*, and *Melendez-Diaz* while later limiting them in *Davis*.[6] It also shows that the Supreme Court's jurisprudence has left some questions unanswered regarding the newly adopted application of the Sixth Amendment—questions that the Court itself has not quite resolved in the decisions that followed.[7] Part III argues that while the Court's interpretation of the Confrontation Clause may appear to impose formidable and unpredictable evidentiary barriers upon the prosecution, many of these barriers can be overcome simply by following Article VIII of the Federal Rules of Evidence.[8] This is a "rule" that is not without its exceptions, but those exceptions are hardly numerous.

Part IV argues that there may be an advantage in completely aligning the requirements of the Confrontation Clause with the Federal Hearsay Rule. The provisions of both aim to remedy the same problem in the context of a trial and the added clarity will aid defense lawyers and prosecutors alike without placing the defendant in any undue jeopardy of

5. U.S. CONST. amend. VI.

6. *Melendez-Diaz*, 557 U.S. 305; *Giles*, 554 U.S. 353; *Davis*, 547 U.S. 813; *Crawford*, 541 U.S. 36.

7. Williams v. Illinois, 567 U.S. 50 (2012); Bullcoming v. New Mexico, 564 U.S. 647 (2011); Michigan v. Bryant, 562 U.S. 344 (2011); *Melendez-Diaz*, 557 U.S. 305; *Giles*, 554 U.S. 353; *Davis*, 547 U.S. 813.

8. FED. R. EVID. 801–07.

an unjust conviction. The Article concludes that following the Federal Hearsay Rule[9] in state and federal prosecutions would allow prosecutors to overcome objections raised under the Confrontation Clause even though the Supreme Court's jurisprudence does not exactly provide crystallized guidance on this matter. In fact, the Article shows that the Supreme Court's jurisprudence may have come full circle, essentially limiting *Crawford* in subsequent decisions to the extent that its rule now largely resembles the very standard it was supposed to overrule.

II. *CRAWFORD*, ITS PROGENY, AND THE NEW APPROACH TO THE CONFRONTATION CLAUSE

The United States Supreme Court's Confrontation Clause jurisprudence took a seemingly sharp turn with the reversal of *Ohio v. Roberts*[10] by *Crawford*. *Roberts* established a standard that survived almost three decades:

> when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate "indicia of reliability." Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.[11]

Crawford appeared to cast that standard aside.[12]

In *Crawford*, the Court decided whether statements made to police by the defendant's wife following the stabbing of another could be used to convict the defendant when Washington's marital privilege precluded her testimony at trial.[13] The Court rendered her statements inadmissible under the Sixth Amendment, reversing the defendant's conviction.[14] Eliminating the "adequate 'indicia of reliability'" test, *Crawford* upheld the right of all criminal defendants to confront the witnesses against them

9. *Id.*

10. Ohio v. Roberts, 448 U.S. 56 (1980) *abrogated by* Crawford v. Washington, 541 U.S. 36 (2004).

11. *Id.* at 66.

12. *See Crawford*, 541 U.S. 36 (reversing *Roberts*, 448 U.S. 56).

13. *Id.* at 38–42.

14. *Id.* at 60–69.

where the witness's statements offered at trial were "testimonial."[15] Although the Court did not categorically establish a definition of "testimonial" in *Crawford*, the Court noted that a "testimonial" statement was "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact," presumably at a future criminal trial.[16] Justice Scalia, writing for the Court in *Crawford* (as well as many other Confrontation Clause decisions discussed in this article), also identified potential exceptions to the rule, such as forfeiture by wrongdoing and statements made while under the belief of impending death.[17]

The Court in *Giles* reaffirmed the application of the Confrontation Clause to a murder case where the defendant killed a witness that made statements to police following a domestic violence incident.[18] The prosecution used those statements in the defendant's trial for the witness's murder to establish that the defendant had previously attacked the witness, with whom he had a prior relationship, after forming the opinion that she was having an affair.[19] It appeared that the prosecution sought to use these statements to show motive (as well as potentially establishing the defendant's willingness to attack the witness without fear, casting doubt on his claim of self-defense).[20] The United States Supreme Court suppressed these statements.[21] The Court reasoned that a defendant could not forfeit his right to confrontation by wrongdoing unless he caused the absence of the witness with the "design" of preventing the witness from testifying.[22] It also established that a person on trial for the murder of a potential witness against himself or herself could not be prosecuted with the "testimonial" statements the witness previously made to police.[23]

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15. *Id.* at 68 ("[w]here testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination.").

16. *Id.* at 51.

17. *Id.* at 56 n.6, 62.

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

19. *Id.* at 356–57.

20. *See id.*

21. *Id.* at 377.

22. *Id.* at 359–64 (emphasis in original), 367–73, 376–77.

23. *Id.* The Court reasoned that a person ordinarily cannot murder a witness with the specific intent of preventing the witness from testifying *at the murder trial in which the witness is the victim*. The scenario itself presents a contradiction: a murder witness cannot testify to his own murder on the account of his death. Furthermore, it would be an extraordinary criminal who kills the victim to prevent the victim from testifying *in the future about the victim's own murder*. However, the Court's decision specifically states that if a criminal kills to prevent a witness from testifying about an earlier crime committed by the same criminal, the prosecution may present the deceased's statement

Melendez-Diaz further reiterated the requirements placed upon the prosecution in *Crawford*, and established that these requirements applied nonetheless to lab reports produced by state and federal agents for the purposes of a criminal prosecution.[24] The case involved an attempt by the prosecution to use an affidavit of a government laboratory technician to establish that the substance found on the defendant's person was cocaine.[25] Justice Scalia, writing for the majority, held that the technician's statements were "testimonial" and therefore subject to confrontation at trial.[26] The Court also concluded that states could modify the procedure regarding how the defendant could invoke the right to confront lab technicians at trial, but the right could not be eliminated altogether merely by admitting the evidence via an exception to the hearsay rule.[27]

Davis limited the reach of the Confrontation Clause by reiterating that a Sixth Amendment objection raised at trial would only be sustained if the statements objected to fell within the definition of "testimonial" statements.[28] Although the Supreme Court had alluded to this rule in *Crawford*, it did not describe the definition of the word "testimonial" in great detail.[29] The facts of *Davis* forced the Court's hand in expounding upon the constitutional definition of the term further.[30]

Davis brought before the Court two cases with seemingly similar facts which were consolidated for review: *Washington v. Davis*[31] and *Hammon v. Indiana*.[32] *Davis* required the Supreme Court to decide whether statements made to law enforcement during a 911 call which identified the perpetrator could be admitted against the perpetrator at trial

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concerning the earlier crime in the trial for that earlier crime. *Id.* at 376–77. Curiously, the Court did not address whether, during a murder trial, a prosecutor can use the murdered witness's statements for a purpose other than the truth of those statements. The prosecutor can introduce such evidence to show the murderer's motive to keep the witness quiet, regardless of whether the statements were true or false. For reasons discussed later in this Article, offering the statement for this alternate purpose should pass muster under the Confrontation Clause. *See infra* Part III.A.

24. *See* Massachusetts v. Melendez-Diaz, 557 U.S. 305 (2009); *see also* Bullcoming v. New Mexico, 564 U.S. 647 (2011).

25. *Melendez-Diaz*, 557 U.S. at 307–09.

26. *Id.* at 310 ("There is little doubt that the documents at issue fall within the 'core class of testimonial statements' thus described.").

27. *Id.* at 325–27.

28. Davis v. Washington, 547 U.S. 813, 821 (2006).

29. *Id.* at 822; Crawford v. Washington, 541 U.S. 36, 52–53 (2004).

30. *Davis*, 547 U.S. at 822.

31. Washington v. Davis, 64 P.3d 661 (2003).

32. Hammond v. Indiana, 829 N.E.2d 444 (Ind. 2005) *rev'd* 547 U.S. 813 (2004); *Davis*, 547 U.S. at 817–21.

when the victim who made the call did not testify.[33] *Hammon* required the Court to decide whether statements made to police after they responded to a domestic violence call and secured the suspect could be admitted against the suspect in a trial where the victim failed to appear and give testimony.[34] Both factual scenarios required the application of *Crawford* with an eye towards the meaning of the word "testimonial."[35] After all, if the statements the witness in *Crawford* made to police after the domestic violence incident at her home could be suppressed under the Confrontation Clause, then how could the result be any different in *Davis* or *Hammon*?[36]

Justice Scalia addressed the question head-on, drawing a crucial distinction between statements made to police in response to interrogation for the purpose of a criminal prosecution and statements made during an "ongoing emergency."[37] The former could be defined as "testimonial" while the latter could not for a host of reasons both under English and American common law.[38] The Court also recognized a practical distinction between calm statements made to police after the defendant was apprehended and frantic declarations made while the victim was in danger and while the defendant was on the run, posing a potential threat both to the victim and to law enforcement.[39] After identifying these distinctions, the Court ruled that the statements made by the victim to the 911 operator in *Davis* were not "testimonial," and therefore the Confrontation Clause did not exclude them from evidence.[40] The statements in *Hammon*, on the other hand, were "testimonial" and therefore should have been suppressed.[41] However, the Court still declined to express a full definition of the word "testimonial" (despite listing several examples) that would apply in all cases following *Davis*.[42]

It is important to note that while *Crawford*, *Giles*, *Melendez-Diaz*, and *Davis* appeared to clarify the issue, they often raised as many questions as they answered. The Supreme Court's own subsequent jurisprudence bore that out: Justice Scalia, who authored all four of the above-mentioned opinions, found himself dissenting in some of the cases

33. *Davis*, 547 U.S. at 817–19.
34. *Id.* at 819–21.
35. *Id.* at 822.
36. *See id.* at 817–34.
37. *Id.* at 822.
38. *Id.* at 817–34.
39. *Davis*, 547 U.S. at 822–34.
40. *Id.* at 822–29.
41. *Id.* at 829–34.
42. *Id.* at 822.

that followed, despite the fact that those cases relied on the interpretation and application of *Crawford*, *Giles*, *Melendez-Diaz*, and *Davis*.[43] Furthermore, one of the Court's latest decisions on the matter resulted in a per curium opinion that dealt more with the concept of the appropriateness of habeas relief rather than offering any great clarification on the application of the Confrontation Clause to particular factual scenarios. This perhaps shows a reluctance on the part of the Court to deal with a divisive issue.[44]

One might theorize from the Court's jurisprudence that a "testimonial" statement is one which *law enforcement* gather for the purposes of use in a criminal prosecution.[45] Notice that this view would place weight on the intent (and official role) of the listener rather than the intent of the speaker (thereby engaging in no analysis regarding the reason a victim might be reporting a crime to the police).[46] This Article does not address in detail why this view is likely incongruent with the holding of the relevant Supreme Court decisions. However, it is important to point out that this view seems to chiefly arise from the following paragraph in *Davis*:

> Without attempting to produce an exhaustive classification of all conceivable statements—or even all conceivable statements in response to police interrogation—as either testimonial or nontestimonial, it suffices to decide the present cases to hold as follows: statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.[47]

At first blush, the paragraph appears to base the definition of the word "testimonial" on whether an interrogating police officer was present, whether he conducted an interrogation, and whether the interrogation was intended to produce statements relevant in a future

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43. *See also* Michigan v. Bryant, 562 U.S. 344, 379–95 (2011). *See generally* Williams v. Illinois, 567 U.S. 50, 119 (2012).

44. *See* Woods v. Etherton, 136 S. Ct. 1149 (2016) (per curiam).

45. *See Davis*, 547 U.S. at 822.

46. *Id.*

47. *Id.*

criminal prosecution.[48] However, this paragraph, which is undoubtedly important, is followed by a crucial footnote:

> Our holding refers to interrogations because, as explained below, the statements in the cases presently before us are the products of interrogations—which in some circumstances tend to generate testimonial responses. This is not to imply, however, that statements made in the absence of any interrogation are necessarily nontestimonial. The Framers were no more willing to exempt from cross-examination volunteered testimony or answers to open-ended questions than they were to exempt answers to detailed interrogation. (Part of the evidence against Sir Walter Raleigh was a letter from Lord Cobham that was plainly *not* the result of sustained questioning. *Raleigh's Case,* 2 How. St. Tr. 1, 27 (1603).) And of course even when interrogation exists, it is in the final analysis the declarant's statements, not the interrogator's questions, that the Confrontation Clause requires us to evaluate.[49]

This is likely for a good reason: the Court identified the Confrontation Clause as a procedural safeguard to verify the credibility of the declarant's testimony through cross-examination.[50] The relevant reliability inquiry looks into the reliability of the *declarant*, not the reliability or official role of whoever overhears the declarant's statement and happens to repeat it at trial.[51] Additionally, if one considers the hearsay rule in general, as well as the Confrontation Clause jurisprudence, it is clear that the goal is to verify the truthfulness and reliability of the declarant, not whoever is recording the statement for trial (even if the person recording the statement is a police officer).[52]

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48. *Id.*

49. *Id.* at 822 n.1.

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

51. *See id.* at 61 ("[T]he Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination."); *see also Davis*, 547 U.S. at 822 n.1.

52. Few rules in Federal Rules of Evidence 801–807 address the credibility or reliability of the person or document that presents the hearsay statement before the fact finder. This is likely because the relevant inquiry looks into the reliability of the statement rather than into the reliability of who heard it. As for the Confrontation Clause, Sir Walter Raleigh did not wish to face his accusers because he believed that their words were not heard or transcribed correctly. He wished to face his accusers to show that they were not telling the truth and wished to establish this through the procedural safeguard of cross-examination. *See generally Crawford*, 541 U.S. at 44.

Furthermore, this approach leaves in question statements made to listeners who are *not* police officers: are they not subject to the Confrontation Clause at all, since no police intent can be implicated whatsoever? One could argue that such statements could be just as damaging as statements made to police, since one bystander telling another that he saw the defendant kill his wife could incriminate the defendant at trial as surely as any statement to this effect made to a police officer. Thus, although this question also adds to some of the instability that plagues current Confrontation Clause jurisprudence, this Article will not consider it much further. Footnote 1 in *Davis* clearly establishes that the questioner, or receiver of an unsolicited "testimonial" statement, is not the target of the Confrontation Clause.[53] Rather, the credibility of the speaker is at issue, and that remains at issue regardless of the person who hears the incriminating declaration.[54]

Finally, it is tragic to note that the noble jurist who penned the four opinions discussed above has recently passed away, potentially leaving the Court at a crossroads without the guidance of the justice who had championed most of the current interpretation of the Confrontation Clause.[55] This uncertainty makes the Confrontation Clause appear as a formidable opponent of hearsay statements being offered into evidence under various state and federal exceptions to the hearsay rule. I will attempt to demonstrate that even with the looming uncertainty that the Confrontation Clause invites, following the Federal Hearsay Rule will often allow hearsay evidence to be admissible over a Sixth Amendment objection.

III. FEDERAL RULES OF EVIDENCE AS A MAP FOR NAVIGATING THE MURKY WATERS OF THE CONFRONTATION CLAUSE JURISPRUDENCE

The Supreme Court's jurisprudence under *Crawford, Giles, Melendez-Diaz,* and *Davis* might appear quite complex. For example, the

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53. *Davis*, 547 U.S. at 822 n.1.

54. *Id.*

55. Press Release, United States Supreme Court, Statement from the Supreme Court Regarding the Death of Justice Antonin Scalia, Statement of the Chief Justice (Feb. 13, 2016)

> On behalf of the Court and retired Justices, I am saddened to report that our colleague Justice Antonin Scalia has passed away. He was an extraordinary individual and jurist, admired and treasured by his colleagues. His passing is a great loss to the Court and the country he so loyally served. We extend our deepest condolences to his wife Maureen and his family.

Id.; Massachusetts v. Melendez-Diaz, 557 U.S. 305 (2009); Giles v. California, 554 U.S. 353 (2008); *Davis*, 547 U.S. 813; *Crawford*, 541 U.S. 36.

definition of "testimonial" is still up for debate, seeming to hinge closely on the particular circumstances of each case.[56] Also, reasonable minds differ on what constitutes a witness's unavailability under the United States Constitution; *Crawford* did not resolve the issue completely.[57] Finally, the way the Sixth Amendment intertwines with the rules of evidence of a particular state, or with the Federal Rules of Evidence themselves, creates doubt as to whether a particular witness statement can or cannot be used against the defendant in a criminal trial.

Despite the potential complications with the United States Supreme Court's recently adopted approach to the Confrontation Clause, it may be that in practice, all the prosecutor must do is satisfy the Federal Hearsay Rule to satisfy the Confrontation Clause. This Article demonstrates that this is in fact the case for the clear majority of out-of-court statements. In fact, it may be that the Supreme Court came full circle from setting aside the *Roberts* standard (that a statement that satisfies a "firmly rooted" hearsay exception is admissible under the Confrontation Clause)[58] in *Crawford* to inadvertently readopting it again through its subsequent holdings.

A. Hearsay and Non-Hearsay Statements Under the Federal Rules of Evidence and Their Admissibility Under the Sixth Amendment

Some legal authors have already discussed the potential connection between the various hearsay rules and exceptions and the Sixth Amendment (though not always in the context of the Federal Rule and without arguing that satisfying the hearsay rule almost necessarily satisfies the Confrontation Clause).[59] Justice Scalia himself, the author of

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56. Williams v. Illinois, 567 U.S. 50, 119 (2012); Bullcoming v. New Mexico, 564 U.S. 647 (2011); Michigan v. Bryant, 562 U.S. 344 (2011); *Melendez-Diaz*, 557 U.S. 305; *Giles*, 554 U.S. 353; *Davis*, 547 U.S. 813; *Crawford*, 541 U.S. 36.

57. *See also Giles*, 554 U.S. 353. *See generally Crawford*, 541 U.S. 36.

58. Ohio v. Roberts, 448 U.S. at 56, 66 (1980).

59. *See* THOMAS A. MAUET & WARREN D. WOLFSON, TRIAL EVIDENCE 163–68 (5th ed. 2012) (discussing the Confrontation Clause and Hearsay in the same chapter); STEVEN I. FRIEDLAND, PAUL BERGMAN & ANDREW E. TASLITZ, EVIDENCE LAW AND PRACTICE 403–84 (4th ed. 2010) (discussing the Confrontation Clause and Hearsay in a chapter labeled: Protecting the Adversary System: The Hearsay Rule and the Confrontation Clause); DAVID P. LEONARD & VICTOR J. GOLD, EVIDENCE: A STRUCTURED APPROACH (2nd ed. 2008); Charles Alan Wright & Peter J. Henning, *Hearsay in General—Confrontation Clause*, 2A FED. PRAC. & PROC. CRIM. § 412 (4th ed.); Paul W. Grimm, Jerome E. Deise & Jon R. Grimm, *The Confrontation Clause and the Hearsay Rule: What Hearsay Exceptions are Testimonial*, 40 U. BALT. L.F. 155 (2010); Kenneth W. Graham, Jr. & Michael H. Graham, *Crawford: Botts Dots or Needless Detour?*, 30A FED. PRAC. & PROC. EVID. § 6371.2 (1st ed. 2017).

the *Crawford* decision, opined that the Confrontation Clause is not so different from the hearsay rule at common law.[60] Perhaps the primary question in the Federal Hearsay Rule is whether the spoken words (or the non-verbal assertive conduct) that are offered into evidence constitute a "statement" as defined by the rule.[61] After all, if the words do not constitute a statement, then the hearsay rule does not mandate their exclusion.[62] To be a "statement," the words (or conduct) must be an assertive communication.[63] It must contain within it an assertion of the truth and must show the truth of the matter asserted.[64] This inquiry also is also a question for the Confrontation Clause when it asks whether the words (or conduct) are "testimonial."[65] In terms of the Confrontation Clause, however, the question is narrower: the communications need not only assert a truth, but the assertion must be made with the anticipation of a criminal trial and for use therein.[66]

Under Federal Rule of Evidence ("Rule") 801, the definition of "statement" can be used in various ways to admit into evidence words that were spoken outside of court, not under oath, and not subject to cross-examination.[67] For example, questions or commands communicated either verbally or non-verbally are non-hearsay because they generally do not assert any truth.[68] Likewise, the Confrontation

60. As the plurality said in Dutton v. Evans, "It seems apparent that the Sixth Amendment's Confrontation Clause and the evidentiary hearsay rule stem from the same roots." 400 U.S. 74, 86 (1970); *See also Giles*, 554 U.S. at 365.

61. FED. R. EVID. 801.

62. FED. R. EVID. 801–802.

63. FED. R. EVID. 801.

64. *Id.*

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

66. *Id.* at 51–52. Defining "testimonial" statements as "solemn declaration[s] or affirmation[s] made for the purpose of establishing or proving some fact" and pointing out that "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Id.*; *see also* Davis v. Washington, 547 U.S. 813, 822 (2006) ("[Statements] are testimonial when the circumstances objectively indicate that there is no . . . ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant *to later criminal prosecution.*") (emphasis added).

67. *See also* United States v. Lewis, 902 F.2d 1176, 1179 (5th Cir. 1990); United States v. Shepherd, 739 F.2d 510, 514 (10th Cir. 1984). *See generally* United States v. Thomas, 453 F.3d 838, 845 (7th Cir. 2006).

68. The statements in question "were not hearsay. Federal Rule of Evidence 801(c) defines hearsay as 'a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.' Thomas's first remark was not a statement, it was a question. *Thomas*, 453 F.3d at 845; *See also Lewis*, 902 F.2d at 1179 ("While 'assertion' is not defined in the rule, the term has the connotation of a positive declaration. . . . The questions asked by the unknown caller, like most questions and inquiries, are not hearsay because they do not, and were

Clause does not exclude this type of evidence, because a question or a command is not designed as an assertion "made for the purpose of establishing or proving some fact" since it is not an assertion at all.[69] This would be the case even if the communication is designed for use in an anticipated criminal trial, because being non-assertive puts a statement squarely outside the definition of "testimonial" as described by *Crawford* and *Davis*.[70]

Rule 801 also permits the use of assertive communications when the communications are offered not for the truth of the matter asserted, but for another permissible purpose.[71] Likewise, the Confrontation Clause generally would not exclude communications not offered for the truth of the matter asserted (but rather for another reason altogether)[72] because such communications are not "testimonial," meaning they are not communications made for the purposes of establishing a particular fact at trial.[73] Examples of these communications include those offered for the effect on the listener,[74] statements of independent legal significance,[75] and statements offered to show the ability to communicate or speak.[76]

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not intended to, assert anything."). *Shepherd*, 739 F.2d at 514 ("An order or instruction is, by its nature, neither true nor false and thus cannot be offered for its truth.") (citing United States v. Keone, 522 F.2d 534 (7th Cir. 1975)).

69. *See Crawford*, 541 U.S. at 51–52; *see also Davis*, 547 U.S. at 822. Requiring that statements "establish or prove past events" to be considered testimonial. *Id.*

70. *Crawford*, 541 U.S. at 51–52; *see also Davis*, 547 U.S. at 822.

71. "The testimony is therefore not hearsay, and falls squarely within the standard use of prior inconsistent statements to impeach a prior witness's credibility." *United States v. Burt*, 495 F.3d 733, 737 (7th Cir. 2007) (permitting the use of a prior inconsistent statement for purposes other than the truth asserted within the statement).

72. Woods v. Etherton, 136 S. Ct. 1149, 1152 (2016); *Crawford*, 541 U.S. at 51–52; *see also Davis*, 547 U.S. at 822.

73. *See Etherton*, 136 S. Ct. at 1152; *see also Davis*, 547 U.S. at 822. *See generally Crawford*, 541 U.S. at 51–52.

74. If a man is tried for murdering his wife, the wife's statement, "I am having an affair!" will not be excluded under Rule 801 or the Confrontation Clause. Although the statement contains an assertion of truth, it is not being offered to show whether the wife had an affair, but rather establish that regardless of its truth, the statement gave the husband the motive to commit the crime. *See generally* United States v. Robinzine, 80 F.3d 246, 252 (7th Cir. 1996) (ruling that words offered to show why a witness recanted her testimony are not hearsay where the words are offered to show how they affected the witness).

75. When two people shake hands and one of them states "[w]e have a deal," the communication can be offered as a communication showing that a binding contractual agreement had been reached, regardless of whether the speaker was right about the pair truly reaching a deal. The independent legal significance rule is particularly applicable when contractual agreements are offered into evidence at criminal trials (perhaps involving theft by deception) or otherwise. Such agreements often contain ample statements of truth, but Rule 801 and the Confrontation Clause (in criminal cases) do not prohibit their admission because these documents are not being offered to show that their

Additionally, there are some assertive communications that Rule 801(d)(2)(E) permits offering into evidence. The statements of a co-conspirator against the defendant are admissible under the Federal Hearsay Rule, so long as those statements were made *in furtherance and in the course of the conspiracy*.[77] This would be completely consistent with the Confrontation Clause since a statement made in furtherance of a conspiracy is almost certainly *not* "testimonial."[78] Only a truly intricate scenario could involve a co-conspirator making a statement that furthers the conspiracy but which the speaker would expect to be used against the defendant at trial.[79]

Finally, there is no indication that the Supreme Court intended to exclude statements that fall into Rule 801(d)(2)(A) or (B) under the guise of the Confrontation Clause. Rule 801(d)(2)(A) deals with admissions by a party opponent, which, if used by the prosecution in a criminal trial, encompass the defendant's own prior communications. It would be counter-intuitive for the Confrontation Clause to exclude such statements, since any objection to the introduction of a defendant's confession under this clause would be the equivalent of a defendant demanding to confront himself or herself. Although in some situations a defendant may indeed become the most damaging witness in his own case due to a direct confession or some other incriminating statement, the Constitution likely does not permit a person to invoke the Fifth Amendment's right against self-incrimination and then demand his own confession be excluded because there was no prior opportunity for his own lawyer to cross-examine him (despite the fact that *Crawford*

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terms are true, but to show that a binding legal instrument exists. *See generally* Echo Acceptance Corp. v. Household Retail Servs., Inc., 267 F.3d 1068, 1087 (10th Cir. 2001). Holding that hearsay rule is inapplicable "where the out-of-court statement actually 'affects the legal rights of the parties, or where legal consequences flow from the fact that the words were said.'") *Id.* (internal citation omitted).

76. The spoken words of a person previously believed to be mute likely could be offered to negate that belief regardless of what the person said both under Rule 801 and the Confrontation Clause because it is not being offered to prove the truth of the matter asserted. *See also Davis*, 547 U.S. at 822. *See generally Crawford*, 541 U.S. at 51–52.

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

78. After all, a person furthering a conspiracy by his statement during the course of the conspiracy would rarely hope that the statement would later be used for the purpose of establishing some fact at a future criminal trial.

79. At least theoretically, two conspirators could agree that one of them would go to jail in order to kill an inmate therein. Part of that conspiracy could involve one of the conspirators committing a crime that would place him into custody, and the other conspirator reporting the act to the police. In that case, the statement of the reporting conspirators would incriminate the conspirator who committed the crime while still furthering the conspiracy by helping place the conspirator who committed the crime in prison with his target.

required confrontation when a speaker was a spouse who did not testify due to Washington's marital privilege). Rather, the plain language of the Confrontation Clause would only apply to the right for the defendant to confront the witnesses against him or her other than himself or herself.[80]

Rule 801(d)(2)(B), which includes communications adopted by the defendant, would likely yield itself to similar reasoning in the eyes of the Court. Since the defendant adopted certain statements via signature or another type of acquiescence to them, he or she cannot invoke the Confrontation Clause to exclude them because he or she cannot cross-examine himself or herself.[81] Ergo, both Rule 801(d)(2)(A) and (B) are rules that, if followed, would permit the prosecutor to overcome an objection under the Confrontation Clause.

1. Exceptions to the Rule Against Hearsay (Unavailability of the Declarant Immaterial)

Just as satisfying the requirements of Rule 801 to admit out-of-court communications into evidence likely overcomes most objections under the Confrontation Clause, following the guidelines of Rule 803 guards a prosecutor from the exclusion of evidence pursuant to this clause of the Sixth Amendment. Almost all the exceptions of Rule 803 are akin to the limitation placed upon the Confrontation Clause by *Davis*: the exceptions serve almost as examples of statements which would be considered "non-testimonial" by the Supreme Court of the United States.[82]

Consider Rule 803(1) and (2), the Present Sense Impression and the Excited Utterance exceptions, respectively: both exemplify statements that are "non-testimonial" by nature. A statement that qualifies as a present sense impression is a statement that the declarant makes almost subconsciously, without any motive to lie, and while under the effect of the event or circumstance described.[83] Such statements are not typically made with premeditation or intent for their subsequent use in a criminal trial.[84] Almost by definition, the statement cannot be "testimonial" because if it was, it would lose its quality of being made almost

80. U.S. CONST. amend. VI.

81. FED. R. EVID. 801(d)(2)(B).

82. *See* Crawford v. Washington, 541 U.S. 36, 51–52 (2004); *see also* Davis v. Washington, 547 U.S. 813, 822 (2006).

83. FED. R. EVID. 803(1); MAUET & WOLFSON, *supra* note 59, at 175–76; FRIEDLAND, BERGMAN & TASLITZ, *supra* note 59, at 634; LEONARD & GOLD, *supra* note 59, at 207–09.

84. *See* MAUET & WOLFSON, *supra* note 59, at 175–76; FRIEDLAND, BERGMAN, & TASLITZ, *supra* note 59, at 634; LEONARD & GOLD, *supra* note 59, at 207–09; *See Crawford*, 541 U.S. at 51–52; *see also Davis*, 547 U.S. at 822.

subconsciously and of being motive-free.[85] The excited utterance exception yields itself to almost identical analysis: if a witness is excited enough to make a spontaneous statement about the cause of his excitement, it is almost assuredly a "non-testimonial" statement.[86] This is because a witness who is in a sufficiently excited state is unlikely to be thinking about the possibility of a future criminal prosecution or considering whether the listeners present include law enforcement officials.[87]

Some may object, citing that the statement that was ultimately suppressed in *Davis* qualified as a present sense impression (per the trial court) and as an excited utterance (per the Indiana Supreme Court) under the Indiana Rules of Evidence.[88] That may be true under the accepted interpretation of the Indiana Rules of Evidence, but it is likely that these statements are not classified this way under the Federal Rules of Evidence.[89] Although the Supreme Court of the United States has not faced a similar evidentiary question under the federal rules, the kind of affidavit testimony that the police collected from the victim in *Hammon* likely would not qualify as an exception to the Federal Hearsay Rule as described by various legal scholars.[90] It is beyond the scope of this Article to determine definitively whether statements made to the police several minutes after the incident by a calm, collected witness qualify as spontaneous or excited. However, at least applying the plain meaning of the Rule 803(1) and (2), such statements would probably not be admissible because they would qualify as hearsay not falling within any exceptions.[91]

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85. *See* MAUET & WOLFSON, *supra* note 59, at 175–76; FRIEDLAND, BERGMAN & TASLITZ, *supra* note 59, at 634; LEONARD & GOLD, *supra* note 59, at 207–09.

86. FED. R. EVID. 803(2); *See* MAUET & WOLFSON, *supra* note 59, at 177–79; FRIEDLAND, BERGMAN & TASLITZ, *supra* note 59, at 634–35; LEONARD & GOLD, *supra* note 59, at 206–07; *Crawford*, 541 U.S. at 51–52; *see also Davis*, 547 U.S. at 822.

87. FED. R. EVID. 803(2); *See* MAUET & WOLFSON, *supra* note 59, at 177–79; FRIEDLAND, BERGMAN & TASLITZ, *supra* note 59, at 634–35; LEONARD & GOLD, *supra* note 59, at 206–07.

88. *Davis*, 547 U.S. at 820–21.

89. *See* United States v. McCall, 740 F.2d 1331, 1342 (4th Cir. 1984) (citing 5 WIGMORE ON EVIDENCE § 1364 (1974) (Chadbourn ed.)) (stating that the hearsay rule prevents trial by affidavit); *See* MAUET & WOLFSON, *supra* note 59, at 175–79; FRIEDLAND, BERGMAN & TASLITZ, *supra* note 59, at 634–35; LEONARD & GOLD, *supra* note 59, at 206–09.

90. *McCall*, 740 F.2d at 1342; *See* MAUET & WOLFSON, *supra* note 59, at 177–79; FRIEDLAND, BERGMAN & TASLITZ, *supra* note 59, at 634–35; LEONARD & GOLD, *supra* note 59, at 206–07.

91. *See McCall*, 740 F.2d at 1342; MAUET & WOLFSON, *supra* note 59, at 175–79; FRIEDLAND, BERGMAN & TASLITZ, *supra* note 59, at 634–35; LEONARD & GOLD, *supra* note 59, at 206–09.

Rule 803(4), (6), (7), (8), (9), and (10) also serve as good guides for overcoming a Confrontation Clause objection, since each exception carves out a type of statement that is non-testimonial. Rule 803(4) concerns statements made for the purposes of a medical diagnosis or treatment, which by definition generally exclude statements made for the purpose of a future criminal prosecution.[92] A patient (or a close relative) who tells a doctor about sexual assault and describes her assailant is unlikely to be making a statement for the purposes of a future criminal prosecution, even if the statement contains the identity of the assailant.[93] This rule, when applied in emergency situations, is of a similar nature to the statements of the 911 caller in *Davis* who spoke to law enforcement during an ongoing emergency.[94] The fear and need to inform law enforcement of a dangerous assailant, in that case, is similar in nature to the physical or psychological pain of a medical patient who received his or her injuries as a result of a crime. Thus, meeting the requirements of this rule would satisfy the Confrontation Clause.

Rule 803(6) and (7), which create an exception to the Hearsay Rule for Business Records (or the absence thereof), usually concern written statements made as a part of a regular business activity having nothing to do with criminal law.[95] Such written statements are not made for the purpose of preparing for a criminal trial, but rather to keep track of business transactions and other company operations.[96] Therefore,

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92. *See* Crawford v. Washington, 541 U.S. 36, 51–52 (2004); *see also Davis*, 547 U.S. at 822.

93. FED. R. EVID. 803(4); *See* Galindo v. United States, 630 A.2d 202, 210–11 (D.C. 1993).

94. *Davis*, 547 U.S. 813.

95. MAUET & WOLFSON, *supra* note 59, at 205–12; FRIEDLAND, BERGMAN & TASLITZ, *supra* note 59, at 668–71; LEONARD & GOLD, *supra* note 59, at 232–37.

96. Records of the number of coins a mint typically creates per day can be helpful in establishing that an employee is stealing the coins. The records can be used to show that after a particular employee began to work at the mint, the number of coins minted decreased by a percentage, at least suggesting theft by the new employee. These records would be admissible over a Confrontation Clause and Hearsay objection under FRE 803(6) and the United States Supreme Court's jurisprudence that statements must be "testimonial" to be excluded under the Confrontation Clause. *Crawford*, 541 U.S. at 51–52; *see Davis*, 547 U.S. at 822; MAUET & WOLFSON, *supra* note 59, at 205–12; FRIEDLAND, BERGMAN & TASLITZ, *supra* note 59, at 668–71; LEONARD & GOLD, *supra* note 59, at 232–37.

Additionally, the *lack* of notation in business records can also suggest a crime: if a record ordinarily contains the details of a recurring transfer that is made daily, but on a certain day no record of the transfer exists, the record would at least suggest that the transfer had been intercepted by someone not legally authorized to do so. This evidence can be used against the accused under FED. R. EVID. 803(7) and under the Confrontation Clause. *Crawford*, 541 U.S. at 51–52; *see Davis*, 547 U.S. at 822; MAUET & WOLFSON, *supra* note 59, at 205–12; FRIEDLAND, BERGMAN & TASLITZ, *supra* note 59, at 668–71;

statements that fall within this exception also avoid exclusion under the Confrontation Clause.[97] Sometimes, Rule 803(6) and (7) can be used by resourceful prosecutors to attempt to offer into evidence police reports and other statements created by government officials that happen to meet the definition of Records of Regularly Conducted Activity set out by these rules.[98] It is likely that Rule 803(6) and (7) were not designed for that purpose specifically, since Rule 803(8)(A)(ii) excludes matters observed by law enforcement personnel while on legal duty from the Public Records Exception (which, admittedly, is a highly related but technically separate exception).[99] This Article does not engage in a lengthy discussion of whether police reports and government lab reports are admissible under the Business Record Hearsay Exception. However, it is safe to conclude that under *Melendez-Diaz* and *Bullcoming*, such reports would not survive a challenge under the Confrontation Clause even if Rule 803(6) otherwise permitted their admission.[100]

Additionally, if the government simply hires a private lab to write reports on DNA analysis, ballistics, or other kinds of scientific analyses frequently involved in criminal prosecutions, it is likely that these types of reports are also excluded under the Confrontation Clause even if they fall within the Business Records exception.[101] First, it is possible that private reports created for law enforcement personnel in return for payment by the government might fall within Rule 803(8)(A)(ii),

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LEONARD & GOLD, *supra* note 59, at 232–37. The latter would permit the evidence because the record, or more specifically the absence of a record, is "non-testimonial" because such records are not typically kept in preparation for trial. *Crawford*, 541 U.S. at 51–52; *see also Davis*, 547 U.S. at 822. Furthermore, it would seem counterintuitive that the *lack* of a statement can be considered "testimonial" within the scope of the Sixth Amendment since definitionally that would mean there is no statement being offered into evidence at all.

97. *Crawford*, 541 U.S. at 51–52. *See Davis*, 547 U.S. at 822; MAUET & WOLFSON, *supra* note 59, at 205–12; FRIEDLAND, BERGMAN & TASLITZ, *supra* note 59, at 668–71; LEONARD & GOLD, *supra* note 59, at 232–37.

98. Air Land Forwarders, Inc. v. United States, 172 F.3d 1338, 1345 (Fed. Cir. 1999); United States v. Blackburn, 992 F.2d 666, 671 (7th Cir. 1993); United States v. Brown, 9 F.3d 907, 911 (11th Cir. 1993); United States v. Cain, 615 F.2d 380, 382 (5th Cir. 1980); United States v. Oates, 560 F.2d 45, 68 (2d Cir. 1977).

99. *Air Land Forwarders, Inc.*, 172 F.3d at 1345; *Blackburn*, 992 F.2d at 671; *Brown*, 9 F.3d at 911; *Cain*, 615 F.2d at 382; *Oates*, 560 F.2d at 68.

100. Massachusetts v. Melendez-Diaz, 557 U.S. 305 (2009); Bullcoming v. New Mexico, 564 U.S. 647 (2011) (holding that business records concerning blood draw results admitted under the business records exception of the New Mexico Rules of Evidence are nevertheless subject to the Confrontation Clause).

101. *Melendez-Diaz*, 557 U.S. 305; *Bullcoming*, 564 U.S. 647. Although it is most likely that such reports would qualify within the Business Records Exception, at least some Supreme Court authority exists that would limit the introduction of business records made specifically for the purposes of litigation. Palmer v. Hoffman, 318 U.S. 109 (1943).

excluding them from evidence altogether.[102] Even if such reports were admissible under Rule 803(6) (instead of being inadmissible under Rule 803(8)), the mere fact that the authors of the reports were private rather than government scientists does not change the fundamental nature of its conclusions: they are statements made in anticipation of criminal litigation.[103] Ultimately, they are "testimonial" statements and therefore likely excluded under the Sixth Amendment.[104]

Rule 803(8) and (10) permit public records (or an absence thereof) that *do not* include police reports to be introduced into evidence over a hearsay objection.[105] This too is consistent with the Confrontation Clause, because records of a public office that do not partake in criminal investigations are not prepared for use at a criminal trial and therefore are "non-testimonial."[106] However, this proposed rule comes with the same caveat as the Business Records Exception: if governmental agency reports such as the ones mentioned within *Melendez-Diaz* and *Bullcoming* are admitted under Rule 803(8) or (10), then such statements would be considered "testimonial" under the Sixth Amendment.[107] In that case, satisfying the definitions of these two exceptions to the hearsay rule does not necessarily allow a prosecutor to overcome an objection under the Confrontation Clause.[108] This Article, however, does not engage in a detailed discussion of whether lab reports or other government documents prepared for the purposes of prosecution by non-uniformed law enforcement personnel are admissible under Rule 803(8) or (10). It may be sufficient to say, absent further clarification from the United

102. *See Air Land Forwarders, Inc.*, 172 F.3d at 1345; *Blackburn*, 992 F.2d at 671; *Brown*, 9 F.3d at 911; *Cain*, 615 F.2d at 382; *Oates*, 560 F.2d at 68.

103. Crawford v. Washington, 541 U.S. 36, 51–52 (2004). *See* Davis v. Washington, 547 U.S. 813, 822 (2006); *see also Melendez-Diaz*, 557 U.S. 305 (2009).

104. *Crawford*, 541 U.S. at 51–52; *see Davis*, 547 U.S. at 822; *see also Melendez-Diaz*, 557 U.S. 305.

105. MAUET & WOLFSON, *supra* note 59, at 213–16; FRIEDLAND, BERGMAN & TASLITZ, *supra* note 59, at 678–81; LEONARD & GOLD, *supra* note 59, at 239–42. Such records could be used much in the same way as business records: to establish something as simple as the time of day that a particular government building closes (to show, for example, that a person trespassed within that building when he was seen there after hours). Furthermore, the absence of a public record, such as the absence of a recorded deed to a property, can be used by the prosecution to negate a claim by the defendant that he was the owner of the house he stands accused of burglarizing. In both situations, because the records are not prepared by law enforcement for use in a criminal trial, the Confrontation Clause does not mandate their exclusion.

106. *See Crawford*, 541 U.S. at 51–52; *see also Davis*, 547 U.S. at 822.

107. *See Melendez-Diaz*, 557 U.S. 305; *see also Bullcoming*, 564 U.S. 647.

108. *See id.*

States Supreme Court, that public records *not* created for criminal prosecution are admissible under the Confrontation Clause.[109]

Rule 803(9) deals with vital statistics and public records thereof, which are generally not prepared for use in a criminal trial, and would therefore be admissible under the Confrontation Clause.[110] Likewise, Rule 803(11) concerns records of religious organizations concerning familial history, which are not prepared for purposes of a criminal prosecution, and therefore do not run afoul of the Confrontation Clause.[111] Rule 803(12) provides similar grounds for admissions of records of marriage, baptism, and other similar ceremonies.[112] Like records of familial history, these types of documents are not made in anticipation of a criminal trial, though they may prove useful to a prosecutor under certain circumstances.[113] Rule 803(13), which is very similar in spirit to Rule 803(11) and (12), permits familial history records to be admitted into evidence despite the hearsay rule, and due to the inherently "non-testimonial" nature of these types records,[114] the Confrontation Clause, too, would not begrudge their admission.[115]

Rule 803(14) and 803(15) are hearsay exceptions somewhat like the Business Records (Rule 803(6), (7)) and Public Records (Rule 803(8),

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109. *See id.*; *Crawford*, 541 U.S. at 51–52; *Davis*, 547 U.S. at 822.

110. FRIEDLAND, BERGMAN & TASLITZ, *supra* note 59, at 687; LEONARD & GOLD, *supra* note 59, at 286–87. In a prosecution for what is commonly referred to as statutory rape, a prosecutor may offer records of the date of the victim's birth under Rule 803(9) and the Confrontation Clause. The Sixth Amendment is not violated by the introduction of this evidence because at the time the victim was born, the records of her birth were not made in anticipation of the criminal trial of her assailant. *See Crawford*, 541 U.S. at 51–52; *see also Davis*, 547 U.S. at 822.

111. FRIEDLAND, BERGMAN & TASLITZ, *supra* note 59, at 687; LEONARD & GOLD, *supra* note 59, at 286–87. Such statistics could be admissible under Rule 803(9) to establish elements of incest, such as an impermissible relationship by blood. The Confrontation Clause permits the admission of such evidence because at the time of its creation, incest was not anticipated, and the records were being kept for purposes other than a criminal trial. *See Crawford*, 541 U.S. at 51–52; *see also Davis*, 547 U.S. at 822.

112. LEONARD & GOLD, *supra* note 59, at 286–87.

113. A prosecutor may use marriage records to prove the crime of bigamy without violating the Confrontation Clause because at the time the record of the initial marriage was created, it can be presumed that a subsequent, illegal marriage was not anticipated. Therefore, the written recorded statement is not "testimonial." *See Crawford*, 541 U.S. at 51–52; *see also Davis*, 547 U.S. at 822.

114. FRIEDLAND, BERGMAN & TASLITZ, *supra* note 59, at 687; LEONARD & GOLD, *supra* note 59, at 288.

115. If family records indicate that a defendant had been married previously and evidence shows that he has taken a second wife, the family records can be used to help convict the defendant of criminal polygamy. Again, since the family records were kept for reasons other than criminal prosecution, they are admissible under the Sixth Amendment. *See Crawford*, 541 U.S. at 51–52; *see also Davis*, 547 U.S. at 822.

(10)) exceptions.[116] They are admissible as exceptions to the Federal Hearsay Rule and likewise survive a Confrontation Clause challenge because the records of and statements in documents that affect interest in property are inherently "non-testimonial."[117] Market reports and commercial publications are also admissible over an objection to hearsay under Rule 803(17), and because these publications are often motivated by market movements rather than any type of criminal prosecution, their admission does not violate the Confrontation Clause of the Sixth Amendment.[118] Rule 803(18), which permits the admission of statements in legal treatises upon the admission of an expert in the field that these sources are reliable, also serves as a guide to overcoming an objection under the Confrontation Clause.[119] Statements that fall within Rule 803(18) are also generally "non-testimonial" since they are rarely prepared for use at trial.[120] Even statements of this sort that can be found in treatises addressed specifically toward law enforcement personnel are not prepared for use in a *particular* criminal investigation.[121] As such, they should pass constitutional muster if offered during a trial.[122]

Rule 803(19)–(21) serve to admit reputation evidence both about a person and about the boundaries or the general history of a particular

116. FRIEDLAND, BERGMAN & TASLITZ, *supra* note 59, at 687; LEONARD & GOLD, *supra* note 59, at 288–89.

117. *Id.* Such documents may be used to show the theft of a vehicle: if documents indicate that the vehicle was sold to someone other than the thief, a prosecutor might use this as at least circumstantial evidence that the thief did not have permission to take the vehicle. Such records are not generally kept in anticipation of the prosecution of a car thief, and therefore they are "non-testimonial," which permits them to pass constitutional muster. *See Crawford*, 541 U.S. at 51–52; *see also Davis*, 547 U.S. at 822.

118. FRIEDLAND, BERGMAN & TASLITZ, *supra* note 59, at 688; LEONARD & GOLD, *supra* note 59, at 290. Documents like these may prove useful in prosecuting insider trading. They can be used to show the prices of a particular security prior to and following the release of information previously known only to the defendant. This, in conjunction with proof that the defendant took a particular market position after becoming aware of certain insider information, can circumstantially show a violation of criminal law. *See Crawford*, 541 U.S. at 51–52; *see also Davis*, 547 U.S. at 822.

119. LEONARD & GOLD, *supra* note 59, at 290–91; *see Crawford*, 541 U.S. at 51–52; *see also Davis*, 547 U.S. at 822.

120. LEONARD & GOLD, *supra* note 59, at 290–91; *see Crawford*, 541 U.S. at 51–52; *see also Davis*, 547 U.S. at 822.

121. Even though a DNA expert may have relied on a statement from a book called USING DNA TO IDENTIFY SEX OFFENDERS, that book was not created for the purpose of investigating or attempting to convict any *particular* sex offender. Therefore, the use of quotes from the book at trial would not violate the defendant's Confrontation rights because the author did not write it with the aim of prosecuting this specific defendant. *See Crawford*, 541 U.S. at 51–52; *see also Davis*, 547 U.S. at 822.

122. *Crawford*, 541 U.S. at 51–52; *Davis*, 547 U.S. at 822.

property.[123] Just like most of the statements enumerated in Rule 803, statements of this nature are inherently "non-testimonial." The various statements that make up a person's reputation throughout the community are, in the vast majority of circumstances, not made in preparation for or anticipation of a criminal trial.[124] Therefore, they are non-testimonial.[125]

Oddly enough, despite its seemingly formal and judicial nature, the "Judgment of a Previous Conviction" exception to the Federal Hearsay Rule (Rule 803(22)), also qualifies as "non-testimonial."[126] Although a judgment of previous conviction is a statement made out by the clerk of a particular court in a largely formal capacity, it can be argued that such statements are made for purposes other than a future criminal prosecution.[127] After all, there are ample uses for court records of a judgment of a previous conviction, and many of them are non-

123. MAUET & WOLFSON, *supra* note 59, at 220–21; LEONARD & GOLD, *supra* note 59, at 291–92.

124. FED. R. EVID. 803(19)–(21); MAUET & WOLFSON, *supra* note 59, at 220–21; LEONARD & GOLD, *supra* note 59, at 291–92; See *Crawford*, 541 U.S. at 51–52; *Davis*, 547 U.S. at 822.

125. Statements that fall within the purview of Rules 803(19)–(21) can be used at trial in various ways. Reputation involving personal or family history can establish that a person has fraudulently claimed to be the only child of a person dying of Alzheimer's disease by showing that it is widely known in the community that the person's only child drowned twenty years ago. Reputation concerning boundaries can be used to show a case of trespass even if the victim is unavailable to appear in court to testify about where his property begins and ends. Reputation regarding a person's character can be particularly relevant when offered under Rule 404(a) after the defendant has put his character at issue. Such evidence can also be relevant when it comes to presenting evidence of an honest reputation possessed by witnesses for the prosecution under Rule 608 after some attack has been made upon those witnesses for lack of honesty. None of these statements that help create and maintain a person's reputation would be inadmissible under the Sixth Amendment's Confrontation Clause because in almost all cases, these statements are "non-testimonial." Only in the odd case where a person's reputation in a community has been formed solely or pervasively from police reports and testimony taken at legal proceedings will testimony concerning such reputation become subject to a Confrontation Clause challenge, and even then, only if the statements about the person's reputation were made for the purpose of a current or future criminal prosecution. See *Crawford*, 541 U.S. at 51–52; See*Davis*, 547 U.S. at 822.

126. *See generally* LEONARD & GOLD, *supra* note 59, at 292–93.

127. *See generally id.* There can be no doubt that prosecutors often use past convictions to enhance future criminal penalties (though this is usually done at the sentencing phase rather than during trial). In fact, sometimes proving an offense may involve proving prior violations of the law. However, that does not mean that this is the reason the clerk records the conviction. Rather, the clerk does so as part of his or her recording duties, like a custodian of records in a place of business or a custodian of public records. The same logic that permits most business records and public records to survive a Confrontation Clause challenge should permit statements offered under Rule 803(22) to survive Sixth Amendment scrutiny.

criminal.[128] Just like statements involving a present sense impression and an excited utterance under the mere fact that they *can* be quite useful at trial does not mean that they are made specifically *for* trial.[129] Therefore, the use of such statements should not violate the Confrontation Clause because the statements are "non-testimonial."[130]

Finally, Rule 803(23) can also guide the prosecutor in overcoming a Confrontation Clause objection because a "Judgment Involving Personal, Family, or General History, or a Boundary" is not a statement made for the purpose or in anticipation of a criminal prosecution.[131] The rule is a provision for the introduction of judgments into evidence that do not involve a criminal conviction and passes constitutional muster for the same reasons under *Crawford* and *Davis* as Rule 803(22).[132] Thus, Rule 803 serves as a sound guide to the prosecutor for overcoming an objection to the introduction of "testimonial" statements into evidence.

2. *Hearsay Exceptions; Declarant Unavailable*

When the Confrontation Clause is considered in conjunction with the Federal Hearsay Rule, it underscores portions of Rule 804 that closely resembles the language of the Supreme Court's recent Sixth Amendment jurisprudence on the subject.[133] After all, Rule 804 is useful only when the witness whose prior statements are offered into evidence is unavailable.[134] This is like the Supreme Court's language in *Crawford*: "[w]here testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination."[135] Perhaps as a result, much of Rule

128. For example, records of conviction could be used by the everyday citizen to determine whether to hire a particular job applicant over another.

129. *See infra* Part III.A.1.

130. *Crawford*, 541 U.S. at 51–52; *Davis*, 547 U.S. at 822. Judgments of a previous conviction can be useful in impeaching a witness under Rule 609 by proof of felonies and crimes involving dishonesty. It can also permit the prosecutor to bring in records of past convictions to enhance a charge from its normal degree to one of a higher degree of culpability that is reserved for habitual offenders.

131. A prosecutor might use evidence under Rule 803(23) such as a judgment of termination of parental rights in a kidnapping case to show that a parent did not have the right to take the child with her when she crossed state lines. *Crawford*, 541 U.S. at 51–52; *Davis*, 547 U.S. at 822.

132. See *Crawford*, 541 U.S. at 51–52; *Davis*, 547 U.S. at 822.

133. *See generally* Giles v. California, 554 U.S. 353 (2008); *Davis*, 547 U.S. 813; *Crawford*, 541 U.S. 36.

134. MAUET & WOLFSON, *supra* note 59, at 166–68; FRIEDLAND, BERGMAN & TASLITZ, *supra* note 59, at 712; LEONARD & GOLD, *supra* note 59, at 244–45.

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

804 lists the exceptions to the Federal Hearsay Rule that the Supreme Court has adopted for the Confrontation Clause as well.[136]

The former testimony exception, for example, (listed in Rule 804(b)(1)) echoes *Crawford* the loudest.[137] It states that prior testimony is admissible when its declarant is unavailable so long as the party against whom the testimony is offered had an opportunity to develop the testimony at a prior hearing.[138] This is almost exactly like the "unavailability and prior opportunity for cross-examination rule" that the Supreme Court set out in *Crawford*.[139] Notice, unlike the exceptions listed in Rule 803, Rule 804(b)(1) does not necessarily side-step the Confrontation Clause by dealing with a statement that is "non-testimonial" as described in *Davis*. On the contrary, statements made during a civil trial which can have criminal consequences may be very much akin to the kind of statements that the Supreme Court described as "testimonial."[140] They are solemn statements made for or in the anticipation of a potential criminal prosecution.[141] Statements given at a preliminary hearing, a traditionally criminal proceeding, also fall within Rule 804(b)(1).[142] They are admissible over a Confrontation Clause objection if the declarant is unavailable because the defendant had an opportunity to develop the testimony of the witness through cross-examination.[143]

Rule 804(b)(1) is a bit more involved in its definition for the exception. Confrontation Clause jurisprudence currently provides regarding the witness's unavailability and the defendant's prior opportunity to cross examine that witness. The rule of evidence points

136. *See Giles*, 554 U.S. 353; *Davis*, 547 U.S. 813; *Crawford*, 541 U.S. 36; MAUET & WOLFSON, *supra* note 59, at 166–68; FRIEDLAND, BERGMAN, & TASLITZ, *supra* note 59, at 712–48; LEONARD & GOLD, *supra* note 59, at 244–70.

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

138. FED. R. EVID. 804(b)(1).

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

140. *Id.* at 51–52; *Davis*, 547 U.S. at 822.

141. This Article does not hypothesize whether such testimony can be considered "non-testimonial" if the witness giving it cannot foresee or anticipate a criminal prosecution arising in the future, although that is a question the Supreme Court might answer in future decisions.

142. FED. R. EVID. 804(b)(1) advisory committees notes to 1974 enactment.

143. California v. Green, 339 U.S. 149 (1970). Rule 804(b)(1) is useful to a prosecutor in developing the testimony of an elderly witness that may die prior to trial. By developing the testimony at the preliminary hearing and putting it on the record, the prosecutor may prove, for example, that the defendant, a nursing home employee, never had the victim's permission to use her credit card. This testimony can be preserved for a fraudulent-use-of-a-credit-card trial while giving the defendant an opportunity to cross examine so that if the victim died of old age, the prosecutor could still rebut a claim by the defense that the defendant had permission to use the credit card all along.

out that an opportunity to develop testimony at the prior hearing need not be limited to cross examination but could involve direct or redirect examination.[144] The same rule would theoretically apply under the Sixth Amendment. If a witness that a party calls during a civil trial turns out to be more hostile than anticipated (and begins to incriminate the party that called him to the stand), it would seem unjust to decline the admission of his testimony at a subsequent criminal trial because the type of examination involved was a direct examination of a hostile witness rather than a cross-examination of that same witness. More than likely, the Supreme Court would recognize that the ability to treat a witness as hostile permits the party that called the witness to confront the statements offered against it at the civil trial if the party so chooses.[145]

Rule 804(b)(2) presents another exception to the Federal Hearsay Rule that the Supreme Court has specifically recognized as admissible under its recent Confrontation Clause jurisprudence: "Statements Under the Belief of Imminent Death."[146] Under Rule 804(b)(2), the statements of a man who is dying and is aware of his impending doom are admissible to show the identity of the killer or the cause of death. This exception exists because of the inherent reliability that society attaches to the last words of a man who believes his death is imminent.[147] The presumption is that a religious person who is aware of his imminent death has a motive to speak honestly before dying because he may wish to avoid sinning right before entering the afterlife.[148] However, despite this theory, the piety of the declarant is nonessential to the admission of his last words concerning the manner of his death.[149] That is because even a person who is not religiously inclined may have a motive to let his last words be truthful to ensure that his killer is found.[150] Finally, the exception may be an implicit recognition that the declarant would

144. FED. R. EVID. 804(b)(1).

145. It may be noted that a party who calls a witness whose hostility was not anticipated would be ill-prepared to cross-examine that witness. However, the Sixth Amendment does not require the right to *effective* confrontation, merely the right confrontation irrespective of its efficacy. After all, many defense attorneys confront prosecution witnesses both at preliminary hearings and civil proceedings, but those confrontations are not always effective. Therefore, the ability to treat the witness as hostile, even without much preparation, may be sufficient under the Sixth Amendment.

146. Giles v. California, 554 U.S. 353, 358–61 (2008); FED. R. EVID 804 (b)(2).

147. Mattox v. United States, 156 U.S. 237, 244 (1895); LEONARD & GOLD, *supra* note 59, at 255–57.

148. LEONARD & GOLD, *supra* note 59, at 255–57; *see also* FRIEDLAND, BERGMAN & TASLITZ, *supra* note 59, at 732–33.

149. *See* FRIEDLAND, BERGMAN & TASLITZ, *supra* note 59, at 732–33; LEONARD & GOLD, *supra* note 59, at 255–57.

150. LEONARD & GOLD, *supra* note 59, at 255–57.

recognize the solemn nature of the occasion if he knows he is speaking words that may be his last (irrespective of his religious beliefs).[151] That recognition, in turn, would lead him to tell the truth.[152]

Although the Supreme Court noted that the origins of this exception to the Confrontation Clause are somewhat curious because dying declarations can certainly involve "testimonial" evidence, it was nevertheless a widely recognized exception to the common law rule of confrontation and therefore renders dying declarations admissible under the Sixth Amendment.[153] A prosecutor can use such statements in a very obvious way; in a murder trial, the statements of the dying victim as to who killed him are crucial evidence to show the identity of the murderer.[154] The Supreme Court did not elaborate on whether dying declarations are only allowed to prove the cause of the homicide in a criminal trial, or whether such declarations have other potential uses.[155] For example, if the Confrontation Clause does not contain the limitation of Rule 804(b)(2) that the statement must concern the cause or manner of the declarant's death, then bedside confessions could prosecute someone other than the person who caused the declarant's death. If a man on his deathbed admits to robbing a bank with an accomplice the previous night, the accomplice may be implicated without violating the Confrontation Clause even if the accomplice had nothing to do with the declarant's death. Nevertheless, the Supreme Court has never elaborated on whether this potential use of a dying declarant's statements would run afoul of the Sixth Amendment.[156]

Rule 804(b)(6) presents another example of statements that, even if they are classified as "testimonial," would be admitted into evidence if offered at trial.[157] This rule permits the admission of "Statements Offered Against a Party That Wrongfully Caused the Declarant's

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151. *See* FRIEDLAND, BERGMAN & TASLITZ, *supra* note 59, at 732–33; LEONARD & GOLD, *supra* note 59, at 255–57.

152. *See* FRIEDLAND, BERGMAN & TASLITZ, *supra* note 59, at 732–33; *see also* LEONARD & GOLD, *supra* note 59, at 255–57.

153. Crawford v. Washington, 541 U.S. 36, 56 (2004).

154. A popular example where this rule may have proved useful is presented by the movie *The Da Vinci Code*. After showing Robert Langdon the dead body of a prominent museum curator (in whose murder Langdon is an unwitting suspect), the detective turns to Langdon.

"What would you do if you had such limited time to send a message?"

"Well, I suppose I'd try to identify my killer," Langdon replies. THE DAVINCI CODE (Columbia Pictures, 2006).

155. *See Crawford*, 541 U.S. at 74.

156. *Id.*

157. *Id.* at 55; Davis v. Washington, 547 U.S. 813, 833 (2006).

Unavailability."[158] The rule embodies the "forfeiture by wrongdoing" exception to the Confrontation Clause that the Supreme Court recognized on more than one occasion.[159] The exception, both under the Federal Hearsay Rule and under the Supreme Court's Sixth Amendment jurisprudence, essentially prevents a defendant from causing the witness to be unavailable and then benefitting from that unavailability.[160] It would contravene justice to permit a defendant in a domestic violence case to threaten his spouse with death if she testified against him and then argue at trial that the victim's unavailability for cross-examination renders her prior statements implicating him inadmissible.[161] Therefore, if the statements offered at trial fall within this exception to the Federal Hearsay Rule, they also satisfy the Confrontation Clause of the United States Constitution.[162]

As noted above, some variations of Rule 804 mirror almost exactly the Supreme Court's jurisprudence on the Confrontation Clause. The only remaining Federal Hearsay rules that warrant further discussion are Rule 805 and Rule 807, since Rule 806 deals essentially with impeachment and is therefore somewhat removed from Confrontation Clause considerations.[163] Rule 805 states a rule for "[h]earsay within Hearsay" which should also apply to the Confrontation Clause. Rule 805 merely states that if a hearsay statement offered at trial is contained within another hearsay statement, both must qualify as an exception or exemption to the Hearsay Rule to be admissible.[164] The Confrontation Clause likely contains a similar implicit requirement. After all, if an adverse witness statement contains another adverse witness statement within it, and no prior opportunity to cross examine either witness has been presented, both statements lack the procedural guarantees of

158. FED. R. EVID. 804(b)(6).

159. *Crawford*, 541 U.S. at 62; *Davis*, 547 U.S. at 833–34.

160. FED. R. EVID. 804(b)(6); *Crawford*, 541 U.S. at 55; *Davis*, 547 U.S. at 833.

161. This is distinguishable from *Giles*, where a murder victim's prior statements concerning *prior* domestic violence could not be used at trial to incriminate the defendant in the victim's *subsequent* murder. *See* Giles v. California, 554 U.S. 353 (2008).

162. If a domestic violence case is set for trial, and the victim is unavailable to testify on that date because she has been threatened by the defendant, her prior statements to the police regarding the nature of the violence would be admissible both under Rule 804(b)(6) and under the Confrontation Clause.

163. This is because statements used for impeachment purposes are not necessarily offered for the truth of the matter asserted and therefore may be considered "non-testimonial." This would permit them to pass Constitutional muster by conforming to the requirements of Rule 806.

164. FED. R. EVID. 805

reliability that the United States Constitution requires.[165] Ergo, both statements would be admissible under the Confrontation Clause to be used against the defendant in court.[166]

B. Exceptions to Hearsay but NOT the Confrontation Clause

An attentive student of Evidence might have noticed by now that some rules are missing from the list of Federal Hearsay Rules discussed above as rules that also render out-of-court statements admissible under the Confrontation Clause.[167] This is no accident. While the clear majority of the Federal Hearsay Rule should serve as a guide to the admissibility (or inadmissibility) of various statements at trial, there is a minority of exceptions that might lead a lawyer astray. This Article also enumerates them in special detail because of the potential danger they pose to the unwary lawyer. The number of exceptions is quite small when compared to the full width and breadth of the Federal Hearsay Rule. This raises the question of whether the Supreme Court might eliminate the problem entirely by simply holding that when the hearsay rule is satisfied, so is the Confrontation Clause. After all, both span from the same desire of procedurally ensuring accurate, truthful testimony. The Court has not done so yet, but that is certainly a possibility in the coming years.

As of today, the Federal Hearsay Rule may provide the basic guidelines for navigating the requirements of the Confrontation Clause, but the Clause and the hearsay rule are not identical.[168] The devil lurks in these details, creating a false sense of comfort when the prosecutor is in grave danger of offering evidence that the Confrontation Clause excludes. Because the differences between the Federal Hearsay Rule and the Sixth Amendment's requirement of confrontation are less numerous than their similarities, this Article outlines the differences in greater detail to ensure that they do not go unheeded.

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165. *Crawford*, 541 U.S. at 68 ("[w]here testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination.").

166. For example, under certain circumstances, a prosecutor could argue that both statements may be excited utterances under Rule 803(2), and therefore also satisfy the Confrontation Clause since both are "non-testimonial." As discussed earlier in this article, statements that meet the requirements of Rule 803(2) would be considered "non-testimonial" in nature under the Court's recent jurisprudence on the matter. *See supra* Part III.A.1. Therefore, the statements exemplified above should be admissible over a Sixth Amendment objection.

167. FED. R. EVID. 801–807.

168. *See generally* Massachusetts v. Melendez-Diaz, 557 U.S. 305 (2009); Giles v. California, 554 U.S. 353 (2008); Davis v. Washington, 547 U.S. 813 (2006); *Crawford*, 541 U.S. 36; FED. R. EVID. 801–07.

1. Rule 801(d)(1). A Declarant-Witness's Prior Statement

Whether the statements that Rule 801(d)(1) describes violate the Confrontation Clause if offered against the defendant in a criminal trial is a close question, but one which is ultimately answered in the affirmative. However, the Supreme Court has not directly addressed the issue after turning away from the *Roberts* standard in *Crawford*, and this is precisely why caution may be necessary. Rule 801(d)(1)(A) permits the introduction of past statements given at a hearing to contradict a witness's testimony at trial.[169] Such statements can be introduced not only to impeach a witness that has changed his or her story, but also for the truth of the matter asserted within that past statement.[170] Because communications of this type are such that their declarant could reasonably expect them to be offered at trial, they fit within the definition of "testimonial" fashioned by the Supreme Court.[171]

"Testimonial" statements are admissible under the Sixth Amendment if they are dying declarations, if the defendant has forfeited his right to cross-examine by wrongdoing, or if the declarant is unavailable and the defendant had a prior opportunity to cross-examine him or her.[172] Technically speaking, statements that fall within Rule 803(d)(1)(A) fall in none of the three categories, and therefore may be inadmissible under the Confrontation Clause. Statements delivered at a prior hearing are not given, in the vast majority of circumstances, when the witness is under the belief that he or she is about to die. Furthermore, simply because a witness testifies in a way that contradicts his or her prior statements at a hearing is no indication that he or she has been rendered unavailable by the defendant.[173] Therefore, the forfeiture by wrongdoing exception

169. MAUET & WOLFSON, *supra* note 59, at 141–42; FRIEDLAND, BERGMAN & TASLITZ, *supra* note 59, at 544–48; LEONARD & GOLD, *supra* note 59, at 196–99. In a situation where a robbery victim testifies to the robbery at a preliminary hearing but claims at trial that no such crime occurred, the prosecutor may attempt to use his past statements to establish the robbery. Notice that the statements are not being used for impeachment purposes, but also for the truth of the matter asserted. This is substantive, not merely impeachment, evidence.

170. MAUET & WOLFSON, *supra* note 59, at 141–42; FRIEDLAND, BERGMAN & TASLITZ, *supra* note 59, at 544–48; LEONARD & GOLD, *supra* note 59, at 196–99.

171. *Crawford*, 541 U.S. at 51–52; *Davis*, 547 U.S. at 822.

172. *Crawford*, 541 U.S. at 55, 68; *Giles*, 554 U.S. at 353, 358–61; *Davis*, 547 U.S. at 833.

173. That fact *may* be true, but it is not *necessarily* true simply because a statement satisfies the requirements of Rule 803(d)(1)(A).

generally does not apply to admit prior inconsistent statements for the truth of the matter asserted over a Confrontation Clause objection.[174]

In some situations, the prosecutor who offers prior hearing testimony under Rule 803(d)(1) may attempt to cure the Confrontation Clause violation by arguing that the witness is currently on the stand and therefore subject to cross-examination, rendering that witness subject to confrontation. This, the prosecutor might argue, cures any defect in offering past testimony under the Sixth Amendment because the witness is *currently* present and available for cross-examination. However, this argument, as tempting as it may sound, does not conform to the technical requirements of *Crawford*.[175] To offer past testimony in this manner, the past or present ability to cross-examine is not sufficient—the witness *must be unavailable*.[176] The Court stated clearly that unavailability is one of the conditions for permitting the admissibility of past testimony.[177]

This may appear counter-intuitive in a situation where the declarant of the prior statements is on the stand and available to be cross examined at that very moment. However, that is nevertheless the straightforward application of the *Crawford* rule.[178] Although this Article will not speculate in detail on why the Court articulated the rule in that exact fashion, it may have something to do with the more basic idea of confrontation: that the defendant is entitled to face his accuser (with some limitations) *when* the accuser makes the solemn statements that tend to incriminate the defendant. Having the accuser recant his or her *current* incriminating statements at trial only to have the prosecution read the *previous* accusations made at a preliminary hearing to the jury does not provide the defendant with the same protections. The Constitution seems to place some emphasis on the fact that the statements that lead to the defendant's conviction should be made at trial if possible. That might explain the two-pronged exception to the Confrontation Clause, which strictly requires unavailability, and explain why statements offered under Rule 801(d)(1)(A) would not, as a rule, pass constitutional muster.[179]

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174. The exception may apply if the reason the witness is testifying differently than before is due to witness intimidation on the part of the defendant. However, the Supreme Court has not yet specifically addressed this potential exception to the Sixth Amendment.

175. *Crawford*, 541 U.S. at 68 ("[w]here testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: *unavailability* and a *prior* opportunity for cross examination.") (emphasis added).

176. *Id.*

177. *Id.*

178. *Id.*

179. The rule may be similar to Rule 801's prohibition on a witness's ability to testify to his or her own out-of-court statements in court for the truth of the matter asserted simply on the account that these were the witness's prior statements and he or she is currently on the stand. Some may argue that this too does not necessarily make legal

Like Rule 801(d)(1)(A), statements that fall within Rule 801(d)(1)(B) would not necessarily be admissible under the Sixth Amendment even though they qualify as non-hearsay under the Federal Hearsay Rule. Rule 801(d)(2)(B) permits statements made previously by a testifying witness to be offered into evidence to rebut a charge of fabrication or to rehabilitate that witness.[180] The rule is particularly useful, especially for a prosecutor in a criminal trial, because the prior statements did not have to occur in a hearing (which *is* a requirement of Rule 801(d)(1)(A)).[181] However, statements of this sort are all the more troublesome when it comes to overcoming a Confrontation Clause objection. Such statements are not necessarily made under the belief of impending death. They are not usually statements where the defendant has forfeited his right to confront the witness by wrongdoing since the witness must be on the stand and subject to cross-examination for his or her prior statements to be admissible under Rule 801(d)(1)(B) in the first place.[182] Finally, the witness is not unavailable (due to his or her presence on the stand), and therefore the Constitution requires the witness to give live trial testimony if the prosecution hopes to use the testimony to substantively support a conviction.[183] Ergo, while a statement admissible under Rule 801(d)(1)(B) *could* theoretically satisfy the requirements of the Confrontation Clause, that is not always the case. Therefore, meeting the requirements of this rule does not necessarily allow a prosecutor to overcome an objection under the Sixth Amendment of the United States Constitution.

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sense, but that is nevertheless the rule. MAUET & WOLFSON, *supra* note 59, at 129; FRIEDLAND, BERGMAN & TASLITZ, *supra* note 59, at 438; LEONARD & GOLD, *supra* note 59, at 196. The Constitution, common law, and the rules of evidence appear to place great stock in live trial testimony, and seem to prefer live testimony in place of the prosecution simply offering past accusations against the defendant when the accuser is easily available to testify concerning those accusations. Perhaps this is because requiring the accuser to testify anew permits a jury to evaluate his or her demeanor, the tone of his or her voice, and his or her overall honesty during that testimony.

180. MAUET & WOLFSON, *supra* note 59, at 143–45; FRIEDLAND, BERGMAN & TASLITZ, *supra* note 59, at 555–57; LEONARD & GOLD, *supra* note 59, at 197–99; FED. R. EVID. 801(d)(2)(B).

181. MAUET & WOLFSON, *supra* note 59, at 141–45; FRIEDLAND, BERGMAN & TASLITZ, *supra* note 59, at 544–57; LEONARD & GOLD, *supra* note 59, at 196–99. A prosecutor may use a child's statements at the age of four about sexual assault committed by her father to rebut defense counsel's argument that when the child was five, her mother convinced her to accuse her father to obtain a more favorable judgment in a divorce proceeding.

182. MAUET & WOLFSON, *supra* note 59, at 143–45; FRIEDLAND, BERGMAN & TASLITZ, *supra* note 59, at 555–57; LEONARD & GOLD, *supra* note 59, at 197–99.

183. *Crawford*, 541 U.S. at 68 ("[w]here testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination.").

Evidence that meets the standard of Rule 801(d)(1)(C) is also not free of potential Confrontation Clause objections, and some of them prove quite effective. This portion of the Federal Hearsay Rule permits the admission of a prior identification of a person by a declarant even if the identification occurred when the declarant was not under oath and not subject to cross-examination.[184] This rule, like Rule 801(d)(1)(B), *could* include evidence admissible under the Confrontation Clause, but admissibility under Rule 801(d)(1)(C) does not guarantee admissibility under the Sixth Amendment. The rule could include an identification under the belief of impending death, but since Rule 801(d)(1) only applies if the declarant testifies at trial, that is unlikely.[185] The rule would not ordinarily include statements that fall into the forfeiture by wrongdoing exception to the Sixth Amendment, since the declarant's presence on the witness stand would necessarily mean that the right to cross examine was not forfeited.[186] Finally, the unavailability requirement would not be met for the third main exception to the Confrontation Clause to apply: the declarant would be testifying at trial and therefore not unavailable.[187]

Rule 801(d)(1)(C) and its relationship to *Crawford* and other recent Sixth Amendment jurisprudence also brings into question the Supreme Court's decision in *United States v. Owens*.[188] In *Owens*, a case decided more than a decade before *Crawford*, the Court considered a case of a prisoner who allegedly assaulted a correctional counselor with a metal pipe, causing brain damage.[189] Initially, the counselor could not identify his assailant.[190] However, as his condition initially improved, the guard recollected that Owens attacked him.[191] Unfortunately, by the time of the defendant's trial, the counselor once again lost the ability to remember or identify his assailant.[192] At trial, despite several attempts to refresh the counselor's recollection, the counselor could not recall the assault

184. MAUET & WOLFSON, *supra* note 59, at 145–46; FRIEDLAND, BERGMAN & TASLITZ, *supra* note 59, at 559–61; LEONARD & GOLD, *supra* note 59, at 200–02.

185. MAUET & WOLFSON, *supra* note 59, at 145–46; FRIEDLAND, BERGMAN & TASLITZ, *supra* note 59, at 559–61; LEONARD & GOLD, *supra* note 59, at 200–02.

186. MAUET & WOLFSON, *supra* note 59, at 145–46; FRIEDLAND, BERGMAN & TASLITZ, *supra* note 59, at 559–61; LEONARD AND GOLD, *supra* note 59, at 200–02.

187. *Crawford*, 541 U.S. at 68 ("[w]here testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination.").

188. United States v. Owens, 484 U.S. 554 (1988).

189. *Id.* at 555–56.

190. *Id.*

191. *Id.*

192. *Id.*

sufficiently to identify the defendant.[193] However, over the defendant's Confrontation Clause and hearsay objection, the prosecution offered the guard's prior identification of the prisoner as substantive evidence of the defendant's guilt.[194] That led to a guilty verdict, which the defendant appealed.[195]

The defendant's objection and subsequent appeals arose from the fact that the witness, in his state while on the witness stand, could not be effectively cross-examined.[196] Due to the counselor's memory loss, defense counsel could not verify or rebut through cross-examination any of the allegations the guard made against the defendant.[197] The Court held that the witness's presence on the stand satisfied the defendant's right to confront the witness against him and also permitted the admission of the witness's out-of-court statement under Rule 801(d)(1)(C).[198] Despite the fact that the cross-examination was rendered ineffective by the witness's loss of memory, the witness's prior identification of the defendant was admissible.[199] Still relying on the *Roberts* test, Justice Scalia wrote for the majority that the Constitution does not guarantee a right to an *effective* cross-examination, and neither does Rule 801(d)(1)(C).[200]

Yet, the ruling in *Owens* may have been different a mere fifteen years later after the Supreme Court decided *Crawford* (and overruled *Roberts*).[201] Perhaps the most well-known line of *Crawford* states that the Sixth Amendment demands "what the common law required: [1] unavailability and [2] a *prior* opportunity for cross-examination."[202] When applied to the facts of *Owens*, *Crawford*'s rule may require that the witness be physically *unavailable* rather than simply present and unable to recall the occurrence.[203] This runs contrary to Rule 801(d)(1)(C), which mandates that the witness be *available* for cross-examination by testifying at trial for the prior identification evidence to

193. *Id.*
194. *Id.* at 555–57.
195. *Id.* at 556–57.
196. *Id.* at 557–61.
197. *Id.* at 555–57.
198. *Id.* at 559 ("Here that question is squarely presented, and we agree with the answer suggested 18 years ago by Justice Harlan. [T]he Confrontation Clause guarantees only 'an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.") (citing Kentucky v. Stincer, 482 U.S. 730, 739 (1987)).
199. *Owens*, 484 U.S. at 559–61.
200. *Id.* at 559–64 (citing Ohio v. Roberts, 448 U.S. 56 (1980)).
201. Crawford v. Washington, 541 U.S. 36 (2004).
202. *Id.* at 68. (emphasis added).
203. *Id.*

be admissible. Therefore, the very first element of *Crawford* would not be met due to this issue of availability.[204]

In *Owens*, the witness testified at trial to a lack of memory about being attacked. Despite his physical presence on the witness stand (which apparently satisfied Rule 801(d)(1)(C)), he was mentally absent—the man with clear memory of the attack was no more.[205] Perhaps an argument could be made that the first prong of *Crawford* was satisfied due to the witness's inability to recall the attack with any specificity. Although the Supreme Court has not spelled out the precise meaning of "unavailability" under the Confrontation Clause, Rule 804 does include testimony to a lack of memory within the meaning of the word (making it theoretically possible for a witness to testify at trial and still be considered "unavailable").[206] This theoretically makes it possible for a witness to be present at trial yet be considered "unavailable" from a constitutional and evidentiary perspective. If the Rule 804 definition is applied in this way, to the Confrontation Clause the counselor in *Owens* would have been properly considered a legally "unavailable" witness despite his presence on the witness stand and physical availability.[207] When viewed in this light, the *Owens* decision survives the first prong of Supreme Court's new Confrontation Clause jurisprudence.[208]

But then, what about the second prong of the *Crawford* test? The *Owens* opinion shows no sign that the prison counselor had been cross-examined by the defendant or his lawyer at any *prior* hearing.[209] It appears that no *prior* opportunity to cross-examine had been afforded.[210] At least on the face of it, the prosecution in *Owens* seems to have fallen short of *Crawford*'s requirements.[211] A straightforward reading of *Crawford* would require a *prior* opportunity for cross-examination of the victim in *Owens* rather than simply giving the defendant the chance to cross-examine the witness live, at trial, after the witness had forgotten the event concerning which he previously spoke.[212] As mentioned earlier, this also may run afoul of the Confrontation Clause.

Did *Crawford* include another break with precedent then, even if unwittingly so? Could it be that Justice Scalia when writing for the Court

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204. *See id.*
205. United States v. Owens, 484 U.S. 554, 555–57 (1988).
206. FED. R. EVID. 804; see Davis v. Washington, 547 U.S. 813 (2006); *Crawford*, 541 U.S. 36.
207. *See Owens*, 484 U.S. at 555–57.
208. *See id.*
209. *See id.*
210. *See id.*
211. *See id.*
212. Crawford v. Washington, 451 U.S. 36, 68 (2004); *Owens*, 484 U.S. at 555–57.

in *Crawford* overruled *Owens* as well as *Roberts* (despite the fact that Scalia himself wrote the opinion in *Owens*)?[213] Although this is undoubtedly open to debate, the short answer seems to be "yes." The plain language of *Crawford* requires that both the unavailability and the prior cross-examination prongs are met for the prosecution to introduce "testimonial" evidence against the accused at trial.[214] It is possible that Justice Scalia "acquired new wisdom" between his opinion in *Owens* and his opinion in *Crawford* a decade later.[215] One argument against this theory is that it is counterintuitive to require a prior opportunity to confront a witness when the witness is available for confrontation at the very moment of trial. Yet, *not* requiring something of this sort can yield a result no less unfair: the prosecution would be able to reap the benefits of reading into evidence a prior statement of a forgetful witness due to the court's holding that the witness is "unavailable." At the same time, the prosecution fears nothing from the cross-examination of the witness by defense counsel on account of the witness's lack of memory. This cannot be considered a meaningful opportunity for an accused to confront the witness against himself or herself in any sense of the Sixth Amendment's plain language or in the plain language of the (current) central decision interpreting that language.[216] Therefore, it is likely that *Crawford* and its progeny covertly overruled *Owens* on this issue.[217]

2. *Rule 801(d)(2)(C) and Rule 801(d)(2)(D). Statements Made by an Opposing Party's Agent*

This Article left two sections of Rule 801(d)(2) out of the list of Federal Hearsay Rules that permit a prosecutor to avoid a Sixth Amendment violation. This is no accident. In a criminal proceeding, it is likely that these vicarious admissions by a party opponent would not violate the confrontation requirement. After all, in the criminal context, Rule 801(d)(2)(C) permits the introduction of statements by a person that

213. *Owens* 484 U.S. at 555.

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

215. Ring v. Arizona, 536 U.S. 584, 611 (2002). Explaining a change of opinion with "acquir[ing] new wisdom" on a separate legal issue. *Id.*

216. U.S. CONST. amend. VI; *Crawford,* 541 U.S. at 68. This is like the general hearsay rule that the presence of the declarant of hearsay on the stand does not cure hearsay. MAUET &WOLFSON, *supra* note 59, at 129; FRIEDLAND, BERGMAN & TASLITZ, *supra* note 59, at 438; LEONARD & GOLD, *supra* note 59, at 196.

217. The application of Rule 801(d)(1)(C) will likely remain unchanged because neither *Crawford* nor its progeny relied in whole or in part on the interpretation of that Federal Rule of Evidence to reach their conclusion.

the defendant authorized to make statements on his or her behalf.[218] Rule 801(d)(2)(D) permits the introduction of statements by the defendant's agents so long as they are in the scope of their relationship.[219] Both can involve a person other than the defendant making "testimonial" statements on the defendant's behalf to which the defendant does not necessarily assent.[220]

The weaker implication of assent to the statements by the defendant that might arise from the mere relationship of the defendant to the declarant is likely insufficient to overcome the need for cross-examination. A defendant not being able to cross-examine himself may be one thing, but cross-examining another person who happened to make statements on the defendant's behalf is another. After all, agents or other individuals authorized to make statements on the behalf of an accused (often before any accusations even arise) can make statements to police or even bystanders that may end up being incriminating to the principle.[221] It is unlikely that the Confrontation Clause would cease to apply to the statements of such agents, and neither *Crawford* nor its progeny imply anything different. If the agent's statement is testimonial, two elements are still required for its introduction: "unavailability, and a prior opportunity for cross- examination."[222]

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218. MAUET & WOLFSON, *supra* note 59, at 153–54; FRIEDLAND, BERGMAN & TASLITZ, *supra* note 59, at 604–07; LEONARD & GOLD, *supra* note 59, at 189–91; FED. R. EVID. 801(d)(2)(C).

219. MAUET & WOLFSON, *supra* note 59, at 153–54; FRIEDLAND, BERGMAN & TASLITZ, *supra* note 59, at 607–09; LEONARD & GOLD, *supra* note 59, at 189–91; FED. R. EVID. 801(d)(2)(D).

220. MAUET & WOLFSON, *supra* note 59, at 153–54; FRIEDLAND, BERGMAN & TASLITZ, *supra* note 59, at 604–09; LEONARD & GOLD, *supra* note 59, at 189–91.

221. Consider a prospective defendant for murder asking his "friend" to tell the police that the defendant did not do it. Yet, in this scenario, the "friend," unbeknownst to the defendant, actually committed the murder. The "friend" might wish to send the police onto the wrong lead. Thus, when members of law enforcement arrive to inquire of the identity of the killer, the "friend," who had been authorized by the prospective defendant to make statements on the defendant's behalf (satisfying the conditions of Rule 801(d)(2)(C)), admits guilt on the defendant's behalf. It would be stunning for the Constitution not to require that the defendant be permitted to confront his "friend" at trial while requiring confrontation in so many other instances.

Another example, this time involving Rule 801(d)(2)(D), could arise within the medical field. A doctor may be performing an operation on a patient when her hand slips and the patient dies as a result. An attending nurse, who is employed by the doctor, goes to the police to claim that the doctor intentionally killed the patient due to an undisclosed, long-held grudge. Surely the Sixth Amendment would require the opportunity for cross-examination of this nurse by the accused doctor in spite of their employer-employee relationship.

222. Crawford v. Washington, 541 U.S. 36, 68 (2004).

Some may argue that statements fitting Rule 801(d)(2)(E) should, under the same logical principle, be excluded by the Confrontation Clause. They may point out that since Rule 801(d)(2)(C) and (D) involve statements by individuals other than the defendant, and such statements do not escape the requirements of the Sixth Amendment. Statements under Rule 801(d)(2)(E) are no different. They too include communications of a person other than the defendant which the defendant did not necessarily adopt or acquiesce to.[223] Therefore, some could argue that if Rule 801(d)(2)(C) and (D) do not provide a sure guide for circumventing a Confrontation Clause objection, neither can Rule 801(d)(2)(E).

Such an argument, however, does not strike at the heart of the issue. Confrontation Clause analysis does not swing on whether the statements are declarations to which the defendant has acquiesced. The relevant inquiry in evaluating Rule 801(d)(2)(C)–(E) concerns whether the statements are categorically "non-testimonial" or whether they can be "testimonial" under certain circumstances. As discussed earlier, statements that fall into the category of Rule 801(d)(2)(E) are inherently "non-testimonial" because a declarant does not reasonably believe he or she is furthering a criminal conspiracy by making statements intended for a subsequent criminal prosecution against his or her co-conspirator.[224] Thus, by simply qualifying as a Rule 801(d)(2)(E) statement, a communication offered in court as a "non-testimonial" statement escapes Sixth Amendment scrutiny. However, Rule 801(d)(2)(C) and (D) do not share this trait because they do not *inherently* exclude such statements by their definition. Therefore, statements under Rule 801(d)(2)(C) and (D) *can* be testimonial, which means that communications that fit into the definition of these two rules do not necessarily permit a prosecutor to overcome a Confrontation Clause challenge.

3. *Rule 803(3). Then Existing Mental, Emotional, or Physical Condition*

Statements that fit the definition of Rule 803(3) also do not necessarily survive Confrontation Clause scrutiny. This rule can be used to demonstrate a declarant's state of mind, such as whether the declarant is scared, upset, or hurt.[225] It is important to note that it cannot be used to

223. FED. R. EVID. 801.

224. *See Crawford*, 541 U.S. at 51–52; *see also* Davis v. Washington, 547 U.S. 813, 822 (2006).

225. MAUET & WOLFSON, *supra* note 59, at 181–86; FRIEDLAND, BERGMAN & TASLITZ, *supra* note 59, at 644–49; LEONARD & GOLD, *supra* note 59, at 212–21.

prove that the state of mind is true or false: for example, a statement by the declarant that he believes he has broken his leg cannot be used to show that the leg was broken; only that the declarant believed it to be.[226]

While statements that survive an objection under the Federal Hearsay Rule due to this exception *can* sometimes survive a Confrontation Clause challenge—that is not a hard-and-fast rule. Some statements, such as a battery victim stating his belief that his leg is broken moments after the attack, may not be "testimonial" due to the fact that they are not made in preparation for or in reasonable anticipation of a criminal trial.[227] However, other statements that fall into the definition of Rule 803(3) do run afoul of the Confrontation Clause. In a harassment or assault case, for example, a victim may tell a police officer that he is still afraid of the already apprehended defendant after the harassment or assault has occurred. Such a statement may be used by a prosecutor to show that the defendant's actions would have been alarming to a reasonable person (as many harassment or assault charges require or at least permit) but they would also involve "testimonial" statements that would be subject to a Confrontation Clause objection if there has been no showing of "unavailability and a prior opportunity for cross-examination."[228]

4. Rule 803(5). Recorded Recollections

While this is a close question, it is likely that statements offered into evidence under the Recorded Recollection exception would not automatically survive a Confrontation Clause challenge. Rule 803(5) carves a narrow opportunity for the party offering the past statements of a forgetful witness into evidence to read those statements into the record, so long as the proponent of the evidence establishes the past reliability of these statements.[229] However, the written statements that would be read

226. FED. R. EVID. 803(3); *See* MAUET & WOLFSON, *supra* note 59, at 181–86; FRIEDLAND, BERGMAN & TASLITZ, *supra* note 59, at 644–49; LEONARD & GOLD, *supra* note 59, at 212–221.

227. *Crawford*, 541 U.S. at 51–52; *Davis*, 547 U.S. at 822.

228. *Crawford*, 541 U.S. at 68; FLA. STAT. ANN. § 784.011 (West 2017) ("An 'assault' is an intentional, unlawful threat by word or act to do violence to the person of another, coupled with an apparent ability to do so, and doing some act which creates a well-founded fear in such other person that such violence is imminent."); ALA. CODE § 13A-11-8 (2017).

229. MAUET & WOLFSON, *supra* note 59, at 217–20; FRIEDLAND, BERGMAN & TASLITZ, *supra* note 59, at 660–68; LEONARD & GOLD, *supra* note 59, at 225–27.

into evidence cannot themselves be admitted as an exhibit unless offered by the opposing party.[230]

Much like Rule 801(d)(1)(C), meeting the requirements of this exception does not necessarily satisfy the Confrontation Clause under *Crawford* and its progeny. Although the inability of a witness to remember may be common in criminal cases, and perhaps even expected, many recorded recollections would likely qualify as "testimonial" statements.[231] Although this is not exclusively the case, many records of this type are prepared for the sole purpose of helping a witness recall an event to elicit testimony concerning that event at trial.[232] Thus, if the statements are indeed "testimonial," "unavailability and a prior opportunity for cross-examination" would be required.[233] Without meeting these requirements, the proponent of these statements would be unable to read them into the record due to the United States Supreme Court's Sixth Amendment jurisprudence.[234] Therefore, a prosecutor's only recourse is to hope to refresh the witness's recollection without reading the recorded recollection into evidence.[235] If the witness can read his or her own account of the facts and suddenly remember what took place independently of the written text, then the witness can testify to the events without invoking any portion of the Federal Hearsay Rule or the United States Constitution.[236] If no independent recollection can be

230. FED. R. EVID. 803(5); MAUET & WOLFSON, *supra* note 59, at 70–72, 217–20; FRIEDLAND, BERGMAN & TASLITZ, *supra* note 59, at 660–68; LEONARD & GOLD, *supra* note 59, at 225–27.

231. *Crawford*, 541 U.S. at 51–52; *Davis*, 547 U.S. at 822.

232. For example, a witness to a murder might write down in his or her witness statement that the defendant used a knife to kill the victim. However, it is possible that the murder trial becomes delayed for several years due to various procedural issues. The witness then cannot remember the weapon she saw used and reviewing her own previous statements does not spark her memory to any extent and does not resurrect within her mind a recollection of the events that is independent of her written statement. The prosecution might attempt to read into the record the witness's prior statements, but the Confrontation Clause would not permit it. The witness may be "unavailable" due to her lack of memory, but there was no *prior* opportunity to cross examine her by the defense. Thus, if *Crawford* indeed overruled a portion of *Owens* as argued above, the reading of the witness's prior statements would be permissible even if the statement is never introduced into evidence as an exhibit.

233. *Crawford*, 541 U.S. at 51–52, 68; *Davis*, 547 U.S. at 822.

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

235. FED. R. EVID. 612; MAUET & WOLFSON, *supra* note 59, at 70–72; FRIEDLAND, BERGMAN & TASLITZ, *supra* note 59, at 660–68; LEONARD & GOLD, *supra* note 59, at 227–29.

236. FED. R. EVID. 612; MAUET & WOLFSON, *supra* note 59, at 70–72; FRIEDLAND, BERGMAN & TASLITZ, *supra* note 59, at 660–68; LEONARD & GOLD, *supra* note 59, at 227–29.

produced, however, the prosecutor must find other ways to elicit the testimony.

Some of this conclusion may seem ominous for the prosecution. After all, certain criminal investigations span years, if not decades, causing lay witnesses and law enforcement alike to forget what took place to the point that no recollection independent of the records is reasonably anticipated. Some witnesses, particularly lab technicians and similarly situated professionals, may have trouble recalling any particular case because of the sheer volume and similarity of cases they encounter each day. The Confrontation Clause undoubtedly imposes a limitation on the testimony of these witnesses as discussed in this section and in the section concerning the admissibility of business records and public records under the Sixth Amendment. The Court may wish to revisit this section again, despite having done so recently in *Melendez-Diaz*.

Yet, the countervailing consideration is that of the defendant: if the Constitution did not provide these safeguards, he or she might be convicted on merely the past statements of witnesses that have no current recollection of what took place! That is quite a frightening notion, especially considering that the testimony against the defendant could, in absence of the Confrontation Clause, be admitted without any meaningful cross-examination whatsoever. This is an evil the Confrontation Clause must guard against, and the balance that the *Crawford* Supreme Court struck seems less onerous when one considers the interests of the defendant.

5. Rule 803(16). Statements in Ancient Documents

Rule 803(16) permits the introduction of documents at least twenty years old into evidence over a hearsay objection.[237] While most such documents may not be made for "testimonial" purposes, that likely is not exclusively true.[238] Thus, an "ancient" document such as a newspaper that reports the details of a crime, which subsequently becomes a cold case, likely cannot be used in the criminal trial that occurs two decades later after the perpetrator has been discovered. Ergo, complying with this exception to the hearsay rule does not guarantee compliance with the Sixth Amendment.

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237. FRIEDLAND, BERGMAN & TASLITZ, *supra* note 59, at 687; LEONARD & GOLD, *supra* note 59, at 289–90; FED. R. EVID. 803(16).

238. *See* FRIEDLAND, BERGMAN & TASLITZ, *supra* note 59, at 687; *see also* LEONARD & GOLD, *supra* note 59, at 289–90.

6. Rule 804(b)(3). Statements Against Interest

Rule 804(b)(3) renders admissible statements of an unavailable declarant when they are made against that declarant's proprietary, legal, or pecuniary interests.[239] The rule also requires something similar to the old *Roberts* Confrontation Clause test because it mandates that such statements be accompanied "by corroborating circumstances that clearly indicate its trustworthiness, if offered in a criminal case . . ."[240] While many statements that are made against the declarant's interest may be made without any intent on the part of the declarant to have them used at trial, that is not categorically the case. For example, a suspect charged with Receiving Stolen Property may state, as part of his confession, that the defendant had given the stolen property to him and subsequently disappeared.[241] Such a statement would affect the legal and pecuniary interests of the declarant, since this inherently shows his knowledge that the property was stolen and makes it even more likely that he would be forced to pay restitution upon conviction. Provided there is corroborating evidence, the statement would be admissible against the defendant under the Federal Hearsay Rule.[242]

The Confrontation Clause, however, is less permissive after *Crawford*. In this scenario, the statements are part of a confession to the police. The declarant knows or should know that these statements will likely be used at trial if he or the initial thief elects to contest the charges against them. These are precisely the kinds of solemn assertions of truth which are deemed "testimonial" under the Confrontation Clause.[243] The statements do not comprise a dying declaration, nor has the defendant, in this scenario, done anything to forfeit his right to confront his accuser. Thus, the Federal Hearsay Rule might be satisfied, but the Sixth Amendment is not. The mere fact that corroborating factors, such as the possession of the stolen property at the time of meeting with the police,

239. *See* MAUET & WOLFSON, *supra* note 59, at 198–204; FRIEDLAND, BERGMAN & TASLITZ, *supra* note 59, at 736–39; LEONARD & GOLD, *supra* note 59, at 259–69; FED. R. EVID. 804(b)(3).

240. FED. R. EVID. 804(b)(3); Ohio v. Roberts, 448 U.S. 56, 66 (1990); MAUET & WOLFSON, *supra* note 59, at 198–204; FRIEDLAND, BERGMAN & TASLITZ, *supra* note 59, at 736–39; LEONARD & GOLD, *supra* note 59, at 259–69.

241. ALA. CODE § 13A-8-16 (2016).

242. FED. R. EVID. 804(b)(3); See also *Roberts*, 448 U.S. at 66; MAUET & WOLFSON, *supra* note 59, at 198–204; FRIEDLAND, BERGMAN & TASLITZ, *supra* note 59, at 736–39; LEONARD & GOLD, *supra* note 59, at 259–69.

243. Crawford v. Washington, 541 U.S. 36, 51–52 (2004); Davis v. Washington, 547 U.S. 813, 822 (2006). Notice that unlike the statements in the statements-made-by-a-co-conspirator exemption of Rule 801(d)(2)(E), the communication at issue here by its very nature does not further any type of conspiracy and therefore cannot be offered as such.

show the statement concerning the theft to be reliable does not satisfy the *Crawford* standard (even though that may have satisfied the old *Roberts* standard).[244] In fact, this example is similar to *Crawford* itself, where the prior statements of the defendant's wife against the defendant satisfied Washington's statements against penal interest exception, but failed to satisfy the Confrontation Clause.[245]

A critic may pose the question: why would the Confrontation Clause potentially exclude statements that fall into the Rule 804(b)(3) exception but permit statements by co-conspirators (Rule 801(d)(2)(E))? The answer spans from the requirements of these exceptions. As discussed earlier, Rule 801(d)(2)(E) statements are statements "*in furtherance of the conspiracy.*"[246] Such statements are inherently "non-testimonial" because they do not seek to implicate anyone in anticipation of a criminal trial, but rather to aid in the commission or concealment of the crime. As exemplified above, Rule 804(b)(3) statements can seek not only to implicate the defendant in a crime, but also can do so in a solemn manner (and in anticipation of trial) such that the Sixth Amendment would require an opportunity for cross examination.

7. *Rule 804(b)(4). Statements of Personal or Family History*

Rule 804(b)(4) renders admissible statements of a declarant either about his own familial relationship or status or about the status of a declarant's relatives.[247] It is very similar to the Rule 803(11)–(13) exceptions, except that Rule 804(b)(4) statements do not have to be in the form of documents.[248] Since this Article has argued for the admissibility of statements that qualify under Rule 803(11)–(13) under the Sixth Amendment, it may seem counterintuitive that Rule 804(b)(4) statements might be excluded under that rule of law. However counterintuitive that would seem, this is a conclusion that the Supreme Court's jurisprudence likely requires.

Statements that fall into the definitions of the Rule 803(11)–(13) exceptions to the Federal Hearsay Rule are necessarily "non-testimonial" because the reasons such records of family history are produced is inherently *not* for the purposes of preserving solemn testimony for future use within a criminal trial.[249] However, statements about family history,

244. *Crawford*, 541 U.S. 36; *Roberts*, 448 U.S. at 66.
245. Crawford, 541 U.S. at 40.
246. FED. R. EVID. 801(d)(2)(E). (emphasis added).
247. FED. R. EVID. 804(b)(4).
248. *Id.*
249. *See Crawford*, 541 U.S. at 51–52, 68; *Davis*, 547 U.S. at 822.

depending on the circumstances, may indeed be testimonial. For example, a parent may incriminate her children by admitting to an investigating officer that they are siblings in an incest investigation. Rule 804(b)(4) would permit the admission of her prior statements despite her refusal to incriminate her children in open court, but the Confrontation Clause is far more stringent on this issue. Such statements would likely be considered "testimonial," and therefore inadmissible, unless the declarant is unavailable and there has been a prior opportunity to cross examine.[250] The Rule 801(11)–(13) exceptions, however, might offer the prosecution an opportunity to present similar incriminating evidence in this scenario while complying completely with the requirements of the Sixth Amendment.

8. Rule 807. Residual Exception

Finally, Rule 807 might be discussed briefly only because it creates some ambiguity about what might be admissible under the Federal Hearsay Rule. The intent of this exception is to render admissible hearsay evidence that may not fit into the other hearsay exceptions but which possesses similar indications of reliability.[251] It is possible that some statements that are included in Rule 807 may be admissible under the Confrontation Clause, but it is likely that many are not.[252] This rule and its inherent reliance on indicators of reliability to side-step the procedural preference for cross-examination, the oath each witness takes before giving testimony in court, and the opportunity for the jury to evaluate the credibility of the declarant put it on the losing end of the Supreme Court's current Confrontation Clause jurisprudence. The very elements that a statement must meet to come into evidence under Rule 807 ring reminiscent of the old *Roberts* standard which the Court abandoned in *Crawford*.[253] Unless the Court chooses to return to that standard in the coming years, statements admissible under Rule 807 cannot be expected to automatically withstand Sixth Amendment scrutiny.

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

251. FED. R. EVID. 807.

252. *See Crawford*, 541 U.S. at 51–52, 68; *See also Davis*, 547 U.S. at 822.

253. *Crawford*, 541 U.S. 36; Ohio v. Roberts, 448 U.S. 56, 66 (1980), *abrogated by* Crawford v. Washington, 541 U.S. 36 (2004).

IV. IT'S A ROUND WORLD

From the above analysis, it is clear that the requirements the *Crawford* standard imposed only exceed the requirements of the Federal Hearsay Rule in eight instances out of all of the possible clauses and subclauses of Rules 801–807.[254] If *Crawford* was supposed to cast aside the *Roberts* rule that satisfying a firmly-rooted hearsay exception assured admissibility of the evidence under the Confrontation Clause, it has only done so in a few instances. The language of *Crawford* itself implied far more expansive reforms when it came to criminal evidence,[255] but that has not panned out because of the limitations in cases like *Davis*. With this in mind, the question must be asked: Is the *Crawford* rule worth keeping?

The guiding principle must be that clear laws benefit everyone because they eliminate surprise and confusion, and they should be adopted where their adoption does not prejudice the rights and interests of the parties. When it comes to out-of-court "testimonial" statements, the Confrontation Clause and the Federal Hearsay Rule share a common goal: to procedurally protect the parties through ensuring cross-examination of statements that do not possess factors that buttress their reliability.[256] There is no indication from the analysis conducted herein that the Confrontation Clause addresses this objective any better than the Federal Hearsay Rule, and in many instances, the Federal Hearsay Rule may actually be more stringent.[257] With this in mind, there is no pragmatic reason for treating the requirements of the Constitutional Amendment and the Federal Hearsay Rule as different since they likely arose out of identical considerations and their interpretation applies a virtually identical line of logic.[258]

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254. *See* Part III, *supra*. I am counting FED. R. EVID. 801(d)(2)(C) and (D) as a single instance, since the rules are quite similar in purpose and in application. It is also important to note that even in these eight instances, there may be situations where a statement is still admissible when it falls within these eight hearsay rules. The current law merely does not *guarantee* admissibility simply because one of these eight rules is satisfied.

255. *See Crawford*, 541 U.S. at 38–42, 60–69.

256. *See* Giles v. California, 554 U.S. 353, 365 (2008). "As the plurality said in *Dutton v. Evans*, '[i]t seems apparent that the Sixth Amendment's Confrontation Clause and the evidentiary hearsay rule stem from the same roots.'" *Id.*, quoting Dutton v. Evans, 400 U.S. 74, 86 (1970).

257. Keep in mind that just because compliance with the Federal Hearsay Rule usually means compliance with the Confrontation Clause does not mean compliance with the Confrontation Clause is equivalent to compliance with the Federal Hearsay Rule.

258. *See supra* Part III.

Furthermore, making the standards equivalent, as the *Roberts* standard essentially did, would eliminate confusion and expense at the lower court level concerning which statements may or may not be admissible. With criminal cases involving expert witnesses, various reports, and state and federal agents who have trouble recalling the exact facts of a case without referring to, and sometimes completely relying on, out-of-court statements created for the purpose of a criminal prosecution (sometimes without any independent recollection of their own involvement), the Confrontation Clause can stall proceedings without providing the defendant with any additional procedural or substantive justice. The only thing the *Crawford* interpretation of the Confrontation Clause actually achieves in that instance is burdening the government without benefiting any of the parties involved. It is unlikely that this was the intent of the Founding Fathers. If confronting a particular witness is truly critical for the defendant, and the prosecution can somehow establish its elements without calling the witness to the stand, the defense can always summon the witness on its own and receive permission from the court to treat him or her as hostile, thereby effectively providing for its own confrontation.[259]

Finally, the differential treatment of the Confrontation Clause and the Federal Hearsay Rule creates a situation where trial and appellate courts throughout the nation develop two distinct bodies of case law based around two rules that arise out of the same procedural considerations and which aim to achieve the same purpose by virtually identical means. This creates various situations where even well-trained lawyers may be unable to determine with any degree of confidence whether a particular out-of-court statement would be admissible. Courts have to now consider both evidentiary rules and the Constitution, but the wealth of precedent that had been developed for the evidentiary rule now proves unavailable when considering the Constitution. Thus, *Crawford* actually eliminates the ability for courts to rely on well-established wisdom of admitting or rejecting certain types of hearsay evidence. Instead, it forces them to reconsider the evidence in the light of the Confrontation Clause (despite a lack of practical difference in outcomes), where post-*Crawford* precedent does not always exist and where much of the precedent that *does* exist is riddled with technicalities which may not be as easily interpreted by the trial court in the midst of trial. That, in turn, only leads to more appeals, reduces judicial efficiency, and harms judicial economy.

259. FED. R. EVID. 611(c)(2).

Therefore, there would be nothing wrong with returning to the *Roberts* standard because it would eliminate many of these problems and criminal prosecutions can proceed as they have for decades prior to the *Crawford* decision with no apparent harm done. By simply holding that satisfying the Federal Hearsay Rule[260] inherently satisfies the requirements of the Confrontation Clause *in all instances*, the Supreme Court can ease the burden on courts, counsel, and state and federal agencies by creating clarity and without prejudicing criminal defendants in any material way. And, from the above analysis,[261] it looks like the Supreme Court has largely done so already.

V. CONCLUSION

The Supreme Court's Confrontation Clause jurisprudence may not be crystal clear, but following the Federal Hearsay Rule can be as good of a guide as any for a prosecutor wishing to introduce evidence of out-of-court statements into evidence without running afoul of the Constitution. It can also serve as a map to a defense attorney wishing to exclude such evidence. Although currently not a perfect guide, the Federal Hearsay Rule provides a basic layout of which pieces of evidence violate the Constitutional protections that extend to every criminal defendant under the Confrontation Clause. The exceptions to this methodology have been enumerated, though this list may not be exhaustive due to the seemingly shifting nature of the Supreme Court's jurisprudence on the Sixth Amendment.

It is almost doubtless that jurisprudence on the subject may change in the coming years, or maybe even in the coming months. There is a tension regarding the introduction of lab reports and other investigative documents into evidence under the Sixth Amendment. Future Supreme Court cases may address whether the Court intentionally or unintentionally overruled *Owens* in its *Crawford* decision. Other decisions may discuss whether the *Roberts* standard has really been abandoned, since falling within many well-established hearsay exceptions indeed cleanses certain evidence of Confrontation Clause impediments. It can be hoped that the Supreme Court takes a step back

260. Satisfying the Federal Hearsay Rule rather than merely a state hearsay rule will probably be an important point, since states tend to adopt some rules that are not widely accepted among their peers. However, the Federal Rules prove constant throughout the nation, signifying a broad acceptance. Furthermore, from a purely practical standpoint, the Federal Rules are subject to instruction and testing by law schools nationwide (not to mention their appearance on the bar exam of every state), therefore, their understanding by all lawyers is likely broader than that of the rules of any particular individual state.

261. *See supra* Part II–III.

and eliminates procedural confusion by equating the Confrontation Clause standard with the Federal Hearsay Rule. The only question is: *when* will the Court eliminate the remaining eight-or-so exceptions and make the Federal Hearsay Rule a *complete* map to the Confrontation Clause?