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## The Hearsay Within Confrontation

John C. O'Brien  
*Saint Louis University School of Law*, [ob7@slu.edu](mailto:ob7@slu.edu)

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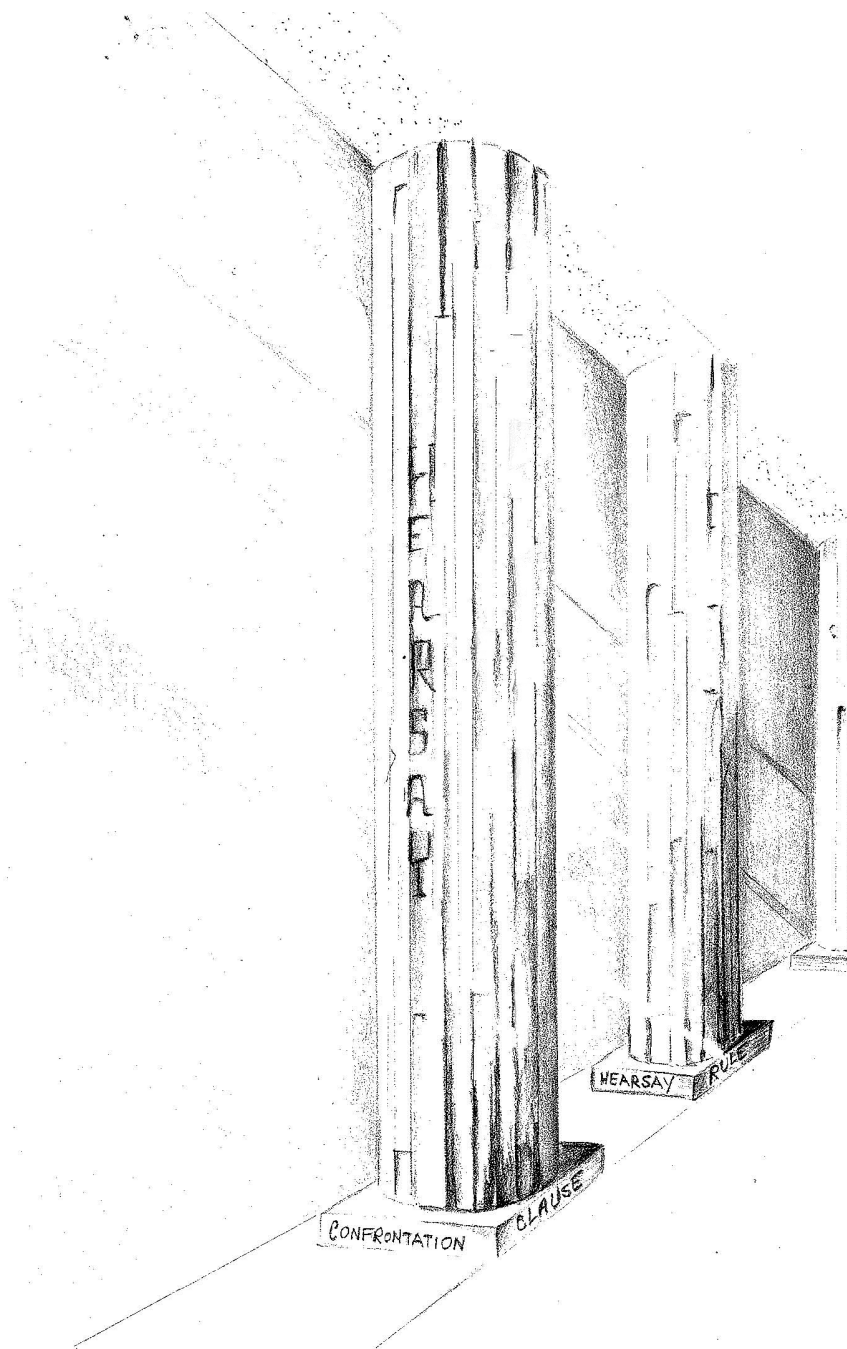
## THE HEARSAY WITHIN CONFRONTATION

JOHN C. O'BRIEN\*

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For a time in our nation's early legal history, before the adoption of the Sixth Amendment to the United States Constitution in 1791, the hearsay rule and the right of confrontation, having both evolved from common origins in the common-law, were probably not clearly distinguished from one another.<sup>1</sup> Over time, however, they have come to be recognized as separate and distinct rights and grounds for objection.<sup>2</sup> Compliance with the hearsay rule does not necessarily surmount a Confrontation Clause objection, and vice versa.<sup>3</sup> The hearsay rule is a common-law rule, now largely codified in most jurisdictions,<sup>4</sup> excluding hearsay evidence from civil and criminal trials and hearings unless the evidence qualifies under one of the numerous exceptions to the rule.<sup>5</sup> The confrontation rule, in comparison, is grounded in the Sixth Amendment Confrontation Clause<sup>6</sup> and, insofar as it applies to hearsay, gives the accused in a criminal case the right to exclude from evidence "testimonial" hearsay statements of a witness who is not produced by the prosecution for examination and cross-examination at trial, unless the witness is unavailable and the accused had a prior opportunity to cross-examine the witness.<sup>7</sup>

Although the hearsay rule and the confrontation right are now clearly separate doctrines, they retain considerable similarity, and hearsay concepts continue to operate within confrontation doctrine. Exploring the hearsay concepts that are part of the confrontation doctrine is the subject of this article. The basic question posed herein is whether the hearsay concepts that exist within the framework of the Confrontation Clause are necessarily the same as, or may be different from, hearsay concepts that traditionally have been recognized as part of the common-law hearsay rule. Hearsay concepts within the confrontation right may not always be the same as those same concepts when they operate within the context of the hearsay rule. Where they are not the same, courts must be careful not to simply inject common-law hearsay doctrine into the "hearsay" aspects of the confrontation right. While there are similarities between hearsay and confrontation rights, significant differences

1. See *Giles v. California*, 128 S. Ct. 2678, 2686 (2008) ("It seems apparent that the Sixth Amendment's Confrontation Clause and the evidentiary hearsay rule stem from the same roots.") (quoting *Dutton v. Evans*, 400 U.S. 74, 86 (1970)).

2. *Ashker v. Leapley*, 5 F.3d 1178, 1180 (8th Cir. 1993) ("Confrontation-clause analysis is a separate and distinct inquiry that does not necessarily overlap with hearsay analysis.").

3. *Id.*

4. See, e.g., FED. R. EVID. 801–807; CAL. EVID. CODE §§ 1200–1380 (West 2009). Forty-five states have codified their rules of evidence. See Barbara Salken, *To Codify or Not to Codify—That is the Question: A Study of New York's Efforts to Enact an Evidence Code*, 58 BROOK. L. REV. 641, 658–59 & n.124 (1992).

5. See FED. R. EVID. 802, 803, 804, 807.

6. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.").

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

do exist. These differences reflect the divergent bases of the rules: the confrontation right is centered on protecting the accused's right to confront and cross-examine the "witnesses against" him or her as the sole means of assessing the reliability of testimonial hearsay evidence,<sup>8</sup> whereas the hearsay rule is concerned with protecting against the untrustworthiness of hearsay evidence, by preventing the use of such evidence unless there are sufficient guarantees of trustworthiness in the circumstances surrounding the out-of-court statement.<sup>9</sup>

There are aspects of the confrontation right that do not entail the use of hearsay statements against an accused. For example, an accused has the right to be personally present when witness testimony is given at trial,<sup>10</sup> to confront the prosecution's trial witnesses face to face,<sup>11</sup> and to have an adequate opportunity for effective cross-examination of trial witnesses.<sup>12</sup> Insofar as these aspects of confrontation involve the defendant's right to confront and cross-examine prosecution witnesses who testify at trial, rather than hearsay declarants who are absent from trial, they are beyond the scope of this article.

This article will first trace the evolution of the confrontation doctrine from the founding period to the present day. Next, the article will examine the elements or concepts of hearsay that operate within the framework of the confrontation right to determine the extent to which they differ from the same elements or concepts that are part of common-law hearsay rule. Finally, the article will offer a number of conclusions about the meaning of hearsay concepts operating within the framework of the confrontation right.

## I. THE EVOLUTION OF THE CONFRONTATION DOCTRINE

Prior to 1791, the year when the Sixth Amendment was ratified as part of the Bill of Rights, there probably was no clear distinction between the hearsay rule and the right of confrontation, both having developed as part of the

8. *Id.* at 61 ("[The Confrontation Clause] commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.").

9. *See, e.g.*, FED. R. EVID. 803, 804, 807; *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973) (the basic rationale for the "declarations against interest" hearsay exception is assurances of trustworthiness); *In re Welding Fume Prod. Liab. Litig.*, 534 F. Supp. 2d 761, 765 (N.D. Ohio 2008) (sufficient assurances of trustworthiness serves as the basis for the "learned treatise exception" to the hearsay rule).

10. *See* 6 Wigmore, *Evidence* §§ 1837–1838; FED. R. EVID. 615 advisory committee's note.

11. *See Maryland v. Craig*, 497 U.S. 836, 849–50 (1990); *Coy v. Iowa*, 487 U.S. 1012, 1019–20 (1988).

12. *See Olden v. Kentucky*, 488 U.S. 227, 231 (1998); *United States v. Owens*, 484 U.S. 554, 559 (1988); *Delaware v. Van Arsdall*, 475 U.S. 673, 678–79 (1986); *Davis v. Alaska*, 415 U.S. 308, 315–17 (1974).

common-law.<sup>13</sup> The evolution of both doctrines was aided by cases like the 1603 trial of Sir Walter Raleigh on a charge of treason.<sup>14</sup> “Lord Cobham, Raleigh’s alleged accomplice, had implicated him in an examination before the Privy Council and in a letter. At Raleigh’s trial, these were read to the jury.”<sup>15</sup> The judges refused Raleigh’s request to produce Cobham at the trial, and Raleigh ended up being convicted of treason and condemned to death largely on the basis of accusatory hearsay statements of someone the prosecution never produced as a witness at trial.<sup>16</sup> As part of the Bill of Rights, ratified in 1791, the Sixth Amendment incorporated into the United States Constitution a provision according a criminal defendant the right “to be confronted with the witnesses against him . . . .”<sup>17</sup>

From 1791 to 1965, there were relatively few decisions by the United States Supreme Court dealing with the Sixth Amendment’s Confrontation Clause.<sup>18</sup> During this period, the Confrontation Clause applied to the federal government, but not to the States,<sup>19</sup> which may help explain the relative paucity of decisions during this long, 174-year period. Most of the cases involved the use of prior court testimony against an accused.<sup>20</sup> As interpreted by the Supreme Court in these early cases, the Confrontation Clause generally required the federal prosecutor to produce the declarant for confrontation and cross-examination by the accused at trial before the trier of fact.<sup>21</sup> However, confrontation and cross-examination at a prior hearing or trial sufficed if the prosecution demonstrated that the declarant was dead or otherwise unavailable to testify at trial.<sup>22</sup> Moreover, confrontation requirements did not apply at all if the statement qualified for admission as a dying declaration<sup>23</sup> or if the accused

13. See *Giles v. California*, 128 S. Ct. 2678, 2686 (2008) (“[C]ourts prior to the founding excluded hearsay evidence in large part *because* it was unfronted.”).

14. Raleigh’s Case, 2 How. St. Tr. 1 (1603). See also *Crawford v. Washington*, 541 U.S. 36, 44 (2004).

15. *Crawford*, 541 U.S. at 44.

16. Raleigh’s Case, 2 How. St. Tr. 1 (1603). See also *Crawford*, 541 U.S. at 44.

17. U.S. CONST. amend VI.

18. See generally *Crawford*, 541 U.S. at 42–51 (discussing the history of the Confrontation Clause).

19. *West v. Louisiana*, 194 U.S. 258, 262 (1904) (“The 6th Amendment does not apply to proceedings in state courts.”).

20. See, e.g., *Motes v. United States*, 178 U.S. 458, 470 (1900) (statement given at examining trial in the nature of a preliminary hearing); *Mattox v. United States*, 156 U.S. 237, 240 (1895) (transcript of testimony from prior trial); *Reynolds v. United States*, 98 U.S. 145, 160–61 (1878) (testimony from prior trial). But see *Kirby v. United States*, 174 U.S. 47, 48–49 (1899) (judgment of conviction of felony).

21. See *Mattox*, 156 U.S. at 242.

22. *Id.* at 243.

23. See *id.* at 243–244.

wrongfully procured the declarant's absence at trial.<sup>24</sup> This era ended in 1965 when, in *Pointer v. Texas*,<sup>25</sup> the Supreme Court first applied the Confrontation Clause to the States.<sup>26</sup>

Following its decision in *Pointer*, the Supreme Court adjudicated a substantial number of confrontation cases over the next 15 years.<sup>27</sup> These decisions involved a wider variety of out-of-court statements—not just prior court testimony,<sup>28</sup> but also accomplice confessions,<sup>29</sup> coconspirator statements,<sup>30</sup> and confessions by co-defendants.<sup>31</sup> For example, in *Douglas v. Alabama*,<sup>32</sup> the court held that the Confrontation Clause was violated when the confession of an accomplice inculcating Douglas was effectively placed before the jury without any opportunity for Douglas to cross-examine the accomplice. Further, a plurality of the Court indicated in *Dutton v. Evans* that the prior statement of a coconspirator used against the accused might violate the Confrontation Clause in the absence of adequate indicia of reliability.<sup>33</sup> Additionally, in *Brookhart v. Janis* the Court found a violation of the Confrontation Clause in the admission against a defendant of an alleged confession made out of court by a co-defendant who did not testify at defendant's trial.<sup>34</sup> Although the Confrontation Clause was applied more expansively in these cases, there was not as yet a single, clearly articulated standard for adjudicating confrontation issues raised by the use of hearsay evidence against a criminal defendant.

In its 1980 decision in *Ohio v. Roberts*,<sup>35</sup> the Supreme Court sought to articulate a clear standard for Confrontation Clause analysis, with its focus on requiring assurances of the reliability of the hearsay statement. The standard was in two parts. First, “when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that [s]he is unavailable.”<sup>36</sup> Second, even if the declarant is shown to be unavailable, the “statement is admissible only if it bears adequate ‘indicia of

24. See *Reynolds*, 98 U.S. at 160.

25. *Pointer v. Texas*, 380 U.S. 400 (1965).

26. *Id.* at 406.

27. See, e.g., *Dutton v. Evans*, 400 U.S. 74 (1970); *California v. Green*, 399 U.S. 149 (1970); *Bruton v. United States*, 391 U.S. 123 (1968); *Gilbert v. California*, 388 U.S. 263 (1967); *Brookhart v. Janis*, 384 U.S. 1 (1966); *Douglas v. Alabama*, 380 U.S. 415 (1965).

28. *Green*, 399 U.S. at 151 (preliminary hearing testimony).

29. *Douglas*, 380 U.S. at 420–22.

30. *Dutton*, 400 U.S. at 78.

31. *Brookhart*, 384 U.S. at 2–3.

32. *Douglas*, 380 U.S. at 422–23.

33. *Dutton*, 400 U.S. at 84–89.

34. *Brookhart*, 384 U.S. at 7–8.

35. *Ohio v. Roberts*, 448 U.S. 56 (1980).

36. *Id.* at 66.

reliability.”<sup>37</sup> Adequate indicia of reliability were demonstrated when the evidence fell within “a firmly rooted hearsay exception.”<sup>38</sup> Otherwise, the evidence had to be excluded unless there was “a showing of particularized guarantees of trustworthiness.”<sup>39</sup> Later decisions of the Court, while retaining the “reliability” prong of the *Roberts* standard, held that the “unavailability” prong was not a general requirement applying to all hearsay statements.<sup>40</sup> These decisions refused to apply the unavailability requirement to statements falling within several firmly rooted hearsay exceptions,<sup>41</sup> and, in fact, suggested that it applied only when the hearsay statement offered was in the form of prior testimony.<sup>42</sup>

For the roughly 25-year period beginning with *Roberts* in 1980 and ending with *Crawford v. Washington*<sup>43</sup> in 2004, the Supreme Court followed a confrontation analysis that largely tracked the hearsay rule. The Confrontation Clause was implicated when the prosecution sought to introduce against a criminal defendant evidence of *any* out-of-court statement for the purpose of proving the truth of the matter asserted in the statement, so long as the declarant did not testify at trial. This followed the general contours of the hearsay rule when applied to the use of out-of-court statements.<sup>44</sup> Exceptions to the confrontation requirement also generally shadowed the exceptions to the hearsay rule. If a hearsay statement qualified for admission under a well-established (“firmly rooted”) hearsay exception, this also sufficed to satisfy the Confrontation Clause.<sup>45</sup> This was true even when the “firmly rooted” hearsay exception did not require any showing that the declarant was unavailable to testify at trial.<sup>46</sup> While *Roberts* suggested a separate confrontation requirement that the prosecution demonstrate that the declarant was unavailable to testify at trial,<sup>47</sup> subsequent decisions strongly indicated that a showing of the declarant’s unavailability was only required when the out-of-court statement was in the form of testimony given in the course of a prior judicial

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37. *Id.*

38. *Id.*

39. *Id.*

40. *White v. Illinois*, 502 U.S. 346, 354 (1992); *United States v. Inadi*, 475 U.S. 387, 392 (1986).

41. *See White*, 502 U.S. at 354–56 (unavailability requirement did not apply to hearsay statements falling within hearsay exceptions for spontaneous declarations and statements made in the course of receiving medical treatment); *Inadi*, 475 U.S. at 387 (unavailability requirement did not apply to statements by coconspirators).

42. *White*, 502 U.S. at 347 (citing *Inadi*, 475 U.S. at 392).

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

44. *See White*, 502 U.S. at 348.

45. *Ohio v. Roberts*, 448 U.S. 56, 66 (1980).

46. *See, e.g., White*, 502 U.S. at 350–51 (spontaneous statements); *Inadi*, 475 U.S. at 394 (statements by co-conspirators).

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

proceeding.<sup>48</sup> Since the hearsay rule already required a showing of unavailability when prior testimony was sought to be introduced,<sup>49</sup> this confrontation requirement added nothing that was not already required for admission over a hearsay objection.

Based on the discussion thus far, it might seem that compliance with the confrontation requirement under *Roberts* required nothing more than simply complying with the hearsay rule. One further question remains, however. What if the hearsay qualified for admission only under a hearsay exception that was not well established or firmly rooted? One might conclude that in this situation conformity with the Confrontation Clause required more than simply compliance with the hearsay rule: the prosecution had to show that the hearsay bore “particularized guarantees of trustworthiness.”<sup>50</sup> Mere inclusion under an exception to the hearsay rule was not enough. However, commonly the non-firmly rooted exception utilized by the prosecutor itself required something akin to a showing of particularized guarantees of trustworthiness.<sup>51</sup> Thus, in theory, compliance with a particular hearsay exception like this should also meet the confrontation requirement. As illustrated by the Supreme Court’s decision in *Idaho v. Wright*,<sup>52</sup> it took a trial court’s less-than-rigorous application of the “equivalent circumstantial guarantees of trustworthiness” requirement in the state’s residual hearsay exception to bring about a failure to meet the confrontation requirement of “particularized guarantees of trustworthiness.”<sup>53</sup>

With its 2004 decision in *Crawford v. Washington*,<sup>54</sup> the Supreme Court abandoned its *Roberts* approach in favor of a stricter, albeit narrower, approach to the Confrontation Clause. No longer did admission or exclusion of a hearsay statement turn, for confrontation purposes, on the presence or absence of adequate assurances of the statement’s trustworthiness—an approach that, said the Court, led to unpredictable, arbitrary, and inconsistent results and, more importantly, allowed courts “to admit core testimonial statements that the Confrontation Clause plainly meant to exclude”<sup>55</sup>—or upon compliance vel

48. See, e.g., *White*, 502 U.S. at 354 (“*Roberts* stands for the proposition that unavailability analysis is a necessary part of the Confrontation Clause inquiry only when the challenged out-of-court statements were made in the course of a prior judicial proceeding.”) (citing *Inadi*, 475 U.S. at 394).

49. See, e.g., FED. R. EVID. 804(b)(1).

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

51. See, e.g., FED. R. EVID. 807 (residual hearsay exception, requiring “equivalent circumstantial guarantees of trustworthiness”); CAL. EVID. CODE § 1360 (West 2009) (statement of child victim describing act of child abuse or neglect).

52. *Idaho v. Wright*, 497 U.S. 805 (1990).

53. *Id.* at 827.

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

55. *Id.* at 63.

non with a “firmly rooted” (or, indeed, any) exception to the hearsay rule. Rather, declared the *Crawford* Court, the Confrontation Clause “is a procedural . . . 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.”<sup>56</sup> The Clause established two clear and strict requirements for “testimonial” hearsay statements.<sup>57</sup> If the declarant was not produced at trial for cross-examination before the trier of fact, the Confrontation Clause mandated exclusion of the statement unless: (1) the declarant was unavailable; and (2) the accused had a prior opportunity to cross-examine the declarant.<sup>58</sup> The Court, however, did not apply these strict requirements to all hearsay statements, as they had done under the *Roberts* approach.<sup>59</sup> In *Crawford*, the Court made clear that these rigid confrontation requirements applied to “testimonial” statements.<sup>60</sup> When the Sixth Amendment accorded an accused the right to be confronted with the “witnesses against” him or her, it referred to persons who “bear testimony.”<sup>61</sup> “Testimony,” in turn, typically meant “[a] solemn declaration made for the purpose of establishing or proving some fact.”<sup>62</sup> As the Court put it, “[a]n accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not.”<sup>63</sup> The Court acknowledged the existence of several definitions of “testimonial” statements,<sup>64</sup> but did not provide a comprehensive formulation of its own.<sup>65</sup> One of the definitions mentioned by the Court would cover “*ex parte* in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially.”<sup>66</sup> While not providing a comprehensive definition of “testimonial,” the Court did say that: “Whatever else the term [“testimonial”] covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations.”<sup>67</sup> The statement at issue in *Crawford*, a “recorded statement, knowingly given [by the

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56. *Id.* at 61.

57. *Id.* at 68.

58. *Id.*

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

60. *Id.*

61. *Id.*

62. *Id.* (quoting NOAH WEBSTER, AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 1020 (1st ed. 1828)).

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

64. *Id.* at 51–52.

65. *Id.* at 68.

66. *Id.* at 51–52 (quoting Brief for Petitioner at 23, *Crawford*, 541 U.S. 36 (No. 02-9410)).

67. *Id.* at 68.

defendant's wife] in response to structured police questioning,"<sup>68</sup> clearly qualified as testimonial.<sup>69</sup>

Decisions of the Court after *Crawford* applied the "testimonial" requirement in some other contexts. In *Davis v. Washington*, decided in 2006, the Court addressed police interrogations and considered "when statements made to law enforcement personnel during a 911 call or at a crime scene are 'testimonial.'"<sup>70</sup> According to the Court, statements are not testimonial "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."<sup>71</sup> On the other hand, held the Court, statements "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."<sup>72</sup> In the latter situation, but not in the former, the declarant is "testifying"—"acting as a witness."<sup>73</sup>

In *Melendez-Diaz v. Massachusetts*, decided in 2009, the Court turned its attention to affidavits reporting the results of forensic analysis, which showed in the instant case that a substance seized by the police and connected to the defendant was cocaine.<sup>74</sup> The Court held that the analysts' affidavits were testimonial statements, and the analysts were witnesses for purposes of the Sixth Amendment Confrontation Clause.<sup>75</sup> The affidavits were "functionally identical to live, in-court testimony, doing 'precisely what a witness does on direct examination.'"<sup>76</sup>

In the broad context of all out-of-court statements, the "specific type"<sup>77</sup> known as "testimonial" statements is a relatively narrow subset.<sup>78</sup> Does the Confrontation Clause impose *any* limit on the use of the large category of nontestimonial hearsay statements? Do the *Roberts* requirements still apply to such statements? In 2006, the Supreme Court, in *Davis v. Washington*, made clear what was strongly suggested in *Crawford*: that the Confrontation Clause does not apply at all to the use of non-testimonial hearsay statements against an accused.<sup>79</sup>

68. *Crawford v. Washington*, 541 U.S. 36, 53 n.4 (2004).

69. *Id.* at 36.

70. *Davis v. Washington*, 547 U.S. 813, 817 (2006).

71. *Id.* at 822.

72. *Id.*

73. *Id.* at 828.

74. *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2530 (2009).

75. *Id.* at 2532.

76. *Id.* (quoting *Davis v. Washington*, 547 U.S. 813, 830 (2006)).

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

78. *Id.* at 51–52 (2004).

79. *Davis*, 547 U.S. at 821.

One effect of *Crawford* has been to unlink the confrontation requirement from the hearsay rule, thus breaking the linkage accomplished under *Roberts*. No longer is the confrontation requirement merely a shadow of the hearsay rule. No longer is compliance with a firmly-rooted hearsay exception sufficient to overcome, without more, a Confrontation Clause objection. Indeed, no longer is the presence of indicia of reliability in the circumstances of a hearsay statement even relevant to the confrontation issue. Rather, the Confrontation Clause imposes strict, rigid requirements of its own for the specific purpose of protecting an accused's procedural right to confront and cross-examine "witnesses against" the accused. At the same time, the Clause imposes these requirements, not on all hearsay offered against the accused, but only on a relatively narrow class of "testimonial" hearsay statements.

## II. HEARSAY ELEMENTS WITHIN CONFRONTATION

While there is now a much greater divergence between the confrontation and hearsay doctrines under *Crawford*, as compared to the *Roberts* approach, many hearsay concepts continue to be essential components of confrontation analysis. First, the Confrontation Clause and the hearsay rule both address the use as evidence of a person's out-of-court statement (only "testimonial" statements under the Confrontation Clause; any statement under the hearsay rule).<sup>80</sup> Since there is some variation among American courts in the definition of "statement" for purposes of the hearsay rule,<sup>81</sup> a key question here is how "out-of-court statement" should be defined for confrontation purposes. A related question is whether this concept should be uniform for confrontation purposes or whether it should follow what the hearsay rule provides in any particular state or jurisdiction. Second, the Confrontation Clause and the hearsay rule come into play only if the out-of-court statement is being used for the purpose of proving the truth of the matter asserted by the declarant in the statement.<sup>82</sup> Neither rule bars the use of out-of-court statements—even if "testimonial"—for purposes other than establishing the truth of the matter asserted.<sup>83</sup> For confrontation purposes, the difficult question is whether the other, nonhearsay purpose must meet a threshold beyond simple logical relevance before the constitutional requirement will give way. Finally, there is the extent to which the Confrontation Clause, like the hearsay rule, recognizes exceptions. Under what circumstances, if any, will courts permit testimonial statements to be used for their truth in spite of the lack of any opportunity by the accused to confront and cross-examine the maker of the statement?

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80. *Id.*

81. *See infra* text accompanying notes 107–12.

82. *Crawford*, 541 U.S. at 60 n.9 (citing *Tennessee v. Street*, 479 U.S. 409, 414 (1985)).

83. *Id.* at 60 (citing *Street*, 479 U.S. at 414).

We may approach the exploration of hearsay concepts within the context of the right of confrontation by first examining the concepts within the hearsay rule itself and then looking at whether and to what extent these concepts apply within the framework of confrontation doctrine. Overall, the Confrontation Clause is directed at restricting the use of “testimonial” hearsay against the accused.<sup>84</sup> Thus, while the confrontation right is not directed at *all* hearsay evidence used against the accused, it is clearly designed to prevent the use of a specific type of hearsay—that which involves testimonial statements.<sup>85</sup> In the context of testimonial statements, then, hearsay concepts seem central to the confrontation right.

The rule against hearsay excludes evidence that falls within a definition of hearsay unless the hearsay evidence also falls within some exception to the rule.<sup>86</sup> In examining hearsay concepts, therefore, one might look first at the elements of the definition of hearsay, and then look at the exceptions to the rule. A common definition of hearsay, set forth in the Federal Rules of Evidence, embraces evidence of “a statement, other than one made by the declarant [the person who makes the statement] while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.”<sup>87</sup> The elements of this definition include: (1) a statement (2) made out of court (3) by a person (4) when the statement is offered for the purpose of establishing the truth of the statement.

In sum, hearsay concepts are an essential part of Confrontation Clause right in that confrontation, like hearsay, excludes (1) evidence of a statement (only a testimonial statement under confrontation) (2) made out of court (3) by a person (4) when the evidence is offered to prove the truth of the matter asserted in the statement, (5) unless the evidence qualifies under some exception to the rule of exclusion. Each of these elements will be discussed in turn.

#### A. A Statement

The first element of the Federal Rules’ definition of hearsay—a statement—encompasses both (a) “an oral or written assertion”<sup>88</sup> and (b) “nonverbal conduct of a person, if it is intended by the person as an

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84. *Davis*, 547 U.S. at 821.

85. *Id.*

86. See *United States v. Salerno*, 505 U.S. 317, 320–21 (1992); *United States v. Pursley*, 577 F.3d 1204, 1221 (10th Cir. 2009) (hearsay statement made by witness to a federal marshal within one hour of assault qualified as an excited utterance); *Darling v. State*, 262 S.W.3d 920, 923 (Tex. App. 2008) (counseling records containing hearsay were admissible pursuant to the medical records hearsay exception).

87. FED. R. EVID. 801(b), (c) (addition).

88. *Id.* at 801(a)(1).

assertion.”<sup>89</sup> Central to this definition is the notion that the declarant must intend by the out-of-court conduct, whether verbal or nonverbal, to make an assertion of some fact or matter.<sup>90</sup> A second, broader definition of hearsay, derived from the classic 1837 English case of *Wright v. Doe d. Tatham*,<sup>91</sup> would also include “implied assertions”<sup>92</sup> and nonassertive conduct. That is, evidence of a person’s out-of-court conduct, whether or not intended as an assertion, is hearsay if the evidence is offered to prove the out-of-court actor’s belief as to some fact or matter (which belief is inferred from or “implied” by the out-of-court conduct) and, further, the truth of that belief.<sup>93</sup> In *Wright*, for example, the proponent of a will offered letters written to the testator years before by various persons.<sup>94</sup> The letters were not offered to prove the truth of any matters the writers asserted in them, but to prove the truth of the writers’ “implied assertions” that the testator was mentally competent, a matter said to be believed by the letter writers when they wrote to the testator.<sup>95</sup> The evidence was rejected as hearsay.<sup>96</sup> The court in *Wright* gave as another illustration of hearsay the conduct of a sea captain in setting sail with his family on a ship after thoroughly inspecting it, which conduct was offered to show the sea-worthiness of the vessel.<sup>97</sup> In this example, the conduct of the out-of-court actor—the sea captain—was entirely nonassertive; it was not intended to assert the ship’s seaworthiness, or anything else.

The Federal Rules’ definition centers on the presence of intent on the part of the declarant—intent to assert some matter. We might refer to it as an “intent-based” definition of a statement.<sup>98</sup> Intent is essential: nothing can be a statement, and thus potentially hearsay, unless the declarant intended to assert some matter.<sup>99</sup> In contrast, the second definition given above, the traditional common-law definition, treats the declarant’s intent to assert as irrelevant and centers instead on the presence of a belief on the part of the declarant or actor about some fact or matter. We might refer to it as a “belief-based” definition of a statement. Out-of-court conduct, either verbal or nonverbal, regardless of whether the actor intended to make an assertion of some matter, is a “statement,” and thus potentially excludable as hearsay, if it is offered to prove

89. *Id.* 801(a)(2).

90. *United States v. Summers*, 414 F.3d 1287, 1299 (10th Cir. 2005).

91. *Wright v. Doe d. Tatham*, 112 Eng. Rep. 488 (1837).

92. *Id.* at 516.

93. *See* FED. R. EVID. 801 advisory committee’s note.

94. *Wright*, 112 Eng. Rep. at 489.

95. *Id.* at 494.

96. *Id.* at 495.

97. *Id.* at 516.

98. *Commonwealth v. Vasquez*, No. CR.2004-1774, 2005 WL 3642768, at \*25 (Mass. Super. Dec. 27, 2005).

99. *See* FED. R. EVID. 801 advisory committee’s note.

the belief about some matter that is “implied” by, or inferred from, the actor’s or “declarant’s” conduct.<sup>100</sup> Of course, the first definition includes an element of the declarant’s belief as to some matter as well, but it requires, in addition, that the declarant intend to assert his or her belief as to that matter. This is why it is called “intent-based.”

In examining these two definitions more closely, it might be useful to classify out-of-court conduct according to four categories: (1) assertive verbal conduct—that is, verbal conduct intended by the declarant to assert some matter; (2) assertive nonverbal conduct—nonverbal conduct intended by the declarant to assert some matter, such as nodding or gesturing in response to a question;<sup>101</sup> (3) nonassertive verbal conduct—that is, words not intended to assert anything, such as a pure direction, question, or request for information;<sup>102</sup> and (4) nonassertive nonverbal conduct—like a sea captain inspecting a vessel and then setting sail on it.<sup>103</sup> The first two categories—assertive verbal conduct and assertive nonverbal conduct—qualify as statements under either of our definitions. The third category—nonassertive verbal conduct—is not a statement under an intent-based definition; however, it may be a statement under a belief-based definition, even though there was no intent to assert some matter or a belief as to some matter. Under an intent-based definition, the question is whether the declarant intended to assert the matter sought to be proved, even though (s)he never expressed the matter directly.<sup>104</sup> Courts have recognized that a person may sometimes intend to assert a matter even when the person speaks indirectly, as by asking a question or issuing a directive.<sup>105</sup> The question of whether or not the declarant intended to assert the matter sought to be proved may be a close, difficult issue.<sup>106</sup> The belief-based definition avoids this difficult issue, since intent to assert is irrelevant in this definition.<sup>107</sup> The fourth category—nonassertive nonverbal conduct—is clearly not within the intent-based definition; although in theory it

100. *See id.*

101. *See* *United States v. Katsougratis*, 715 F.2d 769, 774 & n.4 (2d Cir. 1983) (finding that a suspect’s nodding his head in response to questions constituted a statement for purposes of the hearsay rule).

102. *See, e.g., United States v. Lewis*, 902 F.2d 1176, 1179 (5th Cir. 1990) (holding that questions asked by an unknown caller when police officer called number displayed on paper seized from defendants were not statements within definition of hearsay, since questions were not intended to assert anything).

103. *See Stoddard v. State*, 887 A.2d 564, 592–93 (Md. 2005) (citing 4 STEPHEN A. SALTZBURG, MICHAEL M. MARTIN & DANIEL CAPRA, *FEDERAL RULES OF EVIDENCE MANUAL* 801–14 (8th ed. 2002)).

104. *See* FED. R. EVID. 801(a) advisory committee’s note.

105. *See United States v. Summers*, 414 F.3d 1287, 1299–1300 (10th Cir. 2005).

106. *See Stoddard*, 887 A.2d at 580.

107. *Id.*

could meet the belief-based definition, no modern cases appear to support this application.<sup>108</sup>

The courts today do not apply a uniform concept of “statement” for purposes of the common-law hearsay rule. One court may view certain evidence as constituting a “statement,” and thus possibly subject to exclusion under the hearsay rule, while another court may view the same evidence as not a statement, and thus not subject to exclusion on hearsay grounds. For example, some courts view hearsay statements as simply straight-forward assertions, verbal or nonverbal, where the declarant plainly intended to assert or communicate some matter the truth of which the proponent of the evidence seeks to prove.<sup>109</sup> Other courts extend the concept of “statement” to include situations where the court can infer from an ambiguous or indirect verbal action that, more likely than not, the declarant meant to convey some matter, even though obliquely or indirectly.<sup>110</sup> Still other courts abandon the search for the declarant’s intent in favor of a search for the purpose of the evidence.<sup>111</sup> If the purpose of the evidence is to establish the truth of some matter believed or assumed (but not necessarily asserted) by the declarant, it is hearsay.<sup>112</sup> While the common-law hearsay rule can easily accommodate these different views on the scope of a “statement,” it is important, as discussed *infra*, that courts adopt a consistent and uniform view in deciding a Sixth Amendment Confrontation Clause objection. This is because the scope of a federal constitutional right should not vary from state to state or court to court based on different conceptions of what constitutes hearsay evidence for purposes of the confrontation right.

What constitutes a “statement” for purposes of the confrontation rule? First, it is important to recall that the rule only applies to a “testimonial” statement.<sup>113</sup> This limitation imports a degree of solemnity and formality as a requisite. The Clause only “applies to ‘witnesses’ against the accused—in

108. While hypothetical examples are cited frequently—such as the sea captain setting sail after inspecting the ship, the motorist starting up after being stopped at the red light, the pedestrian opening his umbrella—actual case examples seem non-existent.

109. *See, e.g.*, *United States v. Lewis*, 902 F.2d 1176, 1179 (5th Cir. 1990) (“Rule 801, through its definition of statement, forecloses appellants’ argument by removing implied assertions from the coverage of the hearsay rule.”).

110. *See, e.g.*, *Graham v. State*, 643 S.W.2d 920, 926–27 (Tex. Crim. App. 1991) (holding that shooting motion made by a victim when the police showed her photograph of her attacker was hearsay because it was “assertive in nature”).

111. *See, e.g.*, *United States v. Reynolds*, 715 F.2d 99, 103 (3d Cir. 1993) (The court found that the defendant’s statement to an alleged co-conspirator, “I didn’t tell them anything about you,” was ambiguous and susceptible to different interpretations. The statement was hearsay because it was used to imply that Reynolds was part of a conspiracy.).

112. *See, e.g.*, *Reynolds*, 715 F.2d at 103; *State v. Dullard*, 668 N.W.2d 585, 597–598 (Iowa 2003); *Stoddard*, 887 A.2d at 580.

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

other words those who ‘bear testimony.’”<sup>114</sup> “Testimony” connotes “[a] solemn declaration made for the purpose of establishing or proving some fact.”<sup>115</sup> Thus, a testimonial statement would include “a formal statement to government officers”<sup>116</sup> or a solemn declaration of facts made in an affidavit,<sup>117</sup> but not “a casual remark to an acquaintance,”<sup>118</sup> a “statement[] in furtherance of a conspiracy,”<sup>119</sup> or a statement that “proclaim[s] an emergency and seek[s] help.”<sup>120</sup> “Whatever else the term [“testimonial”] covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a formal trial; and to police interrogations.”<sup>121</sup> Statements like these are testimonial in that they “are an obvious substitute for live testimony, because they do precisely what a witness does on direct examination.”<sup>122</sup>

In view of the limited scope of “testimonial” statements, as well as the formal, solemn nature of these statements, and the fact that often they are elicited by government agents’ questions, it seems that express verbal declarations (like saying, “X and I robbed the bank”) and clear non-verbal assertions (like pointing out a person in a lineup) would qualify as “statements” in the context of the confrontation right.<sup>123</sup> On the other hand, nonassertive conduct, whether verbal or nonverbal, likely should not fall within the definition of “statement” for purposes of the Confrontation Clause. The declarant’s lack of an intent to assert the matter sought to be proved seems totally at odds with the concept of a testimonial statement, which the Supreme Court in *Crawford* described as “a formal statement to government officers”<sup>124</sup> and “a solemn declaration or affirmation made for the purpose of establishing or proving some fact.”<sup>125</sup> Even if nonassertive verbal conduct is involved, it is hard to conceive how a testimonial statement could embrace a speaker’s unexpressed assumption about some matter which the speaker did not intend to assert. In the case of *assertive* verbal conduct where the matter intended to be asserted is stated indirectly or in a less-than-obvious manner,<sup>126</sup> the ambiguity in determining the declarant’s intent and meaning is likely in the testimonial

114. *Id.* at 823.

115. *Crawford v. Washington*, 541 U.S. 36, 51 (2004) (quoting NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 1020 (1st ed. 1828)).

116. *Davis*, 547 U.S. at 824.

117. *See Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2532 (2009).

118. *Crawford*, 541 U.S. at 51.

119. *Id.* at 56.

120. *Davis*, 547 U.S. at 828.

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

122. *Davis*, 547 U.S. at 830.

123. *See, e.g., Crawford*, 541 U.S. at 51.

124. *Id.*

125. *Id.*

126. *See, e.g., United States v. Summers*, 414 F.3d 1287, 1299–1300 (10th Cir. 2005).

context to be clarified by a government officer's further questioning, which would then yield an express assertion. There may, however, be unusual cases in which *intentional*, indirect assertions are regarded as "testimonial." For example, in *United States v. Summers*, a question from one of the defendant's confederates, spoken to the police upon their arrival at the crime scene, "How did you guys find us so fast?," was deemed to be a testimonial hearsay statement.<sup>127</sup> According to the reviewing court, the intent to assert the involvement of defendant and others in narcotics distribution "was apparent."<sup>128</sup>

Apart from the question of what is the proper definition of "statement" within the context of the confrontation right, there is the question of whether different definitions of "statement" should be applied by different courts when deciding the confrontation issue. For purposes of the common-law hearsay rule, different states and courts may adopt different (broader or narrower) definitions of "statement," particularly on the issue of whether "implied" assertions or nonassertive actions are covered. However, for purposes of the Confrontation Clause, the definition of "testimonial" statements should be uniform and consistent from court to court, whether state or federal. Otherwise, the scope of the Sixth Amendment protection would vary from one state or court to another, depending on the common-law definition of hearsay that the court follows for confrontation purposes.

Similar questions arise in connection with what has been called "inferential hearsay." Since hearsay evidence entails the offering of evidence of an out-of-court statement to prove the truth of the matter asserted in the statement, one might think that there cannot be hearsay if there is not witness testimony or other evidence that communicates to the trier of fact—verbatim, in paraphrase, or in substance—the content of an out-of-court statement.<sup>129</sup> However, in the context of the hearsay rule, a number of courts have treated as hearsay the testimony of a witness which invites the jury to infer hearsay, even though the witness never testifies to an out-of-court statement.<sup>130</sup> According to this view, "[i]t is no less a violation of the hearsay rule to set up a set of circumstances by the testimony of a witness which invites the inference of hearsay."<sup>131</sup> Courts have sometimes referred to this as "inferential hearsay."<sup>132</sup> Suppose, for example, a police officer testifies that he was interrogating X, a suspected

127. *Id.* at 1300.

128. *Id.*

129. *See* FED. R. EVID. 801(c).

130. *See, e.g.,* *Molina v. State*, 406 So.2d 57, 58 (Fla. Dist. Ct. App. 1981); *Postell v. State*, 398 So.2d 851, 854 (Fla. Dist. Ct. App. 1981); *State v. Valentine*, 587 S.W.2d 859, 861 (Mo. banc 1979); *State v. Bankston*, 307 A.2d 65, 69 (N.J. 1973).

131. *Valentine*, 587 S.W.2d at 861.

132. *See, e.g.,* *Harris v. Wainwright*, 760 F.2d 1148, 1152 (11th Cir. 1985); *Valentine*, 587 S.W.2d at 861.

accomplice of the defendant, concerning X's participation in a robbery. The police officer, instead of testifying that X implicated the defendant as a participant in the robbery, testifies that immediately after interviewing X, he (the officer) had the defendant arrested. By inference, but without relating X's statement to the jury, the officer has implicated the defendant in the crime. "Testimony which, by clear inference, showed that an alleged accomplice had implicated the defendant in the offense involved, [is] just as much hearsay and objectionable as the implicating statement itself would have been."<sup>133</sup>

How should inferential hearsay be viewed in the context of the Confrontation Clause? In the example given above, if the police officer testified that X named the defendant as a participant in the robbery, X's out-of-court statement would likely be "testimonial," thus implicating the defendant's confrontation rights.<sup>134</sup> Should the result be different if the "inferential hearsay" route is followed? Is X no longer a "witness against" the defendant simply because the prosecution has employed a subtle shortcut? At least one court appeared to reject, peremptorily and without discussion, the proposition that inferential hearsay is covered by the Confrontation Clause under *Crawford*.<sup>135</sup> However, authority on this point is scarce, and some court decisions suggest that the confrontation right, as well as the hearsay rule, may apply in this situation.<sup>136</sup> The latter view is preferable. Allowing the confrontation right to be bypassed by the expedient use of inferential hearsay seems to create an unjustified loophole to the constitutional right.

Whatever the resolution of the question whether inferential hearsay is covered by the Confrontation Clause, there is also the question of whether courts should hold different views on this question. Courts in different states may, quite properly, reach different conclusions as to whether inferential hearsay is subject to exclusion under the hearsay rule. This is one of those areas, like implied assertions, where courts may disagree as to the scope of the hearsay rule. However, when considering the question of whether inferential (and testimonial) hearsay is subject to exclusion under the confrontation right, it is important that state and federal courts have a uniform view. Otherwise, a defendant in State A may be able to exclude the inferential hearsay evidence under the confrontation rule, while a defendant in state B, which refuses to apply the Confrontation Clause to inferential hearsay, would have the evidence admitted against him on identical facts, over a confrontation objection. The need for a uniform approach with respect to confrontation is as important for inferential hearsay as it is for implied assertions.

133. *Valentine*, 587 S.W.2d at 861.

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

135. *United States v. Maher*, 454 F.3d 13, 21 (1st Cir. 2006).

136. See *Harris*, 760 F.2d at 1151-53; *People v. Vardell*, 505 N.Y.S.2d 635, 637 (N.Y. App. Div. 1986).

### B. *Made Out Of Court*

The second element of the definition of hearsay is that the declarant's statement is made "out of court"; that is, the statement must be one other than a statement made while the declarant is testifying at the current trial or hearing.<sup>137</sup> Testimony given at the instant trial or hearing as to some fact or matter is not "out of court"; *all* other statements are "out of court." Out-of-court statements include even those given at a *prior* trial or hearing or in a deposition.<sup>138</sup>

Both the hearsay rule and the confrontation rule are addressed to out-of-court statements in this same sense, although the confrontation rule can only apply if the out-of-court statement is testimonial. An important difference appears, however, when the *maker* of an out-of-court statement later testifies at trial. For purposes of the hearsay rule, once a declarant makes an out-of-court statement, assuming the statement otherwise qualifies as hearsay, it remains an out-of-court statement (and potentially inadmissible hearsay), although the declarant is available to, and does, testify at the subsequent trial or hearing.<sup>139</sup> Even if the declarant later testifies at trial, the original statement was still made out of court, not in the presence of the trier of fact, not under oath (in most instances), and not subject to contemporaneous cross-examination at the time the statement was made.

By comparison, out-of-court statements are treated differently within the framework of confrontation when the declarant later testifies at trial: Consistent with the Confrontation Clause's focus on protecting the accused's procedural right of cross-examination, when a declarant's out-of-court testimonial statements are offered against an accused as substantive evidence, the declarant's later testimony at the current trial, given subject to an adequate opportunity to cross-examine by the defendant, satisfies the confrontation requirement.<sup>140</sup> In other words, the subsequent opportunity to cross-examine the maker of an out-of-court (and testimonial) statement suffices for confrontation purposes, even though it wouldn't necessarily satisfy the hearsay rule in every instance.<sup>141</sup>

137. FED. R. EVID. 801(c).

138. *Alcala v. Woodford*, 334 F.3d 862, 882 (9th Cir. 2003).

139. *Id.* at 882. Under certain defined circumstances, the prior statements of a witness are exempted from the definition of hearsay. *See* FED. R. EVID. 801(d)(1)(A)–(C).

140. *Crawford v. Washington*, 541 U.S. 36, 59 (2004).

141. The hearsay rule may be satisfied under certain prescribed conditions where the declarant later testifies as a witness. *See* FED. R. EVID. 801(d)(1)(A)–(C).

### C. By A Person

The third element in the definition of hearsay is that the out-of-court statement must be made by a “person.”<sup>142</sup> This element excludes from the definition of hearsay the behavior of animals and the information or data generated automatically by a machine, instrument, or device. The behavior of an animal, even if it resembles somewhat the statement of a person, is not considered hearsay.<sup>143</sup> Examples include narcotics-sniffing or scent-tracking by a dog,<sup>144</sup> “talking” by a parrot, or sign language by a gorilla. An animal is, after all, incapable of taking an oath or affirmation or of answering cross-examination questions.<sup>145</sup> As for automated devices or machines, their output is also not regarded as hearsay.<sup>146</sup> Examples might include data generated by laboratory machines,<sup>147</sup> a car’s dashboard display of information, the reading from a clock, or the phone number flashed by a caller-ID device.

Questions arise, of course, as to the reliability of animal behavior and machine-generated information. Was the dog properly trained? Was the automated device properly manufactured, set, or maintained? In this context, the law of evidence requires a foundation showing that human beings have properly done their job, but such a foundation fulfills authentication and relevance requirements, not a hearsay one.<sup>148</sup>

The question remains whether the Confrontation Clause places any restrictions on such “non-human” evidence of animal behavior and machine-generated data. The confrontation requirement cannot apply unless the

142. *Id.* at 801(b).

143. *See* *State v. White*, 642 S.E.2d 607, 615 (S.C. Ct. App. 2007); *State v. Burnice*, No. 32219-6-II, 2006 WL 122198, at \*5 (Wash. Ct. App. Jan. 18, 2006); *State v. Keodara*, No. 54339-3-I, 2005 WL 1684701, at \*2 (Wash. Ct. App. July 18, 2005).

144. *See White*, 642 S.E.2d at 619 (dog-tracking evidence based on testimony of dog handler who tracked defendant with his dog); *Burnice*, 2006 WL 122198, at \*5 (same); *Keodara*, 2005 WL 1684701, at \*2 (same); *People v. Campbell*, 340 N.E.2d 690, 695–96 (Ill. Ct. App. 1975) (positive reaction of dog specially trained to sniff out marijuana).

145. *See White*, 642 S.E.2d at 615 (quoting *People v. Centolella*, 61 Misc.2d 723, 725 (N.Y. Co. Ct. 1969)).

146. *See* *United States v. Lamons*, 532 F.3d 1251, 1263 (11th Cir. 2008) (machine-generated data from phone calls); *United States v. Moon*, 512 F.3d 359, 361 (7th Cir. 2008) (readings from laboratory machines used in testing for cocaine); *United States v. Washington*, 498 F.3d 225, 228–31 (4th Cir. 2007) (raw data generated by forensic lab’s diagnostic machines); *State v. Dunn*, 7 S.W.3d 427, 431–32 (Mo. Ct. App. 1999) (computer-generated report of computer-recorded data documenting a phone call from a particular phone).

147. *See, e.g., Moon*, 512 F.3d at 361; *Washington*, 498 F.3d at 228–31.

148. *See Washington*, 498 F.3d at 231 (“Any concerns about the reliability of such machine-generated information is addressed through the process of authentication not by hearsay or Confrontation Clause analysis.”); *White*, 642 S.E.2d at 613–15 (proper foundation established for dog handler’s testimony).

evidence is an out-of-court testimonial statement *by a person*.<sup>149</sup> This follows the hearsay rule,<sup>150</sup> which excludes from the definition of hearsay the output of an automatic device<sup>151</sup> and the behavior of an animal.<sup>152</sup> The machine or animal is not a human “witness,” or a “witness against” an accused, because it cannot take an oath, give testimony, or be cross-examined.<sup>153</sup>

With respect to a machine or an automatic device, in some instances the output generated may reflect simply the statement of a person. For example, the output from a computer, though stored electronically and generated automatically, frequently represents the statement of the person who inputted the data. Such output should be viewed as the statement of a person for hearsay and confrontation purposes.<sup>154</sup> A postal stamp may automatically generate a postmark indicating the date of mailing; but if a person sets the date each day, it should similarly be viewed as the statement of a person. In both of these situations, the output of the machine in reality represents the statement or assertion of a person.

While the output of an automated machine or device may not be a person’s statement, human statements may be involved in certifying that the device has been tested and found to be operating properly. While such certifications are statements, courts generally have held they are not “testimonial” for confrontation purposes.<sup>155</sup>

149. See *Lamons*, 532 F.3d at 1263; *Keodara*, 2005 WL 1684701 at \*2.

150. See FED. R. EVID. 801(b) (“A ‘declarant’ is a person who makes a statement.”).

151. See cases cited *supra* note 146.

152. See cases cited *supra* note 143.

153. See *United States v. Moon*, 512 F.3d 359, 362 (7th Cir. 2008) (“Nor is a machine a ‘witness against’ anyone. . . . [H]ow could one cross-examine a gas chromatograph?”); *White*, 642 S.E.2d at 615 (“[T]he animals are not witnesses against a defendant any more than is a microscope or a spectrograph; these machines are not subject to a cross-examination any more than the animal . . . .” (quoting *People v. Centolella*, 61 Misc.2d 723, 725 (N.Y. Co. Ct. 1969))) (errors in *White* in original). See *Lamons*, 532 F.3d at 1264 (11th Cir. 2008) (question is whether a human “intervened” at the time the data was “stated” by the machine).

154. See, e.g., *United States v. Enterline*, 894 F.2d 287, 289 (8th Cir. 1990) (computer report identifying vehicle as stolen); *United States v. Hardin*, 710 F.2d 1231, 1237 (7th Cir. 1983) (computer-generated graph of data collected by law enforcement).

155. See *Bohsancurt v. Eisenberg*, 129 P.3d 471, 476–77 (Ariz. Ct. App. 2006) (holding that maintenance and calibration records for breath-testing machine are routine business records that are not testimonial); *Rackoff v. State*, 637 S.E.2d 706, 709 (Ga. 2006) (holding that inspection certifications are business records and are not testimonial); *People v. Kim*, 859 N.E.2d 92, 93–94 (Ill. App. Ct. 2006) (holding that a breath test falls under the public-record exception to the hearsay rule); *Jarrell v. State*, 852 N.E.2d 1022, 1026 (Ind. Ct. App. 2006) (holding that a breath-test-device certification is not testimonial); *Napier v. State*, 820 N.E.2d 144, 149–50 (Ind. Ct. App. 2005) (holding that inspection and operator certifications are not testimonial); *Commonwealth v. Walther*, 189 S.W.3d 570, 575 (Ky. 2006) (holding that notations regarding maintenance and testing of device are not testimonial); *State v. Fischer*, 726 N.W.2d 176, 183 (Neb. 2007) (holding that a simulator-solution certificate is not testimonial); *People v. Lebrecht*,

An expert witness may rely upon and testify to readings from scientific instruments in forming his or her expert opinion.<sup>156</sup> Should testimony as to these readings be treated as hearsay and possibly a confrontation violation? Courts so far have said no, in part because the instruments' readings are not out-of-court statements by persons.<sup>157</sup> On the other hand, where a forensic analyst's written report interpreting machine-generated data is offered in evidence in lieu of the analyst's trial testimony, a person's statement is involved and confrontation rights may well be implicated.<sup>158</sup>

Most animal-behavior cases have involved the use of dogs for drug detection<sup>159</sup> and the tracking of humans.<sup>160</sup> The evidence is generally presented through the testimony of the police officer who worked with the particular dog. Thus, there is an opportunity by the defendant to cross-examine the dog's handler as to the dog's breeding, training, and reliability, as well as the tracking procedure followed in the particular case and the results of that procedure. Not surprisingly, courts generally reject hearsay and confrontation challenges in such cases.<sup>161</sup>

#### D. *Offered For Its Truth*

The last element of the hearsay definition is that the declarant's out-of-court statement is offered for a particular purpose—to prove the truth of the matter asserted by the declarant in the out-of-court statement.<sup>162</sup> Only if the statement is offered “for its truth” does the credibility of the declarant become involved.<sup>163</sup> Did the declarant misperceive the situation? Is the declarant's recollection of the matter faulty? Did the declarant misspeak? Was the declarant consciously fabricating the matter asserted; that is, being insincere? Evidence which is offered for some purpose other than proving the truth of the

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823 N.Y.S.2d 824, 827 (N.Y. App. Term 2006) (holding that calibration/maintenance report and simulator-solution certification are not testimonial); *State v. Norman*, 125 P.3d 15, 20 (Or. Ct. App. 2005) (holding that certificates of accuracy are not testimonial). *But see* *Shiver v. State*, 900 So.2d 615, 618 (Fla. Dist. Ct. App. 2005) (holding that breath-test affidavit, including portion used to show that device had required maintenance, is testimonial).

156. FED. R. EVID. 703.

157. *Moon*, 512 F.3d at 362. *See also* *United States v. Washington*, 498 F.3d 225, 230 (4th Cir. 2007).

158. *See Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2532 (2009).

159. *See, e.g., State v. Keodara*, No. 54339-3-I, 2005 WL 1684701, at \*2 (Wash. Ct. App. July 18, 2005); *State v. White*, 642 S.E.2d 607, 613–14 (S.C. Ct. App. 2007).

160. *See, e.g., People v. Campbell*, 340 N.E.2d 690, 693–94 (Ill. App. Ct. 1975).

161. *See, e.g., Keodara*, 2005 WL 1684701, at \*2 (dogs are not witnesses for purposes of the Confrontation Clause).

162. *See, e.g.,* FED. R. EVID. 801(c); CAL. EVID. CODE § 1200 (West 2009).

163. *See* FED. R. EVID. 801(c) advisory committee's note (“If the significance of an offered statement lies solely in the fact that it was made, no issue is raised as to the truth of anything asserted, and the statement is not hearsay.”).

matter asserted is not within the definition of hearsay and thus is not excluded on hearsay grounds.<sup>164</sup>

There are numerous situations in which, under the substantive law as applied to the issues in the specific case, the mere making of the out-of-court statement, regardless of the truth of anything asserted in it, is relevant for some purpose.<sup>165</sup> For example, the out-of-court statement may be relevant because the words of the statement are legally operative in some way—forming a contract, making an allegedly slanderous or libelous statement, or doing an overt act in furtherance of a conspiracy.<sup>166</sup> Additionally, the out-of-court statement may be relevant because it shows the effect of the out-of-court statement on a person hearing or reading the statement: that the hearer or reader has been made aware of certain matters or has acted in a certain way because of hearing or reading the statement.<sup>167</sup> In short, evidence of an out-of-court statement is not hearsay when “the statement itself [regardless of its truth] affects the legal rights of the parties or is a circumstance bearing on conduct affecting their rights.”<sup>168</sup> When offered for one of these “nonhearsay” purposes, the evidence is outside the definition of hearsay and is not excludable on hearsay grounds.<sup>169</sup>

Of course, evidence must be genuinely relevant for some purpose other than establishing the truth of the matter asserted in the out-of-court statement in order to escape classification as hearsay and potential exclusion on hearsay grounds.<sup>170</sup> If there is no relevant nonhearsay purpose, the evidence of the out-of-court statement would be considered hearsay, since establishing its truth likely would be the only relevant purpose in offering it. Even if there is a relevant nonhearsay purpose, when the probative value of the evidence for this purpose is low, the trial court has discretion to exclude the evidence if its probative value is substantially outweighed by the dangers of unfair prejudice, misleading the jury, or confusion of the issues.<sup>171</sup> When determining whether evidence that is relevant for a nonhearsay purpose should nonetheless be excluded for potential unfair prejudice, the court may consider a number of factors, including whether the out-of-court statement addresses an important

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164. *Id.*

165. *United States v. Inadi*, 475 U.S. 387, 398 n.11 (1986).

166. *See O'Brien v. O'Brien*, 508 S.E.2d 300, 308 (N.C. Ct. App. 1998) (donative intent in making gift); *People v. Mary Dell*, 232 Cal. Rptr. 361, 369 (1991) (verbal offer to enter into contract of prostitution).

167. *See, e.g., United States v. Hanson*, 994 F.2d 403, 406 (7th Cir. 1993); *United States v. Harris*, 942 F.2d 1125, 1130 (7th Cir. 1991).

168. FED. R. EVID. 801(c) advisory committee's note.

169. *Id.* (“If the significance of an offered statement lies solely in the fact that it was made, no issue is raised as to the truth of anything asserted, and the statement is not hearsay.”).

170. *See* FED. R. EVID. 402.

171. *See id.* at 403.

issue in the case, whether the declarant appears knowledgeable so as to be credited by the jury, whether the declarant is available to testify at trial, and whether a limiting instruction will be effective in reducing the danger of unfair prejudice.<sup>172</sup>

When this element of hearsay is considered within the framework of confrontation analysis, a number of points emerge. First, the same basic concept is applicable: Just as with the hearsay rule, the Confrontation Clause only restricts the use of out-of-court statements against an accused if the evidence is offered to prove the truth of the matter asserted in the out-of-court statement.<sup>173</sup> Only then is the maker of a testimonial out-of-court statement a “witness against”<sup>174</sup> the defendant. The Confrontation Clause does not bar the use of out-of-court statements—even testimonial statements—for purposes other than establishing the truth of the matter asserted.<sup>175</sup> Second, in the context of confrontation, two nonhearsay purposes recur frequently in the case law. One involves the use of testimonial out-of-court statements to explain the course of law enforcement’s investigation.<sup>176</sup> The other concerns the use of testimonial out-of-court statements to explain the bases of an expert witness’s in-court opinion.<sup>177</sup> Third, some recent court decisions have suggested that the evidence should be *clearly* relevant for these or other nonhearsay purposes; otherwise, the constitutional protection of the Confrontation Clause could be substantially weakened by the use of the evidence for some ostensible, but only marginally relevant, nonhearsay purpose.<sup>178</sup>

As noted previously, the conventional rule states that, when evidence of a testimonial out-of-court statement is offered for some purpose other than establishing the truth of the matter asserted in the statement, neither the hearsay rule nor the Confrontation Clause bars admission of the evidence.<sup>179</sup> At a minimum, of course, the evidence must be relevant for the other, non-

172. *United States v. Reyes*, 18 F.3d 65, 70–71 (2d Cir. 1994).

173. *Crawford v. Washington*, 541 U.S. 36, 60 n.9 (2004) (citing *Tennessee v. Street*, 471 U.S. 407, 414 (1985)).

174. U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.”).

175. See *Crawford*, 541 U.S. at 60 n.9 (citing *Street*, 471 U.S. at 414).

176. See, e.g., *United States v. Gibbs*, 506 F.3d 479, 484 (6th Cir. 2007); *United States v. Maher*, 454 F.3d 13, 23 (1st Cir. 2006); *United States v. Silva*, 380 F.3d 1018, 1020 (7th Cir. 2004); *Edwards v. State*, 200 S.W.3d 500, 512 (Mo. 2006); *State v. Hoover*, 220 S.W.3d 395, 406–07 (Mo. Ct. App. 2007).

177. See, e.g., *United States v. Mejia*, 545 F.3d 179, 199 (2d Cir. 2009); *United States v. Law*, 528 F.3d 888, 912 (D.C. Cir. 2008); *United States v. Lombardozzi*, 491 F.3d 61, 73–74 (2d Cir. 2007); *State v. Reetz*, No. 06-1577, 2008 WL 680226, at \*4 (Iowa Ct. App. Mar. 14, 2008); *State v. Lewis*, 235 S.W.3d 136, 151 (Tenn. 2007).

178. See, e.g., *Maher*, 454 F.3d at 23; *Silva*, 380 F.3d at 1020.

179. See FED. R. EVID. 801(c); FED. R. EVID. 802; *Crawford*, 541 U.S. at 60.

hearsay purpose.<sup>180</sup> However, this is a very low threshold, requiring only that the evidence have *any* tendency to make the existence of *any* fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.<sup>181</sup> Is that all that is necessary to overcome a confrontation objection—simply that the evidence be minimally relevant for some nonhearsay purpose? As some courts have suggested, a mere requirement of minimal relevance would “eviscerate” and “go far toward abrogating” the defendant’s Sixth Amendment right.<sup>182</sup>

Court decisions dealing with the introduction of out-of-court statements to explain the course of a police investigation generally recognize that the prosecution should be permitted to paint a picture of the relevant events and that sometimes the introduction of an out-of-court statement will be helpful to provide a context for other relevant evidence.<sup>183</sup> There is, however, a distinction between providing relevant and helpful background information and attempting to introduce otherwise inadmissible testimonial statements of witnesses not produced at trial.<sup>184</sup> The prosecution should not be permitted to routinely have its witnesses at trial recount to the jury statements of others inculcating the defendant through the simple expedient of explaining why or how the investigation proceeded to focus on the defendant.<sup>185</sup> Probative value in showing the course of the investigation may well be substantially outweighed by the risks of unfair prejudice in such a situation.<sup>186</sup> In determining admissibility, courts generally look to the detail of the statement sought to be admitted. If the out-of-court statement directly implicates the defendant in the charged criminal conduct, the statement usually will not be admissible.<sup>187</sup> If, however, the statement sought to be introduced by the prosecution merely relates the reason why the police investigated the defendant as a suspect, the evidence may be admissible.<sup>188</sup> Thus, if a police officer testifies that information was relayed to him by an informant apprising him of the location of evidence or a potential suspect (even if the suspect is identified), this testimony is admissible as long as the specific statement is not

180. See FED. R. EVID. 402.

181. *Id.* at 401.

182. See *Maher*, 454 F.3d at 22 (1st Cir. 2006) (quoting *Silva*, 380 F.3d at 1020).

183. See, e.g., *United States v. Gibbs*, 506 F.3d 479, 486 (6th Cir. 2007) (“background evidence to show why Gibbs’s bedroom was searched”); *State v. Broadway*, 753 So.2d 801, 809 (La. 1999) (“useful . . . in ‘drawing the full picture’ for the jury”); *Edwards v. State*, 200 S.W.3d 500, 512 (Mo. 2006) (“explaining subsequent police actions”).

184. See *Maher*, 454 F.3d at 22–23.

185. *Id.* at 23.

186. See FED. R. EVID. 403; *Broadway*, 753 So.2d at 808–09.

187. See *Maher*, 454 F.3d at 22–23; *Broadway*, 753 So.2d at 807–08; *State v. Hoover*, 220 S.W.3d 395, 409 (Mo. Ct. App. 2007).

188. See *Gibbs*, 506 F.3d at 486; *Edwards*, 200 S.W.3d at 512; *Broadway*, 753 So.2d at 809.

recounted and the detail given is limited.<sup>189</sup> Admissibility sometimes hinges on whether the statement recounted by the witness relates to an element of the crime.<sup>190</sup> If a police officer testifies, for instance, that an informant told her that a suspect had guns in his house, but does not mention the specific gun that the defendant is charged with possessing, the testimony may be admissible for the purpose of providing background information.<sup>191</sup>

Several factors may affect resolution of a confrontation issue in this context. First is whether there is a genuine need or reason to present the evidence in order to explain why the police investigation proceeded in a particular manner. A genuine need may exist if there are significant unexplained gaps in the train of events or if the defendant has raised an issue about the investigation.<sup>192</sup> Second is the extent to which it is necessary to elicit the content of the inculpatory statement in order to explain the course of investigation. In many cases, the investigation can be adequately explained without any need to elicit the inculpatory particulars of the statement.<sup>193</sup> Third, if the evidence is to be admitted only for the limited purpose of explaining the course of investigation, the prosecutor must be careful not to argue or use the out-of-court statement for its truth.<sup>194</sup> Fourth, the court should give the jury a limiting instruction that makes clear the permissible and prohibited purposes of the evidence.<sup>195</sup>

Another common situation in which a testimonial out-of-court statement may be relevant for a purpose other than establishing the truth of the matter asserted is when otherwise inadmissible hearsay statements are used by an expert witness to explain the basis for the expert's opinion.<sup>196</sup> Under modern rules of evidence, in most courts an expert witness may testify to his or her opinion even though that opinion is based on hearsay sources of information, provided that the sources meet a certain standard.<sup>197</sup> As expressed by Rule 703 of the Federal Rules of Evidence, the facts or data upon which the opinion is based need not be admissible in evidence in order for the expert's opinion or inference to be admitted, as long as the underlying facts or data are "of a type

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189. See *United States v. Pugh*, 273 F. App'x 449, 455–56 (6th Cir. 2008).

190. See *Gibbs*, 506 F.3d at 486.

191. *Id.* at 486.

192. See *United States v. Robinson*, 272 F. App'x 421, 428–30 (6th Cir. 2007).

193. See *State v. Johnson*, No. 345539-1-II, 2007 WL 1417312, at \*5 (Wash. Ct. App. May 15, 2007) (“[T]he evidence was far more detailed than what would be required to explain why the deputies arrested Johnson.”).

194. See *id.* at \*2, \*5 (regarding evidence used in the prosecutor's argument to show the defendant's guilt).

195. See FED. R. EVID. 105.

196. See *id.* at 703.

197. See, e.g., *id.*; CAL. EVID. CODE § 801 (West 2009).

reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject.”<sup>198</sup>

Facts or data that qualify under an exception to the hearsay rule may be admitted and disclosed to the jury as substantive evidence—to prove the truth of the matter asserted by the outside source of information (although confrontation may be a separate ground for exclusion if testimonial statements are sought to be introduced). But what about facts or data that are inadmissible hearsay, though they may properly serve as a “nonhearsay” basis for an expert’s opinion pursuant to Federal Rule 703? May they be admitted in evidence and disclosed to the jury? There is a substantial danger of jury misuse of this information, and so Federal Rule 703 provides that “[f]acts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert’s opinion substantially outweighs their prejudicial effect.”<sup>199</sup> If the otherwise inadmissible information is disclosed to the jury under this stringent balancing test, the information “must not be used for substantive purposes,” and the trial judge, if requested, must give a limiting instruction to that effect.<sup>200</sup>

With respect to confrontation issues raised in this situation, courts have generally held that the admission of expert opinion testimony that is based on testimonial hearsay will usually not violate the Confrontation Clause because (1) the expert is subject to cross-examination concerning his or her opinions,<sup>201</sup> and (2) the underlying materials upon which the expert expresses the opinion are not being offered to prove the truth of their contents.<sup>202</sup> This reasoning is especially apt when the contents of the underlying materials are not disclosed to the jury on direct examination of the expert.<sup>203</sup>

When the contents of out-of-court statements and materials are disclosed to the jury, more serious confrontation concerns are presented. A confrontation violation is especially likely when the materials disclosed are not being used by the expert as a basis for his or her own expert opinion. In this instance, the expert is merely serving as a conduit for transmitting testimonial hearsay to the

198. FED. R. EVID. 703.

199. *Id.*

200. FED. R. EVID. 703 advisory committee’s note.

201. *People v. Sisneros*, 94 Cal. Rptr. 3d 98, 108 (Cal. Ct. App. 2009); *People v. Ramirez*, 64 Cal. Rptr.3d 96, 99 (Cal. Ct. App. 2007); *Blaylock v. State*, 259 S.W.3d 202, 207–08 (Tex. App. 2008).

202. *Sisneros*, 94 Cal. Rptr. 3d at 108; *Ramirez*, 64 Cal. Rptr. 3d at 99.

203. See *United States v. Henry*, 472 F.3d 910, 914 (D.C. Cir. 2007) (“*Crawford* . . . did not alter an expert witness’s ability to rely on (without repeating to the jury) otherwise inadmissible evidence in formulating his opinion under Federal Rule of Evidence 703.”); *State v. Lewis*, 235 S.W.3d 136, 151 (Tenn. 2007) (citing *Henry*, 472 F.3d at 914).

jury.<sup>204</sup> Even in cases where the expert relies on testimonial statements, sources, or materials, courts sometimes have suggested that disclosure of the contents of these statements or materials to the jury may violate the Confrontation Clause.<sup>205</sup>

In theory, it might seem that the disclosure of the contents of testimonial statements or materials that are actually relied upon by the expert witness in forming his or her opinion should not violate the Confrontation Clause because the out-of-court statements are not being admitted for the truth of matters asserted by them, but only for the limited, “nonhearsay” purpose of explaining the basis of the expert’s opinion and showing the jury what the expert relied on in forming his or her opinion.<sup>206</sup> An instruction could be given to inform the jury of the limited purpose for which the testimonial materials are being admitted.<sup>207</sup>

Courts still may have confrontation concerns in this situation. While the courts have not expressed it this way, a major concern may lie in the difficulty of putting aside hearsay reasoning here. When the expert relies on testimonial sources in forming his or her opinion, it seems that the expert must be accepting the truth of the out-of-court statements. It is said that the expert witness is involved in doing a “validation, expertly performed” of the hearsay sources.<sup>208</sup> It is unlikely that, in forming his or her opinion, the expert is relying on the falsity of the testimonial statements or on the mere fact that they exist. For the most part, the expert is accepting the testimonial statements as true. If so, then the jury will likely also accept them as true, especially since they’ve been ‘validated’ by an expert in the field, who is presumably knowledgeable about what source materials are reliable. The jury’s view is unlikely to be altered by a limiting instruction in this situation.<sup>209</sup>

When testimonial out-of-court statements are offered for an ostensibly nonhearsay purpose, such as explaining the course of law enforcement’s

204. *United States v. Mejia*, 545 F.3d 179, 197 (2d Cir. 2008).

205. *See United States v. Law*, 528 F.3d 888, 912 (D.C. Cir. 2008); *United States v. Lombardozzi*, 491 F.3d 61, 72–73 (2d Cir. 2007); *Henry*, 472 F.3d at 914.

206. *See generally Crawford v. Washington*, 541 U.S. 36, 59–60 n.9 (2004).

207. *See* FED. R. EVID. 703 advisory committee’s note (2000 amend.) (“If the otherwise inadmissible information is admitted . . . the trial judge must give a limiting instruction upon request, informing the jury that the underlying information must not be used for substantive purposes.”).

208. FED. R. EVID. 703 advisory committee’s note.

209. *See* FED. R. EVID. 803(4) advisory committee’s note. The note addresses the related situation of statements made to a physician consulted, not for treatment, but only for the purpose of enabling the physician to testify. The Advisory Committee recognized the ineffectiveness of a limiting instruction here, stating: “While these statements were not admissible as substantive evidence, the expert was allowed to state the basis of his opinion, including statements of this kind. *The distinction thus called for was one most unlikely to be made by juries.* The rule accordingly rejects the limitation.” *Id.* (emphasis added).

investigation or explaining the basis of an expert witness's in-court opinion, and the statements disclose to the jury incriminating facts about the defendant, there is a heightened danger of infringement of the constitutional right of confrontation. Courts need to carefully scrutinize the nonhearsay justification here, require more than minimal relevance for a "nonhearsay" purpose, and exclude the incriminating statements from being presented to the jury if, as a practical matter, the jury is likely to see the testimonial statements as substantive evidence of guilt.

#### *E. Exceptions To The Rule of Exclusion*

Hearsay evidence, however defined, is only excluded by the hearsay rule if the evidence does not fall within an exception to the rule.<sup>210</sup> The hearsay rule recognizes a large number of exceptions—perhaps 30 or so.<sup>211</sup> Most of these exceptions are based, in whole or in large part, on a showing of the presence of assurances of trustworthiness or reliability in the circumstances surrounding the making of the out-of-court statement.<sup>212</sup> The rationale for the exceptions is that the presence of these circumstantial assurances of trustworthiness serves to compensate for the absence of the ideal testimonial conditions which would exist if the statement was one made at the current trial or hearing: personal presence of the declarant before the trier of fact, testimony given under oath, and an opportunity for immediate cross-examination by the opposing party.<sup>213</sup>

The great majority of hearsay exceptions place such a high value on the presence of circumstantial assurances of reliability as a rationale for admitting hearsay that the hearsay statement is not excluded even if the hearsay declarant is available to testify at the current trial or hearing.<sup>214</sup> In other words, the proponent of the hearsay evidence need not show, as a condition of admissibility, that the declarant is unavailable to testify as a witness; the evidence is "not excluded by the hearsay rule, even though the declarant is available as a witness."<sup>215</sup>

For a few hearsay exceptions, it is required that the proponent demonstrate, as a condition of admissibility, that "the declarant is unavailable as a

210. See FED. R. EVID. 802.

211. See *id.* at 803 (delineating 23 specific exceptions); *id.* at 804 (specifying 5 exceptions); *id.* at 807 (recognizing a residual exception). See also FED. R. CIV. P. 32 (regarding admissibility of depositions); *id.* at 65(b) (showing by affidavit for temporary restraining order); FED. R. CRIM. P. 4(a) (regarding affidavits to show grounds for issuing warrants).

212. See FED. R. EVID. 803 advisory committee's note.

213. *Id.*

214. See *id.* ("[U]nder appropriate circumstances a hearsay statement may possess circumstantial guarantees of trustworthiness sufficient to justify nonproduction of the declarant in person at the trial . . .").

215. FED. R. EVID. 803.

witness.”<sup>216</sup> There must be a showing of the necessity to resort to hearsay because the declarant’s testimony at the current trial or hearing is not available.<sup>217</sup> This is in addition to a showing of facts for each exception that provide some assurances of the trustworthiness of the hearsay.<sup>218</sup>

The exceptions to the confrontation right differ markedly from the exceptions to the hearsay rule. For one thing, the confrontation exceptions are much fewer in number—2 to 4, as compared to some 30 hearsay exceptions—encompassing only those exceptions for unfronted testimonial statements that were established at common-law at the time of the founding.<sup>219</sup> The confrontation exceptions that have been judicially recognized in light of *Crawford* include: (1) circumstances where the absent maker of a testimonial statement is unavailable to testify at trial and the defendant had a prior opportunity to cross-examine the declarant;<sup>220</sup> (2) circumstances where the testimonial statement qualifies under the traditional common-law exception for dying declarations;<sup>221</sup> (3) circumstances where the defendant has rendered the declarant unavailable as a witness at a trial by means of wrongful conduct designed for this purpose;<sup>222</sup> and (4) circumstances where the defendant has “opened the door” to the prosecution’s use of a declarant’s testimonial statements by eliciting other testimonial hearsay statements by the same declarant.<sup>223</sup> Another difference is that, unlike most exceptions to the hearsay rule, the exceptions to the confrontation right are, for the most part,<sup>224</sup> not based on the presence of any assurances of the reliability of the hearsay statement.<sup>225</sup> Finally, all of the confrontation exceptions, except the one for “opening the door,” require a showing that the declarant is unavailable to

216. *Id.* at 804(b).

217. *See* FED. R. EVID. 804(b) advisory committee’s note.

218. *Id.*

219. *Crawford v. Washington*, 541 U.S. 36, 54 (2004) (The Sixth Amendment right of confrontation “is most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding.”).

220. *Id.* (“[T]he common law in 1791 conditioned admissibility of an absent witness’s examination on unavailability and a prior opportunity to cross-examine. The Sixth Amendment therefore incorporates those limitations.”).

221. *See* *Giles v. California*, 128 S. Ct. 2678, 2682 (2008) (Dying declarations “were admitted at common law even though they were unfronted.”); *Crawford*, 541 U.S. at 56 & n.6 (noting that there is authority for admitting dying declarations at common law even when they are “clearly” testimonial).

222. *Giles*, 128 S. Ct. at 2683.

223. *See infra* note 285.

224. *See infra* text accompanying notes 279–84 (discussing dying declarations).

225. *See Crawford*, 541 U.S. at 62 (“[E]xceptions to the Confrontation clause . . . make no claim to be a surrogate means of assessing reliability.”).

testify as a witness at trial, while only a few of the roughly 30 exceptions to the hearsay rule require such a showing.<sup>226</sup>

The *Crawford* decision provides the basis for the first exception to the Confrontation rule. The *Crawford* rule is usually read as barring the admission of testimonial hearsay statements of a witness who does not appear at trial unless the witness is unavailable to testify *and* the defendant had a prior opportunity for cross-examination.<sup>227</sup> One can conceptualize *Crawford* as expressing both the confrontation rule and the first exception to the rule.<sup>228</sup> The Sixth Amendment gives the defendant the right to confront and cross-examine the witnesses against him *at trial*.<sup>229</sup> The Confrontation Clause creates a *trial* right.<sup>230</sup> The general rule would be that a witness's testimony (testimonial statement) is not admissible against a defendant as substantive evidence unless the witness appears at trial for confrontation and cross-examination by the defendant.<sup>231</sup> The reliability of the witness's statement must be assessed in a particular manner—by cross-examination at trial in the presence of the trier of fact.<sup>232</sup> The exception to the rule that was recognized in *Crawford*, then, is that appearance of the witness at trial for confrontation and cross-examination by the defendant is not required by the Confrontation Clause if the witness is unavailable to testify at trial *and* the defendant had a prior opportunity to cross-examine the witness.<sup>233</sup> This exception might be referred to as “the *Crawford* exception.” The Court in *Crawford* said that the

226. See *supra* text accompanying notes 214–18.

227. *Crawford*, 541 U.S. at 36, 54 (“[T]he Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify and the defendant had had a prior opportunity for cross-examination. . . . [T]he common law in 1791 conditioned admissibility of an absent witness’s examination on unavailability and a prior opportunity to cross-examine. The Sixth Amendment therefore incorporates those limitations.”); *id.* at 68 (“Where testimonial evidence is at issue . . . the Sixth Amendment demands . . . unavailability and a prior opportunity for cross-examination.”).

228. *Id.* at 54 (The Sixth Amendment “‘right . . . to be confronted with the witnesses against him’ . . . is most naturally read as a reference to the right of confrontation at common law, admitting only those *exceptions* established at the time of the founding . . . . [T]he common law in 1791 conditioned admissibility of an absent witness’s examination on unavailability and a prior opportunity to cross-examine. The Sixth Amendment therefore incorporates those limitations.”) (quoting U.S. CONST. amend. VI) (emphasis added).

229. See *California v. Green*, 399 U.S. 149, 157 (1970) (“[I]t is the literal right to ‘confront’ the witness at the time of the trial that forms the core of the values furthered by the Confrontation Clause . . .”).

230. See *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2531 (2009); *Giles v. California*, 128 S. Ct. 2678, 2682 (2008).

231. See *Melendez-Diaz*, 129 S. Ct. at 2531.

232. See *Giles*, 128 S. Ct. at 2682.

233. See *Melendez-Diaz*, 129 S. Ct. at 2531 (Under *Crawford*, a witness’s testimony is inadmissible “unless the witness appears at trial or, if the witness is unavailable, the defendant had a prior opportunity for cross-examination.”).

Sixth Amendment right of the defendant to be confronted with the witnesses against him “is most naturally read as a reference to the right of confrontation at common-law, admitting only those exceptions established at the time of the founding.”<sup>234</sup> Because “the common-law in 1791 conditioned the admissibility of an absent witness’s examination on unavailability and a prior opportunity to cross-examine [,] [t]he Sixth Amendment therefore incorporates those limitations.”<sup>235</sup>

In accordance with the criteria for exceptions to the confrontation right expressed in *Crawford*, the Supreme Court has declared that exceptions to the confrontation right are recognized in two other instances: when the testimonial statement qualifies under the dying-declaration exception to the hearsay rule as it was recognized at common-law at the time of the founding<sup>236</sup> and when the accused forfeits the confrontation right by intentionally rendering the witness unavailable to testify at trial, as this forfeiture doctrine was recognized at common-law prior to 1791.<sup>237</sup> The *Crawford* Court accepted forfeiture by wrongdoing as an exception to the confrontation right.<sup>238</sup> The Court’s later decision in *Giles* confirmed that dying declarations are also an exception to the confrontation right.<sup>239</sup>

With respect to the dying-declaration exception to confrontation, the Supreme Court in *Crawford* recognized that by the time of the passage of the Sixth Amendment in 1791, several exceptions to the hearsay rule of exclusion had become “well established” as part of the common-law.<sup>240</sup> However, most of these exceptions covered out-of-court statements that were non-testimonial in nature.<sup>241</sup> The Court found “scant evidence that exceptions were invoked to admit *testimonial* statements against the accused in a *criminal* case.”<sup>242</sup> The sole deviation found by the Court “involves dying declarations,”<sup>243</sup> where the Court found authority in the common-law for admitting “clearly” testimonial dying declarations<sup>244</sup> “even though they were unopposed” by the accused.<sup>245</sup> While the Court in *Crawford* stopped short of deciding “whether the Sixth

234. *Crawford v. Washington*, 541 U.S. 36, 54 (2004).

235. *Id.*

236. *Giles*, 128 S. Ct. at 2682–83.

237. *Id.* at 2683 (2008); *Crawford*, 541 U.S. at 62.

238. *Crawford*, 541 U.S. at 62.

239. *Id.*

240. *Crawford*, 541 U.S. at 56.

241. *Id.* (giving, as examples, hearsay exceptions for business records and statements in furtherance of a conspiracy).

242. *Id.*

243. *Id.* at 56 & n.6.

244. *Id.*

245. *Giles v. California*, 128 S. Ct. 2678, 2682 (2008).

Amendment incorporates an exception for testimonial dying declarations,<sup>246</sup> it did indicate that acceptance of the exception would be on “historical grounds” and that the exception for dying declarations is “sui generis.”<sup>247</sup> Most lower court cases decided after *Crawford* recognized the exception for dying declarations,<sup>248</sup> and the Supreme Court recognized the dying-declaration exception explicitly in its 2008 decision in *Giles*.<sup>249</sup>

Apart from the historical reasons for the dying-declaration exception, courts have pointed to the special necessity to resort to this type of evidence in criminal homicide prosecutions.<sup>250</sup> The homicide victim can speak to the jury in no other way, and the requirement that the victim speak under consciousness of impending death compensates for the absence of an oath.<sup>251</sup> The necessity rationale overshadows any reliability justification for this confrontation exception. The *Crawford* Court itself recognized that, as an “exception to the Confrontation Clause,”<sup>252</sup> dying declarations “make no claim to be a surrogate means of assessing reliability.”<sup>253</sup>

Dying declarations, of course, are a recognized exception to the hearsay rule as well as to the confrontation right.<sup>254</sup> As codified in the Federal Rules of Evidence, the dying-declaration exception provides that a hearsay statement is not excluded by the hearsay rule if (1) “the declarant is unavailable as a witness,”<sup>255</sup> (2) the statement is offered “[i]n a prosecution for homicide or in a civil action or proceeding,”<sup>256</sup> (3) the statement was made by the declarant “while believing that the declarant’s death was imminent,”<sup>257</sup> and (4) the statement “concern[ed] the cause or circumstances of what the declarant believed to be [his or her] impending death.”<sup>258</sup>

246. *Crawford*, 541 U.S. at 56 n.6.

247. *Id.*

248. *See, e.g.*, *Wallace v. State*, 836 N.E.2d 985, 992–96 (Ind. Ct. App. 2005); *State v. Young*, 710 N.W.2d 272, 283–84 (Minn. 2006); *State v. Lewis*, 235 S.W.3d 136, 139 (Tenn. 2007). *Contra* *United States v. Jordan*, No. CRIM. 04-CR-229-B, 2005 WL 513501, at \*3–\*4 (D. Colo. 2005).

249. *Giles*, 128 S. Ct. at 2682–83.

250. *Kirby v. United States*, 174 U.S. 47, 61 (1899) (exception to right of confrontation for dying declarations “arises from the necessity of the cause”); *Mattox v. United States*, 156 U.S. 237, 244 (1895) (dying declarations are admitted “simply from the necessities of the case, and to prevent a manifest failure of justice”).

251. *Id.* at 152.

252. *Crawford v. Washington*, 541 U.S. 36, 62 (2004).

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

254. *See, e.g.*, FED. R. EVID. 804(b)(2).

255. *Id.* at 804(b).

256. *Id.* at 804(b)(2).

257. *Id.*

258. *Id.*

It is important to note that the hearsay exception for dying declarations is not necessarily the same as the corresponding exception to the right of confrontation. The current hearsay exceptions reflect variations that have been recognized in the development of the common-law up to the present day. However, the exceptions to the confrontation right reflect “only those exceptions established at the time of the founding.”<sup>259</sup> Later changes in the scope of the exceptions, while recognized in modern exceptions to the hearsay rule, are probably not part of the exceptions to the confrontation right. This may be particularly important in relation to dying declarations. For example, the common-law at the time of the founding recognized this exception for “declarations made by a speaker who was both on the brink of death and aware that he was dying.”<sup>260</sup> It was required that the declarant be deceased at the time of trial.<sup>261</sup> However, the modern hearsay exception, exemplified by the Federal Rules of Evidence, requires only that the declarant be “unavailable as a witness,”<sup>262</sup> not necessarily deceased.<sup>263</sup>

The Supreme Court has also accepted and recognized the rule of forfeiture by wrongdoing as an exception to the Confrontation Clause.<sup>264</sup> As the Court put it, “when defendants seek to undermine the judicial process by procuring or coercing silence from witnesses and victims, the Sixth Amendment does not require courts to acquiesce.”<sup>265</sup> The forfeiture rule, based “on essentially equitable grounds,”<sup>266</sup> applies only when the defendant engages in conduct *that is designed to*, and does, prevent a witness from testifying.<sup>267</sup> The confrontation exception parallels the hearsay exception for forfeiture by wrongdoing, which applies when the defendant “engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as the witness.”<sup>268</sup> Under this hearsay exception, as under the confrontation rule, “intent” means the purpose of making the witness unavailable.<sup>269</sup>

259. *Crawford v. Washington*, 541 U.S. 36, 54 (2004) (citing *Mattox v. United States*, 156 U.S. 237, 243 (1895)).

260. *Giles v. California*, 128 S. Ct. 2678, 2682 (2008). *See also* *Mattox v. United States*, 146 U.S. 140, 151 (1892).

261. *See Mattox*, 146 U.S. at 151–52.

262. FED. R. EVID. 804(b).

263. *See id.* at 804(a) (stating that “unavailability as a witness” includes, among other things, the declarant’s inability to be present to testify “because of physical or mental illness or infirmity”).

264. *Crawford*, 541 U.S. at 62.

265. *Davis v. Washington*, 547 U.S. 813, 833 (2006).

266. *Crawford*, 541 U.S. at 62.

267. *Giles*, 128 S. Ct. 2678.

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

269. *Giles*, 128 S. Ct. at 2687 (quoting 5 C. MUELLER & L. KIRKPATRICK, *FEDERAL EVIDENCE* § 8:134 (3d ed. 2007) (citations omitted)).

It is noteworthy that all of the three exceptions to the confrontation right discussed so far—the *Crawford* exception, the dying-declaration exception, and the forfeiture-by-wrongdoing exception—effectively require that the declarant be unavailable as a witness at trial<sup>270</sup> and do not require the presence of circumstantial assurances of the trustworthiness of the testimonial statement.<sup>271</sup> This is consistent with the Supreme Court’s view in *Crawford*<sup>272</sup> that the purpose of Confrontation Clause is to safeguard an accused’s right to confront and cross-examine testimonial hearsay declarants—i.e., “witnesses against” the accused.<sup>273</sup> The purpose of the Clause is not to *require* that evidence be reliable, but to require that reliability be assessed or determined through the opportunity for cross-examination.<sup>274</sup> The forfeiture exception exemplifies the point. The exception is grounded in equitable considerations, not in the presence of assurances of reliability.<sup>275</sup> An accused who intentionally causes a testimonial hearsay declarant to be unavailable as a witness at trial can hardly claim that he has been denied the right to confront and cross-examine the declarant.<sup>276</sup> Though perhaps less clearly, the dying-declaration exception is also not grounded in the presence of circumstantial assurances of reliability. While one could maintain that one basis for a dying declaration exception is the belief that a declarant facing imminent death is unlikely to lie,<sup>277</sup> the primary reason for recognition of this exception appears to be historical, based more on the necessity to use this type of evidence in homicide prosecutions than on any strong assurance of trustworthiness.<sup>278</sup> As the *Crawford* Court noted, the dying-declaration exception was established in American law for testimonial statements at the time of the adoption of the Sixth Amendment in 1791,<sup>279</sup> thus being recognized as a “*sui generis*”<sup>280</sup> exception to the confrontation right.<sup>281</sup> Like the other confrontation

270. See *Giles*, 128 S. Ct. at 2682–83.

271. See *Crawford*, 541 U.S. at 61.

272. *Id.* at 36.

273. *Id.* at 61.

274. *Id.*

275. *Id.* at 62 (citing *Reynolds v. United States*, 98 U.S. 145, 158–59 (1879)).

276. *Giles v. California*, 128 S. Ct. 2678, 2687 (2008) (quoting *Reynolds*, 98 U.S. at 158).

277. See *Kirby v. United States*, 174 U.S. 47, 61 (1899); *Mattox v. United States*, 146 U.S. 140, 152 (1892).

278. *Mattox v. United States*, 156 U.S. 237, 244 (1895) (Dying declarations are admitted “simply from the necessities of the case, and to prevent a manifest failure of justice.”); *Mattox*, 146 U.S. at 152.

279. *Crawford*, 541 U.S. at 56 n.6.

280. *Id.*

281. *Id.* at 54 (The Sixth Amendment right of confrontation “is most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding.”).

exceptions, dying declarations “make no claim to be a surrogate means of assessing reliability.”<sup>282</sup>

There exists considerable support in lower-court decisions for recognition of a fourth exception to the confrontation right—“opening the door”<sup>283</sup>—though at least one federal appeals court has declined to recognize this exception.<sup>284</sup> The theory of the exception is that a defendant loses—forfeits or waives—the right to confront and cross-examine an absent declarant with respect to the declarant’s testimonial hearsay statements when the defendant himself has elicited testimonial hearsay statements by the declarant.<sup>285</sup> This theory is strongest when the statements elicited by the defendant would create a misleading or distorted impression if the prosecution were not allowed to introduce certain other related or contemporaneous statements by the declarant.<sup>286</sup>

282. *Id.* at 62.

283. *See, e.g.,* *United States v. Burns*, 432 F.3d 856, 859–60 (8th Cir. 2005) (defendant’s cross-examination of police officer created a false impression and opened the door for prosecutor to elicit, on redirect, co-defendant’s hearsay statements inculcating defendant); *State v. Prasertphong*, 114 P.3d 828, 830–32 (Ariz. 2005) (once defendant made the tactical decision to introduce parts of co-defendant’s statement, he forfeited any claim that introduction of remaining parts, which trial court found necessary to prevent the jury from being misled, violated his confrontation rights); *State v. Fisher*, 154 P.3d 455, 481–83 (Kan. 2007); *State v. Birth*, 158 P.3d 345, 350–55 (Kan. Ct. App. 2007) (by eliciting testimony regarding accomplice’s statement to detective, defendant opened the door to admission of statements by accomplice and waived right of confrontation); *People v. Ko*, 789 N.Y.S.2d 43 (N.Y. App. Div. 2005) (once defendant introduced part of defendant’s girlfriend’s statement, her entire statement became admissible to avoid a misrepresentation of the statement’s meaning); *State v. Selalla*, 744 N.W.2d 802, 817–18 (S.D. 2008) (under rule of completeness, when defendant introduced parts of co-defendant’s statement that exculpated defendant, state could introduce other parts of the statement inculcating defendant in order to “complete the picture”) *State v. Robinson*, 146 S.W.3d 469, 493 (Tenn. 2004).

284. *United States v. Cromer*, 389 F.3d 662, 678–79 (6th Cir. 2004).

285. *See Prasertphong*, 114 P.3d at 833 (defendant forfeited his Confrontation Clause right not to have co-defendant’s entire statement admitted against him when he made the tactical decision to introduce portions that, standing alone, had the serious potential to mislead the jury); *Birth*, 158 P.3d at 355 (by eliciting testimony from detective on cross-examination concerning accomplice’s statements to detective, defendant opened the door to admission of accomplice’s statements and waived right of confrontation).

286. *See, e.g., Burns*, 432 F.3d at 860 (allowing incriminating statements to clarify issue where defendant’s cross-examination of police officer left “a false impression”); *Prasertphong*, 114 P.3d at 835 (allowing state to introduce remainder of co-defendant’s statement that “trial court found necessary to prevent the jury from being misled” after defendant had introduced portions of co-defendant’s statement); *Ko*, 789 N.Y.S.2d at 45 (allowing entire statement of girlfriend where portion defendant sought to introduce would, by itself, “misrepresent the meaning of the conversation”); *Selalla*, 744 N.W.2d at 818 (allowing state to introduce statements to “complete the picture” after defendant elicited exculpatory parts of declarant’s statements).

The Supreme Court has not specifically ruled on whether this is an exception to the confrontation right, and the opposing view, presented in a Sixth Circuit decision, *United States v. Cromer*,<sup>287</sup> rejects the opening-the-door exception because, after *Crawford*, “the Confrontation Clause confers a powerful and fundamental right that is no longer subsumed by the evidentiary rules governing the admission of hearsay statements.”<sup>288</sup> Further, a defendant should only forfeit his confrontation right if he has caused a witness to be unavailable by his own wrongful conduct done for that purpose.<sup>289</sup> “A foolish strategic decision [by defense counsel] does not rise to the level of such misconduct and so [should] not cause the defendant to forfeit his rights under the Confrontation Clause.”<sup>290</sup>

There is a strong fairness argument on the other side that a defendant ought not be permitted to elicit some of a declarant’s statements, picking and choosing to create a favorable but misleading impression, and then invoke the confrontation right to prevent the prosecution from responding to correct or complete the picture. To permit such a tactic would convert the Confrontation Clause from a shield to a sword.<sup>291</sup> Instead, the opening-the-door doctrine, like the forfeiture-by-wrongdoing doctrine, should operate in these circumstances to “extinguish[ ] confrontation claims on essentially equitable grounds.”<sup>292</sup>

Courts admitting responsive statements under an opening-the-door theory sometimes cite the rule of completeness.<sup>293</sup> For instance, under Rule 106 of the Federal Rules of Evidence, “[w]hen a writing or a recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.”<sup>294</sup> Rules like Federal Rule 106 will not always apply in this situation, because sometimes the statement in question may be neither “a writing” nor a “recorded statement.” However, the equitable principle should be applied just the same. In any event, if opening the door is truly a recognized exception to the Sixth Amendment confrontation right, courts should have a uniform and consistent rule. If the Confrontation Clause protection is lost in State A through the defendant’s door-opening, the same rule should apply in State B for a defendant trying this same tactic in the same circumstances.

287. *Cromer*, 389 F.3d at 662.

288. *Id.* at 679.

289. *Id.* (citing Richard D. Friedman, *Confrontation: The Search for Basic Principles*, 86 GEO. L.J. 1011, 1031 (1998)).

290. *Cromer*, 389 F.3d at 679.

291. *Prasertphong*, 114 P.3d 828, 834–35.

292. *See id.* at 834 (quoting *Crawford v. Washington*, 541 U.S. 36, 62 (2004)).

293. *See, e.g., Prasertphong*, 114 P.3d at 831; *State v. Selalla*, 744 N.W.2d 802, 806–18 (S.D. 2008).

294. FED. R.EVID. 106.

When does a defendant open the door? Certainly, the defendant's direct elicitation or introduction of part of a declarant's testimonial hearsay statement does this.<sup>295</sup> It has even been held that a defendant can open the door by leaving a false impression in cross-examining a witness, even though defense counsel never asks the witness to repeat what a testimonial hearsay declarant said.<sup>296</sup>

If the door has been opened by the defendant, how far may the prosecution go in responding by the introduction of testimonial hearsay statements? The best answer seems to be that the prosecution may elicit only those parts of the declarant's statements that are necessary and relevant to correct the misleading impression created by the statements elicited by the defendant.<sup>297</sup> The confrontation right is waived or forfeited only to this extent.<sup>298</sup> The confrontation right is not lost if the prosecution seeks to introduce testimonial hearsay statements that are unrelated or unresponsive to statements previously elicited by the defendant.<sup>299</sup>

Another question relates to the nature of the opening-the-door doctrine in the context of confrontation. Is it a true exception to, and limitation of, the Sixth Amendment confrontation right—like the exception for forfeiture by wrongdoing—or is it merely a procedural rule for defendants to follow in asserting the constitutional right—like rules for asserting and waiving objections to evidence? If a defendant loses the protection of the confrontation

295. See, e.g., *Prasertphong*, 114 P.3d at 831–32 (defendant's tactical decision to introduce portions of co-defendant's statement); *Selalla*, 744 N.W.2d 817–18 (defendant's introduction of portions of co-defendant's statement that exculpated defendant).

296. See, e.g., *United States v. Burns*, 432 F.3d 856, 860 (8th Cir. 2005).

297. See *id.* (government's elicitation of co-defendant's post-arrest statements on redirect examination of police officer was properly allowed "to clear up the false impressions created during cross-examination" of the officer); *Prasertphong*, 114 P.3d at 835 (Ariz. 2005) (state properly allowed to introduce remainder of co-defendant's statement "which the trial court found necessary to prevent the jury from being misled"); *People v. Ryan*, 790 N.Y.S.2d 723, 728 (N.Y. App. Div. 2005) (defendant's cross-examination of police officer as to accomplice's statements concerning use of gun in robbery did not open the door to other parts of statements "which did not explain or clarify that subject"); *People v. Ko*, 789 N.Y.S.2d 43, 45 (N.Y. App. Div. 2005) (once defendant insisted upon introduction of portion of girlfriend's statement that shirt at murder scene belonged to her, defendant opened the door to admission of her entire statement concerning the clothing found at the murder scene because the admission of only one portion of the statement "would misrepresent the meaning of the conversation"); *Selalla*, 744 N.W.2d at 817 (when defendant elicited exculpatory part of co-defendant's statement, trial court properly permitted state to "complete the picture" by introducing parts of statement inculcating defendant).

298. See *Ryan*, 790 N.Y.S.2d at 727–28 (statements of defendant's alleged accomplices were introduced in violation of defendant's Sixth Amendment confrontation rights where statements did not explain or clarify accomplices' statements previously elicited by defendant).

299. See *id.* (statements of defendant's alleged accomplices were introduced in violation of defendant's Sixth Amendment confrontation rights where statements did not explain or clarify accomplices' statements previously elicited by defendant).

right because he or she has opened the door by eliciting some of the declarant's testimonial hearsay statements, should this be considered to be a waiver of the right to confrontation or an exception to the right itself? One might think it makes no difference since the result is the same in either event: the defendant loses the right under the Confrontation Clause to cross-examine the "witness"—the testimonial hearsay declarant. However, there may be an important difference here. The determination of this question is significant because state and federal courts, in ruling upon the scope and limits of the constitutional right itself, must follow the law established by the United States Supreme Court's interpretation of the Sixth Amendment's Confrontation Clause.<sup>300</sup> On the other hand, states are free to adopt their own procedural rules governing objections and waiver—that is, how and when the constitutional right must be asserted in court cases.<sup>301</sup>

In *Melendez-Diaz v. Massachusetts*, Justice Scalia, writing for the Court, noted that "[t]he right of confrontation may, of course, be waived, including by failure to object to the offending evidence; and States may adopt procedural rules governing the exercise of such objections."<sup>302</sup> Later in the opinion, Justice Scalia discussed notice-and-demand statutes, which require a defendant to make a confrontation objection within a given period of time prior to trial.<sup>303</sup> He pointed out that such statutes simply govern the time within which the defendant must raise his Confrontation Clause objection.<sup>304</sup> He added, "States are free to adopt procedural rules governing objections."<sup>305</sup>

Justice Scalia was writing mainly about objections and the waiver of the right to confrontation by a defendant's failure to make a timely objection on confrontation grounds. He was also suggesting that State procedural rules governing objections are permissible and do not infringe on the constitutional right.<sup>306</sup> But can these words mean that States are free to adopt procedural rules governing whether and to what extent a defendant's elicitation of some testimonial hearsay statements by a particular declarant opens the door for the prosecution to introduce other testimonial statements by the same declarant? Justice Scalia was addressing a much more limited question—whether States are free to adopt procedural rules governing the timing of objections, that is, when a confrontation objection must be made in order to avoid waiver of the right.

300. See *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2531–32 (2009); *Giles v. California*, 128 S. Ct. 2678, 2682 (2008); *Davis v. Washington*, 547 U.S. 813, 821–23 (2006); *Crawford v. Washington*, 541 U.S. 36, 42 (2004).

301. *Melendez-Diaz*, 129 S. Ct. at 2534 n.3.

302. *Id.*

303. *Id.* at 2541.

304. *Id.*

305. *Id.*

306. *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2541 (2009).

A highly respected treatise on evidence law states that the right to claim error on appeal can be waived not only by failure to make a timely and specific objection but by other means as well.<sup>307</sup> For example, a party can waive its right to claim error on appeal by eliciting the inadmissible evidence itself, either directly by counsel's own questions, or indirectly by counsel's elicitation of some testimony from the witness that "opens the door" or "invites opposing counsel to respond in kind."<sup>308</sup> If the concept of waiver extends this far, then States may indeed be free to adopt their own procedural rules governing waiver of the right to confrontation by opening the door. This is based on the argument that rules like this don't modify the constitutional right, but only regulate the procedure governing the waiver of the right to confrontation. Of course, the Supreme Court has long held that "[t]he question of a waiver of a federally guaranteed constitutional right is a federal question controlled by federal law,"<sup>309</sup> and that "for a waiver [of a constitutional right] to be effective it must be clearly established that there was 'an intentional relinquishment or abandonment of a known right or privilege.'"<sup>310</sup> Any state procedural rules providing for waiver of confrontation right by opening the door would have to comply with these federal standards.

Functionally, the opening-the-door doctrine is more analogous to the doctrine of forfeiture by wrongdoing. In *Giles v. California*,<sup>311</sup> the Supreme Court treated forfeiture by wrongdoing as part of the constitutional doctrine—an exception to the right of confrontation that was recognized by common-law courts at the time of the nation's founding.<sup>312</sup> The Court held that the forfeiture rule applied when the defendant engaged in misconduct that was intended to prevent the witness from testifying.<sup>313</sup> While the opening-the-door doctrine involves loss of the confrontation right by making a tactical decision at trial, rather than by engaging in misconduct intended to prevent a witness from testifying, the doctrine is designed, like forfeiture by wrongdoing, to extinguish the confrontation right "on essentially equitable grounds."<sup>314</sup> It is fundamentally unfair to allow the accused to elicit some testimonial hearsay statements by a witness and then use the Confrontation Clause to bar the prosecution from responding in order to clarify a misleading impression.<sup>315</sup> As

307. 1 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE § 103.14 (2d ed. 1997).

308. *Id.*

309. *Brookhart v. Janis*, 384 U.S. 1, 4 (1966).

310. *Id.*

311. *Giles v. California*, 128 S. Ct. 2678 (2008).

312. *Id.* at 2682–83.

313. *Id.* at 2684.

314. *Crawford v. Washington*, 541 U.S. 36, 62 (2004). *See also State v. Prasertphong*, 114 P.3d 828, 834 (Ariz. 2005).

315. *See Prasertphong*, 114 P.3d at 834–35.

some courts have noted, this would allow the defendant to use the Confrontation Clause, not as a shield against uncontroverted statements, but as a sword to present misleading exculpatory evidence and then block responsive evidence by the prosecution.<sup>316</sup> Such a result would be totally at odds with the purpose of the Confrontation Clause—to preserve and protect the right of the accused to cross-examine the “witnesses against” him or her. The founders could not have intended this result. Moreover, a defendant’s decision to introduce *favorable* testimonial hearsay statements by the declarant raises serious doubt as to whether the declarant should be treated as a “witness against” the defendant under the Confrontation Clause. Thus, the doctrine of opening the door should be recognized as an exception to, or limitation on, the Sixth Amendment right of confrontation.

Summarizing the exceptions to right of confrontation, a limited number of exceptions have gained judicial recognition. One exception, forfeiture by wrongdoing, was accepted by the Supreme Court in *Crawford*<sup>317</sup> and *Giles*.<sup>318</sup> Another exception, for dying declarations, also was recognized by the Supreme Court in *Giles*.<sup>319</sup> A third exception, opening the door, has not been addressed by the Supreme Court but has been recognized by the great majority of lower-court decisions addressing it.<sup>320</sup> A possible fourth exception stems directly from the *Crawford* decision. If the confrontation right is viewed as a right to cross-examine “witnesses against” the accused *at trial*, this exception would cover situations where the witness is unavailable to give testimony at trial *and* the accused has had a *prior* opportunity to cross-examine the witness.<sup>321</sup> Of course, unlike the first three exceptions, this fourth exception (if conceptualized as such) does not permit the use of *uncontroverted* statements against the accused, since it requires that the defendant have had a *prior* opportunity to cross-examine the testimonial hearsay declarant.

#### F. Multiple Hearsay

Occasionally, a situation will arise in which multiple layers of hearsay are present in a proffered item of evidence. This is commonly referred to as “multiple hearsay”<sup>322</sup> or “hearsay within hearsay.”<sup>323</sup> A witness (W) may be asked to testify to the out-of-court statement of one declarant (X), which

316. *Id.* at 835; *State v. Selalla*, 744 N.W.2d 802, 818 (S.D. 2008).

317. *Crawford*, 541 U.S. at 62.

318. *Giles*, 128 S. Ct. at 2687–88.

319. *Id.* at 2682.

320. See cases cited *supra* notes 283–84.

321. See generally *Crawford*, 541 U.S. 36.

322. *Spivey v. Lincoln Nat’l Life Ins. Co.*, No. 89-15680, 1991 WL 36278, at \*4 (9th Cir. Mar. 13, 1991).

323. FED. R. EVID. 805.

statement relates or recites the out-of-court statement of another declarant (Y), and the evidence is offered to prove the truth of both statements. The accepted rule for purposes of hearsay doctrine is that this type of hearsay evidence is excluded by the hearsay rule unless each hearsay statement qualifies under an exception.<sup>324</sup> If only one of the statements falls within an exception, the evidence is not admissible under the hearsay rule to prove the truth of *both* statements.<sup>325</sup>

When this multiple hearsay situation is viewed in terms of a Confrontation Clause objection, the analysis is quite different. The key is whether either or both of the hearsay statements are “testimonial.” If neither X nor Y has made a testimonial statement, the Confrontation Clause is not implicated at all, even though there is a multiple dose of hearsay being offered.<sup>326</sup> If X’s hearsay statement is testimonial, but Y’s is not, the Confrontation Clause applies and would exclude the evidence unless X is unavailable as a witness and the defendant (D) had a prior opportunity to cross-examine X.<sup>327</sup> Let’s assume, for example, that X and Y are alleged coconspirators of D and that W is a police officer testifying to a statement by X, who was “excited” at the time of the statement. W would testify to X’s excited statement that Y said things implicating D in the crime. Both X’s and Y’s statements may surmount a hearsay objection under exceptions to the hearsay rule—the coconspirator exception<sup>328</sup> for Y’s statement to X, and the excited utterance exception<sup>329</sup> for X’s statement to W. However, while Y’s coconspirator statement is probably not testimonial,<sup>330</sup> if X’s statement is testimonial, the evidence is excluded on confrontation grounds, unless X is unavailable as a witness *and* D had a prior opportunity to cross examine X.<sup>331</sup> This is true even though Y’s coconspirator statement to X is likely not testimonial and even though the hearsay rule has been fully satisfied.

What if *both* X’s and Y’s statements are testimonial? Does the Confrontation Clause apply to both? Seemingly yes, as long as both statements are offered for the truth. Suppose, for example, Y is in a state of excitement and reports a crime committed by D to X, a police officer conducting an investigation. X records what Y said. Again, let’s assume that both statements may overcome a hearsay objection under exceptions to the hearsay rule—the excited utterance or present sense of impression for Y’s

324. *Id.*

325. *Id.*; *United States v. Dotson*, 821 F.2d 1034, 1035 (5th Cir. 1987).

326. *See Davis v. Washington*, 547 U.S. 813, 821 (2006).

327. *Crawford v. Washington*, 541 U.S. 36, 53–56 (2004).

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

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

330. *See Crawford*, 541 U.S. at 56.

331. *Id.* at 59.

statement to X,<sup>332</sup> and the business or public records exception for X's written report.<sup>333</sup> However, even if the evidence overcomes a hearsay objection, a confrontation objection should be sustained unless both X and Y are produced for confrontation and cross-examination at trial. To overcome a confrontation objection if both X and Y are not produced to testify, the prosecutor would have to demonstrate that *both* X and Y are unavailable to testify at trial and that D had a prior opportunity to cross-examine both of them.<sup>334</sup> This is so even though, by hypothesis, both X's and Y's hearsay statements would be admissible over a hearsay objection.

In sum, when multiple hearsay is offered against an accused, the differences between the hearsay rule and the right of confrontation are starkly apparent. Compliance with the hearsay rule requires an exception to the hearsay rule for each hearsay statement—an exception that will provide an assurance of the trustworthiness of each. The confrontation right is not concerned with finding circumstantial assurances of the reliability of the hearsay statements.<sup>335</sup> Instead, it is concerned with protecting the accused's right to cross-examine any hearsay declarant whose statement is testimonial and who is thus a "witness against" the accused.<sup>336</sup> If the testimonial hearsay declarants do not testify at trial, their hearsay statements are excluded under the Confrontation Clause unless they are unavailable and the defendant had a prior opportunity to cross-examine them.<sup>337</sup>

### III. CONCLUSIONS

This article has explored the extent to which hearsay concepts as they operate within the framework of the Sixth Amendment right of confrontation are the same as, or different from, the hearsay concepts that are part of the common-law rule against hearsay. The overall conclusion is that, while there is a similarity on the surface, there are a number of important differences that should be borne in mind. Thus, it would be a mistake to just routinely "import" concepts of the hearsay rule into Confrontation Clause analysis. Specific conclusions are as follows:

1. Since they have evolved from similar common-law origins, it is not surprising that there still exists today a general similarity between the hearsay rule and the Confrontation Clause insofar as they relate to the admission or exclusion of persons' out-of-court statements, even

332. See FED. R.EVID. 803(1)–(2).

333. See *id.* at 803(6), (8). It is doubtful, however, that either of these exceptions would apply. See *United States v. Oates*, 560 F.2d 45, 72 (2d Cir. 1977).

334. *Crawford*, 541 U.S. at 68–69.

335. *Id.* at 61.

336. See generally *id.*

337. *Id.* at 59.

though they are separate and distinct grounds for objection. On a very general level, both the hearsay rule and the confrontation rule operate, subject to some exceptions, to exclude evidence of a person's out-of-court statement when it is offered to prove the truth of the matter asserted in the statement.

2. From 1980 to 2004, the United States Supreme Court followed the *Roberts* approach, under which the confrontation rule largely shadowed the hearsay rule, in that the presence of adequate indicia of reliability in the circumstances of the hearsay statement was the key to overcoming a confrontation objection when the hearsay declarant did not testify at trial. The confrontation rule applied to *all* hearsay statements offered against the defendant, just as the hearsay rule did. More importantly, the prosecution could overcome a Confrontation Clause objection (as well as a hearsay objection) simply by showing that the hearsay statement fell within a "firmly rooted" exception to the hearsay rule, thereby demonstrating, without more, the presence of adequate indicia of reliability.<sup>338</sup> Since many, if not most, hearsay exceptions were firmly rooted in the common-law, compliance with the hearsay rule also automatically overcame a confrontation objection. Stated differently, where firmly rooted hearsay exceptions applied, admission over a Confrontation Clause objection required no showing beyond mere compliance with the hearsay rule requirements.
3. With its 2004 *Crawford* decision, the Supreme Court has rejected the *Roberts* approach in favor of an approach that is based on the Confrontation Clause's purpose of protecting the defendant's procedural right to confront and cross-examine the "witnesses against" him or her, rather than on the presence or absence of indicia of the reliability in the circumstances surrounding the out-of-court statement. This approach results in a much greater divergence of the confrontation rule from the hearsay rule. For one thing, the Confrontation Clause no longer applies to all hearsay evidence offered against an accused. The Clause applies only to a narrower subclass of hearsay—"testimonial" hearsay statements.<sup>339</sup> This subclass includes statements that a declarant would reasonably expect to be used in a criminal prosecution,<sup>340</sup> but it excludes the mass of ordinary hearsay.<sup>341</sup> Additionally, compliance with a firmly rooted exception to the hearsay rule is no longer a ticket to admission of hearsay under

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338. *Ohio v. Roberts*, 448 U.S. 56, 66 (1980).

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

340. *See Crawford*, 541 U.S. at 51–52.

341. *See id.* at 56.

the confrontation rule. Indeed, the *Crawford* Court rejected the criterion for the Confrontation Clause of making admissibility turn on the presence or not of sufficient circumstantial guarantees of trustworthiness (“adequate indicia of reliability”) in the conditions surrounding the making of the hearsay statement. Instead, the Court focused on the clause as a “procedural” guarantee, demanding “not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.”<sup>342</sup> This makes the two rules divorced from one another. Hearsay evidence is not excluded under the hearsay rule when offered against an accused if it complies with one of the many exceptions to the hearsay rule, which are based largely on the presence of circumstantial guarantees of the reliability of the hearsay. On the other hand, testimonial hearsay evidence offered against the accused is excluded under the Confrontation Clause if the declarant does not testify at trial unless: (1) the declarant is unavailable to testify, and (2) the accused had a prior opportunity to testify.<sup>343</sup> There are very few exceptions to this rule. The evidence is excluded under the confrontation rule even though it may clearly fall within an exception to the hearsay rule and even though it may bear ample circumstantial assurances of reliability.

4. Despite the disparity of treatment as a result of *Crawford* between the hearsay rule and the “hearsay” aspects of the confrontation rule, both rules continue to address the same basic question: whether evidence of a person’s out-of-court statement is admissible against a criminal defendant for the purpose of proving the truth of the matter asserted in the statement. Hearsay elements or concepts are an integral part of the confrontation right in that confrontation, like hearsay, excludes (1) evidence of a statement (however, only a “testimonial” statement under confrontation) (2) made out of court (3) by a person (4) when the evidence is offered to prove the truth of the matter asserted in the statement, (5) unless the evidence falls within an exception to the rule of exclusion.
5. For purposes of the hearsay rule, courts have followed at least two different views as to what constitutes a “statement.” The first approach exemplified by the Federal Rules of Evidence, holds that nothing can be a statement unless it was intended as an assertion of some fact or matter. Another approach would include as hearsay evidence one’s out-of-court conduct, even if not intended as an assertion, if the evidence is offered to prove the actor’s belief as to

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342. *Id.* at 61.

343. *Id.* at 68.

some fact or matter and, further, the truth of that belief. While the common-law of hearsay can accommodate these different views on the meaning of a “statement,” the confrontation rule must adopt a uniform approach. This is because the scope and protection of the Sixth Amendment Confrontation Clause should not vary from state to state based on different constructions of what constitutes hearsay evidence for purposes of the confrontation rule.

6. As to what definition of “statement” should apply for purposes of the Confrontation Clause, the “intent to assert” definition seems more consistent with the *Crawford* requirement that the statement be “testimonial.” A testimonial statement is “a solemn declaration made for the purpose of establishing or proving some fact.”<sup>344</sup> Witnesses who “bear testimony” intend to assert some fact or matter—the matter sought to be proved.
7. Sometimes, it appears that there is no “statement” at all because a witness never testifies expressly to a person’s out-of-court statement; however, the witness’s testimony presents the inference that such a statement has been made. Some courts refer to this as “inferential hearsay,” and conclude that it is excludable under the hearsay rule.<sup>345</sup> If the inferential hearsay statement is “testimonial”—such as an alleged accomplice’s statement to the police that implicates the defendant in the crime—would admission of the officer’s testimony violate the defendant’s right of confrontation? The cases are relatively few on this point.<sup>346</sup> However, allowing the inferential hearsay “shortcut” would seem to create an unjustified loophole in the confrontation right, so the better view is that Confrontation Clause should apply in this situation. In any event, since this question goes to the scope and extent of the confrontation right, courts in different states should follow a uniform approach for confrontation purposes, even if they differ as to whether inferential hearsay is subject to the hearsay rule.
8. The hearsay rule and the confrontation rule are limited to evidence of statements that are made *out-of-court*; that is, ones other than statements made while the declarant is testifying as a witness at the current trial or hearing. In the context of the hearsay rule, out-of-court statements may still be subject to exclusion under the rule even if the declarant later testifies at the trial or hearing. The hearsay rule is not

344. *Id.* at 51 (quoting NOAH WEBSTER, AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 1020 (1st ed. 1828)).

345. See cases cited *supra* note 130.

346. See cases cited *supra* notes 135–36.

automatically satisfied by the declarant's later testimony at trial. The hearsay rule, once applicable by the terms of its definition, is indelible; the evidence does not cease to be hearsay merely because the declarant is now a witness. The confrontation rule is distinctly different. Even though the prosecution offers a testimonial hearsay statement against the defendant, the declarant's later testimony as a prosecution witness at trial, accompanied by the declarant's submission to cross-examination by the defendant, suffices to satisfy the confrontation rule.<sup>347</sup> In other words, "when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statement."<sup>348</sup>

9. Both the hearsay rule and the confrontation rule are limited to out-of-court statements *made by a person*. Neither is directed at the out-of-court behavior of animals or the out-of-court information provided by automated devices or machines. This is an area where it is difficult to discern any significant difference between the hearsay rule and the hearsay within the confrontation rule. Just as machines and animals are not "declarants" for purposes of the hearsay rule, so they are not "witnesses" against the defendant for purposes of the Confrontation Clause.
10. Both the hearsay rule and the confrontation rule are limited to evidence of a person's out-of-court statement that is *offered to prove the truth of the matter asserted* in the statement. Neither applies when the evidence is offered for some purpose other than proving the truth of the matter asserted. Under ordinary rules of evidence, the evidence must be relevant to the non-hearsay purpose and, even if the evidence is relevant, the trial court has discretion to exclude it if its probative value is outweighed by the danger of unfair prejudice.<sup>349</sup> Since the Confrontation Clause affords criminal defendants a fundamental constitutional right, one might question whether that right should give way when minimal evidentiary requirements of relevance are satisfied. As some courts have noted, such an approach would "eviscerate" the Sixth Amendment right.<sup>350</sup> A heightened standard should be required. The courts should insist on clear relevance, substantial probative value, and a genuine need for evidence of the testimonial statement before the Sixth Amendment objection can be overcome. Further, specific incriminating testimonial statements should not be disclosed

347. *Crawford*, 541 U.S. at 57.

348. *Id.* at 59–60 n.9.

349. *See, e.g.*, FED. R. EVID. 403.

350. *See* cases cited *supra* note 182.

to the jury if, as a practical matter, the jury is likely to use them as substantive evidence of the defendant's guilt. Some courts already seem to impose similar requirements.<sup>351</sup>

11. The hearsay rule has a large number of exceptions—somewhere north of 30.<sup>352</sup> The large number of exceptions reflects the practical compromises in the rule. On the one hand, hearsay evidence is troublesome because the declarant is making the statement without the safeguards that would be present if the declarant were relating the matter as a witness at the current trial: telling the story under oath in the presence of the finder of fact and subject to contemporaneous cross-examination. On the other hand, much hearsay is given under circumstances which supply solid assurances of its reliability. Since the hearsay rule applies generally in all cases, civil and criminal, too much valuable evidence would be excluded unless there were a large number of exceptions. In effect, the exclusionary hearsay rule allows the presence of circumstantial assurances of trustworthiness, reflected by the various exceptions, to compensate for the lack of ideal testimonial conditions, thus permitting the admission of a great deal of hearsay.
12. The confrontation rule has only a few exceptions—those recognized by the common-law prior to the adoption of the Sixth Amendment in 1791.<sup>353</sup> Unless one of these exceptions applies, the evidence must be excluded in the absence of an opportunity by the defendant to cross-examine the declarant. The rule, unlike the hearsay rule, is not a practical compromise whereby the presence of circumstantial assurances of trustworthiness in the making of the hearsay statement is an acceptable substitute for the lack of cross-examination and other testimonial safeguards. Instead, the confrontation rule is an ironclad command that the defendant must be afforded the opportunity to cross-examine prosecution witnesses at trial, and “witnesses” include hearsay declarants who make testimonial statements.<sup>354</sup> While the confrontation rule will ultimately help to improve the reliability of testimonial hearsay evidence, essentially it is concerned with ensuring and protecting the procedural right of the accused to cross-examine the “witnesses against” him or her as the best means of assessing the reliability of testimonial hearsay statements.<sup>355</sup>

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351. See cases cited *supra* note 187.

352. See *supra* note 211 and accompanying text.

353. *Crawford*, 541 U.S. at 54.

354. See generally *id.*

355. See *id.* at 42.