COURSE CORRECTION: A PROPOSAL TO LIMIT THE ADMISSIBILITY AND USE OF "COURSE OF INVESTIGATION" TESTIMONY IN CRIMINAL TRIALS

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ABSTRACT

Allowing agents to narrate the course of their investigations, and thus present juries damning information that is not subject to cross-examination, would largely abrogate the defendant's rights under the Sixth Amendment and the hearsay rule.[1]

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I. Introduction

In 1988, federal prosecutors in Chicago charged Rodrigo Mejia with cocaine trafficking.[2] At trial, a drug enforcement agent testified that surveillance of Mejia's home began with an informant's tip to police that a

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1. United States v. Silva, 380 F.3d 1018, 1020 (7th Cir. 2004).
2. United States v. Mejia, 909 F.2d 242, 245 (7th Cir. 1990).

"shipment" was expected to arrive at the house.[3] The trial court admitted the agent's testimony about the tip over a hearsay objection.[4] After Mejia's conviction, the Seventh Circuit upheld the lower court's ruling, reasoning that the informant's statements were relevant "to show something other than the truth."[5] Namely, the tip explained why agents initiated the surveillance—"a fact that in no way depended on the tip's truth."[6]

The Federal Rules of Evidence include a generic restriction on the admissibility of hearsay, that is, a declarant's out-of-court statement offered for the truth of the matter asserted.[7] The prohibition is rooted in concerns that the declarant "might have been lying" or "might have misperceived the events which he relates" to the listener.[8] In turn, the listener "might [have] misunderstood or taken out of context" the declarant's words.[9] To mitigate these hazards and to "encourage a witness to do his best," the "Anglo-American tradition" requires that a witness's testimony is given "under oath," "in the personal presence" of the judge and jury, and "subject to cross-examination."[10]

Still, the evidence rules contain myriad exceptions to the hearsay prohibition.[11] Moreover, courts routinely allow witnesses to testify to a declarant's out-of-court statements as relevant for reasons other than "the truth of the matter asserted."[12] Frequently, those statements are admitted to show the effect or impact on the state of mind of the testifying witness who heard or read the statement.[13] A common scenario involves law enforcement witnesses in criminal prosecutions who testify to out-of-court statements to give "background" for their subsequent actions.[14] These statements are often referred to as "course of conduct" or

3. *Id.* at 246.
4. *Id*. at 247.
5. *Id.*
6. *Id.*
7. Fed. R. Evid. 802. The evidence rules in all fifty states and the District of Columbia contain a similar prohibition on hearsay.
8. *See* Williamson v. United States, 512 U.S. 594, 598 (1994); Fed. R. Evid. 801 advisory committee introductory note to Article VIII: "The factors to be considered in evaluating the testimony of a witness are perception, memory, and narration."
9. Williamson, 512 U.S. at 598.
10. Fed. R. Evid. 801 advisory committee introductory note to Article VIII.
11. *See* Fed. R. Evid. 801, 803, 804.
12. Steven Goode & Olin G. Wellborn III, Courtroom Evidence Handbook 187 (2020) ("An out-of-court statement is not inadmissible as hearsay if it has relevancy apart from the truth of the matter that it asserts or implies.").
13. *Id.* at 190–91.
14. Joëlle Hervic, *Statements of Bystanders to Police Officers Containing an Accusation of Criminal Conduct Offered to Explain Subsequent Police Conduct*, 55 U. Miami L. Rev. 771, 771 (2001) (describing the admission of out-of-court statements to explain police conduct in relation to a criminal prosecution "with the ringing endorsement of judges"); *see also Mejia*, 909 F.2d at 246; United States v. Woods, 684 F.3d 1045, 1062 (11th Cir. 2012) (containing testimony that images of child pornography found on defendant's computer matched known images of child pornography not offered for its truth but to explain how certain

"course of investigation" testimony.[15] In other words, the statements are not admitted for their "truth" but as relevant to demonstrate that a law enforcement officer heard the declarant's words and acted upon them in furtherance of a criminal investigation.[16]

In addition to skirting the rule against hearsay, admission of "course of investigation" testimony confers a second benefit upon prosecutors. Specifically, as the out-of-court statements are not admitted for their truth, criminal defendants are hard-pressed to raise a viable Sixth Amendment Confrontation Clause challenge.[17] This problem exists even though the majority of "course of investigation" statements would otherwise violate the Confrontation Clause under the U.S. Supreme Court's definition of "testimonial" statements, such as those that function as a substitute for courtroom testimony.[18] Further, the non-hearsay designation for "course of investigation" statements absolves the prosecution of establishing the declarant's "unavailability," another essential component of a Confrontation Clause analysis.[19]

Despite longstanding judicial approval of "course of investigation" testimony, its admission sows juror confusion and unfairly prejudices criminal defendants. The distinction between hearsay statements admissible for their "truth" versus their "effect on the listener" is critical to the

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images were selected for "in-depth analysis"); United States v. Breland, 356 F.3d 787, 792 (7th Cir. 2004) (opining that officer's testimony about an informant's statement that "a 'black (Note: the single quotation mark before "black" is an opened but unclosed single quotation mark) male with a bald head . . . [was] selling cocaine and marijuana from the relevant residence" was offered to explain why the officer approached the defendant when he was standing outside the residence and matched the informant's description and was not hearsay); Suggs v. Stanley, 324 F.3d 672, 681–82 (8th Cir. 2003) (finding testimony admissible only to show why officer went home and not to prove that criminal activity reported by dispatcher or the 911 caller were true); United States v. Aguwa, 123 F.3d 418, 421 (6th Cir. 1997) (agent's recounting of informant's statements admitted only to "explain how and why the agents came to be involved" with defendant).

15. Woods, 684 F.3d at 1063 (citing United States v. Baker, 432 F.3d 1189, 1208 n.17 (11th Cir. 2005)); United States v. Eberhart, 434 F.3d 935, 939 (7th Cir. 2006); United States v. Brown, 923 F.2d 109, 111 (8th Cir. 1991).
16. *See, e.g.*, Suggs, 324 F.3d at 681–82; Aguwa, 123 F.3d at 421; Mejia, 909 F.2d at 247.
17. Jones v. Basinger, 635 F.3d 1030, 1046 (7th Cir. 2011) (citing United States v. Akinrinade, 61 F.3d 1279, 1283 (7th Cir. 1995)); *see also* Carter v. Douma, 796 F.3d 726, 736 (7th Cir. 2015) ("When the prosecution offers out-of-court statements of non-witnesses on the theory they are being offered to explain "the course of the investigation," it runs a substantial risk of violating both the hearsay rules of evidence and the Confrontation Clause rights of the defendant."). (Note: there are two open double quotations and only one closing double quotation).
18. *See* Crawford v. Washington, 541 U.S. 36 (2004); *see also* Jones, 635 F.3d at 1046; Jeffrey Bellin, *The Incredible Shrinking Confrontation Clause*, 92 B.U. L. Rev. 1865, 1869 (2012) (commenting that out-of-court testimonial statements are "roughly characterized as those made for purposes of litigation.").
19. California v. Green, 399 U.S. 149, 180-83 (1970).

fact-finding process, but it is nuanced—if not altogether impenetrable.[20] Further—unlike other hearsay anomalies[21]—courts are not required to provide a limiting instruction to differentiate the two.[22] Additionally, an instruction's value to mitigate the prejudice of "course of investigation" testimony is dubious.[23] Still, without guidance, the risk that juries will treat "course of investigation" testimony as "true" is ever-present.[24]

Even more problematic, "course of investigation" testimony is reserved only for prosecutors and police officers.[25] While its origin is nebulous,[26] the admissibility and use of "course of investigation" testimony flourished during the 1980s "War on Drugs" period and emergence of mass incarceration policies.[27] By 1993, a Third Circuit federal appeals court

20. Paul S. Milich, *Re-Examining Hearsay Under the Federal Rules: Some Method for the Madness*, 39 U. Kan. L. Rev. 893, 893–95 (1991) (citing sources characterizing the hearsay rule as "bizarre," "a crazy quilt," and "an unintelligible thicket"); *see also* James W. McElhaney, McElhaney's Trial Notebook 265 (4th ed. 2005) (describing lawyers' impression of the hearsay rule as "baffling," "amazingly complex," and "impossible to apply").
21. For instance, courts must give a jury instruction to explain the difference between prior inconsistent statements offered to impeach a witness's credibility versus those offered for their truth. *See, e.g.*, Model Crim. Jury Instructions § 2.16 cmt. (3d Cir. 2020).
22. *See, e.g.*, United States v. Mejia, 909 F.2d 242, 247 (7th Cir. 1990) ("Mejia never asked for a limiting instruction so he cannot complain about the lack of one on appeal.").
23. Hervic, *supra* note 14, at 771 (noting that levels of judicial scrutiny for "course of investigation" statements are varied and inconsistent); United States v. Jones, 930 F.3d 366, 377–78 (5th Cir. 2019) (holding that court's use of a limiting instruction regarding officer's testimony about informant's tip did not cure confrontation violation); Orlando v. Nassau Cty. Dist. Att'y's Off., 915 F.3d 113, 121-22 (2d Cir. 2019) (holding that court's use of a limiting instruction regarding officer's testimony about codefendant's statements did not cure confrontation violation).
24. Hervic, *supra* note 14, at 772 ("The jury is likely to consider ['course of investigation'] testimony for its truth.").
25. *Id.* at 771–72; Charles T. McCormick et al., 2 McCormick on Evidence § 249 (5th ed. 1999) (highlighting "one area where abuse may be a particular problem involves statements by arresting or investigating officers regarding the reason for their presence at the scene of a crime").
26. Federal and state judicial opinions involving "course of investigation" testimony emerged in the 1970s. *See, e.g.*, United States v. Mancillas, 580 F.2d 1301, 1310 (7th Cir. 1978) (rejecting "course of investigation" testimony); People v. Estes, 37 Ill. App. 3d 889, 894-95 (1976) (mischaracterizing "course of investigation" testimony as an "exception to the hearsay rule").
27. David Farber, *The War on Drugs Turns 50 Today. It's Time to Make Peace*, Wash. Post (June 17, 2021), https://www.washingtonpost.com/outlook/2021/06/17/war-drugs-turns-50-today-its-time-make-peace/ [https://perma.cc/CD56-2X7F] (noting the escalation of a "punitive war on drugs" during President Reagan's administration); James Cullen, *The History of Mass Incarceration*, Brennan Ctr. Just. (July 20, 2018), https://www.brennancenter.org/our-work/analysis-opinion/history-mass-incarceration [https://perma.cc/BUC8-9TQY] (explaining that the prison population "truly exploded" during President Reagan's administration and continued to grow due to the Violent Crime Control and Law Enforcement Act of 1994); Bellin, *supra* note 18, at 1875-77 (describing the admissibility

warned that "course of investigation" testimony was "an area of widespread abuse" in criminal prosecutions.[28] The practice continues mostly unabated today, even amidst other reforms to the criminal justice system.[29]

To be sure, "course of investigation" testimony will persist in criminal trials—if due more to prosecutorial foot-stomping and jurisdictional custom than to constitutional fidelity. Courts, however, must take special care to ensure that prosecutors do not sidestep directives derived from *U.S. v. Crawford*, especially if police conduct can be readily explained without an explicit recounting of extrajudicial statements. In this Article, I review Confrontation Clause jurisprudence, with a focus on the requirement of witness unavailability and on the definition of "testimonial" statements. I then chart recent federal appellate court decisions rejecting "course of investigation" testimony on Confrontation Clause grounds. Finally, drawing upon recent interpretations of the Confrontation Clause, I propose a two-part gatekeeping standard to limit the admissibility and protect against the misuse of "course of investigation" testimony.

II. The Confrontation Clause: Witness Unavailability and "Testimonial" Statements

The Confrontation Clause of the Sixth Amendment provides that "in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him[.]"[30] In practical terms, the language affords criminal defendants the right to cross-examine adverse trial witnesses.[31] While a faithful reading of the Confrontation Clause would bar all out-of-court statements introduced at trial without an opportunity for cross-examination, the provision has been subject to a century-plus

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of laboratory reports in narcotics prosecutions without analyst testimony as "another noteworthy practice" associated with hearsay and prosecutions during the "War on Drugs").

28. United States v. Sallins, 993 F.2d 344, 346 (3d Cir. 1993) (citing Charles T. McCormick et al., 2 McCormick on Evidence § 249 (4th ed. 1992)); *see also* Jones v. Basinger, 635 F.3d 1030, 1046 (7th Cir. 2011) ("While such 'course of investigation' evidence usually has little or no probative value, the dangers of prejudice and abuse posed by the 'course of investigation' tactic are significant.").

29. Ames Grawert & Tim Lau, *How the FIRST STEP Act Became Law — and What Happens Next*, Brennan Ctr. Just. (Jan. 4, 2019), https://www.brennancenter.org/our-work/analysis-opinion/how-first-step-act-became-law-and-what-happens-next [https://perma.cc/UKZ6-7YVC] (discussing legislative reforms to federal charging, sentencing, and incarceration policies and practices).

30. U.S. Const. amend. VI.

31. Pointer v. Texas, 380 U.S. 400, 406–07 (1965); *see also* Coy v. Iowa, 487 U.S. 1012, 1021 (1988) (characterizing the "'right to *meet face to face* all those who appear and give evidence *at trial*'" as "the irreducible literal meaning of the Clause" (quoting California v. Green, 399 U.S. 149, 175 (1970) (Harlan, J., concurring))); Davis v. Alaska, 415 U.S. 308, 315–16 (1974) ("The main and essential purpose of confrontation is *to secure for the opponent the opportunity of cross examination.*" (quoting 5 John Henry Wigmore, A Treatise on the System of Evidence in Trials at Common Law § 1395 at 123 (3d ed. 1940)).

of judicial calibrations.[32] In 1895, the Supreme Court in *Mattox v. United States* held that "the substance" of the Confrontation Clause is preserved when transcripts of testimony from unavailable witnesses are admitted at the retrial of a defendant who had an opportunity to cross-examine the witnesses during the initial trial.[33] The Court reasoned that "a technical adherence to the letter" of the Confrontation Clause "must occasionally give way to considerations of public policy."[34] A categorical exclusion, the Court warned, would amount to an "unwarrantable" extension of a defendant's confrontation rights at the expense of "the safety of the public."[35] Further, the Court recognized certain hearsay exceptions such as "dying declarations" ("the sense of impending death is presumed to remove all temptations of falsehood") that predated the Confrontation Clause and allowed for testimony by unavailable witnesses due to "the necessities of the case, and to prevent a manifest failure of justice."[36] In the Court's view, those exceptions validated its qualified stance.[37]

For the next several decades, the *Mattox* Court's weighing of a defendant's historical confrontation rights against prevailing public policy considerations served as a durable, if mostly unsystematic, analytical approach.[38] Two developments proved course-altering. First, in 1965, the Court incorporated the Confrontation Clause to the states.[39] Much like the *Mattox* Court's federal dilemma, incorporation challenged state courts to square a defendant's confrontation rights with preexisting hearsay rules.[40] A decade later, U.S. Congress enacted the Federal Rules of Evidence.[41] The hearsay exceptions comprised "the lengthiest and far and away the most significant article" in the rules.[42] Shortly after their promulgation, Jon Waltz, a Northwestern University law professor, described the exceptions as "lengthy, complicated, and full of innovations."[43]

32. *See* John G. Douglass, *Confronting the Reluctant Accomplice*, 101 Colum. L. Rev. 1797, 1817 n.69 (2001) ("The problem of applying the Confrontation Clause to hearsay is among the most perplexing dilemmas of constitutional criminal procedure.").
33. 156 U.S. 237, 242-44 (1895).
34. *Id.* at 242-43.
35. *Id.* at 243.
36. *Id.* at 243–44.
37. *Id.* at 243. (affirming an obligation to "interpret the Constitution in the light of the law as it existed at the time it was adopted, not as reaching out for new guaranties of the rights of the citizen").
38. *See* Jeremy A. Blumenthal, Comment, *Reading the Text of the Confrontation Clause: "To Be" or Not "To Be"?*, 3 U. Pa. J. Const. L. 722, 735 (2001).
39. Pointer v. Texas, 380 U.S. 400, 403–06 (1965) (holding that confrontation is "a fundamental right and is made obligatory on the States by the Fourteenth Amendment").
40. *See* Blumenthal, *supra* note 38.
41. Jon R. Waltz, *The New Federal Rules of Evidence: An Overview*, 52 Chi.-Kent L. Rev. 346 (1975).
42. *Id.* at 355 (describing "the rule against hearsay evidence and all its pendant exceptions have long been either the bane or the joy of litigators").
43. *Id.* at 350.

In 1980, *Ohio v. Roberts* effectively coalesced the Confrontation Clause into the newly promulgated hearsay exceptions.[44] In doing so, the Supreme Court abandoned efforts of a textual interpretation of the Confrontation Clause in favor of a rules-inspired, "reliability" analysis.[45] The explicit conflation of the separate confrontation and hearsay analyses was made manifest in a two-part test.[46] First, the Court required the prosecution to establish the declarant's "unavailability" to testify at trial despite "good faith efforts" to produce the declarant.[47] Upon demonstration of unavailability, the declarant's out-of-court statement satisfied the Confrontation Clause if it bore "adequate 'indicia of reliability.'"[48] The Court defined "reliability" as statements that "fall within 'firmly rooted' hearsay exceptions" or those "which rest upon such solid foundations that admission of virtually any evidence within them comports with the 'substance of the constitutional protection.'"[49] Moreover, even in the absence of a "firmly rooted" hearsay exception, the Court concluded that a statement that contains a "particularized guarantee of trustworthiness" passes constitutional muster.[50]

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44. Ohio v. Roberts, 448 U.S. 56 (1980).The defendant was charged with a check forgery. *Id.* at 58. At a preliminary hearing, the defendant called the victim's daughter as the defense's only witness. *Id.* The daughter testified that she permitted the defendant to temporarily reside at her apartment but denied that she gave the defendant access to the victim's checkbook. *Id.* Before trial, the government issued five subpoenas for four different trial dates to the daughter. *Id.* at 59. She did not respond. *Id.* At trial, the defendant testified that the victim's daughter gave the defendant the checkbook. *Id.* During rebuttal, the prosecution relied upon an Ohio evidentiary rule allowing for the admissibility of preliminary examination testimony of a witness who cannot "for any reason be produced at the trial." *Id.* The trial court admitted the transcript over the defendant's objection and a jury convicted him. *Id.* at 59–60.
45. GLEN WEISSENBERGER & JAMES J. DUANE, FEDERAL RULES OF EVIDENCE: RULES, LEGISLATIVE HISTORY, COMMENTARY & AUTHORITY 505 [NEED PINCITE] (2011) ("As a practical matter, [the "reliability" analysis] rendered the Confrontation Clause largely duplicative of the hearsay rules[.]"); Bellin, *supra* note 18, at 1873 n. 39 (*Roberts* "makes no attempt to anchor its theory in either the language of the Sixth Amendment or its history") (quoting 30A CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE & PROCEDURE § 6367 (1972)).
46. Roberts, 448 U.S. at 66; *see also* Bellin, *supra* note 18, at 1873 (noting the "fairly intuitive logical argument" in Roberts to establish the "reliability of hearsay").
47. *Id.* at 74 ("The lengths to which the prosecution must go to produce a witness . . . is a question of reasonableness") (quoting California v. Green, 399 U.S. 149, 189 n.22 (1970)).
48. *Id.* at 66.
49. *Id.* at 66. Applying the test, the Court held that the Ohio prosecutors successfully established the daughter's "unavailability" through repeated attempts to subpoena her. *Id.* at 75. Moreover, the daughter's preliminary hearing testimony fell within a "firmly rooted" hearsay exception as it was given under oath and subjected to adversarial testing. *Id.* at 70–73.. Therefore, the trial court's admission of the daughter's earlier testimony did not violate the Confrontation Clause. *Id.* at 73–75.
50. *Id.* at 66.; *See also* Idaho v. Wright, 497 U.S. 805, 817 (1990) (excluding hearsay as prosecution failed to show that declarant's out-of-court statements fell within

The *Roberts* era was marked by significantly diminished confrontation rights as courts routinely relied on "firmly rooted" hearsay exceptions or other "guarantees" of trustworthiness to admit extrajudicial statements by unavailable witnesses.[51] Further, despite *Roberts*' efforts towards a uniform and user-friendly standard, lower courts applied the test in a "starkly inconsistent manner."[52] While a boon to prosecutors in an age of exploding incarceration rates, the "wishy washy" and "widely reviled" standard lost favor among the justices in a series of subsequent decisions.[53]

In 2004, *Crawford v. Washington* disentangled the hearsay rules from the Confrontation Clause.[54] In the process, the Supreme Court rejected *Roberts* and resuscitated confrontation rights for criminal defendants.[55] The *Crawford* Court reversed a conviction after the prosecution introduced the "testimonial" hearsay of an unavailable witness.[56] The Court reasoned that the Sixth Amendment requires face-to-face confrontation by witnesses who give the functional equivalent of "testimony" against

a "firmly rooted" hearsay exception or, in the alternative, bore "particularized guarantees of trustworthiness").

51. *See* David H. Kwasniewski, *Confrontation Clause Violations as Structural Defects*, 96 Cornell L. Rev. 397, 399 (2011) ("In effect, the [*Roberts*] Court decreed that defendants do not have a right to cross-examination *per se*; rather, they have a right to the goal of cross-examination-reliable testimony"); *See* Weissenberger & Duane, *supra* note 45, at 506 (noting that the *Roberts* test "greatly minimized the incentive for criminal defense attorneys to object on constitutional grounds to the admission of hearsay").
52. Fred O. Smith, *Crawford's Aftershock: Aligning the Regulation of Nontestimonial Hearsay with the History and Purposes of the Confrontation Clause*, 60 Stan. L. Rev. 1497, 1515 (2008) (commenting that "courts adopted ways of applying *Roberts* that stood fundamentally opposed to each other.").
53. Bellin, *supra* note 18, at 1867; *see also* Ohio v. Clark, 576 U.S. 237, 252 (2015) (Scalia, J., concurring) (remarking that "[p]rosecutors, past and present, love that flabby [Roberts] test"); Weissenberger & Duane, supra note 45, at 505 ("[After] Ohio v. Roberts, the [U.S.] Supreme Court interpreted the Confrontation Clause as imposing only a minimal constraint on a prosecutor's use of hearsay that would otherwise be admissible under the hearsay rules.").
54. Crawford v. Washington, 541 U.S. 36 (2004). In *Crawford*, the defendant confessed that he stabbed the victim following an earlier incident when the victim assaulted the defendant's wife. *Id.* at 38. The defendant claimed he acted in self-defense as he believed the victim was armed. *Id.* The defendant's wife gave a tape-recorded statement to the police and admitted leading the defendant to victim's apartment, but denied seeing a weapon in the victim's hands. *Id.* at 40. At trial, the defendant's wife did not testify after the defendant invoked his marital privilege. *Id.* Over hearsay and Confrontation Clause objections, the trial court admitted the tape recording as a statement against interest that bore "a particularized guarantee of trustworthiness." *Id.* After an appeals court reversed the ruling, the state supreme court reinstated the conviction, reasoning that the wife's confession was trustworthy as it was "virtually identical" to the defendant's statement. *Id.* at 41.
55. George Fisher, Evidence 568 (2d ed. 2008) ("After *Crawford*, *Roberts* and its reliability-based analysis are dead"); Weissenberger & Duane, *supra* note 45, at 506 (stating that *Crawford* "completely overturned" a "quarter century of constitutional law" based on *Roberts*).
56. Crawford, 541 U.S. at 61.

an accused—irrespective of whether the statements pass an amorphous and subjective "reliability" test.[57] In characteristically acerbic fashion, Justice Scalia wrote that "[d]ispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because the defendant is obviously guilty."[58]

By any measure, *Crawford*'s emphasis on extrajudicial "testimonial" statements produced a more rigorous confrontation analysis.[59] While the Court "[left] for another day" a "comprehensive" definition of "testimonial," it applied the term "at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations, ."[60] The Court then integrated the new standard into a historical framework shaped by its previous Confrontation Clause rulings.[61] Invoking *Mattox*, the *Crawford* Court concluded that "[t]estimonial statements of witnesses absent from trial" may be "admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine."[62]

Post-*Crawford* Supreme Court cases have reshaped the contours of "testimonial."[63] Nonetheless, extrajudicial statements that are "potentially relevant" to later criminal prosecutions remain the Court's central concern.[64] Further, "testimonial" statements as defined in subsequent opinions are those in which the declarant describes "what happened" versus "what is happening."[65] Additionally, while the "level of formality" in an exchange between police or prosecutors and a witness continues as a factor, it is no longer "the sole touchstone" of the inquiry.[66] Indeed,

57. *Id.* ("Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of 'reliability.'").
58. *Id.* at 62.
59. Bellin, *supra* note 18, at 1866–67; Kwasniewski, *supra* note 51, at 403 (arguing that "treating Confrontation Clause violations as structural defects is more consonant with contemporary interpretations of the Sixth Amendment").
60. Crawford, 541 U.S. at 68. In contrast, "non-testimonial" statements include "an offhand, overheard remark" or "a casual remark to an acquaintance." *Id.* at 51.
61. *Id.* at 68–69.
62. *Id.* at 59–60 n. 9 (citing, among others, Mattox v. United States, 156 U.S. 237, 244 (1895) and California v. Green, 399 U.S. 149, 165–168 (1970)).
63. *See* Davis v. Washington, 547 U.S. 813, 822 (2006) (holding that "non-testimonial" statements include those made for the "primary purpose" of enabling the police to respond to an ongoing emergency versus those intended to prove past events relevant to a later prosecution); Bullcoming v. New Mexico, 564 U.S. 647, 663–65 (2011) (concluding that state crime laboratory reports used to prove an element of a crime are "testimonial"); Michigan v. Bryant, 562 U.S. 344, 367 (2011) (requiring a "combined inquiry that accounts for both the declarant and the interrogator" in determining whether a statement is "testimonial.")
64. *Davis*, 547 U.S. at 822; *see also* Ohio v. Clark, 576 U.S. 237, 245 (2015) ("In the end, the question is whether, in light of all the circumstances, viewed objectively, the 'primary purpose' of the conversation was to 'creat[e] an out-of-court substitute for trial testimony.'" (quoting *Bryant*, 562 U.S. at 358)).
65. Davis, 547 U.S. at 830.
66. Bryant, 562 U.S. at 366.

a "testimonial" statement may be volunteered or made in the absence of any interrogation—including statements that spur a police investigation.[67] In essence, a "testimonial" statement may be either "formal or informal."[68]

III. Appellate Trends Rejecting "Course of Investigation" Testimony

Of course, only "testimonial" *hearsay* is barred by the Sixth Amendment.[69] Multiple federal appellate courts, however, have lately proved unwilling to facilitate prosecutorial efforts to circumvent *Crawford* through use of "course of investigation" testimony.[70] In July 2021, the Fifth Circuit took up "the recurring problem" of prosecutors "[b]ackdooring highly inculpatory hearsay via an explaining-the-investigation rationale."[71] In *United States v. Sharp*, a police detective stated that on the day of the defendant's arrest, another officer "got a call from a confidential informant saying Mr. Sharp was at [the county courthouse], and he was in possession of a large amount of methamphetamine."[72] After Sharp's conviction, the prosecution argued on appeal that the statement was offered and admitted at trial "to explain the course of the investigation rather than to assert that the informant's account was true."[73] In response, the Fifth Circuit opined that "the mere existence of a purported non-hearsay purpose does not insulate an out-of-court statement from a Confrontation Clause challenge."[74] The Court employed a balancing test from the evidence rules to make its point, reasoning that "[t]he probative value of the non-hearsay purpose of explaining the investigation may pale in comparison to the risk that the jury will consider a highly inculpatory out-of-court statement for its truth."[75] It then offered a hypothetical exchange in a murder case to highlight the prejudicial impact of "course of investigation" testimony:

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67. Davis, 547 U.S. at 822 n. 1.
68. Bryant, 562 U.S. at 358; *see also* Weissenberger & Duane, *supra* note 45, at 514 (commenting that *Bryant* "apparently regarded the 'formality' variable as the least important part of the equation, turning to a consideration of that factor only after examining every other possible basis for determining whether the statement at issue was testimonial").
69. Crawford, 541 U.S. at 59 n. 9 (2004) (citing Tennessee v. Street, 471 U.S. 409, 414 (1985)).
70. *See, e.g.*, Jones v. Basinger, 635 F.3d 1030, 1046 (7th Cir. 2011) ("While such 'course of investigation' evidence usually has little or no probative value, the dangers of prejudice and abuse posed by the 'course of investigation' tactic are significant.").
71. United States v. Sharp, No. 20-60437, 2021 WL 3136040, at *6 (5th Cir. July 26, 2021).
72. *Id.* at *5.
73. *Id.*
74. *Id.*
75. *Id.*; *see also* Fed. R. Evid. 403 ("The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of . . . unfair prejudice.").

> PROSECUTOR: Why did you start investigating the defendant?
> DETECTIVE: An eyewitness told me that the defendant was the shooter.[76]

While the Court acknowledged that the above exchange may reveal the origins of a criminal investigation, such a rationale "does not permit an end run around the confrontation right."[77] The testimony's marginal value in explaining an investigation's starting point is substantially outweighed by "the intolerably high risk" that a jury will presume a defendant's guilt.[78] Similarly, the officer in Sharp's case repeated an out-of-court statement "of the most damaging kind—that Sharp was committing the crime" without providing an opportunity for Sharp to confront his accuser.[79] Meanwhile, there was "minimal need" for the officer to disclose the tip's substance as background for his ensuing investigation.[80] The Court concluded that unchecked "course of investigation" testimony threatens to "eviscerate the constitutional right to confront and cross-examine one's accusers."[81]

Two years earlier, the Fifth Circuit in *United States v. Jones* drew a bright line between "background information showing the police officers did not act without reason" and statements "specifically link[ing] a defendant to the crime."[82] In that case, a police officer testified at trial that he "made a phone call to my confidential source, who then made some phone calls himself and got back to me that [a drug] deal had happened."[83] He then testified that "based on that information" he stopped the defendant.[84] Over an objection, the Court admitted the statements to explain the officer's basis for the stop.[85] During its closing argument, the government highlighted the statements to "reinforce" the connection between the officer and informant.[86] Reversing the trial court's ruling, *Jones* recognized that "a witness's statement to police that the defendant is guilty of the crime charged is highly likely to influence the direction of a criminal investigation."[87] Therefore, at a minimum, a "police officer cannot repeat such out-of-court accusations at trial, even if helpful to explain why the defendant became a suspect or how the officer was able

76. *Sharp*, 2021 WL 3136040 at *5.
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.*
81. *Id.* at *6.
82. United States v. Jones, 930 F.3d 366, 377–78 (5th Cir. 2019) (citing United States v. Kizzee, 877 F.3d 650 (5th Cir. 2017); United States v. Vitale, 596 F.2d 688, 689 (5th Cir. 1979)).
83. *Id.* at 376.
84. *Id.*
85. *Id.* at 375.
86. *Id.* at 376 (noting that the government's opening statement also referenced the connection between the two).
87. *Id.* at 377.

to obtain a search warrant (internal quotations omitted)."[88] In its ruling, *Jones* emphasized the need for "vigilance" by courts to preserve "the core guarantees of the Confrontation Clause" when faced with prosecutorial "attempts to 'explain the officer's actions' with out-of-court statements."[89]

Shortly after *Jones*, the Second Circuit followed suit. In *Orlando v. Nassau County District Attorney's Office*, a police officer testified at trial that a murder suspect gave self-inculpatory statements to a second officer.[90] According to the testifying officer, the suspect then claimed that the defendant "had paid him to [commit the murder]."[91] The trial court interrupted the officer's testimony and instructed the jury:

> You have been permitted to hear testimony about remarks made to the defendant by [the detective] about statements allegedly made by [the other suspect]. You're to consider this testimony only when considering the circumstances under which the defendant himself may have made statements and for no other purposes.[92]

At the same time, the court told the jury "to completely disregard any statement allegedly made by [the other suspect] when considering evidence against the defendant."[93] The court concluded by instructing the jurors "not to concern yourself with whether [the other suspect] did or did not make any statements to the police, if he did, what those statement[s] may have been or whether or not they were true."[94] The officer resumed his testimony and stated that the defendant, upon hearing the other suspect's statements, "changed his account of the evening's events" and admitted to his role in the murder.[95] After the jury returned a guilty verdict, the state appellate courts upheld the conviction, agreeing that the officer's testimony was admitted for the "limited purpose of explaining [his] actions . . . and not for the truth of the [suspect's] statement."[96]

On appeal of the federal district court's denial of habeas relief, the Second Circuit took the opposite tack. The officer's testimony, it ruled,

88. *Id.* (5th Cir. 2019) (citing United States v. Kizzee, 877 F.3d 650, 654 (5th Cir. 2017) ("'holding that a detective's testimony that he was able to obtain a search warrant for the defendant's house after questioning a witness about drug purchases violated the Confrontation Clause'"); Taylor v. Cain, 545 F.3d 327, 331, 336 (5th Cir. 2008) (finding a violation of clearly established law when an officer testified that he was able to develop a suspect after an unnamed individual told him '"that the perpetrator was Bruce"'); United States v. Hernandez, 750 F.2d 1256, 1257 (5th Cir. 1985) ("rejecting argument that hearsay evidence identifying defendant as a drug smuggler was permissibly used '"to explain the motivation behind DEA's investigation"').
89. *Id.* ("The prosecution must be circumspect in its use [of 'course of investigation' testimony]") (citing United States v. Evans, 950 F.2d 187, 191 (5th Cir. 1991)).
90. Nassau Cty. Dist. Attorney's Off, 915 F.3d at 116–17.
91. *Id.* at 117.
92. *See id.* at 117–18 (The trial court gave a similar limiting instruction at the close of trial).
93. *Id.* at 118.
94. *Id.*
95. *Id.*
96. *Id.* at 119..

resulted in a "clear" violation of the Confrontation Clause.[97] Like *Jones*, the prosecution's use of the testimony in its closing in support of its "murder for hire" theory increased the likelihood that the jury accepted the out-of-court statements as true.[98] Further, the court's attempt at a limiting instruction did not cure the violation, especially as the out-of-court statements were made by an alleged accomplice to the crime.[99] Notwithstanding its facial insufficiency, the court also noted that the instruction's language was "decidedly unclear."[100] The trial court told the jury to "consider [the officer's testimony] when considering the circumstances under which [the defendant] made any statements."[101] Those "circumstances," however, directly involved the inadmissible hearsay as the defendant's statements occurred immediately after the testifying officer relayed the other suspect's conflicting account of the crime.[102]

Among the federal appellate courts, the Seventh Circuit has been among the most vociferous in its post-*Crawford* rejections of purported "course of investigation" testimony.[103] Just months after *Crawford*, the court concluded that "[a]llowing agents to narrate the course of their investigations, and thus spread before juries damning information that is not subject to cross-examination . . . would eviscerate the constitutional right to confront and cross-examine one's accusers."[104] It has since described "course of investigation" testimony as "a constitutional and evidentiary minefield" as it is "so often abused and/or misunderstood" and admonished "defense counsel and trial judges to be on high alert when the prosecution offers what sounds like hearsay to explain 'the course of the investigation.'"[105] Most recently, the Court vacated an Indiana state conviction on habeas review after a police officer at trial "knit[ted] together the state's case" using "a flood of hearsay" masquerading as "course of investigation" testimony.[106]

Still, like other federal and state courts, the Seventh Circuit has yet to provide meaningful guidance to check the admissibility of "course of

97. *Id.* at 123.
98. *Id.* at 118–19, 123 ("The risk that the jury would consider [the suspect's] statement for its truth was simply too great to allow the jury to hear it, absent cross-examination[.]").
99. *Id.* at 122 (citing United States v. Bruton, 391 U.S. 123, 136 (1968)).
100. *Id.* at 124, n.17.
101. *Id.*
102. *Id.*
103. *See, e.g.*, Jones v. Basinger, 635 F.3d 1030, 1046 (7th Cir. 2011); Carter v. Douma, 796 F.3d 726, 736 (7th Cir. 2015); Richardson v. Griffin, 866 F.3d 836, 839 (7th Cir. 2017); *see also* Dixon v. Pfister, 420 F. Supp. 3d 740, 763 (N.D. Ill. 2019) (holding that police officer's testimony about witness's identification of petitioner was not relevant to put officer's "investigative steps in context" and violated petitioner's confrontation rights.).
104. Dixon, 420 F. Supp. 3d at 764–65 (citing United States v. Silva, 380 F.3d 1018, 1020 (7th Cir. 2004).
105. Carter, 796 F.3d at 736.
106. Richardson, 866 F.3d at 839.

investigation" testimony at trial. Rather, only after a defendant has been convicted has the court periodically granted relief on an *ad hoc* basis.[107] In several instances, "course of investigation" testimony in a successful state prosecution has been rejected only after federal habeas proceedings.[108] The pathway to federal habeas review is lengthy and lined with procedural obstacles.[109] State appeals take years to reach federal courts, often leaving defendants convicted on unconstitutional grounds to languish in prison.[110]

IV. A Proposal to Curb the Admissibility and Use of "Course of Investigation" Testimony

Despite the ongoing threat to confrontation rights posed by "course of investigation" testimony, a uniform and consistent method to limit its admissibility and use at trial does not exist. A two-part analysis informed by *Crawford*—and both its predecessors and progeny—provides state and federal trial courts with a meaningful gatekeeping standard.[111]

A. *Require Evidence of the Declarant's Unavailability.*

In *California v. Green*, a case decided nearly a quarter-century before *Crawford*, Justice Harlan characterized witness availability as the "uppermost consideration" in Confrontation Clause jurisprudence.[112] In-person testimony, Harlan wrote, is imperative to a fair trial as it "insures that the witness will give his statements under oath; forces the witness to

107. *See, e.g.*, Jones, 635 F.3d at 1046; *Carter*, 796 F.3d at 736; *Richardson*, 866 F.3d at 839.

108. *See* Orlando v. Nassau County District Attorney's Office, 915 F.3d 113, 113 (2d Cir. 2019); Richardson, 866 F.3d at 836; Dixon, 420 F. Supp. 3d at 740.

109. Hugh Mundy, *Rid of Habeas Corpus? How Ineffective Assistance of Counsel Has Endangered the Writ of Habeas Corpus and What the Supreme Court Can Do in Maples and Martinez to Restore It*, 45 Creighton L. Rev. 185, 186 (2011) ("Despite the broad promise of access to habeas corpus relief, restrictive state procedural rules often rob habeas petitioners of the right to federal review of valid constitutional claims.").

110. *Id.* at 196–99.

111. The analysis should be undertaken during a pretrial hearing after the prosecutor provides reasonable notice to the defendant and to the court of its intent to offer "course of investigation" testimony at trial. *See* Melendez–Diaz v. Massachusetts, 557 U.S. 305, 324 (2009) ("[T]he Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court.").

112. California v. Green, 399 U.S. 149, 183 (1970); *see also* Laird C. Kirkpatrick, *Confrontation and Hearsay: Exemptions from the Constitutional Unavailability Requirement*, 70 Minn. L. Rev. 665, 670 (1986) ("The requirement of showing unavailability or producing the hearsay declarant for cross-examination at trial has been a recurring theme in two lines of Supreme Court decisions extending back to the nineteenth century"); Fisher, *supra* note 55, at 568 (noting that *Green*'s "broad holding" regarding witness availability "remain[s] good law today"); Bellin, *supra* note 18, at 1895 ("[A] requirement that the prosecution demonstrate the declarant's unavailability . . . can be found as far back as the trial of Sir Walter Raleigh.").

submit to cross-examination; and permits the jury that is to decide the defendant's fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility."[113] To that end, proof of a witness's "unavailability" is a high bar—reached only after a prosecutor has made "every effort" to produce the witness without success.[114] Echoing *Green*, *Ohio v. Roberts* held that confrontation at trial is a constitutional mandate "unless the prosecutorial authorities have made a *good-faith effort* to obtain his presence at trial."[115]

Since *Crawford*, the Supreme Court has recognized that the ability of a defendant to subpoena a government witness "is no substitute for the right of confrontation."[116] The Court, however, has never established a precise evidentiary threshold for the prosecution's proof of a witness's unavailability. Instead, "good-faith" abstractions remain despite *Crawford*'s return to Sixth Amendment originalism.[117] Nonetheless, *Crawford* "remain[s] faithful" to prior Supreme Court holdings in which the admissibility of out-of-court statements requires proof of a declarant's unavailability.[118]

To safeguard against continued abuse of "course of investigation" testimony as a "backdoor" to evade a confrontation analysis, the government must be held to a comparable standard. First, as described in *Sharp* and elsewhere, the relevance of "course of investigation" testimony as investigative origin story is threadbare, especially compared to its prejudicial impact.[119] As Gilbert Merritt, a federal appellate judge in the Sixth Circuit, has commented, "[P]rosecutors determined to present such low-value evidence . . . should at least have to produce the out-of-court declarant for cross examination or demonstrate his or her unavailability."[120] A prosecutor's successful demonstration of the declar-

113. Green, 399 U.S. at 158.
114. *Id.*
115. Ohio v. Roberts, 448 U.S. 56, 65, 74–77 (1980) (describing unavailability as a threshold confrontation requirement); *see also* United States v. Inadi, 475 U.S. 387, 393 (1986) (characterizing *Roberts* as part of "a long line of Confrontation Clause cases involving prior testimony" that held "that before such statements can be admitted the government must demonstrate that the declarant is unavailable").
116. Melendez-Diaz, 557 U.S. at 324. The *Melendez-Diaz* Court did, however, note that state "notice and demand" laws requiring the prosecution to give pretrial notice of its intent to use a trial document and then require the defendant to make a pretrial demand for the author's presence are constitutional. *Id.*
117. *See* David E. Pozen, *Constitutional Bad Faith*, 129 HARV. L. REV. 887 (2016) (observing that "the language of good faith and bad faith rarely surfaces in constitutional doctrine.").
118. Crawford v. Washington, 541 U.S. 36, 59 (2004).
119. *See* Charles T. McCormick et al., 2 MCCORMICK ON EVIDENCE § 249 (7th ed. 2013) ("The need for this evidence is slight, and the likelihood of misuse great."); *see also* United States v. Sharp, 6 F. 4th 573, 582(5th Cir. 2021);United States v. Mancillas, 580 F.2d 1301, 1310 (7th Cir. 1978) ("To convict a defendant, after all, the prosecution does not need to prove its reasons for investigating him.").
120. United States v. Martin, 897 F.2d 1368, 1373 (6th Cir. 1990) (Merritt, C.J.,

ant's unavailability would increase, if only modestly, the need for—and corresponding probative value of—an officer's testimony. The trial court could then take measures to mitigate the danger of unfair prejudice.[121]

Further, proof of "good-faith efforts" to establish a declarant's availability will curtail "course of investigation" testimony drawn from statements by informants. As many informants work with police in exchange for money or leniency for the informant's own crimes, their information is inherently self-serving and frequently unreliable.[122] While prosecutors typically resist the disclosure of an informant's identity, their intent to offer "course of investigation" testimony through a police officer should require such a disclosure. Furthermore, disclosing the informant's identity would also demonstrate prosecutorial efforts to procure the informant's availability. As *Jones* establishes, the "level of the informant's activity" and the "helpfulness of the disclosure to the asserted defense" are two factors for a trial court's analysis when deciding whether to require the government to disclose an informant's identity.[123] Additionally, both considerations are "closely tied" to a Confrontation Clause analysis.[124] If, as in *Jones*, a confidential informant's statements as relayed by a testifying police officer establish facts "central to [the government's] case," disclosure is warranted.[125] Prosecutorial preferences towards secrecy should not supplant a defendant's confrontation rights.

Most critically, requiring prosecutorial "good-faith efforts" to secure a witness's availability will strengthen the right to confrontation—and, in the process, promote just verdicts and bolster public trust in the integrity of the criminal justice system. In some instances, the government's efforts to produce witnesses will bear fruit. At the very least, awareness of the obligation will reduce the government's easy reliance on the testimony of a police officer at the expense of the defendant's confrontation rights. At bottom, requiring the government to present its trial witnesses or provide substantive proof of its inability to do so will foster procedural fairness in both perception and in reality.[126]

B. *Eliminate "Testimonial" Statements*

In the absence of useful precedent or a uniform jury instruction, trial courts have long taken a scattershot approach to assessing "course

concurring in part and dissenting in part).

121. *See infra* Part 2.A principal method to reduce the danger of unfair prejudice is redaction of "testimonial" statements, as described in the second prong of the analysis.

122. Mary N. Bowman, *Truth or Consequences: Self-Incriminating Statements and Informant Veracity*, 40 N.M. L. Rev. 225, 227-28 (2010) ("This [informant] system of providing leniency for cooperation has tremendous potential for abuse.").

123. United States v. Jones, 930 F.3d 366, 381 (5th Cir. 2019).

124. *Id.*

125. *Id.*

126. Coy v. Iowa, 487 U.S. 1012, 1019 (1988) ("The perception that confrontation is essential to fairness has persisted over the centuries because there is much truth to it.").

of investigation" testimony. The critical constitutional implications in play demand a standardized gatekeeper to admissibility. Towards that goal, the Supreme Court's definition of "testimonial" extrajudicial statements provides a workable test.[127] The benefits of evaluating course of investigation statements through a "testimonial" lens are twofold. First, the standard would provide trial courts a uniform and consistent method of separating statements offered as investigatory background and those which encroach upon a defendant's confrontation rights. In addition, the definition would offer courts a means to narrow the gap between the probative value of course of investigation testimony and the substantial danger of unfair prejudice.

Had the inquiry been used in *Sharp*, the trial court would have almost assuredly excluded the contested out-of-court statements as "testimonial." After all, the officer testified that the investigation originated from a tip that the defendant possessed "a large amount of methamphetamine."[128] The same logic holds true in *Jones* (out-of-court statements by an informant that a drug deal orchestrated by the defendant "had happened") and *Orlando* (out-of-court statements by a suspect during a custodial interrogation).[129] Both statements would have, by definition, fallen under the "testimonial" umbrella.[130] Other cases decided throughout the checkered history of "course of investigation" testimony would follow suit. For instance, in *United States v. Breland*, out-of-court statements that "a 'black male with a bald head . . . [was] selling cocaine and marijuana from the relevant residence" rank as "testimonial."[131] Moreover, the informant's statements in *United States v. Woods* that images of pornography discovered on the defendant's home computer matched those catalogued in a national database would be excluded under the standard.[132] Finally, the out-of-court statements used against Mejia—the defendant profiled in this Article's introduction—that a "shipment" was en route to his home are also "testimonial."[133] Even in grayer areas, such as out-of-court statements originating from a 911 call, a "testimonial" analysis would provide reliability and uniformity to the adjudication of contested issues.[134]

In like fashion, a "testimonial" guidepost would help courts reduce the sizeable prejudice of "course of investigation" testimony while

127. *See Melendez–Diaz v. Massachusetts, 557 U.S. 305, 334-5 (2009)* (Kennedy, J., dissenting) ("The Court made clear in *Davis* that it will not permit the testimonial statement of one witness to enter into evidence through the in-court testimony of a second.").
128. United States v. Sharp, 6 F.4th 573, 581(5th Cir. 2021).
129. Jones, 930 F.3d at 376-377; Orlando v. Nassau County District Attorney's Office, 915 F.3d 113, 116–17 (2d Cir. 2019).
130. Crawford v. Washington, 541 U.S. 36, 61 (2004). (Thomas, J. concurring in part).
131. United States v. Breland, 356 F.3d 787, 792 (7th Cir. 2004).
132. United States v. Woods, 684 F.3d 1045, 1062 (11th Cir. 2012).
133. United States v. Mejia, 909 F.2d 242, 246 (7th Cir. 1990).
134. *See, e.g.*, Suggs v. Stanley, 324 F.3d 672, 681–82 (8th Cir. 2003) (involving "course of investigation" testimony about crime reported in 911 call).

recognizing its occasional relevance. For example, if applied to *Sharp*'s hypothetical "course of investigation" testimony, the "intolerably high risk" of prejudice is diminished while the probative value as to the investigation's beginnings remains:

> PROSECUTOR: Why did you start investigating the defendant?
> DETECTIVE: An eyewitness told me that the defendant was the shooter.[135]
> PROSECUTOR: Why did you start investigating the defendant?
> DETECTIVE: I spoke to an eyewitness.

As a final prophylactic, a limiting instruction framed in "testimonial" language will mitigate the prejudice of course of investigation testimony and help jurors understand its limited value.[136] The garbled, inconsistent, and ineffectual instructions typified by the trial court in *Orlando* would give way to a streamlined and sturdier admonishment:

> You have just heard the witness refer to statements made by another person. That person will not testify at this trial and, as a result, the defendant cannot question that person about the truthfulness of their statements. Therefore, you must not assume that the person's statements are true or otherwise consider the statements as evidence of the defendant's guilt in this case. Rather, the officer is simply explaining why the investigation began.[137]

V. Conclusion

The "damning information" endemic to "course of investigation" testimony imperils a defendant's confrontation rights and undermines the truth-seeking objectives of the Federal Rules of Evidence.[138] The remedial measures I propose provide courts with a consistent and constitutionally sound framework to curb its unimpeded admission at trial. While neither measure fully eliminates the admissibility of "course of investigation" testimony during criminal trials, both serve to limit its exploitative use by prosecutors and promote more just jury verdicts.

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135. United States v. Sharp, 6 F.4th 573, 581 (5th Cir. 2021), 2021 WL 3136040, at *5 (5th Cir. July 26, 2021).
136. United States v. Jass, 569 F.3d 47, 55 (2d. Cir. 2009) (stating that jury instruction limiting testimony to admissible nonhearsay purpose "is generally sufficient to eliminate" confrontation violation) (citing Richardson v. Marsh, 481 U.S. 200, 206 (1987)); *but cf.* Orlando v. Nassau County District Attorney's Office, 915 F.3d 113, 122 (2d Cir. 2019) (holding that jury instruction was insufficient to cure confrontation violation when out-of-court statements were made by another suspect to the crime).
137. For additional commentary on best practices for jury instructions, *see* Hugh M. Mundy, *Forward Progress: A New Pattern Criminal Jury Instruction for Impeachment with Prior Inconsistent Statements Will Ease the Court's Burden by Emphasizing the Prosecutor's*, 84 Fordham L. Rev. 1455, 1462 (2016) (discussing the importance of "active voice, concrete phrasing, and colloquial language").
138. United States v. Silva, 380 F.3d 1018, 1020 (7th Cir. 2004); Fed. R. Evid. 102 (These rules "should be construed . . . to [ascertain] truth.").