

The Louisiana "Explanatory Exception": Faithfulness to Louisiana's Hearsay Framework or Mere Storytime with the Prosecution?

Joshua P. Clayton

Repository Citation

Joshua P. Clayton, *The Louisiana "Explanatory Exception": Faithfulness to Louisiana's Hearsay Framework or Mere Storytime with the Prosecution?*, 71 La. L. Rev. (2011)
Available at: <https://digitalcommons.law.lsu.edu/lalrev/vol71/iss4/6>

This Comment is brought to you for free and open access by the Law Reviews and Journals at LSU Law Digital Commons. It has been accepted for inclusion in Louisiana Law Review by an authorized editor of LSU Law Digital Commons. For more information, please contact kreed25@lsu.edu.

The Louisiana “Explanatory Exception”: Faithfulness to Louisiana’s Hearsay Framework or Mere Storytime with the Prosecution?

TABLE OF CONTENTS

I.	Introduction.....	1260
II.	Anatomy of an Anecdote: What Is the Explanatory Exception?.....	1262
	A. The Rule: Hearsay.....	1262
	B. The “Exception”: Explanation.....	1263
	C. What It Was and What It Is.....	1265
	D. Scope of the Exception.....	1267
	1. Relevancy.....	1267
	2. Verbal Statements v. Conduct.....	1268
	3. Constitutional Restrictions.....	1269
	4. Other Evidentiary Limitations.....	1269
III.	Louisiana’s Application of the Explanatory Exception:	
	A Tumultuous Tale.....	1270
	A. The Supreme Court Trilogy.....	1271
	B. Too Much Hearsay Relevancy.....	1274
	C. Uncaging of the Beast: Inconsistent Appellate Application.....	1275
	1. Blatant Explanatory Exception Abuse.....	1276
	2. Specific Categories of Misuse.....	1279
IV.	Resolving the Plot’s Central Conflict: How to Legally Apply the Explanatory Exception in Louisiana.....	1285
	A. Return to a Proper Relevancy Analysis.....	1286
	1. Explanations of an Officer’s Conduct.....	1286
	2. Explanations of the Sequence of Events.....	1290
	B. Perform a More Vigilant Harmless Error Analysis.....	1296
	C. Reformulate the Explanatory Exception.....	1301
V.	Conclusion.....	1303

I. INTRODUCTION

In the impassioned film *12 Angry Men*, 12 sweating jurors decide whether a young man will be put to death.¹ As they deliberate, more and more jurors express their reasonable doubt of the defendant's guilt.² Nearing the movie's rousing finale, Henry Fonda's character points out to the other jurors that he noticed that the crucial eyewitness had marks over her nose, indicating that she must regularly wear eyeglasses.³ The jury acquits the defendant in light of the woman's testimony that she looked up from her bed to see the murder out of her window; she could not have been certain of the perpetrator's identity because she did not have time to place her eyeglasses on her face.⁴ This classic film demonstrates one fine point, among others: the jury takes *everything* into account in rendering its verdict.

Imagine a jury considering a police officer's testimony about her first "big break" in an investigation. The prosecutor asks Officer Mary McFadden what a particular informant told her about the defendant. Officer McFadden replies that the informant said that he had known the defendant for years as a partner in crime and that the defendant was the one who committed the criminal act. Normally, defense counsel would object on hearsay grounds because Officer McFadden testified to an out-of-court statement not made under oath and used to prove the defendant's guilt.⁵ The Louisiana explanatory exception would purport to admit the statement, not to prove the defendant's guilt, but to show Officer McFadden's valid reason for suspecting the defendant to be the perpetrator.⁶ The explanatory exception is a principle that allows a testifying law enforcement official like Officer McFadden to refer to out-of-court statements made to the official to explain the criminal investigation or the officer's conduct.⁷ Even though the judge who permits the use of the explanatory exception might instruct the jury to only consider the out-of-court statement as relevant to the officer's conduct, the judge cannot "unring the

Copyright 2011, by JOSHUA P. CLAYTON.

1. *12 ANGRY MEN* (United Artists 1957).
2. *Id.*
3. *Id.*
4. *Id.*
5. See discussion *infra* Part II.A.
6. See discussion *infra* Part II.B.
7. See *infra* text accompanying note 50.

bell”⁸—an out-of-court speaker not under oath said the defendant is guilty.

The Louisiana Code of Evidence (LCE) is designed to ensure that jurors take appropriate evidence into account,⁹ including police testimony that is omnipresent in criminal trials.¹⁰ Louisiana appellate courts regularly violate the LCE through winking at improper use of the explanatory exception in the trial courts, allowing jurors to take improper police testimony into account.¹¹ Prosecutorial abuse of the exception by engaging in illegitimate storytelling through hearsay statements is not as much to blame as is the courts’ unfaithfulness to Louisiana’s statutory hearsay framework. Trial courts and reviewing appellate courts have yet to apply the exception in a way that properly balances the prosecution’s need to present evidence with the defendant’s statutory right to not have inadmissible hearsay evidence heaped up against him.

This Comment explains how Louisiana courts should properly apply the explanatory exception. Part II describes the explanatory exception through examining its adoption from the federal jurisprudence, its relation to the Louisiana rule of hearsay, and its potentially limited use. Part III demonstrates the illicit judicial use of the explanatory exception by showing how the courts have refused to implement Louisiana Supreme Court directives. Part III also illustrates specific areas of abuse by the appellate courts—allowing testimony about informants’ statements, testimony to explain the reason for the defendant’s arrest, testimony establishing a sequence of events, and testimony as to conduct that is an assertion. Part IV proposes solutions to restore legality to the application of the exception: (1) limiting the use and content of officers’ testimony, (2) performing a vigilant harmless error analysis, and (3) reformulating the exception for logical consistency. This Comment concludes that if the explanatory exception is to have continued existence, the judiciary should give less weight to prosecutorial storytelling and more attention to establishing proper norms for prosecutorial questioning of police witnesses.

8. MICHAEL H. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 105:1 (6th ed. 2006).

9. See LA. CODE EVID. ANN. art. 103(C) (2006) (inadmissible evidence should not be suggested to the jury by any means).

10. See *infra* notes 193–94 and accompanying text.

11. See discussion *infra* Part III.C.

II. ANATOMY OF AN ANECDOTE: WHAT IS THE EXPLANATORY EXCEPTION?

A. *The Rule: Hearsay*

Although a large portion of the general populace is familiar with the term “hearsay,”¹² what it *is* baffles even experienced legal minds.¹³ However, the LCE clearly defines hearsay: “a statement, other than one made by the declarant while testifying at the present trial or hearing, offered in evidence to prove the truth of the matter asserted.”¹⁴ Put simply, if the statement was made outside of the present courtroom proceeding, its substance cannot be repeated in court to prove that the words within the statement are true. The hearsay rule is necessary to ensure that the witness makes his assertion under oath and subject to cross-examination and to permit the jury to assess the witness’s credibility through observing the witness’s demeanor while making the statement.¹⁵ Requiring the out-of-court declarant¹⁶ to come into court also establishes the witness’s competency to testify.¹⁷

Two mechanisms enable out-of-court statements to come into court without violating the hearsay rule: hearsay exceptions and nonhearsay.¹⁸ Hearsay exceptions exist solely in statutes.¹⁹ Nonhearsay is an out-of-court statement not offered to prove the truth of the words in the statement, meaning that the hearsay rule

12. See IRVING J. KLEIN, *LAW OF EVIDENCE FOR POLICE* 98 (2d ed. 1978).

13. See FRANK L. MARAIST, *EVIDENCE AND PROOF* § 10.1, in 19 *LOUISIANA CIVIL LAW TREATISE* 155 n.4 (1999).

14. LA. CODE EVID. ANN. art. 801(C) (2006).

15. *State v. Wille*, 559 So. 2d 1321, 1329 (La. 1990) (citing *California v. Green*, 399 U.S. 149, 154 (1970)).

16. A declarant is a person who makes a statement. LA. CODE EVID. ANN. art. 801(B) (2006).

17. MARAIST, *supra* note 13, § 10.1, at 156; see also *Buckbee v. United Gas Pipe Line Co.*, 561 So. 2d 76, 80 (La. 1990) (citing 4 JACK WEINSTEIN & MARGARET BERGER, *WEINSTEIN’S EVIDENCE* §§ 800-1 to -5 (1988)).

18. Classification of an out-of-court statement as hearsay, as admissible evidence under a statutory exception, or as nonhearsay is governed by the LCE. The Louisiana Supreme Court acknowledges that in deciding whether a given statement violates the hearsay rule, reference to Louisiana jurisprudence predating the LCE’s enactment is proper. See *Garza v. Delta Tau Delta Fraternity Nat’l*, 948 So. 2d 84, 89 (La. 2006). Furthermore, one should consider the Federal Rules of Evidence (FRE) when classifying an out-of-court statement because the LCE is modeled after the FRE, Act No. 515, § 1, 1988 La. Acts 1086 (“Introductory Note” to Chapter 8), and the Louisiana Supreme Court approves the use of federal case law interpreting the FRE as persuasive authority in interpreting the LCE, see *State v. Foret*, 628 So. 2d 1116, 1122–23 (La. 1993).

19. LA. CODE EVID. ANN. art. 802 (2006).

does not apply.²⁰ In other words, an out-of-court statement is nonhearsay if the words spoken have independent relevance, regardless of whether they are true.²¹ Nonhearsay exists when an out-of-court statement falls into one of several general categories:²² causation of legal consequences,²³ attack of a witness's credibility,²⁴ demonstration of a declarant's state of mind,²⁵ or demonstration of a hearer's state of mind.²⁶ As will be discussed, the explanatory exception is actually a type of nonhearsay that often demonstrates the hearer's state of mind.²⁷

B. The "Exception": Explanation

The explanatory exception arises through the testimony of a law enforcement official.²⁸ The following scenario illustrates the explanatory exception: Joe Schmeaux, whose "street name" is "Dopey," is being tried before a jury for possession of an illegal weapon. The State of Louisiana calls as its first witness Officer Mary McFadden, who states that her investigation started when a voice crackled over her radio, diverting her from her patrol route to investigate suspicious activity. She later testifies that upon investigation, she encountered an informant who said that "Dopey," one block down the street, was peddling drugs and wearing a red hooded jacket and brown corduroy pants. The prosecutor further elicits from McFadden that she traveled a block down the street and saw someone who matched the description of "Dopey." She states that as she approached the suspect, she heard a raspy-voiced gentleman across the street from the suspect shout, "Dopey, they're going to find that AK-47 this time, buster!" The officer then testifies that she knew that possession of an AK-47 requires a permit²⁹ and that she patted down the suspect, found an AK-47 on his person, and arrested the suspect on the spot.

Within Officer McFadden's testimony are three out-of-court statements: the initial radio message, the informant's naming and

20. See *id.* art. 801(C).

21. See MARAIST, *supra* note 13, § 10.1, at 157. For a definition of relevance, see *infra* note 56.

22. *Buckbee*, 561 So. 2d at 80; MARAIST, *supra* note 13, § 10.1, at 157.

23. See *Melancon v. Hyatt Corp.*, 589 So. 2d 1186, 1191 (La. Ct. App. 1st 1991).

24. See MARAIST, *supra* note 13, § 10.1, at 157.

25. *Id.*

26. See *Buckbee*, 561 So. 2d at 81; MARAIST, *supra* note 13, § 10.1, at 157.

27. See *infra* notes 33–36 and accompanying text.

28. See *infra* notes 37–50 and accompanying text.

29. See generally LA. REV. STAT. ANN. §§ 40:1781–1783 (2008) (addressing required registration of certain firearms).

describing the defendant, and the raspy-voiced man's naming the defendant and indicating that he had a weapon. Each of these statements could be offered to prove the truth of the words in them and, thus, be hearsay. This is where the explanatory exception becomes applicable: under its broadest formulation, these statements would be proper nonhearsay because the prosecutor did not elicit these statements from McFadden to prove that there was suspicious activity, that Schmeaux was wearing corduroy pants, or that Schmeaux was about to be arrested for his possession of an illegal weapon. Instead, the statements were offered to explain the officer's progressing motivation to act as she did during the criminal investigation and to develop the sequence of events leading to the defendant's arrest.³⁰

In Louisiana, a court does not admit McFadden's testimony through an "exception," properly speaking. The adoption of the LCE brought with it a clear prohibition that hearsay is not admissible unless it falls within an exception provided by the LCE itself or other legislation.³¹ Additionally, the LCE closed the door to new jurisprudential, non-statutory exceptions.³² Evidence is admissible under the explanatory exception only because it is not a jurisprudential exception, but really an application of nonhearsay.

Out of the possible categories of nonhearsay, the explanatory exception falls most comfortably under the "hearer's state of mind" category.³³ In one Louisiana case, the defendant testified that his employer told him what his job duties entailed to show that he did not have the intent that is a requisite element of the crime of payroll fraud and theft.³⁴ The court held that the statement was nonhearsay, relevant to the defendant-employee's state of mind.³⁵ Just as the employee needed the out-of-court statement to prove his state of mind, Officer McFadden may need to demonstrate her motivation for subsequent conduct by using the raspy-voiced gentleman's statement. The statement would be nonhearsay,

30. See *infra* text accompanying note 50.

31. LA. CODE EVID. ANN. art. 802 (2006).

32. *Id.* cmt. b. Further, the adoption of the LCE may have placed limits on the explanatory exception inherent within the hearsay articles. For instance, pre-LCE, the Louisiana Supreme Court held in *State v. Murphy*, 309 So. 2d 134, 135 (La. 1975), that although an officer may state his mind as to why he arrested a defendant, he cannot explain the substance of the statement, for example, that the declarant pointed to the defendant as guilty. Louisiana law was not substantially changed by the adoption of article 802, so such limitations may still exist. See LA. CODE EVID. ANN. art. 802 cmt. a (2006).

33. See *supra* note 26 and accompanying text.

34. *State v. Jones*, 558 So. 2d 546, 548-50 (La. 1990).

35. *Id.*

relevant to establish the officer's state of mind.³⁶ To define the explanatory exception's modern parameters within which statements may establish an officer's state of mind, the exception's history is crucial.

C. *What It Was and What It Is*

The explanatory exception dates back perhaps as far as a century ago in federal courts. In 1919, the federal Sixth Circuit, in the pioneering case *Biandi v. United States*, refused to admit a prosecuting witness's testimony of an out-of-court statement to explain the witness's subsequent actions.³⁷ The out-of-court statement was a report of criminal activity tending to prove the defendant's guilt, proof that could not be admitted through hearsay evidence.³⁸ In the 1920s, following *Biandi*, the federal circuit courts disallowed officer testimony about general complaints of criminal activity³⁹ and reports from unidentified informants warning of impending crimes.⁴⁰ The courts reasoned that such evidence was hearsay, incompetent, and highly prejudicial.⁴¹ In 1932, the First Circuit in *Enrique Rivera v. United States* allowed officers to testify that they acted upon certain information to explain their actions, but not to testify in detail as to what they were told, which would be hearsay.⁴²

The Louisiana Supreme Court joined the discussion by the mid-twentieth century. In the 1948 case *State v. Kimble*, the court's infant venture quoted *Enrique* and established a fairly firm standard: a police officer may testify that he made an arrest or search and seizure as a result of information received, but "the exception is limited to the statement of the fact."⁴³ In *Kimble*, because the officer testified to the *nature* of the complaint, he was not merely testifying to the *fact* that information was received but also to what someone else told him, thus violating the hearsay rule.⁴⁴ In 1970, the Louisiana Supreme Court in *State v. Favre* frequently cited to *Kimble* in holding that where an officer testified

36. The officer's state of mind would have to be the subject of proper relevance. See LA. CODE EVID. ANN. art. 401 (2006) (evidence must have probative worth to a fact that is of consequence to determining the case).

37. 259 F. 93 (6th Cir. 1919).

38. *Id.* at 93.

39. *Mattson v. United States*, 7 F.2d 427, 428 (8th Cir. 1925).

40. *Bolt v. United States*, 2 F.2d 922, 922-23 (D.C. Cir. 1924).

41. *Mattson*, 7 F.2d at 427-28; *Bolt*, 2 F.2d at 922-23.

42. 57 F.2d 816, 820 (1st Cir. 1932).

43. *State v. Kimble*, 36 So. 2d 637, 638 (La. 1948).

44. *Id.* at 638-39.

that information leading to the defendant's arrest came from a reliable informant, the testimony was proper nonhearsay because it did not divulge the substance of any out-of-court statements.⁴⁵ As evidenced by these early cases, the original formulation of the rule forbade testimony as to an out-of-court declarant's words, though the officer could state that credible or helpful statements were made to him in the course of investigating a crime.

The bewildering factor is that somewhere along the line, the rule was greatly broadened. A perusal of Louisiana and federal jurisprudence in the 1980s and 1990s shows how broad the rule has become: officers may testify as to statements given to them by other persons involved in the case that help to explain the sequence of events that led to an arrest.⁴⁶ By 1990, even the Louisiana Supreme Court acknowledged "widespread abuse" of the explanatory exception.⁴⁷ Although the Louisiana rule once limited officers to testifying that they acted "upon information received,"⁴⁸ now courts allow officers to actually state the content of the out-of-court statements for the nonhearsay purpose of explaining the officer's conduct and the investigation.⁴⁹ Thus, the explanatory exception may be modernly defined as the principle that allows testifying law enforcement officials to explain their actions by referring to out-of-court statements made to them by other persons involved in the case, without violating the hearsay rule.⁵⁰

45. *State v. Favre*, 232 So. 2d 479, 483 (La. 1970).

46. *See, e.g.*, *United States v. Linwood*, 142 F.3d 418, 425 (7th Cir. 1998); *United States v. Reyes*, 18 F.3d 65, 70 (2d Cir. 1994); *United States v. Bowser*, 941 F.2d 1019, 1021 (10th Cir. 1991); *United States v. Lazcano*, 881 F.2d 402, 407 (7th Cir. 1989); *United States v. Love*, 767 F.2d 1052, 1063 (4th Cir. 1985); *State v. Edwards*, 406 So. 2d 1331, 1349 (La. 1981) (citing *State v. Calloway*, 324 So. 2d 801, 809 (La. 1976)); *State v. Williams*, 735 So. 2d 62, 75-76 (La. Ct. App. 5th 1999); *State v. Keelen*, 670 So. 2d 578, 582 (La. Ct. App. 4th 1996) (citing *State v. Watson*, 449 So. 2d 1321, 1328 (La. 1984)); *State v. Clay*, 623 So. 2d 211, 214 (La. Ct. App. 2d 1993); *State v. Byrd*, 540 So. 2d 1110, 1114 (La. Ct. App. 1st 1989); *State v. Burns*, 504 So. 2d 124, 152 (La. Ct. App. 2d 1987); *State v. Washington*, 461 So. 2d 340, 341 (La. Ct. App. 2d 1984). This is but a fraction of extant examples.

47. *State v. Wille*, 559 So. 2d 1321, 1331 (La. 1990) (citing EDWARD W. CLEARY ET AL., MCCORMICK ON EVIDENCE § 249 (3d ed. 1984)).

48. *See, e.g.*, *Favre*, 232 So. 2d at 483.

49. *See, e.g.*, GRAHAM, *supra* note 8, § 801:5; STEPHEN A. SALTZBURG ET AL., FEDERAL RULES OF EVIDENCE MANUAL 1468 (7th ed. 1998); JOHN W. STRONG ET AL., MCCORMICK ON EVIDENCE § 249 (5th ed. 1999).

50. 23 C.J.S. *Criminal Law* § 1164 (2006).

*D. Scope of the Exception**1. Relevancy*

Relevancy governs the scope of the explanatory exception.⁵¹ Statements that fall under the exception may have a permissible nonhearsay aspect and always have an impermissible hearsay aspect.⁵² When a permissible nonhearsay aspect exists, such a statement is probative to explain the officer's response or state of mind, or even the "background of the case."⁵³ The always-present impermissible hearsay aspect is the likelihood that the jury will consider the statement as evidence of the fact asserted, which improperly points to the defendant's guilt.⁵⁴ Therefore, the scope of the exception is determined using an LCE article 401/403 relevancy analysis to determine if a given statement is relevant to a nonhearsay fact.⁵⁵

An article 401/403 analysis requires that the out-of-court statement have probative value in tending to prove a fact that helps determine the outcome of the criminal case,⁵⁶ and its admission must not cause unfair prejudice to the defendant.⁵⁷ A particular out-of-court statement that incriminates the defendant may "move the decision maker's mind off dead center" as to why an officer did what he did or how the case developed.⁵⁸ However, if the defendant is unfairly prejudiced, i.e., if the statement possesses an undue tendency to suggest a decision on an improper basis, then the statement should not be admitted.⁵⁹ Because a statement containing an assertion of criminality could cause the jury to use the statement as proof of the truth of the words spoken, article 403

51. See, e.g., *Wille*, 559 So. 2d at 1331.

52. *Id.*

53. SALTZBURG ET AL., *supra* note 49, at 1468.

54. GRAHAM, *supra* note 8, § 801:5.

55. See *supra* text accompanying note 51; *infra* text accompanying notes 56-60.

56. See LA. CODE EVID. ANN. art. 401 (2006) ("'Relevant evidence' means evidence having 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.").

57. See *id.* art. 403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or waste of time.").

58. See MARAIST, *supra* note 13, § 5.1, at 66. "Moving the mind off dead center" is assisting the fact finder in determining the existence of a fact at issue. *Id.*

59. FED. R. EVID. 401 advisory committee's note.

would forbid admission of the statement—a hearsay use suggests a decision on an improper basis.⁶⁰

2. *Verbal Statements v. Conduct*

The scope of the explanatory exception also entails consideration of whether the evidence within an officer's testimony is a verbal statement or physical conduct. Both an oral assertion and nonverbal conduct intended by the actor as an assertion meet the hearsay definition.⁶¹ If an officer testifies as to conduct that was intended by the actor to be an assertion, the explanatory exception may admit the out-of-court action–statement to explain the officer's conduct. Picture Officer McFadden testifying that, after showing a witness a photo line-up of potential suspects, she was able to obtain an arrest warrant for the defendant Schmeaux and to arrest him. McFadden's testimony as to her out-of-court action in obtaining the warrant and arresting Schmeaux is potentially an assertion of guilt because implicit in her narrative is the detail that the witness identified Schmeaux.⁶² If a court found that McFadden's conduct was a statement,⁶³ the court could nonetheless admit the "statement" under the explanatory exception as nonhearsay, probative to the ongoing investigation.

60. SALTZBURG ET AL., *supra* note 49, at 1468. Even if a statement is inadmissible under the explanatory exception because of non-relevance to a proper nonhearsay purpose or because of unfair prejudice, the statement still could be admitted under a statutory hearsay exception, in some cases. *See State v. Wade*, 908 So. 2d 1220, 1231 (La. Ct. App. 2d 2005) (finding a statement inadmissible not just because the explanatory exception did not apply but also because no statutory exception applied). One example is *res gestae* under article 801(D)(4), a statutory exception permitting the admission of a statement that is an event speaking for itself under the immediate pressure of the occurrence and that is an immediate incident of the criminal act. LA. CODE EVID. ANN. art. 801(D)(4) (2006); *see also infra* note 119 (regarding the labeling of *res gestae* as an "exception"). A court would find the statement to meet the *res gestae* definition if the statement was integrally connected to the event under scrutiny. GEORGE W. PUGH ET AL., HANDBOOK ON LOUISIANA EVIDENCE LAW 619 (2009). Additionally, the statement could be admitted under one of more than 30 exceptions in LCE articles 803, 803.1, and 804. LA. CODE EVID. ANN. arts. 803–804 (2006 & Supp. 2011). However, even if a statement would survive hearsay scrutiny allowing admittance under the explanatory exception, the statement could still be excluded on relevancy grounds. *See State v. Hicks*, 607 So. 2d 937, 946–47 (La. Ct. App. 2d 1992) (a bare assertion by the prosecution that the statement is not offered for its truth is insufficient).

61. LA. CODE EVID. ANN. art. 801(A) (2006).

62. *See State v. Banford*, 653 So. 2d 671, 674–75 (La. Ct. App. 5th 1995).

63. *See STRONG ET AL.*, *supra* note 49, § 250 (the burden of establishing that an actor intended for his conduct to be an assertion should be placed upon the party urging the hearsay objection).

3. Constitutional Restrictions

The most significant difference between verbal statements and conduct-type statements is that if the explanatory exception attempts to admit the former, the Sixth Amendment to the U.S. Constitution could stand in the way of such an evidence proffer.⁶⁴ The Confrontation Clause of the Sixth Amendment to the U.S. Constitution provides that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.”⁶⁵ Statements admitted under the explanatory exception sometimes breach the defendant’s right of confrontation.⁶⁶ The U.S. Supreme Court’s landmark Confrontation Clause decision in *Crawford v. Washington* limits the use of “testimonial” out-of-court statements to when the out-of-court declarant (1) is unavailable at the trial and (2) has been available for prior cross-examination by the defendant.⁶⁷ Under *Crawford*, if a statement admitted under the explanatory exception is “testimonial” and the defendant has had no opportunity to cross-examine the declarant, the U.S. Constitution is violated.⁶⁸

4. Other Evidentiary Limitations

Notwithstanding a statement’s relevant, nonhearsay, and constitutional uses, a court may disallow the explanatory exception on other evidentiary grounds. For example, if a statement has potential use as “other crimes” evidence, article 404 could prevent its admissibility because evidence of other crimes is not admissible to prove the defendant’s guilt in the present trial.⁶⁹ McFadden may not be allowed to testify that the confidential informant told her

64. See U.S. CONST. amend. VI. A proffer is an offer of evidence. BLACK’S LAW DICTIONARY 1329 (9th ed. 2009).

65. U.S. CONST. amend. VI. The Louisiana Constitution similarly provides that “[a]n accused is entitled to confront and cross-examine the witnesses against him.” LA. CONST. art. I, § 16.

66. See *State v. Hearold*, 603 So. 2d 731, 737 (La. 1992) (citing *State v. Banks*, 439 So. 2d 407 (La. 1983)) (“Law enforcement officers may not testify as to the contents of an informant’s tip because such testimony violates the accused’s constitutional right to confront and cross-examine his accusers.”).

67. 541 U.S. 36, 68 (2004). The Court’s Confrontation Clause case law continues to develop. See, e.g., *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009); *Giles v. California*, 554 U.S. 353 (2008); *Washington v. Davis*, 547 U.S. 813 (2006).

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

69. LA. CODE EVID. ANN. art. 404(B)(1) (2006).

that “Dopey” had previously been indicted for other drug crimes.⁷⁰ Further, if the out-of-court statement was made by a declarant who did not have firsthand knowledge of the facts in his statement⁷¹ or the officer is not competent to testify as to what the declarant said,⁷² the explanatory exception would be denied. Or, if the content of the declarant’s statement contains improper lay opinion, the officer would not be allowed to testify regarding the statement.⁷³

Though the issues with the exception are legion, including the Confrontation Clause, various evidentiary rules, and interaction with other hearsay exceptions, the present focus is the exception’s potential to violate the LCE hearsay framework. That potential has been tragically realized through abuse by Louisiana appellate courts.

III. LOUISIANA’S APPLICATION OF THE EXPLANATORY EXCEPTION: A TUMULTUOUS TALE

Louisiana’s embrace of this particular application of nonhearsay surpasses the federal use of the principle, with the State’s courts christening it the “explanatory exception.”⁷⁴ Throughout the 1990s, the Louisiana Supreme Court finally tackled the status of the exception in Louisiana and laid down guidelines that the trial courts and reviewing appellate courts subsequently either neglected or wholesale refused to implement.⁷⁵ The question is, “Where did our courts get off track?”

70. See *United States v. Hernandez*, 750 F.2d 1256, 1258 (5th Cir. 1985); *State v. Williams*, 735 So. 2d 62, 76 (La. Ct. App. 5th 1999).

71. LA. CODE EVID. ANN. art. 602 (2006) (a witness may only testify to a matter if he has personal knowledge of it).

72. See *State v. Moses*, 932 So. 2d 701, 712 (La. Ct. App. 5th 2006) (finding that an officer was not competent to testify as to what was in the declarant’s mind because such testimony would have been speculative).

73. LA. CODE EVID. ANN. art. 701 (2006) (lay witnesses may only give opinions that are both rationally based on their perceptions and helpful to the fact finder in more clearly understanding the testimony or determining a fact at issue).

74. *State v. Hearold*, 603 So. 2d 731, 737 (La. 1992); *State v. Legendre*, 942 So. 2d 45, 50, 52–54 (La. Ct. App. 4th 2006); *State v. Antoine*, 841 So. 2d 874, 881 (La. Ct. App. 5th 2003); *State v. Hawkins*, 667 So. 2d 1070, 1080 (La. Ct. App. 4th 1995), *aff’d*, 688 So. 2d 473 (La. 1997); *State v. Hall*, 624 So. 2d 927, 930 (La. Ct. App. 2d 1993); *State v. Preston*, 623 So. 2d 938, 941 (La. Ct. App. 4th 1993).

75. See discussion *infra* Part III.A., C.

A. The Supreme Court Trilogy

The seminal and oft-quoted Louisiana Supreme Court explanatory exception case of *State v. Wille* arrived in 1990.⁷⁶ At the time, the Louisiana Supreme Court had fallow ground to break because 1990 marked the one-year anniversary of the fledgling LCE.⁷⁷ *Wille* is the first of a trilogy of 1990s cases that became the appellate courts' precedents of choice—at least in name.

Because the case involved a brutal child rape and murder resulting in a first degree murder conviction and a death penalty sentence, the facts of *Wille* could not have been more antipathetic to the defendant.⁷⁸ The defendant objected to an FBI special agent's extensive testimony that eyewitnesses to the murder implicated the defendant as the perpetrator and that the eyewitnesses' assertions led the agent to conclude that the defendant was the prime suspect in the case.⁷⁹ The prosecuting attorney argued that the testimony was admissible to explain the sequence of events, from the viewpoint of the investigating officer, leading to the defendant's arrest.⁸⁰ The court held that because there was no true issue as to the propriety of the officer's actions, the statements should have been excluded as hearsay, bearing a high potential for use by the jury as proof of the defendant's guilt.⁸¹

The court established several premises that became important for analyzing the explanatory exception. First, the court fumed that the explanatory exception is an area of "widespread abuse."⁸² Second, the court suggested that the exception is probably not properly used if the statement significantly connects the defendant with the crime.⁸³ Third, the court affirmed the significant interrelation of the rules of relevancy and hearsay and the necessity of weighing prosecutorial need of the statement against unfair prejudice to the defendant.⁸⁴ The court restrictively stated that an investigating officer's trial testimony to explain his conduct

76. 559 So. 2d 1321 (La. 1990).

77. Act No. 515, § 1, 1988 La. Acts 1086.

78. *Wille*, 559 So. 2d at 1323–24.

79. *Id.* at 1329.

80. *Id.*

81. *Id.* at 1331.

82. *Id.* (citing *CLEARY ET AL.*, *supra* note 47, § 249).

83. *Id.* at 1329 (distinguishing the prosecution's cited cases, in which the out-of-court assertions did not significantly connect the defendant with the crime, unlike the present case).

84. *Id.* at 1331.

“almost always has only marginal relevance at best.”⁸⁵ Despite having faced facts of horrible actions by the defendant, the court impartially refused to allow a violation of the hearsay rule.

Two years later, the supreme court faced a much less heinous crime, possession of methamphetamine, in *State v. Hearold*.⁸⁶ The statements at issue were subtler: an officer testified that he received information that the defendant and another suspect were involved in narcotics dealings in the eastern part of a particular parish.⁸⁷ The court held that the officer’s testimony as to the contents of an informant’s tip was impermissible hearsay.⁸⁸ Additionally, other officers’ testimonies that they had received many complaints about the defendant being involved in drug dealing included inadmissible hearsay.⁸⁹ The trial court’s error in admitting this evidence was harmful enough for the court to reverse the conviction.⁹⁰ The court’s reasoning constituted a landmark line of demarcation:

Generally, an explanation of the officer’s actions should never be an acceptable basis upon which to admit an out-of-court declaration when the so-called “explanation” involves a direct assertion of criminal activity against the accused. . . . Absent some unique circumstances in which the explanation of purpose is probative evidence of a *contested fact*, such hearsay evidence should not be admitted under an “explanation” exception.

[In this case,] [t]he jury had no opportunity to evaluate the out-of-court declarant whose credibility may have been substantially less than that of a police officer testifying in full uniform.⁹¹

Hearold clarifies *Wille*’s restrictions. First, the “explanation exception” is not justifiably used when the statement directly implicates the accused, except in a “unique circumstance” in which the officer’s conduct or purpose for acting is a “contested fact.”⁹² The “contested fact” standard requires the defense and prosecution to dispute the propriety of the officer’s conduct for the exception to apply. This is actually narrower than a normal relevance standard,

85. *Id.*

86. 603 So. 2d 731, 733 (La. 1992).

87. *Id.* at 737.

88. *Id.*

89. *Id.* at 738.

90. *Id.* at 739.

91. *Id.* at 737–38 (emphasis added).

92. *Id.* at 737.

under which a fact only has to be of consequence to the determination of the action.⁹³

Second, the supreme court focuses on jurors' thought processes in applying the exception. *Hearold* states that because a jury may find an out-of-court declarant to have substantially less credibility than a testifying fully uniformed police officer, the explanatory exception may improperly abrogate the jury's credibility determination.⁹⁴ Such an assumption by the court represents a stance that the court has the capability to objectively determine the effect that such a statement would have on the jury.⁹⁵

The trilogy culminated in *State v. Broadway* in 1999.⁹⁶ In *Broadway*, the trial court convicted the defendant of first degree murder and sentenced the defendant to death.⁹⁷ At trial, the prosecution elicited from two detectives the circumstances under which they had first heard the defendant's name.⁹⁸ The detectives testified that a particular suspect gave the defendant's name while under interrogation.⁹⁹ The supreme court once again refused to uncage the explanatory exception. The prosecution "seriously crossed over the line" drawn by the *Wille-Hearold* decisions through deliberately eliciting testimony involving out-of-court statements pointing toward the defendant's culpability.¹⁰⁰ The statements were hearsay even though the verbatim content of the statements was not placed before jurors.¹⁰¹

Although the *Broadway* decision cites to *Wille* and *Hearold* in denying the exception, some dubious language in the opinion calls into question the *Hearold* "contested fact" standard of relevancy.¹⁰² The court stated that although information about the course of a police investigation is not relevant to any essential

93. LA. CODE EVID. ANN. art. 401 (2006).

94. *Hearold*, 603 So. 2d at 738.

95. Such a determination could not be made subjectively because a juror may not testify as to the effect of anything that influenced his assent to or dissent from the verdict, LA. CODE EVID. ANN. art. 606(B) (2006), and a credibility determination is ultimately the jury's as the fact finder, see *Lirette v. State Farm Ins. Co.*, 563 So. 2d 850, 852 (La. 1990).

96. 753 So. 2d 801 (La. 1999). See generally 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, 777 (2001) (suggesting that *Broadway's* approach comes closest to upholding the intent of the FRE and U.S. Constitution in addressing admissibility of bystanders' statements to police officers).

97. *Broadway*, 753 So. 2d at 805-07.

98. *Id.*

99. *Id.*

100. *Id.* at 809.

101. *Id.*

102. See *State v. Hearold*, 603 So. 2d 731, 737 (La. 1992).

elements of the crime, it may be useful in drawing the “full picture” for the jury, to show that police did not arrest the defendant “out of thin air,” but rather as a result of a “thorough professional investigation.”¹⁰³ Still, the court concluded that the prosecution may not use the “guise” of police investigational relevancy to place before the jury an out-of-court declaration of criminal accusation.¹⁰⁴

B. Too Much Hearsay Relevancy

The Louisiana Supreme Court’s ground rules regarding the exception established guidelines for the courts to determine whether police testimony accords with Louisiana’s relevancy standards. Using the article 401/403 relevancy balancing test, a court can often see through the prosecution’s argument to determine that a statement is *actually* being offered as proof of criminal wrongdoing, though cloaked in the guise of the explanatory exception. For example, it is easy to determine that the prosecution’s subjective reason for offering a statement is to prove its truth when the statement was made by the sole eyewitness to the crime, was primarily concerned with identification procedures, was barren of explanatory background details, and specifically named the defendant as the perpetrator.¹⁰⁵ Additionally, the prosecution’s actual intent in offering a statement as hearsay is obvious when the prosecution refers back to the out-of-court statement in closing argument.¹⁰⁶

In contrast, what determines whether a statement is “offered” to prove its own truth when the prosecution does not leave helpful hints along the way? This ambiguity has resulted in judicial confusion over whether the offeror’s actual intent or the effect of the statement’s use determines whether a statement is offered for its truth. Some court decisions suggest that if the statement’s objectively determinable effect is that the jury will use it as proof of the defendant’s guilt, then the statement has been “offered” for a hearsay purpose.¹⁰⁷ Problematically, other appellate opinions

103. *Broadway*, 753 So. 2d at 809.

104. *Id.* at 810.

105. *State v. Jones*, 841 So. 2d 965, 972, 974–75 (La. Ct. App. 5th 2003).

106. *See United States v. Hernandez*, 750 F.2d 1256, 1257–58 (5th Cir. 1985); *Broadway*, 753 So. 2d at 807.

107. *See, e.g., Hearold*, 603 So. 2d at 738 (finding that the statement served no other purpose than to show the defendant’s guilt). *See also State v. Bean*, 582 So. 2d 947, 950 (La. Ct. App. 2d 1991), finding that where the officer testified that a man told the officer, who was controlling a crowd at a house fire, that the victim had been shot in the street, the statement was nonhearsay. The statement

suggest that the proper focus in determining if a statement is unfairly prejudicial is upon the actual intent of the prosecution as offeror of the statement.¹⁰⁸ Such a result conveys the court's disregard of the obvious effect of such a statement in spotlighting the accused's guilt.

More than academic dawdling, the distinction bespeaks the Louisiana Supreme Court's position that, under an article 401/403 analysis, the prosecution's alleged need of a statement for a proper use must be balanced against the potential for unfair prejudice from jury misuse.¹⁰⁹ Focusing on the prosecution's ostensible intent may ignore unfair prejudice to the defendant under article 403. Therefore, the courts could better fulfill their mandate to consider the possibility of unfair prejudice if they considered the objective effect that a statement is likely to have on the jury.

C. Uncaging of the Beast: Inconsistent Appellate Application

Although Louisiana court opinions as a whole acknowledge a general mandate to consider the jury's use of out-of-court statements, the devil is in the details. While paying lip service to supreme court opinions circumscribing proper relevance of out-of-court statements, the Louisiana circuit courts of appeal apply the exception so inconsistently that it is as if the LCE is not binding and the supreme court has never spoken on the issue. When a circuit court states that the only purpose of an out-of-court statement was to prove that the "[d]efendant was the one who pulled the trigger that killed the [v]ictim," and then two paragraphs later declares that the statement was properly admitted as an

did not have the effect of showing that a particular defendant shot the victim but merely had the effect of explaining why the officer left the house fire to view the victim's plight. *Id.*

108. See, e.g., *State v. Smothers*, 927 So. 2d 484, 491 (La. Ct. App. 5th 2006) (State intended to use the physical descriptions of the perpetrator in a taped 911 statement to bolster State's case as to defendant's identity); *Evangelista v. U.S. Welding Serv., Inc.*, 898 So. 2d 438, 441 n.1 (La. Ct. App. 1st 2004) (whether a police report is inadmissible hearsay depends upon the "purpose" for which it is offered); *State v. Antoine*, 841 So. 2d 874, 881 (La. Ct. App. 5th 2003) (prosecution intended the officer's testimony to indirectly place before the jury an assertion of the defendant's guilt); *State v. Cowart*, 815 So. 2d 275, 289 (La. Ct. App. 5th 2002) (statement was nonhearsay even though it involved a witness saying that he saw the defendant commit the criminal act).

109. *Broadway*, 753 So. 2d at 810; *Hearold*, 603 So. 2d at 737; *State v. Wille*, 559 So. 2d 1321, 1331 (La. 1990).

explanation of the events leading to the defendant's arrest, obviously something is amiss.¹¹⁰

1. Blatant Explanatory Exception Abuse

Perhaps the most inexcusable abuse of the exception occurs in instances that clearly violate the terms of the LCE, supreme court holdings, or both. One such area of abuse is the confusion of nonhearsay with proper statutory hearsay exceptions.¹¹¹ Because legal hearsay exceptions are only those created by statute,¹¹² treating a hearsay statement that does not fit under a statutory exception as a statement admissible under an explanatory exception is particularly egregious. The Louisiana courts' decision to call it the "explanatory exception"¹¹³ is a misnomer to begin with: it is not spelled out in a statute, so it cannot be an exception. One court went as far as to carelessly label the explanatory exception as "one such exception" under Louisiana's statutory framework.¹¹⁴

More specifically, Louisiana appellate courts muddle the lines between specific LCE hearsay exceptions and nonhearsay that is admissible under the explanatory exception. Confusing *res gestae* under article 801(D)(4)¹¹⁵ with the explanatory exception is one such offense.¹¹⁶ The Louisiana Fourth Circuit admitted detectives' and officers' testimony as to out-of-court conversations under the "res gestae exception" because officers may refer to statements made by others to explain the officers' own actions or to explain the sequence of events leading to the defendant's arrest.¹¹⁷ The court clearly confused *res gestae* with the explanatory exception because the court used large *Hearold-Wille* quotes to conclude that *res gestae* applied.¹¹⁸ Not only does the opinion inaccurately fail to differentiate *res gestae* from nonhearsay, but the court's holding,

110. See *State v. Jones*, 999 So. 2d 239, 250–51 (La. Ct. App. 3d 2008). A most exacting scrutiny of the court's opinion reveals that the court may have been referring to two different statements, but the treatment of the issue is sufficiently haphazard to create an apparently absurd result.

111. See *infra* notes 112–22 and accompanying text.

112. LA. CODE EVID. ANN. art. 802 (2006).

113. See *supra* text accompanying note 74.

114. See *State v. Grant*, 954 So. 2d 823, 833 (La. Ct. App. 2d 2007). *But see State v. Hunt*, 797 So. 2d 138, 142 (La. Ct. App. 2d 2001) (correctly recognizing that the State did not need to use the article 803(3) exception because the statement at issue was nonhearsay).

115. LA. CODE EVID. ANN. art. 801(D)(4) (2006).

116. See *infra* notes 117–19 and accompanying text.

117. *State v. Dangerfield*, 816 So. 2d 885, 896 (La. Ct. App. 4th 2002).

118. *Id.* at 896–97.

that portions of the testimony fit within the *res gestae* exception and that others were inadmissible, also creates a vague standard for future explanatory exception cases.¹¹⁹

Courts also blend other statutory exceptions with the explanatory exception. For instance, courts confuse the article 801(D)(1) allowance of an out-of-court declarant who is present at trial and subject to cross examination concerning a statement¹²⁰ with the explanatory exception.¹²¹ Conceivably, the courts' confusion in this area lies in the fact that if a statement within an officer's testimony is hearsay, it still could be admitted if it falls under a valid statutory hearsay objection.¹²² However, this does not justify the confusion of nonhearsay with a statutory exception. Confusion of the two because they both reach the same result of admitting evidence is theoretically inconsistent.

Another area of abuse demonstrates such evaporation of consistency: the courts' use of the explanatory exception merely because the person who made the out-of-court statement to which the officer testifies is present in court.¹²³ Before the adoption of the LCE, there was a jurisprudential hearsay exception admitting a statement when the declarant was present in court; however, that exception no longer exists.¹²⁴ Still, the courts use this non-existent

119. *Id.* at 896; *see also* State v. Granier, 592 So. 2d 883, 888 (La. Ct. App. 4th 1991) (holding that statements made to a police officer to explain his actions often fall into the *res gestae* exception and are admissible as nonhearsay to prove the sequence of events leading to the defendant's arrest).

It is worth noting that under a literal reading of article 801(D), the *res gestae* "exception" (and the other "exceptions" of article 801(D)) are *actually* instances of statements that are "not hearsay." LA. CODE EVID. ANN. art. 801(D) (2006). Under article 801(D)(4), "[a] statement is *not hearsay* if" it is *res gestae*—in contrast with the article 803–04 "exceptions," properly speaking. *Id.* art. 801(D)(4) (emphasis added). However, this Comment refers to the article 801(D) provisions as statutory "exceptions," for they apparently function in the same way as the article 803–04 exceptions—to provide a *statutory* basis for admitting out-of-court statements that might otherwise fit the definition of hearsay.

120. LA. CODE EVID. ANN. art. 801(D)(1) (2006).

121. State v. Taylor, 973 So. 2d 83, 97–99 (La. Ct. App. 5th 2007); State v. Greene, 951 So. 2d 1226, 1232–34 (La. Ct. App. 5th 2007).

122. *See* State v. Wade, 908 So. 2d 1220, 1231 (La. Ct. App. 2d 2005) (finding that the statement was inadmissible not only because the explanatory exception did not apply but also because there was no valid statutory exception to the hearsay rule).

123. *See infra* notes 124–27 and accompanying text.

124. *See* MARAIST, *supra* note 13, § 10.1, at 159 (citing LA. CODE EVID. ANN. art. 801(C) (2006)). Hearsay is a statement, "other than one made by the declarant while testifying." LA. CODE EVID. ANN. art. 801(C) (2006). Therefore, even if the declarant testifies at trial, his statement is hearsay because it was

“declarant is present in court” exception to liberally apply the explanatory exception. The Louisiana Third Circuit inappropriately distinguished *Wille* on the grounds that in the case before it, the out-of-court declarants were present in court, unlike in *Wille*.¹²⁵ The Louisiana Fifth Circuit stated that improper use of the explanatory exception would be harmless error because the out-of-court declarant was present in court and subject to cross-examination.¹²⁶ The Louisiana Second Circuit said that it was persuaded that statements were properly admitted under the explanatory exception because the declarant testified in the defendant’s case-in-chief and was fully questioned on direct and cross-examination.¹²⁷

Even more troubling is the appellate courts’ refusal to honor the Louisiana Supreme Court’s holding in *Hearold* that a court may not apply the exception to explain an officer’s conduct when the propriety of the officer’s conduct is not contested.¹²⁸ Although

made out of court, not while he was testifying. *See also id.* art. 802 (foreclosing non-statutory hearsay exceptions).

125. *State v. Jones*, 999 So. 2d 239, 250 (La. Ct. App. 3d 2008).

126. *State v. Moses*, 932 So. 2d 701, 712 (La. Ct. App. 5th 2006). The court further defied logic by stating that the declarant’s presence in court rendered “any possible *harm* in admitting Detective Wall’s statement *harmless*.” *Id.* (emphasis added). It is unclear how harm can become harmless, or macrocosmically, how any thing could be something other than itself. The courts also say that error is harmless when out-of-court declarants are present at trial to testify, in contexts outside the explanatory exception. *See State v. Smith*, 710 So. 2d 1187, 1191 (La. Ct. App. 5th 1998).

127. *State v. Wiley*, 614 So. 2d 862, 869 (La. Ct. App. 2d 1993). In the court’s opinion, there was not even a showing that the declarant was subjected to cross-examination concerning the admitted statements. *Id.*

128. Pre-*Wille* and pre-*Hearold* (and thus pre-LCE) decisions in which the Louisiana Supreme Court admitted out-of-court statements as relevant to an officer’s investigation are not subject to heated criticism because there was little danger of the statements creating unfair prejudice. *See, e.g., State v. Smith*, 400 So. 2d 587, 591 (La. 1981) (officer’s testimony that he was “advised” of an incident was nonhearsay because probative as to why the investigation commenced); *State v. Watson*, 406 So. 2d 1331, 1349 (La. 1981) (statements were nonhearsay, relevant to explain the officer’s conduct of how the “initially deflected” investigation got “back on track”); *State v. Turner*, 392 So. 2d 436, 438, 440 (La. 1980) (where prosecutor repeatedly asked investigator to avoid repeating what was told him, the investigator’s testimony that he had received information that certain suspects had been receiving contraband was relevant to explain why the investigator ordered an intrusive strip search of the defendant); *State v. Monk*, 315 So. 2d 727, 740 (La. 1975) (officer’s testimony of a radio message about a bank robbery was only offered to explain officer’s initiation of investigation and the jury was instructed as to the limited purpose of the evidence); *State v. Bluain*, 315 So. 2d 749, 751, 753 (La. 1975) (where defendant filed numerous bills of exceptions, some of which put the propriety of

the propriety of an officer's actions was not at issue, to explain the officer's actions the Louisiana Second Circuit admitted the officer's testimony that a subject had divulged that the defendant was a drug supplier.¹²⁹ The court's holding was patently erroneous because *Hearold* forbade explanation of an officer's actions involving a direct assertion of criminal activity against the accused,¹³⁰ and such a direct assertion existed in the statement at issue.¹³¹

2. *Specific Categories of Misuse*

The more blatant abuses of the explanatory exception give rise to less conspicuous misuse by the appellate courts. Though inconspicuous, these misuses are no less repugnant to the hearsay rule.

a. Informants and Anonymous Tipsters

Returning to the earlier hypothetical involving Officer Mary McFadden's arrest of Joe Schmeaux, the informant described Schmeaux as wearing brown corduroy pants and a red hooded jacket. This is hearsay unless it comes under a statutory exception or is proper nonhearsay under the explanatory exception. Such out-of-court statements by informants, especially those providing

the investigation at issue, officer's testimony that he was given the defendant's license plate number from the victim's purse was nonhearsay because offered to show how the officer obtained a search warrant to search the defendant's house).

129. *State v. Zeigler*, 920 So. 2d 949, 954–55 (La. Ct. App. 2d 2006).

130. *State v. Hearold*, 603 So. 2d 731, 737 (La. 1992).

131. *Zeigler*, 920 So. 2d at 954. See also *State v. Grant*, 954 So. 2d 823, 833 (La. Ct. App. 2d 2007), erroneously admitting an officer's testimony as to another officer's out-of-court statement, which implicated the defendant, to explain why the testifying officer looked into a hole in the wall for drugs. The police had a search warrant to search the house, making the propriety of the officer's peek into the hole undisputed. See also *Moses*, 932 So. 2d at 712, admitting an officer's testimony that through interviewing the victim's neighbor he learned the physical description of the defendant's car. The court held this to be probative to the officer's reason for later locating the defendant's vehicle, though the officer's conduct was not a contested fact. *Id.* Making matters worse, the court erroneously found the neighbor's statement to be "permissible hearsay testimony" because it did not speak to the defendant's guilt or innocence, only to the car's physical description. *Id.* Such reasoning appears insufficient: if the statement was offered to prove the car's physical description, it was offered to prove the truth of the words spoken and was inadmissible hearsay!

officers with anonymous tips, are commonly admitted under the explanatory exception, often erroneously.¹³²

The court in *State v. Raby* admitted an officer's testimony that he had received a confidential informant's tip describing the defendant and the defendant's clothing before the officer proceeded to a certain housing project.¹³³ The court in *Raby* inappropriately distinguished *Hearold* on the rationale that in *Hearold*, the officer's testimony went beyond the scope of questions about the substance of the investigation.¹³⁴ The court also distinguished *Wille* by saying that in *Wille* the statements were solely relevant to guilt.¹³⁵ This differentiation of *Hearold* and *Wille* based on superfluous factual differences amounts to disregard of *Hearold's* clear holding that the explanatory exception may not be used to admit the contents of an informant's tip.¹³⁶ Appellate courts' use of the exception to admit the contents of an informant's tip is defiant of supreme court jurisprudence.¹³⁷

132. See *infra* notes 133–37 and accompanying text.

133. 738 So. 2d 699, 700, 702, 704 (La. Ct. App. 4th 1999).

134. *Id.* at 704.

135. *Id.*

136. *State v. Hearold*, 603 So. 2d 731, 737 (La. 1992). See also *State v. Anderson*, 842 So. 2d 1222, 1229 (La. Ct. App. 2d 2003), in which an officer testified that his search of the defendant's residence, leading to the discovery of illegal drugs and a firearm, was prompted by his receipt of information from a confidential informant who identified the defendant's criminal activity. In admitting the statement, the court cited to a supreme court case for the proposition that despite its hearsay character, an informant's tip, when proven accurate, may be used by the fact finder to support the conviction. *Id.* (citing *State v. Butler*, 760 So. 2d 322 (La. 2000)). However, in the cited case the court actually admitted an informant's tip because "counsel did not object to testimony regarding the informant's tip, despite its hearsay character." *Butler*, 760 So. 2d at 323. When the defendant does not object to hearsay evidence, a court is free to allow the evidence to be admitted. See LA. CODE EVID. ANN. art. 103(A)(1) (2006). Therefore, *Anderson* not only improperly applied the explanatory exception, but also misconstrued a Louisiana Supreme Court holding for support in doing so. Other examples of the circuit courts improperly admitting informants' statements include *State v. Franks*, 975 So. 2d 836, 840–41 (La. Ct. App. 2d 2008), and *State v. Williams*, 735 So. 2d 62, 75–76 (La. Ct. App. 5th 1999). It seems the Louisiana First Circuit got it right in *State v. Young*, 764 So. 2d 998, 1004–05 (La. Ct. App. 1st 2000). The court held that where the officer said that he had received numerous citizen complaints, the testimony included proper nonhearsay used to explain why the police investigated the specific area. *Id.* The court properly utilized *Hearold's* instruction that only testifying to the *content* of an informant's tip violates the hearsay rule. See *Hearold*, 603 So. 2d at 737; see also *State v. Murphy*, 309 So. 2d 134, 135 (La. 1975) (police testimony as to an informant's out-of-court statement was "pure hearsay").

137. See *supra* note 136 and accompanying text.

b. Reason for Arrest

Immediately before Officer McFadden arrested Schmeaux, she heard the raspy-voiced gentleman imply that Schmeaux was carrying a weapon. Naturally, the gentleman's statement, coupled with the verification of the informant's physical description of Schmeaux, would put McFadden on the defensive to protect herself from a potentially armed criminal. McFadden's trial testimony as to the raspy-voiced man's statement could arguably be nonhearsay, probative to explain McFadden's next step in patting down Schmeaux for weapons. In this hypothetical case, perhaps the officer's "reasonable suspicion," or lack thereof, may be a contested fact, making the out-of-court statement properly relevant to establish the reason for patting down and then arresting Schmeaux. Unfortunately, appellate decisions often use the officer's reason for arrest as a subject of relevance under much more questionable circumstances.¹³⁸

State v. Cowart demonstrates the problem with using the officer's reason for arrest as the subject of an out-of-court statement's relevancy.¹³⁹ Under the rationale that the statement was nonhearsay, the court admitted an officer's testimony that a woman told the officer that she had witnessed the shooting for which the defendant was being tried, which explained what led to the defendant's arrest.¹⁴⁰ The court found that the statement was necessary to show the jury that the statement, coupled with the officer's inability to confirm the defendant's alibi defense, gave a valid reason for arrest.¹⁴¹ The problem with such analysis is that it merely recites precedent for admitting such statements without applying an article 403 balancing test to determine if the need to explain why the arrest occurred substantially outweighs the likelihood of unfair prejudice, a test required by the supreme court decisions.¹⁴²

138. See *infra* text accompanying notes 139–42.

139. 815 So. 2d 275 (La. Ct. App. 5th 2002).

140. *Id.* at 289.

141. *Id.*; see also *State v. Soler*, 636 So. 2d 1069, 1078 (La. Ct. App. 5th 1994).

142. *State v. Broadway*, 753 So. 2d 801, 809 (La. 1999); *State v. Hearold*, 603 So. 2d 731, 738 (La. 1992); *State v. Wille*, 559 So. 2d 1321, 1331 (La. 1990). For a proper approach, see *State v. Davis*, 947 So. 2d 48, 56–57 (La. Ct. App. 5th 2006), where testimony was proper nonhearsay to show why the officer's suspicions were raised and led to an investigation when the officer testified that the out-of-court statements did not disclose information about the defendant.

c. Sequence of Events

Driving along her patrol route, Officer McFadden's train of thought was interrupted by the crackling fuzz of radio chatter. Listening to the message being relayed, she quickly realized that there was suspicious activity that required her to leave her usual route. In court, McFadden might testify that she received a radio report of suspicious activity at around 11:00 p.m. Such testimony would include an out-of-court statement, the radio report. However, the prosecutor might argue that the statement is nonhearsay, not offered to prove the fact of suspicious activity, but to show the timeline of events, painting the "full picture" for the jury. Using this radio report as evidence relevant to establish the sequence of events would probably not carry much danger of unfair prejudice because the statement does not tend to link Schmeaux to the particular crime for which he is charged. The statement merely has the tendency to show at what time McFadden initiated her investigation, not that a particular defendant was investigated.

Louisiana circuit courts of appeal continue to use the explanatory exception to explain the sequence of events when, unlike in Schmeaux's case, there is a high potential for unfair prejudice. In *State v. Dyer*, a detective testified that a suspect had implicated the defendant and that, based upon that information, the detective compiled a photographic array, which included the defendant's picture, to show to the victim.¹⁴³ The court admitted the statement "to explain the sequence of events leading to the arrest of the defendant from the viewpoint of the officer."¹⁴⁴ This recital ignored the probability that the jury would use the statement as proof of the defendant's identity as the perpetrator of the robbery. Additionally, the statement led to a photo lineup, so admission of the hearsay statement pointed toward the defendant's culpability. The courts' use of the explanatory exception to establish a sequence of events violates even the most "lenient" of the three decisive supreme court cases, *Broadway*, which forbids the exception when it would indirectly place hearsay evidence of guilt before the jury.¹⁴⁵

143. 794 So. 2d 1, 11–12 (La. Ct. App. 5th 2001).

144. *Id.*

145. *Broadway*, 753 So. 2d at 809. For another case erroneously admitting out-of-court statements as relevant to the sequence of events, see, for example, *State v. Jones*, 999 So. 2d 239, 249 (La. Ct. App. 3d 2008). The court admitted a statement because it established a "time line of the [v]ictim's whereabouts prior to his death." *Id.* The proper article 403 analysis would have recognized the potential that a jury would consider the statement for the truth of its assertion as

d. Conduct as an Assertion

A subtle, complicated area of concern is the possibility that an officer's testimony as to out-of-court conduct constitutes testimony as to a "statement" within the meaning of the hearsay rule. Recall that the definition of hearsay includes out-of-court conduct, if intended as an assertion.¹⁴⁶ Hence, Officer McFadden testifies that before proceeding to the area of arrest, her confidential informant said he would tie his shoe across the street from "Dopey" to signify whom the officer should arrest. McFadden then testifies that she watched the informant tie his shoe across the street from someone, whom McFadden then arrested, who turned out to be Schmeaux. It is likely from McFadden's testimony that the jury would conclude that the informant's out-of-court action was an assertion. In testifying that the informant tied his shoe across the street, McFadden probably implied the informant's intent to assert Schmeaux's criminal status.

Though the probability of an actor intending his conduct to be an assertion is generally low,¹⁴⁷ appellate decisions show that out-of-court conduct as an assertion can be a legitimate issue.¹⁴⁸ In *State v. Banford*, a detective testified that he showed a co-

to the victim's whereabouts, potentially linking the particular defendant to that location and ultimately to the crime itself. *Id.* See also *State v. Warren*, 538 So. 2d 1036, 1038-40 (La. Ct. App. 4th 1989), admitting testimony as to an out-of-court statement that the defendant had stolen a winch as relevant to outline the sequence of events leading to the defendant being charged for illegal possession of a stolen thing. Further, the court in *State v. Byrd*, 540 So. 2d 1110, 1114 (La. Ct. App. 1st 1989), admitted an officer's testimony that the victim had given the officer the license plate number of the suspected robber's car and that after running the number, the officer linked the vehicle to the defendant, as relevant to explain the sequence of events. On the other hand, *State v. Watson*, 449 So. 2d 1321, 1328 (La. 1984), is a pre-LCE supreme court case in which use of the "sequence of events" logic is consistent with the modern *Hearold-Wille-Broadway* opinions because the particular statements at issue did not have a high degree of danger for use as hearsay. The investigating officer testified to the responses of the victim's roommate when the officer questioned the roommate as to the victim's activities on the night of the murder. *Id.* Still, the court did not apply the later heightened scrutiny of the post-LCE supreme court cases. *Id.* See also *State v. Calloway*, 324 So. 2d 801, 809 (La. 1975), in which the supreme court, addressing 21 separate bills of exceptions, used the "sequence of events" rationale to briefly dispense with the defense's hearsay objection to an officer's testimony that he had received a report on the radio describing the suspects' car as a black Cadillac.

146. See discussion *infra* Part II.D.2.

147. STRONG ET AL., *supra* note 49, § 250.

148. See *infra* text accompanying notes 149-53.

defendant a photo line-up and that after showing him the line-up, the officer obtained an arrest warrant for the defendant.¹⁴⁹ Although the detective did not testify as to the result of the line-up, the defendant objected on hearsay grounds that the testimony was a “back door” means of putting before the jury the co-defendant’s identification of the defendant.¹⁵⁰ The court admitted the testimony as nonhearsay—the detective did not repeat the substance of the out-of-court statement made to him—and stated that even if there was a “hearsay implication,” the explanatory exception would admit the statement.¹⁵¹ The court failed to consider whether the officer’s conduct in obtaining an arrest warrant after the photo line-up was an out-of-court assertion that the co-defendant implicated the defendant. Such a case would be double hearsay, or “hearsay within hearsay.”¹⁵² The officer would be testifying to both his own out-of-court conduct—assertion and the co-defendant’s assertion that the defendant was the perpetrator.¹⁵³

149. 653 So. 2d 671, 674 (La. Ct. App. 5th 1995).

150. *Id.*

151. *Id.* at 675.

152. See LA. CODE EVID. ANN. art. 805 (2006) (“Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided by legislation.”).

153. See also *State v. Bagneris*, 804 So. 2d 831, 833–34 (La. Ct. App. 4th 2001), in which the detective testified that a phone call had been received, which allowed the officers to run the phone number through a list, obtain the address from which the call was made, and learn that the defendant lived there. The court held that the mere fact that the jury could infer that someone may have made a statement implicating the defendant did not constitute hearsay. *Id.* The problem was the court’s failure to consider the possibility that the officer’s conduct in tracing the call to make contact with the defendant, in light of receiving a phone call incriminating the defendant, constituted an out-of-court action—statement offered to prove the defendant’s culpability. *Id.*

In cases like this, the officer’s assertive conduct as “outer hearsay” could possibly be admitted under a statutory hearsay exception. For example, one statutory exception would admit the statement if the officer’s conduct—statement was consistent with his in-court testimony and was offered to rebut a charge against him that he had an improper influence or motive for arresting the defendant. See LA. CODE EVID. ANN. art. 801(D)(1)(b) (2006). However, the “inner hearsay” of the statement made by the declarant identifying the defendant may be inadmissible. Additionally, under an article 401/403 analysis, such testimony carries minimal proper relevance, and the jury will probably use such testimony of the officer’s conduct as an assertion that the “inner hearsay” declarant implicated the defendant. See PUGH ET AL., *supra* note 60, at 608 (citing *Bagneris*, 804 So. 2d 831). For a case that seems to have gotten it right, see *State v. Davis*, 947 So. 2d 48, 56–57 (La. Ct. App. 5th 2006). The detective testified that statements made by co-defendants raised his suspicions and led to questioning of the defendant. *Id.* The detective’s further testimony that the co-defendants’ statements did not disclose any information about the defendant

From neglecting to consider hearsay implications of officer testimony to confusing the explanatory exception with statutory exceptions, the courts' misapplication of the explanatory exception defies the Louisiana Legislature and violates criminal defendants' rights. Reviewing Louisiana appellate decisions to see the erroneous departure from LCE principles and supreme court standards is easy, but caging the unruliness of the explanatory exception to its proper scope is a more elusive task.

IV. RESOLVING THE PLOT'S CENTRAL CONFLICT: HOW TO LEGALLY APPLY THE EXPLANATORY EXCEPTION IN LOUISIANA

It is possible to rein in the abuse of the Louisiana explanatory exception and to restore it to its proper scope. Because law enforcement officials are vital to the success of any prosecution in providing links of the accused to the crime, the prosecution's development of a narrative that includes the details of the officer's investigation is properly relevant at some level.¹⁵⁴ However, as Louisiana appellate decisions show, the development of a narrative at trial is recurrently achieved at the expense of unfaithfulness to the LCE. The courts only pay lip service to the article 401/403 balancing test, giving greater deference to prosecutorial discretion in narrating the criminal investigation¹⁵⁵ than to the defendant's right under the hearsay rule to be free from unfair prejudice.¹⁵⁶ To once more legally apply the explanatory exception in Louisiana and consistently afford both the defendant and the prosecution the ability to protect their legal interests, Louisiana courts need to adopt the following solutions: (1) return to a proper relevancy analysis of the officer's conduct and the investigation's sequence of events; (2) perform a more vigilant harmless error analysis in

dispelled any concerns of officer conduct implicitly asserting that the co-defendants had implicated the defendant. See also *State v. Moses*, 932 So. 2d 701, 712 (La. Ct. App. 5th 2006), where the detective testified that when the witness identified the defendant, the witness was certain of the defendant's identity. It seems that the defendant's hearsay objection was that the detective was implicitly asserting the content of an out-of-court statement—the witness's statement to the detective of the witness's certainty of identity. *Id.* The court excluded the statement on competency grounds, i.e., the officer's testimony as to the contents of the witness's mind would have been speculative. *Id.*

154. See *infra* notes 190–95 and accompanying text.

155. See discussion *infra* Part III.B–C.

156. See *State v. Broadway*, 753 So. 2d 801, 809 (La. 1999); *State v. Hearold*, 603 So. 2d 731, 737 (La. 1992); *State v. Wille*, 559 So. 2d 1321, 1331 (La. 1990).

cases using the explanatory exception; and (3) reformulate the exception for logical consistency.

A. Return to a Proper Relevancy Analysis

The courts need to return to a proper relevancy analysis of out-of-court statements offered to explain officers' conduct and to explain the sequence of events in investigations. Although both officer conduct and the timeline of events may be proper subjects of relevancy, the courts need to perform circumspect analysis if the explanatory exception is to be used without violating the LCE.

1. Explanations of an Officer's Conduct

The courts' serial use of language that officers may testify to out-of-court statements to "explain the course of the police investigation"¹⁵⁷ is overly broad. First of all, courts should recognize that an officer's conduct during his investigation is usually irrelevant at a general criminal trial on the merits.¹⁵⁸ Logically, an officer's investigation and arrest of the defendant are probative as to the defendant's guilt. However, an article 403 analysis suggests that a jury would not merely use the fact of the officer's investigation as evidence of guilt, but also use the out-of-court statement containing an assertion of criminality as evidence of guilt.¹⁵⁹ Louisiana Supreme Court decisions have already taken the view that an officer's conduct is generally irrelevant; appellate courts need only get in line.¹⁶⁰

The courts should only allow the exception when an officer's conduct and underlying motives are facts at issue. One such recognized category is a motion to suppress hearing, as opposed to

157. See, e.g., *State v. Maise*, 805 So. 2d 1141, 1152 (La. 2002) (using this language, though resolutely excluding the statement at issue as hearsay).

158. Stephen C. Bower, *Relevancy—Old Rule, New Approach*, 38 RES GESTAE 18, 18–19 (1994).

159. *Id.*

160. *Hearold*, 603 So. 2d at 737–38; *Wille*, 559 So. 2d at 1331. *But see Broadway*, 753 So. 2d at 809 ("Information about the course of a police investigation . . . 'draw[s] the full picture' for the jury."). There are rare cases when an officer's conduct will be relevant on the merits after performing an article 403 balancing test, but such rare exceptions should not swallow the general rule against trial-on-the-merits relevance of officer conduct. For instance, where the police officer's aggressive conduct against the defendant is explained by an informant's tip that the defendant usually carried a gun and wanted to kill the testifying undercover agent, the tip has proper relevance to explain law enforcement conduct that would otherwise cause the jury to penalize the prosecution. *United States v. Bowser*, 941 F.2d 1019, 1021 (10th Cir. 1991).

the actual criminal trial. If a defendant wishes to have evidence excluded at trial that he believes was unconstitutionally obtained, an evidentiary pre-trial hearing may be granted for the defendant to prove why the evidence should be suppressed.¹⁶¹ At a motion to suppress hearing, the explanatory exception is appropriate because the officer's presence and the reasonableness of his conduct are contested facts to which out-of-court statements are highly probative.¹⁶² Officer conduct also becomes a fact at issue when the defendant "opens the door" through questioning the police officer on cross-examination as to the propriety of the officer's actions,¹⁶³ alleging police coercion,¹⁶⁴ or deliberately eliciting out-of-court statements from the officer on cross-examination to prove some point the defendant wants to make.¹⁶⁵

Although it is easy to see how an officer's conduct is a fact at issue at a motion to suppress hearing or when the defendant "opens the door," the thornier question is whether the propriety of law enforcement action can be a fact at issue in a general criminal trial. The obvious answer appears to be no;¹⁶⁶ indeed, the supreme court has said that an officer's conduct must be a "contested fact" to be a fact at issue.¹⁶⁷ However, the LCE's plain text only requires a fact to be "of consequence" in determining the action to be the subject

161. LA. CODE CRIM. PROC. ANN. art. 703 (2003).

162. See *Wille*, 559 So. 2d at 1331; PUGH ET AL., *supra* note 60, at 607; GAIL DALTON SCHLOSSER, LOUISIANA CRIMINAL TRIAL PRACTICE § 20:30 (4th ed. 2008); see also *State v. Stewart*, 656 So. 2d 677, 680 (La. Ct. App. 2d 1995) (where reasonableness of officer's belief in having obtained consent to search the defendant's hotel room was a fact at issue at a motion to suppress hearing, the hotel manager's statements were highly probative to the officer's state of mind); *State v. McNair*, 597 So. 2d 1096, 1099 (La. Ct. App. 2d 1992) (properly recognizing that an officer's conduct is a fact at issue at a motion to suppress hearing, but not at a trial). In *State v. Shirley*, the supreme court recently held that the rule of hearsay is not applicable to a motion to suppress hearing, thus foreclosing the need for the explanatory exception. 10 So. 3d 224, 228–29 (La. 2009). The court explained that the judge's ruling at a motion to suppress hearing is the determination of a "question of fact preliminary to the admissibility of evidence" under LCE article 1101(C)(1), and that the judge, in making this determination, "is not bound by the rules of evidence"—except for privileges—under article 104. *Id.* (citing LA. CODE EVID. ANN. arts. 104, 1101(C)(1) (2006)).

163. BENNETT L. GERSHMAN, PROSECUTORIAL MISCONDUCT § 10:30 (2d ed. 2000).

164. See *Tennessee v. Street*, 471 U.S. 409 (1985).

165. See *State v. Keelen*, 670 So. 2d 578 (La. Ct. App. 4th 1996); PUGH ET AL., *supra* note 60, at 621.

166. See *supra* notes 157–60 and accompanying text.

167. *State v. Hearold*, 603 So. 2d 731, 737 (La. 1992).

of proper relevance.¹⁶⁸ The legislative history to LCE article 401 demonstrates that evidence may be relevant to “background facts” of the case that are undisputed—facts that enable the fact finder to understand the evidence.¹⁶⁹ On the other hand, the Louisiana Legislature, having expressly forbade jurisprudentially created hearsay exceptions,¹⁷⁰ could not have intended a “background exception” to the hearsay rule by which any out-of-court statement relevant to background facts would become admissible.

Background facts are more easily comprehended as what some legal scholars call “meta-relevance.”¹⁷¹ The great breadth of basic article 401 relevance has been described by the fact that “a brick is not a wall” and has been extended even further by one scholar who points out that a brick is composed of atoms.¹⁷² In other words, article 401’s “any tendency” language facially makes all evidence relevant as building a small portion of the larger wall of an ultimate fact.¹⁷³ One writer describes “meta-relevance” as information provided by a witness’s testimony that has only slight probative value, but where the event of the counsel’s question and the witness’s answer has substantial value to the proponent.¹⁷⁴ The problem with meta-relevance is that the tiny brick in the much larger wall often creates unfair prejudice.¹⁷⁵ If a defendant is charged with theft by cutting a chain-link fence with a pair of shears, and the prosecution introduces evidence of a prior theft by similar means, the meta-relevance of proving an ability to commit the crime¹⁷⁶ has the danger of unfairly prejudicial use as “other

168. LA. CODE EVID. ANN. art. 401 (2006). Contrast this with the California standard, defining relevance as the tendency to prove or disprove a “disputed” fact. CAL. EVID. CODE § 210 (West 1995).

169. FED. R. EVID. 401 advisory committee’s note; Act No. 515, § 1, 1988 La. Acts 1068 (adopting LCE article 401); PUGH ET AL., *supra* note 60, at 366. Although the federal rule advisory committee’s note is not legislative history for LCE article 401—rather, it is legislative history for FRE 401—it is a useful interpretive guide. *See supra* note 18 (regarding the FRE’s role as a model for the LCE).

170. LA. CODE EVID. ANN. art. 802 (2006).

171. *See, e.g.*, Richard D. Friedman, *Irrelevance, Minimal Relevance, and Meta-Relevance*, 34 HOUS. L. REV. 55 (1997); Christopher B. Mueller, *Meta-Evidence: Do We Need It?*, 25 LOY. L.A. L. REV. 819 (1992).

172. David Crump, *On the Uses of Irrelevant Evidence*, 34 HOUS. L. REV. 1, 11 (1997).

173. LA. CODE EVID. ANN. art. 401 (2006); Crump, *supra* note 172, at 11.

174. Friedman, *supra* note 171, at 68.

175. *Id.* at 67.

176. *Id.*

crimes” evidence.¹⁷⁷ The problem with meta-relevance, or background facts, is that evidence offered to prove such facts has the danger of jury misuse.¹⁷⁸

The Louisiana Legislature could not have intended an officer’s conduct to be a proper background fact or subject of meta-relevance because it adopted article 403. The standalone proposition that a fact need not be disputed for evidence related to that fact to be admissible ignores the reality that under article 403, evidence of an undisputed fact could be excluded. An officer’s undisputed conduct would rarely be a proper background fact because evidence to establish it often consists of hearsay statements. Therefore, *Hearold*’s “contested fact” standard is correctly based in statutory law. The reason for requiring an officer’s conduct to be “contested” for the explanatory exception to apply is to reaffirm that though article 401 may suggest that an officer’s conduct is a background fact, article 403’s unfair prejudice standard excludes these statements because of their improper hearsay use.¹⁷⁹

A practical reason for the “contested fact” standard is to cure the egregious judicial incongruity of allowing the prosecution to use the explanatory exception to establish the reason for an officer’s conduct as a background fact, but disallowing the exception to defendants when cross-examining officers.¹⁸⁰ The courts prevent defendants from eliciting out-of-court statements from officers on the rationale that such testimony would neither prove nor negate the elements of a crime.¹⁸¹ Recognizing officer conduct as a *de jure* background fact for the prosecution, but not for the defendant, is unjust. Equitably, the courts should refuse to

177. See LA. CODE EVID. ANN. art. 404(B)(1) (2006) (stating that proof of prior bad acts and crimes is generally not admissible to prove the defendant’s commission of the current crime for which he is prosecuted).

178. See *id.* art. 403; Friedman, *supra* note 171, at 67.

179. See FED. R. EVID. 401 advisory committee’s note. The FRE advisory committee’s note provides that some situations call for excluding evidence offered to prove facts conceded by the opponent, but such a ruling should be based on article 403, not a general “disputed fact” requirement. However, the FRE are only guidance in interpreting the LCE. As the highest court interpreting Louisiana statutory law, the Louisiana Supreme Court can rationally implement the prohibition of hearsay statements in an officer’s testimony through requiring that officer conduct be contested. Additionally, although the LCE broadens the admissibility of out-of-court statements overall, compared to the FRE, the scope is still narrower in “several respects.” Act No. 515, § 1, 1988 La. Acts 1085, 1200 (“Introductory Note” to Chapter 8). The explanatory exception is one such area in which the LCE narrows the scope of admissible out-of-court statements.

180. See, e.g., *State v. Berry*, 684 So. 2d 439, 453 (La. Ct. App. 1st 1996); *State v. Hicks*, 607 So. 2d 937, 946–47 (La. Ct. App. 2d 1992).

181. *Berry*, 684 So. 2d at 453; *Hicks*, 607 So. 2d at 947.

allow the prosecution to use the explanatory exception when the reasons for an officer's conduct are undisputed.

Moreover, allowing the explanatory exception to effectively make an officer's conduct an automatic fact at issue at trial implicates several policy concerns. Because juries are unlikely to appreciate the personal, political, and professional pressure to get convictions placed on prosecutors and law enforcement agents,¹⁸² juries are unable to reliably appraise statements made by testifying law enforcement officials.¹⁸³ To preserve the jury from aggrandizement in police testimony, officers should not be given carte blanche to use statements with an improper hearsay element to justify themselves in the jury's eyes.¹⁸⁴ Additionally, the defendant walks into a "cloud of negative inference" from the beginning of trial.¹⁸⁵ The jury may assume that the police would not have wasted their time and resources on this defendant unless he was "the one."¹⁸⁶ Defining officer conduct as yet another background fact in a criminal trial adds to the jury's existent perception of the defendant's guilt, denying the defendant the chance to use his own set of background facts to rebut this negative inference.¹⁸⁷ Once the appellate courts acknowledge the "contested fact" standard for officer conduct, some semblance of legality can be restored to the explanatory exception.

2. Explanations of the Sequence of Events

A trial involves a narrative; police testimony will include the events that occurred.¹⁸⁸ Generally, for the same reasons that one would argue that an officer's conduct could be a "background fact" or subject of "meta-relevance," the sequence of events could also be such background information, aiding the jury in understanding the larger issues of the criminal case.¹⁸⁹ However, unlike with officer conduct, the timeline of events is almost certainly a

182. Wayne D. Garris, Jr., Current Development, *Model Rule of Professional Conduct 3.8: The ABA Takes a Stand Against Wrongful Convictions*, 22 GEO. J. LEGAL ETHICS 829, 840 (2009).

183. Mueller, *supra* note 171, at 823.

184. In fact, the rule against hearsay is designed in part to protect against improper prosecutorial action because of known pressure placed upon prosecutors. *See id.*

185. Hervic, *supra* note 96, at 781.

186. *Id.*

187. *See supra* notes 180–81 and accompanying text.

188. *See, e.g.,* Eleanor Swift, *Narrative Theory, FRE 803(3), and Criminal Defendants' Post-Crime State of Mind Hearsay*, 38 SETON HALL L. REV. 975, 980 (2008).

189. *See supra* note 169 and accompanying text.

background fact. The mere word “background” connotes prior events helping one understand the central issue.¹⁹⁰ The question is how much of the substance of an out-of-court statement may be admitted under the explanatory exception to set forth the chronology of events. To answer this question, one must first ascertain the extent of the prosecution’s need to tell a story of events comprising the criminal case.

Anglo-American legal history¹⁹¹ and scholarship¹⁹² demonstrate that the modern American prosecutor has leeway in, and the need for, telling a story. Consequently, the modern criminal jury trial requires the prosecution to be able to tell the story of pertinent events through law enforcement testimony¹⁹³ so that the jury can fulfill its function of fact gathering to render an informed verdict.¹⁹⁴ For example, the prosecution might want to offer Officer McFadden’s testimony of an out-of-court statement, the radio report, to establish the time when the officer deviated from her route to investigate suspicious activity, impressing the jury with the absence of holes in the prosecution’s story.¹⁹⁵

Although officer testimony is crucial to prosecutorial narrative, the prosecution’s construction of a story that will win the hearts and minds of jurors has boundaries that should circumscribe usage of the explanatory exception to explain the sequence of events. For example, the prosecution cannot present a lavish chronology that diverts the jury from its proper fact finding role, instead

190. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 131 (4th ed. 2000).

191. JOHN H. LANGBEIN, THE ORIGINS OF ADVERSARY CRIMINAL TRIAL 64 (2003); see also BARBARA J. SHAPIRO, “BEYOND REASONABLE DOUBT” AND “PROBABLE CAUSE”: HISTORICAL PERSPECTIVES ON THE ANGLO-AMERICAN LAW OF EVIDENCE (1991).

192. Swift, *supra* note 188, at 980; see also GEORGE C. CHRISTIE & PATRICK H. MARTIN, JURISPRUDENCE: TEXT AND READINGS ON THE PHILOSOPHY OF LAW 145 (3d ed. 2008); John H. Blume et al., *Every Juror Wants a Story: Narrative Relevance, Third Party Guilt and the Right to Present a Defense*, 44 AM. CRIM. L. REV. 1069, 1087–90 (2007); John B. Mitchell, *Evaluating Brady Error Using Narrative Theory: A Proposal for Reform*, 53 DRAKE L. REV. 599, 612 (2005).

193. KEVIN TIERNEY, COURTROOM TESTIMONY: A POLICEMAN’S GUIDE 1, 14 (1970); see also GILBERT B. STUCKEY, EVIDENCE FOR THE LAW ENFORCEMENT OFFICER 1, 363 (1974).

194. See JOAN E. JACOBY, THE AMERICAN PROSECUTOR: A SEARCH FOR IDENTITY 6–7, 16 (1980); DELMAR KARLEN, ANGLO-AMERICAN CRIMINAL JUSTICE 27 (1967).

195. See discussion *supra* Part III.C.2.c; see also Blume et al., *supra* note 192, at 1090; Richard O. Lempert, *Narrative Relevance, Imagined Juries, and a Supreme Court Inspired Agenda for Jury Research*, 21 ST. LOUIS U. PUB. L. REV. 15, 18 (2002); Mitchell, *supra* note 192, at 612; Richard K. Sherwin, *The Narrative Construction of Legal Reality*, 18 VT. L. REV. 681, 688–89 (1994).

encouraging the jury's consideration of the consequences of a verdict—the expression of social condemnation, community outrage, or some other task outside of fact finding.¹⁹⁶ This proper balance is achieved through an adamant relevancy analysis—requiring the criminal “story,” told by out-of-court statements, to have a strong logical relationship with the formal elements of the crime such that probative worth outweighs unfair prejudice.¹⁹⁷ Louisiana trial courts and reviewing appellate courts should strictly analyze narrative out-of-court statements under the article 403 balancing test.¹⁹⁸

To accommodate both the defendant's need of protection from the danger of hearsay use by the jury and the prosecution's need to tell a narrative, Louisiana courts should limit an officer's testimony to a statement that the officer acted “upon information received.”¹⁹⁹ The court's proper analysis in *State v. Legendre* demonstrates a correct limitation on use of the explanatory exception for the prosecution to develop its story of the case.²⁰⁰ In *Legendre*, a detective testified that by using a record of telephone calls made from a stolen cell phone, the detective was able to obtain the defendant's name from an unidentified witness, which allowed the detective to obtain a visual identification of the defendant in a photo line-up.²⁰¹ The court agreed with the defendant that probative worth to provide the “complete story” of the investigation was outweighed by the improper use of the statement as hearsay proof of guilt.²⁰² The court could have more

196. James Joseph Duane, *What Message Are We Sending to Criminal Jurors When We Ask Them to “Send a Message” with Their Verdict?*, 22 AM. J. CRIM. L. 565, 612 (1995) [hereinafter Duane, *Message*]; see also James Joseph Duane, “Screw Your Courage to the Sticking-Place”: *The Roles of Evidence, Stipulations, and Jury Instructions in Criminal Verdicts*, 49 HASTINGS L.J. 463, 467–68 (1998) [hereinafter Duane, *Courage*] (distrusting the prosecution being able to influence a jury verdict through introducing evidence on some basis other than its logical tendency to prove historical facts disputed at trial); Lenora Ledwon, *The Poetics of Evidence: Some Applications from Law & Literature*, 21 QUINNIPIAC L. REV. 1145, 1146 (2003) (suspicious of giving the prosecutor the right to tell a story at the expense of making the prosecutor a “creative fiction writer,” rather than a “rational, scientific presenter of proofs”); Todd E. Pettys, *Evidentiary Relevance, Morally Reasonable Verdicts, and Jury Nullification*, 86 IOWA L. REV. 467, 511 (2001) (arguing that the prosecution's ability to tell a morally persuasive story creates imbalance).

197. Pettys, *supra* note 196, at 470–71.

198. *State v. Wille*, 559 So. 2d 1321, 1331 (La. 1990).

199. *State v. Favre*, 232 So. 2d 479, 483 (La. 1970); STRONG ET AL., *supra* note 49, § 249; Hervic, *supra* note 96, at 784.

200. 942 So. 2d 45 (La. Ct. App. 4th 2006).

201. *Id.* at 48, 54.

202. *Id.* at 53 (citing MARAIST, *supra* note 13, § 10.1, at 156 n.4).

concretely stated that the officer was limited to stating that he acted “upon information received” to place the photograph in the line-up. This must be the standard, or courts will continue to use the explanatory exception to introduce unfairly prejudicial evidence.

An officer can legitimately explain his investigation through stating that he acted upon information that he received. Such testimony does not violate the hearsay rule because it does not include the substance of any assertion made by a declarant who supplied the officer with investigative information.²⁰³ Further, if the defendant is concerned that the “upon information received” testimony will cause the jury to speculate about the particular information that the officer received, the defendant may purposefully “open the door” by cross-examining the officer.²⁰⁴ The defendant could contest the propriety of the investigation, which would allow the court to admit the substance of out-of-court statements as nonhearsay, pursuant to *Hearold*.²⁰⁵

Although an officer’s testimony that he acted “upon information received” would strike a proper balance in allowing the prosecution to fill any gaps in its story, the 1997 U.S. Supreme Court opinion in *Old Chief v. United States*²⁰⁶ threatens to quash the above discussion regarding circumscribed storytelling relevance.²⁰⁷ Louisiana courts overwhelmingly cite to *Old Chief* as persuasive authority, regrettably impacting the explanatory exception in Louisiana.²⁰⁸ Justice Souter’s opinion in the case

203. See *supra* text accompanying notes 42–45. This was the historical rule, when the exception was first articulated.

204. See *supra* text accompanying notes 163–65.

205. *State v. Hearold*, 603 So. 2d 731, 737 (La. 1992).

206. 519 U.S. 172 (1997).

207. The case has resulted in scholar after scholar expressing astonishment at the new implications the case has for a storytelling relevancy analysis. See, e.g., Duane, *Courage*, *supra* note 196, at 467–68 (referring to the court’s opinion as “breathtakingly radical” and with “virtually no supporting authority”); Ledwon, *supra* note 196, at 1146 (“[W]hat in heaven’s name is the Supreme Court doing by speaking approvingly of a prosecutor’s right to tell ‘a story of guiltiness?’”); Pettys, *supra* note 196, at 472 (calling the court’s opinion a “momentous proposition”). But see Mitchell, *supra* note 192, at 613 (stating that the Court aligned its understanding of how jury trials work with that of law academics, though questioning just how far this legitimation of narrative theory leads).

208. See, e.g., *State v. Robertson*, 988 So. 2d 166, 172–73 (La. 2008); *State v. Thornton*, 979 So. 2d 486, 487 (La. 2008); *State v. Love*, 847 So. 2d 1198, 1204 (La. 2003); *State v. Taylor*, 838 So. 2d 729, 743 (La. 2003); *State v. Ball*, 824 So. 2d 1089, 1115 (La. 2002); *State v. Mitchell*, 779 So. 2d 698, 702 (La. 2001); *State v. Broadway*, 753 So. 2d 801, 809 (La. 1999); *State v. Colomb*, 747 So. 2d 1074, 1076 (La. 1999); *State v. Ridgley*, 7 So. 3d 689, 697 (La. Ct. App.

contains dicta²⁰⁹ that gives prosecutors an arsenal of weaponry with which to forcefully advance their storytelling agenda.²¹⁰

Taking *Old Chief's* momentous propositions one piece at a time, like the character in the clever Johnny Cash song,²¹¹ the first proposition is that the prosecution should be able to use evidence that convinces the jury that a guilty verdict would be "morally reasonable."²¹² This signifies that the admissibility of evidence is contingent upon its ability to influence not only a juror's mind, but also his heart, in a way that may supplant the logical determination of whether the elements of a crime are fulfilled.²¹³ Such a standard of moral satisfaction with a guilty verdict²¹⁴ bears the potential to introduce evidence that is not only irrelevant to the crime, but also unfairly prejudicial to the defendant.²¹⁵ Next, *Old Chief* proposes that prosecutorial narrative is necessary to meet the jury's expectations as to what proper proof should be.²¹⁶ This broadens relevance far beyond demonstrating the elements of a crime being

5th 2009); *State v. Benoit*, 885 So. 2d 625, 634 (La. Ct. App. 5th 2004). This is but a small sampling.

209. "Obiter dictum" is a statement made in passing. It encompasses that which is not the holding of a case. See BLACK'S LAW DICTIONARY 1177 (9th ed. 2009). It is well established that the portions of the opinion addressing storytelling relevance are dicta. See Duane, *Courage*, *supra* note 196, at 463; Aviva Orenstein, *Deviance, Due Process, and the False Promise of Federal Rule of Evidence 403*, 90 CORNELL L. REV. 1487, 1502 n.49 (2005); Jeffrey Zahler, *Allowing Defendants to Present Evidence of Prison Conditions to Convince Juries to Nullify: Can Only the Prosecutor Present "Moral" Evidence?*, 34 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 485, 489-90 (2008).

210. One author has asserted that "[l]awyers one century from now may look back on *Old Chief* as the beginning of a gradual but radical shift in our collective conception of the criminal trial process." Duane, *Courage*, *supra* note 196, at 469.

211. See JOHNNY CASH, *One Piece at a Time, on ONE PIECE AT A TIME* (Columbia Records 1976), in which a factory worker steals various automobile parts over the years, finally assembling a car from the spare parts in his own driveway and later driving across the country to display the finished product. Just as with the character in the comical tune, assembly of *Old Chief's* various parts leads to a potentially hodgepodge result, though the implications for the criminal defendant are nothing to laugh at.

212. *Old Chief v. United States*, 519 U.S. 172, 188-89 (1997).

213. Duane, *Courage*, *supra* note 196, at 467. Whether laudable or not, it is nothing short of revolutionary for the Court to broaden relevance to include subjective moral facts. See *id.* at 468.

214. See Duane, *Message*, *supra* note 196, at 612.

215. Lempert, *supra* note 195, at 18. Adding moral considerations to increase the weight given to the probative worth of the prosecution's evidence greatly increases the unfair prejudice that the defendant will be forced to show in order to have evidence excluded under article 403. Pettys, *supra* note 196, at 516.

216. *Old Chief*, 519 U.S. at 188-89.

met.²¹⁷ Last is the proposition that the prosecution has the right to avoid breaks in the natural sequence of narrative evidence.²¹⁸ More than acknowledging an Anglo-American legal heritage of proper prosecutorial narrative, the U.S. Supreme Court expanded relevance to include moral considerations and narrative largesse that add great probative worth to out-of-court statements used in prosecutorial storytelling.²¹⁹

The point of setting out the revolutionary nature of *Old Chief* is not to deprecate it as a federal jurisprudential derelict. The problem is that *Old Chief* impermissibly broadens the Louisiana usage of the explanatory exception in the police officer storytelling context. Although federal courts have used *Old Chief* to broaden the federal explanatory exception,²²⁰ Louisiana is not bound by the case's holding both because it is not a holding—it is dicta²²¹—and because it is a case addressing the FRE, not the LCE.²²² Alas, the third case in the Louisiana Supreme Court explanatory exception trilogy, *Broadway*, cites to *Old Chief*.²²³ However, *Broadway*'s use of *Old Chief* for the proposition that the prosecution has some leeway in presenting a full picture for the jury is also dicta—the court in *Broadway* found that the prosecution did not need the out-of-court statement to tell the full story.²²⁴ Ever since *Broadway*, other Louisiana courts have incorporated *Old Chief*'s reasoning side-by-side with the explanatory exception analysis.²²⁵ However,

217. Duane, *Courage*, *supra* note 196, at 467–68; Pettys, *supra* note 196, at 472. Prior to this case, there was no such normative claim that the jury's expectations determine which evidence is relevant; satisfying a juror's expectations was an ancillary benefit provided only when article 403 did not exclude the evidence. Pettys, *supra* note 196, at 472. Now, under the U.S. Supreme Court's formulation, a juror's expectations of how the story should emerge at trial are the threshold for admitting evidence. *Old Chief*, 519 U.S. at 187–88 (stating that the “fair and legitimate weight” of evidence is determined in part by whether it meets “the jurors’ expectations about what proper proof should be”); Pettys, *supra* note 196, at 472.

218. *Old Chief*, 519 U.S. at 189. One author asserts that the opinion makes the prosecutor sound like a “creative fiction writer.” Ledwon, *supra* note 196, at 1146.

219. *See infra* note 220 and accompanying text.

220. Hervic, *supra* note 96, at 789 (calling the case a “launching pad” to justify the explanatory exception in virtually all instances of out-of-court statements within police testimony).

221. *See supra* note 209 and accompanying text.

222. *Old Chief*, 519 U.S. at 178.

223. *State v. Broadway*, 753 So. 2d 801, 809 (La. 1999) (citing *Old Chief*, 519 U.S. 172).

224. *Id.*

225. *See, e.g.*, *State v. Taylor*, No. 2008-KA-0517, 2009 WL 282734 at *5 (La. Ct. App. 4th Jan. 28, 2009); *State v. Carter*, 981 So. 2d 734, 753 (La. Ct. App. 3d 2008); *State v. Allen*, 800 So. 2d 378, 393 (La. Ct. App. 4th 2001). All

Louisiana appellate courts can remedy this problem by not following what may be characterized as “dicta within dicta.”

Louisiana courts should not use the “enhanced” relevance of *Old Chief* to create heightened storytelling relevance to admit officers’ out-of-court statements. Under Louisiana’s article 401/403 test, out-of-court statements having probative value to persuade jurors’ hearts and minds that a guilty verdict is morally reasonable is not properly relevant.²²⁶ Louisiana courts must reject the *Old Chief* enhanced relevance model and require that when an officer offers sequence-of-events evidence, he should state that he acted “upon information received.”²²⁷ The potential of jury misuse is too high to tolerate if an officer specifically repeats definite complaints of criminal activity.²²⁸ Returning to this standard that existed many decades ago²²⁹ is necessary to reject unfairly prejudicial information disguised as legally sanctified storytelling.

B. Perform a More Vigilant Harmless Error Analysis

When a trial court improperly uses the explanatory exception, the harm done to a defendant can be mended through a reviewing court’s proper harmless error analysis. In Louisiana, harmless error and the explanatory exception are highly connected; *Wille* and *Broadway* both used the harmless error rule to avoid reversing convictions in trials where the explanatory exception was improperly used.²³⁰ The harmless error rule states that in a criminal trial if an error does not affect a defendant’s substantial rights, the error was harmless, and the conviction may stand.²³¹ An erroneous

of these cases cite to *Old Chief* directly after citing to *Hearold*’s “contested fact” language.

226. See Duane, *Courage*, *supra* note 196, at 467 (pointing out that *Old Chief* adds these considerations to the probative worth test under article 403).

227. See *supra* text accompanying notes 199–205.

228. See EDWARD W. CLEARY ET AL., MCCORMICK ON EVIDENCE § 248 (2d ed. 1972).

229. See *supra* notes 43–45 and accompanying text.

230. *State v. Broadway*, 753 So. 2d 801, 818 (La. 1999) (finding that the “very serious confrontation error was harmless beyond a reasonable doubt”); *State v. Wille*, 559 So. 2d 1321, 1332–33 (La. 1990) (finding that the conviction need not be overturned because the admission of hearsay was harmless error beyond a reasonable doubt and because the prosecution’s case was extremely strong).

231. ALAN CHILDRESS & MARTHA S. DAVIS, STANDARDS OF REVIEW § 7.3 (1986). Harmless error is one of the pillars of American criminal trial procedure, especially at the level of appellate review. *Sullivan v. Louisiana*, 508 U.S. 275, 284 (1993) (Rehnquist, J., concurring); CHILDRESS & DAVIS, *supra*, § 7.3. The

use of the explanatory exception potentially violates a defendant's substantial right,²³² triggering the Louisiana harmless error statute.²³³ If the appellate court determines that the error contributed to the verdict, it is harmful error.²³⁴ In some cases, the jury's verdict clearly would have been "guilty" even if the explanatory exception had not been used erroneously.²³⁵ However, in cases where the particular out-of-court statements are direct assertions of the defendant's guilt or are used to explain the officer's ostensibly righteous investigation such that other exculpatory evidence is undermined, a reviewing court should exercise more caution before determining that no substantial right was violated.²³⁶

With improper explanatory exception usage, as with other evidentiary violations, circumspect harmless error analysis is

rationale for the rule is that a mistrial is a drastic remedy. *State v. Ducre*, 827 So. 2d 1120, 1120 (La. 2002).

232. Violations of the LCE can be substantial violations of a criminal defendant's rights because the LCE provides a framework for determining the truth in a securely *fair* manner. *See* LA. CODE EVID. ANN. art. 102 (2006) (stating that the LCE is designed to secure fairness in administering the law of evidence). Article 102 provides that the ascertainment of truth is not the only policy underlying the Code, but also just determination of the proceedings. *Id.*; *see also* Addison K. Goff, IV, *Mixed Signals: A Look at Louisiana's Experience with Harmless Error in Criminal Cases*, 59 LA. L. REV. 1169, 1184–85 (1999) (evidentiary rules are designed to guarantee a fair trial, so their violation should constitute harmful error).

233. LA. CODE CRIM. PROC. ANN. art. 921 (2008). Further, in many cases where the explanatory exception is improperly used, the fact that there was testimonial hearsay raises Sixth Amendment Confrontation Clause concerns. Though this Comment focuses on the explanatory exception as a violation of the hearsay statute, the explanatory exception also has a high potential to violate the Confrontation Clause. *See* discussion *supra* Part II.D.3. Such a constitutional violation would almost certainly violate a "substantial right" of the defendant, requiring a finding of *harmful* error. One law review article has already argued that the explanatory exception under the federal hearsay rule compromises defendants' right of confrontation. Hervic, *supra* note 96.

234. Alfred Paul LeBlanc, Jr., *Considerations Concerning Harmless Error in Louisiana Criminal Cases*, 64 LA. L. REV. 21, 31, 35 (2003) (citing *State v. Harris*, 711 So. 2d 266 (La. 1998)).

235. *See, e.g., Wille*, 559 So. 2d at 1332–33 (where there was full corroboration by "numerous evidentiary links between defendant, the victim and the crime" through fingerprints, strong circumstantial evidence, physical evidence, and the defendant's fully corroborated testimony, the admission of hearsay was harmless).

236. LeBlanc, *supra* note 234, at 36, 38.

essential²³⁷ to avoid unfair and mischievous results, especially when the question of guilt or innocence is a close one.²³⁸ Without careful use, the rule effectively allows the State to break evidentiary rules as often as it wants, as long as the defendant is probably guilty.²³⁹ With the explanatory exception in particular, the Louisiana appellate courts have used a sloppy harmless error analysis.

Because harmless error is a remedial doctrine, Louisiana appellate courts should not reach the harmless error question until first determining that the trial record contains legal error.²⁴⁰ In actuality, the appellate courts' approval of the explanatory exception is often carelessly riddled with statements to the effect that even if the trial court should not have used the exception, the admission of the out-of-court statement was harmless such that the conviction will stand. Astonishingly, in some of these instances, the court will literally say that "even if" it was hearsay, admitting it was harmless error.²⁴¹ Other times, the court will state that "any possible" harm to the defendant resulting from the officer's testimony being improperly admitted is cured by the harmless error doctrine's automatic solution to the problem, supposedly absolving the court of its decision to abort further analysis.²⁴²

237. *State v. Michelli*, 301 So. 2d 577, 579 (La. 1974) (besmirching the harmless error rule as a potential "cop out" and an "abdication of the judicial function in criminal appeals").

238. *Chapman v. California*, 386 U.S. 18, 22 (1967).

239. James E. Boren & Michael A. Fiser, *Fear of a Paper Tiger: Enforcing Louisiana's Procedural and Statutory Rules in the Wake of Harmless Error Analysis*, 64 LA. L. REV. 5, 17 (2003).

240. LeBlanc, *supra* note 234, at 29.

241. *State v. Davis*, 947 So. 2d 48, 57 (La. Ct. App. 5th 2006) ("Nevertheless, even if some of the testimony was inadmissible hearsay and went beyond what was necessary to explain the steps taken in the investigation, the admission was harmless."); *State v. Cowart*, 815 So. 2d 275, 289 (La. Ct. App. 5th 2002) (even if hearsay, it is subject to a harmless error analysis); *State v. Soler*, 636 So. 2d 1069, 1078 (La. Ct. App. 5th 1994) (even assuming it was hearsay, it was harmless); *State v. Byrd*, 540 So. 2d 1110, 1114 (La. Ct. App. 1st 1989) (even assuming it was hearsay, harmless error).

242. *State v. Grant*, 954 So. 2d 823, 833 (La. Ct. App. 2d 2007) ("Further, the erroneous admission of hearsay evidence does not require reversal of the conviction when the error is harmless beyond reasonable doubt."); *State v. Moses*, 932 So. 2d 701, 712 (La. Ct. App. 5th 2006) ("any possible harm" in admitting the testimony was harmless); *State v. Zeigler*, 920 So. 2d 949, 955 (La. Ct. App. 2d 2006) ("any erroneous admission of hearsay" did not require reversal); *see also State v. Jones*, 999 So. 2d 239, 250–51 (La. Ct. App. 3d 2008) (holding that the statements were nonhearsay after discussing the possibility of finding any potential error to be harmless, indicating a judicial lack of willingness to stand by a holding that the statements were nonhearsay).

The confusion is even more pronounced in appellate decisions that fail to articulate whether the holding is (1) that the explanatory exception was properly used or (2) that the exception should not have been used but the error was harmless. One Louisiana appellate court opinion discussed harmless error in advance of its hearsay discussion, suggesting that the court was only trying to reach the result of getting the statement admitted, regardless of its legality.²⁴³ The same court said that the police's "testimony was not hearsay and admitting such into evidence did *not* constitute *harmful* error."²⁴⁴ If it was not hearsay, why say that it was not harmful error, other than to cover all one's bases in judicially admitting the evidence? The disingenuousness of these decisions extends to one court skipping analysis of the out-of-court statement to find that the police testimony was harmless error.²⁴⁵ No less nebulous was another court's statement asserting first that harmless error does not require reversal, next that the statements were not offered to prove the defendant's guilt, and lastly that "any error in this regard" was harmless.²⁴⁶ Perhaps most egregious was one court's abandonment of not only the "harmless beyond a reasonable doubt" standard adopted by the Louisiana Supreme Court,²⁴⁷ but also of any sense of protecting a defendant's substantial rights.²⁴⁸ The court mused that it was "highly unlikely" that the defendant was convicted on the strength of hearsay evidence.²⁴⁹ Such confusion and slipshod analysis has effectively morphed the explanatory exception into a subspecies of harmless error, confusing correctness with error, attempting to make something into that which is against its nature. Ironically, the problematic harmless error analysis could become the solution if harmless error and the explanatory exception were properly maintained as separate analyses.

Harm done to a defendant through a trial court's erroneous use of the explanatory exception could easily be cured by a proper harmless error analysis, which the appellate courts have yet to consistently perform. The "even if" and "regardless" approaches to

243. *State v. Smith*, 710 So. 2d 1187, 1190 (La. Ct. App. 5th 1998). An honest approach would be for a court opinion to read, "We think he did it, but rules are rules, and the rules that were broken made the trial unfair," before deciding whether the resulting unfairness has violated a defendant's substantial right. *See Boren & Fiser, supra* note 239, at 10.

244. *Smith*, 710 So. 2d at 1190.

245. *State v. Baker*, 720 So. 2d 767, 774 (La. Ct. App. 2d 1998).

246. *State v. Haygood*, 641 So. 2d 1074, 1078-79 (La. Ct. App. 2d 1994).

247. *State v. Gibson*, 391 So. 2d 421, 428 (La. 1980).

248. *State v. Dangerfield*, 816 So. 2d 885, 897 (La. Ct. App. 4th 2002).

249. *Id.*

harmless error unacceptably ignore the fact that harmless error review is only permissible after first determining whether an error has occurred.²⁵⁰ If courts will abandon these improper approaches, they will attend to their normative function of establishing limits upon the prosecution's elicitation of police officer testimony about the particular out-of-court statements in the case.²⁵¹ Therefore, in future cases, prosecutors will not think that they have more latitude than they actually have and defendants will have guidance in forming an adequate trial strategy.²⁵² The inconsistent application of the explanatory exception shows that proper harmless error analysis is especially important to establish standards for when the prosecution has overstepped its bounds and violated the hearsay rule.

The LCE prohibits jurisprudentially created hearsay exceptions,²⁵³ and courts serially pronounce that inappropriate admission of statements under the explanatory exception is non-reversible harmless error. Such jurisprudence has effectively carved out an illegitimate, non-statutory hearsay exception that will almost always allow the prosecution to violate the hearsay rule.²⁵⁴ The appellate courts must return to a prudent harmless error analysis, in which judicial opinions precede such analysis with a finding of whether or not the explanatory exception was properly used at trial. Such judicial carefulness will limit unfair prejudice to defendants and will restore legal application of the explanatory exception by establishing proper norms for prosecutors who will question officers in future cases.²⁵⁵

250. LeBlanc, *supra* note 234, at 39.

251. *Id.*

252. *See id.*

253. LA. CODE EVID. ANN. art. 802 (2006).

254. There is the possibility that the ubiquitous use of harmless error coupled with the explanatory exception deprives criminal defendants of due process of law guaranteed by the Louisiana Constitution. The Louisiana Constitution assures to criminal defendants the presumption of innocence until proven guilty. LA. CONST. art. I, § 16. Proof must be made in conformity with the rules of evidence, and when the explanatory exception is illegally used to admit a hearsay statement that illegitimately has the effect of proving guilt, the explanatory exception unconstitutionally removes the defendant's presumption of innocence. *See id.* The Louisiana Constitution also provides that a criminal defendant is entitled to confront and cross-examine witnesses against him and to compel the attendance of witnesses. *Id.*

255. Until the courts return to a more vigilant harmless error analysis, and even if they do, it is crucial that the defendant thoroughly brief harmless error on appeal, establishing a connection between weakness in the overall trial evidence and the particular erroneously admitted statement(s), to show that the error was not harmless beyond a reasonable doubt. *See* URSULA BENTELE & EVE CARY,

C. Reformulate the Explanatory Exception

Returning to a proper relevancy analysis and to a vigilant harmless error analysis are problem-solving applications of the explanatory exception. A third option to legitimize the exception's use in Louisiana and return to protecting defendants' rights where police testimony is concerned is to reformulate the exception, or at least rethink the theory behind it, to achieve consistent results.

At the outset, the Louisiana Supreme Court needs to carefully revisit the requirement stated in *Hearold* that an officer's conduct must be a "contested fact" for the explanatory exception to apply.²⁵⁶ As previously discussed, Louisiana courts have automatically considered officer conduct to be a *de jure* background fact to which an officer's testimony concerning out-of-court statements is relevant, regardless of whether in reality the propriety of the police investigation is disputed or questioned in a given case.²⁵⁷ The courts have shown no movement toward actually applying the "contested fact" requirement,²⁵⁸ so the supreme court needs to revisit this requirement, reaffirming its importance. Although a proper article 403 analysis would have the same effect in limiting the explanatory exception when the need to explain an officer's conduct is outweighed by the jury's potential use of the evidence as hearsay,²⁵⁹ the highest court of this state should articulate the standard that the court will require in judging the relevance of an officer's presence or conduct: article 403, the "contested fact" standard, or both.

The exception also needs an overhaul through the drastic, yet simple, reform of not calling it the "explanatory exception." The federal courts that apply this same concept under the FRE do not call it an "exception."²⁶⁰ Although the FRE are not the law in Louisiana, this approach is certainly capable of application in Louisiana. When permissibly allowing an officer to testify about statements made to him during the investigation, a court does not really admit the statements under an explanatory "exception," but as nonhearsay.²⁶¹ If the courts will simply articulate that a statement is proper nonhearsay, they will avoid the conceptual

APPELLATE ADVOCACY: PRINCIPLES AND PRACTICE 284–85 (4th ed. 2004); LeBlanc, *supra* note 234, at 40.

256. *State v. Hearold*, 603 So. 2d 731, 737 (La. 1992).

257. *See* discussion *supra* Part IV.A.1.

258. *See* discussion *supra* Part III.C.1.

259. *See* discussion *supra* Part II.D.1.

260. *See supra* note 74 and accompanying text.

261. *See supra* note 33 and accompanying text.

inconsistency of citing to prior explanatory exception language from other cases without a proper analysis of the underlying statutory hearsay rule.

A more radically effective method would be revisiting *jurisprudence constante*'s perpetuation of the exception. The appellate courts are free to—and should—cease mere regurgitation of the precedent²⁶² that an officer may testify “about statements made to him by other persons involved in the case in order to explain [his] actions.”²⁶³ If not altogether abolished, this precedential language should be revised to elucidate the true legitimate scope of the nonhearsay rule: a police officer may refer to statements made to him to explain the sequence of events, from the officer's viewpoint, leading to the defendant's arrest when the officer's conduct is a contested fact, or when there is proper narrative relevance to the investigation under an article 403 test showing that the defendant will not be unfairly prejudiced. If it is precedent they want, this is the essential formulation that *Wille* originally required, anyway.²⁶⁴

Finally, the appellate courts' fresh look at the explanatory exception should include an approach under which an appellate court's review of the trial record takes into account the objective effect of admitting a statement. Whether a statement is hearsay depends upon whether it is “offered to prove” the truth of the matter asserted.²⁶⁵ The courts often determine whether the out-of-court statement is “offered” for its truth by focusing on the subjective intent of the prosecution, the alleged proper use.²⁶⁶ A better approach is for the courts to decide whether the statement is offered for its truth by determining whether the statement has the objective effect of being used as an assertion of the statement's truth. Such an approach would properly account for both the

262. Because Louisiana has *jurisprudence constante*, not *stare decisis*, the appellate courts are free to abolish their own precedential language. See *Willis-Knighton Med. Ctr. v. Caddo Shreveport Sales & Use Tax Comm'n*, 903 So. 2d 1071, 1087–88 nn.16–17 (La. 2005); *Doerr v. Mobil Oil Corp.*, 774 So. 2d 119, 128–29 (La. 2000); Albert Tate, Jr., *Civilian Methodology in Louisiana*, 44 TUL. L. REV. 673, 678 (1970).

263. *State v. Henry*, 27 So. 3d 935, 944 (La. Ct. App. 5th 2009); see also *supra* text accompanying notes 39, 43.

264. *State v. Wille*, 559 So. 2d 1321, 1331 (La. 1990) (citing GEORGE W. PUGH, *LOUISIANA EVIDENCE LAW* 429–31 (1974)) (“The fact that an officer acted on information received in an out-of-court assertion may be relevant to explain his conduct, but this fact should not become a passkey to bring before the jury the substance of the out-of-court information that would otherwise be barred by the hearsay rule.”).

265. LA. CODE EVID. ANN. art. 801(C) (2006).

266. See *supra* note 108 and accompanying text.

prosecution's need for the statement and the defendant's right to not be prejudiced by improper jury misuse.²⁶⁷ Solely considering the prosecution's ostensible intent ignores the fact that a statement with a definite complaint of criminal behavior of the accused will be used by the jury as evidence of guilt.²⁶⁸ Focusing on objective effects, coupled with the courts' re-examination of the theory behind the explanatory exception, will avoid the mere continuation of precedent, protect defendants' rights, and give notice to prosecutors as to what questions they may properly ask officers at trial.

V. CONCLUSION

Louisiana appellate courts have virtually carved out a jurisprudential exception to the hearsay rule that is non-statutory and therefore illegal. The courts must now properly apply the explanatory exception to fulfill the hearsay rule's purpose of protecting against improper prosecutorial action²⁶⁹ and to protect defendants from the admission of statements lacking the indicia of reliability that the hearsay rule was designed to provide. The condoning of prosecutorial misconduct must cease, and the courts must now establish norms for proper questioning of police witnesses crucial to criminal trial testimony. The defendant should not have to perform this role for the courts, which are bound to uphold the LCE.

To accomplish these ends, Louisiana courts should rein in prosecutorial storytelling by circumscribing the explanatory exception. They must limit the exception's use to explain officer conduct to when an officer's conduct is a contested fact and limit the exception's use to explain the sequence of events to the officer stating that he acted "upon information received." The appellate courts must also perform a vigilant harmless error analysis and renew the exception's consistent application through calling it "nonhearsay" rather than an "exception," doing an analysis instead of merely reciting previous erroneous chains of precedential wording, and considering the likely effect of an out-of-court statement upon the jury.

Although Officer Mary McFadden cannot articulate her theory of the investigation with the skill of a seasoned litigator, her

267. See *State v. Broadway*, 753 So. 2d 801, 810 (La. 1999); *State v. Hearold*, 603 So. 2d 731, 737 (La. 1992); *Wille*, 559 So. 2d at 1331.

268. GRAHAM, *supra* note 8, § 801:5; PUGH ET AL., *supra* note 60, at 607.

269. Mueller, *supra* note 171, at 823 (recognizing that the hearsay rule protects against known pressure placed on prosecutors).

experience on the streets has taught her when her “hunch” of the defendant’s guilt is likely something that should make her pull her car over and investigate Joe Schmeaux.²⁷⁰ Officer McFadden may want to testify about what someone told her that gave her that reliable hunch—the hunch she has come to know will usually lead her to handcuffing a criminal, and the prosecutor has a legitimate interest in asking questions that will elicit this information. However, Louisiana has rules of evidence to which the officer is as equally bound as are other witnesses whose testimony protects the public from malefactors. One instructional textbook written to train law enforcement on the rules of evidence at trial muses that the law of evidence is a game with many roadblocks, obstructions that can be circumvented by clever maneuvering.²⁷¹ It is time for Louisiana courts’ application of the explanatory exception to require officers and their fellow prosecuting attorneys to play by the game’s rules so that clever maneuvering ends where the firm bulwark of the LCE begins.

*Joshua P. Clayton**

270. See Craig S. Lerner, *Reasonable Suspicion and Mere Hunches*, 59 VAND. L. REV. 407, 466 (2006) (“Just because police officers fail to frame their words in the approved language of the courts, or are unable to express themselves with the glibness of a skilled litigator, does not mean that they acted unreasonably given the factual situation they faced.”).

271. See KLEIN, *supra* note 12, at 3.

* The author thanks several individuals who contributed to this work of scholarship: Jesus Christ, for indispensable strength and resolve; my dear wife, Amanda Marie, for her constant encouragement; Professor Frank L. Maraist, for getting me “into” evidence law and giving critical feedback; Professor George W. Pugh, for serving as a most excellent sounding board and inspiration; Johnny Cash, for footnote 211; and last, yet certainly not least, Carmen Hebert, for her patience, care, and fiery attention to detail during the writing process.