Cornell Law Review

Volume 96
Issue 2 *January*

Article 11

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NOTE

CONFRONTATION CLAUSE VIOLATIONS AS STRUCTURAL DEFECTS

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INTRODUCTION

Recently, the Supreme Court has become more concerned with finding the appropriate rationale for its decisions than with its decisions' substantive effects.[1] In few areas of law is this more evident than in the Court's contemporary Confrontation Clause jurisprudence. Because the Court has failed to consider how lower appellate courts review Confrontation Clause violations, its newly fashioned rationale for the Confrontation Clause and its purported expansion of the substantive scope of the right of confrontation are at odds with the

[1] *See, e.g.*, United States v. Gonzalez-Lopez, 548 U.S. 140, 150 (2006) (explaining that violations of the right to the effective assistance of counsel are trial errors and subject to harmless error review, not because the violations are any less severe than other structural defects, but because "the requirement of showing prejudice in ineffectiveness claims stems from the very definition of the right at issue"); Crawford v. Washington, 541 U.S. 36, 60 (2004) ("Although the results of our decisions have generally been faithful to the original meaning of the Confrontation Clause, the same cannot be said of our rationales.").

application of harmless error review to all Confrontation Clause violations. This Note argues that unless courts begin treating some Confrontation Clause violations as structural defects, the remedies available to criminal defendants—and consequently, the de facto scope of the right of confrontation—will remain unchanged.

The Sixth Amendment's Confrontation Clause gives all criminal defendants the right "to be confronted with the witnesses against" them.[2] The Confrontation Clause involves, at its core, four procedural safeguards—in-person testimony by witnesses, testimony given under oath, testimony subject to cross-examination, and testimony where the jury can observe a witness's demeanor.[3] The third safeguard—the requirement that testimony be subject to cross-examination—has been the subject of much recent controversy. Just thirty years ago, in *Ohio v. Roberts*,[4] the Supreme Court decided that the right of confrontation did not grant the defendant the right to cross-examine absolutely everyone. Instead, the Court held that if a judge could determine that a person's statement was sufficiently reliable on its own, then the judge could admit that person's statement without violating the defendant's Sixth Amendment rights.[5] In effect, the Court decreed that defendants do not have a right to cross-examination per se; rather, they have a right to the *goal* of cross-examination—reliable testimony. In 2004, the Supreme Court overruled *Roberts* in *Crawford v. Washington*[6] and announced a dramatic about-face: the right of confrontation is not "merely" a right to reliable testimony but is a right to cross-examination per se.[7]

Since *Crawford*, the Court has continued to expand the substantive scope of the right of confrontation, holding inadmissible victims' statements to the police;[8] out-of-court, unconfronted statements of murder victims (except where the accused killed the victim specifically for the purpose of preventing the victim's testimony);[9] and certificates of laboratory analysts stating that the substances found on defendants were illegal narcotics,[10] while only cautiously admitting transcripts of 911 calls.[11] However, the Court has not yet addressed what I term the *procedural scope* of the right of confrontation: whether Confrontation

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2 U.S. CONST. amend. VI.

3 *See* Maryland v. Craig, 497 U.S. 836, 845–46 (1990).

4 448 U.S. 56 (1980).

5 *See id.* at 66 (quoting Mancusi v. Stubbs, 408 U.S. 204, 213 (1972)).

6 541 U.S. 36.

7 *See id.* at 67–68.

8 *See* Davis v. Washington, 547 U.S. 813, 829–30, 834 (2006).

9 *See* Giles v. California, 128 S. Ct. 2678, 2688 (2008).

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

11 *See Davis*, 547 U.S. at 826–29.

Clause violations, when reviewed on appeal, should be treated as either *trial errors* or *structural defects.*

Prior to *Crawford,* all Confrontation Clause violations were trial errors subject to harmless error review on appeal.[12] Under this standard, a violation of the Confrontation Clause at trial would only upset the resulting conviction if the violation was harmful; if the error was harmless, the appellate court would affirm the conviction.[13] An error is harmful in this context if the admission of evidence in violation of the Confrontation Clause "affect[s] the reliability of the factfinding process at trial."[14] The Court engages in three different types of harmless error review. Some trial errors, such as permitting representation by an attorney with a conflict of interest, require only a cursory inquiry into the harmfulness of the error.[15] Most, like pre-*Crawford* Confrontation Clause violations, require the prosecution to prove the error harmless beyond a reasonable doubt.[16] And a few, such as the ineffective assistance of counsel, require the defendant to prove that the error was harmful.[17] Despite treating these three types of errors differently, the Court has never explicitly categorized them as anything but trial errors.

The only line the Court has explicitly drawn differentiates between trial errors and what it terms *structural* defects.[18] Structural defects are broadly defined as constitutional violations that "affect[ ] the framework within which the trial proceeds."[19] If an appellate court determines that a structural defect contaminated the proceeding below, it must overturn the underlying conviction without any further

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12 *See* Delaware v. Van Arsdall, 475 U.S. 673, 684 (1986).

13 *See id.*

14 *Id.*

15 *See* Cuyler v. Sullivan, 446 U.S. 335, 349–50 (1980) (ineffective assistance of counsel based on a conflict of interest); Napue v. Illinois, 360 U.S. 264, 271–72 (1959) (knowing use of false testimony by the prosecution).

16 *See, e.g.,* Delaware v. Van Arsdall, 475 U.S. 673, 681 (1986); Chapman v. California, 386 U.S. 18, 23 (1967).

17 *See* Strickland v. Washington, 466 U.S. 668, 690 (1984); Brady v. Maryland, 373 U.S. 83, 87–88 (1963).

18 *See* Arizona v. Fulminante, 499 U.S. 279, 309 (1991). Structural defects include the denial of the right to counsel, *see* Gideon v. Wainwright, 372 U.S. 335, 344 (1963); denial of the right to an impartial adjudicator, *see* Tumey v. Ohio, 273 U.S. 510, 523, 535 (1927); denial of the right to self-representation, *see* McKaskle v. Wiggins, 465 U.S. 168, 177–78 (1984); unlawful exclusion of members of the defendant's race from a grand jury, *see* Vasquez v. Hillery, 474 U.S. 254, 263–64 (1986) ("[D]iscrimination in the grand jury undermines the structural integrity of the criminal tribunal itself, and is not amenable to harmless-error review."); denial of the right to a public trial, *see* Waller v. Georgia, 467 U.S. 39, 49 (1984); and denial of the right to the beyond-a-reasonable-doubt burden of proof, *see* Sullivan v. Louisiana, 508 U.S. 275, 281–82 (1993).

19 *See Fulminante,* 499 U.S. at 310.

inquiry—in effect, the appellate court presumes the harmfulness of these errors.[20]

Since *Crawford*, the Supreme Court has not addressed whether all Confrontation Clause violations remain subject to some form of harmless error review. The Court treats the substantive scope and procedural scope of the right of confrontation as separate and distinct issues, typically declining to state any opinion on the former despite expounding at great length on the latter.[21] Although Chief Justice William Rehnquist argued in his partial concurrence in *Crawford* that the majority provided "implicit recognition that the mistaken application of its new rule . . . is subject to harmless-error analysis,"[22] the Court has not adopted this position despite at least two direct challenges to *Delaware v. Van Arsdall*[23] since *Crawford*.[24] Furthermore, other areas of the Court's recent Sixth Amendment jurisprudence have failed to shed any light on the issue: while *United States v. Gonzalez-Lopez*[25] compared post-*Crawford* Confrontation Clause violations to violations of the Sixth Amendment right to counsel of choice, which are structural defects, *Whorton v. Bockting*[26] distinguished the right of confrontation from the Sixth Amendment right to appointed counsel largely on the ground that *Crawford* had little net effect on the reliability of criminal trials.

This Note argues that analysis of the procedural and substantive scope of the right of confrontation cannot be so easily separated. If the purpose of the right of confrontation is to prevent the evil of ex parte examinations, a review process that focuses on how a violation affects the reliability of the proceeding, rather than the egregiousness of the violation itself, is profoundly inadequate. Accordingly, this Note proposes that courts should distinguish between complete and

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20 *See id.*

21 *See, e.g.*, Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527, 2531 (2009); *id.* at 2542 n.14 (holding that the Confrontation Clause barred the admission of the written certificates of state laboratory analysts stating that the substance found on the defendant was cocaine but expressing "no view as to whether the error was harmless"); Davis v. Washington, 547 U.S. 813, 829 (2006) ("[The Washington Supreme Court] also concluded that, even if [there was a Confrontation Clause violation, it] was harmless beyond a reasonable doubt. Davis does not challenge that holding, and we therefore assume it to be correct."); Crawford v. Washington, 541 U.S. 36, 42 n.1 (2004) ("The State also has not challenged the Court of Appeals' conclusion . . . that the confrontation violation, if it occurred, was not harmless. We express no opinion on these matters.").

22 *Crawford*, 541 U.S. at 76 (Rehnquist, C.J., concurring).

23 475 U.S. 673 (1986).

24 *See* Petition for Writ of Certiorari, Abu Ali v. United States, 129 S. Ct. 1312 (2009) (No. 08-464), 2008 WL 4533652 [hereinafter Petition for Writ of Certiorari, *Abu Ali*]; Petition for Writ of Certiorari, Shisinday v. Quarterman, 129 S. Ct. 62 (2008) (No. 07-1383), 2008 WL 2020334 [hereinafter Petition for Writ of Certiorari, *Shisinday*].

25 548 U.S. 140, 145–48 (2006).

26 549 U.S. 406, 419 (2007).

partial Confrontation Clause violations and treat complete Confrontation Clause violations as more like structural defects.

This Note defines a *partial Confrontation Clause violation* as any improper limit or constraint on a defendant's cross-examination of a witness, such as prohibiting the defendant from asking particular questions or shortening the time permitted for cross-examination. A complete Confrontation Clause violation is any action that effectively prevents a defendant from cross-examining a witness at all, such as allowing a prosecutor to play a prerecorded statement of a witness in place of live testimony or excluding the defendant and defense counsel from certain portions of the proceedings.[27] Partial Confrontation Clause violations should remain subject to harmless error review—the potential variation in their scope and effect may make some violations trivial, and requiring the reversal of a conviction for such inevitable, minor errors would consume enormous resources and tarnish the public's perception of the criminal justice system. Complete Confrontation Clause violations, however, are never trivial, and the continued practice of subjecting them to harmless error review, thereby implying that they may be harmless, risks tarnishing the public's perception of the criminal justice system in the opposite way—creating the perception that the system does not care about defendants' rights. Although a few courts have attempted to make similar distinctions, there has yet been no serious reconsideration of the requirement that Confrontation Clause violations be subject to harmless error review in the wake of *Crawford*.[28]

This Note makes three arguments for treating the most egregious Confrontation Clause violations as structural errors. First, the core concern in harmless error review is whether the error undermined the reliability of the proceeding.[29] Thus, except where the witness's testimony was purely cumulative or irrelevant or where the prosecution's case was overwhelming, the primary inquiry in the harmless error analysis of Confrontation Clause violations will be the reliability of

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27 *See* Petition for Writ of Certiorari, *Abu Ali*, *supra* note 24, at 22–23 (arguing that the Supreme Court "has declared that the 'denial or significant diminution' of the right to cross-examine calls into question the 'integrity of the fact-finding process'" (quoting Chambers v. Mississippi, 410 U.S. 284, 295 (1973))).

28 The only decisions distinguishing between Confrontation Clause violations based on their egregiousness to determine whether to apply harmless error or structural defect review predate *Crawford*. *See, e.g.*, Campbell v. Rice, 302 F.3d 892, 898–900 (9th Cir. 2002); Rice v. Wood, 77 F.3d 1138, 1141–45 (9th Cir. 1996); Hegler v. Borg, 50 F.3d 1472, 1477–78 (9th Cir. 1995); State v. Garcia-Contreras, 953 P.2d 536, 540–41 (Ariz. 1998); State v. Calderon, 13 P.3d 871, 878–79 (Kan. 2000); State v. Bird, 43 P.3d 266, 269–73 (Mont. 2002). However, at least one judge has continued to argue that Confrontation Clause violations may amount to structural defects. *See* United States v. Mitchell, 502 F.3d 931, 1010 (9th Cir. 2007) (Reinhardt, J., dissenting).

29 Delaware v. Van Arsdall, 475 U.S. 673, 684 (1986).

the wrongfully admitted evidence.[30] To make this determination, reviewing courts will have to search for the same sort of "indicia of reliability"[31] previously required for the admission of out-of-court statements under *Roberts*. Because reliable out-of-court statements do not threaten the reliability of the proceedings, the Supreme Court has thus created a right without a (complete) remedy: any conviction resulting from a Confrontation Clause violation under *Crawford* will not be overturned unless it also would have been a violation of the Confrontation Clause under *Roberts*.

Second, treating Confrontation Clause violations like structural defects is more consonant with contemporary interpretations of the Sixth Amendment. The Court's recent Sixth Amendment jurisprudence reflects a marked anti-inquisitorialism—the theory that the core evil that the Sixth Amendment was designed to prevent was the creation of an inquisitorial, or civil law–style, system of criminal procedure.[32] *Crawford* makes it clear that the right of confrontation protects a core safeguard against inquisitorialism: the right of criminal defendants to ensure the reliability of evidence through active participation in the proceedings—a role the defendant cannot play in inquisitorial systems.[33] Permitting judicial-reliability assessments in lieu of cross-examination is precisely the inquisitorial evil *Crawford* set out to undo.[34] Yet, harmless error review requires exactly that: a reviewing court must make its own determination as to the reliability of the evidence to determine whether the error was harmless. Moreover, by forbidding trial courts from making such reliability determinations,

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30 *Cf. id.* ("The correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt.").

31 Ohio v. Roberts, 448 U.S. 56, 65 (1980) (quoting Mancusi v. Stubbs, 408 U.S. 204, 213 (1972)).

32 *See* David Alan Sklansky, *Anti-Inquisitorialism*, 122 HARV. L. REV. 1634, 1642–56 (2009).

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

> The right to confront one's accusers is a concept that dates back to Roman times. . . . English common law has long differed from continental civil law in regard to the manner in which witnesses give testimony in criminal trials. The common-law tradition is one of live testimony in court subject to adversarial testing, while the civil law condones examination in private by judicial officers.

It is not clear whether the Court's analysis would be affected by, or if indeed it is even aware of, the fact that many modern civil law or inquisitorial systems provide criminal defendants with something akin to the Sixth Amendment right of confrontation. *See, e.g.*, European Convention for the Protection of Human Rights and Fundamental Freedoms art. 6(3), cl. (d), Nov. 4, 1950, 312 U.N.T.S. 221 (providing every criminal defendant with the right "to examine or have examined witnesses against him").

34 *See Crawford*, 541 U.S. at 61 ("Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation.").

Crawford forces appellate courts to ascertain the reliability of evidence in the first instance with only the cold record before them.

Third, classifying the most egregious Confrontation Clause violations as structural defects comports with the broader justifications of the trial-error/structural-defect dichotomy. The Court in *Arizona v. Fulminante*[35] explained that trial errors are those errors which occur "during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether [the error] was harmless," while structural defects affect "the framework within which the trial proceeds"[36] and violate rights so basic that "'a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair.'"[37] In holding that violations of the Sixth Amendment right to counsel of choice are structural defects, the Court has stressed that prejudice is appropriately presumed because "[i]t is impossible to know what different choices the rejected counsel would have made, and then to quantify the impact of those different choices on the outcome of the proceedings."[38] Complete Confrontation Clause violations at least qualify for a rule of automatic reversal; much like violations of the right to counsel of choice, assessing prejudice in the Confrontation Clause context presents courts with the difficult task of assessing the potential impact of a number of hypothetical scenarios. Violations of this magnitude directly undermine the framework in which the trial proceeds by gutting the core meaning of an adversarial proceeding and by demonstrating a profound lack of respect for the defendant's role in the criminal process. This Note further argues that the Court's unwillingness to challenge the presumption that harmless error review applies to Confrontation Clause violations stems from a conflation of rules of evidence—which are almost always considered trial errors—with constitutional rules of criminal procedure that operate like rules of evidence, such as violations of a suspect's *Miranda* rights,[39] which courts ought to treat more seriously.[40]

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35 Arizona v. Fulminante, 499 U.S. 279 (1991).

36 *See id.* at 307–08, 310.

37 *Id.* at 310 (quoting Rose v. Clark, 478 U.S. 570, 577–78 (1986)).

38 United States v. Gonzalez-Lopez, 548 U.S. 140, 150 (2006).

39 *See* Oregon v. Elstad, 470 U.S. 298, 307–08 (1985) (holding that voluntary statements taken in violation of *Miranda* may be admitted for impeachment on cross-examination).

40 *See, e.g.*, Satterwhite v. Texas, 486 U.S. 249, 258 (1988) (discussing the admission of evidence at the sentencing stage of a capital case that violated of the Sixth Amendment's Counsel Clause); Milton v. Wainwright, 407 U.S. 371, 377–77 (1972) (discussing a confession obtained in violation of *Massiah v. United States*, 377 U.S. 201 (1964)); Chambers v. Maroney, 399 U.S. 42, 52–53 (1970) (discussing the admission of evidence obtained in violation of the Fourth Amendment).

This Note proceeds in five Parts. Part I discusses recent developments in the Supreme Court's trial-error/structural-defect and Confrontation Clause jurisprudence and the intersection of these two bodies of law in the wake of *Crawford*. Part II argues that, unless the Court reconsiders the requirement of harmless error review, the substantive scope of the right of confrontation will be confined to the limits of *Roberts*. Part III argues that applying harmless error review to Confrontation Clause violations permits evidence to be introduced based on a judicial determination of reliability, which is precisely the inquisitorial evil *Crawford* aimed to prevent. Part IV argues that applying harmless error review to Confrontation Clause violations in the wake of *Crawford* is inconsistent with the general principles the Court has outlined for distinguishing structural defects from trial errors. Part V proposes categorizing Confrontation Clause violations into two types of violations—complete violations and partial violations—and treating complete violations as structural defects while retaining harmless error review for partial violations. A conclusion follows.

I
BACKGROUND

A. The Emergence of the Trial-Error/Structural-Defect Dichotomy

Chapman v. California[41]—which involved a violation of the Confrontation Clause—fashioned the modern harmless error rule for federal criminal-procedural violations.[42] The *Chapman* Court, however, failed to articulate any principled means for distinguishing between errors subject to harmless error review and errors requiring automatic reversal; it merely noted that "our prior cases have indicated that there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error."[43] Nearly a quarter-century later, *Fulminante* somewhat clarified the distinction: violations subject to harmless error review are called *trial errors* and are (not very helpfully) defined as errors "in the trial process itself"; violations requiring automatic reversal are called *structural defects* and are defined as errors that "affect[ ] the framework within which the trial proceeds."[44] While the Court has now applied harmless error review to most constitutional errors,[45] the Court has also gradually expanded

41 386 U.S. 18 (1967)

42 *Id.* at 22–23 (1967).

43 *Id.* at 23.

44 499 U.S. 279, 310 (1991).

45 *See, e.g.*, Clemons v. Mississippi, 494 U.S. 738, 752–54 (1990) (unconstitutionally overbroad jury instructions at the sentencing stage of a capital case); Carella v. California, 491 U.S. 263, 266–67 (1989) (per curiam) (jury instruction containing an erroneous con-

the set of errors classified as structural defects to include: the denial of the right to counsel;[46] denial of the right to an impartial adjudicator;[47] denial of the right of self-representation;[48] unlawful exclusion of members of the defendant's race from a grand jury;[49] denial of the right to public trial;[50] and denial of the right to the beyond-a-reasonable-doubt burden of proof.[51]

Although the Supreme Court has only explicitly distinguished between trial errors and structural defects, the Court has in fact applied four different levels of harmless error review to trial errors. Some errors, such as an actual conflict of interest that adversely affected counsel's performance, require only a minimal finding of prejudice.[52] The majority of trial errors, including violations of the Confrontation Clause, require the government to prove beyond a reasonable doubt that the error was harmless.[53] A few trial errors, most notably ineffective assistance of counsel, actually require the defendant to demonstrate prejudice.[54] Lastly, trial errors when on review in federal habeas proceedings must be shown to have a "'substantial and injurious effect or influence in determining the jury's verdict.'"[55]

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clusive presumption); *Satterwhite*, 486 U.S. at 258 (admission of evidence at the sentencing stage of a capital case in violation of the Sixth Amendment Counsel Clause); Pope v. Illinois, 481 U.S. 497, 501–04 (1987) (jury instruction misstating an element of the offense); Rose v. Clark, 478 U.S. 570, 579–82 (1986) (jury instruction containing an erroneous rebuttable presumption); Crane v. Kentucky, 476 U.S. 683, 691 (1986) (erroneous exclusion of defendant's testimony regarding the circumstances of his confession); Rushen v. Spain, 464 U.S. 114, 117–18 (1983) (denial of a defendant's right to be present at all "critical" stages of trial and to be represented by counsel); United States v. Hasting, 461 U.S. 499, 510–12 (1983) (improper comment on defendant's silence at trial in violation of the Fifth Amendment Self-Incrimination Clause); Hopper v. Evans, 456 U.S. 605, 610 (1982) (statute improperly forbidding a trial court from giving a jury instruction on a lesser included offense in a capital case in violation of the Due Process Clause); Kentucky v. Whorton, 441 U.S. 786, 789–90 (1979) (failure to instruct the jury on the presumption of innocence); Moore v. Illinois, 434 U.S. 220, 232 (1977) (admission of identification evidence in violation of the Sixth Amendment); *Milton*, 407 U.S. at 377–78 (confession obtained in violation of *Massiah*, 377 U.S. 201 (1964)); Coleman v. Alabama, 399 U.S. 1, 10–11 (1970) (denial of counsel at a preliminary hearing in violation of the Sixth Amendment's Counsel Clause); *Chambers*, 399 U.S. at 52–53 (admission of evidence obtained in violation of the Fourth Amendment).

46 *See* Gideon v. Wainwright, 372 U.S. 335, 339–44 (1963).

47 *See* Tumey v. Ohio, 273 U.S. 510, 529–34 (1927).

48 *See* McKaskle v. Wiggins, 465 U.S. 168, 177–78 (1984).

49 *See* Vasquez v. Hillery, 474 U.S. 254, 261–62 (1986).

50 *See* Waller v. Georgia, 467 U.S. 39, 49 (1984).

51 *See* Sullivan v. Louisiana, 508 U.S. 275, 281–82 (1993).

52 *See* Cuyler v. Sullivan, 446 U.S. 335, 349–50 (1980); *see also* Napue v. Illinois, 360 U.S. 264, 271–72 (1959) (knowing use of false testimony by the prosecution).

53 *See* Delaware v. Van Arsdall, 475 U.S. 673, 681 (1986); Chapman v. California, 386 U.S. 18, 22–23 (1967).

54 *See* Strickland v. Washington, 466 U.S. 668, 690 (1984); *see also* Brady v. Maryland, 373 U.S. 83, 87–88 (1963).

55 Brecht v. Abrahamson, 507 U.S. 619, 623 (1993) (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946)). Although Confrontation Clause violations may be sub-

The trial-error/structural-defect dichotomy has drawn considerable criticism. The Court has never adequately explained why all structural defects require automatic reversal or why courts cannot reverse all trial errors without a determination of harmfulness.[56] The Court in *Rose v. Clark* argued that structural defects, by eroding such basic procedural protections, so thoroughly undermine the reliability of a criminal trial that no punishment could be deemed fundamentally fair.[57] But this argument assumes the truth of what it purports to prove—that structural defects encompass all and only those basic procedural protections necessary to ensure fundamental fairness. Nor are structural defects obviously more fundamental than trial errors; the failure to instruct the jury on the presumption of innocence[58] is not obviously less harmful than the denial of the right to an impartial adjudicator.[59] The distinction between denial of the right to counsel at trial[60] and denial of the right to counsel at a preliminary hearing[61] is hazy at best. The Court's ad hoc approach to categorizing structural defects and trial errors makes it all the less clear why Confrontation Clause violations remain classified as trial errors.

B. *Roberts*: Reducing the Confrontation Clause to a Substantive Guarantee

A literal reading of the Confrontation Clause suggests that it codifies a procedural protection: in every criminal trial, a defendant has the right to "confront[ ]," meaning (among other things) to cross-examine, each witness who testifies against her or him.[62] The historical context surrounding this Clause lends further support to this reading. Prior to America's independence, dissatisfaction with the British practice of ex parte prosecution—as seen in Sir Walter Raleigh's trial—was prevalent among the American colonists.[63] Raleigh's alleged accomplice, Lord Cobham, implicated Raleigh in both testimony before the

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ject to this standard in habeas proceedings, this Note focuses on the *Chapman–Van Arsdall* standard applied to Confrontation Clause violations on direct review.

56 *See* Steven M. Shepard, Note, *The Case Against Automatic Reversal of Structural Errors*, 117 YALE L.J. 1180, 1182–83 (2008) (arguing that the severity of the automatic-reversal remedy for structural defects has led courts to weaken the underlying constitutional rights).

57 478 U.S. 570, 577–78 (1986).

58 *See* Kentucky v. Whorton, 441 U.S. 786, 789–90 (1979) (per curiam) (holding that failure to instruct a jury on the presumption of innocence does not itself require reversal).

59 *See* Tumey v. Ohio, 273 U.S. 510, 532 (1927) (holding that any procedure that might tempt a judge to forget the burden of proof denies due process of law).

60 *See* Gideon v. Wainwright, 372 U.S. 335 (1963).

61 *See* Coleman v. Alabama, 399 U.S. 1, 10–11 (1970).

62 U.S. CONST. amend. VI.

63 *See* Crawford v. Washington, 541 U.S. 36, 44–45 (2004); *see also The Trial of Sir Walter Raleigh, knt. at Winchester, for High Treason: 1 James I. 17th of November, A.D. 1603*, *in* 2 COBBETT'S COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND

Privy Council and a letter.[64] During Raleigh's trial, the transcript of Cobham's testimony and letter were read to the jury.[65] Raleigh argued that Cobham had lied and demanded that the judges order Cobham to appear as a witness.[66] The judges refused, and Raleigh was convicted and sentenced to death.[67] One of Raleigh's trial judges would later lament that "'the justice of England has never been so degraded and injured as by the condemnation of Sir Walter Raleigh.'"[68] In reaction to such practices, many early decisions construed the right of confrontation quite strictly,[69] some even going so far as to hold any out-of-court statements inadmissible even when the defendant was able to cross-examine the speaker at the time the statements were made.[70]

During the twentieth century, the Supreme Court reframed Sixth Amendment jurisprudence in terms of what it perceived to be the ultimate goal of the Sixth Amendment: ensuring reliable outcomes at trial. In *Roberts*, the court held that cross-examination is not the only constitutionally acceptable means to guarantee the reliability of evidence offered at trial.[71] The facts of *Roberts* were a near-perfect illustration of how a formalistic reading of the Confrontation Clause can create unsavory results. The case involved allegations of forgery.[72] The defendant argued that the victim's daughter had allowed him to use her parents' credit cards and checkbook.[73] The daughter denied

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OTHER CRIMES AND MISDEMEANORS 1, 15–16 (London, R. Bagshaw 1809) [hereinafter *Trial of Sir Walter Raleigh*].

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

65 1 DAVID JARDINE, CRIMINAL TRIALS 435 (London, Charles Knight 1832).

66 *Trial of Sir Walter Raleigh*, *supra* note 63, at 15–16.

67 *Id.* at 31.

68 JARDINE, *supra* note 65, at 520.

69 *See, e.g.*, United States v. Macomb, 26 F. Cas. 1132, 1137 (C.C.D. Ill. 1851) (No. 15,702) (admissibility of prior testimony only permitted where there was a previous opportunity for cross-examination); Commonwealth v Richards, 35 Mass. (18 Pick.) 434, 437 (1837) (same); State v. Houser, 26 Mo. 431, 435–36 (1858) (same); State v. Webb, 2 N.C. (1 Hayw.) 103, 104 (1794) (depositions could be read against the accused only if taken in her or his presence); State v. Campbell, 30 S.C.L. (1 Rich.) 124, 132 (1844) (same); State v. Hill, 20 S.C.L. (2 Hill) 607, 608–10 (1835) (admissibility of prior testimony only permitted where there was a previous opportunity for cross-examination); Kendrick v. State, 29 Tenn. (10 Hum.) 479, 485–88 (1850) (same); Bostick v. State, 22 Tenn. (3 Hum.) 344, 345–46 (1842) (same); Johnston v. State, 10 Tenn. (2 Yer.) 58, 59 (1821) (depositions could be read against the accused only if taken in her or his presence where there is proof that the witness is dead); *see also* 1 JOEL PRENTISS BISHOP, COMMENTARIES ON THE LAW OF CRIMINAL PROCEDURE § 1093, at 688–89 (Boston, Little, Brown & Co. 2d ed. 1872); THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 318 (Boston, Little, Brown & Co. 1868).

70 *See, e.g.*, State v. Atkins, 1 Tenn. (1 Overt.) 229 (1807); Finn v. Commonwealth, 26 Va. (5 Rand.) 701, 708 (1827).

71 Ohio v. Roberts, 448 U.S. 56, 65–66 (1980).

72 *Id.* at 58.

73 *Id.* at 58–59.

this allegation during a preliminary examination and was not subjected to cross-examination.[74] Before trial, without any evidence of foul play by either the prosecution or the defense, the witness moved to another state and ceased all contact with her family and the defendant.[75] At trial, in lieu of her testimony, the prosecution introduced the transcript of the preliminary examination in accordance with an Ohio statute that permitted the admission of preliminary-examination transcripts when witnesses were unavailable.[76] The Court upheld the admission of the transcript by interpreting the Confrontation Clause narrowly, in light of "its underlying purpose to augment accuracy in the factfinding process,"[77] to permit the admission of uncross-examined testimony—or, to use the Court's Sixth Amendment jargon, *unconfronted* testimony—when it "bears adequate indicia of reliability."[78] The Court thus interpreted the Confrontation Clause as a substantive guarantee of the underlying goal of cross-examination—ensuring reliable testimony—rather than as a right to that procedure itself.

The Court borrowed the "indicia of reliability" test from several decisions that "conclud[ed] that certain hearsay exceptions rest upon such solid foundations that admission of virtually any evidence within them comports with the 'substance of the constitutional protection.'"[79] In other words, the admission of unconfronted testimony does not violate the Confrontation Clause if the testimony would be admissible under traditional rules of evidence. The Court reasoned that the drafters of the Sixth Amendment could not have intended to constitutionalize the entire law of hearsay given that this ancient doctrine long predated the Constitution and the Bill of Rights. Yet, this line of reasoning reduced the right of confrontation to another rule of evidence that might complement the law of hearsay but not supersede it. This approach is unique to the American right of confrontation and is not present in other constitutional doctrines that limit admissibility of certain evidence; for example, a defendant's confession, though admissible under well-established hearsay exceptions, is inadmissible if obtained in violation of *Miranda* or coerced in violation of the Due Process Clause. This conflation of the right of confrontation with the rules of evidence was the ultimate basis for classifying all Confrontation Clause violations as trial errors, just as all rules of evidence are subject to harmless error review.

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74 *Id.*

75 *Id.*

76 *Id.* at 59.

77 *Id.* at 65.

78 *Id.* at 66 (internal quotation omitted).

79 *Id.* (quoting Mattox v. United States, 156 U.S. 237, 244 (1895)).

C. Confrontation Clause Violations as Trial Errors

Thus, application of harmless error review was the natural consequence of *Roberts*'s interpretation of the Confrontation Clause. The Court has elsewhere recognized that substantive guarantees, unlike procedural rights, generally must be subject to some inquiry into their prejudicial impact before reversal is appropriate. For example, the Court in *Strickland v. Washington* distinguished denial of the right to the effective assistance of counsel—a trial error—from denial of the right to counsel—a structural defect—by stressing that the very notion of ineffective assistance presupposes that counsel did something that rendered the trial unfair.[80] That is, under the Court's analysis, the question of whether the defendant was denied the right of effective assistance of counsel cannot be meaningfully separated from the question of whether counsel's failings harmed the defendant because ineffectiveness implies a failing that has actually harmed the defendant.[81]

Van Arsdall similarly characterized the Confrontation Clause as conferring on defendants the "'right of effective cross-examination'" and accordingly held that all Confrontation Clause violations were trial errors.[82] *Van Arsdall* presented relatively ideal facts for the application of harmless error review. The defendant had been barred from impeaching a prosecution witness through questioning about the dismissal of an unrelated criminal charge in exchange for the witness's agreement to testify.[83] Outside of the presence of the jury, the witness admitted to the agreement but denied that it affected his testimony.[84] *Van Ardsall* recognized that the trial court unquestionably erred in preventing the defendant from cross-examining the witness on this point[85] but did not reverse—the Court remanded because the

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80 *See* Strickland v. Washington, 466 U.S. 668, 691–96 (1984). Because this decision predated *Fulminante*, the Court does not expressly state that violations of the right to the effective assistance of counsel are trial errors or that violations of the right to counsel are structural defects. However, the Court does state, "In certain Sixth Amendment contexts, prejudice is presumed," while "actual ineffectiveness claims . . . are subject to a general requirement that the defendant affirmatively prove prejudice." *Id.* at 692–93. While this standard imposes the burden of proving prejudice on the defendant, unlike the traditional *Chapman* standard, it is clear from the Court's analysis that a reversal will be obtained only if prejudice is proven and that a nonprejudicial, or harmless, error will not result in a reversal. *See id.* at 693.

81 *See* United States v. Gonzalez-Lopez, 548 U.S. 140, 147 (2006).

82 Delaware v. Van Arsdall, 475 U.S. 673, 682 (1986) (quoting Davis v. Alaska, 415 U.S. 308, 318 (1974)). Although the Court had applied harmless error analysis to Confrontation Clause violations prior to *Van Arsdall* in *Harrington v. California*, 395 U.S. 250, 251–54 (1969); *Schneble v. Florida*, 405 U.S. 427, 428–32 (1972); and *Brown v. United States*, 411 U.S. 223, 26–27 (1973), *Van Arsdall* was the first decision to broadly declare that "the denial of the opportunity to cross-examine an adverse witness does not fit within the limited category of constitutional errors that are deemed prejudicial in every case." 475 U.S. at 682.

83 *Van Arsdall*, 475 U.S. at 676.

84 *Id.* at 676–77.

85 *Id.* at 679.

lower court had not addressed the harmlessness of the error.[86] The testimony at issue was purely cumulative, marginally relevant, and questionably reliable given the witness's extreme state of intoxication during the events at issue; the remainder of the prosecution's case, by contrast, was quite strong.[87]

In requiring harmless error review for Confrontation Clause violations, *Van Arsdall* stressed that the core inquiry was whether the admission of evidence without proper cross-examination affected the reliability of the fact-finding process.[88] Naturally, the reliability of the wrongfully admitted evidence will play a key role in this process, as the wrongful admission of reliable evidence is not likely to adversely affect the reliability of the proceeding. *Van Arsdall* also noted that several other factors may also bear on the harmlessness determination, such as "the importance of the witness' [sic] testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case."[89] With the exceptions of corroboration (which bears directly on reliability) and the extent of cross-examination otherwise permitted (from which the reliability of the witness on other matters may be inferred), finding a Confrontation Clause violation harmless on the basis of the secondary factors alone would require a reviewing court to determine, in effect, that the prosecution could have satisfied its burden even without the wrongfully admitted evidence either because the remainder of its case was overwhelming or because the evidence at issue was unimportant or cumulative. Although such a finding is not entirely uncommon, to date, only one court has suggested that these secondary factors are more important that the primary goal of ensuring reliability.[90]

D. *Crawford*: The End of the *Roberts* Era and the Refashioning of the Confrontation Clause into a Procedural Right

A twenty-three years after its inception, the *Roberts* era ended with *Crawford*. Justice Antonin Scalia, writing for the majority, applied a rigid originalist framework: "[T]he Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a

86 *Id.* at 684.

87 *Id.* at 675–76.

88 *Id.* at 684.

89 *Id.*

90 *See* United States v. Mejia, 545 F.3d 179, 199 n.5 (2d Cir. 2008).

prior opportunity for cross-examination."[91] Indeed, imposing an originalist framework seemed more important to the Court than correcting the substantive course of its prior jurisprudence: "Although the results of our decisions have generally been faithful to the original meaning of the Confrontation Clause, the same cannot be said of our rationales."[92]

Crawford involved a prosecution for assault and attempted murder.[93] In *Crawford*, the defendant's spouse was barred from testifying under Washington's marital-privilege rule.[94] In lieu of the spouse's testimony, the trial court permitted the prosecution to introduce a tape-recorded statement that the spouse made to the police.[95] Applying *Roberts*, the Washington Supreme Court upheld the admission of the tape recording because "it bore guarantees of trustworthiness," as the defendant's confession corroborated the recording.[96] The United States Supreme Court reversed and, in overruling *Roberts*, explained that the determinative inquiry is no longer whether evidence bears sufficient indicia of reliability but simply whether the defendant had an opportunity to cross-examine the witness: "Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation."[97] However, the Court also narrowed the right of confrontation in one important respect: while *Roberts* applied to any out-of-court statement introduced against the accused, *Crawford* held that the Confrontation Clause applied primarily to "testimonial statements,"[98] a neologism the Court did not define until *Davis v. Washington*,[99] when it explained that statements are testimonial when elicited for "the primary purpose of . . . establish[ing] or prov[ing] past events potentially relevant to later criminal prosecution."[100]

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

92 *Id.* at 60.

93 *Id.* at 40.

94 *Id.*

95 *Id.*

96 *Id.* at 41–42.

97 *Id.* at 68–69.

98 Although *Crawford* did not explain to what extent the Confrontation Clause still applied to nontestimonial statements, *see id.* at 53–54, the Court has subsequently clarified that there is no constitutional right to confront the declarants of nontestimonial out-of-court statements. *See* Whorton v. Bockting, 549 U.S. 406, 420 (2007). After *Crawford* but before *Bockting*, courts had continued to apply *Roberts* to nontestimonial statements. *See id.*

99 547 U.S. 813 (2006).

100 *Id.* at 822.

1. *The Applicability of Harmless Error Review to Post-*Crawford *Confrontation Clause Violations*

a. *The Supreme Court Has Declined to Directly Address Whether Confrontation Clause Violations Remain Subject to Harmless Error Review*

Despite having dramatically refashioned the substantive scope of the right of confrontation, the *Crawford* Court declined to address whether harmless error review continued to apply to Confrontation Clause violations, noting only in a footnote that it "express[ed] no opinion" as to whether "the confrontation violation, if it occurred, was not harmless."[101] In *United States v. Gonzalez-Lopez*,[102] however, the Court was quick to compare violations of the newly fashioned right of confrontation with a structural defect:

> Since, it was argued, the purpose of the Confrontation Clause was to ensure the reliability of evidence, so long as the testimonial hearsay bore "indicia of reliability," the Confrontation Clause was not violated. We rejected that argument . . . in *Crawford* . . . saying that the Confrontation Clause "commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination."
>
> So also with the Sixth Amendment right to counsel of choice. It commands, not that a trial be fair, but that a particular guarantee of fairness be provided . . . .[103]

The Court went on to hold that the denial of the right to counsel of choice was a structural defect because it "def[ied] analysis by harmless-error standards."[104]

Gonzalez-Lopez's strong reading of *Crawford* notwithstanding, *Whorton v. Bockting*[105] declined to apply *Crawford* retroactively in a collateral review of a pre-*Crawford* conviction. For a new procedural rule announced in a decision of the Supreme Court to apply retroactively in a collateral proceeding, the rule must be either substantive or "a watershed rule of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding."[106] To qualify as watershed, a new rule of criminal procedure must be "necessary to prevent an impermissibly large risk of an inaccurate conviction" and "alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding."[107] To date, the Supreme Court

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101 541 U.S. at 42 n.1.

102 548 U.S. 140 (2006).

103 *Id.* at 146 (citations omitted).

104 *Id.* at 148 (quoting Arizona v. Fulminante, 499 U.S. 279, 309–10 (1991)) (internal punctuation omitted).

105 549 U.S. 406, 416, 421 (2007).

106 *Id.* at 416 (citations and internal punctuation omitted).

107 *Id.* at 418 (citations and internal punctuation omitted).

has only acknowledged one rule that might have qualified for watershed status[108]—the Sixth Amendment right to appointed counsel first recognized in *Gideon v. Wainwright*.[109] The Court distinguished *Crawford* from *Gideon* on the ground that the "overall effect of *Crawford*" on "the accuracy of factfinding in criminal cases is not easy to assess."[110] The Court noted that while *Crawford* is more restrictive than *Roberts* with respect to testimonial statements and thus "may improve the accuracy of factfinding in some criminal cases," *Crawford* eliminated "Confrontation Clause protection against the admission of unreliable out-of-court nontestimonial statements"; the Court was thus "unclear whether *Crawford*, on the whole, decreased or increased the number of unreliable out-of-court statements that may be admitted in criminal trials."[111] However, the Court did stress that the watershed exception is "extremely narrow"[112] and that it has rejected every claim that a new rule qualifies as watershed, including rules that are structural in nature.[113]

Ultimately, neither *Gonzalez-Lopez* nor *Bockting* establishes the gravity of Confrontation Clause error. Despite being squarely presented with the issue in at least two petitions for certiorari,[114] the Supreme Court has continued to refuse to directly answer the question of whether post-*Crawford* Confrontation Clause violations are subject to harmless error review or automatic reversal.[115]

b. *Most Lower Federal Courts Have Continued to Apply* Van Arsdall *Since* Crawford

Despite *Crawford*, virtually all federal courts of appeals have continued to subject Confrontation Clause violations to harmless error review.[116] It is not clear from these decisions whether lower courts

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108 *See id.* at 419.

109 372 U.S. 335 (1963).

110 *Bockting*, 549 U.S. at 419.

111 *Id.* at 419–20.

112 *Id.* at 417 (quoting Schriro v. Summerlin, 542 U.S. 348, 352 (2004)).

113 *See, e.g.*, Beard v. Banks, 542 U.S. 406, 408 (2004) (rejecting retroactivity for *Mills v. Maryland*, 486 U.S. 367 (1988)); *Summerlin*, 542 U.S. at 358 (rejecting retroactivity for *Ring v. Arizona*, 536 U.S. 584 (2002)); O'Dell v. Netherland, 521 U.S. 151, 167 (1997) (rejecting retroactivity for *Simmons v. South Carolina*, 512 U.S. 154 (1994)); Gilmore v. Taylor, 508 U.S. 333, 335 (1993) (rejecting retroactivity for *Falconer v. Lane*, 905 F.2d 1129 (7th Cir. 1990)); Sawyer v. Smith, 497 U.S. 227, 229 (1990) (rejecting retroactivity for *Caldwell v. Mississippi*, 472 U.S. 320 (1985)).

114 *See* Petition for Writ of Certiorari, *Abu Ali*, *supra* note 24, at 13; Petition for Writ of Certiorari, *Shisinday*, *supra* note 24, at 12.

115 *See, e.g.*, Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527, 2542 n.14 (2009) ("We of course express no view as to whether the [Confrontation Clause violation] was harmless.").

116 The following cases, grouped by circuit courts of appeals, have subjected Confrontation Clause violations to harmless error review:

- First Circuit: United States v. Earle, 488 F.3d 537, 545–46 (2007); United States v. Rodriguez-Marrero, 390 F.3d 1, 18 (2004).

believe that *Crawford* and its progeny implicitly mandate application of harmlessness analysis, as Chief Justice Rehnquist intoned, or simply adhere to *Van Ardsall* in the absence of any express indication that *Crawford* might have undermined it. With the exception of cases in which the prosecution's evidence was overwhelming[117] or extremely weak,[118] these decisions have focused on whether the evidence admitted in violation of the Confrontation Clause was ultimately reliable,[119] although courts rarely make it clear on which factors of the multifactor *Van Arsdall* test they rely.

2. *Several Lower-Court Decisions Suggesting that Especially Egregious Confrontation Clause Violations May Amount to Structural Defects*

Several courts have apparently rejected *Van Arsdall*'s blanket application of harmless error review to all Confrontation Clause violations. Instead, before deciding whether to apply harmless error review, these decisions first examine whether (1) the defendant would have been in a position to affect the trial had the violation not occurred and (2) the confrontation right was violated at a fundamental level.[120] Under this framework, three state supreme courts held that fundamental violations of the Confrontation Clause were structural

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- Second Circuit: United States v. Anson, 304 F. App'x 1, 5 (2008); United States v. Santos, 449 F.3d 93, 95 (2006).
- Third Circuit: United States v. Jimenez, 513 F.3d 62, 77–79 (2008); Albrecht v. Horn, 485 F.3d 103, 134–36 (2007).
- Fourth Circuit: United States v. Banks, 482 F.3d 733, 741–42 (2007).
- Fifth Circuit: United States v. Zheng Xiao Yi, 460 F.3d 623, 634–35 (2006); Miller v. Dretke, 404 F.3d 908, 918 (2005).
- Sixth Circuit: Hawkins v. Ganshimer, 286 F. App'x 896, 904–05 (2008); United States v. Robinson, 389 F.3d 582, 593 (2004).
- Seventh Circuit: United States v. Gilbert, 391 F.3d 882, 887 (2004).
- Eighth Circuit: Bobadilla v. Carlson, 575 F.3d 785, 793 (2009).
- Ninth Circuit: United States v. Larson, 495 F.3d 1094, 1107–08 (2007) (en banc); United States v. Nielsen, 371 F.3d 574, 581–82 (2004).
- Tenth Circuit: United States v. Summers, 414 F.3d 1287, 1303–04 (2005).
- Eleventh Circuit: Grossman v. McDonough, 466 F.3d 1325, 1338–39 (2006).

117 *See, e.g.*, *Banks*, 482 F.3d at 742 (basing guilt upon, *inter alia*, revealed firsthand knowledge of the alleged crimes, multiple pieces of physical evidence, and several sets of fingerprints).

118 *See, e.g.*, *Bobadilla*, 575 F.3d at 793.

119 *See, e.g.*, *Zheng*, 460 F.3d at 634–35 (noting that the witness spoke directly to her own knowledge and that other physical evidence corroborated the testimony).

120 *See* Campbell v. Rice, 302 F.3d 892, 900 (9th Cir. 2001) (exclusion of defendant from in-chambers hearing was structural error); Rice v. Wood, 77 F.3d 1138, 1144–45 (9th Cir. 1996) (en banc) (finding the defendant's exclusion from the announcement of the verdict subject to harmless error review because the defendant had little role to play at that point); Hegler v. Borg, 50 F.3d 1472, 1477 (9th Cir. 1995) (finding the exclusion of defendant from reading the trial transcript back to the jury subject to harmless error review because the ability of the defendant to influence the process at that point was negligible).

defects requiring automatic reversal.[121] The United States Supreme Court, however, has not revisited the differentiation between structural defects and trial errors.

II

UNTIL COMPLETE CONFRONTATION CLAUSE VIOLATIONS ARE RECOGNIZED AS STRUCTURAL DEFECTS, *CRAWFORD* WILL BE REDUCED TO *ROBERTS* ON APPEAL

If all Confrontation Clause violations continue to remain subject to harmless error review, *Crawford* has created a right without a remedy. Because the core concern of harmless error review is reliability, appellate courts will not reverse convictions for violations of the Confrontation Clause when the wrongfully admitted evidence is sufficiently reliable. Thus, to determine whether the Confrontation Clause has been violated under *Crawford*, appellate courts will have to make the same reliability assessments trial courts were to make under *Roberts*, and as a result, only violations of both *Roberts* and *Crawford* will result in a reversal of the underlying conviction.

In the short term, the limited procedural scope of the right of confrontation will cause appellate courts to limit the de facto substantive scope of the right to the confines of *Roberts*. It is possible that conscientious trial courts might strictly adhere to the letter of *Crawford* and exclude unconfronted testimonial evidence. However, in the long term, trial courts will lose any incentive to enforce the letter of *Crawford*, and prosecutors will have every reason to attempt to introduce unconfronted testimonial evidence because any consequent Confrontation Clause violations will not result in a reversal of the conviction unless the evidence is also unreliable. This situation will leave defendants without any means of enforcing the constitutional rights that *Crawford* guarantees them. If the Supreme Court is at all interested in protecting the substantive scope of the Confrontation Clause, it must provide means of remedying Confrontation Clause violations that will also prevent the future admission of unconfronted testimony.

As an alternative method for enforcing defendants' rights, Jennifer Laurin has suggested making civil remedies available to a defendant whose right of confrontation was violated.[122] Such a sea change in current practice, however, is unlikely and would not necessarily

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121 *See* State v. Garcia-Contreras, 953 P.2d 536, 540–41 (Ariz. 1998) (en banc) (holding that the defendant's exclusion from the jury-selection process was a structural defect); State v. Calderon, 13 P.3d 871, 878–79 (Kan. 2000) (holding that the failure to provide a translator during closing arguments was a structural defect); State v. Bird, 43 P.3d 266, 269–72 (Mont. 2002) (classifying defendant's exclusion from in-chambers individual voir dire proceedings as a structural defect).

122 *See* Jennifer E. Laurin, Melendez-Diaz v. Massachusetts, Rodriguez v. City of Houston, *and Remedial Rationing*, 109 COLUM. L. REV. SIDEBAR 82, 83 (2009).

cure the problems of harmless error review. The potential dignitary harms arising from a violation of the right of confrontation would be difficult to prove and even more challenging to quantitatively assess. Furthermore, even if such damages were available, this result would be cold comfort to the defendant who must nevertheless remain incarcerated or otherwise punished. Thus, regardless of the form of the remedy, the Court must treat at least some Confrontation Clause violations as structural errors to prevent the right of confrontation from collapsing again into a mere right to reliable testimony. The remainder of this Part examines the structure of contemporary harmless error review and how lower courts have applied harmlessness analysis in the Confrontation Clause context, concluding that, in fact, courts have already begun to reduce the scope of the *Crawford*-era Confrontation Clause to its *Roberts*-era limits.

A. The Primary Objective of Harmless Error Review

The harmless error doctrine arises from "the principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence."[123] Harmless error analysis evaluates whether an error is "harmless" in terms of its "effect on the factfinding process at trial."[124] Accordingly, in the Confrontation Clause context, the harmless error inquiry focuses on whether the wrongfully admitted evidence "might have affected the reliability" of the proceeding.[125] The Supreme Court has also stressed that a secondary, but nonetheless important, purpose of harmless error review is to "promote[ ] public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error."[126] Although the Court has never indicated how this secondary consideration might affect harmless error review, it further evidences the Court's concern about the fairness of the criminal trial, which is necessarily implicated when the reliability of the trial process is diminished.

The Second Circuit has suggested that contemporary Confrontation Clause harmless error jurisprudence has shifted from a focus on reliability to a focus on assessing the strength of the remaining evidence of guilt. In effect, this shift would reduce the inquiry to a determination of whether the remainder of the prosecution's case was

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123 Delaware v. Van Arsdall, 475 U.S. 673, 681 (1986) (citing United States v. Nobles, 422 U.S. 225, 230 (1975)); *see also* Arizona v. Fulminante, 499 U.S. 279, 308 (1991).

124 *Van Arsdall*, 475 U.S. at 681.

125 *Id.* at 684.

126 *Id.* at 681 (citing ROGER J. TRAYNOR, THE RIDDLE OF HARMLESS ERROR 50 (1970) ("Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it.")).

sufficient to meet its burden.[127] This approach potentially means that even the most prejudicial errors would not result in reversal if the fact finder could have found the defendant guilty based on the remaining evidence. The court identified *Harrington v. California*[128] and *Schneble v. Florida*[129] as evidence of this shift. Although both of these decisions apply harmless error review to Confrontation Clause violations, they predate *Van Arsdall*, which states that the primary goal of harmless error analysis is to gauge the effect of the violation on the reliability of the proceeding.[130] The Second Circuit does not explain why only one of the secondary *Van Arsdall* factors should be prioritized over all of the other factors. Moreover, if the prosecution's case sufficiently meets its burden even absent the wrongfully admitted evidence, this showing can be equated to a form of indirect corroboration; because the defendant in these instances is guilty beyond a reasonable doubt, evidence supporting the defendant's guilt must be, to some degree, accurate. To date, other circuit courts do not appear to have followed the Second Circuit's approach.

B. Reducing the Confrontation Right to Its *Roberts*-Era Scope

This Note suggests that while the de jure substantive scope of the right of confrontation—at least with respect to testimonial statements—has expanded in the wake of *Crawford*, the de facto scope largely remains unchanged. To test this hypothesis, this Note has identified two core distinctions between *Crawford* and *Roberts*. First, under *Roberts*, evidence is admitted solely on the basis of a judicial-reliability assessment, while under *Crawford* the determinative inquiry is whether there was a prior opportunity for cross-examination.[131] Second, under *Roberts*, out-of-court confessions of accomplices are routinely admitted, while the *Crawford* Court made clear that the Confrontation Clause means to exclude them.[132] This subpart defines these core distinctions and examines whether lower courts have preserved them, concluding that the distinctions between the two decisions collapse under harmless error review.

1. *The Reemergence of Judicial Reliability Assessments in the* Crawford *Era*

Under *Roberts*, a trial court could admit unconfronted testimonial evidence if it manifested "particularized guarantees of trustworthi-

127 *See* United States v. Mejia, 545 F.3d 179, 199 n.5 (2d Cir. 2008) (citing 2 STEVEN ALAN CHILDRESS & MARTHA S. DAVIS, FEDERAL STANDARDS OF REVIEW § 7.03 (3d ed. 1999)).

128 395 U.S. 250, 254 (1969).

129 405 U.S. 427, 432 (1972).

130 *Van Arsdall*, 475 U.S. at 684.

131 *See* Crawford v. Washington, 541 U.S. 36, 61–62 (2004).

132 *See id.* at 63–64.

ness."[133] If the trial court determined that the evidence bore sufficient indicia of reliability, the court could admit the evidence upon a showing that the source of the testimony was unavailable, ignoring whether the defendant had any opportunity to cross-examine the declarant at the time the statement was made.[134] Only the court needed to be satisfied of the evidence's reliability.[135] Under *Crawford*, the trial court makes no reliability determination; instead, reliability is assessed "by testing in the crucible of cross-examination."[136] That is, the Constitution is interpreted to mandate that a particular procedure be employed in assessing reliability, not that reliability itself be guaranteed.[137] *Crawford* emphasized this point by highlighting that the judicial-reliability assessments permitted by *Roberts* were precisely the sort of ex parte proceedings that infamously characterized Sir Walter Raleigh's case[138] and several other notorious English prosecutions.[139] The Court noted that the prosecution in Sir Walter Raleigh's case employed many of the same arguments a court applying *Roberts* might have invoked: that the statements were self-inculpatory,[140] not made in the heat of passion,[141] and not obtained upon any promise of a pardon[142]—in other words, that they bore particularized guarantees of trustworthiness.

As a result of the application of harmless error review to violations of the Confrontation Clause, the amorphous *Roberts* test has resurfaced as the de facto rule for assessing harmfulness. This result has come about because the primary inquiry in the harmless error review of confrontation violations is whether the evidence affected the reliability of the proceeding.[143] The most straightforward means for an

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

134 *See id.*

135 *See Crawford*, 541 U.S. at 62.

136 *Id.* at 61.

137 *Id.*

138 *Trial of Sir Walter Raleigh*, *supra* note 63, at 15–16, 24 (admitting an accomplice's letter and testimony before the Privy Council without any prior opportunity for the defendant to cross-examine the accomplice).

139 *See, e.g.*, John Lilburn, *The Trial of John Lilburn and John Wharton, for Printing and Publishing Seditious Books. In the Star-Chamber: 13 Charles I. A.D. 1637*, *in* 3 COBBETT'S COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS 1315, 1318–22 (London, R. Bagshaw 1809) (admitting an out-of-court accusation of seditious publication without recourse to cross-examine the declarant); *The Trial of Sir Nicholas Throckmorton, knight, in the Guildhall of London, for High Treason: 1 Mary, April 17, 1554*, *in* 1 COBBETT'S COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS 869, 875–77 (London, R. Bagshaw 1809) (admitting the prior examination of a witness in lieu of live testimony without any prior opportunity for cross-examination).

140 *Trial of Sir Walter Raleigh*, *supra* note 63, at 19.

141 *Id.* at 14.

142 *Id.* at 29.

143 *See* Delaware v. Van Arsdall, 475 U.S. 673, 684 (1986).

appellate court to make this determination is to examine the record for particularized guarantees of the evidence's trustworthiness. If some means other than cross-examination guaranteed the evidence's reliability, cross-examination could not have significantly improved the reliability of the proceeding, and thus the denial of the defendant's right of confrontation is harmless. But "[a]dmitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation"[144] even when the goal of the judicial inquiry is the same as that of cross-examination.[145]

Roberts-style reliability assessments have begun to emerge in the post-*Crawford* decisional law of the Courts of Appeals. In *United States v. Earle*,[146] a prosecution of a deported alien for illegal reentry, the First Circuit held that the admission of a Certificate of Nonexistence of a Record—a document stating that there was no record the defendant had filed the form required for legal reentry of a deportee—was a harmless error without permitting the defendant to cross-examine the preparer of the form.[147] The court held that the opportunity to cross-examine the preparer's subordinate would have rendered any testimony by the preparer purely cumulative—implicitly assuming that the subordinate and preparer were equally reliable witnesses despite the defense's protestations to the contrary—and therefore would not have affected the reliability of the proceeding.[148] The North Carolina Court of Appeals similarly held the admission of a drug-test lab report a harmless error where a supervisor testified about procedures and equipment but the testing analyst did not testify.[149] In *United States v. Anson*,[150] a prosecution for the transport and possession of child pornography, the Second Circuit held that the admission of hearsay statements about the "ages and geographic location of the children depicted" was harmless, in part because "the officers could have testified to the ages of the children based on their direct observation of the children or on their inspection of the relevant birth certificates or other documentary evidence."[151] In effect, the court made a determination that the hearsay statements must be reliable because the officers' knowledge of other facts implicitly corroborated the statements.

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

145 *See* Petition for Writ of Certiorari, *Shisinday*, *supra* note 24, at 21.

146 488 F.3d 537 (1st Cir. 2007).

147 *Id.* at 546.

148 *Id.* at 546 n.12; *see also* United States v. Madarikan, 356 F. App'x 532, 535 (2d Cir. 2009) (finding an error under *Melendez-Diaz* to admit a Certificate of Nonexistence of Record without opportunity to cross-examine the preparer but holding the error harmless due to defendant's admission that she had not filed the requisite form).

149 State v. Galindo, 683 S.E.2d 785, 787–89 (N.C. Ct. App. 2009).

150 304 F. App'x 1 (2d Cir. 2008).

151 *Id.* at 5.

Furthermore, in *United States v. Jimenez*,[152] the Third Circuit upheld the defendants' bank-fraud convictions, obtained in part through the admission of several bank statements as business records, despite the defendants having no opportunity to cross-examine the custodian of records.[153] The court noted that the written declarations of the records custodian stated that the bank statements were created at or near the time that the matters contained in the statements occurred, that the statements were made and kept in the course of the regularly conducted activities of the bank, and that any duplicates were accurate copies of the originals.[154] The court repeatedly stressed that the defendants never challenged the accuracy of these declarations.[155] The admission of the statements thus appears to have been predicated on their reliability, as determined by the Third Circuit, rather than on the extent to which the defendants had an opportunity to cross-examine the custodian. The Fifth Circuit in *Miller v. Dretke*[156] held that the admission of a codefendant's incriminating extrajudicial confession was harmless error, in part because the defendant had an opportunity to cross-examine another witness "whose testimony corroborated [the] confession."[157] Similarly, the Sixth Circuit held that the admission of a tape-recorded statement by a nontestifying codefendant was harmless error because of "independent circumstantial proof" and corroboration from another witness.[158]

Lastly, the Ninth Circuit has held that a district court's refusal to permit a defendant to cross-examine a cooperating witness about the mandatory-minimum life sentence the witness faced in the absence of cooperation was harmless error. The court so held in part because the defendant was permitted to explore the witness's criminal past and general desire to obtain a lesser sentence and because the court instructed the jury to treat cooperating witnesses "with greater caution"—in effect, a finding that the testimony bore adequate indicia of reliability.[159]

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152 513 F.3d 62 (3d Cir. 2008).

153 *Id.* at 77–79. The court did not address whether the admission of the bank statements violated the Confrontation Clause but only stated that if the statements did violate the Confrontation Clause, their admission was harmless. *Melendez-Diaz* now establishes that business records are nontestimonial and therefore not subject to the Confrontation Clause. *See* 129 S. Ct. 2527, 2539–40 (2009).

154 *Jimenez*, 513 F.3d at 78.

155 *Id.* at 78–79.

156 404 F.3d 908 (5th Cir. 2005).

157 *Id.* at 918.

158 Hawkins v. Ganshimer, 286 F. App'x 896, 904 (6th Cir. 2008).

159 United States v. Larson, 495 F.3d 1094, 1108 (9th Cir. 2007) (en banc).

2. *The Effect of the Application of Harmless Error Analysis to a* Crawford *Confrontation Clause Violation*

Crawford also stressed that the Confrontation Clause was "plainly meant to exclude" the out-of-court confessions of accomplices.[160] Under *Roberts*, however, courts routinely admitted them.[161] The Court attributed this error to the amorphous and unpredictable nature of the *Roberts* test, noting that its applications were often flatly inconsistent.[162] For example, the Court in *Crawford* stated that

> the Colorado Supreme Court held a statement more reliable because its inculpation of the defendant was "detailed," while the Fourth Circuit found a statement more reliable because the portion implicating another was "fleeting." The Virginia Court of Appeals found a statement more reliable because the witness was in custody and charged with a crime . . . , while the Wisconsin Court of Appeals found a statement more reliable because the witness was not in custody and not a suspect. Finally, the Colorado Supreme Court in one case found a statement more reliable because it was given "immediately after" the events at issue, while that same court, in another case, found a statement more reliable because two years had elapsed.[163]

After *Crawford*, several appellate courts have held that the admissions of accomplices' or agents' inculpatory statements were harmless error.[164] In *Grossman v. McDonough*,[165] the Eleventh Circuit held the

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160 Crawford v. Washington, 541 U.S. 36, 63–64 (2004).

161 *See, e.g.*, United States v. Photogrammetric Data Servs., Inc., 259 F.3d 229, 245–46 (4th Cir. 2001); People v. Farrell, 34 P.3d 401, 406–08 (Colo. 2001) (en banc); People v. Lawrence, 55 P.3d 155, 160–61 (Colo. App. 2001); People v. Thomas, 730 N.E.2d 618, 625–26 (Ill. App. Ct. 2000); Taylor v. Commonwealth, 63 S.W.3d 151, 166–68 (Ky. 2001); People v. Schutte, 613 N.W.2d 370, 376–77 (Mich. Ct. App. 2000); State v. Hawkins, 2002-Ohio-7347U, at ¶¶ 63–75, *abrogated by Crawford*, 541 U.S. 36; State v. Marshall, 737 N.E.2d 1005, 1009 (Ohio Ct. App. 2000); State v. Jones, 15 P.3d 616, 623–25 (Or. Ct. App. 2000); State v. Bintz, 2002 WI App 204, ¶¶ 8–14, 257 Wis. 2d 177, 650 N.W.2d 913. Courts have also invoked *Roberts* to admit a small number of other plainly testimonial statements. *See, e.g.*, United States v. Aguilar, 295 F.3d 1018, 1021–23 (9th Cir. 2002) (plea allocution showing existence of a conspiracy); United States v. Thomas, 30 F. App'x 277, 279 (4th Cir. 2002) (grand jury testimony); United States v. Centracchio, 265 F.3d 518, 527–30 (7th Cir. 2001) (plea allocution showing existence of a conspiracy); United States v. Dolah, 245 F.3d 98, 104–05 (2d Cir. 2001) (same); United States v. Petrillo, 237 F.3d 119, 122–23 (2d Cir. 2000) (same); United States v. Moskowitz, 215 F.3d 265, 268–69 (2d Cir. 2000) (per curiam) (same); United States v. Papajohn, 212 F.3d 1112, 1118–20 (8th Cir. 2000) (grand jury testimony); United States v. Gallego, 191 F.3d 156, 166–68 (2d Cir. 1999) (plea allocution showing existence of a conspiracy); State v. McNeill, 537 S.E.2d 518, 523–24 (N.C. Ct. App. 2000) (prior trial testimony).

162 *See Crawford*, 541 U.S. at 63.

163 *Id.* (emphases and citations omitted).

164 *But see id.* at 63–64 (citing as a prime example of the "unpardonable vice" of *Roberts* the decisional law permitting the introduction of out-of-court accomplice confessions it inspired).

165 466 F.3d 1325 (11th Cir. 2006).

admission of an accomplice's confession to a detective a harmless error in part because the confession duplicated prior inculpatory statements the defendant had made to three other private parties, each of whom testified at trial.[166] The Fifth Circuit similarly upheld the admission of the out-of-court statements of the defendant's employee in part because the employee "spoke directly to her own knowledge" and because the statements were "corroborated by other evidence."[167] Thus, even the most flagrant violations of the Confrontation Clause will go without remedy if a court ultimately finds that the evidence introduced was reliable.

Not only have *Roberts*-style judicial-reliability determinations reemerged, but courts that are perhaps ill equipped to do so now decide the question of whether evidence is sufficiently reliable to pass constitutional muster. More importantly, however, is how harmless error review affects the substantive scope of the *Crawford*-era Confrontation Clause. Harmless error review will only require a reversal when a *Crawford* error would also have been a *Roberts* error. As a result, courts on appeal will undo whatever expanded protections *Crawford* may have granted defendants. These protections are constitutional criminal-procedure rights, which a criminal remedy should vindicate. In the long run, these decisions will reduce the incentive of trial courts to follow the letter of *Crawford* as they will only suffer reversal if the error would have amounted to an error under *Roberts*. If the Supreme Court does not soon revisit *Van Arsdall*, *Crawford* may become a dead letter.

III
TREATING EGREGIOUS VIOLATIONS OF THE CONFRONTATION CLAUSE AS STRUCTURAL DEFECTS IS CONSONANT WITH CONTEMPORARY SIXTH AMENDMENT JURISPRUDENCE

Although the doctrine that Confrontation Clause violations are subject to harmless error review is arguably forty years old[168] and has been uncontested for nearly twenty-five years,[169] *Crawford*'s refashioning of the right of confrontation into a procedural guarantee necessitates its reconsideration. *Crawford* situates the Confrontation Clause in a broader theory of the Sixth Amendment as a set of fundamental procedural rights intended to prevent the evils of an inquisitorial system.[170] Under this anti-inquisitorial framework, the right of confrontation merits strong protection because it lies at the core of

166 *Id.* at 1340.
167 United States v. Zheng Xiao Yi, 460 F.3d 623, 634–35 (5th Cir. 2006).
168 *See* Harrington v. California, 395 U.S. 250, 254 (1969).
169 *See* Delaware v. Van Arsdall, 475 U.S. 673, 674 (1986).
170 *See Crawford*, 541 U.S. at 53.

what it means for a criminal trial to be adversarial.[171] In light of the recognition of the right of confrontation as a core procedural right, courts should treat complete violations of the Confrontation Clause as structural defects.

The Supreme Court's Sixth Amendment jurisprudence has long suffered from confusion about whether the primary goal of the Sixth Amendment is to guarantee a fair and reliable trial overall or to mandate certain specific trial procedures.[172] In the decades preceding *Crawford*, the Court generally interpreted the Sixth Amendment with the primary goal of promoting verdict accuracy.[173] Since *Crawford*, however, the Court has largely recast the Sixth Amendment primarily as a set of procedural rights designed to prevent the perceived evils of an inquisitorial system.[174] This shift regarding the goals of the Sixth Amendment further necessitates revisiting *Van Arsdall*.

A. The Effect of the Disentanglement of the Reliability and Anti-Inquisitorial Theories of the Sixth Amendment on Contemporary Confrontation Clause Jurisprudence

By adopting an anti-inquisitorial theory of the Confrontation Clause, the Supreme Court has recognized that the procedure of cross-examination itself, not simply the goal of verdict accuracy, must be protected. Sanjay Chhablani locates the emergence of reliability as a consideration in Confrontation Clause jurisprudence in *Mattox v. United States*.[175] In *Mattox*, the Court admitted the prior testimony of two deceased witnesses when the defendant had had a prior opportunity to cross-examine them based on "considerations of public policy and the necessities of the case."[176] However, it was not until *Dutton v. Evans*[177] that reliability became the predominant goal of the Confrontation Clause,[178] and a majority of the Court did not explicitly accept this predominance until *Roberts*.[179]

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171 *See id.* at 43, 50–51.

172 *See* Sanjay Chhablani, *Disentangling the Sixth Amendment*, 11 U. PA. J. CONST. L. 487, 488–90 (2009) (examining the roles and attractiveness of anti-inquisitorialism in American criminal process and law); *see also* Sklansky, *supra* note 32, at 1643–56 (examining the operation of anti-inquisitorialism under the Supreme Court's reinterpretation of the Confrontation Clause).

173 *See* Ohio v. Roberts, 448 U.S. 56, 66 (1980); Dutton v. Evans, 400 U.S. 74, 86 (1970); Mattox v. United States, 156 U.S. 237, 243 (1895); YALE KAMISAR ET AL., MODERN CRIMINAL PROCEDURE: CASES, COMMENTS AND QUESTIONS 1429 (12th ed. 2008); Chhablani, *supra* note 172, at 513.

174 *See* Sklansky, *supra* note 32, at 1642–44.

175 156 U.S. 237 (1895); *see* Chhablani, *supra* note 172, at 513.

176 156 U.S. at 243.

177 400 U.S. 74 (1970).

178 *See* John G. Douglass, *Beyond Admissibility: Real Confrontation, Virtual Cross-Examination, and the Right to Confront Hearsay*, 67 GEO. WASH. L. REV. 191, 202–03 (1999).

179 *See* Chhablani, *supra* note 172, at 513–14.

Chhablani, relying on Justice Clarence Thomas's concurrence in *White v. Illinois*,[180] argues that the priority of reliability in the Court's pre-*Crawford* Confrontation Clause jurisprudence was "inconsistent with the text and history of the Clause" and that reliability "is more properly a due process concern."[181] In other words, Sixth Amendment jurisprudence had become entangled with the reliability norms of due process.[182] *Crawford*, in rejecting this approach, emphasized that "the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure" rather than the reliability of fact-finding in criminal cases.[183] David Alan Sklansky argues that *Crawford* is thus best understood as a component of a broader program by the Court to reframe constitutional criminal procedure as a set of rights designed to protect the adversarial process from the evils of inquisitorialism.[184] Thus, because the Court "takes prosecution of a criminal defendant through the use of statements taken in his absence to be a signal feature of the inquisitorial system," the Court has read the Confrontation Clause expansively, emphasizing that examination of witnesses must follow the constitutionally prescribed procedure.[185] The Court's extensive discussion in *Crawford* of the role played by ex parte examinations in the 1603 treason trial of Sir Walter Raleigh bolsters this reading of *Crawford*;[186] the Court declared emphatically that "[t]he common-law tradition is one of live testimony in court subject to adversarial testing, while the civil law condones examination in private by judicial officers."[187]

The Court's subsequent jurisprudence has only further expanded the scope of the anti-inquisitorial theory of the Confrontation Clause. *Davis v. Washington*[188] held that statements made during police interrogation are testimonial and that the Confrontation Clause may bar these statements because they bear a "striking resemblance" to civil law ex parte examinations.[189] *Melendez-Diaz v. Massachusetts* held that the admission of a certificate of analysis stating that the substance found on the defendant was cocaine without providing the defendant an opportunity to cross-examine the forensic analyst that prepared the certificate violated the Confrontation Clause, in part because the certificates resembled affidavits, part of the "core class of testimonial

180 502 U.S. 346, 358 (1992) (Thomas, J., concurring).

181 Chhablani, *supra* note 172, at 514–15 (quoting *White*, 502 U.S. at 358, 363–64 (Thomas, J., concurring)).

182 *See id.*

183 Crawford v. Washington, 541 U.S. 36, 50–51 (2004).

184 *See* Sklansky, *supra* note 32, at 1635.

185 *Id.* at 1652–53.

186 *See Crawford*, 541 U.S. at 44–45.

187 *Id.* at 43.

188 547 U.S. 813 (2006).

189 *Id.* at 830 (quoting *Crawford*, 541 U.S. at 52).

statements."[190] The Court analogized the case to *Kirby v. United States*,[191] where the Court overturned a conviction for stolen property because part of the evidence consisted of the records of conviction of the three individuals who had stolen the property.[192] Although, much like in *Melendez-Diaz*, the documents did not prove the defendant's guilt, the Court nevertheless ruled that the admission of the records violated the Confrontation Clause.[193] The Court recently reaffirmed its holding in *Melendez-Diaz* by summarily reversing a decision of the Supreme Court of Virginia that upheld the admission of a certificate of forensic-laboratory analysis without the production of the analyst where state law permitted the defendant to subpoena the analyst.[194]

B. The Anti-Inquisitorialist Theory of the Sixth Amendment Applied to Harmless Error Review

The determinative inquiry in harmless error review is whether the constitutional violation has affected the reliability of the proceeding.[195] This reliability-focused inquiry is consonant with the *Roberts* approach to the right of confrontation; however, it is fundamentally at odds with the Court's current theory of the Confrontation Clause, which is now framed entirely in terms of the importance of preserving the integrity of the adversarial process, irrespective of its overall effect on the trial's reliability.[196] If, as *Crawford* suggests, the core evil of the denial of the right of confrontation is the corruption of the adversarial process, it is unclear why the reliability of the wrongfully admitted evidence or, for that matter, the strength of the prosecution's case or any of the other secondary *Van Arsdall* factors are at all relevant in assessing the harmfulness of the constitutional violation. The violation subsists in the denial of the defendant's right to assess the reliability of the evidence introduced against her or him to her or his satisfaction. Once a judicial-reliability determination replaces the cross-examination, the violation is complete. Much as the violation of the Sixth Amendment right to counsel of choice is "'complete' when the defendant is erroneously prevented from being represented by the lawyer he wants,"[197] so too should the Court recognize that once a judge's assessment of reliability takes the place of any cross-examina-

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190 129 S. Ct. 2527, 2532 (2009) (internal quotations omitted).

191 174 U.S. 47 (1899).

192 *See Melendez-Diaz*, 129 S. Ct. at 2534 (discussing *Kirby*, 174 U.S. at 53).

193 *Id.* at 2542.

194 Magruder v. Commonwealth, 657 S.E.2d 113, 120–21 (Va. 2008), *vacated and remanded sub nom.* Briscoe v. Virginia, 130 S. Ct. 1316 (2010) (per curiam).

195 *See* Delaware v. Van Arsdall, 475 U.S. 673, 684 (1986); *see also supra* Part II.B.1.

196 *See* Crawford v. Washington, 541 U.S. 36, 62–68 (2004) (criticizing the *Roberts* test for its unpredictability, amorphousness, and subjectivity).

197 United States v. Gonzalez-Lopez, 548 U.S. 140, 148 (2006).

tion, the violation of the Confrontation Clause is complete and the Court should not further inquire into the harmfulness of the error.

C. Complete Violations of the Confrontation Clause as a Structural Defect Under *Fulminante*

Under the contemporary trial-error/structural-defect framework, the Supreme Court should consider complete Confrontation Clause violations to be structural defects. In *Fulminante*, Chief Justice Rehnquist, writing for the Court on this issue only, attempted to develop a coherent test for distinguishing between trial errors and structural defects. Trial errors, Chief Justice Rehnquist wrote, are errors "which occur[ ] during the presentation of the case to the jury."[198] Structural defects, by contrast, "affect[ ] the framework within which the trial proceeds."[199] Although these general principles are relatively clear, the application of this test remains mysterious. For example, denial of the right to trial by jury by giving a defective reasonable-doubt instruction is a structural defect.[200] However, a jury instruction containing an erroneous conclusive[201] or rebuttable presumption,[202] a jury instruction misstating an element of the offense,[203] or a total failure to instruct the jury on the presumption of innocence[204] are all trial errors. The arbitrariness of this test in practice highlights the need to end the era of classifying certain rights violations as always trial errors or always structural defects and recognizing that certain rights may be violated in both trivial and egregious ways.

D. Complete Confrontation Clause Violations as Structural Defects

A core concern in Sixth Amendment structural defect jurisprudence is the difficulty in hypothesizing how a trial might have proceeded in absence of the defect. Thus, *Gonzalez-Lopez*, in holding that the denial of the Sixth Amendment right of counsel of choice is a structural defect, stressed that "[i]t is impossible to know what different choices the rejected counsel would have made, and then to quantify the impact of those different choices on the outcome of the proceedings."[205] Although this concern may not entirely explain why the denial of the right of counsel of choice is a structural defect, it at least explains why harmless error analysis in this context would be a

198 Arizona v. Fulminante, 499 U.S. 279, 307 (1991).
199 *Id.* at 310.
200 *See* Sullivan v. Louisiana, 508 U.S. 275, 278–82 (1993).
201 *See* Carella v. California, 491 U.S. 263, 266 (1989).
202 *See* Rose v. Clark, 478 U.S. 570, 578–80 (1986).
203 *See* Pope v. Illinois, 481 U.S. 497, 501–04 (1987).
204 *See* Kentucky v. Whorton, 441 U.S. 786, 789–90 (1979).
205 United States v. Gonzalez-Lopez, 548 U.S. 140, 150 (2006).

futile, purely speculative inquiry.[206] *Gonzalez-Lopez* also rejects a proposed reliability-based definition of the Sixth Amendment right of counsel of choice, relying largely on *Crawford*.[207] In other words, the Sixth Amendment right to counsel gives defendants, rather than courts, control over the procedure to select counsel, just as the Confrontation Clause gives defendants control over the procedure by which the reliability of evidence is assessed.[208] And although *Bockting* made it clear that *Crawford* was not applicable retroactively, the narrow exception permitting the retroactive application of new rules of criminal procedure applies only to rules that remedy "an impermissibly large risk of an inaccurate conviction."[209] The exclusive concern in the retroactivity context was reliability, which does not appear to play such a dominant role in trial-error/structural-defect jurisprudence.

Relying in part on *Gonzalez-Lopez*, the petitioner in *Shisinday v. Quarterman* argued that *Crawford* requires reconsideration of *Van Arsdall*.[210] Shisinday argued that "the confrontation of testimony involves an exchange in court whose outcome is unpredictable."[211] Thus, similar to *Gonzalez-Lopez*, harmless error review is purely speculative: "There is no way to reliably quantify or predict what would have happened had petitioner not been deprived of his right to confront and cross-examine . . . witness[es]."[212] Moreover, the right of confrontation is more than simply a means of ensuring the correct result—"it also is a reflection of the fundamental constitutional commitment to treating a criminal defendant as someone who can affect the course of his own trial."[213] This point highlights another important commonality between the right of confrontation and the right of counsel of choice: both protect the defendant's ability to exert some control over the manner in which her or his trial proceeds. A substantial infringement on the right of confrontation certainly has the potential to affect the framework within which the trial proceeds. The admission of a transcript of a proceeding in lieu of the live testimony of a single witness may be an error in the presentation of the case to the jury. But if the prosecution were to present the testimony of all its witnesses in the form of tape-recorded monologues, the adversarial process itself would be fundamentally undermined. Thus, at least some Confrontation Clause violations have the potential to be structural defects.

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206 *Id.*

207 *Id.* at 145–46.

208 *Id.* at 146.

209 Whorton v. Bockting, 549 U.S. 406, 418 (2007) (quoting Schriro v. Summerlin, 542 U.S. 348, 356 (2004)) (internal punctuation omitted).

210 Petition for Writ of Certiorari, *Shisinday*, *supra* note 24, at 17–23.

211 *Id.* at 18.

212 *Id.* at 19.

213 *Id.* at 20.

Also relying on *Gonzalez-Lopez*, the petitioner in *Abu Ali v. United States* similarly argued that the court should consider the presentation of classified evidence to the jury—evidence to which the petitioner and his counsel were denied access—a structural defect.[214] In particular, the petitioner stressed the comparison drawn in *Gonzalez-Lopez* between the right of counsel of choice and the right of confrontation, as both require "not that a trial be fair, but that a particular guarantee of fairness be provided."[215] The petitioner also argued that *Van Arsdall* was inapposite because it "involved a matter the federal rules (and common law) place firmly within the District Court's discretion—the scope and extent of cross-examination," while the issue in *Abu Ali* concerned a district court's "authority to pick and choose what evidence admitted at trial the defendant will be permitted to see at all."[216] Although the Court denied certiorari in both *Abu Ali*[217] and *Shisinday*,[218] the Court has yet to explicitly affirm *Van Arsdall* since its decision in *Crawford*.

E. The Erroneous Conflation of the Confrontation Clause with Other Constitutional Rules of Evidentiary Admissibility

The Supreme Court's failure to recognize that egregious Confrontation Clause violations may be structural errors stems from its treatment of the right of confrontation as a rule of evidentiary admissibility rather than as the pure procedural right *Crawford* suggests it ought to be.[219] Most constitutional rules of evidentiary admissibility are trial errors.[220] However, Sklansky urges that the Supreme Court look to the emerging confrontation jurisprudence of the European Court of Human Rights (ECHR) for guidance, noting that "the European confrontation right is very much a procedural right, not a rule of evidentiary admissibility."[221] Thus, the ECHR has little to say about the admissibility of statements made by witnesses who are now dead, focusing instead almost exclusively on protecting the defendant's ability to meaningfully participate in the trial process.[222]

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214 *See* Petition for Writ of Certiorari, *Abu Ali*, *supra* note 24, at 7, 17.

215 *Id.* at 17–18 (quoting United States v. Gonzalez-Lopez, 548 U.S. 140, 146 (2006)).

216 *Id.* at 22–23.

217 Abu Ali v. United States, 129 S. Ct. 1312 (2009).

218 Shisinday v. Quarterman, 129 S. Ct. 62 (2008).

219 *See* Crawford v. Washington, 541 U.S. 36, 61 (2004); Sklansky, *supra* note 32, at 1693.

220 *See, e.g.*, cases cited *supra* note 40.

221 Sklansky, *supra* note 32, at 1693. Sklansky also criticizes the ECHR for its very strong harmless error rule. *Id.*

222 *See* P.S. v. Germany, App. No. 33900/96 (Eur. Ct. H.R. Dec. 20, 2001), http://www.echr.coe.int/ECHR/EN/Header/Case-Law/HUDOC/HUDOC+database (follow "HUDOC Database" hyperlink; then search for "P.S. v. Germany"; then follow "Case of P.S. v. Germany" hyperlink) (finding a violation of the right of confrontation when police officers but not magistrates have questioned victims of child sexual abuse); Saïdi v. France,

Elsewhere in the criminal-procedure context, the Court has conflated rights that require the exclusion of certain evidence with mere rules of evidence. For example, the Court has long held that incriminating statements taken in violation of a defendant's *Miranda* rights may nonetheless be used for the purposes of impeachment[223] or as a basis for further investigation.[224] As one commentator has noted, "the Court appears willing to overlook many technical violations of *Miranda* if the search for truth is somehow aided."[225] In effect, *Miranda* is not treated like the Fourth Amendment right against searches and seizures but more like the rule against hearsay: so long as the incriminating statements are only used for limited purposes (and not the truth of their contents), they are admissible.

The right of confrontation's even greater similarity to the rule against hearsay has led the Court to further conflate the two. If the right of confrontation were no more than a rule of evidentiary admissibility, a harmless error rule would be sensible because the general goal of restrictions on the admissibility of evidence is to prevent undue prejudice to the litigants.[226] But *Crawford* suggests that the right of confrontation protects a more basic, procedural right of defendants to actively participate in the trial process.[227] If the Court is serious about creating a genuine procedural right, it cannot continue to permit this right to be wholly undermined by subjecting it to harmless error review.

IV
COMPLETE CONFRONTATION CLAUSE VIOLATIONS SHOULD BE CONSIDERED STRUCTURAL DEFECTS

This Note proposes that the Supreme Court should treat complete Confrontation Clause violations as structural defects, while partial Confrontation Clause violations should remain subject to harmless error review. A complete Confrontation Clause violation occurs when there is a total lack of any opportunity to cross-examine a witness or witnesses. Thus, the introduction of a witness's prerecorded statement to the police in lieu of her or his live testimony or the forcible expulsion of the defendant and defense counsel from the courtroom during a witness's testimony would amount to a complete Confronta-

261 Eur. Ct. H.R. (ser. A) 40, 55–57 (1993) (finding a violation of the right of confrontation when informants have been questioned but their identities were not disclosed to the defense); Kostovski Case, 166 Eur. Ct. H.R. (ser. A) at 19–20 (1989) (same).

223 *See* Harris v. New York, 401 U.S. 222, 225–26 (1971).

224 *See* Michigan v. Tucker, 417 U.S. 433, 451–52 (1974).

225 Thomas P. Windom, Note, *The Writing on the Wall:* Miranda*'s "Prior Criminal Experience" Exception*, 92 VA. L. REV. 327, 348 (2006).

226 *See* THOMAS BUCKLES, LAWS OF EVIDENCE 20 (2003).

227 *See* Crawford v. Washington, 541 U.S. 36, 61 (2004).

tion Clause violation. A partial Confrontation Clause violation occurs when a defendant's opportunity to cross-examine a witness is unduly restricted. Thus, for example, prohibiting the defendant from asking whether the witness had received any offers in exchange for her or his favorable testimony would amount to a partial Confrontation Clause violation.

This distinction broadly tracks *Fulminante*'s description of the distinction between structural defects and trial errors. Denying a defendant any opportunity to cross-examine a witness alters the framework within which the trial proceeds. At least for the duration of that witness's testimony, the trial no longer progresses with the typical adversarial "give and take" between the two sides; instead, the prosecution unilaterally presents evidence without contest from the defendant. Moreover, when a defendant is not permitted to ask any questions, a reviewing court can only guess how the cross-examination might have proceeded. By contrast, when a defendant is merely limited in terms of the questions she or he may ask, the adversarial character of the proceeding is not equally disrupted. Moreover, a reviewing court may more easily assess what questions the defendant might have asked, if permitted, based on the questions that the defendant did, or attempted to, ask.

When applying harmless error review to a partial Confrontation Clause violation, the inquiry should not be whether the evidence, in the court's opinion, is reliable. Rather, the inquiry should focus on whether the questions that the defendant was permitted to ask and the answers to those questions are, by themselves, adequate indicia of reliability. That is, the question should be whether the defendant had a meaningful opportunity to determine that the evidence was reliable or to challenge its reliability. A reviewing court can sustain a conviction obtained in violation of the Confrontation Clause only if it is convinced beyond a reasonable doubt that the lower court gave the defendant a meaningful opportunity to cross-examine the witness.

A. Finding the Middle Ground: Resolving the Misalignment Between the De Facto and De Jure Scope of the Confrontation Clause

The only viable solution is one that treats some violations of the Confrontation Clause as structural defects and other violations as trial errors. Not all violations of the Confrontation Clause are structural defects because many of them do not involve the substitution of a judicial determination of reliability for cross-examination. A court may limit a defendant's cross-examination out of a concern for the dignity of a victim or to prevent the needless waste of time. Trial courts should be permitted to determine when defendants have had an ade-

quate opportunity to challenge the reliability of the evidence and to deny needless or harassing cross-examination. In some instances, these courts might infringe on the Confrontation Clause, but these technical violations should not merit a reversal when the defendant already had an adequate cross-examination.

Complete Confrontation Clause violations should lead to automatic reversals because they necessarily involve a substitution of a judicial determination of reliability for cross-examination, thus implicating the core anti-inquisitorial concern of the Confrontation Clause. The admission of testimonial statements without any cross-examination affects the framework within which the trial proceeds in two ways. First, and most immediately, it eliminates the normal "give and take" of adversarial proceedings by silencing the defendant. Second, it trivializes the defendant's role in the proceedings as an actor that can affect the course of the trial. This disrespect for the defendant suggests that the defendant's interests are worth only minimal consideration, and it will likely color the trier of fact's perception of the defendant. Although a Confrontation Clause violation may not necessarily affect "[t]he entire conduct of the trial from beginning to end,"[228] *Sullivan v. Louisiana*[229]—in finding a structural error in the giving of a defective reasonable-doubt instruction—demonstrates that a sufficiently grave constitutional violation may amount to a structural defect even if it does not affect the whole of the trial.[230] Lastly, applying a modified harmless error review to complete Confrontation Clause violations would be trivial because there cannot be a meaningful opportunity to cross-examine a witness if there is no opportunity to cross-examine whatsoever.

There are several reasons for drawing the line at the complete denial of any opportunity to cross-examine a witness or witnesses. A defendant who is allowed to ask a witness only one question is no better off than a defendant who cannot ask any questions. However, should such an extreme case arise, it is extremely unlikely that a court would sustain the conviction—finding a meaningful opportunity to cross-examine in a single question is extremely improbable. Moreover, there is at least a symbolic value in asking one question: it demonstrates that the defendant is still considered a participant in the trial process, albeit to an extremely limited degree. Finally, drawing the line here creates a clear rule that is easy for courts to follow.

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228 Arizona v. Fulminante, 499 U.S. 279, 309 (1991).

229 508 U.S. 275 (1993).

230 *Id.* at 281–82.

Three Ninth Circuit cases[231] and three state supreme courts[232] have also suggested distinguishing between more and less severe Confrontation Clause violations and treating the more severe violations as structural defects. However, these decisions first examine whether the defendant could have affected the trial had the violation not occurred and whether the particular violation was fundamental before deciding whether to apply harmless error analysis to a Confrontation Clause violation that affected only a portion of a trial.[233] The difficulty in this approach is its vagueness: When is a Confrontation Clause violation fundamental? What does it mean for a defendant to be able to affect a trial? The decisions supply no clear answer, and it is doubtful that they could.

B. Confrontation Clause Violations as Structural Errors and the Effect on the Overall Scope of the Right

Steven Shepard argues that the rule of automatic reversal has led courts to narrow the scope of the rights that the rule protects.[234] Unfortunately, without some sort of rule of automatic reversal in the Confrontation Clause context, the right will invariably be reduced to its *Roberts*-era scope. Thus, the question becomes whether its scope as a structural error will be greater than it was under *Roberts*. Given the vagueness and subjectivity of the *Roberts* test, it is almost certain that the automatic-reversal rule will better protect the right. Moreover, the push to narrow the rights that the rule of automatic reversal protects arises from the Supreme Court's categorical approach to the trial-error/structural-defect dichotomy. An approach that recognizes that violations of the same right may in some cases be a mere trial error and in other cases be a structural defect does not run the same risks. Instead, courts will be free to openly discuss whether the violation is sufficiently serious to require automatic reversal rather than having to first characterize the right before proceeding to review the error.

CONCLUSION

If the Supreme Court continues to decline to revisit *Van Arsdall*, *Crawford* will, in practice, offer no greater protection to defendants than *Roberts*. It is unlikely that the Court is entirely unaware of this ramification of *Van Arsdall* or of the emergent trends in harmless er-

231 *See* Campbell v. Rice, 302 F.3d 892, 898 (9th Cir. 2002); Rice v. Wood, 77 F.3d 1138, 1141 (9th Cir. 1996) (en banc); Hegler v. Borg, 50 F.3d 1472, 1477 (9th Cir. 1995).

232 *See* State v. Garcia-Contreras, 953 P.2d 536, 540 (Ariz. 1998) (en banc); State v. Calderon, 13 P.3d 871, 878–79 (Kan. 2000); State v. Bird, 2002 MT 2, ¶¶ 46–49, 308 Mont. 75, 43 P.3d 266.

233 Petition for Writ of Certiorari, *Shisinday*, *supra* note 24, at 22.

234 Shepard, *supra* note 56, at 1183.

ror review in the courts of appeals. It is more likely that the Court is more concerned with the rationales of its decisions than with its decisions' substantive effects.[235] Unfortunately, the Court's focus on developing a coherent theory of anti-inquisitorialism and its treatment of the Confrontation Clause as a rule of evidentiary admissibility rather than a procedural right has muddled the Confrontation Clause in practice. Treating complete Confrontation Clause violations as structural errors can solve the difficulties of contemporary Confrontation Clause jurisprudence.

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