2014

Business Record Authentication and the Confrontation Clause: State v. Hood, 135 Ohio St. 3d 137 (Ohio 2012)

Nicholas F. Caprino

Follow this and additional works at: https://scholarship.law.uc.edu/uclr

Recommended Citation
Available at: https://scholarship.law.uc.edu/uclr/vol82/iss2/9

This Article is brought to you for free and open access by University of Cincinnati College of Law Scholarship and Publications. It has been accepted for inclusion in University of Cincinnati Law Review by an authorized editor of University of Cincinnati College of Law Scholarship and Publications. For more information, please contact ken.hirsh@uc.edu.
BUSINESS RECORD AUTHENTICATION AND THE CONFRONTATION CLAUSE: STATE V. HOOD, 135 OHIO ST. 3D 137 (OHIO 2012)

Nicholas F. Caprino*

I. INTRODUCTION

While many constitutional issues are complex and constantly evolving, few concepts have seen the drastic overhaul that the Confrontation Clause has undergone in recent years.¹ Like other revolutions in legal analysis, the Confrontation Clause revolution, established by Crawford v. Washington, brought about unforeseen challenges and questions that many courts were not prepared to answer.² The Crawford test initially seemed to be fairly simple, but as fact patterns on the margins of the rule rose to the U.S. Supreme Court, the Crawford analysis became much more complex.³ The Supreme Court of Ohio fell victim to this complex analysis in State v. Hood.⁴ While Crawford stands for the total separation of evidentiary analysis and Confrontation Clause analysis,⁵ Hood used the evidentiary rules for business records and their authentication to find a violation of the Confrontation Clause.⁶ The Ohio Attorney General and Solicitor General submitted a motion for reconsideration in response to the faulty analysis in Hood I, which the Supreme Court of Ohio granted.⁷ Although Hood II slightly altered the opinion in Hood I, the court again failed to correctly evaluate the issue and left the Confrontation Clause hopelessly entangled with evidentiary analysis.⁸

---

* Associate Member, 2012-2013 University of Cincinnati Law Review. I would like to thank my parents, Frank and Elise Caprino, for all the support they have given me throughout my education. I would also like to thank my Grandfather, Charlie Winans, for all of his encouragement and for providing me with an example of a great lawyer.


2. See, e.g., Hammon v. State, 829 N.E.2d 444 (Ind. 2005), rev’d, 547 U.S. 813 (2006) (state supreme court ruled that admission of wife’s statement to police was not a violation of the Confrontation Clause, but was overruled by the U.S. Supreme Court); State v. Bullcoming, 226 P.3d 1 (N.M. 2010), rev’d, 131 S. Ct. 2705 (2011) (state supreme court ruled that admission of BAC report did not violate the Confrontation Clause, but was overruled by the U.S. Supreme Court).


7. See Hood II, 984 N.E.2d at 1059.


563
Part II of this Article provides an overview of the Confrontation Clause and its case law development and discusses the business records exception analysis as applied to confrontation issues. Part III discusses the opinion in Hood I and the subsequent changes in Hood II. Part IV discusses the U.S. Supreme Court’s intended treatment of business records under the Confrontation Clause and the way the Supreme Court of Ohio actually applied this analysis. Part IV will also address the potential consequences of Hood II. Finally, Part V will conclude that both Hood I and II failed to properly apply U.S. Supreme Court precedent and that the Supreme Court of Ohio should yet again revisit the Hood opinions to avoid unintended consequences—in particular, Hood II will grant a heightened constitutional standard of review for any defendant’s challenge of business record authentication.9

II. BACKGROUND

A. The Confrontation Clause

The Confrontation Clause of the Sixth Amendment states: “In all prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.”10 Like much of the Constitution, the Confrontation Clause provides little guidance as to what it truly means to give a criminal defendant the right “to be confronted with the witnesses against him,” and deeper interpretation has been left to the courts.11

The roots of the right to confrontation can be found in ancient Roman law and the more modern developments of English common law.12 Early common law allowed justices to directly examine witnesses in the presence of the accused, and these practices were first codified in the sixteenth century.13 The most famous instance of early witness examination was the trial of Sir Walter Raleigh in 1603.14 Lord Cobham implicated Raleigh in a confession, and Cobham’s statements were read to the jury at Raleigh’s trial.15 Raleigh objected, declaring that

10. U.S. CONST. amend. VI.
12. Crawford, 541 U.S. at 43.
13. Id. (citing 1 J. Stephen, History of the Criminal Law of England, 326 (1883) and 1 & 2 Phil. & M., c. 13 (1554)).
14. Id. at 44.
15. Id. Lord Cobham was Raleigh’s alleged accomplice. Id.
“Cobham is absolutely in the King’s mercy; to excuse me cannot avail him; by accusing me he may hope for favour.”\textsuperscript{16} Demanding that Cobham confront him before the jury, Raleigh argued that “[t]he Proof of the Common Law is by witness and jury: let Cobham be here, let him speak it. Call my accuser before my face . . . .”\textsuperscript{17} The judges denied Raleigh’s demands, and he was convicted and sentenced to death.\textsuperscript{18}

After gradually realizing the injustice that Raleigh, and others like him, had endured, English statutes were enacted to protect citizens’ right to confront witnesses against them.\textsuperscript{19} Courts followed suit by “admitting examinations only if the witness was demonstrably unable to testify in person.”\textsuperscript{20} Not only did the English courts hold that the witness was required to testify in person, but also that the defendant would be afforded the opportunity to cross-examine that witness.\textsuperscript{21} This tradition was carried to early America and “[m]any declaration of rights adopted around the time of the Revolution guaranteed a right of confrontation.”\textsuperscript{22} Despite this, the right to confrontation was not included in the proposed Federal Constitution, engendering several objections from citizens: “[n]othing can be more essential than the cross examining [of] witnesses, and generally before the triers of the facts in question . . . . [W]ritten evidence . . . [is] almost useless; it must be frequently taken ex parte . . . but very seldom leads to the proper discovery of truth.”\textsuperscript{23} In response, the first Congress included the Confrontation Clause in the Sixth Amendment, stating that “the accused shall enjoy the right . . . to be confronted with the witnesses against him.”\textsuperscript{24}

\begin{footnotes}
\footnotetext[16]{Id. (quoting 1 D. Jardine, Criminal Trials 435 (1832)) (internal quotation marks omitted).}
\footnotetext[17]{Id. (quoting 2 How. St. Tr., at 15–16) (internal quotation marks omitted).}
\footnotetext[18]{Id. (citing 2 How. St. Tr., at 15, 24).}
\footnotetext[19]{Id. at 44–45. “One of Raleigh’s trial judges later lamented that “the justice of England has never been so degraded and injured as by the condemnation of Sir Walter Raleigh.”” Id. at 44 (quoting 1 Jardine, Criminal Trials 435, 520 (1832)). Crawford also cites an example of statutory reform in England’s treason statutes that required the witnesses to confront the accused “‘face to face’” at his arraignment. Id. at 45 (citing 13 Car. 2, c. 1, § 5 (1661)).}
\footnotetext[20]{Id. at 45 (citing Lord Morley’s Case, 6 How. St. Tr. 769, 770–71 (H.L. 1666)).}
\footnotetext[21]{Id. (citing King v. Paine, 5 Mod. 163, 87 Eng. Rep. 584 (holding that a dead witness’s statement was not admissible because the defendant was not present when the examination of the witness was taken)).}
\footnotetext[22]{Id. at 48 (citing Virginia Declaration of Rights § 8 (1776); Pennsylvania Declaration of Rights § IX (1776); Delaware Declaration of Rights § 14 (1776); Maryland Declaration of Rights § XIX (1776); North Carolina Declaration of Rights § VII (1776); Vermont Declaration of Rights Ch. I, § X (1777); Massachusetts Declaration of Rights § XII (1780); New Hampshire Bill of Rights § XV (1783)).}
\footnotetext[23]{Id. at 49 (quoting R. Lee, Letter IV by the Federal Farmer (Oct. 15, 1787)) (internal quotation marks omitted).}
\footnotetext[24]{Id. at 38, 42; U.S. CONST. amend. VI.}
\end{footnotes}
1. Ohio v. Roberts: Indicia of Reliability

Interestingly enough, judicial analysis of the Confrontation Clause begins in Ohio, where this analysis will eventually end up in Hood. From 1980 to 2004, the Confrontation Clause was analyzed through an "indicia of reliability" test set out by the U.S. Supreme Court in Ohio v. Roberts.25

In Roberts, the prosecution sought to admit at trial a transcript of an unavailable witness's testimony from the preliminary hearing.26 At this preliminary hearing, the defense extensively cross-examined the witness.27 Although she was sent five subpoenas, this particular witness did not appear at trial.28 The defense objected to admission of the preliminary hearing transcript on the grounds that the defendant would be denied his Sixth Amendment right to confront the witness.29 After a hearing on admissibility, the court admitted the transcript.30 The case was appealed to the Supreme Court of Ohio, where the testimony was found to be inadmissible,31 following a grant of certiorari, the U.S. Supreme Court reversed.32

To address the issue of whether the admission of testimony from a declarant who is not present at trial violates the Confrontation Clause, the Court adopted the "indicia of reliability" test.33 This test intertwined constitutional and evidentiary analyses to determine the inherent trustworthiness of particular testimony. The Court held that testimony from a declarant who is not available for trial may not be admitted unless the testimony bears some indicia of reliability.34 To admit evidence lacking indicia of reliability would violate the Sixth Amendment.35 Testimony was deemed to bear indicia of reliability if the evidence fell "within a firmly rooted hearsay exception" or illustrated a "particularized guarantee[] of trustworthiness."36 Therefore,

26. Id. at 59.
27. Id. at 58. The defendant was charged with stealing credit cards and check forgery, and the witness was the daughter of the victims. The defense counsel's cross-examination unsuccessfully attempted to elicit a confession from the witness that she gave the checks and credit cards to the defendant without telling him that she took them without permission. Id.
28. Id. at 59.
29. Id.
30. Id.
31. Id. at 61 ("The [Ohio Supreme C]ourt held that the mere opportunity to cross-examine at a preliminary hearing did not afford constitutional confrontation for purposes of trial . . . .")
32. Id. at 77.
33. Id. at 66.
34. Id.
35. Id.
36. Id.
if under an evidentiary analysis a proponent of evidence could show that statements of a declarant not available for trial could be allowed through hearsay exceptions, it would most likely follow that those statements would not violate the Confrontation Clause.37

This analysis was rooted in the reliability of the particular evidence at issue.38

The focus of the Court’s concern has been to ensure that there “are indicia of reliability which have been widely viewed as determinative of whether a statement may be placed before the jury though there is no confrontation of the declarant,” and to “afford the trier of fact a satisfactory basis for evaluating the truth of the prior statement.”39

Because the exceptions to hearsay are likewise rooted in reliability, this early formulation of the Confrontation Clause allowed courts to refer to the hearsay rules when deciding if admission of evidence amounted to a constitutional violation.40 In general, if the admission of evidence was permissible according to the hearsay rules, it would not violate the Confrontation Clause.41

2. The Crawford Revolution

a. Crawford

In Crawford, the defendant allegedly stabbed a man who tried to rape his wife.42 The trial court admitted the wife’s tape-recorded statement describing the stabbing, despite the fact that the defense was not given the opportunity to cross-examine the wife.43 The Washington Supreme Court affirmed the admission of the recorded statement, “unanimously concluding that, although [the] statement did not fall under a firmly rooted hearsay exception, it bore the guarantees of trustworthiness”44 making it admissible under Roberts.45 The U.S. Supreme Court reversed and overruled Roberts in the process.46

After delving into the rich history behind the Confrontation Clause,

37. See id.
38. Id.
39. Id. at 65–66 (citing Dutton v. Evans, 400 U.S. 74, 89 (1970); California v. Green, 399 U.S. 149, 161 (1970)).
40. See id. at 66.
41. See id.
43. Id. at 40.
44. Id. at 41 (citing State v. Crawford, 54 P.3d 656, 663 (Wash. 2002)).
45. Id. at 40–41.
46. Id. at 68–69.
Justice Scalia, writing for the majority, declared that the Clause should not be so conflated with the rules of evidence.\textsuperscript{47} \textit{Roberts} held that if a statement would fall within a hearsay exception, it would most likely not violate the Confrontation Clause.\textsuperscript{48} Hearsay rules apply only to out-of-court statements, and Justice Scalia believed that "[l]eaving the regulation of out-of-court statements to the law of evidence would render the Confrontation Clause powerless to prevent even the most flagrant inquisitorial practices. Raleigh was, after all, perfectly free to confront those who read Cobham's confession in court."\textsuperscript{49} In other words, a rule that denies defendants the ability to confront a witness against them because the testimony is "a firmly rooted hearsay exception" does not go far enough to uphold the Sixth Amendment.\textsuperscript{50} "[N]ot all hearsay implicates the \textit{Sixth Amendment}'s core concerns. An off-hand, overheard remark might be unreliable evidence and thus a good candidate for exclusion under the hearsay rules, but it bears little resemblance to the . . . abuses the Confrontation Clause targeted."\textsuperscript{51} In addition, the Court found the general notion of "reliability" to be too unpredictable to be an appropriate standard for the right to confrontation.\textsuperscript{52} Although the right is not completely separate from the notion of "reliability," the subjective determination of reliability is too "amorphous" to fully fulfill the Confrontation Clause.\textsuperscript{53} "To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than substantive guarantee. It commands, not \textit{that evidence be reliable}, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination."\textsuperscript{54} Justice Scalia looked to the text of the Sixth Amendment and its history to develop what he believed was a more structured and predictable guarantee of the right to confront one's accuser.\textsuperscript{55} Analyzing the text of the Sixth Amendment, the Court observed that the Confrontation Clause applies to "witnesses," and a witness is one who bears testimony.\textsuperscript{56} "'Testimony,' in turn, is typically '[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.' An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes

\textsuperscript{47} See id. at 51.
\textsuperscript{49} \textit{Crawford}, 541 U.S. at 51.
\textsuperscript{50} Id. Cf. \textit{Roberts}, 448 U.S. at 66.
\textsuperscript{51} \textit{Crawford}, 541 U.S. at 51 (emphasis added).
\textsuperscript{52} Id. at 61.
\textsuperscript{53} Id.
\textsuperscript{54} Id. (emphasis added).
\textsuperscript{55} Id. (emphasis added).
\textsuperscript{56} Id. at 51.
a casual remark to an acquaintance does not." Therefore, the question is not whether the statement fits into a hearsay exception or has guarantees of trustworthiness, but whether it is "testimonial" in the more general sense.58

The fact that a statement is testimonial does not automatically mean a defendant is guaranteed the right to confront the witness at trial. Justice Scalia recognized that the common law application of the confrontation right allowed admissibility of a statement if the witness was 1) unavailable and 2) there was a prior opportunity to cross-examine. Therefore the "Sixth Amendment incorporates those limitations."59 With this analysis, the Court declared a new rule: "[t]estimonial statements of witnesses absent from trial [shall be] admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine."60

The Court's analysis of "testimonial" statements briefly addressed the fact that certain hearsay exceptions, like business records, have constituted valid Confrontation Clause exceptions since the time of the Framers.61 But Justice Scalia declared that the business records exception was not "invoked to admit testimonial statements against the accused...."62 Rather, business records, "by their nature were not testimonial," and therefore could be constitutionally admitted without the witness's availability or the opportunity for the defendant to cross-examine.63

Despite the pronouncement of the new "testimonial" based rule, the Court left "for another day any effort to spell out a comprehensive definition of 'testimonial.'"64 Justice Scalia only declared that the wife's tape-recorded statement at issue was clearly testimonial, and therefore its admission was a violation of the Confrontation Clause.65

**b. What Is Testimonial?**

The Supreme Court clarified the definition of "testimonial" in *Davis v. Washington* and *Hammon v. Indiana*.66 The Court consolidated these

---

57. *Id.* (citations omitted) (quoting 2 N. Webster, An American Dictionary of the English Language (1828)).
58. *Id.* at 51–52.
59. *Id.* at 54 (emphasis added).
60. *Id.* at 59.
61. *Id.* at 56.
62. *Id.*
63. *Id.*
64. *Id.* at 68.
65. *Id.*
two cases, both involving declarants' (victims') statements about domestic abuse. In *Davis*, the Washington Supreme Court determined that a 911 call from a victim of domestic abuse was not testimonial under *Crawford*, so the admission of the call at trial did not violate the Confrontation Clause. In *Hammon*, the Indiana Supreme Court affirmed the admission of statements made to police officers by a victim of domestic violence. The statements at issue were made after the police officers had arrived at the scene and the victim and defendant were separated. In both situations, the victim was unavailable to testify at trial.

In an opinion by Justice Scalia, the U.S. Supreme Court affirmed *Davis* and reversed *Hammon*. The test to determine whether a statement is testimonial or not depends on the objective "primary purpose" of those statements.

Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate there is no such ongoing emergency, and the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

The difference between testimonial and nontestimonial lies in the distinction between proving "some past fact" as it happened and "describing current circumstances requiring police assistance" as events are happening. The former is testimonial, and the latter is not.

Applied to the facts at hand, the declarant's call in *Davis* was about events "as they were actually happening" and in response to "resolve a present emergency." The declarant in *Davis* "simply was not acting as a witness; she was not testifying." Because Justice Scalia considered these types of nontestimonial statements to be just as strong as live testimony, the confrontational problem Raleigh faced would be avoided.

67. *Id.* at 817–19.
68. *Id.* at 819.
69. *Id.* at 819–20.
70. *Id.*
71. *Id.* at 819–20. Both declarants were subpoenaed but did not show up for trial. *Id.*
72. *Id.* at 834.
73. *Id.* at 822.
74. *Id.*
75. *Id.* at 827.
76. See *id.*
77. *Id.* (emphasis omitted).
78. *Id.* (emphasis omitted).
79. *Id.* at 828.
without the need for the declarant's appearance at trial or a prior opportunity to cross-examine.80 To the contrary, the statements in Hammon had the primary purpose of investigation of a possible crime and were therefore "inherently testimonial."81

In Melendez-Diaz v. Massachusetts, the Court, again through Justice Scalia, explained why business records were not testimonial: "[b]usiness and public records are generally admissible absent confrontation not because they qualify under an exception to the hearsay rule, but because—having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial . . . ."82 The Court then held that drug lab analysis certificates were not business records under the Confrontation Clause and were therefore testimonial.83

c. Michigan v. Bryant

In the early morning of April 29, 2001 in Detroit Michigan, Anthony Covington suffered a gunshot wound.84 Officers found Covington lying on the ground in a gas station parking lot, and with some difficulty, Covington told the officers that "Rick" had shot him.85 "Rick" was Richard Bryant who had allegedly shot Covington after a conversation between the two at Bryant's house.86 Covington spoke with police for about five to ten minutes before the emergency medical vehicles arrived, and Covington died soon after.87

The Bryant trial occurred before the U.S. Supreme Court decisions in Crawford and Davis.88 At trial, the police officers testified to the conversation with Covington before he died.89 A jury convicted Bryant of murder, and the Michigan Court of Appeals affirmed, but the Michigan Supreme Court remanded the case for reconsideration in light of the recently issued Davis decision.90 The Michigan Court of Appeals again affirmed the conviction on the finding that Covington's statements were not testimonial, and the Michigan Supreme Court reversed,

80. See generally id. at 822.
81. Id. at 830.
83. Id. at 311, 320.
85. Id.
86. Id.
87. Id.
88. Id.
89. Id.
90. Id. at 1150–51.
ordering a new trial. The Michigan Supreme Court held that Covington's statements were testimonial because "the 'primary purpose' of the questioning was to establish the facts of an event that had already occurred," and not to "enable police to meet an ongoing emergency." The U.S. Supreme Court vacated the judgment of the Michigan Supreme Court on the basis that Covington's declaration that Rick shot him was not testimonial. Bryant provided the Court an opportunity to elaborate on the "ongoing emergency" concept created in Davis. Bryant focused on all of the factors and circumstances surrounding the statements to determine what the primary purpose of the statements were, and therefore whether they were testimonial. Discussing the factors to consider, Bryant declared that "[i]n making the primary purpose determination, standard rules of hearsay, designed to identify some statements as reliable, will be relevant." For example, "[t]his logic is not unlike that justifying the excited utterance exception in hearsay law." Despite seemingly reverting back to Roberts's reliance on evidentiary standards to determine whether a statement bears indicia of reliability to be allowed under the Confrontation Clause, the Bryant Court claimed to fully rely on Crawford and Davis for the basis of its holding. The Bryant majority opinion, written by Justice Sotomayor, was met with a vehement dissent by Justice Scalia, the author of Crawford and Davis. Justice Scalia saw Bryant as a drastic break from Crawford and its progeny, and perhaps rightfully so. As Justice Scalia saw it, Bryant took a step from Crawford back to Roberts by looking at firmly rooted hearsay exceptions to determine violations of the Confrontation Clause. While Crawford sought to rely solely on whether the evidence was testimonial, rather than on the evidence’s reliability, Bryant considered reliability factors to determine if the statement was

91. Id. at 1151.
92. Id. (emphasis omitted) (quoting People v. Bryant, 768 N.W.2d 65, 71 (Mich. 2009)).
93. Id. at 1167.
94. Id. at 1156.
95. See generally id. at 1157–60.
96. Id. at 1155.
97. Id. at 1157.
98. Id.
99. Id. at 1149.
101. See Bryant, 131 S. Ct. at 1168 (Scalia, J., dissenting).
testimonial, resurrecting the Roberts reliability analysis. The current Confrontation Clause analysis lies in a state of limbo between Crawford's and Roberts's. In Bullcoming v. New Mexico, the majority of the U.S. Supreme Court ruled that blood alcohol analyses were testimonial. Although the majority cited Bryant, it did not make any indication that it took evidentiary hearsay standards into account when determining the primary purpose of the blood alcohol tests. Justice Sotomayor, the author of Bryant, filed a concurrence to emphasize the idea that the hearsay rules should have a bearing on the primary purpose of the tests. The current split in views among the Justices leaves the future of the Confrontation Clause somewhat tenuous, but at least for now, Crawford and Melendez-Diaz are the law.

B. Business Records

Traditionally, business records have been granted exceptions to typical evidentiary analysis in the areas of hearsay and the Confrontation Clause. The logic behind granting an exception for business records from the bar against hearsay is different from the logic behind granting an exception to the Confrontation Clause constraints. For this reason,
this Note discusses business records in each arena separately.

1. Business Records Exception in Hearsay

Hearsay in the Ohio Evidence Rules is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted" and is generally inadmissible. The business records exception to the hearsay rule (Ohio Evidence Rule 803(6)) allows the admission of evidence "even though the declarant is available as a witness." The "memorandum, report, record, or data compilation" must have been "kept in the course of a regularly conducted business activity" to fall under the business records exception and must be authenticated as such. The staff notes to Rule 803(6) illustrate that this exception has a "guaranty of trustworthiness" derived from "the fact that records made in the ordinary course of business by employees under an obligation to make such records will be accurate because business cannot, as a matter of course, function without accurate records."

2. Confrontation Clause Exception

_Crawford_ first identified the business records exception under the Confrontation Clause, but made clear that this exception does not have the same underpinnings as the business records exception to hearsay. In _Crawford_, Justice Scalia admits that it cannot be denied that the early implementation of the Confrontation Clause did indeed recognize an exception for business records, "[b]ut there is scant evidence that exceptions were invoked to admit testimonial statements against the accused in a criminal case." Business records were treated differently
under the Confrontation Clause not because they were also an exception to hearsay, nor because they were reliable.\textsuperscript{117} Rather, the business records were not subject to confrontation analysis because they “by their nature were not testimonial . . . .\textsuperscript{118} Rather than describing business records as an exception to the Confrontation Clause, a more accurate explanation would be that business records are not subject to Confrontation Clause violations because they are, by their nature, nontestimonial.\textsuperscript{119}

Melendez-Diaz expounded on this point.\textsuperscript{120} Business records are admissible without requiring confrontation “not because they qualify under an exception to the hearsay rule,” but because they were created to carry out the affairs of an entity and “not for the purpose of establishing or proving some fact at trial . . . .\textsuperscript{121} To put it in the simplest terms, business records are an exception to hearsay because they are trustworthy and reliable,\textsuperscript{122} and their admission will not violate the Confrontation Clause because they were not prepared to prove a fact at trial.\textsuperscript{123} These justifications often overlap, increasing the risk that courts will mistakenly conflate these analyses.\textsuperscript{124}

III. \textit{State v. Hood}

\textbf{A. Hood I}

A house party in Cleveland, Ohio was wrapping up at about 5:00 a.m. in January 2009 when the homeowners and guests encountered four masked, armed men.\textsuperscript{125} The masked men held the victims at gunpoint and ordered them to strip and hand over cell phones and money.\textsuperscript{126} The robbers quickly left, and the victims heard gunshots immediately after.\textsuperscript{127} One of the robbers, Peet, was found dead in a nearby yard, and local officers apprehended two other co-conspirators, Hood and Hill.\textsuperscript{128}

\begin{enumerate}
\item \textsuperscript{117} See id.
\item \textsuperscript{118} Id.
\item \textsuperscript{119} See id.
\item \textsuperscript{120} Melendez-Diaz v. Massachusetts, 557 U.S. 305, 324 (2009).
\item \textsuperscript{121} Id.
\item \textsuperscript{122} See OHIO EVID. R. 803(6) staff notes.
\item \textsuperscript{123} Melendez-Diaz, 557 U.S. at 324.
\item \textsuperscript{124} See id.
\item \textsuperscript{125} Hood II, 984 N.E.2d 1057, 1059–60 (Ohio 2012).
\item \textsuperscript{126} Id. at 1060.
\item \textsuperscript{127} Id.
\item \textsuperscript{128} Id. One co-conspirator was identified by several of the victims based on his distinctive coat. Id. The fourth robber was Davis, and the opinion does not indicate how he was apprehended. See generally id. at 1060–61.
\end{enumerate}
Hill eventually testified against Hood, explaining the group’s plan and describing an altercation taking place between Hood and Peet immediately after the heist, which allegedly resulted in Peet’s murder.\textsuperscript{129} At trial, the state sought to admit phone records that purported to show cell phone traffic between the co-conspirators around the time in question, including “a call from one of the stolen cell phones to Hill’s phone.”\textsuperscript{130} The prosecution relied on the business records exception to hearsay to admit the testimony and attempted to authenticate the records by introducing testimony describing the subpoena process by the detective who obtained the records.\textsuperscript{131} The defense objected on the grounds of improper authentication, and the court responded by requiring the state to provide another witness to authenticate the records.\textsuperscript{132} The state brought a different detective to testify to his experience with the geolocation of cell phones based on cell-tower data.\textsuperscript{133} Despite the trial court’s “gut reaction . . . to subpoena Verizon” to further authenticate the records, it admitted them based on the detectives’ testimony.\textsuperscript{134} The jury convicted Hood of murder, kidnapping, aggravated robbery, and burglary.\textsuperscript{135}

Hood appealed the conviction on two grounds. First, the defense argued that cell phone records were not admissible as business records without proper authentication.\textsuperscript{136} Second, the admission of the unauthenticated cell phone records under the business records exception violated the Confrontation Clause.\textsuperscript{137} The intermediate appellate court affirmed the trial court judgment and conviction.\textsuperscript{138}

\textit{Hood I} was first decided by the Supreme Court of Ohio on December 3, 2012.\textsuperscript{139} In affirming the appellate and trial courts, the court found that the admission of the records violated the rules of evidence and were unconstitutional, but the error was harmless.\textsuperscript{140} The court held that cell phone records were hearsay because they were “statements . . . offered in evidence to prove the truth of the matter asserted.”\textsuperscript{141} The records may have qualified under the business records exception to the hearsay

\begin{itemize}
  \item \textsuperscript{129} Id. at 1061.
  \item \textsuperscript{130} Id. at 1062.
  \item \textsuperscript{131} Id. at 1061–62.
  \item \textsuperscript{132} Id. at 1062.
  \item \textsuperscript{133} Id.
  \item \textsuperscript{134} Id. at 1062–63.
  \item \textsuperscript{135} Id. at 1063.
  \item \textsuperscript{136} Id.
  \item \textsuperscript{137} Id.
  \item \textsuperscript{138} Id. at 1063–64.
  \item \textsuperscript{139} \textit{Hood I}, 984 N.E.2d 929 (Ohio 2012).
  \item \textsuperscript{140} Id. at 937–39.
  \item \textsuperscript{141} Id. at 937 (quoting \textit{Ohio Evid. R. 801(C)}).\
\end{itemize}
rule if they had been properly authenticated, but the court found that "there was simply no foundation laid by the custodian of the record or by any other qualified witness." The trial court should have followed its gut and required the state to subpoena Verizon to authenticate the records.

On the Confrontation Clause issue, the court initially found that the cell phone records were nontestimonial based on Melendez-Diaz, and therefore "the Confrontation Clause [did] not affect their admissibility." But in an unusual twist, the court relied on pre-Roberts decisions to declare that "[a] hearsay violation itself violates the Confrontation Clause, and thus requires a heightened harmless-error analysis." Heightened harmless-error analysis for constitutional violations requires de novo review and harmlessness, which is determined beyond a reasonable doubt. This is a stricter standard than an evidentiary violation, which only requires abuse of discretion review and simple harmlessness (not beyond a reasonable doubt).

B. Motions for Reconsideration

The Attorney General and Solicitor General submitted motions for reconsideration expressing concern that Confrontation Clause analysis was improperly comined with evidentiary analysis in Hood I. Most importantly, the Attorney General and Solicitor General were concerned with the level of review that a constitutional analysis would impose on all hearsay challenges if Hood I were to prevail. According to Hood I, because every hearsay violation is inherently a constitutional violation, appeals of hearsay violations will be afforded the constitutional violation, de novo, standard of review: heightened harmless-error analysis, also known as harmlessness beyond a reasonable doubt. This is opposed to the lower standard of review that is afforded simple evidentiary violations: abuse of discretion that is tempered by

---

142. Id.
143. Id.
144. Id.
145. Id. The Court cited State v. Johnson, 643 N.E.2d 1098, 1105 (Ohio 1994), from 1994, which explicitly implicated the "indicia of reliability" test supposedly abandoned in Crawford. Id. at 937–38 (quoting State v. Johnson, 643 N.E.2d 1098, 1105 (Ohio 1994)).
146. Memorandum of Amicus Curiae, supra note 9, at 2.
147. Id. at 6.
149. Motion for Reconsideration, supra note 148, at 4–5; Memorandum of Amicus Curiae, supra note 9, at 5.
harmlessness, also known as simple harmlessness review.\textsuperscript{150}

The Solicitor General mapped out the specific changes that the court should make in \textit{Hood I}.\textsuperscript{151} First, the Solicitor General suggested that the opinion be changed so that whether a statement is testimonial is not determined by proper authentication.\textsuperscript{152} He also suggested that the court remove the holding that a hearsay violation itself violates the Confrontation Clause and the analysis that followed.\textsuperscript{153} Finally, the Solicitor General asked that any reference to heightened harmless-error review and "beyond a reasonable" doubt be removed.\textsuperscript{154}

C. Hood II

Although the court reconsidered the case, and vacated parts of \textit{Hood I}, it did not go as far as the Attorney General and Solicitor General would have liked.\textsuperscript{155} The court altered only one paragraph, and omitted reference to pre-\textit{Crawford} cases that relied on the \textit{Roberts}'s "indicia of reliability" test.\textsuperscript{156} However, the Supreme Court of Ohio maintained the heightened harmlessness as to constitutional analysis and rather than declaring that hearsay violations are inherently constitutional violations, it stated that it was the unauthenticated nature of the cell phone records that gave rise to the constitutional violation.\textsuperscript{157} "Thus, the cell-phone records . . . were not authenticated as business records, and that fact affect[ed] their status in regard to the Confrontation Clause. If the records had been authenticated, we could be sure that they were not testimonial . . ."\textsuperscript{158} Therefore, the court maintained the same standard of review as \textit{Hood I} and sustained the court's prior affirmance of the conviction based on the harmlessness of the error.\textsuperscript{159}

IV. Discussion

While \textit{Hood II} changed some of the incorrect holdings of \textit{Hood I}, it did not go far enough and left Ohio with an inadequate standard to review Confrontation Clause issues. First, \textit{Hood II} conflated evidentiary analysis with confrontation analysis and did not recognize that a

\begin{flushleft}
\textsuperscript{150.} Motion for Reconsideration, \textit{supra} note 148, at 4–5.
\textsuperscript{151.} Memorandum of Amicus Curiae, \textit{supra} note 9, at 7.
\textsuperscript{152.} Id.
\textsuperscript{153.} Id.
\textsuperscript{154.} Id.
\textsuperscript{155.} Id. \textit{See also Hood II}, 984 N.E.2d 1057 (Ohio 2012).
\textsuperscript{156.} \textit{Hood II}, 984 N.E.2d at 1066; \textit{Hood I}, 984 N.E.2d 929, 937–38 (Ohio 2012).
\textsuperscript{157.} \textit{Hood II}, 984 N.E.2d at 1066–67.
\textsuperscript{158.} Id. at 1066.
\textsuperscript{159.} Id. at 1066–67.
\end{flushleft}
business record, by its nature, is not testimonial and cannot violate the Confrontation Clause. The court could have cited Bryant to at least partially explain its holding in Hood II but rather chose to adopt an incorrect understanding of Crawford. In addition, the Supreme Court of Ohio did not recognize or explain the new burdens this would place on the state by subjecting every defendants’ challenge of authentication to a heightened standard of review. Finally, Hood II hinders the presentation of appropriate evidence to the trier of fact, making it more difficult for the judge or jury to ascertain the truth to reach a “legitimate verdict.”

A. Under Crawford, the Standard Is Whether the Statement Is Testimonial, Not Reliable

Justice Scalia used the history behind the Sixth Amendment to find that the Confrontation Clause is only concerned with whether a statement is testimonial, not whether a statement is reliable. “[T]he Confrontation Clause does not guarantee reliable evidence; it guarantees specific trial procedures that were thought to assure reliable evidence . . . .” Evidentiary analysis, on the other hand, is very much concerned with reliability of evidence as a prerequisite for admission. Therefore, the question of evidentiary admissibility under the rules of hearsay and the question of admissibility under the Confrontation Clause should be wholly separate. There may be a few overlapping factors used to determine reliability under evidence and the primary purpose of the statement under the Confrontation Clause, but the answer to such a question in an evidentiary analysis should not affect the

162. See Memorandum of Amicus Curiae, supra note 9, at 5–6.
163. See Ian Dennis, The Right to Confront Witnesses: Meanings, Myths, and Human Rights, 4 CRIM. L. REV. 255, 259 (2010) ("[T]he right to confrontation can be founded on the defendant’s core right against a factually inaccurate verdict.").
166. The exceptions to the rules of hearsay are exceptions mainly because of their inherent trustworthiness or reliability. See, e.g., OHIO EVID. R. 803(1), staff notes (Present sense impression: "[t]he circumstantial guaranty of trustworthiness is derived from the fact that the statement is contemporaneous and there is little risk of faulty recollection . . . ."); OHIO EVID. R. 803(2), staff notes (Excited Utterance: "[t]his exception derives its guaranty of trustworthiness from the fact that declarant is under such state of emotional shock that his reflective processes have been stilled. Therefore, statements made under these circumstances are not likely to be fabricated."); OHIO EVID. R. 803(5), staff notes (Recorded recollection: "[t]he exception gathers its circumstantial guaranty of trustworthiness from the fact that the person having made the statement is on the witness stand subject to oath, cross-examination and demeanor evaluation.").
167. See Crawford, 541 U.S. at 61.
Confrontation Clause analysis.\textsuperscript{168} For example, a court may consider the state of mind of the declarant to decide if a statement falls under the excited utterance exception to hearsay because this helps determine its level of reliability.\textsuperscript{169} When the court meets the confrontation issue, it may again consider the state of mind of the declarant at the time the statement was made. The difference here is that the court does not consider what bearing that state of mind has on the reliability of the statement.\textsuperscript{170} Rather, the court only asks what the primary purpose of the statement was: to state what is happening or to memorialize past events for potential use at trial.\textsuperscript{171}

This same distinction is consistent between the business records exception to the hearsay rule and the business records treatment under the Confrontation Clause.\textsuperscript{172} Again, the hearsay exception is in place to allow for excluded hearsay evidence based on its reliability,\textsuperscript{173} but the Confrontation Clause is only concerned with whether the statement is testimonial.\textsuperscript{174} The Confrontation Clause "commands, not that evidence be reliable, but that reliability be assessed in a particular manner,"\textsuperscript{175} that is, through confrontation.\textsuperscript{176}

Business record treatment under the Confrontation Clause is not intertwined with the reliability analysis of the hearsay rule, "but because—having been created for the administration of an entity’s affairs and not for the purpose of establishing or proving some fact at trial—[business records] are not testimonial."\textsuperscript{177} \textit{Hood I} completely ignored this U.S. Supreme Court holding by using pre-\textit{Crawford} cases to support the mistaken idea that "[a] hearsay violation itself violates the Confrontation Clause . . . "\textsuperscript{178} \textit{Hood II} partially corrected this by removing the concept that a hearsay violation is a constitutional violation, but then repeated the mistake by replacing it with the concept that nonauthentication affects the status of business records under the

\textsuperscript{168} See \textit{id}.
\textsuperscript{169} See, e.g., State v. Wallace, 524 N.E.2d 466, 468 (Ohio 1988) (admitting hearsay because it was an excited utterance under OHIO EVID. R. 803(2)). Hearsay that is an excited utterance is allowed because it does "not allow the declarant a meaningful opportunity to reflect on statements regarding the event." \textit{Id}. As a result, "the chance that the statement is fabricated, or distorted due to poor memory, is greatly reduced." \textit{Id}.
\textsuperscript{170} See \textit{Crawford}, 541 U.S. at 61.
\textsuperscript{172} See \textit{Melendez-Diaz v. Massachusetts}, 557 U.S. 305, 324 (2009).
\textsuperscript{173} OHIO EVID. R. 803(6) staff notes.
\textsuperscript{174} See \textit{Melendez-Diaz}, 557 U.S. at 324.
\textsuperscript{175} \textit{Crawford}, 541 U.S. at 61.
\textsuperscript{176} \textit{Melendez-Diaz}, 557 U.S. at 324.
\textsuperscript{177} \textit{Id}.
\textsuperscript{178} \textit{Hood I}, 984 N.E.2d 929, 937 (Ohio 2012).
Confrontation Clause. 179

B. The Supreme Court of Ohio Inappropriately Used Authentication

Relying on evidentiary authentication rather than hearsay in general does little to curb the issue of mixing evidentiary and confrontation analysis. 180 The rule of authentication is a rule of evidence, and it follows that it is a rule rooted in reliability. 181 Under the rules of evidence, a business record is an exception to hearsay because of its trustworthiness, and authentication is required to ascertain the trustworthiness. 182 Under a Crawford analysis, authentication should have no bearing on whether the evidence is testimonial. 183 Although confrontation of the custodian of a business record is a method to determine if the record is reliable, reliability does not determine if that record is testimonial and therefore subject to confrontation. 184 Business records "are comprised of lists of facts, without opinion or interpretation," 185 and it follows that they "are not prepared for litigation and are thus not testimonial . . . ." 186 The fact that business records are not testimonial in nature is the end of the confrontation analysis. 187

Hood I and Hood II agreed, at least initially, that the cell phone records at issue were business records and therefore not testimonial. 188 But the final holding that the nonauthenticated nature of the records "affect[ed] their status in regard to the Confrontation Clause" contradicted the initial holding and the most basic understanding of Crawford. 189 The court implicitly held that nontestimonial evidence becomes testimonial if it violates the rules of evidence. 190 Not only is there no precedent for this concept, but it has no basis in the Supreme Court's development of the Confrontation Clause. 191 While Crawford does not specifically address authentication, it gives no indication that a business record can be transformed into a testimonial statement by any

180. See Melendez-Diaz, 557 U.S. at 324.
182. Ohio Evid. R. 803(6) staff notes; see also Ohio Evid. R. 901.
184. See Crawford, 541 U.S. at 61.
185. Motion for Reconsideration, supra note 148, at 2.
188. Hood I, 984 N.E.2d 929, 936–37 (Ohio 2012); Hood II, 984 N.E.2d at 1065.
189. Hood II, 984 N.E.2d at 1066; see also Crawford, 541 U.S. at 68.
190. Memorandum of Amicus Curiae, supra note 9, at 1.
means, let alone authentication. Business records are “by their nature . . . not testimonial” because they “have been created for the administration of an entity’s affairs and not for the purpose of establishing or proving some fact at trial . . . .” In Hood, the cell phone records were exactly that: prepared for Verizon’s business affairs and not to be used at trial. No precedent indicates that the evidentiary authentication standard has any effect on this constitutional analysis, and the Supreme Court of Ohio may have indeed recognized that fact, as it did not cite to any authority when it declared that nonauthentication affects a business record’s status under the Confrontation Clause.

The authentication process within the evidence rule ensures that business records falling under the hearsay exception are sufficiently reliable to pass the hearsay rule. The authentication process is not designed to establish if the records are testimonial. Because cell phones records are created for the administration of business affairs, they are definitively nontestimonial on their face. Requiring authentication of the cell phone records in Hood serves the goals of evidence, but not the goals of the Confrontation Clause as they were described in Crawford. While authentication can be a legitimate requirement under hearsay, requiring authentication for confrontation purposes places an undue burden on the state without serving any constitutional purpose.

At least to some extent, the Supreme Court of Ohio recognized Hood I’s inconsistency with Crawford when it reconsidered the case at the request of the Attorney General and Solicitor General. Nonetheless, the court gave no reasons for not accepting most of the Solicitor General’s specific proposals, and gave no reason or support for the adoption of the new rule that authentication affects Confrontation Clause admissibility.

The court could have adopted the Solicitor General’s suggestions and still sustained the conviction. In fact, it would have been easier to sustain because the standard of review of the trial court’s error would be lowered from the constitutional de novo standard considering

192. See id. at 56.
193. Id.
197. See OHIO EVID. R. 803(6), staff notes.
198. See Melendez-Diaz, 557 U.S. at 324.
201. Id. at 1066.
202. Memorandum of Amicus Curiae, supra note 9, at 7.
harmlessness beyond a reasonable doubt to an abuse of discretion that considers simple harmlessness.\(^{203}\) The court should have simply found that the admission of the business records violated the hearsay rules by not being properly authenticated as a business record, and therefore not availing itself of the business records exception. The court did not have to reach the constitutional question, and perhaps should not have, even if it was correctly applied. This "avoidance doctrine" was first laid out in a concurring opinion by Justice Brandeis where he declared that, "[t]he Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of."\(^{204}\) The U.S. Supreme Court has solidified the avoidance doctrine by recognizing that the "fundamental and long-standing principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them."\(^{205}\)

In *Hood II*, the Supreme Court of Ohio could have stopped after it found the authentication error, which would have subjected the appeal to the lower harmlessness standard of review and would have allowed it to reach the same verdict.\(^{206}\) This would have still maintained the integrity of the necessity to authenticate evidence without upsetting the just verdict.\(^{207}\) Instead, the court chose to reach the constitutional issue, despite the fact that its analysis would not affect the verdict. As a result, the court distorted Confrontation Clause analysis and unnecessarily increased the burden on the state at every appeal of criminal authentication issues.\(^{208}\)

C. How the Supreme Court of Ohio Could Have Justified Its Opinion Through Bryant

As explained above, the Supreme Court of Ohio gave no authority for its holding that authentication of business records "affects their status in regards to the Confrontation Clause."\(^{209}\) In addition, it gave no explanation of why it would not adopt the Attorney General or Solicitor General's recommendations.\(^{210}\) The court devotes only four sentences
to justify the holding.\footnote{See id.} If the court felt so strongly about maintaining the heightened constitutional review, it should have at least stretched some precedent to validate its opinion, and perhaps could have.

\textit{Bryant} could have explained the court’s reliance on the totality of circumstances and its use of firmly rooted hearsay exceptions.\footnote{See Michigan v. Bryant, 131 S. Ct. 1143, 1155, 1157 (2011).} Much to Justice Scalia’s chagrin,\footnote{See id. at 1174 (Scalia, J., dissenting).} \textit{Bryant} looked at all of the circumstances surrounding the declarant’s dying statement to determine whether it was testimonial.\footnote{Id. at 1156.} In particular, \textit{Bryant} used hearsay’s “excited utterance” analysis to explain why such statements are more reliable and therefore nontestimonial.\footnote{Id. at 1157.} Although \textit{Bryant} conflates evidentiary and confrontation analysis, the majority does not purport to break from \textit{Crawford}.\footnote{Id.} As a result, the Confrontation Clause analysis hangs in limbo between \textit{Crawford} and \textit{Roberts} without a clear consensus on how to define testimonial.\footnote{See, e.g., Bullcoming v. New Mexico, 131 S. Ct. 2705, 2717 (2011) (holding that blood alcohol analysis was testimonial and therefore subject to confrontation). Justice Sotomayor filed a concurring opinion where she reasserted the contention made in \textit{Bryant} that “‘[i]n making the primary purpose determination, standard rules of hearsay . . . will be relevant.’” Id. at 2720 (Sotomayor, J., concurring) (quoting \textit{Bryant}, 131 S. Ct. at 1155).} The Supreme Court of Ohio could have used \textit{Bryant} and this state of limbo to solidify its holding, but the court did not cite to \textit{Bryant}.\footnote{See generally \textit{Hood II}, 984 N.E.2d 1057 (Ohio 2012).} For Supreme Court support, \textit{Hood II} only cited to \textit{Crawford} and \textit{Melendez-Diaz},\footnote{Id. at 1064–65. The Court did cite to \textit{Bullcoming}, but only to distinguish the present case, not for support. Id. at 1065.} both of which unequivocally prohibit the conflation of evidentiary and confrontation analysis.\footnote{Crawford v. Washington, 541 U.S. 36, 61 (2004); Melendez-Diaz v. Massachusetts, 557 U.S. 305, 324 (2009).} Specifically, the court could have cited \textit{Bryant}’s reference to the excited utterance rule and the idea that to determine a statement’s primary purpose “standard rules of hearsay . . . will be relevant.”\footnote{Bryant, 131 S. Ct. at 1143, 1155.} While it may have been a stretch to compare the dying declaration of Covington in \textit{Bryant} to Verizon’s cell phone records,\footnote{See id. at 1150.} it would have made slightly more sense than the \textit{Hood II} opinion as it stands.\footnote{See generally \textit{Hood II}, 984 N.E.2d at 1066.} At least its confusion of evidentiary and confrontation analysis would be loosely rooted in precedent, rather than...
pulled out of thin air.

Although applying *Bryant* may have provided more support for *Hood II* and illustrated some rationale for the holding, using *Bryant* would still not have solved *Hood II*’s fatal mistake. At the very most, applying *Bryant* would only serve as a weak and tenuous citation of authority. The strictest application of *Bryant* only allows its application to dying declarations or excited utterances, which would clearly not apply to the business records at issue in *Hood*.224 A more generous understanding of *Bryant* would still not suffice. On the most general level, *Bryant* applies to cases where the “primary purpose” of a declarant’s statement is at issue.225 Is the primary purpose to establish a fact that already occurred or to meet an ongoing emergency?226 The business records in *Hood* were without question intended to establish a fact that already happened (i.e., who made what cell phone calls when),227 but they were not testimonial because business records are by nature nontestimonial.228 Because their primary purpose is clearly “for the administration of an entity’s affairs,” there is no question as to their admissibility, at least on constitutional grounds.229 Therefore, the *Bryant* standard is not necessary to analyze the records and cannot be legitimately used to conflate the evidentiary authentication standard with the Confrontation Clause. Using *Bryant* may have helped *Hood II*’s audience understand the opinion’s reasoning, but citing *Bryant* would still not go far enough to fully correct *Hood II*’s flawed Confrontation Clause analysis.

**D. Policy Considerations**

1. Every Authentication Challenge Will Be Met with Heightened Review

If *Hood I* was not reconsidered, every hearsay consideration on appeal would have to undergo a heightened standard of scrutiny.230 This leads to two consequences. “First, courts would have to review hearsay determinations de novo, rather than for an abuse of discretion.... Second, if a hearsay error is also a confrontation problem, then the admission of hearsay will always trigger the ‘heightened harmless-error

---

224. *See Bryant*, 131 S. Ct. at 1150.
225. *Id.* at 1151.
226. *Id.*
229. *Id.*
analysis’ reserved for constitutional errors.” 231 Hood II only narrowed
the application of these inappropriate results. Rather than subjecting all
hearsay violations to de novo and heightened harmless-error analysis,
only authentication violations will warrant the higher review. 232 This
result is still incorrect, as the Supreme Court of Ohio “has long reviewed
a trial court’s evidentiary determinations only for abuse of
discretion.” 233 Even when applied to this specific issue—authentication
of business records—courts have applied the abuse of discretion
standard of review. 234

Although Hood II did narrow the constitutional application from
hearsay to authentication, the result is still inappropriate and will lead to
disastrous practical results. 235 Now the bar will be significantly lowered
for defendants to succeed on authentication challenges. 236 While
“Hood’s conviction can withstand even this heightened
standard, . . . that will not be true of every conviction.” 237 Defendants
who challenge authentication issues at trial could successfully overturn
their convictions if the state is not able to show harmlessness beyond a
reasonable doubt. 238 Convictions would be overturned or require retrial
simply because a business record is not properly authenticated. That is
not to say that the authentication of business records should be
disregarded or taken lightly at trial. Rather, the protections ensuring that
business records are properly authenticated have already been
established under the abuse of discretion review. 239 Setting the standard
for authentication at abuse of discretion and harmlessness illustrates that
while courts believe that authentication is important, it should not
operate to overturn convictions unless absolutely necessary. 240 Hood II
allows authentication to control the outcome of many criminal trials on
appeal much more than precedent allows, and without proper

231. Id.
233. Memorandum of Amicus Curiae, supra note 9, at 6 (citing State v. Issa, 752 N.E.2d 904,
921–22 (Ohio 2001)).
234. Memorandum of Amicus Curiae, supra note 9, at 6 (citing State v. Taylor, No. 98107, 2012
WL 5878806, at *3–4 (Ohio Ct. App. Nov. 21, 2012); State v. Corder, 969 N.E.2d 787, 790–91 (Ohio
235. See Motion for Reconsideration, supra note 148, at 5–6; Memorandum of Amicus Curiae,
supra note 9, at 6.
236. Memorandum of Amicus Curiae, supra note 9, at 6.
237. Id.
238. Id.
239. See, e.g., Taylor, 2012 WL 5878806, at *3–4; Corder, 969 N.E.2d at 790–91; Wiley, 2012
WL 443977, at *3; Barton, 2007 WL 731409, at *10.
240. See Memorandum of Amicus Curiae, supra note 9, at 6.
From the *Hood II* opinion it is not even clear that defendants will be required to allege a constitutional violation. The holding that “the cell-phone records in this case were not authenticated as business records, and that fact affects their status under the Confrontation Clause,” seems to imply that simply challenging the authentication will warrant constitutional review, even if the specific constitutional violation is not alleged. Regardless of the interpretation, lower courts are sure to struggle in appropriately applying *Hood II* due to its lack of analysis and guidance.

2. *Hood II* Runs Against the General Rule Favoring Admissibility of Evidence and Accurate Verdicts

While there is no policy in favor of admissibility when the Confrontation Clause is concerned, the rules of evidence seek to admit probative evidence when it is not overly prejudicial to assist the trier of fact to a proper outcome. As discussed above, hearsay and authentication are solely evidentiary issues and should have no bearing on Confrontation Clause admissibility. By making authentication a constitutional issue, *Hood II* denies the underlying policy favoring admission of relevant evidence. Placing a constitutional standard of scrutiny may tip the balance too far in favor of the right to confrontation and against the general rule of admitting evidence. Courts must be careful to not restrict the flow of accurate evidence to the jury to the extent that it will hinder just verdicts, and *Hood II* ignores this concern.

First, prosecutors may think twice before presenting certain business records after *Hood II*, knowing a defendant’s objection on the issue will lead to an appeal on constitutional error, not merely evidentiary error. This could deprive juries of perfectly reliable and probative evidence that could help them draw an inference towards a defendant’s guilt or innocence. As *Melendez-Diaz* made clear, business records are “created for the administration of...affairs and not for the purpose of establishing or proving some fact at trial,” which can make the records all the more useful in determining guilt. The confrontation has been
described as "founded on the defendant's core right against a factually inaccurate verdict." The Melendez-Diaz standard demonstrates that business records, by their nature, will facilitate accurate verdicts. By placing a constitutional burden on business records, courts will inadvertently hinder their admission, potentially resulting in less accurate verdicts and counteracting the very foundation of the Confrontation Clause. Hood II takes the fateful step in this direction and the court should again reconsider the case to avoid placing a heightened standard of review on the authentication of business records.

V. CONCLUSION

Despite reconsidering Hood I, the Supreme Court of Ohio failed to fully remedy its past mistakes. Hood I improperly concluded that "[a] hearsay violation itself violates the Confrontation Clause," and Hood II only transforms the mistake to a different one by holding that evidentiary authentication affects business records' status under the Confrontation Clause. While the business records exception to hearsay is rooted in reliability, admissibility under the Confrontation Clause is only based on whether a statement is testimonial. That is, the Sixth Amendment "commands, not that evidence be reliable, but that reliability be assessed" by the testimonial nature of the statement. The Hood cases initially and properly held that business records were nontestimonial, but Hood II then implicitly transformed the business record at issue into a nontestimonial statement by the nature of the authentication. Because authentication is rooted in the reliability of evidence, this improperly conflates evidentiary and confrontation analysis.

In addition, Hood II drastically increased the burden on the state by lowering the bar for defendants to challenge convictions where authentication issues were present at trial. Because Hood II characterization in Melendez-Diaz was not meant to illustrate "reliability," but that business records are nontestimonial. The same characteristics also happen to make business records more reliable, but that is not why the Confrontation Clause does not bar their admission. See id.

249. Dennis, supra note 163, at 259.
250. See Melendez-Diaz, 557 U.S. at 324.
253. OHIO EVID. R. 803(6) staff notes.
255. Id. at 61.
256. Hood II, 984 N.E.2d at 1066.
258. Memorandum of Amicus Curiae, supra note 9, at 6.
transforms authentication issues into constitutional questions on appeal, appellate courts are to undergo a more heightened standard of review than they would for a simple evidentiary error.\textsuperscript{259} Finally, by transforming an evidentiary standard to a constitutional one, the court deprived the authentication rule of the underlying policy of evidence law that leans in favor of admissibility.\textsuperscript{260} While these outcomes did not affect the conviction of Hood, this "will not be true of every conviction."\textsuperscript{261}

\begin{itemize}
\item \textsuperscript{259} Id. at 6.
\item \textsuperscript{260} See generally OHIO EVID. R. 402 (allowing any admissible relevant evidence).
\item \textsuperscript{261} Memorandum of Amicus Curiae, supra note 9, at 6.
\end{itemize}