IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,	)	BRIEF OF GIRIJA HATHAWAY
Appellee,	)	AND JACOB SMITH
	)	AS *AMICI CURIAE*
v.	)	IN SUPPORT OF APPELLANT
	)	
Chief Warrant Officer Two	)	
RANDY E. JONES,	)	
United States Army,	)	Crim. App. No. 20150370
Appellant.	)	USCA Dkt. No. 17-0608/AR

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TO THE HONORABLE, THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES:

ISSUES PRESENTED

I. WHETHER ADMISSION OF AN ALLEGED CO-CONSPIRATOR'S CONFESSION TO LAW ENFORCEMENT VIOLATED M.R.E. 801(d)(2)(E).

II. WHETHER ADMISSION OF THE SAME CONFESSION VIOLATED APPELLANT'S SIXTH AMENDMENT RIGHT TO CONFRONTATION.

III. WHETHER USE OF THE CONFESSION TO CORROBORATE OTHERWISE UNSUPPORTED ESSENTIAL ELEMENTS IN APPELLANT'S OWN CONFESSION VIOLATED M.R.E. 304(g) AND UNITED STATES v. ADAMS, 74 M.J. 137 (C.A.A.F. 2015).

STATEMENT OF STATUTORY JURISDICTION

Appellant's Statement of Statutory Jurisdiction is accepted.

STATEMENT OF THE CASE

Appellant's Statement of the Case is accepted.

STATEMENT OF THE FACTS

Appellant's Statement of Facts is accepted.

STATEMENT OF INTERST

Pursuant to Rule 26(a)(2) of the Court's Rules of Practice and Procedure, this brief of *amici curiae* in support of Appellant is filed in response to the invitation of the Court dated December 18, 2017, and by leave of this Court granted on February 13, 2018. *Amici curiae* are second-year law students at the University of Texas School of Law, and have prepared this brief as part of this Court's Project Outreach under the supervision of Professor Stephen I. Vladeck, a member of the bar of this Court.

STATEMENT OF CONSENT

Counsel for both the Appellant and the Appellee have consented to the filing of this brief.

SUMMARY OF ARGUMENT

The government has now conceded that the admission of MSG Addington's testimonial statement violated both M.R.E. 801(d)(2)(E)

and the Appellant's rights under the Sixth Amendment's Confrontation Clause. It nevertheless asks this Court to affirm the Army CCA's summary affirmance of Appellant's conviction on the ground that any such error at trial was harmless beyond a reasonable doubt.

Whether this Court agrees with the government or the Appellant on the harmlessness of the error, *amici* offer two distinct considerations to help guide the Court's resolution of this case: *First*, this Court should clarify the precise *nature* of the error—*i.e.*, that the admission of MSG Addington's testimonial statement would have violated the Confrontation Clause whether or not it fell within the scope of M.R.E. 801(d)(2)(E). Although the government's brief (and the Army CCA's decision in *United States* v. *Diamond*, 65 M.J. 876 (A. Ct. Crim. App. 2007)) suggest that the Confrontation Clause is only implicated by the admission of a testimonial statement that falls *outside* the scope of a hearsay exclusion (as it did here), this Court can and should clarify that, as Appellant correctly argues, the two analyses are distinct—and that the admission of testimonial statements implicates the Confrontation Clause even if they fall *within* the scope of a hearsay exclusion such as M.R.E. 801(d)(2)(E).

Second, if this Court is inclined to agree with the government that the error was indeed harmless, it should nevertheless *hold* that error occurred, rather than assuming the existence of such error without formally deciding the matter (thereby avoiding a precedential ruling clarifying the relationship between hearsay exclusions and the Confrontation Clause). This Court rarely has an opportunity to clarify such an important question of evidentiary procedure, and this case provides an appropriate vehicle through which to do so, even if such a holding is not strictly necessary to the result.

ARGUMENT

I. The Government Has Correctly Conceded That the Admission of MSG Addington's Testimonial Statement Violated M.R.E. 801(d)(2)(E) and the Sixth Amendment

The Sixth Amendment to the U.S. Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with witnesses against him." In *Crawford* v. *Washington*, the Supreme Court held that, "[w]here testimonial evidence is at issue, . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." 541 U.S. 36, 68 (2004). The Constitution does not allow the government to make

its case through the admission of *ex parte* testimony formalized during police interrogation. *See id.* at 51–52.

Both parties acknowledge that the admission of such evidence against the Appellant was error,[1] but they meaningfully differ as to whether it was one error or two. *Compare* Appellant's Br. at 8 (arguing that admission was "in violation of *both* M.R.E. 801(d)(2)(E) *and* CW2 Jones's right to confrontation") (emphases added), *with* Appellee's Br. at 7 (suggesting "statement was improperly admitted under Mil. R. Evid. 801(d)(2)(E) because it was not in furtherance of a conspiracy and, *therefore*, its admission violated appellant's Confrontation Clause rights.") (emphasis added). The government thereby implies the inverse—that statements made by alleged co-conspirators that *are* covered by Rule 801(d)(2)(E)[2] are *per se* nontestimonial under *Crawford*,

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1. *Amici* agree with the parties that the statement was not made "in furtherance" of a conspiracy. Appellee's Br. 7; *see also* Advisory Committee Note to Fed. R. Evid. 801(d)(2)(E) ("The rule is consistent with the position of the Supreme Court in denying admissibility to statements made after the objectives of the conspiracy have either failed or been achieved.") (citing *Krulewitch* v. *United States*, 336 U.S. 440 (1949); *Wong Sun v. United States*, 371 U.S. 471 (1963)).

2. Mil. R. Evid. 801(d) is taken "without change" from the corresponding Federal Rule of Evidence. *See* Drafters' Analysis, Manual for Courts-Martial, United States (2016 ed.) at A22–61. This Court's

whereas Appellant argues that his rights under M.R.E. 801(d)(2)(E) and the Confrontation Clause were *separately* violated at trial.[3] This Court has not squarely decided this question. Not only should it use this case to do so, but it should side with the Appellant.

"Though a statement may qualify as a hearsay exception[,] that does not vitiate the fact that the statement is testimonial and does not remove it from the 'core concerns' of the Confrontation Clause." *United*

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predecessor has therefore read the civilian and military rules to be *in pari materia*. *See, e.g.*, *United States* v. *Ward*, 16 M.J. 341, 352–53 (C.M.A. 1983). *Amici* will therefore refer to "Rule 801(d)(2)(E)" interchangeably to describe both the civilian and military rule.

3. Lower federal civilian and military courts are divided on this issue. *See, e.g.*, *United States* v. *Saget*, 377 F.3d 223, 230 (2d Cir. 2004) (Sotomayor, J.) (holding first that disputed statements of a separately indicted co-conspirator were nontestimonial before independently finding them admissible under the Federal Rules of Evidence); *United States* v. *Caraballo*, 595 F.3d 1214, 1225–29 (11th Cir. 2010) (separately analyzing whether disputed evidence that fell "squarely within an exception to hearsay" was testimonial); *United States* v. *Jackson*, 636 F.3d 687, 692 n.2 (5th Cir. 2011) ("[T]he Confrontation Clause, as a constitutional right, cannot be circumscribed by merely invoking the evidentiary rules of hearsay."). *But see, e.g.*, *Diamond*, 65 M.J. at 884 ("[T]he requirements outlined in *Crawford* do not apply to them because co-conspirator statements are, by definition, nonhearsay."), *review granted in part, cause remanded*, 67 M.J. 247 (C.A.A.F. 2009); *United States v. Reyes*, 362 F.3d 536, 540 & n.4 (8th Cir. 2004) (finding that "co-conspirator statements, which fall within a firmly rooted hearsay exception" are nontestimonial).

States v. *Jackson*, 625 F.3d 875, 890 n.2 (5th Cir. 2010) (Dennis, J., concurring), *opinion withdrawn and superseded on reh'g*, 636 F.3d 687 (5th Cir. 2011). Rather, "[s]tatements taken by police officers in the course of interrogations are . . . testimonial under even a narrow standard." *Crawford*, 541 U.S. at 52. And as Justice Scalia wrote for the *Crawford* majority, "Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence . . . ." *Id.* at 61.

A. Lower Courts Are Divided As To Whether Out-of-Court Statements Admitted Under Rule 801(d)(2)(E) Implicate the Confrontation Clause

A defendant has the right to confront a witness whose testimony is used against him. Despite this directive, some civilian and military federal courts have interpreted *Crawford* to compel the conclusion that statements admitted through hearsay exceptions or exclusions, including co-conspirator statements made to law enforcement officers, are categorically non-testimonial. In *United States* v. *Diamond*, for example, the defendant was convicted of murder based solely upon an alleged co-conspirator's statements to the police. 65 M.J. at 887. There was no other evidence linking the defendant to the crime, and he never

had the opportunity to cross-examine the declarant, because she did not testify at trial. *See id.* at 878–81. Still, the Army Court of Criminal Appeals concluded that, "[b]ecause we find that *Crawford* does not apply to co-conspirator statements we find the admission of these statements did not violate the Sixth Amendment's Confrontation Clause." *Id.* at 887. This back-door reasoning is flatly inconsistent with *Crawford*.

Other courts determine whether statements are testimonial independently of the evidentiary code analysis—as the Confrontation Clause requires. For example, in *United States* v. *Logan*, the defendant conspired with two accomplices to commit arson and then use a baseball game as an alibi, 419 F.3d 172, 175–76 (2d Cir. 2005). After the arson was committed, the co-conspirators provided the agreed-upon alibi when the police questioned them, and thus furthered the conspiracy, making their statements admissible under Rule 801(d)(2)(E). *See id.* When the officer who took the co-conspirators' statement testified at the defendant's trial about what the co-conspirators had told him, the defendant objected on Sixth Amendment grounds. *Id.* at 178. The court found that statements which "involve a declarant's knowing responses

to structured questioning in an investigative environment or a courtroom setting where the declarant would reasonably expect that his or her responses might be used in future judicial proceedings" are testimonial, despite the fact that they "fall within a firmly rooted hearsay exception," *i.e.*, Rule 801(d)(2)(E). *Id.* at 178–79.

To similar effect is *United States* v. *Sutherland*: "Even if this Court were to find that Henley's statements made to law enforcement fall within the limits of Rule 801(d)(2)(E), the Court still would find them to be inadmissible under *Crawford* v. *Washington*, since such statements are testimonial and therefore their admission would violate Sutherland's Confrontation Clause rights." No. 07-50106, 2008 WL 4858322, at *4 (D.S.D. Nov. 10, 2008). As these cases underscore, there is disagreement among lower civilian and military courts as to whether the Appellant or the government is correct about the relationship between Rule 801(d)(2)(E) and the Confrontation Clause.

B. Co-Conspirator Confessions Given to Law Enforcement Officers During Interrogations Are "Testimonial Even Under a Narrow Standard"

The Supreme Court in *Crawford* notoriously acknowledged that the crux of its decision—the distinction between testimonial and non-

testimonial statements—would be fleshed out only in subsequent cases. *See Crawford,* 541 U.S. at 68. But the Court did set a floor:

> Whatever else ["testimonial"] covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations. These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed.

Id.; see United States v. *Foerster*, 65 M.J. 120, 123 (C.A.A.F. 2007) (quoting this passage); *Williams* v. *Illinois*, 567 U.S. 50, 82–83 (2012) (plurality opinion) ("[A]ll but one of the post-*Crawford* cases in which a Confrontation Clause violation has been found" involved both "out-of-court statements having the primary purpose of accusing a targeted individual of engaging in criminal conduct" and "formalized statements such as affidavits, depositions, prior testimony, or confessions.").

In *Davis* v. *Washington*, the Supreme Court further clarified that an interaction between a hearsay declarant and law enforcement is testimonial for Sixth Amendment purposes when "circumstances objectively indicate that there is no [] ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Michigan* v. *Bryant*, 562 U.S. 344, 356 (2011) (quoting *Davis* v. *Washington*, 547 U.S. 813,

822 (2006)). To that end, in *United States* v. *Rankin*, this Court identified three considerations for determining whether statements resulting from law enforcement interrogation are testimonial under *Davis*'s primary purpose test: whether (1) the statement was "elicited by or made in response to law enforcement or prosecutorial inquiry"; (2) the statement involved "more than a routine and objective cataloging of unambiguous factual matters"; and (3) "the primary purpose for making, or eliciting, the statements [was] the production of evidence with an eye toward trial." 64 M.J. 348, 352 (C.A.A.F. 2007); *see also Foerster*, 65 M.J. at 125 ("[W]e believe that [the Supreme Court's] references to affidavits that would be *presumptively* testimonial refer to ex parte affidavits developed: (1) by law enforcement or government officials and (2) by private individuals acting in concert with or at the behest of law enforcement or government officials.").

As *ex parte* testimony elicited by government officers while the declarant was a "suspect" being investigated for the same criminal activity, MSG Addington's statement, like Sylvia Crawford's, "is testimonial under any definition." *Crawford*, 541 U.S. at 61; *see id.* at 65 ("*Roberts*' failings were on full display in the proceedings below.

Sylvia Crawford made her statement while in police custody, herself a potential suspect in the case.").[4] Further, as in *Rankin*, MSG Addington's confession was elicited by law enforcement officers one month into their investigation. *See* JA 014, 019 (Jones investigation begins March 2014; Addington is interviewed 21 April 2014).

More than a routine cataloging of unambiguous factual matters, the prosecution relied on the alleged co-conspirator's confession to prove two key elements of the underlying offense: that the source of the tools was the Retro-Sort Yard, drawing the inference that they were "military property"; and that Jones intended to use the tools with his schoolkids rather than in-garrison stateside, showing intent to permanently deprive. *See* Appellant Br. 15–18, 23; JA 021, 024. Finally, made pursuant to an extended Criminal Investigation Division investigation, the formalized sworn statement had the primary purpose of producing

4. The confession is also "formalized," *see Giles* v. *California*, 554 U.S. 353, 377–78 (2008) (Thomas, J., concurring), and also satisfies Justice Alito's test in *Giles* as the functional equivalent of trial testimony. *See id*. at 378 (Alito, J., concurring). Further, it was not made in the course of an ongoing emergency but rather as a sworn statement a month into an investigation for the primary purpose of "prov[ing] past events potentially relevant to later prosecution." *Bryant*, 562 U.S. at 361 (quoting *Davis*, 547 U.S. at 822).

evidence with an eye toward trial. JA 019; *see United States* v. *Porter*, 72 M.J. 335, 337 (C.A.A.F. 2013) ("Moreover, the pages . . . were prepared by analysts at CID's request and with certain knowledge that the testing was part of a criminal investigation. There is no question that the statements were 'made under circumstances which would lead an objective witness reasonably to believe that the statement[s] would be available for use at a later trial.'") (quoting *United States* v. *Blazier*, 68 M.J. 439, 442 (C.A.A.F. 2010)) (alteration in original).

MSG Addington's sworn confession to law enforcement therefore falls within the "core class" of testimonial statements identified in *Crawford* and its progeny. *Crawford*, 541 U.S. at 51–52; *see also Melendez-Diaz* v. *Massachusetts*, 557 U.S. 305, 310–11 (2009); *Davis,* 547 U.S. at 822, 837; *United States* v. *Gardinier*, 65 M.J. 60, 65 (C.A.A.F. 2007). MSG Addington was the "witness" Jones had a right to confront at trial. *United States* v. *Blazier*, 69 M.J. 218, 222–23 (C.A.A.F. 2010) (citing *Crawford,* 541 U.S. at 51). And absent a showing that MSG Addington was unavailable and that Jones had a prior opportunity to cross-examine him, the admission of his confession violated Jones's rights under the Confrontation Clause.

C. Rule 801(d)(2)(E) Does Not—and Could Not—Abrogate Appellant's Confrontation Clause Rights

Since *Crawford*, the Supreme Court has repeatedly observed that Confrontation Clause protections are not trumped by the evidentiary code. *See, e.g.*, *Melendez-Diaz*, 557 U.S. at 324 ("Whether or not they qualify as business or official records, the analysts' statements here—prepared specifically for use at petitioner's trial—were testimony against petitioner, and the analysts were subject to confrontation under the Sixth Amendment."); *Davis*, 547 U.S. at 825 & n.4; *Crawford*, 541 U.S. at 56 n.7. According to *Crawford*, "Leaving 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." 541 U.S. at 51. Acutely aware of the risks posed by government involvement in producing evidence, *Crawford* observed, as this Court has reiterated, that "[i]nvolvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse." *United States* v. *Squire*, 72 M.J. 285, 288 (C.A.A.F. 2013) (quoting *Rankin,* 64 M.J. at 351).

In *Crawford* itself, the dissenters argued that testimonial statements should still be subject to the hearsay exceptions—that the

Confrontation Clause should be interpreted to be consistent with longstanding evidentiary rules. But the majority was emphatic in holding to the contrary. As Justice Scalia wrote for the Court, "this consideration does not evaporate when testimony happens to fall within some broad, modern hearsay exception, even if that exception might be justifiable in other circumstances." *Crawford*, 541 U.S. at 56 n.7. Thus, the relationship between whether a statement falls within a "standard hearsay exception[] and exemption from the confrontation requirement . . . is not a causal one." *Bryant*, 562 U.S. at 392 (Scalia, J., dissenting); s*ee also Giles*, 554 U.S. at 358 (plurality opinion).

To suggest otherwise is to "misunderstand[] the relationship." *Melendez-Diaz*, 557 U.S. at 324. In *Melendez-Diaz,* the Supreme Court considered how *Crawford* applies to business records—another hearsay exception that is not by its "nature" testimonial—in the form of forensic analysis of seized material formalized as an affidavit and prepared for trial. *See id.* at 307. The Court held that the admission of such evidence was error: "The Sixth Amendment does not permit the prosecution to prove its case via *ex parte* out-of-court affidavits." *Id.* at 329. It reasoned

that the case "involve[d] little more than the application of our holding in *Crawford*." *Id*.

And while *Crawford* had observed that "Most of the hearsay exceptions covered statements that by their nature were not testimonial—for example, business records or statements in furtherance of a conspiracy," 541 U.S. at 56, *Melendez–Diaz* clarified that

> Business and public records are generally admissible absent confrontation not because they qualify under an exception to the hearsay rules, 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*—they are not testimonial. Whether or not they qualify as business or official records, the analysts' statements here—prepared specifically for use at petitioner's trial—were testimony against petitioner, and the analysts were subject to confrontation under the Sixth Amendment.

557 U.S. at 324 (emphasis added); *accord. United States* v. *Harcrow*, 66 M.J. 154, 159 (C.A.A.F. 2008).

Thus, although the scope of hearsay exceptions and the Confrontation Clause may *generally* not overlap, *Melendez-Diaz* reiterates that they *can* be coextensive. *See Bryant*, 562 U.S. at 392 (Scalia, J., dissenting) (citing *Melendez-Diaz,* 557 U.S. at 324). To construe them as mutually exclusive is to repeat "the unpardonable vice of the *Roberts* test . . . its demonstrated capacity to admit core

testimonial statements that the Confrontation Clause plainly meant to exclude," such as "accomplice confessions." *Crawford,* 541 U.S. at 63–64. Like business records in *Melendez-Diaz*, co-conspirator statements are not necessarily testimonial, *Crawford*, 541 U.S. at 56, 68, *see also Melendez-Diaz,* 557 U.S. at 324, but that is not because they are *per se non*testimonial. *See Melendez-Diaz*, 557 U.S. at 321 ("[T]he affidavits do not qualify as traditional official or business records, and even if they did, their authors would be subject to confrontation nonetheless.").

D. This Court Should Hold That The Admission of MSG Addington's Testimonial Statement Violated the Confrontation Clause Independent of Rule 801(d)(2)(E)

The confusion over the relationship between hearsay exclusions like Rule 801(d)(2)(E) and the Confrontation Clause is powerfully reflected in *United States* v. *Jackson*, a recent Fifth Circuit case. The original panel opinion in *Jackson* had held that drug ledgers that had not been properly authenticated as business records were admitted at trial in violation of the defendant's Confrontation Clause rights. 625 F.3d 875. In the process, however, the panel's reasoning could have been read to suggest that, had the ledgers been properly authenticated, they would have been admissible even though they were testimonial.

Judge Dennis concurred separately to stress his concerns with such analysis. As he explained:

> *Crawford* itself recognized that though a statement may qualify as hearsay exception, that does not vitiate the fact that the statement is testimonial and does not remove it from the "core concerns" of the Confrontation Clause. Moreover, . . . *Melendez-Diaz* unequivocally says that evidence—even if properly classified within the hearsay exception for business records—does not foreclose Confrontation Clause scrutiny.

Id. at 890 n.2 (Dennis, J., concurring). The panel took Judge Dennis's concerns to heart, and superseded its original opinion on rehearing to clarify "that our evidentiary and constitutional analyses are two separate and distinct considerations." *Jackson*, 636 F.3d at 690; *cf. id.* at 692 n.2 ("[B]usiness records are not *per se* nontestimonial, but they are *generally*.").

Under a properly conceived *Crawford* analysis, the admissibility inquiry for the confession of an alleged co-conspirator to law enforcement depends not only on whether it was made during the conspiracy and in furtherance thereof (which is what Rule 801(d)(2)(E) requires), but whether the "primary purpose for making, or eliciting, the statements [was] the production of evidence with an eye toward trial." *Rankin*, 64 M.J. at 352. As in *Jackson*, co-conspirator statements

are not *per se* nontestimonial, but they are generally. And whereas the government's brief could fairly be read to suggest that, if MSG Addington's statement *satisfied* Rule 801(d)(2)(E), its admission would not violate Appellant's Confrontation Clause rights, this Court should clarify that the contrary is true—and that, so long as MSG Addington's statement was testimonial, its admission was unconstitutional whether or not it fell within the scope of Rule 801(d)(2)(E). *See Crawford*, 541 U.S. at 61 ("Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence. . . .").

II. Even if the Admission of MSG Addington's Statement Was Harmless Constitutional Error, this Court Should Hold—Rather Than Assume—That It Was Error

After opposing this Court's review on the Issues Presented, the government in its merits brief conceded that the admission of MSG Addington's testimonial statement at Appellant's trial violated Appellant's rights under both Rule 801(d)(2)(E) and the Sixth Amendment's Confrontation Clause. The government argues only that such a violation was harmless error—and that Appellant's conviction can therefore be affirmed on alternative grounds. *Amici* argued above

that this Court should clarify that the admission of MSG Addington's testimonial statement would have violated the Confrontation Clause even if it satisfied Rule 801(d)(2)(E). But even if this Court agrees with the government that the admission of MSG Addington's statement was harmless Confrontation Clause error, it should nevertheless *hold*, rather than assume without deciding, that such an error in fact took place—in order to clarify the law for military trial and appellate judges going forward.

A. This Court is Rarely in a Position To Conclusively Resolve Evidentiary Questions Such As Those Presented Here

This case presents an opportunity for this Court to engage in error correction that would also settle uncertainty over an important question of evidentiary procedure. "Error correction implies reversing lower court judgments simply because they are wrong," whereas a court of last resort acts "not as a source of justice for individual litigants or the forum to correct aberrations in the application of law, but rather [provides] the structure and guidance necessary for the lower courts to correct or avoid errors." Carolyn Shapiro, *The Limits of the Olympian Court: Common Law Judging Versus Error Correction in the Supreme*

Court, 63 Wash. & Lee L. Rev. 271, 278–79 (2006). Not merely correcting error in this case would help clarify that "CAAF is in the primary business of law declaration and will engage in error correction only when intermediate courts fail in their role." Rodrigo M. Caruço, *In Order to Form A More Perfect Court: A Quantitative Measure of the Military's Highest Court's Success As A Court of Last Resort*, 41 Vt. L. Rev. 71, 122 (2016).

In the military justice system, the average case does not generate a precedential appellate decision. Per its FY16 Annual Report, this Court granted less than 10% of the petitions for review that it received. *See* Joint Annual Report of the Code Committee Pursuant to the Uniform Code of Military Justice at 17 (Sept. 30, 2016) (hereinafter "FY16 Report").[5] Of these, "error correction still made up nearly half of

5. Fewer than 3,000 special and general courts-martial are tried each year—most involving judges sitting alone. *See* James A. Young, *Court-Martial Procedure: A Proposal*, The Reporter, Vol. 41, No. 2, at 24 (2014) (reviewing FY2009–FY2013); FY16 Report, *supra*, at 4–7 (briefings from the services reporting 1,137 courts-martial between the Army and Navy in FY2015). A review of cases from the Army Court of Criminal Appeals' 2017 Term on Westlaw shows that a small minority were published in the *Military Justice* reporter.

all CAAF decisions in its most recent term." Caruço, *supra*, at 123.[6] While this Court has been lauded for issuing course-correcting decisions where the "service court seemed to have been on automatic pilot," still "the fact remains that [it] hands down a modest number of full opinions." Eugene R. Fidell, *Is There A Crisis in Military Appellate Justice*, 12 Roger Williams U.L. Rev. 820, 823 (2007).[7]

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6. This slate is not necessarily of the Court's choosing. The case at bar echoes instances raised by Caruço where "CAAF could not discuss the lower court's reasoning, likely because it appears there was none: the lower court issued a summary disposition." Caruço, *supra*, at 118 (citing *United States* v. *Straight*, 42 M.J. 244, 246 (C.M.A. 1995)); *see also United States* v. *Winckelmann*, 73 M.J. 11, 16 (C.A.A.F. 2013) ("The Court of Criminal Appeals did not detail its analysis in this case; nor was it obligated to do so. Going forward, however, a reasoned analysis will be given greater deference than otherwise.").

7. Professor Fidell references *United States* v. *Jenkins*, 60 M.J. 27 (C.A.A.F. 2004), in which this Court set aside a service court opinion where large portions were replicated from the government's briefs, noting: "The CCAs are intended to not only uphold the law, but provide a source of structural integrity to ensure the protection of service members' rights within a system of military discipline and justice where commanders themselves retain awesome and plenary responsibility." *Id.* at 29 (citing *Bill to Unify, Consolidate, Revise, and Codify the Articles of War, the Articles for the Government of the Navy, and the Disciplinary Laws of the Coast Guard, and to Enact and Establish a Uniform Code of Military Justice: Hearings on S. 857 and H.R. 4080 Before a Subcomm. of the Comm. on Armed Services*, 81st Cong. 151, 623 (1949) (statement of Frederick P. Bryan, Chairman, Special Committee on Military Justice of the Bar Association of the City of New York)).

Evidentiary issues—subject to the broad discretion granted to trial judges, routinely insulated by harmless error or strategic concession, and often difficult to untangle on post-conviction appeal—present unique challenges for developing clear statements of law across military jurisprudence.[8] In this Court's appendix of selected decisions from the September 2015 Term, only two evidentiary issues elicited declarations of law beyond error correction. *See* FY16 Report, *supra*, at 13–15.[9]

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8. Such issues are also unlikely to ever be appropriate for collateral relief under *Burns* v. *Wilson,* 346 U.S. 137, 142 (1953) (plurality opinion); *see Thomas v. U.S. Disciplinary Barracks*, 625 F.3d 667, 670–71 (10th Cir. 2010) ("When an issue is briefed and argued before a military board of review, we have held that the military tribunal has given the claim fair consideration, even though its opinion summarily disposed of the issue with the mere statement that it did not consider the issue meritorious or requiring discussion.") (quoting *Watson* v. *McCotter*, 782 F.2d 143, 145 (10th Cir. 1986)).

9. *See United States* v. *Hills*, 75 M.J. 350, 354 (C.A.A.F. 2016) ("Neither this Court nor any federal circuit court has permitted the use of M.R.E. 413 or Fed. R. Evid. 413 as a mechanism for admitting evidence of charged conduct to which an accused has pleaded not guilty in order to show a propensity . . . ."); *United States* v. *Hoffmann*, 75 M.J. 120, 122 (C.A.A.F. 2016) (holding that military judge abused discretion in refusing to suppress fruit of a search of seized media after accused withdrew consent in violation of the Fourth Amendment); *cf. United States* v. *Martin*, 75 M.J. 321, 323 (C.A.A.F. 2016) ("We hold that under the circumstances of this case, trial defense counsel did invite error when, in the course of conducting cross-examination, he was the first

This case presents an appropriate opportunity for this Court to "clarify the law of its domain" in "correct[ing] error when such erroneous interpretation results in material prejudice." Caruço, *supra*, at 121–22. Holding that the admission of an alleged co-conspirator's formalized confession to law enforcement violated the Appellant's Sixth Amendment rights would offer guidance to future courts on a subject CAAF has infrequent opportunities to confront. That an error may be harmless is no reason to "avoid correcting an obvious misapprehension . . . by at least one of the Courts of Criminal Appeals." *United States* v. *Davis*, 64 M.J. 445, 450 (C.A.A.F. 2007) (Ryan, J., concurring).[10]

B. This Case is an Appropriate Vehicle Through Which To Hold That the Admission of MSG Addington's Testimonial Statement Was Error

If this Court agrees with the government that the admission of MSG Addington's confession was harmless error, it could, of course,

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party to elicit human lie detector testimony from the same witness on the same evidentiary point.").

10. Holding that the trial court committed error even though that error was harmless would also allow this Court to perform its supervisory function and clarify the law without disturbing the trial court's judgment in this case.

assume without deciding that the confession was error—and thereby leave open the issue discussed in Part I, *supra*. But even in circumstances in which an appeal can be resolved without reaching the merits, "[t]here are occasions . . . when it is appropriate to proceed further and address the merits. This is one of them." *Munaf* v. *Geren*, 553 U.S. 674, 691 (2008). *Amici* respectfully submit that the same is true here—and that this Court should reach out and resolve the issue discussed above even if its resolution is not strictly necessary to reach the result in this case.

As noted above, this Court seldom has the opportunity to conclusively settle properly presented questions about evidentiary procedure at trial. Here, in contrast, the matter has received plenary briefing from the parties and *amici*, the Court is hearing oral argument, and the underlying dispute is not so complicated as to require an inordinate expenditure of judicial resources to resolve it. Moreover, as noted in Part I, there is confusion among lower courts both within and without the military justice system over the relationship between hearsay exclusions such as Rule 801(d)(2)(E) and the scope of the Confrontation Clause after *Crawford*. Thus, not only is the underlying

question properly (and adequately) presented here, but judicial efficiency would best be served by resolving it now, rather than allowing the confusion to further pervade the lower civilian and military courts.[11]

To be sure, courts should normally avoid unnecessary holdings; "[a] fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them." *Lyng* v. *Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445 (1988). However, the Supreme Court has acknowledged situations where such avoidance has a deleterious effect on the development of forward-looking legal rules and the need to ensure uniformity in lower-court decisionmaking, as most familiarly seen in the context of the qualified immunity defense in civilian courts:

> Consider a plausible but unsettled constitutional claim asserted against a government official in a suit for money damages. The court does not resolve the claim because the official has immunity. He thus persists in the challenged practice; he knows that he can avoid liability in any future damages action, because the law has still not been clearly

11. Indeed, even if this Court shares the government's—we believe incorrect—view on the merits of the evidentiary question, *amici* are still of the view that clarification is necessary—not only for the CCAs, but to help crystallize a division of authority between this Court and the civilian courts of appeals that might, in turn, merit the Supreme Court's attention.

> established. Another plaintiff brings suit, and another court both awards immunity and bypasses the claim. And again, and again, and again. So the moment of decision does not arrive. Courts fail to clarify uncertain questions, fail to address novel claims, fail to give guidance to officials about how to comply with legal requirements.

Camreta v. *Greene*, 563 U.S. 692, 706 (2011) (footnote omitted). The *Camreta* Court went on to explain that "For this reason, we have permitted lower courts to avoid avoidance—that is, to determine whether a right exists before examining whether it was clearly established." *Id.*

Even in cases in which determining whether the right exists was unnecessary to reach the result (because such a right was not "clearly established" at the time of the defendant's conduct), *Camreta* identified reasons for courts to reach out and decide unnecessary merits questions—including cases in which those questions are relatively straightforward; the public interest would be advanced through judicial resolution; the lower courts are divided on the merits; and resolution of the merits would not unduly expend judicial resources. *Id.* at 704–06.

This case meets all of those criteria. Civilian and military federal courts are divided on the interaction between the hearsay exceptions and the Confrontation Clause; the matter has been fully briefed and

vetted before this Court; the question can be answered in a manner that is relatively straightforward; and it would be clarifying for trial judges in both courts-martial and federal district courts to have an opinion from this Court carefully explaining why the admission of MSG Addington's testimonial statement violated the Confrontation Clause independent of whether it also violated Rule 801(d)(2)(E).

Indeed, reaching out to decide the underlying evidentiary question is all the more appropriate here because, as noted above, the government's characterization of the underlying error is itself incomplete, and the lack of an opinion from the CCA suggests a more pervasive misconstruction—with the Army CCA's reasoning in *Diamond* demonstrating that the government's misunderstanding of the relationship between the hearsay exceptions and the Confrontation Clause is not just a one-off. Thus, even if this Court concludes that the admission of MSG Addington's statement was harmless error, it should nevertheless conclusively resolve this contested evidentiary question for the benefit of the lower courts—and, as *amici* have argued above, in favor of the conclusion that the admission constituted two *separate* errors under Rule 801(d)(2)(E) and the Confrontation Clause.

CONCLUSION

Amici respectfully submit that this case be decided consistently with the views articulated herein.

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CERTIFICATE OF FILING AND SERVICE

I certify that on March 12, 2018, a copy of the foregoing brief in the case of *United States v. Jones*, Army Ct. Crim. App. Dkt. No. 20150370, USCA Dkt. No. 17-0608/AR, was electronically filed with the Court (efiling@armfor.uscourts.gov) and contemporaneously served on the Defense and Government Appellate Divisions.

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CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

This brief complies with the type-volume limitation of Rule 24(c) because it contains 5,889 words. This brief complies with the typeface and type-style requirements of Rule 37.

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