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Taking Confrontation Seriously: Does Crawford Mean That Confessions Must Be Cross-Examined?

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Taking Confrontation Seriously: Does Crawford Mean That Confessions Must Be Cross-Examined?

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Abstract

This article focuses on the applicability of the Supreme Court’s decision in Crawford v. Washington to one subcategory of party admissions – defendants’ confessions “taken by police officers in the course of interrogations.” Such statements fall within Crawford’s core class of testimonial statements, which must be subjected to cross-examination either at the time they are made or at trial in order to satisfy the Confrontation Clause. In some post-Crawford cases, defendants have argued that the failure to comply with Crawford should bar the prosecution from using their confessions. The lower courts have uniformly held that Crawford does not apply to a defendant’s own confession because such statements are defined by the Federal Rules of Evidence as "not hearsay," and Crawford applies only to "testimonial hearsay." In this paper I argue that, as a definitional matter, Crawford does apply to confessions but that they should be exempted from Crawford’s cross-examination requirement on “historical grounds.”

I. Introduction

The “Crawford” revolution eight years’ ago radically changed how courts were to determine whether admitting hearsay violated a criminal defendant’s Sixth Amendment confrontation rights by switching the focus from the reliability of the statement itself to the cross-examination of the person who made the statement. As a result, the focus of the Confrontation Clause became whether or not hearsay statements which the Crawford Court

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2 Id. at 68-69:

In this case, the State admitted Sylvia's testimonial statement against petitioner, despite the fact that he had no opportunity to cross-examine her. That alone is sufficient to make out a violation of the Sixth Amendment. Roberts notwithstanding, we decline to mine the record in search of indicia of reliability. Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.
called “testimonial” had been subjected to cross-examination.\(^3\) Since 2004, a new “Crawford” case has reached the Supreme Court almost every term, many of them grappling with the question Crawford intentionally left unanswered – what does “testimonial” mean?\(^4\)

One potential “Crawford” issue has yet to make it to the High Court -- Crawford’s effect on the hearsay “exemptions” found in Federal Rule of Evidence 801(d)(2), collectively labeled as “Party Admissions.”\(^5\) At first blush, this makes sense because party admissions are deemed “not hearsay” by the Federal Rules of Evidence\(^6\) and according to the Crawford Court, the “primary object” of the Sixth Amendment’s Confrontation Clause is “testimonial hearsay.”\(^7\) Nonetheless, there is an argument that party admissions should not be exempted from Crawford on those grounds because prior to the Federal Rules, party admissions were treated as hearsay admitted subject to an exception.\(^8\) Thus, their current non-hearsay status is largely a matter of labeling\(^9\) and should not affect how they are treated for Crawford purposes.

Moreover, unlike non-hearsay statements exempted from Crawford scrutiny because they are not admitted for their truth,\(^10\) party admissions are both admitted for truth and often provide powerful evidence of a defendant’s guilt. And, statements which are not hearsay because they are not offered for their truth presumably need not be subjected to cross-examination because their reliability is not an issue, \textit{i.e.}, it does not matter whether they are true.

\(^3\) Id. at 51.
\(^6\) \textit{Fed. R. Evid.} 801(d) (“A statement that meets the following conditions is not hearsay....”).
\(^7\) Crawford v. Washington, 541 U.S. at 36.
\(^8\) Federal Evid. 801(d), advisory committee’s note (“Several types of statements which would otherwise fall within the definition [of hearsay] are expressly excluded from it...”).
\(^9\) See \textit{e.g.}, George Fisher, \textit{Evidence} 393 (2d ed. 2008) (“Do not struggle to find meaning in this Orwellian labeling. You are best off thinking of all of the above categories [including Rule 801(d)(2)] as exceptions to the rule.”).
\(^10\) Crawford v. Washington, 541 U.S. at 59 n. 9.
This article will focus primarily on the applicability of Crawford to one subcategory of party admissions—defendants’ confessions “taken by police officers in the course of interrogations,” which fall within Crawford’s “core class of ‘testimonial’ statements.”¹¹ Confessions also satisfy the definition of hearsay, since they are out-of-court statements admitted for their truth.¹² And, finally, they appear to satisfy Crawford’s other requirements—the person who made the statement is unavailable as a witness at trial and was not cross-examined at the time the statement was made.¹³ Nevertheless, no post-Crawford court has seriously considered whether confessions admitted without cross-examination violate the Confrontation Clause and many have admitted them into evidence simply because they are deemed not hearsay by the Federal Rules of Evidence.¹⁴

In spite of this simplistic approach, it may be that these courts have reached the correct result. One explanation is that Crawford’s inclusion of statements made in response to police interrogation within its “core class” of testimonial statements is meant to refer to the statements of others and not to the defendant’s own statements.¹⁵ After all, Crawford itself dealt with a statement made by the defendant’s wife in response to the police and not the defendant’s confession.¹⁶ Another possibility is that there is a pre-Federal Rules justification for the treatment of party statements as “not hearsay” and that therefore their current categorization as

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¹¹ Crawford v. Washington, 541 U.S. at 51-52. Out-of-court statements made by criminal defendants to those not known to be police are also party admissions but they are not testimonial.

¹² FED. R. EVID. 801(c).

¹³ Crawford v. Washington, 541 U.S. at 53-54.


¹⁵ See United States v. Crowe, 563 F.3d 969, 976 n.12 (9th Cir. 2009).

such is not just semantics.\textsuperscript{17} Finally, it may be that, since a criminal defendant is present at trial when his confession is admitted into evidence, he is not unavailable in the sense that the Crawford Court used that term.\textsuperscript{18}

This essay will consider, in turn, these possible explanations for the outcomes in the post-Crawford testimonial confession cases. It will also consider whether Crawford should apply to the other categories of party admissions covered by Rule 801(d)(2). Finally, it will argue that a plausible reading of Crawford would result in the exclusion of confessions that were not been cross-examined at the time they were made and predict how the Supreme Court might avoid this unintended outcome.

Part II: Does A Defendant’s Confession Satisfy Crawford’s Three Pre-Requisites?

A. Is a Defendant’s Confession “Testimonial”?

Crawford applies only to “testimonial” out-of-court statements, the “comprehensive definition” of which the Court intentionally left to be worked out in future cases.\textsuperscript{19} Nonetheless, the Court made it clear that a statement made in response to police interrogation falls squarely within its “core class” of testimonial statements.\textsuperscript{20} To reach this position, Justice Scalia, writing for the majority in Crawford, started with the language of the Confrontation Clause: “In all criminal prosecutions, the accused shall enjoy the right … to be confronted with the witnesses against him ….”\textsuperscript{21} Justice Scalia then turned to history to determine what the founders understood “witness against” a defendant to mean -- “those who actually testify at trial, those

\textsuperscript{17}See Freda F. Bein, Parties’ Admissions, Agent’s Admissions: Hearsay Wolves in Sheep’s Clothing, 12 HOFSTRA L. REV. 393, 403 (1984).
\textsuperscript{18} See infra pp. .
\textsuperscript{19} Crawford v. Washington, 541 U.S. at 68.
\textsuperscript{20} Id. at 51-52.
\textsuperscript{21} U.S. CONST. amend. VI.
whose statements are offered at trial, or something in-between.”22 Notwithstanding this
indication of a somewhat broader inquiry, Justice Scalia’s focus thereafter is almost exclusively
upon out-of-court statements that might have been offered in evidence at trial and whether cross-
abroad examination of such a statement was a pre-requisite to its admissibility.23 One source of
evidence similar to a modern police interrogation was the “Marian” bail and committal
procedure24 which “required justices of the peace to examine suspects and witnesses in felony
cases and certify the results to the court.”25 And while there was once some doubt whether the
cross-examination requirement applied to these interrogations, “by 1791 (the year the Sixth
Amendment was ratified), courts were applying the cross-examination rule even to examinations
by justices of the peace in felony cases.”26

Those who must be cross-examined – i.e., witnesses -- are those who give testimony
which is “'[a] solemn declaration or affirmation made for the purpose of establishing or proving
some fact.'”27 According to Justice Scalia, it is therefore such “testimonial” statements, when
offered in evidence at trial, which must have been cross-examined at the time made if the person
who made the statement is unavailable to testify. Since “[s]tatementss taken by police officers in

22 Crawford v. Washington, 541 U.S. at 43 (citations omitted).
23 Id. at 43-51. Indeed, Justice Scalia flatly rejected “the view that the Confrontation Clause applies of its own
force only to in-court testimony.” Id at 51.
24 Id. at 52
25 Id. at 44.
26 Id. (citations omitted)
27 Id. at 51. It is clear that in the early common law period, criminal defendants were not witnesses, nor was there
cross-examination, in the way we use those terms today. The defendant participated in the trial as an unsworn
witness, unrepresented by counsel. John H. Langbein, The Historical Origins Of The Privilege Against Self
Incrimination At Common Law, 92 Mich. L. Rev. 1047, 1049 (1994). The purpose of the trial “was to provide the
accused an opportunity to explain away the prosecution case.” Id. “The result was that, during the period in
question [1554-1637], the examination of the prisoner, which is at present scrupulously, and I think even
pedantically, avoided, was the very essence of the trial, and his answers regulated the production of the evidence…..”
1 James Fitzjames Stephen, HISTORY OF THE CRIMINAL LAW ENGLAND 325-326 (1883). Thus, during the
common law trial, the defendant’s participation was arguably the functional equivalent of testifying.
the course of interrogations are … testimonial,” as a definitional matter a defendant’s own confession could be included within this category. Nonetheless, it seems clear that Justice Scalia meant to include only statements made by “[a]n accuser who makes a formal statement to government officers.”

Yet, reading a defendant’s confession to the police out of Crawford’s definition of “testimonial” statements is problematic for several reasons. First, as the analysis above suggests, such an interpretation is contrary to the plain language of Crawford. Second, it leads to an unavoidable contradiction -- an accusatory statement made by a third party to the police is “testimonial,” while a self-accusatory statement made by a defendant under exactly the same circumstances is not. And, finally, it would put Crawford’s understanding of “witness” in the Confrontation Clause at odds with the Court’s interpretation of the same word in the Fifth Amendment.

More than a dozen years before Crawford was decided, Professor Akhil Amar made an argument for a Crawford-like reading of the Confrontation Clause which avoids these problems. Professor Amar, starts from the proposition that “[i]n ordinary language, when witness A takes the stand and testifies about what her best friend B told her out of court, A is the witness, not B. Imagine, for example, that B were later asked whether she had ever before been a witness in a criminal prosecution. Surely B would say no…” Accordingly, an “’out-of-court declarant whose utterance is introduced for the truth of the matter of asserted’” is only considered to be a witness when it is necessary to prevent violations of the Confrontation Clause

28 Id. at 52.
29 Id. at 51.
30 U.S. CONST. amend. V: “No person … shall be compelled in any criminal case to be a witness against himself.”
32 Id. at 127
by prosecutorial “sneakiness.”
 Thus, witnessing encompasses some kinds out-of-court statements, such as, “videotapes, transcripts, depositions, and affidavits when prepared for court use and introduced as testimony,” including any such substitute testimony given by the defendant “under penalty of contempt.”
 This distinguishes Professor Amar’s approach to confrontation from Crawford’s by excluding a defendant’s confession to the police since there is no threat of contempt when the police interrogate a defendant. The confessing defendant is therefore not a witness and his confession is not “testimonial.” The witness whom the defendant has right to confront is the police officer who took his confession.

Could a post-Crawford Court adopt Professor Amar’s limitation on the types of out-of-court statements which require confrontation to those made by defendants “under penalty of contempt”? Unfortunately this simple and elegant solution would require the Court to return to its pre-Miranda understanding of what being compelled to be a “witness” means in the Fifth Amendment, and that would result in assigning different meanings to the same word used in different sections of the Constitution. As a matter of constitutional interpretation, this is not a desirable outcome.

Of course, sometimes words in a legal document mean something different from the same words in ordinary language. However, in a Constitution ratified by, subject to, and proclaimed in the name of, the people, it would be unfortunate if words generally could not be taken at face value. At any rate, surely a careful ordinary citizen reading the confrontation clause and pondering the word witness might see how the word is used elsewhere in the Constitution itself.

The Court’s pre-Miranda regulation of the admissibility of confessions resulting from police interrogations focused on whether they were “voluntary” and thus comported with the

33 Id. at 128-29.
34 Id. at 128.
36 Amar, supra at 127-28.
Due Process Clause of the Fourteenth Amendment. By contrast, the Fifth Amendment’s prohibition against compelling a person to be a “witness against himself” was limited to statements made under some form of judicial compulsion, which was not present during police interrogations. Therefore, a defendant who confessed to the police was not a “witness.”

_Miranda_ expanded the concept of “witness” by extending the Fifth Amendment to reach statements made by a defendant during police interrogations where “the compulsion to speak in the isolated setting of the police station may well be greater than in courts or other official investigations….” _Miranda_ clearly recognizes that a defendant is a “witness” during a police interrogation. _Crawford_ holds that the statements made during police interrogations are “testimonial” and that the witnesses who make them must be cross-examined. It is thus not possible to limit _Crawford’s_ “testimonial” statements to those made by the defendant to the police “under penalty of contempt” without reaching the conclusion that that word “witness” means something different in the Sixth Amendment than it does in the Fifth.

### B. Are Confessions Hearsay?

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37See, e.g., _Hopt v. People of the Territory of Utah_, 110 U.S 574 (1884) (holding a confession that violated the common law voluntariness rule inadmissible). Thirteen years later, in _Bram v. United States_, 168 U.S. 532 (1897), the Court used the self-incrimination clause of the Fifth Amendment to preclude a statement compelled by coercive police interrogation tactics. _Bram_, for the first time, made the admissibility of confessions a matter of constitutional significance. Steven Penney, _Theories Of Confession Admissibility: A Historical View_, 25 Am. J. CRIM. L. 309, 327 (1998). “The fact that the interrogation was conducted by a police officer and not a judge or examining magistrate was immaterial; the privilege against self-incrimination demanded the exclusion of confessions obtained by the application of any form of external pressure.” _Id_. at 328. Nonetheless, “for two-thirds of a century the Court never explicitly and exclusively relied on the privilege against self-incrimination to suppress the use of a confession in another federal case. After _Bram_ and until 1964, the Court turned to the Due Process Clause to decide coerced confession cases.” Stephen A. Saltzburg and Daniel J. Capra, _American Criminal Procedure: Cases and Commentary_ 652 (9th ed. 2010) (citation omitted).

38 See _Murphy v. Waterfront Comm._, 378 U.S. 52, 55 (1964). (“[The privilege against self-incrimination] reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt ….”)


41 This conclusion is not altered by the Court’s two most important post- _Crawford_ elaborations on the definition of “testimonial,” neither of which involved police interrogation of a defendant. See _Davis v. Washington_, 547 U.S. 813 (2006) and _Michigan v. Bryant_, 131 S.Ct. 1143 (2011).
While there is “general agreement that the prosecution is entitled to introduce confessions, …the conceptual basis for this position is somewhat unclear.”42 The Advisory Committee Notes (ACN) to the Federal Rules of Evidence do little to elucidate what that conceptual basis might be. The ACN categorize admissions by a party-opponent as not hearsay because their admissibility “is the result of the adversary system rather than satisfaction of the conditions of the hearsay rule.”43 One explanation of the the Advisory Committee’s position is:

The exceptions to the hearsay rule apply to admit hearsay when surrounding circumstances provide guarantees of reliability. There are no guarantees of reliability in the case of an admission. Therefore admissions do not qualify for an exception to the hearsay rule. Nevertheless, admissions have been received into evidence since time immemorial. If they do not qualify as an exception, then they must have been received because they are not hearsay at all.44

But there is a circularity in this rationalization that begs the real question. The essence of hearsay, as it is defined in the Federal Rules, is “an out-of-court assertion offered to prove the truth of the matter asserted….45 Since a defendant’s confession unambiguously meets this definition, how is it somehow mysteriously dubbed “not hearsay” just because it has been received in evidence from “time immemorial”?46

43 Fed. R. Evid. 801(d)(2) advisory committee’s note. The authorities cited by the ACN in support of the language quoted in the text on balance viewed party admissions as hearsay, subject to an exception to the hearsay rule. Bein, supra note at 404 n. 67.
45 Strong, et.al., supra note at § 246.
46 Indeed, in another passage the ACN concede the hearsay status of party admissions. Fed. R. Evid. § 801(d), advisory committee’s note (stating that “statements which would otherwise literally fall within the definition of hearsay are expressly excluded from it”); Bein, supra note at 403:
Commentators have therefore sought to explain the use of party admissions by modern methods of classification. One group holds that party admissions are admissible because they are analytically ‘not hearsay.’ The other group concedes the hearsay nature of party admissions, but argues that they constitute a desirable exception to the hearsay rule.
One prominent 20th century commentator tackled this conundrum head on. After examining and rejecting several theories for the admissibility of party admissions as other than exceptions to the hearsay rule, Professor Morgan concluded:

Certain it is that extra-judicial admissions are received in evidence. Equally certain is it that they are received for the purpose of proving the truth of the matter admitted. It is likewise certain that they do not fall within that exception to the rule against hearsay which admits declarations against interest. These are facts from which the conclusion is inevitable that they are received as an exception of the rule against hearsay, and not that they are received on any theory that they are not hearsay.

According to Professor Morgan such statements are admitted into evidence as exceptions to the hearsay rule because “[a]ll the substantial reasons for excluding hearsay” do not apply to these statements, i.e. the party against whom they are offered cannot complain about the “lack of confrontation,” “the lack of opportunity for cross-examination,” or the fact that she “was not under oath.” Thus, Professor Morgan faced the inescapable fact that confessions fall squarely within the definition of hearsay and that they are admissible in evidence as an exception to that rule. Given the definition of hearsay, the logic of this position is unassailable. Confessions, therefore, should be classified as “testimonial hearsay” for Crawford purposes.

C. Are Criminal Defendants Unavailable Witnesses?

47 Edmund M. Morgan, Admissions as an Exception to the Hearsay Rule, 30 Yale L.J. 355, 355-359 (1920-21) (rejecting arguments that extra-judicial party admissions were treated the same as judicial admissions; that they were evidence of the state of mind of the declarant; that they impeached the declarant’s position at trial and therefore were not admitted for their truth; or that they fell within the declarations against interest exception to the hearsay rule).

48 Id. at 359-360. Morgan consistently advanced this position. See e.g., Edmund M. Morgan, Admissions, 12 Wash. L. Rev. 181 (1937); Edmund M. Morgan, Some Suggestions for Defining and Classifying Hearsay, 86 U.P.A. L. Rev. 258 (1938).

49 Id. at 361.

50 Id.

51 Florida treats party admissions, including confessions, as hearsay subject to an exception to the hearsay rule. Fla. Stat. § 90.803(18)(a). Professor Ehrhardt, the leading commentator on Florida evidence, comparing the federal and Florida approaches, concludes that while “there is a difference in the method of defining whether it is an exception or an exclusion, an admission is admissible in the same circumstances under both the federal and Florida codifications. It is a distinction without a practical difference.” Charles W. Ehrhardt, Florida Evidence § 803.18, at 855 (2005). See also Fisher, supra note at 393 (“You are best off thinking of all of the above categories [including 801(d)(2)(A)] as exceptions to the [hearsay] rule.”)
Despite the categorization of a confession as “testimonial hearsay,” Crawford’s cross-examination requirement would apply only if the declarant is unavailable as a witness at trial.\textsuperscript{52} But what exactly does unavailable mean? Unavailable entirely? Or, unavailable to the party seeking to introduce the out-of-court statement? If unavailable means unavailable to the party offering evidence of an out-of-court statement, then a criminal defendant is clearly unavailable as a witness when the prosecution offers her confession in its case-in-chief.\textsuperscript{53} The Federal Rules of Evidence define the relevant form of unavailability:

A declarant is considered to be unavailable as a witness if the declarant:

(1) is exempted by a court ruling on the ground of having a privilege to not testify about the subject matter of the declarant’s statement….\textsuperscript{54}

This test of unavailability clearly applies to a criminal defendant who has a valid claim of privilege which prevents the prosecution from calling her as a witness.\textsuperscript{55} So, at least in that sense, a defendant is unavailable as a witness at the time the prosecution offers her confession during its case-in-chief.\textsuperscript{56}

On the other hand, a criminal defendant is clearly not unavailable as a witness in any absolute sense. She has the right to testify on her own behalf. Moreover, she has an advantage that other witnesses do not have – the Confrontation Clause guarantees her right to be present in court while the prosecution witnesses testify. And indeed, the fact that the defendant has that advantage, as well as the option to testify, seems to undergird the admissibility of party

\textsuperscript{52} Crawford v. Washington, 541 U.S. at 59 (“Testimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine.”)


\textsuperscript{54} Fed. R. Evid. 804(a)(1). A valid claim of marital privilege is why Sylvia Crawford, whose out-of-court statement was offered in evidence by the prosecution, was “unavailable” as a prosecution witness in Crawford. Crawford v. Washington, 541 U.S. at 40.

\textsuperscript{55} See Counselman v. Hitchcock, 142 U.S. 547, 562 (1892).

\textsuperscript{56} See United States v. Liley, 581 F.2d 182, 187 (8th Cir. 1978) (defendant’s husband unavailable to prosecution as a witness during its case-in-chief due to defendant’s invocation of marital privilege).
admissions as exceptions to the hearsay rule. Thus, the defendant against whom such evidence is offered “is in no position to object on the score of lack of confrontation or lack of opportunity for cross-examination,”\(^57\) for, as Professor Morgan observes:

> He [the in-court witness] is confronting the very person whose statements he is reporting, he is subject to cross-examination by counsel who has at his elbow the person who knows all the facts and circumstances of the alleged statements and who, is therefore in the best possible position to conduct a searching inquiry, and, finally, the declarant may himself go upon the stand and deny, qualify or explain the alleged admissions.\(^58\)

This may be a plausible rationale for excepting confessions from the hearsay ban, but it does not address whether a defendant who has the option to testify at the point when the prosecutor offers the confession in evidence is “available” as a witness, thereby satisfying \textit{Crawford}.

A case which may shed some light on this question is \textit{United States v. Owens}.\(^59\) There, the Supreme Court considered whether a prosecution witness, who had suffered a profound memory loss, “testifies at the trial or hearing is subject to cross-examination,” a pre-requisite to the admission of his out-of-court identification of the defendant.\(^60\) Justice Scalia wrote for the Court that “a witness is regarded as ‘subject to cross-examination’ when he is placed on the stand, under oath and responds willingly to questions….”\(^61\) It seems clear that \textit{Owens} means that in order for the prosecutor to introduce an out-of-court identification, she must call the witness who made the identification so that she may be cross-examined.

\(^{57}\) Morgan, \textit{supra} note at 361.

\(^{58}\) Id. This view is consistent with Professor Amar’s interpretation of the confrontation right which would apply to the witness who reports the hearsay statement in court and not to the out-of-court hearsay declarant. Amar, \textit{supra} note at 127.


\(^{60}\) Id. at 561.

\(^{61}\) Id.
By analogy, *Crawford’s* cross-examination requirement must also mean that the prosecutor must call the witness who made the out-of-court statement. This criterion is not met when the prosecutor offers the confession of a criminal defendant, even though she is present in court at the time.

Part III: *Crawford’s* Applicability to Other Party Admissions

Confessions are not the only party admissions that some lower courts have exempted from *Crawford* simply because they are deemed “not hearsay.” 62 Subsections (B)-(E) of Rule 801(d)(2) apply to statements made by others which are attributed to the defendant. And, with the exception of adopted statements 63 which must be made in the defendant’s presence, 64 the argument is even stronger that *Crawford’s* cross-examination requirement should apply to these statements, 65 despite their designation as “not hearsay,” because the defendant need not be present when such statements are made or even be aware of their contents. Thus, the defendant may not be able to provide her counsel with ammunition to cross-examine the witness who appears in court. 66 Nor, does the defendant have the option to testify that the statement was not

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62 See United States v. Hargrove, 508 F.3d 445, 449 (7th Cir. 2007) (co-conspirator statements); United States v. Yi, 460 F.3d 623, 634 (5th Cir. 2006) (agent’s statements); United States v. Jenkins, 419 F.3d 614, 618 (7th Cir. 2005) (co-conspirator statements).
63 FED. R. EVID. 801(d)(2)(B).
64 Jenkins v. Anderson, 447 U.S. 231, 248-49 (1980) (Marshall, J., dissenting) (“[S]ilence was traditionally considered a tacit admission if a statement made in the party's presence was heard and understood by the party, who was at liberty to respond, in circumstances naturally calling for a response, and the party failed to respond.”).
65 These statements are authorized by the defendant (Rule 801(d)(2)(C)), made by the defendant’s agent (Rule 801(d)(2)(D)), or made by the defendant’s co-conspirators (Rule 801(d)(2)(E)).
66 See supra p.
what she said.67 Finally, and perhaps most obviously, since the declarant is someone other than the defendant, cross-examination is possible.

Cross-examination of a declarant who makes a statement which is attributed to a defendant is also particularly important because, unlike statements admitted as hearsay exceptions, party admissions need not be predicated on personal knowledge and are free from the restrictions placed upon opinion evidence.68 This point is well-illustrated by the leading post-Federal Rules case on the admissibility of an agent’s statements.69 In that case, the agent’s statements, which were not based on personal knowledge, were admissible despite the fact that they contained misleading, even false, information.70 Fortunately, these statements were used in a civil case and the agent was available to be called as a witness. Imagine the consequences if these statements had been admitted in a criminal case as the statements of an un-cross-examined, unavailable agent. In such circumstances, Crawford should certainly bar the evidence if there was no cross-examination of the declarant.

At least one post-Crawford court has taken this approach to party admissions not made by the defendant herself. In United States v. Baines,71 the court encountered the exceedingly rare case of a testimonial co-conspirator declaration.72 Finding that the statement was admissible hearsay, the court nonetheless concluded that:

An examination of Crawford shows that the Supreme Court did not intend for its decision with respect to testimonial statements to be abrogated by a rule of evidence. While the

67 Id.
69 Mahlandt v. Wild Canid Survival & Research Center, Inc., 588 F.2d 626 (8th Cir. 1978).
70 Bein, supra note at 401 (The “utterances [in Mahlandt] were only the latest example of a class of evidence that must be ranked among the least trustworthy of all proof admissible at trial.”)
72 Id. at 1299. In Baines, the co-conspirator statements were made in response to police interrogation before the conspiracy was foiled by the discovery of drugs in the cars they were driving.
Court cited co-conspirator statements as an example of non-testimonial evidence, its decision did not issue a mandate that all co-conspirator statements are to be considered non-testimonial. …What the Court did make clear is that testimonial statements are subject to the Confrontation Clause, whether or not such statements may also fall within a hearsay exception.73

Part V: Conclusions

Some may dismiss this essay as sophistry. They might argue that since it is apparent that what the Confrontation Clause guarantees is a defendant’s right to cross-examination and since it is impossible for a defendant to cross-examine himself, the confrontation right simply does not apply to the defendant’s own confession.74 But the point of this intentionally provocative piece has been to suggest that a literal reading of Crawford could lead to unintended results. Crawford says that un-cross-examined “testimonial hearsay” statements of unavailable witnesses are inadmissible, period. And whether they might be otherwise reliable hearsay is simply beside the point.75 Thus, however unlikely it might be, it is possible to read Crawford to mean that the prosecution may not offer into evidence a defendant’s out-of-court confession unless the defendant is on the witness stand. This outcome, of course, would be extremely costly in confession cases because prosecutors would be foreclosed from using valuable evidence that is

73 Id. at 1299-1300; see also Crawford v. Washington, 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, much less to amorphous notions of ‘reliability.’”)
74 United States v. Lafferty, 387 F.Supp 2d 500, 510 (W.D. Pa. 2005), rev’d on other grounds, 503 F.3d 293 (3rd Cir. 2007) (“Inherent in Justice Scalia’s analysis in the Crawford opinion was the idea that the right of confrontation exists as to accusations of third parties implicating a criminal defendant, not a criminal defendant implicating himself.”).

But whatever improvement in reliability Crawford produced in this respect must be considered together with Crawford’s elimination of Confrontation Clause protection against the admission of unreliable out-of-court nontestimonial statements. Under Roberts, an out-of-court nontestimonial statement not subject to prior cross-examination could not be admitted without a judicial determination regarding reliability. Under Crawford, on the other hand, the Confrontation Clause has no application to such statements and therefore permits their admission even if they lack indicia of reliability.
highly relevant to the determination of guilt. But if Crawford’s interpretation of the Confrontation Clause is correct, that price is one exacted by our Constitution.\textsuperscript{76}

It is a fair question whether there is a principled way the Court could avoid coming to that conclusion, aside from saying that the Confrontation Clause is simply inapplicable when the evidence is the defendant’s confession. That route, as I argued above, would require the Court to face the question whether witness in the Sixth Amendment has different meaning than it has in the Fifth. Needless to say, that is a question the Court might prefer to duck. There is, however, a hint in Crawford which suggests another path the Court might take.

In a footnote, Justice Scalia alluded to dying declarations and opined that they might be a \textit{sui generis} exception to Crawford’s cross-examination mandate on “historical grounds,” given the undisputed practice of admitting them as exceptions to the hearsay rule.\textsuperscript{77} Though Justice Scalia does not say so, the need for this \textit{sui generis} exception for dying declarations may be due to a characteristic they share with a defendant’s confession – the impossibility of cross-examining the declarant either at the time the statement is made or at trial. What Justice Scalia proposed as a solution would work equally well for confessions since the “historical grounds” for the use of confessions as evidence are even more compelling than are those for dying declarations.\textsuperscript{78} Ironically, however, this solution is premised on the reliability of statements that

\textsuperscript{76} See United States v. Leon, 468 U.S. 897, 941 (1984) (Brennan, J. dissenting) (“It is the loss of that evidence that is the ‘price’ our society pays for enjoying the freedom and privacy safeguarded by the Fourth Amendment. Thus, some criminals will go free not, in Justice (then Judge) Cardozo's misleading epigram, “because the constable has blundered,” … but rather because official compliance with Fourth Amendment requirements makes it more difficult to catch criminals.”).

\textsuperscript{77} Crawford at 55 n.6.

\textsuperscript{78} For example, the cases approving the admission of a defendant’s voluntary confession are even older than the one cited by Justice Scalia in support of an “historical” exception for dying declarations. \textit{Compare} Hopt v. Utah, 110 U.S. 574 (1884) (confessions) with Mattox v. United States, 156 U.S. 237 (1895) (dying declarations); \textit{see also} Crawford v. Washington, 541 U.S. at 541 (citing authorities indicating that at least by the 18\textsuperscript{th} Century, confessions were regularly admitted in evidence against criminal defendants).
have long been admitted as exceptions to the hearsay rule,\textsuperscript{79} an approach which is more in line with \textit{Roberts’} approach to confrontation analysis,\textsuperscript{80} than it is with \textit{Crawford’s}.

\textsuperscript{79} \textit{Ohio v. Roberts}, 448 U.S. 56, 66 (1980) ("The Court has applied this ‘indicia of reliability’ requirement principally by concluding that certain hearsay exceptions rest upon such solid foundations that admission of virtually any evidence within them comports with the ‘substance of the constitutional protection.’" (quoting \textit{Mattox v. United States}, 156 U.S. at 244).

\textsuperscript{80} There is some indication that at least in some situations, the Court may be returning to reliability as the keystone to satisfying confrontation concerns. \textit{See \textit{Michigan v. Bryant}}, 131 S.Ct. 1143, 1155 (2011):

But there may be other circumstances, aside from ongoing emergencies, when a statement is not procured with a primary purpose of creating an out-of-court substitute for trial testimony. \textit{In making the primary purpose determination, standard rules of hearsay, designed to identify some statements as reliable, will be relevant}. Where no such primary purpose exists, the admissibility of a statement is the concern of state and federal rules of evidence, not the Confrontation Clause.

Justice Scalia dissented in \textit{Bryant}, characterizing the Court’s decision as “a revisionist narrative in which reliability continues to guide our Confrontation Clause jurisprudence, at least where emergencies and faux emergencies are concerned.” \textit{Id.} at 1174.