



The Confrontation Clause and the Hearsay Rule:
What Hearsay Exceptions are Testimonial?

The Honorable Paul W. Grimm
Jerome Deise
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ARTICLE

THE CONFRONTATION CLAUSE AND THE HEARSAY RULE: WHAT HEARSAY EXCEPTIONS ARE TESTIMONIAL?

By: The Honorable Paul W. Grimm,*
Jerome Deise,** and John R. Grimm***

I. INTRODUCTION

There is a natural tension between the Confrontation Clause's requirement that a criminal defendant be "confronted with the witnesses against him"¹ and the hearsay rule's tolerance of statements made by declarants who are not present at trial.² Although most hearsay rules allow a declarant to be unavailable, and some even *require* it,³ only one federal hearsay exception⁴ and several Maryland exceptions require a

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¹ U.S. CONST. amend. VI.

² Compare *id.* (requiring opportunity to confront witnesses) with FED. R. EVID. 803 (admitting hearsay regardless of declarant's availability), Md. Rule 5-803 (same), FED. R. EVID. 804 (admitting hearsay if declarant is unavailable), and Md. Rule 5-804 (same).

³ See FED. R. EVID. 804; Md. Rule 5-804.

⁴ See FED. R. EVID. 803(5) (past recollection recorded). The "requirement" of an available declarant is mechanical, not substantive, arising out of the fact that the rule only applies when a witness who is already testifying "now has insufficient recollection." *Id.*

declarant to testify.⁵ In a criminal trial, therefore, it is easy to encounter a situation in which a defendant cannot confront an unavailable declarant whose statement nevertheless meets a hearsay exception.

From the current Supreme Court and Maryland appellate court cases concerning the Confrontation Clause, a series of principles can be divined to assist the busy trial judge or practitioner in quickly and accurately analyzing Confrontation Clause issues that may arise, even in the heat of a trial, where calm deliberation is not possible. We summarize them below in outline form, and then we explain how the Supreme Court and Maryland appellate courts have applied them to certain hearsay exceptions. Finally, we dare to suggest how the principles likely will be applied in the future to various commonly encountered hearsay exceptions that the courts have not yet addressed.

II. CONFRONTATION CLAUSE OVERVIEW

A. *Crawford v. Washington: A New Touchstone of Admissibility*

In 2004, the Supreme Court fundamentally altered its Confrontation Clause jurisprudence in *Crawford v. Washington*.⁶ Prior to *Crawford*, the controlling case was *Ohio v. Roberts*.⁷ Under *Roberts*, a court could allow the admission of an unavailable declarant's statement as long as it bore sufficient "indicia of reliability,"⁸ either by meeting an established hearsay exception or possessing other particularized guarantees of trustworthiness.⁹ *Crawford* involved a tape-recorded statement to police in which the defendant's wife described the defendant stabbing the victim with a knife.¹⁰ The wife was unable to testify against her husband at trial because of the state's spousal privilege, and, as a result, the State sought to introduce her recorded statement, which was not barred by the privilege.¹¹ The trial judge, and ultimately the Washington Supreme Court, found that, under *Roberts*, the statement bore the necessary indicia of reliability, and allowed its admission.¹²

⁵ See Md. Rule 5-802.1, which allows the admission of certain out-of-court statements as long as the declarant testifies at trial. Substantively, this rule has a federal analogue, which also requires that the declarant testify. See FED. R. EVID. 801(d)(1) (applying to statements when "[t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement"). However, under the Federal Rules these statements are defined as non-hearsay, as opposed to exceptions. Compare FED. R. EVID. 801(d) with Md. Rule 5-802.1.

⁶ 541 U.S. 36 (2004).

⁷ 448 U.S. 56 (1980), abrogated by *Crawford*, 541 U.S. 36, superceded by statute as stated in *Snowden v. State*, 156 Md. App. 139, 846 A.2d 36 (2004).

⁸ *Dutton v. Evans*, 400 U.S. 74, 89 (1970).

⁹ *Roberts*, 448 U.S. at 66.

¹⁰ 541 U.S. at 38.

¹¹ *Id.* at 40.

¹² *Id.* at 40-41.

The Supreme Court, however, reversed this decision and held that the *Roberts* test did not satisfy the Sixth Amendment's Confrontation Clause.¹³ Under the new approach laid out in *Crawford*, merely meeting a hearsay exception is not enough to satisfy the Confrontation Clause.¹⁴ The Sixth Amendment, the Court held, guarantees the defendant the right to confront anyone who bears testimony¹⁵ against him, including a hearsay declarant.¹⁶ If a witness was absent at trial, the only way his or her out-of-court testimonial statement could be admitted is if he or she was unavailable,¹⁷ and the defendant had a prior opportunity to cross-examine her.¹⁸

Because a witness, for purposes of the Sixth Amendment, is one who "bears testimony,"¹⁹ *Crawford* shifted the touchstone of admissibility from a statement's reliability to its testimonial nature.²⁰ Thus, the key to understanding *Crawford*'s scope is understanding which statements are testimonial. Testimony, according to *Crawford*, is a "solemn declaration or affirmation made for the purpose of establishing or proving some fact."²¹ Statements taken by police officers during an interrogation²² are the clearest example of testimonial statements.²³ Beyond this, however, the Court obliquely left "for another day any effort to spell out a comprehensive definition of 'testimonial,'" ²⁴ which it did not do until 2006, when it decided *Davis v. Washington*.²⁵

B. Defining "Testimonial" Statements

The Supreme Court first elaborated its definition of "testimonial" in *Davis v. Washington*.²⁶ *Davis* turned on whether a recorded 911 call was

¹³ *Id.* at 60 (rejecting *Roberts* test).

¹⁴ *See id.* at 51 ("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.")

¹⁵ *Id.* (defining "witnesses" as "those who 'bear testimony' ") (quoting NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 114a (1828)).

¹⁶ *Crawford v. Washington*, 541 U.S. 36, 51 (2004).

¹⁷ The Court does not define "unavailable," but the rules of evidence provide detailed definitions of when the declarant of a statement is unavailable. *See* FED. R. EVID. 804(a); Md. Rule 5-804(a).

¹⁸ *Crawford*, 541 U.S. at 53-54.

¹⁹ *See supra* note 15.

²⁰ *Crawford*, 541 U.S. at 68.

²¹ *Id.* at 51 (quoting NOAH WEBSTER, *supra* note 15, at 91c).

²² The Court uses this term in the colloquial, not the technical legal sense. *Id.* at 53 n.4. However, not every conversation with police is an interrogation. *See Davis v. Washington*, 547 U.S. 813, 826 (2006) ("[W]e had immediately in mind [in *Crawford*] . . . interrogations solely directed at establishing the facts of a past crime . . .").

²³ *Crawford*, 541 U.S. at 52.

²⁴ *Id.* at 68.

²⁵ 547 U.S. 813 (2006).

²⁶ *Id.*

testimonial.²⁷ During a murder trial, the State sought to introduce a 911 recording in which the victim identified the defendant as her attacker.²⁸ The 911 call presented a close question: Because it involved questioning by law enforcement, it could conceivably be considered an interrogation. However, it was made during an ongoing emergency, not an investigation.²⁹ The Court held that a statement made to the police is nontestimonial if the circumstances objectively indicate that the primary purpose of the “interrogation” is to enable the police “to meet an ongoing emergency.”³⁰ A statement *is* testimonial if (1) the circumstances objectively indicate there is no ongoing emergency, and (2) the primary purpose of the interrogation is to establish or prove events relevant to later criminal prosecution.³¹ Because a 911 call, or at least the initial portion of a 911 call, is not ordinarily designed to establish or prove a past fact, but rather, to describe current circumstances, the call (or part of the call) will normally not be testimonial.³²

Davis developed *Crawford*'s inchoate definition of “testimonial,” but it muddied the waters in terms of when *Crawford* applies. Although judges need no longer make subjective determinations of trustworthiness, *Davis* now requires them to determine what the circumstances objectively indicate the purpose of a police interaction to be.³³ The *Davis* test clarified the definition of “testimonial” only to the extent the specific facts of *Davis* required.³⁴ It also intended to clarify which police *interrogations* are testimonial.³⁵ Thus, although it is the Court's clearest pronouncement to date on what is “testimonial,” *Davis* is not entirely clear about whether “[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact”³⁶ follows the objective “primary purpose” test if it is not made to a police officer.

There is support, however, for the idea of a general “primary purpose” test that determines if a statement is testimonial. In *Crawford*, the Court listed a series of possible definitions of “testimonial,” which included “statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be

²⁷ *Id.* at 817.

²⁸ *Id.* at 817-18.

²⁹ *See id.* at 823 (discussing difficulty of classifying 911 call as interrogation).

³⁰ *Id.* at 822.

³¹ *Davis v. Washington*, 547 U.S. 813, 822 (2006).

³² *Id.* at 827.

³³ *See id.* at 834 (Thomas, J., dissenting) (criticizing the majority for introducing a test as unpredictable as the *Roberts* test).

³⁴ *See id.* at 822 (holding definition of “testimonial” “suffices to decide the present cases”).

³⁵ *See id.* (distinguishing between testimonial and nontestimonial statements “when made in the course of police interrogation”).

³⁶ *Crawford*, 541 U.S. at 51 (quoting NOAH WEBSTER, *supra* note 15, at 91c).

available for use at a later trial.”³⁷ The Court has referred back to this particular formulation in later cases.³⁸ Thus, while the Court has not articulated a comprehensive test for whether a statement is testimonial, a common attribute to all testimonial statements is the objective likelihood that they be used in trial.

C. Exceptions to the Confrontation Requirement

Although *Crawford* extended Sixth Amendment protections to even reliable statements of unavailable declarants, the Court did recognize that some limits to the Confrontation Clause exist. *Crawford*'s holding turned predominately on a historical analysis of the purpose of the Sixth Amendment.³⁹ Any exception to the confrontation requirement that existed when the Sixth Amendment was drafted would allow such statements to be admitted under *Crawford* as well. The only possible confrontation exception is dying declarations,⁴⁰ but the Court stopped short of deciding the issue, and noted that, if dying declarations are an exception, they are *sui generis*.⁴¹

The Court has recognized one additional exception on equitable, rather than historical grounds, which is forfeiture by wrongdoing.⁴² The rule of forfeiture by wrongdoing admits statements when the defendant's wrongdoing procured the declarant's unavailability, for the purpose of preventing the declarant from testifying.⁴³ The Supreme Court, in *Giles v. California*,⁴⁴ clarified that the forfeiture exception to the Confrontation Clause is a narrow one. In *Giles*, the State introduced a murder victim's testimonial statements at trial.⁴⁵ The California Supreme Court held that the statements satisfied the forfeiture by wrongdoing rule embraced by *Crawford* because the defendant's intentional criminal act made the

³⁷ *Id.* at 52 (quoting Brief for National Association of Criminal Defense Lawyers et al. as *Amici Curiae* 3).

³⁸ *See* *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2531 (2009) (finding forensic reports testimonial when an objective witness “would . . . reasonably . . . believe that the statement would be available for use at a later trial”) (quoting *Crawford*, 541 U.S. at 52).

³⁹ *See* *Crawford*, 541 U.S. at 54-57 (discussing history of the Sixth Amendment).

⁴⁰ *Id.* at 56 n.6 (“The one deviation we have found involves dying declarations Although many dying declarations may not be testimonial, there is authority for admitting even those that clearly are.”) (internal citations omitted); *see generally* FED. R. EVID. 804(b)(2) (modern federal dying declaration exception); Md. Rule 5-804(b)(2) (modern Maryland dying declaration exception).

⁴¹ *Crawford*, 541 U.S. at 56 n.6. “*Sui generis*” is defined as “[o]f its own kind or class; unique or peculiar.” BLACK’S LAW DICTIONARY 1572 (9th ed. 2009).

⁴² *Crawford*, 541 U.S. at 62 (“[F]orfeiture by wrongdoing (which we accept) extinguishes confrontation claims on essentially equitable grounds . . .”).

⁴³ *See* FED. R. EVID. 804(b)(6); Md. Rule 5-804(b)(5).

⁴⁴ 128 S. Ct. 2678 (2008).

⁴⁵ *Id.* at 2682.

victim unavailable.⁴⁶ The Supreme Court vacated and remanded, noting that the forfeiture rule only applies when the defendant engaged in criminal conduct *designed* to prevent the witness from testifying.⁴⁷

D. Confronting Forensic Reports and Affidavits

An altogether different category of testimonial hearsay is found in reports written by forensic analysts. The Court first addressed the Confrontation Clause implications of these reports in *Melendez-Diaz v. Massachusetts*.⁴⁸ In *Melendez-Diaz*, the State sought to prove that a seized substance was cocaine by introducing three “certificates of analysis,” without calling the analysts who prepared the certificates as witnesses.⁴⁹ The Court found that the certificates easily fell into the “core class of ‘testimonial’ statements”⁵⁰ covered by *Crawford*.⁵¹ Whether referred to as “certificates,” “affidavits,” or something else, the documents were clearly “solemn declaration[s] or affirmation[s] made for the purpose of establishing or proving some fact.”⁵² Thus, if the government wishes to introduce a lab report against a criminal defendant, it may not do so unless the analyst who prepared the report testifies (or the analyst is unavailable but was previously cross-examined).⁵³ And, while the analyst who prepared the report must be called, the Court specifically rejected the notion that the prosecution must call everyone whose testimony is relevant to establish the chain of custody, the authenticity of the sample, or the accuracy of the testing device used to perform the analysis.⁵⁴

Melendez-Diaz did not explicitly resolve whether the Confrontation Clause requires the government to make an affiant *available* for the defendant to cross-examine, or whether the government must affirmatively call the witness in its case-in-chief. However, the Supreme Court apparently answered this question when it decided *Briscoe v. Virginia*⁵⁵ in 2010. *Briscoe* involved a Virginia statute, which provided that, when the prosecution introduces a forensic report, the Commonwealth must produce the analyst if the defendant wishes, and the defendant can examine him as a hostile witness.⁵⁶ This allowed the

⁴⁶ *Id.*

⁴⁷ *Id.* at 2683, 2693.

⁴⁸ 129 S. Ct. 2527 (2009).

⁴⁹ *Id.* at 2531.

⁵⁰ *Crawford*, 541 U.S. at 51.

⁵¹ *Melendez-Diaz*, 129 S. Ct. at 2532.

⁵² *Id.* (quoting *Crawford*, 541 U.S. at 51); *see also supra* note 21.

⁵³ *Melendez-Diaz*, 129 S. Ct. at 2532.

⁵⁴ *Id.* at 2532 n.1.

⁵⁵ 130 S. Ct. 1316 (2010) (per curiam).

⁵⁶ *See Magruder v. Commonwealth*, 657 S.E.2d 113 (Va. 2008), *cert. granted sub nom.*, *Briscoe v. Virginia*, 129 S. Ct. 2858 (2009), *vacated and remanded by* 130 S. Ct. 1316; VA.

government to introduce forensic reports against a defendant without calling the affiant, and it required the defendant to call the witness in her case-in-chief if she wished to confront him. Virginia argued that the Confrontation Clause is satisfied as long as the witness is subject to in-person cross-examination, and that the Sixth Amendment does not require that the prosecution call the analyst in its case-in-chief.⁵⁷ This position, however, is at odds with dictum in *Melendez-Diaz* to the effect that the defendant's ability to call a witness is "no substitute"⁵⁸ for confrontation:

Converting the *prosecution's duty* under the Confrontation Clause into the defendant's privilege under state law or the Compulsory Process Clause shifts the consequences of adverse-witness no-shows from the State to the accused. More fundamentally, the Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court. Its value to the defendant is not replaced by a system in which the prosecution presents its evidence via *ex parte* affidavits and waits for the defendant to subpoena the affiants if he chooses.⁵⁹

The *Briscoe* Court seems to have considered this language dispositive because, in an unsigned order, it vacated and remanded the case to the Virginia Supreme Court for further proceedings not inconsistent with *Melendez-Diaz*.⁶⁰

CODE ANN. § 19.2-187.1 (Supp. 2008) ("The accused in any hearing or trial in which a certificate of analysis is offered into evidence . . . shall have the right to call the person performing such analysis or examination or involved in the chain of custody as a witness therein, and examine him in the same manner as if he had been called as an adverse witness. Such witness shall be summoned and appear at the cost of the Commonwealth.").

⁵⁷ See Brief for Respondent at 30-39, *Magruder*, 275 Va. 283, 657 S.E.2d 113 (No. 070817). Even before *Briscoe*, it appears that, in Maryland, the mere ability to cross-examine a declarant at *some point* was not enough to satisfy the Confrontation Clause. Cf. *Myer v. State*, 403 Md. 463, 943 A.2d 615 (2008). In *Myer*, a child sexual abuse case, the State called the victim as its first witness. *Id.* at 468, 943 A.2d at 617. At the end of its case-in-chief, it introduced into evidence a video of the victim's earlier interview with a social worker. *Id.* at 469, 943 A.2d at 618. Although the declarant of the statement had been present and subject to cross-examination, the trial court abused its discretion by denying the defendant an opportunity to re-examine the victim about the videotaped interview. *Id.* at 475, 943 A.2d at 622. However, the Court of Appeals was at pains to stress that it was resolving the issue on Maryland evidentiary, not constitutional grounds; so, while it is informative as to the general attitude of Maryland courts it does not reflect any actual Confrontation Clause jurisprudence. See *id.*

⁵⁸ *Melendez-Diaz*, 129 S. Ct. at 2540.

⁵⁹ *Id.* (emphasis added).

⁶⁰ *Briscoe*, 130 S. Ct. 1316.

E. The Confrontation Right in Maryland

Maryland's first application of *Crawford* came in *State v. Snowden*.⁶¹ *Snowden* is unique in that it involved a Maryland evidentiary rule that does not have a federal equivalent. Maryland's "tender years" statute⁶² allows the court to admit hearsay statements of unavailable juvenile victims of child abuse if the statements were made to certain health or social work professionals. In *Snowden*, the State called a police sexual abuse investigator to testify to statements made to her by the defendant's alleged sexual abuse victim.⁶³ The Court of Appeals determined that, under *Crawford*, the proper test for determining if a statement is testimonial is whether the statement was made under circumstances that would lead an objective declarant to reasonably believe the statement would be used at a later trial.⁶⁴ Under this test, an ordinary declarant would anticipate that the statements to a sexual abuse investigator would be used to prosecute the defendant, and the admission of those statements did not comport with *Crawford*.⁶⁵

Snowden did not eliminate the "tender years" statute, however, anticipating that some statements to health or social workers would be nontestimonial.⁶⁶ *State v. Lawson*⁶⁷ involved such a nontestimonial statement. In *Lawson*, a sexual abuse victim made a statement to a social worker, not to the police.⁶⁸ The court did not find the statement to be testimonial.⁶⁹ Emphasizing the distinction between police and social workers, the court noted that "[t]he mere fact that the interview was conducted after the police investigation and that the social worker was gathering information that . . . could also be used as evidence in court is not determinative regarding the testimonial nature of the encounter."⁷⁰ This is not to say that the statement was nontestimonial, however, and the court did not decide the issue. The *Lawson* court determined that *Crawford* was satisfied because the declarant herself also testified, so the testimonial nature of her statement to the social worker was not determinative of the confrontation issue.⁷¹ However, a year later, in

⁶¹ 385 Md. 64, 867 A.2d 314 (2005).

⁶² MD. CODE ANN., CRIM. PROC. § 11-304 (2008).

⁶³ 385 Md. at 69, 867 A.2d at 316.

⁶⁴ *Id.* at 83, 867 A.2d at 325.

⁶⁵ *Id.* at 84, 867 A.2d at 325.

⁶⁶ *Id.* at 92, 867 A.2d at 330.

⁶⁷ 389 Md. 570, 886 A.2d 876 (2005).

⁶⁸ *Id.* at 577, 886 A.2d at 880.

⁶⁹ *Id.* at 589, 886 A.2d at 887 ("[E]ven if the out-of-court statements were testimonial in nature (and we do not so hold), they were admissible because the declarant testified at trial.") (emphasis added).

⁷⁰ *Id.* at 588 n.9, 886 A.2d at 886 n.9.

⁷¹ *Id.* at 588-89, 886 A.2d at 886-87.

Griner v. State,⁷² the Court of Special Appeals addressed the testimonial nature of a “tender years” statement, affirmatively ruling that a statement made to a nurse was not testimonial because it was made in the course of receiving medical treatment.

Snowden is important to Maryland courts for two reasons. It determined how *Crawford* applies to a unique Maryland statute, the “tender years” statute, and it adopted a definition of “testimonial” that the Supreme Court has not explicitly required. The Court of Special Appeals further developed this definition of “testimonial” in *Marquardt v. State*.⁷³ *Marquardt* involved a defendant charged with assault against his wife, who invoked her spousal privilege and did not testify at trial.⁷⁴ The State introduced several statements made by the wife prior to trial. The first statement, made to a police officer at the hospital following the assault, was held to be testimonial because “a reasonable person would realize that their statements to the police incriminating [the declarant] would be ‘available for use at a later trial.’”⁷⁵ The second statement admitted against the defendant was a recorded 911 call.⁷⁶ During the assault, the defendant’s wife called 911 and left the phone on, so she could yell out her location to the dispatcher.⁷⁷ The defendant could be heard yelling at his wife in the recording.⁷⁸ Unlike the hospital statement, the 911 recording was held to be nontestimonial because the primary purpose was to help the victim escape, not to create evidence for use at trial.⁷⁹ Although *Marquardt* predates *Davis*, it deals with 911 recordings along essentially the same lines as *Davis*’ “continuing emergency” test.

Post-*Davis*, the Court of Special Appeals applied the primary purpose test in *Head v. State*.⁸⁰ In *Head*, a police officer arrived at a house after several people were shot.⁸¹ The officer found one of the shooting victims on the ground and, after asking the victim who had shot him, the victim identified the defendant.⁸² This statement was held to be nontestimonial because, under *Davis*’ subjective test, a reasonable police officer would

⁷² 168 Md. App. 714, 742-43, 899 A.2d 189, 205-06 (2006).

⁷³ 164 Md. App. 95, 882 A.2d 900 (2005).

⁷⁴ *Id.* at 109, 117, 882 A.2d at 908, 913.

⁷⁵ *Id.* at 128, 882 A.2d at 919 (quoting *State v. Snowden*, 385 Md. 64, 83, 867 A.2d 314, 325 (2005)); see also *Clark v. State*, 188 Md. App. 110, 125, 981 A.2d 666, 675 (2009) (holding 911 call nontestimonial because “[t]he primary concern of a person in [the declarant’s] situation was to get help, not to create evidence for use in a future prosecution against [the declarant]”).

⁷⁶ *Marquardt*, 164 Md. App. at 117, 882 A.2d at 913.

⁷⁷ *Id.* at 114, 882 A.2d at 911.

⁷⁸ *Id.* at 116, 882 A.2d at 912.

⁷⁹ *Id.* at 122, 882 A.2d at 916.

⁸⁰ 171 Md. App. 642, 912 A.2d 1 (2006).

⁸¹ *Id.* at 644, 912 A.2d at 2.

⁸² *Id.*

understand the statement was made during an ongoing emergency and would need to know who the shooter was for safety reasons.⁸³ The Court of Special Appeals also mentioned that the trial court found the statement to be a dying declaration,⁸⁴ but, because it resolved the case under the *Davis* testimonial test, it did not decide whether a dying declaration is an exception to *Crawford*.

One final dimension to Maryland's Confrontation Clause jurisprudence that seems at odds with both the Supreme Court and other Maryland decisions is the treatment of forensic statements. In 2006, the Court of Appeals decided *Rollins v. State*,⁸⁵ which predates *Melendez-Diaz*. In *Rollins*, the State introduced an autopsy report but did not call the Assistant Medical Examiner who prepared the report.⁸⁶ As required by *Crawford*, the court considered whether the report was testimonial, and it determined that the report was a nontestimonial business record.⁸⁷ The court noted dictum in *Crawford* suggesting that business records are not testimonial⁸⁸ but ultimately found that the content of a business record will determine whether it is testimonial.⁸⁹ The court held that, "[i]f the autopsy report contains only findings about the physical condition of the decedent that may be fairly characterized as routine, descriptive and not analytical, and those findings are generally reliable . . . , the report may be admitted into evidence."⁹⁰ But this holding appears inconsistent with *Davis* and *Snowden*'s emphasis on the objective purpose to which the statement will be put. Whether reliable or not, an autopsy report is almost always "made under circumstances that would lead an objective declarant reasonably to believe that the statement would be available for use at a later trial."⁹¹ *Melendez-Diaz* appears to settle the discrepancy left by *Rollins*,⁹² however, as of early 2010, a Maryland court has yet to interpret *Melendez-Diaz*, and the Supreme Court has yet to examine the rule announced by *Rollins*.

⁸³ *Id.* at 659, 912 A.2d at 11.

⁸⁴ *Id.* at 648, 912 A.2d at 4.

⁸⁵ 392 Md. 455, 897 A.2d 821 (2006).

⁸⁶ *Id.* at 465, 897 A.2d at 827.

⁸⁷ *Id.* at 482, 510, 897 A.2d at 837, 853.

⁸⁸ *Id.* at 473, 897 A.2d at 831. *See also* *Crawford v. Washington*, 541 U.S. 36, 55 (2004) ("Most of the [historical] hearsay exceptions covered statements that by their nature were not testimonial—for example, business records . . .").

⁸⁹ *Rollins*, 392 Md. at 497, 897 A.2d at 845-46.

⁹⁰ *Id.*

⁹¹ *State v. Snowden*, 385 Md. 64, 83, 867 A.2d 314, 325 (2005).

⁹² Like the affidavits in *Melendez-Diaz*, the purpose of the report in *Rollins* was "to provide 'prima facie evidence' " of the victim's cause of death. *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2532 (2009).

F. Synthesizing the Law on Confrontation

The contours of the confrontation right under *Crawford* are being determined in a piecemeal fashion, but when the cases are taken collectively, a pattern emerges. The Supreme Court and Maryland's *Crawford* decisions can be synthesized into a series of rules guiding when out-of-court statements may be admitted against a criminal⁹³ defendant:

- (1) A **testimonial statement**, defined as
 - a. A solemn declaration or affirmation made for the purpose of establishing or proving some fact;⁹⁴
 - b. A statement made under circumstances which would lead an objective witness reasonably to believe the statement would be available for use at a later trial;⁹⁵
 - c. A statement made under circumstances objectively indicating that the primary purpose of the questioning is to establish or prove past events potentially relevant to later prosecution, not to enable police assistance in an ongoing emergency;⁹⁶ and
 - d. Affidavits and forensic reports “sworn to by the declarant before an officer authorized to administer oaths”;⁹⁷
- (2) is **inadmissible**, *unless*
 - a. The declarant
 - i. Testifies and is **subject to cross-examination**; or
 - ii. The declarant is **unavailable**⁹⁸ *and* was **previously available** for cross-examination;⁹⁹
 - or*
 - b. The statement meets a **Confrontation Clause Exception**
 - i. **Forfeiture by wrongdoing**: The defendant procured the declarant's unavailability **in order to prevent testimony**;¹⁰⁰

⁹³ The Confrontation Clause is inapplicable in civil cases. *Crawford v. Washington*, 541 U.S. 36, 42 (2004).

⁹⁴ *Id.* at 51.

⁹⁵ *Id.* at 52; *Snowden*, 385 Md. at 83, 867 A.2d at 325; *Marquardt v. State*, 164 Md. App. 95, 121, 882 A.2d 900, 915 (2005).

⁹⁶ *Davis v. Washington*, 547 U.S. 813, 822 (2006); *Head v. State*, 171 Md. App. 642, 660, 912 A.2d 1, 11 (2006).

⁹⁷ *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2532 (2009).

⁹⁸ *Crawford v. Washington*, 541 U.S. 36, 68 (2004); FED. R. EVID. 804(a) (defining “unavailable”); Md. Rule 5-804(a) (same).

⁹⁹ *Crawford*, 541 U.S. at 68.

¹⁰⁰ *Id.* at 56; *Giles v. California*, 128 S. Ct. 2678 (2008); FED. R. EVID. 804(b)(6) (forfeiture by wrongdoing exception); Md. Rule 5-804(b)(5) (same).

- ii. **Possibly a dying declaration**,¹⁰¹ or
- iii. The defendant has **waived his or her Confrontation Clause rights** by (1) failing to object to the introduction of the testimonial statement when offered,¹⁰² or (2) failing to adhere to notice requirements designed to alert the prosecution that the defendant intends to invoke his or her Confrontation Clause rights with respect to testimonial statements, which otherwise would be admissible under the rules of evidence.¹⁰³

This overview seeks to explain the sometimes-factious *Crawford* line. However, a broad synopsis of the theoretical landscape will not resolve specific Confrontation Clause issues as they arise. The following two parts of this article are devoted to analyzing specific principles to aid judges and practitioners when confrontation issues arise under the Federal and Maryland Rules of Evidence.

III. HEARSAY EXCEPTIONS: UNAVAILABILITY OF DECLARANT NOT REQUIRED

As outlined above, the *Crawford* and *Snowden* lines of cases may be synthesized into a series of principles that can help a busy trial judge or practitioner in analyzing Confrontation Clause issues as they arise. This part of the article takes that synthesis a step further and applies these principles to the hearsay exceptions where the unavailability of the declarant is not required. We do this first by explaining how the Supreme Court and Maryland appellate courts have applied these principles to specific hearsay exceptions and, then, by suggesting how these principles will be applied to commonly encountered hearsay exceptions that the courts have yet to examine through the lens of the Confrontation Clause.

The Maryland Rules of Evidence dealing with hearsay are generally patterned after the Federal Rules of Evidence (“FRE”), with certain important differences. Maryland Rule 5-801(a)-(c) contains the familiar hearsay formula: a statement made by a declarant at a time other than when testifying under oath and in the presence of the factfinder, offered for its substantive truth. The Maryland Rules part company with the

¹⁰¹ See *Crawford*, 541 U.S. at 56 n.6 (discussing dying declaration as possible confrontation exception); *Head v. State*, 171 Md. App. 642, 912 A.2d 1 (2006) (same); FED. R. EVID. 804(b)(2) (dying declaration exception); Md. Rule 5-804(b)(2) (same).

¹⁰² *Melendez Diaz*, 129 S. Ct. at 2534 n.3.

¹⁰³ *Id.* at 2541 (“The defendant *always* has the burden of raising his Confrontation Clause objection; notice-and-demand statutes simply govern the *time* within which he must do so. States are free to adopt procedural rules governing objections.” (citing *Wainwright v. Sykes*, 433 U.S. 72, 86-87 (1977))).

Federal Rules by rejecting the notion that the collection of “[p]rior statement[s] by witness[es]” found in FRE 801(d)(1)¹⁰⁴ and “[a]dmission[s] by party-opponent[s],” discussed in FRE 801(d)(2)(A)-(E), are non-hearsay, as the introductory clause to FRE 801(d) asserts.¹⁰⁵ Rather, the Maryland Rules treat FRE 801(d)(1) “prior witness statements” and FRE 801(d)(2) “admissions by party-opponents” as admissible hearsay.¹⁰⁶

The hearsay exceptions recognized by the Maryland Rules fall into five categories: (1) the 5-802.1 “prior statements by witnesses” exceptions; (2) the 5-803(a) “statement[s] by party-opponent[s]” exceptions; (3) the 5-803(b) exceptions where the unavailability of the declarant is not required; (4) the 5-804 exceptions which require the unavailability of the declarant; and (5) the 5-803(b)(24) “residual” or “catchall” hearsay exception. In total, there are forty recognized exceptions, and the federal and Maryland courts have considered only a handful of those in the specific context of the Confrontation Clause. Despite the large number of exceptions, there are a much smaller number of hearsay exceptions that are used with great regularity in criminal trials, and courts have discussed a number of those using post-*Crawford* Confrontation Clause analysis. Moreover, with regard to those exceptions that can be expected to be involved in criminal cases and that have not yet been analyzed under current Confrontation Clause law, they are sufficiently similar to other exceptions that have been analyzed, permitting accurate predictions about how courts will treat them in the future. In the remainder of this article, we will discuss these exceptions and offer practical guidance to judges and lawyers regarding how the hearsay rules ought to be applied in future criminal cases consistently with the mandates of the Confrontation Clause.

¹⁰⁴ Those statements are: prior consistent statements made under oath at a trial, hearing, court proceeding, or deposition, FED. R. EVID. 801(d)(1)(A); prior consistent statements offered to rebut an allegation of recent fabrication, FED. R. EVID. 801(d)(1)(B); and statements of identification of a person made after having perceived the person, FED. R. EVID. 801(d)(1)(C).

¹⁰⁵ See FED. R. EVID. 801(d) (“Statements which are not hearsay. A statement is *not* hearsay if . . .”) (emphasis added).

¹⁰⁶ Maryland Rule 5-802.1 includes the same prior witness statements found in FRE 801(d)(1), but it adds others that are absent from the federal rule (*e.g.*, Md. Rule 5-802.1(a)(2) (prior witness statements that have been reduced to writing and signed by the declarant); Md. Rule 5-802.1(a)(3) (prior witness statements that have been recorded in substantially verbatim fashion by stenographic or electronic means contemporaneously with the making of the statement); Md. Rule 5-802.1(d) (statements of prompt complaint of sexually assaultive behavior to which the declarant was subjected if consistent with the declarant’s testimony); and Md. Rule 5-802.1(e) (statements constituting past recollection recorded)). Maryland Rule 5-803(a) contains the identical admissions by a party-opponent found at FRE 801(d)(2)(A)-(E).

A. Rule 5-802.1 Hearsay Exceptions and the Confrontation Clause

As noted in the preceding section of this article, Maryland Rule 5-802.1 captures the three types of statements classified as non-hearsay by FRE 801(d)(1), augments them with some additional statements not found in the Federal Rules, and characterizes them as hearsay, but admissible as an exception to the general prohibition against admission of hearsay evidence.¹⁰⁷ Maryland Rule 5-802.1(a) identifies three such statements that are admissible as substantive evidence provided the declarant is available to testify at trial: (1) a statement inconsistent with the declarant's trial testimony, provided it was given under oath under penalty of perjury at "a trial, hearing, or other proceeding or in a deposition"; (2) a statement inconsistent with the declarant's trial testimony that was "reduced to writing and . . . signed by the declarant"; and (3) a statement inconsistent with the declarant's trial testimony that was "recorded in substantially verbatim fashion by stenographic or electronic means contemporaneously with the making of the statement." The latter two statements were included as a result of the Court of Appeals' 1993 decision in *Nance v. State*.¹⁰⁸ Additionally, Rule 5-802.1(d) permits the introduction as substantive evidence of "prompt complaint[s] of sexually assaultive behavior" that are consistent with the victim's trial testimony, and Rule 5-802.1(c) permits the introduction as substantive evidence of "[a] statement that is one of identification of a person made after perceiving the person."

Prior testimony, written and signed statements, contemporaneously verbatim recorded statements, statements of prompt complaint in sexual assault cases, and statements made identifying a person after having perceived him or her are particularly well suited to finding their way into criminal cases. Therefore, judges and counsel can expect to be presented with the issue of whether these statements are substantively admissible

¹⁰⁷ 6A LYNN MCLAIN, MARYLAND PRACTICE: MARYLAND EVIDENCE, STATE AND FEDERAL § 802.1 (2d ed. 2001) [hereinafter MCLAIN, MARYLAND EVIDENCE].

The Maryland Rules move the three categories of out-of-court statements listed in Fed. R. Evid. 801(d)(1) to a new rule, Md. Rule 5-802.1, "Hearsay Statements—Prior Statements by Witnesses." These three categories require that the declarant testify at the trial or hearing and be subject to cross-examination concerning the statement. Because the hearsay exception for "past recollection recorded," which is codified in Fed. R. Evid. 803(5), also contains the requirement that the declarant testify at trial, Maryland placed that hearsay exception in Md. Rule 5-802.1.

Md. Rule 5-802.1 includes the category of prompt complaints of rape and other sexual assault, because that exception likewise requires that the declarant testify at trial and be subject to cross-examination regarding the out-of-court statement.

Id.
¹⁰⁸ 331 Md. 549, 629 A.2d 633 (1993).

against the defendant under the Confrontation Clause. Happily, the answer to this question is an unequivocal “YES.” The reason is quite simple. By definition, each of the statements identified in Rule 5-802.1 is admissible *only* if the declarant “testifies at the trial . . . and . . . is subject to cross-examination concerning the statement.”¹⁰⁹ And, as the Supreme Court unambiguously stated in *Crawford*: “Finally, we reiterate that, when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements.”¹¹⁰

*B. Rule 5-803(a) Statements by Party-Opponent and the
Confrontation Clause*

Maryland Rule 5-803(a) identifies five categories of statements that are admissible as exceptions to the hearsay rule and that constitute admissions by a “party-opponent,” which includes the defendant in a criminal case. The most frequently encountered type of admission is found at Rule 5-803(a)(1): The defendant’s “own statement, in either an individual or representative capacity.” Since the defendant will be present at trial—unless he or she is absent because of misconduct, in which case the right of confrontation has been forfeited¹¹¹—there can be no Confrontation Clause impediment to introducing the defendant’s own prior statements against him or her at trial.¹¹² And, from a logical perspective, statements by others “of which the party has manifested an adoption or belief in its truth,” Rule 5-803(a)(2), so-called “adoptive admissions” also should be admissible without Confrontation Clause concerns, because it is the defendant’s own statement or conduct that adopts the statement of another as his or her own.

Similarly, Rule 5-803(a)(5) identifies “[a] statement by a coconspirator of the party during the course and in furtherance of the conspiracy” as a statement of a party-opponent that is admissible as an exception to the hearsay rule. Once again, by its very nature, a coconspirator’s statement will present no Confrontation Clause issue

¹⁰⁹ Md. Rule 5-802.1.

¹¹⁰ *Crawford v. Washington*, 541 U.S. 36, 59 n.9 (2006); MCLAIN, MARYLAND EVIDENCE, *supra* note 107, § 801:1c.ii.B (Supp. 2009) (“By definition then, the hearsay exceptions codified in Md. Rule 5-802.1, which require that the declarant testify at trial and be subject to cross-examination concerning the statement, cannot raise a confrontation clause issue.”) (citations omitted).

¹¹¹ MCLAIN, MARYLAND EVIDENCE, *supra* note 107, § 801:1c.ii.C(1) (Supp. 2009).

¹¹² *Id.* at § 801:1c.iv.D(4)(d) (Supp. 2009) (“The admission against an accused of his or her own out-of-court statements (as an ‘admission of a party opponent’) does not violate the confrontation clause, as one cannot be heard to complain that one has no opportunity to confront or cross-examine oneself. Consistent with this common-sense principle, the *Crawford* majority cites seventeenth and eighteenth century authorities that ‘a suspect’s confession could be admitted . . . against himself.’”) (citations omitted).

because it is not made with the objective expectation that it will be used in future criminal proceedings; indeed, it is made with exactly the opposite expectation. Thus, such statements cannot be “testimonial” for Confrontation Clause purposes, and they are admissible against the defendant under both the hearsay rule and the Confrontation Clause.¹¹³

Rule 5-803(a)(3) identifies as admissible under the hearsay rule “[a] statement by a person authorized by the party to make a statement concerning the subject.” Once again, this hearsay exception requires proof that the defendant did authorize the statement to be made on his or her behalf, thus making it his or her own, and thus eliminating any Confrontation Clause issue for the reasons already explained above.

The final example of an admission by a party-opponent identified by Rule 5-803(a) presents potential Confrontation Clause issues. Specifically, Rule 5-803(a)(4) recognizes as admissible as a hearsay exception “[a] statement by the party’s agent or employee made during the agency or employment relationship concerning a matter within the scope of the agency or employment.” This exception is different from a statement by a person specifically authorized by the defendant to make a statement on his or her behalf. Admissions under 5-803(a)(4) are typically attributed to the defendant, not because he or she specifically authorized them, but rather, as the byproduct of the agency or employment relationship they have with the defendant and the fact that the defendant has authorized them to act on his or her behalf within a range of authorized activities.¹¹⁴

To be sure, this hearsay exception typically is used in civil cases against a corporate, organizational, or government entity, but there is nothing that prevents its use in a criminal case against an individual person who has an agent or employee. No case has been found interpreting this exception in light of the Confrontation Clause, but it is not difficult to imagine instances where a statement made by a defendant’s agent or employee while acting within the scope of his or her responsibilities will in fact be “testimonial,” that is to say, made with the objective expectation that it will be used in future criminal proceedings. If so, then an argument may be made that it is not admissible under the Confrontation Clause unless the agent is unavailable and there was a prior opportunity to cross-examine the agent or employee by the defendant. It

¹¹³ *Crawford*, 541 U.S. at 56 (“Most of the hearsay exceptions [recognized as admissible at the time the Confrontation Clause was adopted as part of the Constitution] covered statements that by their nature were not testimonial—for example . . . statements in furtherance of a conspiracy.”); MCLAIN, MARYLAND EVIDENCE, *supra* note 107, § 801:1c.iv.D(4)(c) (Supp. 2009).

¹¹⁴ *See* B & K Rentals & Sales Co. v. Universal Leaf Tobacco Co., 324 Md. 147, 153-54, 596 A.2d 640, 643 (1991); *see also* MCLAIN, MARYLAND EVIDENCE, *supra* note 107, § 801(4):5 (2001) (discussing the application of Maryland Rule 5-803(a)(4)).

is also foreseeable that courts would conclude that Rule 5-803(a)(4) admissions were not within the scope of Confrontation Clause protections because, assuming the foundational requirements of the rule are met, the statements are not those of the agent or employee, but rather, are those of the defendant. Resolution of this issue will have to await further development in the case law.

C. Rule 5-803(b) Exceptions—Overview

The largest collection of hearsay exceptions—twenty-three in all—are found at Maryland Rule 5-803(b), and—with two exceptions¹¹⁵—these exceptions are largely the same as those found at FRE 803. The exceptions found at Rule 5-803(b) all have one thing in common: They are admissible regardless of the availability or unavailability of the declarant. This distinguishes them from the much smaller number of exceptions found at Rule 5-804, all of which are inadmissible unless the declarant is unavailable. At first blush, the Rule 5-803(b) exceptions seem like an impossibly diverse and confusing set of rules, collected with little unifying similarity other than the fact that they may be admitted regardless of the availability of the declarant. But, on closer examination, it is apparent that the rules fall into four categories, and when thought of in this fashion they are much easier to understand and use.

Category One: The exceptions that deal with **perception, state of mind, emotion, intent, and physical or mental condition**, namely: Rule 5-803(b)(1) (present sense impression); Rule 5-803(b)(2) (excited utterance); Rule 5-803(b)(3) (then existing mental, emotional or physical condition); and Rule 5-803(b)(4) (statements made for purpose of medical diagnosis or treatment);

Category Two: The exceptions that deal with various types of **records, documents and writings**, namely: Rule 5-803(b)(5) (past recollection recorded);¹¹⁶ Rule 5-803(b)(6) (business records); Rule 5-803(b)(7) (the absence of an entry in a business record, offered to prove the non-existence of a fact); Rule 5-803(b)(8) (public records); Rule 5-803(b)(9) (records of vital statistics); Rule 5-803(b)(10) (the absence of a public record or

¹¹⁵ The Maryland Rules of Evidence have no equivalent to FRE 803(22), which pertains to admissibility of judgments of previous convictions offered for a purpose other than impeachment under FRE 609. The federal equivalent of Maryland Rule 5-803(b)(24), which is the Maryland version of the “catchall” or “residual” hearsay exception, is not found in FRE 803, but rather is found in its own rule, FRE 807.

¹¹⁶ Past recollection recorded is also addressed by Maryland Rule 5-802.1(e). *See supra* note 110 and accompanying text. Since the declarant must testify in person in order for the foundation for this exception to be established, there are no Confrontation Clause issues associated with its use. *Id.*

entry in a public record offered to prove the non-existence of a fact); Rule 5-803(b)(11) (records of religious organizations); Rule 5-803(b)(12) (certificates of baptism, marriage, or related certificates); Rule 5-803(b)(13) (family records); Rule 5-803(b)(14) (records of documents affecting an interest in property); Rule 5-803(b)(15) (statements in documents affecting an interest in property); Rule 5-803(b)(16) (ancient documents); Rule 5-803(b)(17) (market reports and published compilations); Rule 5-803(b)(18) (learned treatises); and Rule 5-803(b)(23) (judgments as to personal, family, general history, or boundaries);

Category Three: The exceptions that deal with various forms of **reputation evidence**, namely: Rule 5-803(b)(19) (reputation regarding personal or family history); Rule 5-803(b)(20) (reputation regarding general history or land boundaries); and Rule 5-803(b)(21) (reputation regarding a person's character, among associates or within the community); and

Category Four: The “**catchall**” hearsay exception found at Rule 5-803(b)(24).

The similarity of the exceptions within each of the first three categories of rules suggests that Confrontation Clause analysis will, in most instances, be similar for each rule within each category.

D. Category One: Exceptions Dealing with Perception, State of Mind, Emotion, Intent, and Physical or Mental Condition and the Confrontation Clause

When analyzing Confrontation Clause issues associated with this first category of hearsay exceptions found in Maryland Rule 5-803(b), the key is to determine whether the statement meets the definition of a “testimonial statement” as defined by *Crawford* and the subsequent Confrontation Clause cases decided by the Supreme Court—namely, was the statement made under circumstances manifesting an objective expectation that the statement would be available for future use at a future trial?¹¹⁷ If “yes,” then it will be “testimonial” in nature and inadmissible under the Confrontation Clause, regardless of whether it is admissible under the hearsay rules, unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant, or the defendant has waived or forfeited his or her confrontation rights.

The Supreme Court case that provides the most assistance in determining whether the exceptions falling within this first category are

¹¹⁷ *Crawford*, 541 U.S. at 52; see also *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2529 (2009); *Davis v. Washington*, 547 U.S. 813, 822–23 (2006).

testimonial or not is *Davis v. Washington*.¹¹⁸ There, the Court analyzed statements admitted in two separate criminal trials, one (*Davis v. Washington*) involving a 911 call and the other (*Hammon v. Indiana*) involving a written affidavit given to the police in the course of investigating a domestic battery complaint, to determine whether the statements were testimonial under the Confrontation Clause.¹¹⁹ The Court held:

[S]tatements 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 that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.¹²⁰

It is noteworthy that, in the second case analyzed by the Supreme Court in *Davis* (the *Hammon* case), the Indiana trial court had admitted the victim's statements in the battery affidavit as present sense impressions and excited utterances.¹²¹ Because the Supreme Court found that these statements were testimonial and thus inadmissible under the Confrontation Clause,¹²² the Court did not discuss the hearsay issues. But, with respect to Category One statements, *Davis* provides the best guidance on how a court should rule regarding the admissibility of these hearsay exceptions under the Confrontation Clause.

Simply put, if a Category One statement is made under circumstances that manifest an objective expectation that it is being made for the purpose of establishing past events potentially relevant to future criminal prosecution,¹²³ then it will be testimonial and inadmissible, regardless of whether it is admissible under the hearsay rules, unless the declarant is unavailable and there was a prior opportunity by the defendant to cross-examine the declarant, or the defendant has waived or forfeited his or her right to confront the declarant. In most instances this determination should be an easy one to make. However, if a Category One statement is not made to a law enforcement officer, or medical provider providing treatment in connection with a criminal assault, then the statement was

¹¹⁸ 547 U.S. 813 (2006).

¹¹⁹ *Id.* at 817.

¹²⁰ *Id.* at 813-14.

¹²¹ *Id.* at 819-21.

¹²² *Id.* at 820-21 (statements inadmissible under the Confrontation Clause because the complainant failed to appear to testify, despite having been subpoenaed, and the defendant had not been given a prior opportunity to cross-examine her).

¹²³ *Id.* at 822.

not made with the objective expectation that it will be used in a subsequent criminal prosecution, and it will thus be nontestimonial.

Indeed, most Category One statements will not be testimonial, as they will either be made to friends, family, or even strangers, and not to law enforcement. Further, even those that are made in the presence of law enforcement will not be testimonial if the statements were volunteered or made in response to police inquiry, the focus of which was to assist the police in meeting and resolving an emergency. It is only when the emergency has passed and the purpose of the inquiry has shifted from responding to the emergency to eliciting facts to establish what happened for use in future criminal proceedings that the line between nontestimonial and testimonial has been crossed.

For example, in *State v. Lucas*,¹²⁴ the Court of Appeals of Maryland was asked to decide whether statements made by a “visibly upset” woman in response to questioning by a police officer who was responding to a domestic call were testimonial for purposes of the Confrontation Clause.¹²⁵ The statements had been admitted by the circuit court judge as excited utterances under Rule 5-803(b)(2).¹²⁶ Judge Adkins, writing for the Court of Appeals, noted that the court’s task was to “determine whether the circumstances of [the officer’s] interrogation [of the victim] objectively indicate[d] that its primary purpose was ‘to enable police assistance to meet an ongoing emergency.’”¹²⁷ This determination “requires more than a simple grammatical analysis” of the officer’s questions.¹²⁸ Instead, it turns on a number of factors including: (1) “the timing of the statements” (whether made while the events were occurring, or describing past events); (2) “whether [a] ‘reasonable listener would recognize that [the declarant] . . . was facing an ongoing emergency’”; (3) “the nature of what was asked and answered” (were the statements necessary to resolve the emergency or only to learn what had happened); and (4) “the interview’s level of formality.”¹²⁹ After analyzing the above factors, the court concluded that the primary purpose of the officer’s questioning of the victim was to establish or prove past facts, rendering the statements testimonial, and, accordingly, their admission into evidence against the defendant at trial was a violation of the Confrontation Clause.¹³⁰

¹²⁴ 407 Md. 307, 965 A.2d 75 (2009).

¹²⁵ *Id.* at 308, 965 A.2d at 76.

¹²⁶ *Id.*

¹²⁷ *Id.* at 323, 965 A.2d at 85 (quoting *Davis v. Washington*, 547 U.S. 813, 822 (2006)).

¹²⁸ *Id.*

¹²⁹ *Id.* (citing *Davis*, 547 U.S. at 826–27).

¹³⁰ *Lucas*, 407 Md. 323–34, 965 A.2d at 85 (quoting *Davis*, 547 U.S. at 822). In *Marquardt v. State*, 164 Md. App. 95, 882 A.2d 900 (2005), decided the year before *Davis*, the Court of Special Appeals, using analysis that is consistent with that employed by the Court

In contrast, in *Griner v. State*,¹³¹ decided approximately one month before the Supreme Court decided *Davis*, the Court of Special Appeals of Maryland considered whether statements made by a four-year-old boy were testimonial for purposes of the Confrontation Clause. He had made the statements to a nurse who examined him at a hospital after he was taken there at the direction of the police investigating whether his grandmother had assaulted him.¹³² The circuit court admitted the statements as those made for the purpose of medical diagnosis and treatment under Rule 5-803(b)(4), over the objection of the defendant that they violated his Confrontation Clause rights.¹³³ The Court of Special Appeals agreed, concluding that the statements were not made with the objective expectation that they would be used in a future criminal prosecution, but rather, had been made “as a routine preliminary procedure necessary prior to admitting him to the pediatrics ward,” and that they were made to a registered nurse on that ward for the purpose of assessing the boy’s condition and vital signs and to assist the nurse in administering necessary medication.¹³⁴ Accordingly, they were not testimonial.¹³⁵

In summary, when analyzing the hearsay statements falling within the first category of statements contained in Rule 5-803(b) (those pertaining to perception, state of mind, emotional condition, intent, physical and mental condition, and those made for the purpose of medical diagnosis or treatment), their admissibility under the Confrontation Clause turns on a case-by-case, fact-specific determination of whether the statement was made in objective expectation that it would be available for use at future criminal proceedings, as opposed to some unrelated purpose, such as to identify the existence and nature of an emergency to enable medical or law enforcement personnel to respond appropriately. When the exigency has passed and the purpose of the statement is to memorialize the facts that occurred because they may be relevant to some future criminal proceedings, they will be testimonial. In making this determination, as the *Lucas* court stressed, the inquiry must be nuanced and multi-factored, not a “simple grammatical analysis”¹³⁶ of what was asked and answered.

of Appeals in *Lucas*, concluded that statements of an assault victim recorded during a 911 call and admitted by the trial court as excited utterances under Maryland Rule 5-803(b)(2) were nontestimonial because they were recorded contemporaneously with the occurrence of the assault and were not made in response to any questioning by the police or 911 operator. *Marquardt*, 164 Md. App. at 122, 882 A.2d at 916.

¹³¹ 168 Md. App. 714, 899 A.2d 189 (2006).

¹³² *Id.* at 720-26, 899 A.2d at 192-96.

¹³³ *Id.* at 736-37, 899 A.2d at 202.

¹³⁴ *Id.* at 742-43, 899 A.2d at 205.

¹³⁵ *Id.*, 899 A.2d at 205-06.

¹³⁶ *Lucas*, 407 Md. at 323, 965 A.2d at 85 (quoting *State v. Ohlson*, 168 P.3d 1273, 1279 (Wash. 2007)).

E. Category Two: Exceptions Dealing with Records, Documents, and Writings and the Confrontation Clause

As noted, the vast majority of the hearsay exceptions collected in Maryland Rule 5-803(b) deal with records, writings, and other documents. By far, the two most important and most frequently evoked exceptions are the business records exception, Rule 5-803(b)(6),¹³⁷ and the public records exception, Rule 5-803(b)(8).¹³⁸ It is not an exaggeration to say that the analysis, which governs whether business and public records are admissible under the Confrontation Clause, will serve equally well with the remainder of the records, documents, and writings covered by exceptions in Rule 5-803(b).

As with all hearsay exceptions, the key to whether they are admissible under the Confrontation Clause is to determine whether they constitute testimonial statements. If made under circumstances where there is an objective expectation that they will be used as evidence in a future criminal proceeding, then the statements will be deemed to be testimonial and inadmissible under the Confrontation Clause, unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant, or the defendant has waived or forfeited his or her

¹³⁷ Maryland Rule 5-803(b)(6) provides:

Records of regularly conducted business activity. A memorandum, report, record, or data compilation of acts, events, conditions, opinions, or diagnoses if (A) it was made at or near the time of the act, event, or condition, or the rendition of the diagnosis, (B) it was made by a person with knowledge or from information transmitted by a person with knowledge, (C) it was made and kept in the course of a regularly conducted business activity, and (D) the regular practice of that business was to make and keep the memorandum, report, record, or data compilation. A record of this kind may be excluded if the source of information or the method or circumstances of the preparation of the record indicate that the information in the record lacks trustworthiness. In this paragraph, "business" includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

¹³⁸ Maryland Rule 5-803(b)(8) provides:

Public Records and reports. (A) Except as otherwise provided in this paragraph, a memorandum, report, record, statement, or data compilation made by a public agency setting forth (i) the activities of the agency; (ii) matters observed pursuant to a duty imposed by law, as to which matters there was a duty to report; or (iii) in civil actions and when offered against the State in criminal actions, factual findings resulting from an investigation made pursuant to authority granted by law. (B) A record offered pursuant to paragraph (A) may be excluded if the source of information or the method or circumstance of the preparation of the record indicate that the record or the information in the record lacks trustworthiness. (C) A record of matters observed by a law enforcement person is not admissible under this paragraph when offered against an accused in a criminal action. (D) This paragraph does not supersede specific statutory provisions regarding the admissibility of particular public records.

confrontation rights. If they are not testimonial, then there will be no Confrontation Clause hurdle to impede their admissibility, which will be governed by the hearsay rules.

1. *Business Records*

Turning first to the business records exception, the very elements needed to establish this hearsay exception provide the greatest clue as to whether or not it will be testimonial. In essence, a record is admissible as a business record, pursuant to Maryland Rule 5-803(b)(6), if: (1) it was made at or near the time of the events it describes; (2) it was made by someone with personal knowledge (or from information provided by someone with personal knowledge); (3) it was made and kept in the course of a regularly conducted business¹³⁹ activity; and (4) it was the regular practice of the business to make and keep the record. If these four elements are met, then the record is admissible, unless the source, methods, or circumstances of its making lack trustworthiness.¹⁴⁰ Thus, the underpinnings that permit the admissibility of a business record focus on both the regularity and routine nature of its creation and use, provided the circumstances of its making demonstrate its reliability. These characteristics also provide the clues for determining whether business records pass muster under the Confrontation Clause.

In *Crawford*, the Supreme Court, in dicta, suggested that, in most instances, business records were “by their nature . . . not testimonial.”¹⁴¹ Left unanswered, however, was the question of whether business records prepared by the government under circumstances where there was an objective expectation that the records would be introduced into evidence at a future criminal trial¹⁴² would be deemed nontestimonial, as suggested in *Crawford*, despite the fact that they were prepared under circumstances that would, objectively viewed, suggest a likelihood of their use in future criminal proceedings. The Supreme Court recently provided the answer,

¹³⁹ Maryland Rule 5-803(b)(6) defines “business” very broadly to include “business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.” Under this definition, then, government agencies would qualify as a “business,” and courts frequently analyze the admissibility of a document under both the business and public records exceptions. *See, e.g.*, *Rollins v. State*, 392 Md. 455, 497, 897 A.2d 821, 845 (2006) (noting that “an autopsy report may be classified as both a business and a public record”).

¹⁴⁰ Md. Rule 5-803(b)(6).

¹⁴¹ *Crawford v. Washington*, 541 U.S. 36, 56 (2006) (“Most of the hearsay exceptions [recognized as admissible at the time the Sixth Amendment was adopted] covered statements that by their nature were not testimonial—for example, business records . . .”).

¹⁴² These business records could include autopsy reports, documents prepared showing the results of blood or chemical tests performed on drunk driving suspects, reports containing the results of laboratory tests of crime scene evidence, or laboratory reports of tests performed on suspected illegal drugs.

however, in *Melendez-Diaz v. Massachusetts*.¹⁴³ In that case, the Supreme Court considered whether certificates of analysis showing the result of forensic examination of suspected drugs seized from the defendant were admissible under the Confrontation Clause.¹⁴⁴ The Court concluded that the documents, referred to by the prosecution as “certificates,” were actually indistinguishable from affidavits, stating that “[t]here is little doubt that the documents at issue in this case fall within the ‘core class of testimonial statements [described in *Crawford*].’”¹⁴⁵ Accordingly, the Court stated, “[t]he ‘certificates’ are functionally identical to live, in-court testimony, doing ‘precisely what a witness does on direct examination,’”¹⁴⁶ which clearly made them testimonial. The Court emphatically rejected the argument that the certificates were, in essence, business records, which typically are nontestimonial, stating:

Respondent argues that the analysts’ affidavits are admissible without confrontation because they are “akin to the types of official and business records admissible at common law.” But the affidavits do not qualify as traditional official or business records, and even if they did, their authors would be subject to confrontation nonetheless.

Documents kept in the regular course of a business may ordinarily be admitted at trial despite their hearsay status. *See* Fed. R. Evid. 803(6). But that is not the case if the regularly conducted business activity is the production of evidence for use at trial. Our decision in *Palmer v. Hoffman*, 318 U.S. 109 . . . (1943), made that distinction clear. There we held that an accident report provided by an employee of a railroad company did not qualify as a business record because, although kept in the regular course of the railroad’s operations, it was “calculated for use essentially in court, not in the business.” The analysts’ certificates—like police reports generated by law enforcement officials—do not qualify as business or public records for precisely the same reason.¹⁴⁷

The Court further discussed the Confrontation Clause implications of business and official records, stating:

¹⁴³ 129 S. Ct. 2527 (2009).

¹⁴⁴ *Id.* at 2530.

¹⁴⁵ *Id.* at 2532.

¹⁴⁶ *Id.* (quoting *Davis v. Washington*, 547 U.S. 813, 830 (2006)).

¹⁴⁷ *Id.* at 2538 (internal citations omitted). The Court also noted that “[t]he early common-law cases [that allowed admission of business records] likewise involve records prepared for the administration of an entity’s affairs, and not for use in litigation.” *Id.* at 2538 n.7.

Respondent also misunderstands the relationship between the business-and-official-records hearsay exceptions and the Confrontation Clause. As we stated in *Crawford*: “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.” 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.¹⁴⁸

Thus, *Melendez-Diaz* provides the key for distinguishing when business and public records are testimonial for purposes of the Confrontation Clause. Regardless of whether they may be classified as business or public records under the hearsay rules, they are nontestimonial if prepared for the administration of the entity’s own affairs, but testimonial if prepared for the purpose of establishing or proving some fact at trial. In this regard, the Court seems to require more than just foreseeability that business or public records may be introduced into evidence in some future trial in order for them to cross the line between nontestimonial and testimonial. Rather, the focus appears to be on the *purpose* for which the record was created: If the purpose is to create a document “for use essentially in the court”¹⁴⁹ which does “precisely what a witness does on direct examination,”¹⁵⁰ then the business or public record will be testimonial.

However, the mere possibility or foreseeability of use in trial of a business or public record that truly was prepared for the purpose of proper administration of the government entity’s own internal affairs would not appear to render it testimonial, as the Court suggested in a footnote, when it stated that, “[a]dditionally, documents prepared in the regular course of equipment maintenance may well qualify as nontestimonial records.”¹⁵¹ Further, in the body of the opinion itself, the Court stated that, at common law, “[a] clerk could by affidavit *authenticate* or provide a copy of an otherwise admissible record, but could not do what the analysts did here: *create* a record for the sole

¹⁴⁸ *Id.* at 2539–40 (internal citations omitted).

¹⁴⁹ *Id.* at 2538 (quoting *Palmer v. Hoffman*, 318 U.S. 109, 114 (1943)).

¹⁵⁰ *Id.* at 2532 (quoting *Davis*, 547 U.S. at 830).

¹⁵¹ *Id.* at 2532 n.1.

purpose of providing evidence against a defendant.”¹⁵² The Court thus provided two examples of government business-public records that may withstand a Confrontation Clause challenge because they are nontestimonial: (1) documents created for the purpose of administering the internal affairs of the government entity and (2) documents that serve to authenticate as true and accurate copies of other records, which themselves are nontestimonial and admissible under the Confrontation Clause.

Maryland courts also have considered whether business and public records are testimonial for purposes of the Confrontation Clause. In *Rollins v. State*,¹⁵³ decided after *Crawford* but before *Melendez-Diaz*, the Court of Appeals considered whether autopsy reports prepared by the medical examiner’s office and offered into evidence in a homicide case were testimonial. The court ruled that the reports only would be testimonial if they were made under circumstances that would lead an objective person reasonably to believe that the report would be available for use at a later criminal trial.¹⁵⁴ It noted that autopsy reports were not created exclusively to be used as evidence in criminal cases but were required by statute to be prepared in all deaths that occurred by violence, suicide, or casualty; suddenly, if the deceased was in apparent good health or unattended by a doctor; or in a suspicious or unusual manner.¹⁵⁵ The court concluded:

When the report is offered as evidence against the defendant at trial, in a criminal case, we conclude that an autopsy report is not *per se* “testimonial” in light of *Crawford*. The trial court must determine whether the report contains testimonial or non-testimonial hearsay statements. The testimonial statements may not be admitted against the defendant at trial, unless the declarant is unavailable and there was a prior opportunity for cross-examination.¹⁵⁶

It then went on to explain:

[F]indings in an autopsy report of the physical condition of a decedent, which are routine, descriptive and not analytical, which are objectively ascertained and generally reliable and enjoy a generic indicum[sic] of reliability, may be received into evidence without the testimony of the examiner. Where, however, contested conclusions or opinions in an autopsy report are central

¹⁵² *Id.* at 2539 (emphasis in original).

¹⁵³ 392 Md. 455, 497, 897 A.2d 821, 845-46 (2006).

¹⁵⁴ *Id.* at 484, 897 A.2d at 838.

¹⁵⁵ *Id.* at 485 & n.18, 486, 897 A.2d at 838 & n.18, 839.

¹⁵⁶ *Id.* at 486-87, 897 A.2d at 839.

to the determination of *corpus delicti* or criminal agency and are offered into evidence, they serve the same function as testimony and trigger the Sixth Amendment right of confrontation.¹⁵⁷

However commendable the court's effort to parse through autopsy reports line by line to divine the testimonial from the nontestimonial, it is doubtful whether its reasoning would withstand analysis after *Melendez-Diaz*. As noted, the standard articulated in that case was not whether the content of the business or public record was "routine," "descriptive," or "non-analytical," or "reliable" as opposed to "contested conclusions," but rather, whether the purpose of making that particular record was for administration of the internal affairs of the "business" or government office, as opposed to recording for future litigation use the type of facts typically testified to by witnesses at trial.¹⁵⁸ What *Rollins* failed to acknowledge was that, while some autopsy reports may not be prepared with the objective expectation that they will be introduced at a future criminal trial (say, for example, in the case of a suicide with no indication of foul play), thus making them nontestimonial, it is a certainty that those autopsy reports, which reach the conclusion that the cause of death was homicide, must of necessity trigger an objective expectation that they, with reasonable foreseeability, may be offered into evidence at a criminal case, clearly making them testimonial. *Melendez-Diaz* does not stand for the proposition that courts should consider business records *generically* to determine whether or not they are testimonial, because, as *Crawford* noted,¹⁵⁹ business records at common law are classic examples of nontestimonial hearsay. Rather, *Melendez-Diaz* requires consideration of the reason why a *particular* business or public record or report was made, and if, viewed objectively, it appears that it was prepared for a litigation-related purpose, rather than for administration of the internal affairs of the business or government office, then it will be testimonial.

Even more fundamentally, however, the approach taken in *Rollins* is suspect even under *Crawford*, which it purported to follow, because the *Rollins* court's continued use of the "reliability" of the information in an autopsy report as a measure of whether it complies with the Sixth Amendment¹⁶⁰ clashes with the unambiguous statement in *Crawford*: "To be sure, the [Confrontation] Clause's ultimate goal is to ensure reliability

¹⁵⁷ *Id.* at 489, 897 A.2d at 841.

¹⁵⁸ *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2532 (2009).

¹⁵⁹ *Crawford v. Washington*, 541 U.S. 36, 56 (2006).

¹⁶⁰ *Rollins*, 392 Md. 455, 497, 897 A.2d 821, 845–46 (2006) ("If the autopsy report contains only findings about the physical condition of the decedent that may be fairly characterized as routine, descriptive and not analytical, and those findings are generally reliable and are afforded an indicum [sic] of reliability, the report may be admitted into evidence without the testimony of its preparer, and without violating the Confrontation Clause.").

of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner”¹⁶¹ That “procedural guarantee” is appearance at trial for cross-examination, or, if unavailable at trial, availability for cross-examination before trial begins. *Rollins* appears to support the notion that the determination of “testimonial” *vel non* turns on whether particular entries in an autopsy report are “reliable” rather than “contested or disputed,” instead of the foreseeability, objectively viewed, that the record will be used in a future criminal trial. Thus, it is unlikely that the conclusions reached in *Rollins* will continue to withstand analysis following *Melendez-Diaz*.

Similarly, in *Costley v. State*,¹⁶² decided after *Rollins*, but before *Melendez-Diaz*, the Court of Special Appeals, citing *Rollins*, held that the trial court did not commit error by admitting into evidence in a criminal trial an unredacted autopsy report because the defendant failed to challenge at trial the portions of the report that addressed the manner of death or the conclusions reached by the medical examiner. Because of its reliance on *Rollins*, the future usefulness of *Costley* is also uncertain.

2. Public Records

As already described in the preceding section, the Supreme Court and Maryland appellate courts have analyzed the Confrontation Clause issues associated with business records and public records simultaneously, noting that forensic and autopsy reports could qualify as both business and public records.¹⁶³ The reason is apparent when the two rules are examined together, as they are so structurally similar. For instance, under the Maryland Rules, business records include “[a] ‘memorandum, report, record, or data compilation,’”¹⁶⁴ while public records include “a memorandum, report, record, statement or data compilation” made by a public agency.¹⁶⁵ Also, a business record that meets the requirements of the rule may still be excluded from evidence if “the source of information or the method or circumstances of the preparation of the record indicate that the information in the record lacks trustworthiness.”¹⁶⁶ This is similar to a public record otherwise admissible under the rule, which may

¹⁶¹ *Crawford*, 541 U.S. at 61.

¹⁶² 175 Md. App. 90, 125-26, 926 A.2d 769, 789-90 (2007).

¹⁶³ *Melendez-Diaz*, 129 S. Ct. at 2538 (“Respondent argues that the analysts’ affidavits are admissible without confrontation because they are ‘akin to the types of official and business records admissible at common law.’ ”); *Rollins*, 392 Md. at 482, 897 A.2d at 836-37 (concluding that the autopsy report was admissible as both a business and a public record); *Costley*, 175 Md. App. at 123, 926 A.2d at 788 (citing *Rollins*, 392 Md. at 491, 897 A.2d at 842).

¹⁶⁴ Md. Rule 5-803(b)(6).

¹⁶⁵ Md. Rule 5-803(b)(8)(A).

¹⁶⁶ Md. Rule 5-803(b)(6).

be excluded “if the source of information or the method or circumstances of the preparation of the record indicate that the record or the information in the record lacks trustworthiness.”¹⁶⁷ Finally, Maryland Rule 5-803(b)(6) defines a “business” broadly to include a “business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.” Thus, a federal, state, or local government entity would fit into this definition of a “business.”

In light of the structural similarities between the two rules and the willingness of the courts to analyze records prepared by government entities under the same analysis as business records for purposes of the Confrontation Clause, the lessons learned in *Melendez-Diaz* regarding when business records are “testimonial,” discussed in the preceding section, apply with equal force to public records: They are testimonial if, objectively viewed, it is reasonably foreseeable that they will be used in future criminal proceedings against a defendant.¹⁶⁸ The Supreme Court further refined the distinction between testimonial and nontestimonial business and public records as follows: “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.”¹⁶⁹ The key distinction is whether the records were prepared for the internal administration of the government entity’s affairs or to be used to prove a fact against a defendant in a criminal trial.

There is one final point to be made about the Confrontation Clause issues associated with public records under Rule 5-803(b)(8) that underscores the above conclusions. In essence, the public records exception applies to three general types of records: (1) those setting forth “the activities of the agency”;¹⁷⁰ (2) those setting forth “matters observed pursuant to a duty imposed by law, as to which matters there was a duty to report”;¹⁷¹ and (3) those setting forth “in civil actions and when offered against the State in criminal actions, factual findings resulting from an investigation made pursuant to authority granted by law.”¹⁷² Further, with respect to the second category of public records, those setting forth matters observed pursuant to a legally imposed duty to report, Rule 5-803(b)(8)(C) states that “[a] record of matters observed by a law enforcement person is not admissible under this paragraph when offered

¹⁶⁷ Md. Rule 5-803(b)(8)(B).

¹⁶⁸ *Melendez-Diaz*, 129 S. Ct. at 2531.

¹⁶⁹ *Id.* at 2539–40.

¹⁷⁰ Md. Rule 5-803(b)(8)(A)(i).

¹⁷¹ Md. Rule 5-803(b)(8)(A)(ii).

¹⁷² Md. Rule 5-803(b)(8)(A)(iii).

against an accused in a criminal action.”

These restrictions—stated in the rule itself—dovetail entirely with the Supreme Court’s discussion in *Melendez-Diaz* regarding the distinction between testimonial and nontestimonial public records. Public records containing descriptions of matters observed where there is a legal duty to report¹⁷³ are not admissible against a defendant in a criminal case because their purpose is to record evidence of criminal activity, not to efficiently regulate the activities of the official entity. Similarly, findings of fact from investigations made pursuant to authority granted by law¹⁷⁴ are only admissible in criminal cases against the State, not the defendant, for exactly the same reason: By definition, fact findings resulting from investigations authorized by law are created in anticipation of use in litigation, not for the internal administration of the affairs of the creating agency. This distinction appears to have been overlooked by the Court of Appeals in *Rollins*, and Court of Special Appeals in *Costley*, but it was not overlooked by the Supreme Court in *Melendez-Diaz*.¹⁷⁵

3. Hearsay Exceptions Regarding Other Documents, Records, and Writings Found in Rule 5-803(b)

As noted in the introduction to this section, the hearsay exceptions found in Maryland Rule 5-803(b) address an assortment of various documents, records, and writings, in addition to business and public records, including: 5-803(b)(9) (records of vital statistics); 5-803(b)(11) (records of religious organizations); 5-803(b)(12) (marriage, baptismal, and similar certificates); 5-803(b)(13) (family records); 5-803(b)(14) (records of documents affecting an interest in property); 5-803(b)(15) (statements in documents affecting an interest in property); 5-803(b)(16) (statements in ancient documents); 5-803(b)(17) (market reports and published compilations); 5-803(b)(18) (learned treatises); and 5-803(b)(23) (judgment as to personal, family or general history, or boundaries). These hearsay exceptions are far less frequently employed than the business and public records exceptions, and, not surprisingly, research has failed to reveal any case since *Crawford* in which the Supreme Court or a Maryland court has analyzed the admissibility of these exceptions under the Confrontation Clause. However, since each of them shares similarities with business and public records, and since each involves a writing of some sort, there is little doubt that their

¹⁷³ Md. Rule 5-803(b)(8)(A)(ii).

¹⁷⁴ Md. Rule 5-803(b)(8)(A)(iii).

¹⁷⁵ *Melendez-Diaz*, 129 S. Ct. at 2538 (“The analysts’ certificates—like police reports generated by law enforcement officials—do not qualify as business or public records for precisely the same reason. See [FED. R. EVID.] 803(8) (defining public records as ‘excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel’).”) (emphasis added).

admissibility under the Confrontation Clause would be governed by the same analysis that courts have used to evaluate admissibility under the Confrontation Clause of business and public records.¹⁷⁶

Thus, if the documents, records, or writings were prepared with the objective expectation that they would be used in future criminal proceedings against an accused or for the purposes of use in litigation, then they would be testimonial and inadmissible under the Confrontation Clause, despite qualifying as hearsay exceptions, unless the declarant was unavailable and there had been a prior opportunity for the defendant to cross-examine the declarant, or the defendant had waived or forfeited his or her confrontation rights. Practically speaking, however, the very nature of most of these exceptions makes it highly unlikely that they will be deemed to be testimonial. Records of religious organizations, family records (such as entries made in family Bibles), certificates of baptism or marriage, property records, ancient documents, market compilations and directories, and learned treatises are simply not prepared with the objective expectation that they will be used in criminal prosecutions against an accused. Indeed, by their very nature, they are prepared for the administration of a religious, family, government, or business purpose and not in anticipation of use in criminal prosecutions.

Two additional exceptions found in Rule 5-803(b) also are unlikely to raise Confrontation Clause issues for the simple reason that they do not involve use of any out-of-court statement offered for its truth. To the contrary, they are offered to prove the *nonexistence* of a fact or *nonoccurrence* of an event. Rule 5-803(b)(7),¹⁷⁷ which pertains to business records, and 5-803(b)(10),¹⁷⁸ which pertains to public records,

¹⁷⁶ McLAIN, MARYLAND EVIDENCE, *supra* note 107, §§ 803(11):1 to 803(18):1 (2001 & Supp. 2009).

¹⁷⁷ Maryland Rule 5-803(b)(7) provides:

Absence of entry in records kept in accordance with subsection (b)(6). Unless the circumstances indicate a lack of trustworthiness, evidence that a diligent search disclosed that a matter is not included in the memoranda, reports, records, or data compilations kept in accordance with subsection (b)(6), when offered to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind about which a memorandum, report, record, or data compilation was regularly made and preserved.

¹⁷⁸ Maryland Rule 5-803(b)(10) provides:

Absence of public record or entry. Unless the circumstances indicate a lack of trustworthiness, evidence in the form of testimony or a certification in accordance with Rule 5-902 that a diligent search has failed to disclose a record, report, statement, or data compilation made by a public agency, or an entry therein, when offered to prove the absence of such a record or entry or the nonoccurrence or nonexistence of a matter about which a record was regularly made and preserved by the public agency.

permit the introduction of evidence that a diligent search has failed to disclose the existence of a business or public record, or entry within a business or public record, for the purposes of proving the nonexistence of a record or nonoccurrence of an event that, had it occurred, would have been memorialized in a business or public record. These exceptions present no Confrontation Clause issue because there is no out-of-court statement being offered.¹⁷⁹

F. Category Three: Hearsay Exceptions in Rule 5-803(b) Pertaining to Reputation and the Confrontation Clause

As stated in the introduction to this section, the third category of hearsay exceptions, found in Maryland Rule 5-803(b), involves three exceptions, all dealing with reputation evidence. Rule 5-803(b)(19)¹⁸⁰ addresses reputation concerning personal or family history; Rule 5-803(b)(20)¹⁸¹ addresses reputation concerning boundaries or general history; and Rule 5-803(b)(21)¹⁸² addresses reputation as to character. Since reputation evidence necessarily involves the collective judgment of a group or community regarding—with respect to these particular rules—a person’s family history, a property boundary, an historical event, or a character trait of a person that is established over time, it seems highly unlikely that a reputation could develop under circumstances that would meet the definition of “testimonial” under *Crawford*.¹⁸³ Rather, it is most likely that the reputation evidence will be provided by a live witness at trial who will testify as to his or her knowledge of the particular reputation at issue and, in so doing, be available for cross-examination. Further, from a practical perspective, the type of reputation evidence

¹⁷⁹ MCLAIN, MARYLAND EVIDENCE, *supra* note 107, §§ 803(7):1, 803(10):1 (Supp. 2009).

¹⁸⁰ Maryland Rule 5-803(b)(19) provides:

Reputation concerning personal or family history. Reputation, prior to the controversy before the court, among members of a person’s family by blood, adoption, or marriage, or among a person’s associates, or in the community, concerning a person’s birth, adoption, marriage, divorce, death, or other similar fact of personal or family history.

¹⁸¹ Maryland Rule 5-803(b)(20) provides:

Reputation concerning boundaries or general history. (A) Reputation in a community, prior to the controversy before the court, as to boundaries of, interests in, or customs affecting lands in the community. (B) Reputation as to events of general history important to the community, state, or nation where the historical events occurred.

¹⁸² Maryland Rule 5-803(b)(21) provides: “Reputation as to character. Reputation of a person’s character among associates or in the community.”

¹⁸³ MCLAIN, MARYLAND EVIDENCE, *supra* note 107, §§ 803(19):1, 803(21):1 (Supp. 2009) (“The out-of-court statements generating reputation evidence under [these] hearsay exception[s] would seem clearly to be nontestimonial under *Crawford v. Washington*.”).

covered by these rules would likely be introduced in criminal cases infrequently. Accordingly, judges and practitioners can expect that these three exceptions will seldom, if ever, be objectionable under the Confrontation Clause.

G. Category Four: The Rule 5-803(b)(24) “Catchall” Exception and the Confrontation Clause

The final “category” (albeit a category of one, but with infinite possibilities) of hearsay exceptions found in Maryland Rule 5-803(b) is the so-called “catchall exception” found at Rule 5-803(b)(24).¹⁸⁴ It is the Maryland equivalent of FRE 807. And, although located in Rule 5-803, the exception covers any statement “not specifically covered by any of the hearsay exceptions listed in this Rule or in Rule 5-804,” provided the following factors are met: (1) the statement is offered to prove a “material fact”; (2) the statement is more probative evidence of that material fact than any other evidence that, with reasonable effort, could be procured to prove it; (3) the general purpose of the evidence rules and the interests of justice will be served by permitting the introduction of the evidence; and (4) sufficient advance notice of the intent to introduce the evidence is given to the opposing party, as well as the particulars of the statement and the name and address of the declarant.¹⁸⁵ It is readily apparent that this exception, limited only by human imagination, could be abused to the extent of trumping the established hearsay exceptions and the very rule against admission of hearsay itself. However, the committee note for Rule 5-803(b)(24) cautions that the rule

does not contemplate an unfettered exercise of judicial discretion, but it does provide for treating new and presently unanticipated situations which demonstrate a trustworthiness within the spirit of the specifically stated exceptions. . . . It is intended that the

¹⁸⁴ Maryland Rule 5-803(b)(24) provides:

Other exceptions. Under exceptional circumstances, the following are not excluded by the hearsay rule: A statement not specifically covered by any of the hearsay exceptions listed in this Rule or in Rule 5-804, but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. A statement may not be admitted under this exception unless the proponent of it makes known to the adverse party, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the intention to offer the statement and the particulars of it, including the name and address of the declarant.

¹⁸⁵ Md. Rule 5-803(b)(24).

residual hearsay exception will be used very rarely, and only in exceptional circumstances.¹⁸⁶

It is, therefore, apparent that two conclusions can be drawn about the Confrontation Clause issues that may be associated with efforts to introduce hearsay under the catchall exception: (1) if the rule is applied as intended by its drafters, then attempts to use it will be infrequent and only in exceptional circumstances, and (2) it is impossible to anticipate in advance every instance where use of the rule may apply. Regardless, the Confrontation Clause implications of this rule are rather simple. If the hearsay statement offered under Rule 5-803(b)(24) meets the definition of a “testimonial statement” as discussed above, then it will not be admissible against a defendant in a criminal trial unless the declarant is unavailable and there was a prior opportunity for cross-examination, or the defendant has waived or forfeited his or her confrontation rights.¹⁸⁷ Practically speaking, judges and lawyers should compare the hearsay statement offered under the catchall exception to the closest analog among the existing hearsay exceptions, and then determine whether that particular type of hearsay has been—or is likely to be—treated as testimonial under the Supreme Court and Maryland cases.

IV. HEARSAY EXCEPTIONS: DECLARANT UNAVAILABLE

In the preceding two parts of this article, we synthesized the principles developed in the *Crawford* and *Snowden* lines of cases and then applied them to the specific hearsay exceptions that do not require the unavailability of the declarant. As noted throughout the article, *Crawford* requires that testimonial statements made by a declarant be inadmissible unless two conditions are satisfied. First, the declarant must be unavailable to testify at trial.¹⁸⁸ Second, the defendant must have had a prior opportunity to cross-examine the declarant.¹⁸⁹ With limited exception, unless both of these conditions are met, the statement will be excluded under the Confrontation Clause, even if it is not excluded as inadmissible hearsay.¹⁹⁰ This part of the article addresses the applicability of *Crawford* to the hearsay exceptions that *require* the declarant to be unavailable and, additionally, analyzes the limited exceptions to the Confrontation Clause’s requirement that testimonial out-of-court statements are inadmissible.

¹⁸⁶ Md. Rule 5-803(b) advisory committee’s note.

¹⁸⁷ MCLAIN, MARYLAND EVIDENCE, *supra* note 107, § 803(24):1 (Supp. 2009) (“‘Testimonial’ statements offered against an accused [under Maryland Rule 5-803(b)(24)] must comply with *Crawford*.”).

¹⁸⁸ See *supra* Part II.F.

¹⁸⁹ *Id.*

¹⁹⁰ *Crawford*, 541 U.S. at 68.

A. Maryland Rule 5-804 Overview

With one significant difference,¹⁹¹ the Maryland hearsay exceptions that require the unavailability of the declarant to testify closely resemble, if not are identical to, the federal rules from which much of these exceptions are derived.¹⁹² Unlike Maryland Rule 5-803, which does not require the unavailability of the declarant as a prerequisite to admissibility, Maryland Rule 5-804 requires that the declarant of the statement not be available to testify as a witness. More specifically, it is the unavailability of the *declarant's testimony*, not the unavailability of the declarant, which is required by this rule.¹⁹³

Under Maryland Rule 5-804, hearsay statements will not be excluded by the rule against hearsay, Maryland Rule 5-802, if the following is present: (1) the declarant is “unavailable as a witness,” and (2) the statement qualifies as an exception under Maryland Rule 5-804(b). Regarding the first condition, Rule 5-804(a) identifies five situations that qualify a declarant to be “unavailable as a witness.”¹⁹⁴ Judges and practitioners should note that the examples of declarant unavailability provided by Rule 5-804(a) are illustrative and not exclusive.¹⁹⁵ A declarant may be unavailable because: (1) the declarant is exempted by a claim of privilege; (2) the declarant refuses to testify; (3) the declarant claims lack of memory; (4) the declarant is unable to testify due to death or physical or mental infirmity; or (5) the declarant is absent from the hearing and the proponent has been unable to procure the absent declarant's attendance or testimony by service of process or similar means.¹⁹⁶ Unavailability, however, is limited, as the rule provides that a statement will not qualify as an exception to the hearsay rule if the unavailability of the witness is due to the procurement or wrongdoing of the proponent of the statement for the purpose of preventing the witness from attending or testifying.¹⁹⁷

¹⁹¹ See *infra* Part IV.E.

¹⁹² Compare FED. R. EVID. 804 with Md. Rule 5-804.

¹⁹³ 5 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE § 804.03[1] (Joseph M. McLaughlin ed., 2d ed. 2010) [hereinafter WEINSTEIN'S FEDERAL EVIDENCE] (“The declarant's presence on the witness stand will not block use of his or her extra-judicial statement if the declarant refuses to answer, exercises a privilege not to answer, or is suffering from a mental disability or impairment of memory that results in the ‘unavailability’ of testimony.”).

¹⁹⁴ Md. Rule 5-804(a).

¹⁹⁵ Md. Rule 5-804(a) (“‘Unavailability as a witness’ *includes* situations in which”) (emphasis added).

¹⁹⁶ Md. Rule 5-804(a). See MCLAIN, MARYLAND EVIDENCE, *supra* note 107, §§ 804:1 to 806(6):2 (2001 & Supp. 2009), for a discussion of the five circumstances of “unavailability” under 5-804 and comparison to the federal rules and common law.

¹⁹⁷ Md. Rule 5-804(a). FRE 804(a) similarly provides that a declarant is *NOT* unavailable as a witness if exemption, refusal, claim of lack of memory, inability or absence due to the

If the witness is, in fact, unavailable, a judge or attorney must then look to the particular type of statement to determine if it falls under one of five exceptions. Maryland Rule 5-804(b) provides that the following statements may be entered into evidence and not excluded by the hearsay rule: (1) former testimony; (2) statement under impending belief of death; (3) statement against interest; (4) statement of personal or family history; and (5) statements made by a witness now unavailable because of a party's wrongdoing. Thus, if the witness is unavailable and the statement falls under one of these five exceptions, then the statement may be admitted into evidence, unless it is excluded for other reasons.¹⁹⁸

The Court in *Crawford* held that the Sixth Amendment demands, as the common law required, unavailability of the declarant and prior opportunity for the defendant to cross-examine the witness.¹⁹⁹ The Confrontation Clause, therefore, does not prohibit the introduction of a prior testimonial statement for its substantive truth if the statement meets the requirements laid out in *Crawford*. Thus, in criminal cases, when hearsay statements are also "testimonial," a defendant's Sixth Amendment right to confrontation must be considered. The following sections examine the exceptions provided by Maryland Rule 5-804(b) under such a context.

B. Rule 5-804(b)(1) Former Testimony and the Confrontation Clause

Maryland Rule 5-804(b)(1), as does FRE 804(b)(1), provides a specific exception to the hearsay rule concerning statements given in former testimony. Under this exception, former testimony will not violate the Confrontation Clause because the exception itself requires both that the declarant be unavailable to testify and that the defendant had the opportunity to cross-examine the declarant when the former testimony was given. In *Williams v. State*, the Court of Special Appeals of Maryland considered this precise issue, noting, "we need not make an independent inquiry into appellant's Sixth Amendment claim because our finding that the testimony was properly admitted under Rule 5-804(b)(1) is necessarily predicated on a determination that appellant had a prior opportunity to cross-examine [the declarant]."²⁰⁰ Former testimony,

procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying. Nevertheless, such statements will not be excluded by the hearsay rule under FRE 804(b).

¹⁹⁸ As for example, otherwise relevant evidence excluded by "constitutions, statutes or these rules, or by decisional law not inconsistent with these rules." Md. Rule 5-402.

¹⁹⁹ *Crawford v. Washington*, 541 U.S. 36, 68 (2004).

²⁰⁰ *Williams v. State*, 183 Md. App. 517, 533, 962 A.2d 440, 449 (2008), *cert. granted*, 408 Md. 149, 968 A.2d 1064 (Apr. 7, 2009); *see also* *United States v. Avants*, 367 F.3d 443, 445 (5th Cir. 2004) ("The qualities that made [the witness'] testimony admissible under 804(b)(1) make it meet *Crawford's* [Sixth Amendment] Confrontation Clause test: unavailability and a prior opportunity for cross examination.").

unlike other exceptions, does not rely upon some set of circumstances to substitute for oath and cross-examination, since both oath and opportunity to cross-examine were present in fact. The only ideal condition for the giving of testimony missing is the opportunity for the jury to observe the witness' demeanor while testifying.²⁰¹

The language of both Maryland Rule 5-804(b)(1) and FRE 804(b)(1) is essentially identical, except with respect to the way each describes the forum in which the testimony is given. The Maryland rule includes testimony "given as a witness in any action or proceeding or in a deposition."²⁰² The federal rule describes testimony given at "another hearing of the same or a different proceeding."²⁰³ Both rules require that the party against whom the statement is being offered have had the opportunity and similar motive to develop the testimony *either* by direct, cross, or redirect examination.²⁰⁴ Additionally, they both mandate that the issue to which the testimony related at the former hearing is substantially identical to the issue in the present case.²⁰⁵

In criminal cases, there must be an *opportunity* for the defendant to cross-examine the witness whose former testimony from a prior trial is now being offered against the defendant in his or her current trial.²⁰⁶ Tactical or strategic decisions will not constitute a denial of the opportunity to examine. Only an *opportunity* to develop the testimony is required; there need not have been an actual examination of the witness

²⁰¹ See FED. R. EVID. 804 advisory committee's note. However, this condition is present if the former testimony was video recorded. See, e.g., *United States v. McGowan*, 590 F.3d 446, 456 (7th Cir. 2009) (noting that unavailable witness' videotaped deposition "allowed the jury to fully experience [the witness'] testimony, to view her demeanor, to hear her voice and to determine her credibility").

²⁰² Md. Rule 5-804(b)(1). Depositions are admissible in a federal civil case under FED. R. CIV. P. 32(a)(3) and in a federal criminal case under FED. R. CRIM. P. 15(f).

²⁰³ FED. R. EVID. 804(b)(1).

²⁰⁴ FED. R. EVID. 804(b)(1); Md. Rule 5-804(b)(1); see also *Williams v. State*, 183 Md. App. 517, 531, 962 A.2d 440, 448 (2008), cert. granted, 408 Md. 149, 968 A.2d 1064 (2009) ("In determining the admissibility of the testimony of a witness from an earlier proceeding under Rule 5-804(b)(1), the issue is whether the party opposing the admission had a similar motive to cross-examine that witness at the prior proceeding, not whether he, in fact, acted on that motive.").

²⁰⁵ See *United States v. Carson*, 455 F.3d 336, 378 (D.C. Cir. 2006) (excluding prior testimony because of a failure to show similar motive); *United States v. Koon*, 34 F.3d 1416 (9th Cir. 1994), *aff'd in part and rev'd in part on other grounds*, 518 U.S. 81 (1996); *United States v. DiNapoli*, 8 F.3d 909, 914-15 (2d Cir. 1993); *United States v. Feldman*, 761 F.2d 380, 385 (7th Cir. 1985) (factors for determining "similarity of motive" include: "(1) the type of proceeding in which the testimony is given, (2) trial strategy, (3) the potential penalties or financial stakes, and (4) the number of issues and parties") (citations omitted).

²⁰⁶ *Tyler v. State*, 342 Md. 766, 774-75, 679 A.2d 1127, 1131-32 (1996); *Williams*, 183 Md. App. at 533, 962 A.2d at 449.

by the party or predecessor in interest.²⁰⁷ For example, a party's choice to limit or forego examination in a motion hearing or deposition will not necessarily preclude the admissibility of testimony from the hearing or deposition in a later trial.²⁰⁸

C. Rule 5-804(b)(2) Statements Under Belief of Impending Death and the Confrontation Clause

In *Crawford*, the Court also left “for another day” the question of whether the distinction between testimonial and nontestimonial hearsay should be applied in the dying declaration hearsay exception to the rule prohibiting the admission of hearsay evidence.²⁰⁹ Only testimonial statements cause the out-of-court declarant to be a “witness” within the meaning of the Confrontation Clause. The Court noted that most hearsay exceptions cover statements that are, by their nature, not testimonial.²¹⁰ And, accordingly, most dying declarations are likely to be nontestimonial.²¹¹ Moreover, the Court found authority for admitting even those dying declarations that *were* testimonial, noting that dying declarations were the only recognized criminal hearsay exception that was well established at common law.²¹² The Court, however, refused to consider whether the Sixth Amendment incorporates an exception for dying declarations.²¹³ Rather, the Court found that, if dying declarations must be admissible under the Sixth Amendment on historical grounds, they would be a *sui generis*²¹⁴ exception.²¹⁵ To this day, the Court has not yet resolved this issue.²¹⁶

²⁰⁷ United States v. Mann, 161 F.3d 840, 861 (5th Cir. 1998); *Koon*, 34 F.3d at 1427; *Crawford v. State*, 282 Md. 210, 220-22, 383 A.2d 1097, 1103-04 (1978); *Williams*, 183 Md. App. at 531, 962 A.2d at 447-48.

²⁰⁸ See United States v. Zurosky, 614 F.2d 779, 791-93 (1st Cir. 1979), *cert. denied*, 446 U.S. 967 (1980).

²⁰⁹ *Crawford v. Washington*, 541 U.S. 36, 56 n.6 (2004).

²¹⁰ *Id.* at 56.

²¹¹ *Id.* at 56 n.6.

²¹² *Id.*

²¹³ *Id.*

²¹⁴ See *supra* note 41.

²¹⁵ *Crawford*, 541 U.S. at 56 n.6.

²¹⁶ As discussed in Weinstein's treatise on evidence:

Some statements qualifying as dying declarations under Rule 804(b)(2) likely will be testimonial, while others will not. The Supreme Court in *Crawford* found “scant evidence that exceptions were invoked to admit *testimonial* statements against the accused in a criminal case.” However, in the Court's view, dying declarations presented “the one deviation” from that situation. “Although many dying declarations may not be testimonial, there is authority for admitting even those that clearly are.” The Court found support for this view in light of the fact that dying declarations were the only recognized criminal hearsay exception that was well-established at common law. However, the Court declined to decide whether the

Maryland Rule 5-804(b)(2) provides that statements given under belief of impending death are not excluded by the hearsay rule. This rule is broader than its federal counterpart, FRE 804(b)(2), which applies only to prosecution for homicide.²¹⁷ Maryland Rule 5-804(b)(2), however, applies to “unlawful homicide, attempted homicide, or assault with intent to commit homicide.” Both apply to civil actions.²¹⁸ The justification for this exception, other than need, lies in the requirement that the declarant made the statement while believing that his or her death was imminent, and that the statement concerned the *cause or circumstances* of what the declarant believed to be his or her impending death.²¹⁹ Under this exception, such statements would qualify as a dying declaration even though the “dying declarant” survives, so long as: (1) the declarant is now unavailable to testify as a witness for any reason under Maryland Rule 5-804(a), which could be, for example, “because of death *or then existing physical or mental illness or infirmity*”²²⁰ caused by the attack; (2) it was the intent of the attacker to kill the declarant; (3) the declarant, at the time the statement was made, believed that death was imminent; and (4) the statement concerned the cause or circumstances of the declarant’s belief.²²¹

There still exists a lack of guidance regarding the treatment of dying declarations. In his treatise on evidence, Weinstein suggests:

Appellate courts will eventually either exclude dying declarations from confrontation requirements altogether or develop rules for determining whether a proffered dying declaration is “testimonial” under *Crawford v. Washington*. In the meantime, trial judges will have to determine whether to impose a confrontation requirement on dying declarations, and, if so,

Sixth Amendment incorporates an exception for testimonial dying declarations. “If this exception must be accepted on historical grounds, it is *sui generis*.”

WEINSTEIN’S FEDERAL EVIDENCE, *supra* note 193, § 804.05[1] (quoting *Crawford*, 541 U.S. at 56 & n.6); *see also* *People v. Monterroso*, 101 P.3d 956, 972 (Cal. 2004) (finding trial court’s admission of dying declaration was not error, as *Crawford* seems to imply that the Sixth Amendment does not conflict with the dying declarations exception), *cert. denied*, 546 U.S. 834 (2005).

²¹⁷ Compare Md. Rule 5-804(b)(2), with FED. R. EVID. 804(b)(2).

²¹⁸ See FED. R. EVID. 804(b)(2) (“In a prosecution for homicide *or in a civil action or proceeding . . .*”); Md. Rule 5-804(b)(2) (“In a prosecution for an offense . . . *or in any civil action . . .*”).

²¹⁹ *Shepard v. United States*, 290 U.S. 96, 100 (1933) (“Fear or even belief that illness will end in death will not avail of itself to make a dying declaration. There must be a settled hopeless expectation that death is near at hand, and what is said must be spoken in the hush of its impending presence.”) (internal citations omitted).

²²⁰ Md. Rule 5-804(a)(4) (emphasis added).

²²¹ Md. Rule 5-804(b)(2).

decide whether the *Crawford* requirements have been met concerning the particular declaration at issue.²²²

However, courts have noted that no jurisdiction has excluded a testimonial dying declaration.²²³ Further, several states have specifically allowed the declaration as an exception to the rule in *Crawford*.²²⁴

In 2006, the Court of Special Appeals of Maryland dealt with the admissibility of a dying declaration in *Head v. State*.²²⁵ In that case, the court held that a statement made by a dying declarant to a police officer responding to a 911 call was nontestimonial, and, thus, the defendant's right to cross-examination was not violated.²²⁶ The court concluded that "[a]ny reasonable observer would understand that [the declarant] was facing an ongoing emergency and that the purpose of the interrogation was to enable police assistance to meet that emergency."²²⁷ Taken as a whole, depending on the circumstances surrounding the declaration, some statements admitted as dying declarations will likely be testimonial while

²²² WEINSTEIN'S FEDERAL EVIDENCE, *supra* note 193, § 804.05[1] (citing *Crawford*, 541 U.S. at 56 n.6 (raising, but not resolving, issues concerning dying declarations)).

²²³ See *State v. Lewis*, 235 S.W.3d 136, 148 (Tenn. 2007) (citing *Wallace v. State*, 836 N.E.2d 985, 992-96 (Ind. Ct. App. 2005) ("Since *Crawford*, we have found no jurisdiction that has excluded a testimonial dying declaration. Several states have specifically allowed the declaration as an exception to the rule in *Crawford*."); *State v. Young*, 710 N.W.2d 272, 283-84 (Minn. 2006)).

²²⁴ See, e.g., *Gardner v. State*, No. AP-75, 582, 2009 WL 3365652 (Tex. Crim. App. Oct. 21, 2009) (providing a useful summary of dying declarations and *Crawford*); *Harkins v. Nevada*, 143 P.3d 706, 711 (Nev. 2006) ("We agree with the states that recognize dying declarations as an exception to the Sixth Amendment confrontation right."); *Wallace v. State* 836 N.E.2d 985, 996 (Ind. Ct. App. 2006) ("[W]e are convinced that *Crawford* neither explicitly, nor impliedly, signaled that the dying declaration exception to hearsay ran afoul of an accused right of confrontation under the Sixth Amendment."); *People v. Monterroso*, 101 P.3d 956, 972 (Cal. 2004) ("[I]f, as *Crawford* teaches, the confrontation clause 'is most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding,' it follows that the common law pedigree of the exception for dying declarations poses no conflict with the Sixth Amendment.") (internal citations omitted).

²²⁵ 171 Md. App. 642, 659-60, 912 A.2d 1, 11 (2006). *Head v. State* provides an excellent review of *Crawford* and post-*Crawford* cases dealing with the issues of 911 calls and dying declarations. In *Head*, the court found three facts to support its conclusion:

First, as Officer George testified, the situation was "chaotic." Second, the scent of gunpowder in the air would mean to an objective observer that the crime was very recent and the situation was dangerous—at least potentially—because Officer George did not know whether the criminal who shot [the declarant] was still in the house. Third, immediately before he identified his attacker, [the declarant] was crying for help.

Id. at 659-60, 912 A.2d at 11.

²²⁶ *Id.* at 659-61, 912 A.2d at 11-12.

²²⁷ *Id.* at 659, 912 A.2d at 11 (quoting *United States v. Clemmons*, 461 F.3d 1057, 1060-61 (8th Cir. 2006)).

others will not.²²⁸ However, although the Court has not specifically ruled on this issue, it appears that even testimonial dying declarations will be admissible.

*D. Rule 5-804(b)(3) Statement Against Interest and the
Confrontation Clause*

Maryland Rule 5-804(b)(3) allows for the admissibility of out-of-court statements made by a declarant, which are against that declarant's interest, provided the declarant is unavailable as a witness. Statements against penal interest typically arise in criminal trials when offered by a defendant who claims that the declarant committed or was involved in the offense.²²⁹ These statements also arise when offered by the prosecution to establish the defendant's guilt as an accomplice of the declarant.²³⁰ The Maryland Rule that covers these statements, Rule 5-804(b)(3), and its federal counterpart, FRE 804(b)(3), are identical.²³¹ Each is founded on the premise that reasonable people tend not to make statements that are self-inculpatory, unless they believe that those statements are true.²³²

²²⁸ Crawford v. Washington, 541 U.S. 36, 56 n.6 (2004).

²²⁹ WEINSTEIN'S FEDERAL EVIDENCE, *supra* note 189, § 804.06[1] (citing Lilly v. Virginia, 527 U.S. 116 (1999)).

²³⁰ *Id.*

²³¹ FRE 804(b)(3) and Maryland Rule 5-804(b)(3) both currently provide:

A statement which was at the time of its making so contrary to the declarant's pecuniary or propriety interest, so tended to subject the declarant to civil or criminal liability, or . . . to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless the person believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

In September of 2009, the Judicial Conference met and approved an amendment to FRE 804(b)(3), which, at the time, only required a *defendant* to make a showing of corroborating circumstances. See Judicial Conference, Summary of the Report of the Judicial Conference Committee on Rules of Practice and Procedure 27 (September 2009), http://www.uscourts.gov/rules/Reports/Combined_ST_Report_Sept_2009.pdf (emphasis added). The proposed amendment would also "require the *government* to show corroborating circumstances as a condition for admission of an unavailable declarant's statement against penal interest." *Id.* (emphasis added). Upon approving the proposed amendment, the Judicial Committee transmitted the amendment to the Supreme Court for its consideration. *Id.* On Friday, April 16, 2010, the Maryland Rules Committee met to discuss the adoption of a conforming amendment to Maryland Rule 804(b)(3), which would amend "Rule 5-804(b)(3) by deleting the language 'to exculpate the accused' and adding the language 'in a criminal case'." See Maryland Rules Committee, Agenda for Rules Committee Meeting (April 16, 2010), <http://www.mdcourts.gov/rules/agenda/agenda.pdf>.

²³² Williamson v. United States, 512 U.S. 594, 599 (1994). See also FED. R. EVID. 804 advisory committee's note (citing Hileman v. Nw. Eng'g Co., 346 F.2d 668 (6th Cir. 1965)) ("The circumstantial guarantee of reliability for declarations against interest is the assumption that persons do not make statements which are damaging to themselves unless satisfied for good reason that they are true.").

Because statements qualifying under Maryland Rule 5-804(b)(3) may or may not be testimonial, they require a statement-by-statement Confrontation Clause analysis. In *Crawford*, the Court specifically identified several examples of declarations against penal interests as testimonial.²³³ The Court determined that plea allocutions were testimonial and inadmissible.²³⁴ Confessions of an accomplice made to law enforcement officers were also deemed testimonial, including those that do not directly implicate the defendant.²³⁵ These types of statements against interest must be excluded, unless the defendant had the opportunity to cross-examine the unavailable declarant.²³⁶ If the statements do not fall under one of the examples described in *Crawford*, judges and practitioners should examine the statement to determine whether or not it is testimonial.²³⁷

Whether a statement is, in fact, so contrary to the declarant's interest such that a reasonable person in the declarant's position would not have made the statement is a preliminary determination to be made by the court, based on the circumstances of each case.²³⁸ In Maryland, preliminary determinations by the court regarding questions of admissibility of evidence are governed by Rule 5-104(a), which allows the court to "decline to require strict application of the rules of evidence, except those relating to privilege and the competency of the witness."

During the preliminary determination, when statements made by an unavailable declarant who is subject to criminal prosecution are offered against an accused, the declarant's motivation for making the statement will be strictly scrutinized.²³⁹ This rule does not, however, attempt to codify the constitutional principle articulated in *Bruton v. United States*,²⁴⁰ concerning statements of co-defendants offered at a joint trial against a co-defendant. There, the Court ruled that, at a joint trial, the

²³³ *Crawford*, 541 U.S. at 65.

²³⁴ *Id.* at 64-65.

²³⁵ *Id.* at 63-64.

²³⁶ *Id.* at 65.

²³⁷ *See supra* Part II.F.

²³⁸ FED. R. EVID. 804 advisory committee's note. The advisory committee's note for FRE 804 states:

Thus a statement admitting guilt and implicating another person, made while in custody, may well be motivated by a desire to curry favor with the authorities and hence fail to qualify as against interest. On the other hand, the same words spoken under different circumstances, *e.g.*, to an acquaintance, would have no difficulty in qualifying.

Id. (internal citations omitted). For cases discussing declarations against penal interest, see *State v. Matusky*, 343 Md. 467, 682 A.2d 694 (1996); *Stewart v. State*, 151 Md. App. 425, 827 A.2d 850 (2003); *Nero v. State*, 144 Md. App. 333, 798 A.2d 5 (2002).

²³⁹ *See, e.g.*, *United States v. Oliver*, 626 F.2d 254, 261 (2d Cir. 1980).

²⁴⁰ *Bruton v. United States*, 391 U.S. 123, 126, 137 (1968).

admission of a co-defendant's confession that implicated the defendant violated that defendant's Sixth Amendment to confront his accusers.²⁴¹ That issue continues to be governed by constitutional law.²⁴²

A statement containing both self-serving and disserving declarations may be admitted in its entirety, if the two statements are related and the statement considered in its entirety is sufficiently trustworthy to establish that the statement is against the declarant's interest.²⁴³ This exception requires corroborating circumstances clearly indicating the trustworthiness of an against-penal-interest statement only if the statement is offered to exculpate the accused.²⁴⁴ However, because of Sixth Amendment confrontation concerns, courts, even before *Crawford*, have imposed a similar corroboration/trustworthiness requirement upon statements *inculcating* the accused, as well.²⁴⁵

E. Rule 5-804(b)(4) Statement of Personal or Family History and the Confrontation Clause

The Maryland and Federal rules concerning statements of personal or family history, Maryland Rule 5-804(b)(4) and FRE 804(b)(4), are virtually identical.²⁴⁶ The rationale for admissibility rests on the premise that a declarant will not make a statement about the matters covered in the exception unless it is trustworthy.²⁴⁷ Both rules govern statements made by the declarant concerning, among other things, *the declarant's* own birth; adoption; marriage; legitimacy; ancestry; or relation by blood, adoption, or marriage, even though the declarant lacked personal knowledge of these matters.²⁴⁸ As such statements are those made by the declarant and which generally concern only the declarant, it would seem

²⁴¹ *Id.*

²⁴² *Id.*; see also *Oliver*, 626 F.2d at 261 n.9.

²⁴³ MCLAIN, MARYLAND EVIDENCE, *supra* note 107, § 804(3):1(d) (2001) (citing *State v. Matusky*, 343 Md. 467, 478-82, 682 A.2d 694, 699-701 (1996) (detailed discussion); *State v. Standifur*, 310 Md. 3, 16-17, 526 A.2d 955, 961-62 (1987)); see also *Stewart v. State*, 151 Md. App. 425, 827 A.2d 850 (2003), *cert. denied*, 377 Md. 276, 833 A.2d 32 (2003).

²⁴⁴ *Brady v. State*, 226 Md. 422, 428-29 (1961), *aff'd*, 373 U.S. 83 (1963); see also *Gray v. State*, 368 Md. 529, 796 A.2d 697 (2002). See *supra* note 231 for discussion of proposed amendments to both FRE 804(b)(3) and Maryland Rule 804(b)(3), which would extend the corroboration requirement to the government.

²⁴⁵ *Williamson*, 512 U.S. 594 (1994) (not reaching issue); *United States v. Costa*, 31 F.3d 1073 (11th Cir. 1994); *United States v. Harty*, 930 F.2d 1257 (7th Cir. 1991), *cert. denied*, 502 U.S. 894 (1991); *United States v. Condolini*, 870 F.2d 496 (9th Cir. 1989); see Rebecca L. Dubin, Recent Decision, 343 Md. 467, 682 A.2d 694 (1996), 57 MD. L. REV. 838 (1998) (discussing admissibility of non-self-inculpatory statements that are not within declaration against interest)

²⁴⁶ Compare Md. Rule 5-804(b)(4), with FED. R. EVID. 804(b)(4).

²⁴⁷ MCLAIN, MARYLAND EVIDENCE, *supra* note 107, § 804(4):1 (discussing admissibility of statements of personal or family history).

²⁴⁸ Md. Rule 5-804(b)(4); FED. R. EVID. 804(b)(4).

unlikely that the Confrontation Clause would be offended.²⁴⁹ Nevertheless, statements made by a declarant describing his or her personal or family history may be inculpatory of an accused.²⁵⁰ While infrequent, they may require a confrontation analysis to consider whether or not the statement is testimonial.²⁵¹ Statements regarding alienage, for example, have been found to be testimonial.²⁵²

*F. Rule 5-804(b)(5) Forfeiture by Wrongdoing and the
Confrontation Clause*

In *Crawford*, the Supreme Court specifically accepted the rule of forfeiture by wrongdoing and held that it extinguishes Confrontation Clause claims on essentially equitable grounds.²⁵³ However, in *Giles v. California*,²⁵⁴ the Court limited the forfeiture by wrongdoing doctrine for confrontation purposes. In that case, the Court considered whether testimonial statements made by a murder victim to police before she was killed were admissible under the forfeiture by wrongdoing doctrine.²⁵⁵ At common law, the Court noted, there were two forms of testimonial statements that were admissible even though there was no confrontation: (1) dying declarations and (2) statements of a witness who was “detained” or “kept away” by means or procurement of the defendant.²⁵⁶ This second exception, also known as forfeiture by wrongdoing, required that the defendant engage in conduct specifically designed to prevent the witness from testifying.²⁵⁷ Applying this reasoning to the facts of the case, the Court determined that, because it was not shown that the appellant murdered the victim with the intention of preventing her from testifying at trial, the statements were inadmissible.²⁵⁸

In criminal cases, the doctrine of forfeiture by wrongdoing allows the admissibility of statements made by declarants whose unavailability to testify was wrongfully procured by *any* party—the defendant or

²⁴⁹ *But see* United States v. Gonzalez-Marichal, 317 F. Supp. 2d 1200, 1200 (S.D. Cal. 2004) (granting a motion in limine to “exclude an unavailable material witness’s statement made during custodial interrogation about her alienage on the ground that admission of the statement violates Defendant’s Sixth Amendment confrontation rights”).

²⁵⁰ *See Id.* at 1202-03 (finding statements regarding declarant’s alienage to be testimonial in nature).

²⁵¹ *See supra* Part II.F.

²⁵² *Gonzalez-Manchal*, 317 F. Supp. 2d at 1202-03.

²⁵³ *Crawford v. Washington*, 541 U.S. 36, 62 (2004) (“[T]he rule of forfeiture by wrongdoing . . . extinguishes confrontation claims on essentially equitable grounds; it does not purport to be an alternative means of determining reliability.”); *see also* *Davis v. Washington*, 547 U.S. 813, 833 (2006).

²⁵⁴ 128 S. Ct. 2678 (2008).

²⁵⁵ *Id.* at 2681-82.

²⁵⁶ *Id.* at 2682-83.

²⁵⁷ *Id.* at 2683.

²⁵⁸ *Id.* at 2693.

prosecution.²⁵⁹ A defendant who causes a witness to be unavailable may act personally or through others.²⁶⁰ It is sufficient “if the wrongdoing leading to the witness’s unavailability was ‘in furtherance, within the scope, and reasonably foreseeable as a necessary and natural consequence of an ongoing conspiracy’ between the defendant and the wrongdoer.”²⁶¹ Wrongdoing includes “coercion, undue influence, or pressure to silence testimony.”²⁶² When it is determined that a witness is unavailable because a defendant wrongfully procured the unavailability of that witness, an accused may forfeit objections based on both hearsay and Sixth Amendment confrontation grounds.²⁶³

While both the federal and state rules allow for the admission of hearsay statements in which a witness is unavailable because of a party’s wrongdoing, the processes for determining whether a defendant has caused a witness to be unavailable differ significantly. The federal rule for forfeiture by wrongdoing, FRE 804(b)(6), admits a statement if the declarant is unavailable and the statement is “offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.” Maryland, however, has not adopted FRE 804(b)(6) into its rules of evidence in criminal causes.²⁶⁴ Instead, when the witness is unavailable due to a party’s wrongdoing, Maryland Rule 5-804(b)(5)(B) provides that admission of the witness’ statements be governed by section 10-901 of the Courts and Judicial Proceedings Article of the Maryland Code.²⁶⁵ As demonstrated below, the result is considerably more restrictive than under FRE 804(b)(6).

1. Federal Approach to Forfeiture by Wrongdoing.

FRE 804(b)(6) provides that a “statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness” will not be excluded by the hearsay rule if the declarant is unavailable as a witness.²⁶⁶ For a statement to be admissible under FRE 804(b)(6), the

²⁵⁹ 30B MICHAEL H. GRAHAM, FEDERAL PRACTICE & PROCEDURE § 7078 (2006 & Supp. 2009).

²⁶⁰ *Id.*

²⁶¹ WEINSTEIN’S FEDERAL EVIDENCE, *supra* note 193, § 804.03[7][a] (quoting United States v. Cherry, 217 F.3d 811, 820 (10th Cir. 2000)).

²⁶² United States v. Scott, 284 F.3d 758, 764 (7th Cir. 2002).

²⁶³ *Id.* at 762.

²⁶⁴ Witness unavailability by wrongdoing in civil cases is discussed in Maryland Rule 5-804(b)(5)(A).

²⁶⁵ *See generally* MD. CODE ANN., CTS. & JUD. PROC. § 10-901 (2006).

²⁶⁶ Rule intended as a “prophylactic rule to deal with abhorrent behavior ‘which strikes at the heart of the system of justice itself.’ ” FED. R. EVID. 804(b)(6) advisory committee’s note

following is required: (1) the declarant must be unavailable as a witness; (2) the statement must be offered against a party that has “*engaged in or acquiesced in*” wrongdoing; (3) the wrongdoing must have been intended to, and did, procure the unavailability of the witness;²⁶⁷ and (4) there must be a nexus between the defendant’s wrongful acts and the unavailability of the witness (the wrongdoing need not be criminal activity). It is important to note that the statement need not be one that is given under oath or written, nor signed by the declarant.

Under the federal rules, the forfeiture by wrongdoing doctrine applies to all parties, including the government, and there appears to be no limitation as to the type of criminal cause to which the rule applies.²⁶⁸ There is no requirement to notify opposing counsel of intent to introduce the statement. Additionally, a hearing for the purpose of making a preliminary determination under FRE 104(a), regarding whether the defendant caused declarant’s unavailability as a witness, is not required; however, the majority of federal courts allow a hearing.²⁶⁹ Where a hearing is permitted, when making preliminary determinations under FRE 104(a), the rules of evidence are relaxed and need not apply, except with respect to privilege.²⁷⁰ Finally, the standard of proof required for preliminary determinations of forfeiture by wrongdoing is preponderance of the evidence.

2. Maryland Approach to Forfeiture by Wrongdoing.

As noted, in Maryland, preliminary determinations by the court regarding questions of admissibility of evidence are ordinarily governed by Rule 5-104(a), which allows the court to “decline to require strict application of the rules of evidence, except those relating to privilege and the competency of the witness.” When analyzing statements falling

(quoting *United States v. Mastrangelo*, 693 F.2d 269, 272 (2d Cir. 1982), *cert. denied*, 467 U.S. 1204 (1984)).

²⁶⁷ *Giles v. California*, 128 S. Ct. 2678, 2687-88 (2008) (citations omitted) (emphasis added).

²⁶⁸ See FED. R. EVID. 804(b)(6) advisory committee’s note.

²⁶⁹ Hearing out of the presence not required. See *United States v. Emery*, 186 F.3d 921, 926 (8th Cir. 1982) (court held that trial court need not conduct independent evidentiary hearing but may admit testimonial hearsay of an unavailable witness “contingent upon proof of the underlying murder by a preponderance of the evidence”—which may be established during trial). This is similar to conditional relevance FRE 104(b) determination and FRE 403 judicial economy considerations that courts apply when determining whether to admit hearsay statements of co-conspirators. See *United States v. Johnson*, 219 F.3d 349, 356 (4th Cir. 2000) (sufficient evidence presented during trial to establish the defendant caused unavailability of witness without necessity of evidentiary hearing).

²⁷⁰ FED. R. EVID. 104(a) (“Preliminary questions concerning the . . . admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination *it is not bound by the rules of evidence* except those with respect to privileges.”) (emphasis added).

under the forfeiture by wrongdoing exception, however, Maryland courts employ Rule 5-804(b)(5) and section 10-901 of the Courts and Judicial Proceedings Article.²⁷¹ The former adopts the doctrine of forfeiture by wrongdoing as an exception to the hearsay rule.²⁷² The latter provides a statutory procedure for determining when this exception applies.²⁷³ The requirements of this statute significantly differ from those under FRE 804(b)(6).

For a statement to be admissible under section 10-901 of the Courts and Judicial Proceedings Article, the declarant must be unavailable as a witness, and the statement can only be offered against a party that is charged with a felonious crime of violence or felonious narcotics distribution. Unlike under the federal rule, a statement may not be admitted under this section *unless* it was (1) “[g]iven *under oath* subject to the penalty of perjury at a trial, hearing or other proceeding or in a deposition”; (2) [*r*]educed to writing and signed by the declarant”; or (3) “[r]ecorded in substantially verbatim fashion by stenographic or electronic means contemporaneously with the making of the statement.”²⁷⁴ In addition to requiring the higher clear and convincing standard for statements admitted under this doctrine, the statute mandates that courts apply the Maryland Rules of Evidence strictly.²⁷⁵

The statute also requires notice.²⁷⁶ As soon as is practicable after the proponent of the statement learns that the declarant will be unavailable, the proponent must notify the adverse party of: (1) “[t]he intention to offer the statement”; (2) “[t]he particulars of the statement”; and (3) “[t]he identity of the witness through whom the statement is offered.”²⁷⁷ It is only when all of these conditions have been met that a statement may be offered as an exception under Maryland Rule 5-804(b)(5)(B). As demonstrated by a higher standard of proof, a stricter application of the rules of evidence, and a notice requirement, the Maryland Rule and its

²⁷¹ Md. Rule 5-804(b)(5)(B) (“In criminal causes in which a witness is unavailable because of a party’s wrongdoing, admission of the witness’s statement under this exception is governed by [Maryland Code, Courts & Judicial Proceedings Article], § 10-901.”); *see also* Byron L. Warnken, “*Forfeiture by Wrongdoing*” After Crawford v. Washington: *Maryland’s Approach Best Preserves the Right to Confrontation*, 37 U. BALT. L. REV. 203, 241-44 (2008); Tracey L. Perrick, Comment, Crawford v. Washington: *Redefining Sixth Amendment Jurisprudence; The Impact Across the United States and in Maryland*, 35 U. BALT. L. REV. 133, 134 n.10 (2005) (noting that “the Maryland General Assembly codified the common law rule of forfeiture, adopting a statute that incorporates by reference Maryland Rule 5-804”).

²⁷² MCLAIN, MARYLAND EVIDENCE, *supra* note 107, § 804(6):1(b) (Supp. 2009).

²⁷³ *See* MD. CODE ANN., CTS. & JUD. PROC. § 10-901 (2006).

²⁷⁴ *Id.* at § 10-901(c)(1).

²⁷⁵ *Id.* at § 10-901(b)(1).

²⁷⁶ *Id.* at § 10-901(c)(2).

²⁷⁷ *Id.*

corresponding statute are much more restrictive than their federal counterpart.

V. CONCLUSION

Given the frequency with which the Supreme Court and Maryland Appellate Courts have issued opinions regarding the contours of the Confrontation Clause since the publication of *Crawford* in 2004, it is fair to predict that they will continue to do so for the foreseeable future, at least until the many unanswered questions about the effect of the Confrontation Clause on the admissibility of hearsay in criminal cases have been resolved. Recognizing this, as well as the challenges presented to trial judges and lawyers who often must deal with these issues “on the fly” during trial, we have attempted to provide practical and useful guidelines that should lead to correct rulings and fair outcomes at trial.

Reduced to its essentials, the Confrontation Clause precludes introduction as evidence against a defendant in a criminal trial statements that are testimonial unless the declarant is unavailable, and the defendant has had a prior opportunity to cross-examine the declarant. However, even statements that are deemed to be testimonial and for which there was no prior opportunity for cross-examination may be admitted against a defendant. In such instances, the Confrontation Clause will not be violated if the defendant has forfeited his confrontation rights by his wrongdoing, waived them by failing to object to the introduction of the statement, or by failing to comply with statutes imposing a duty to notify the prosecution that the defendant intends to object to the introduction of out of court testimonial statements, such as laboratory reports, unless the declarant who made them testifies.

With regard to hearsay statements that fall within recognized exceptions to the general rule excluding hearsay, certain exceptions, such as those found at Maryland Rule 5-802.1 always will meet Confrontation Clause requirements because they require the presence of the declarant at trial to insure the opportunity for cross-examination. Others, such as Rule 5-803(a) admissions by a party-opponent usually will be nontestimonial. Other hearsay exceptions, such as those found at Maryland Rule 5-803(b)(6) will withstand Confrontation Clause challenges, even if the defendant does not testify, if they are not properly classified as “testimonial” because, objectively viewed, when made, it was not reasonably foreseeable that they would be used in future criminal proceedings. As to these exceptions, no per se rule can be stated; rather, a fact-intensive case-by-case analysis will be required to differentiate testimonial from nontestimonial statements. Among the 5-803(b) exceptions, those falling into the category dealing with the declarant’s perceptions, state of mind, emotion, intent, and physical or mental condition often will not be testimonial because they will have been made

under circumstances that make it unlikely that, objectively viewed, it was foreseeable that they would see future use as evidence in criminal proceedings. For those for which such use reasonably is foreseeable, however, they will be classified as testimonial, and, therefore, excluded under the Confrontation Clause, unless the declarant is unavailable, and there was a prior opportunity for cross-examination, unless confrontation rights have been forfeited or waived.

As for the vast array of Maryland Rule 5-803(b) hearsay exceptions that deal with various documents, records and writings, some, such as business and public records, will be deemed to be testimonial, or not, based on the purpose underlying their creation. If made for routine use by the entity or person for whose benefit they were created, they can be expected to be nontestimonial. If, however, prepared for purposes of use in criminal proceedings, such as crime lab or similar forensic records, they will be testimonial and subject to the restrictions of the Confrontation Clause. For these hearsay exceptions, the key determinative factor is to avoid reliance on labels such as “business” or “public” records, but instead to focus on the purpose underlying the particular record’s creation. Specifically, the essential question is whether the document or record was prepared for the purpose of proving factual matters in a criminal case. If evidentiary use is reasonably foreseeable at the time of preparation, then, once again, the restrictions of the Confrontation Clause will apply. Finally, Maryland Rule 5-803(b) exceptions dealing with reputation evidence have in common the indicia of having been made under circumstances that usually will result in a finding that they are not testimonial.

The five hearsay exceptions found at Maryland Rule 5-804(b) all involve unavailable declarants and will be exempt from Confrontation Clause restrictions only if not testimonial, again requiring case-by-case evaluation. Of these exceptions, prior testimony of an unavailable declarant always will meet Confrontation Clause requirements because the declarant will have had to have been available for cross-examination at the earlier trial or court proceeding. Dying declarations could be deemed to be testimonial or nontestimonial, depending on the circumstances surrounding their making, but they may also be *sui generis* exceptions to the requirements of the Confrontation Clause because they were well recognized at common law at the time of the enactment of the Sixth Amendment. Statements of unavailable declarants that are against their penal, proprietary, or pecuniary interests when made may be testimonial, or not, depending on the circumstances surrounding their making, and the foreseeability of their being used in subsequent criminal proceedings. And, finally, when the strict procedural requirements of Maryland Rule 5-804(b)(6) have been satisfied, then the statement of an unavailable declarant may be admitted against a defendant without

violating the Confrontation Clause, if the declarants' unavailability was procured by the defendant's own misconduct, which results in the forfeiture of confrontation rights.

It is hoped that our ambitions in writing this article have been fulfilled, and that it will provide a practical and helpful guide for judges and lawyers charged with applying the rules of evidence in criminal cases, for whom we have the greatest respect and highest regard.