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The 'Double Feature' of Hearsay and the Confrontation Clause, Plus Coming Attractions

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**The “Double Feature” of Hearsay and the Confrontation Clause,
Plus Coming Attractions**

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University of Baltimore School of Law
Tuesday, March 11, 2008
Professor Lynn McLain

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I. The Continuously Playing Double Feature of the Rules of Evidence and the Constitution: How Do the Pieces Fit Together?

To determine whether evidence of an -out-of-court statement is excluded by either the rules of evidence or the Constitution, one must make up to four determinations in the following order:

- (1) **Is the proffered evidence hearsay** (FRE 801, Md. Rule 5-801) (see II. and IV.)? This step is essential, because **if the evidence is nonhearsay** (including FRE 801(d) categories), **neither the hearsay rule (nor the Confrontation Clause) will exclude it.** See, e.g., *Tennessee v. Street*, 471 U.S. 409 (1985) (defendant's rights under the Confrontation Clause were not violated by the introduction of the confession of an accomplice for the *nonhearsay* purpose of rebutting respondent's testimony that his own confession was coercively derived from the accomplice's statement).
- (2) **IF it is hearsay, is it nonetheless not excluded by the hearsay rule, because it falls within an exception to that rule** (FRE 803-804, Md. Rules 5-802.1, 5-803 and 5-804)?
- (3) Even if the hearsay rule does not exclude it, **do other evidence rules exclude it** (e.g., FRE 403, 407-412, Md. Rules 5-403, 5-407-5-412, or privileges)?
- (4) *If it is hearsay* but *neither* the hearsay rule nor other rules of evidence exclude it, then one must ask **whether the Constitution excludes the evidence:**
 - (a) *If it is hearsay, and it is offered at a trial on the merits* against a *criminal accused*, and the evidence rules do not exclude it, is it "testimonial" hearsay? If so, does its admission comply with the **confrontation clause** (see III., IV., and V.)?
 - (b) If it is offered in any other proceeding, to which the **due process** clause applies, is it *reliable* hearsay?

II. FIRST FULL-LENGTH FEATURE: HEARSAY LAW (Both Civil and Criminal Cases)

A. Hearsay in General

1. The Definition of Hearsay: OCS + TOMA

Evidence is hearsay if (1) **an out-of-court statement of a person (“OCS”) is being proved, and (2) in order for that OCS to help to prove the fact it is being offered to prove today at trial, the fact-finder would have to assume that the out-of-court speaker or writer (the “declarant”) was correct about that fact.** The shorthand for this last element is that **the OCS is offered now at trial to prove “TOMA,” the truth of some matter that was (either explicitly or implicitly) asserted by the declarant when the declarant made the out-of-court statement.**

If a hearsay objection is properly made, because the evidence includes an OCS, the proponent of the evidence must meet the objection by explaining to the court how either the evidence is nonhearsay or it falls within a hearsay exception. Otherwise, the court may correctly sustain the objection.

2. When is an OCS Not Offered to Prove TOMA?

Ask, “Even if the out-of-court declarant was factually incorrect with regard to the assertion s/he made in the OCS, is it still relevant that the declarant made the statement?” “Is it relevant simply that the OCS was made?” If the answer to these questions is yes, the evidence may properly be offered as *NONHEARSAY*. (A limiting instruction under FRE 105 or Md. Rule 5-105 may be appropriate.)

a. Substantive Law

Common nonhearsay categories include (1) “verbal acts” or “*legally operative facts*” such as a contract or a will; (2) statements offered to prove their *effect on the hearer or reader*, e.g., to prove notice; (3) statements offered as *circumstantial proof of the declarant’s knowledge, state of mind, or being alive or conscious*. See, e.g., *Thomas v. State*, 397 Md. 557, 575-80, 919 A.2d 49 (2007) (circumstantial evidence of declarant’s state of mind, one of consciousness of guilt); *Holland v. State*, 122 Md. App. 532, 713 A.2d 364 (1998).¹

b. Generally, Evidence Not Offered as Substantive Evidence Cannot Be Hearsay

Because of the TOMA element, generally *only substantive evidence can be hearsay*. Evidence of a **declarant’s own** statement offered only to impeach that declarant, or for purposes of his or her credibility only, *cannot be hearsay*. E.g., *Tennessee v. Street*, 471 U.S. 409 (1985); *Holmes v. State*, 350 Md. 412, 712 A.2d 554 (1998). Note that this does not permit impeaching

¹ For a complete discussion of the most common categories of nonhearsay, see L. MCLAIN, VOL. 6A MARYLAND EVIDENCE: STATE AND FEDERAL §§ 801.5–801.12 (2d ed. 2001 & 2007-08 Supp.) (available online at Westlaw under MDEV-ST FED; input the volume and section numbers you seek). To purchase a copy — of the treatise and annual pocket parts (volumes 5, 6, and 6A) — or of the 2007 edition of the Rules book (volume 7), contact the publisher at 1-800-344-5009.

one person by another person's OCS (unless there is an agency relationship between the two). E.g., *United States v. Libby*, 475 F.Supp.2d 73, 77 (D.D.C. 2007).

The most common form of permissible non-substantive evidence is a **declarant's prior inconsistent statement, offered under FRE 613 or Md. Rule 5-613 for impeachment**, rather than as substantive evidence under FRE 801(d)(1)(A) or Md. Rule 5-802.1(a). It also would include a **declarant's prior consistent statement, offered to rehabilitate the declarant's credibility, offered under Md. Rule 5-616(c)(2)**, rather than as substantive evidence, under FRE 801(d)(1)(B) or Md. Rule 5-802.1(b).

Similarly, **if experts in a particular field reasonably rely on certain types of hearsay in reaching their opinions, FRE 703 and Md. Rule 5-703** provide that the court has discretion to admit that otherwise inadmissible hearsay basis, for the limited nonsubstantive purpose of explaining how the expert arrived at the opinion.

3. The Two Elements of OCS: "Out-of-Court" and "Statement"

a. "Out-of-Court"

FRE 801(c) and Md. Rule 5-801(c) define an OCS as **"a statement, other than one made by the declarant while testifying at the trial or hearing. . . ."**

Thus, even the prior statement of a witness who is testifying today at trial is considered an OCS. *The hearsay rule excludes a witness's own prior statements unless either (1) they are offered only for a relevant nonhearsay purpose or (2) the proper foundation has been laid to support a finding by the trial judge under FRE 104(a) or Md. Rule 5-104(a) that they fall within a particular hearsay exception (or exceptions).*

This may be surprising, because, after all, this witness declarant *can* be cross-examined at trial. In this situation where the out-of-court declarant testifies at trial, there is therefore no confrontation clause issue — but there is a hearsay and other rules of evidence issue.

b. "Statement"

FRE 801(a) and Md. Rule 5-801(a) define a "statement," in turn, as **"(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion."** It can fairly be said, then, that a "statement" is **an assertion of fact(s) by a person. It does not include "statements" by animals or machines.** When determining whether a statement is by a person or by a machine, *consider whether there is a person who had crucial and direct input into the statement.* For example, a hand-stamped "Received April 12, 2003" on a document would be an OCS of a person asserting that the document was received on 4/12/03, as likely would be a gas and electric bill, asserting that the homeowner owed \$310.06 for July 2007. Also *consider whether, instead, the writing is relevant as circumstantial evidence without*

the need to cross-examine anyone (e.g., the mass-printed writing on a cocktail napkin, “Bohager’s, Fells Point, Baltimore” offered as circumstantial evidence that the person who had the napkin in his pocket had been to that watering hole. See IV. (discussion of *United States v. Washington*, 498 F.3d 225 (4th Cir. 2007), petition for cert. filed (U.S. No. 07-8291, Dec. 14, 2007) (data generated by forensic lab’s diagnostic machines regarding alcohol and drugs in defendant’s blood were not statements of a person) (2-to-1 decision)).

- B. ACTION MOVIE: *Stoddard v. State*: Where the Utterance is Relevant Only If It is an Implied Assertion of the Fact It is Offered to Prove, It is Hearsay

1. The *Stoddard* Holding

In *Stoddard v. State*, 389 Md. 681, 887 A.2d 564 (2005), the Court of Appeals of Maryland (4-to-3) adopted the common law rule of *Wright v. Tatham*, an 18th century English case, as to implied assertions from utterances made in words. Under this rule:

Verbal (in words, either spoken or written) **utterances** are hearsay if offered to prove the truth of the matter that was directly asserted by the declarant. They **are also hearsay if they are offered to prove the truth of an assertion implied by the declarant, i.e., their proponent is asking the fact-finder to infer that the declarant would not have made the utterance unless he or she believed a particular fact to be true, and the out-of-court utterance is offered to prove the truth of that fact the declarant apparently believed.**

In *Stoddard*, the defendant was charged with the murder of a 3-year-old girl, Calen, who had been left in his care, along with an 18-month-old. The OCS was of the 18-month-old child, who said to her mother, “Is [the defendant] going to get me?” Because the evidence was relevant only if offered to prove a fact implied by her question, that the child was afraid of the defendant because she had seen him “get” Calen, it was inadmissible hearsay.

2. The Evidence is Nonhearsay Only If It Has Relevance Independent of the Truth of Any Implied Assertion

Contrast the situation where the utterance has relevance as nonhearsay. Consider the following example:

Evidence

D said, “Does your boss have a burglar alarm?”

Offered to Help to Prove

D was planning a burglary of the premises, which helps to show that he later committed the burglary.

Here *the declarant's state of mind* (his intent) is itself relevant to the case, as opposed to the truth of and fact he may have remembered at the time he asked the question. The evidence is now admissible nonhearsay as circumstantial evidence of D's state of mind/intent. See *Carlton v. State*, 111 Md. App. 436, 681 A.2d 1181 (1996) (finding the evidence to be nonhearsay). Although the *Carlton* court employed a test different from *Stoddard's*, the *result* should remain the same after *Stoddard*. . . .

3. *Bernadyn*

Bernadyn v. State, 390 Md. 1, 887 A.2d 602 (2005), presented a situation where the same result could have been reached as was reached in *Carlton*, if the prosecutor had had the prescience to foresee the Court of Appeals' decision in *Stoddard*. The defendant was charged with possession of marijuana (and possession with intent to distribute) at the residence at 2024 Morgan Street in Edgewood. The evidence in question was a medical bill which police testified they seized at 2024 Morgan Street in Edgewood, Maryland; the bill was addressed to "Michael Bernadyn, 2024 Morgan Street, Edgewood, Maryland 21040."

As Judge Wilner, joined by Judge Battaglia, pointed out in his dissent, the bill with that name on it was relevant (it had probative value connecting Bernadyn to that address) simply because it was *found at that address*. (Consider if, instead, the bill had been found at a garbage dump—then it would have had no relevance unless we relied on the accuracy of the addresser of the bill.)

The prosecutor at Bernadyn's trial argued "TOMA," however, in his closing, when he stated that the folks at Johns Hopkins Bayview who had sent the bill "did not randomly pick that address," as they would have wanted the bill to be paid and would have *made sure* to send it to the correct address. The Court of Appeals found that the bill was *inadmissible hearsay* when used by the State in this fashion to establish that Bernadyn lived at that address.

Had the State offered the bill only as circumstantial evidence linking someone using that name with the address where it was found, it should have been admissible for that limited purpose. See *Cooley v. State*, 157 Md. App. 101, 116, 849 A.2d 1026 (2004), rev'd on other grounds, 385 Md. 165, 867 A.2d 1065 (2005) ("The State's case included testimony that, when the search warrant was executed about 6:20 a.m. on July 20, 2001, both Jones and Cooley were present, along with their child. Cooley was sleeping when the police arrived. Both Cooley and Jones were in the bedroom at the time the bullet cartridges were recovered. In addition, paperwork in the names of both Jones and Cooley was recovered from the premises. This evidence was sufficient to establish that Cooley and Jones were residing together at 2001 McCullough Street when the search warrant was executed."). ***But see Fields v. State***, 395 Md. 758, 912 A.2d 637 (2006) (unfortunately, declining to reach the issue and instead holding that error, if any, was harmless) (see also D. Eyler's well reasoned opinion for the majority of the CSA panel, at 168 Md. App. 22, 895 A.2d 339).

4. Thank Heaven for Small Favors: The “Implied Assertion” Analysis is Not Applicable to Nonverbal Conduct Not Obviously Intended as a Statement

“Out of court statement” includes oral or written statements in words and “nonverbal conduct of a person, if it is intended by the person as an assertion.” FRE 801(a), Md. Rule 5-801(a). Examples of assertive nonverbal conduct include nodding “yes” or “no.” Here we can easily identify what words the conduct was intended to mean.

In adopting Title 5 of the Maryland Rules, the Court of Appeals unequivocally adopted the rule that **implied assertions from nonverbal conduct not intended as an assertion are not “statements” and thus cannot be hearsay**. The jury is thought to more easily be able to assess the strengths and weaknesses of such evidence than when they hear an OCS. . . .

HYPOTHESIS: Suppose on retrial in *Stoddard* the State offers Mom’s testimony that after the victim’s death, when the defendant came to the door of the 18-month-old’s home, the child saw him and ran and hid in a closet; Mom found her cowering, shaking and crying.

Now there is no hearsay evidence! Unless the evidence is excluded on another ground (as it might be under Rule 5-602 or 5-403) the jury could consider the surviving child’s actions as circumstantial evidence that she had reason to fear the defendant, which in turn is circumstantial evidence that she saw the defendant harm the victim. Her state of mind itself remains irrelevant; but because the evidence does not include an “OCS,” the hearsay rule does not exclude it.

C. COMING ATTRACTIONS: *Coates v. State*

In *Coates v. State*, 175 Md. App. 588, 936 A.2d 852 (2007), cert. granted, 402 Md. 55, 936 A.2d 852 (Dec. 13, 2007), statements of an almost 8-year-old to a SAFE pediatric nurse practitioner, regarding sexual abuse occurring over a year earlier, were admitted by the trial court as substantive evidence, under **Md. Rule 5-803(b)(4) (statements made by a declarant seeking “medical treatment or diagnosis in contemplation of treatment”)**. The Court of Special Appeals reversed the resulting conviction, holding that there was inadequate evidence to support a finding that the child “understood that she was being seen for medical treatment or diagnosis.” Although the nurse ordered testing for HIV, there was “no indication that [the child] had any understanding . . . , that she was at continued risk of developing a latent, sexually transmitted disease or HIV.”

The *Coates* CSA panel also commented, as to *whether the Rule embraces statements identifying an abuser*, that the State knew that the defendant no longer had any contact with the child; thus, “this was not a case in which there was a concern as to the identity of the perpetrator in order to prevent continued exposure of the child to the abuser.”

The Court of Appeals granted the State's petition for certiorari on the following question: "Did a child abuse victim's statements to a nurse practitioner fall within the hearsay exception for statements made for the purpose of medical treatment or diagnosis?"

D. IN THEATERS NOW: *Bellamy v. State*

In *Bellamy v. State*, ___ A.2d ___, 2008 WL 382938 (Md., Feb. 14, 2008), the Court of Appeals held that **a prosecutor's factual proffer when presenting a guilty plea should have been admitted under Md. Rule 5-803(a)(2), as an adoptive admission by the State**. The majority found that the trial court committed error by excluding the defense's evidence of the State's factual proffer when earlier presenting a guilty plea with regard to an accessory after the fact to the charged crime.

The State had adopted as true, and represented as true at the time, the accessory's statement that he saw a person other than Bellamy shoot the victim; the prosecutor also had advised the court that there was new evidence that Bellamy had told an informant that Bellamy had also shot the victim. The majority found the error harmless, because the earlier proffer at the least showed that Bellamy aided and abetted in the murder, which was all that was needed to convict him, and the jury was so instructed. Chief Judge Bell and Judge Wilner, dissenting, would have reversed the conviction.

E. NOW AVAILABLE ON DVD: Other Recent Developments in the Hearsay Realm

1. Md. Rule 5-802.1(a): Certain Prior Inconsistent Statements

To clarify that the declarant's adoption by signature will suffice, and that the declarant need not have been the one to reduce the statement to writing, **Md. Rule 5-802.1(a)(2) was amended** by order of November 8, 2005, effective January 1, 2006, to read: "A statement that is inconsistent with the declarant's testimony if the statement was . . . (2) reduced to writing and was signed by the declarant. . . ."

2. Md. Rule 5-802.1(c): Prior Statements of Identification

See *Jones v. State*, 395 Md. 97, 909 A.2d 650 (2006) (reversible error to preclude defense from calling detective who presented photo array to testify at suppression hearing). See also *Alston v. State*, 177 Md. App. 1, 30-34, 934 A.2d 949 (2007), **cert. granted** (Md. Feb. 13, 2008) (no error in admitting witness's in-court identification of defendant when trial court properly found witness had adequate basis for identification independent of suppressed identification from photo array).

3. Md. Rule 5-803(b)(3): Direct Assertion of Declarant's State of Mind

See *Figgins v. Cochrane*, 174 Md. App. 1, 27-31, 920 A.2d 572 (2007) (*Hillmon* analysis inapplicable when no contention that declarant acted in accord with stated intent).

4. Md. Rule 5-803(b)(6): Business Records

Hall v. University of Maryland Medical Sys. Corp., 398 Md. 67, 919 A.2d 1177 (2007) (reversible error to exclude statements written by doctors, also reporting what nurses and residents had said, regarding pathologically germane information).

5. Md. Rule 5-805: Multiple Levels of OCS's Within One OCS

See *Cooley v. State*, 157 Md. App. 101, 111, 849 A.2d 1026 (2004), rev'd on other grounds, 385 Md. 165, 867 A.2d 1065 (2005) (one level of the double OCS was nonhearsay, and the other was hearsay falling within an exception).

III. SECOND FULL-LENGTH FEATURE: The Confrontation Right after *Crawford v. Washington* (Criminal Trials Only)

A. In General

1. Texts of the U.S. and Maryland Clauses

U.S. CONST., amend. VI (applicable in federal courts and, via amend. XIV, in state courts): "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."

MD DECLARATION OF RIGHTS, art. 21: "In all criminal prosecutions every man hath a right . . . to be confronted with the witnesses against him, . . . to examine the witnesses for and against him on oath."

2. Citations to U.S. Supreme Court and Maryland Court of Appeals Cases

Maryland state courts construe the two clauses *in pari materia* (in like matter, in equal fashion). Thus, U.S. Supreme Court decisions apply in Maryland as to both provisions.

See: *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354 (2004)

Davis v. Washington, 126 S.Ct. 2266 (2006)

Snowden v. State, 385 Md. 164, 867 A.2d 314 (2005)

Rollins v. State, 392 Md. 435, 397 A.2d 821 (2006)

(For detailed discussions of these and cases from other jurisdictions, see the 2007-08 pocket part to LYNN MCLAIN, VOL. 6A MARYLAND EVIDENCE: STATE AND FEDERAL §§ 801:1 *et seq.*, *supra* note 1.)

3. How Does the Confrontation Clause Relate to the Hearsay Rule?

The confrontation clause applies only if the evidence offered is hearsay (see II.) (*Crawford* fn. 9) **and then only if it is a certain type of hearsay: “testimonial”** (i.e., in the nature of testimony and thus considered to be the statement of a “witness” within the meaning of the confrontation clause).

The constitutional question ought not be reached unless it is first determined that the *jurisdiction’s rules of evidence do not exclude the evidence* (see I.).

4. When Does the Clause Apply?

The confrontation clause applies **only**:

- (1) **in criminal cases**; and only
- (2) **to “testimonial” hearsay evidence**; and only if such evidence is
- (3) **offered by the prosecution, against an accused**; and only if offered
- (4) **in a trial on the merits of guilt or innocence.**

5. How Can the Confrontation Clause Be Satisfied, When It Applies?

When the confrontation right applies to the proof of an OCS + TOMA, it may be satisfied in any of three ways:

- (1) **The out-of-court declarant** who made the testimonial hearsay statement (a) **testifies at the trial and** (b) **the accused has an opportunity to cross-examine the declarant at trial** (*Crawford* (fn. 9); *Lawson v. State*, 389 Md. 570, 587-89, 886 A.2d 876 (2005));
- or** (2) **The declarant is unavailable to testify** at trial (see Fed. R. Evid. 804(a) or Md. Rule 5-804(a)) **and the accused has earlier had an opportunity to cross-examine the declarant about his or her statement** that is now being offered into evidence;
- or** (3) **The accused has forfeited his or her confrontation right by engaging in wrongdoing (directly or in a conspiracy) that caused the declarant to be unavailable** (as defined by FRE 804(a) and Md. Rule 5-804(a)) to testify at the trial (see V.).²

² An accused also may *waive* the right by failing to object, explicitly citing the confrontation clause.

Crawford* and *Davis* require strategic changes by the prosecution.** Before *Crawford* and *Davis* a case could have been prosecuted through the admission of excited utterances to police. In light of the first route to compliance with the confrontation clause, *Crawford* and *Davis* increase the prosecution's incentives to ***do everything possible to have the declarant testify at trial and thus be subject to cross-examination by the accused.³

In light of the second route to compliance with the confrontation clause, the prosecution may begin to, ***more routinely, conduct a prompt preliminary hearing*** at which the defense has the opportunity to cross-examine. Then, if the declarant subsequently becomes unavailable, *Crawford* is satisfied.

Finally, if it believes that the witness's unavailability to testify has been caused by the accused's intimidation or other wrongdoing (such as threats, bribery, assault, or murder) then the prosecution will follow the Court's suggestions in *Crawford* and *Davis* to **pursue a ruling that the accused has forfeited** his or her right to confront the witness (see V.).

B. The Distinction Between Testimonial and Nontestimonial Statements

1. The Confrontation Clause Applies Only If the Hearsay is Testimonial

Crawford strongly hinted, and *Davis* held, that a criminal defendant's confrontation right applies only to "testimonial" hearsay statements.

2. What Constitutional Limits Apply If the Hearsay Evidence is Nontestimonial?

If the hearsay statement is "nontestimonial," the confrontation clause does not apply to its admission. *Davis v. Washington*. The only constitutional check will be **the due process clause**, under which a verdict that was based on unreliable hearsay would be constitutionally unsound. **As to what is "reliable" we can still look to *Ohio v. Roberts*, 448 U.S. 56 (1980), for this due process purpose.**

C. How Can We Tell Which is Which? *Crawford* and *Davis*

1. *Crawford*

³ Sometimes, however, it is not in the state's power to have the declarant testify:

- (1) Child abuse victims who are very young may be found to be unqualified to testify in court;
- (2) Domestic violence victims may invoke a marital privilege not to testify, or
- (3) Witnesses of any kind may be afraid to testify, for fear of retaliation.

a. Rationale and Limited Holding

Crawford finds the Sixth Amendment unclear on its face and therefore looks to the **founders' intent** when the Amendment was ratified in 1791. Justice Scalia, writing for the Court, concludes that the founders were concerned that we not repeat a practice that had occurred during "Bloody Mary's" reign in England where — following the civil law practice rather than the common law's approach — justices of the peace gathered ex parte statements from witnesses and these were later offered into evidence, without the accused being given a chance to cross-examine the makers of the statements.

Justice Scalia (who, by the way, is coming to speak at UB Law April 24, 2007) remarks, "The involvement of government officers in the production of testimonial evidence presents the same risk, whether the officers are police or justices of the peace." He reasons that "**witnesses are those who bear testimony**," but declines to articulate a definition of "testimonial." *Crawford* explicitly states only that **the following are testimonial under any definition**:

- (1) "ex parte testimony at a preliminary hearing";
- (2) "plea allocution";
- (3) "grand jury testimony";
- (4) prior trial testimony; and
- (5) "[s]tatements taken by police officers in the course of interrogations. . . ."

b. Instructive Dicta

Importantly, Justice Scalia's opinion in *Crawford* suggests that several categories of **hearsay are nontestimonial**:

"[N]ot all hearsay implicates the Sixth Amendment's core concerns. An **off-hand, overheard remark** bears little resemblance to the civil-law abuses the Confrontation Clause targeted. * * * An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a **casual remark to an acquaintance** does not."

"Most of the hearsay exceptions [that had become well established by 1791] covered statements that by their nature were not testimonial—for example, **business records** or **statements in furtherance of a conspiracy**."

“Even our recent cases, in their outcomes, hew closely to the traditional line. * * * *Bourjaily v. United States*, 483 U.S. 171, 181-184, 107 S.Ct. 2775, 97 L.Ed.2d 144 (1987), admitted **statements made unwittingly to an FBI informant**. . . .”⁴

Finally, footnote 6 in *Crawford* suggests that **even testimonial dying declarations may not be excluded** by the confrontation clause, because they were admissible under the common law of 1791.⁵

2. *Davis*

a. The Test When the OCS is the Result of Police Interrogation

In *Davis*, in another opinion authored by Justice Scalia, the Court again took a measured step. It held:

Without attempting to produce an exhaustive classification of all conceivable statements—or even all conceivable statements in response to police interrogation—as either testimonial or nontestimonial, it suffices to decide the present cases to hold as follows: **Statements are nontestimonial when made in the course of police interrogation⁶ under circumstances objectively indicating**

⁴ Justice Scalia’s selection of the fact that the declarant did not know he was speaking to a government agent, but did so “unwittingly,” suggests that he believes that that fact makes the declarant’s statement nontestimonial – even though, undoubtedly, the FBI informant’s (the hearer’s) intent was to gather evidence for the government.

⁵ In its first post-*Davis* decision, however, the Court of Special Appeals relied instead on *Davis*, to conclude that **a particular dying declaration was nontestimonial**. In *Head v. State*, 171 Md. App. 642, 912 A.2d 1 (2006), cert. denied, 395 Md. 315, 902 A.2d 1059 (2007), the first police officer arriving at the scene of a shooting asked the victim, “Who shot you?” The victim, who died within the hour, answered “Bobby.”

Judge Salmon, writing for the Maryland panel in a manner reminiscent of Louis L’Amour, pointed out “the strong smell of gunpowder still in the air.” That fact, coupled with the officer’s testimony that the victim “kept ‘yelling out’ the words ‘help me, help me,’” “the situation was ‘chaotic,’” the officer “‘didn’t even know if . . . the person who caused that gunpowder was still in the house,’” and “in the officer’s view, it was still ‘potentially even a dangerous situation. . . ,” led the panel to conclude that the statement was nontestimonial under *Davis* because, “Viewed objectively, the primary purpose of Officer George’s question does not appear to have been either to establish or prove past events for possible use at a trial.”

⁶ The *Crawford* Court had explained in its footnote 4 that it declined to define interrogation:

We use the term “interrogation” in its colloquial, rather than any technical legal, sense. Cf. *Rhode Island v. Innis*, 446 U.S. 291, 300-301, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980). Just as various definitions of “testimonial” exist, one can imagine various definitions of “interrogation,” and we need not select among them in this case. Sylvia’s recorded statement, **knowingly given in response to structured police questioning**, qualifies under any conceivable definition.

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.

b. Application to *Davis* Facts

The Court had consolidated two cases for its decision in *Davis*. In *Davis* itself, the Court held that **the victim's statements during the beginning moments of a 911 call [e.g., "He's here jumpin' on me again.")] were nontestimonial:**

The statements in *Davis* were taken when McCottry was alone, not only unprotected by police, but apparently in immediate danger from Davis. **She was seeking aid, not telling a story about the past.** McCottry's present-tense statements showed immediacy.

* * *

In *Davis*, McCottry was **speaking about events as *they were actually happening***, rather than "describ[ing] past events." * * * Moreover, **any reasonable listener would recognize that McCottry . . . was facing an ongoing emergency.**

Although one *might* call 911 to provide a narrative report of a crime absent any imminent danger, McCottry's call was plainly a call for help against bona fide physical threat. Third, the nature of what was asked and answered in *Davis*, again **viewed objectively**, was such that **the elicited statements were necessary to be able to resolve the present emergency, rather than simply to learn (as in *Crawford*) what had happened in the past.** That is true even of the operator's effort to establish the identity of the assailant, so that the dispatched officers might know whether they would be encountering a violent felon. And finally, the **difference in the level of formality** between the two interviews is striking. Crawford['s wife] was responding calmly, at the station house, to a series of questions, with the officer-interrogator taping and making notes of her answers: McCottry's frantic answers were provided over the phone, in an environment that was not tranquil, or even (as far as any reasonable 911 operator could make out) safe.

We conclude from all this that the circumstances of McCottry's interrogation objectively indicate its primary purpose was to enable police assistance to meet an ongoing emergency. She simply was not acting as a *witness*; she was not *testifying*. * * *

This is not to say that a conversation which begins as an interrogation to determine the need for emergency assistance cannot, as the Indiana Supreme Court put it, “evolve into testimonial statements,” once that purpose has been achieved. In this case, for example, after the operator gained the information needed to address the exigency of the moment, the emergency appears to have ended (when Davis drove away from the premises). The operator then told McCottry to be quiet, and proceeded to pose a battery of questions. It could readily be maintained that, from that point on, McCottry’s statements were testimonial, not unlike the “structured police questioning” that occurred in *Crawford*.

c. Application to *Hammon* Facts

On the other hand, it held that **in the companion case of *Hammon v. Indiana*, the domestic violence victim’s (1) second set of oral statements to the responding police, in answer to their questions and (2) her affidavit signed at the scene were both testimonial.** Justice Scalia analyzed the statements to the responding police as follows:

It is entirely clear from the circumstances that the interrogation [in *Hammon*] was **part of an investigation into possibly criminal past conduct**—as, indeed, the testifying officer expressly acknowledged. There was **no emergency in progress**; the interrogating officer testified that he had heard no arguments or crashing and saw no one throw or break anything. When the officers first arrived, Amy told them that things were fine, and there was no immediate threat to her person. When the officer questioned Amy for the second time, and elicited the challenged statements, he was not seeking to determine (as in *Davis*) “what is happening,” but rather “what happened.” **Objectively viewed, the primary, if not indeed the sole, purpose of the interrogation was to investigate a possible crime. . . .**⁷

* * * It was **formal** enough that Amy’s interrogation was conducted in a separate room, away from her husband (who tried to intervene), with the officer receiving her replies for use in his “investigat[ion].” * * * Both declarants [Hammon’s wife, Amy, and Crawford’s wife, Sylvia] were actively separated from the defendant—officers forcibly prevented Hershel [Hammon] from participating in the interrogation. Both statements **deliberately recounted, in response to police questioning, how potentially criminal past events began and progressed. And both took place some time after the events described were over.** Such statements under official interrogation are an obvious substitute

⁷ Justice Thomas roundly criticized the Court for failing to provide a workable standard for distinguishing between testimonial and nontestimonial statements. *Davis v. Washington*, 126 S.Ct. 2266, 2283-85 (U.S. 2006) (Thomas, J., concurring in judgment in part and dissenting in part).

for live testimony, because they do precisely *what a witness does* on direct examination; they are inherently testimonial.

* * * Amy's narrative of past events was delivered at some remove in time from the danger she described. And after Amy answered the officers' questions, he had her execute an affidavit, in order, he testified, "[t]o establish events that have occurred previously."

Thus, even though the hearsay rule did not exclude Amy's excited utterances, the confrontation clause did.

3. How Can We Analyze Whether Statements Outside the Holdings of *Crawford* and *Davis* are Testimonial?

What happens, for example, when the declarant's statement is not knowingly made to an agent of law enforcement? In footnote 2 in *Davis*, the Court makes clear that it was not addressing that question:

If 911 operators are not themselves law enforcement officers, they may at least be agents of law enforcement when they conduct interrogations of 911 callers. For purposes of this opinion (and without deciding the point), we consider their acts to be acts of the police. As in *Crawford v. Washington*, therefore, our holding today makes it **unnecessary to consider whether and when statements made to someone other than law enforcement personnel are "testimonial."**

In footnote 1 in *Davis*, the Court qualified its reference to interrogation as follows: "This is not to imply, however, that statements made in the absence of any interrogation are necessarily nontestimonial. The Framers were no more willing to exempt from cross-examination volunteered testimony or answers to open-ended questions than they were to exempt answers to detailed interrogation."

The Court seems to be moving toward adopting some version of one of the two following formulations of "testimonial" statements it had quoted but declined to explicitly adopt in *Crawford*:⁸

"ex parte in-court testimony or its functional equivalent – that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially," Brief for Petitioner 23; [or] * * * **"statements that were made under circumstances which would lead an**

⁸ In extending "testimonial" to at least some responses to initial police inquiries in the field, the *Davis* court went beyond "formalized testimony or its equivalent" and thus lost the vote of Justice Thomas.

objective witness reasonably to believe that the statement would be available for use at a later trial,” Brief for National Association of Criminal Defense Lawyers et al, as *Amici Curiae* 3.

Justice Scalia carefully pointed out in *Davis* that, “**even when interrogation exists, it is in the final analysis the declarant’s statements**, not the interrogator’s questions, **that the Confrontation Clause requires us to evaluate.**” What import does this comment have? *See United States v. Udeozor*, 2008 WL 271295 (4th Cir. Feb. 1, 2008) (inculpatory statements made to victim by defendant’s coconspirator were nontestimonial when *declarant did not know* they were being recorded by the government); *United States v. Brito*, 427 F.2d 53, 61-62 (1st Cir. 2005), cert. denied, 126 S.Ct. 2983 (2006) (“Ordinarily, statements made to police while the declarant or others are still in personal danger cannot be said to have been made with consideration of their legal ramifications. *Such a declarant usually speaks out of urgency* and a desire to obtain a prompt response.”).

Until the Court speaks more definitively, lower courts are left to their own devices. *See, e.g., State v. Jensen*, 299 Wis. 2d 267, 727 N.W.2d 518, 524-29 (2007) (holding that no government involvement is needed in order for a statement to be testimonial; here, more formal statements — in a letter given to a neighbor and in voicemails to declarant’s child’s teacher were testimonial, but declarant’s oral statements to them were not).

4. How Did the Maryland Court of Appeals Interpret *Crawford* in *Snowden*?

In its first post-*Crawford* decision, *Snowden v. State*, 385 Md. 64, 867 A.2d 314 (2005), the Court of Appeals of Maryland held that 8 and 10-year-old girls’ statements during an interview with a social worker were **testimonial**, under the following facts:

- The social worker was a county employee who described her position as a “sexual abuse investigator”;
- She interviewed the children with a police detective present in the room;
- The express purpose of the interviews “was to develop their testimony for possible use at trial”;
- Each child told her that “she was aware that she was being interviewed as a result of her accusations against [the defendant]”; and
- The children were interviewed “at a County-owned and operated facility unfamiliar to the children and used for the purpose of investigating and assessing victims of child abuse.”

Snowden presaged *Davis*. The social worker in *Snowden* — like the 911 operator in *Davis* — was held to be acting as “an agent of the police,” and the children’s statements to her were made when there was no ongoing emergency or criminal activity. The *Snowden* court, like *Davis*, applied an objective rather than a subjective test. *Snowden* rejected the notion that the analysis should consider the young age of the declarant. Judge Harrell, writing for the *Snowden* Court, emphasized:

Most telling [was] the fact that [social worker] Wakeel’s participation in this matter was initiated, and conducted, as part of a formal law enforcement investigation. The children were interviewed at the behest of Detective Davey of the Montgomery County Police Department, who was actively involved in the investigation. Unlike some cases in which statements to investigators were deemed nontestimonial because they were in the course of ascertaining whether a crime had been committed, the children’s statements were elicited by Wakeel subsequent to initial questioning of them by the police and after the identity of a suspect was known. Indeed, Wakeel testified that she began her investigation with a police report in hand, which stated that “Michael Snowden had sexually abused these children.”

The *Snowden* Court added this caveat:

Statements made to a school principal conducting a casual chat with a student, for example, do not present necessarily the same potential constitutional abuses as when a child’s statement is made to a health or social work professional that is working in tandem with law enforcement in furtherance of an ongoing and formal criminal investigation. We leave to another day the question of whether such noninvestigatory statements would be admissible in light of *Crawford*.

5. What About “Business Records” of the State? — i.e., “Public Records” — The Court of Appeals’ Decision in *Rollins*

In *Rollins v. State*, 392 Md. 455, 897 A.2d 821 (2006), the Court of Appeals affirmed a Court of Special Appeals’ decision that **“the findings in an autopsy report of the physical condition of a decedent, which are routine, descriptive and not analytical, [and] which are objectively ascertained” were non-testimonial**. The medical examiner-declarant had moved to California and did not testify, but his deputy medical examiner testified, basing her testimony on the autopsy report. **The trial court had redacted some of the original medical examiner’s opinions regarding “disease . . . [,] smothering . . . [and] homicide . . . by asphyxiation.”** In an opinion by Judge Greene, a unanimous Court of Appeals held:

[T]he autopsy report, as redacted, contained non-testimonial hearsay statements in nature that were admissible under either the business or public records exceptions to the hearsay rule. We further hold that, under the facts of

the instant case, the availability of a witness is immaterial to the question of admissibility of hearsay evidence under either the business or public records exception. **Opinions, speculation, and other conclusions drawn from the objective findings in autopsy reports are testimonial** and should be redacted before the report is admitted into evidence.

* * *

The information that was not redacted from the autopsy report, while it might eventually be used in a criminal trial, was not created for that express purpose, and was statutorily required to be determined by the medical examiner and placed into the report pursuant to § 5-311 of the Health General Article.

Accord Costley v. State, 175 Md. App. 90, 114-26, 926 A.2d 769 (2007). *But see United States v. Feliz*, 467 F.3d 227 (2d Cir. 2006) (finding autopsy reports to be nontestimonial in their entirety; as in *Rollins*, a doctor who had not conducted the autopsies testified at trial).

With a similar focus on the **routine nature** of the statement, the United States Court of Appeals for the Ninth Circuit has held that public records contained in the accused's **"penitentiary packet"** – records of his convictions, his fingerprints and a photograph – were not testimonial. Moreover, their certification as accurate copies of those public records, by the Oklahoma records custodian and by Oklahoma's Secretary of State, were also routine, non-testimonial statements. *United States v. Weiland*, 420 F.3d 1062, 1076-77 (9th Cir. 2005), *cert. denied*, 126 S.Ct. 1911 (U.S. 2006).

IV. **OSCAR NOMINEE: *United States v. Washington*: When is a Writing Not an OCS of a Person, So that Neither the Hearsay Rule Nor the Confrontation Clause Applies?**

In *United States v. Washington*, 498 F.3d 225 (4th Cir. 2007), petition for cert. filed (U.S. No. 07-8291, Dec. 14, 2007), the defendant had been stopped on the Baltimore-Washington Parkway and arrested for driving while under the influence of alcohol or drugs. A sample of his blood was taken and was tested at an Armed Forces Institute lab. The lab technicians who put the blood in the machines did not testify at trial. Rather, the lab director, Dr. Barry Levine, gave expert testimony, based on the test results, that the defendant's blood contained PCP and alcohol.

The majority of the three-judge panel, in an opinion by Judge Niemeyer, held that the test results were not "statements" of the lab technicians; rather, they were **statements of machines and thus were not hearsay** (see II.A.3.b.).⁹ No issue as to authentication or chain of custody

⁹ The majority explained:

The Institute's Forensic Toxicology Laboratory subjected the blood sample to "headspace gas chromatography" to identify whether ethanol was in the blood and to "immunoassay or chromatography" to screen for the presence of amphetamine, barbiturates, benzodiazepines, cannabinoids, cocaine, opiates, and

was presented, and the lab technicians' knowledge of the chemical analysis of the blood could only have come from the test results, as Dr. Levine's had. *Accord United States v. Moon*, 512 F.3d 359, 361 (7th Cir. 2008).

V. LEADING BOX OFFICE ATTRACTION: Forfeiture of Right to Object on Confrontation Grounds

A. The Common Law Principle

As Justice Scalia explained in *Davis*:

[W]hen defendants seek to undermine the judicial process by procuring or coercing silence from witnesses and victims, the Sixth Amendment does not require courts to acquiesce. While defendants have no duty to assist the State in proving their guilt, they *do* have the duty to refrain from acting in ways that destroy the integrity of the criminal-trial system. We reiterate what **we said in *Crawford*: that “the rule of forfeiture by wrongdoing (which we accept) extinguishes confrontation claims on essentially equitable grounds”** (citing *Reynolds*, 98 U.S. at 158-159). That is, **one who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation.**

In dictum he added:

phencyclidine, using a Hewlett Package HP 6890 series gas chromatograph machine and computers with HP ChemStation software. After lab technicians subjected the blood sample to testing, the instruments printed out some 20 pages of data and graphs. Based on the data, the director of the lab and its chief toxicologist, Dr. Barry Levine, issued a report to the United States Park Police, stating that the blood sample “contained 27 mg/dL of ethanol” and that the sample tested positive for phencyclidine, containing “0.04 mg.L of phencyclidine as quantitated by gas chromatograph/spectrometry.” While Dr. Levine did not see the blood sample and did not conduct any of the tests himself, three lab technicians operating under his protocols and supervision conducted the tests and then presented the raw data from the tests to him.

The raw data were mechanical computer printouts with each page headed by the date of the test, the machine operator, an identification of the sample, its dilution factor, and other similar information, and containing computer-generated graphs and data reporting the results produced by the chromatograph machine.

Judge Michael dissented both on this point and as to the majority's second holding, which was that, even had the machines' statements been hearsay, they were not “testimonial” as they described a “*present condition* of the blood” rather than a “past event.” 498 F.3d 232.

We take no position on the standards necessary to demonstrate such forfeiture, but federal courts using Federal Rule of Evidence 804(b)(6), which codifies the forfeiture doctrine, have generally held the Government to **the preponderance-of-the-evidence standard**, see, e.g., *United States v. Scott*, 284 F.3d 758, 762 (C.A.7 2002). State courts tend to follow the same practice, see e.g., *Commonwealth v. Edwards*, 444 Mass. 526, 542, 830 N.E.2d 158, 172 (2005). Moreover, if a hearing on forfeiture is required, *Edwards*, for instance, observed that **“hearsay evidence, including the unavailable witness’s out-of-court statements, may be considered.”**

B. The Corollary Hearsay Exception Codified in Fed.R.Evid. 804(b)(6)

Since 1997, FRE 804(b)(6) has recognized a hearsay exception, under the federal rules of evidence, for the admission, against the offending party, of any OCS + TOMA of a declarant who has been intentionally made unavailable to testify by the party’s engaging or acquiescing in “wrongdoing.”

C. Maryland’s Evidence Rule Codifications Derived from Fed.R.Evid. 804(b)(6): A Criminal Statute and a Civil Rule

1. The Criminal Statute

The Maryland forfeiture-hearsay exception statute, Md. Cts. & Jud. Proc. Code Ann. § 10-901, was adopted in 2005. It is **much narrower** than FRE 804(b)(6).¹⁰ First, unlike

¹⁰ The Maryland statute recognizes the following hearsay exception:

(a) During the trial of a criminal case in which the defendant is charged with a felonious violation of Title 5 of the Criminal Law Article or with the commission of a crime of violence as defined in 14-101 of the Criminal Law Article, a statement as defined in Maryland Rule 5-801(a) is not excluded by the hearsay rule if the statement is offered against a party that has engaged in, directed, or conspired to commit wrongdoing that was intended to and did procure the unavailability of the declarant of the statement, as defined in Maryland Rule 5-804.

(b) Subject to subsection (c) of this section, before admitting a statement under this section, the court shall hold a hearing outside the presence of the jury at which:

(1) The Maryland Rules of Evidence are strictly applied; and

(2) The court finds by clear and convincing evidence that the party against whom the statement is offered engaged in, directed, or conspired to commit the wrongdoing that procured the unavailability of the declarant,

(c) A statement may not be admitted under this section unless:

(1) The statement was:

the federal rule, **the Maryland statute is restricted so as to apply only to trials for certain crimes.**¹¹

Second, the Maryland statute is intended to provide that unlike in other preliminary determinations by the trial judge (outside the hearing of the jury) as to admissibility of evidence under Md. Rule 5-104(a), **the other Maryland Rules of evidence (including the hearsay rule) will be “strictly applied” at this preliminary stage.** The preliminary facts thus must be proved either by the testimony of another witness who has first-hand knowledge of them, or by the unavailable witness’s out-of-court statements that qualify under a hearsay exception, such as that for excited utterances.

Third, **the statute applies a burden of “clear and convincing evidence” at this stage,** unlike the ordinary burden of a preponderance of the evidence. This is a departure from the Maryland case law which has applied the clear and convincing standard only when evidence of an accused’s “other crimes” is to be admitted before the jury, the trier of fact. Under the forfeiture doctrine, the jury does not hear of the party’s wrongdoing that made the witness unavailable, but only of the unavailable declarant’s out-of-court statement, which is directly relevant to the pending charge. (It should be noted that evidence of that wrongdoing might come in, however, under a preexisting, independent route, such as that of wrongful acts showing “guilty knowledge.” See Md. Rule 5-804(b)(5), Committee Note.)

-
- (i) Given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding or in a deposition;
 - (ii) Reduced to writing and signed by the declarant; or
 - (iii) Recorded in substantially verbatim fashion by stenographic or electronic means contemporaneously with the making of the statement; and

(2) As soon as is practicable after the proponent of the statement learns that the declarant will be unavailable, the proponent notifies the adverse party of:

- (i) The intention to offer the statement;
- (ii) The particulars of the statement; and
- (iii) The identity of the witness through whom the statement will be offered.

¹¹ The statute applies only to crimes **involving either drug distribution** (“felonious violations of Title 5 of the Criminal Law Article”) **or those that qualify as “crimes of violence as defined in 14-101 of the Criminal Law Article.”** The latter category does not include, for example, second degree assault (which is often charged in domestic violence cases). In the 2006 session § 14-101 of the Criminal Law article was amended to include “**child abuse in the first degree under § 3-601** of [the Criminal Law] article” as a “crime of violence.” In 2007 the General Assembly added “**sexual abuse of a minor under § 3-602** of [the Criminal Law] article if: (i) the victim is under the age of 13 years and the offender is an adult at the time of the offense; and (ii) the offense involved: (1) vaginal intercourse, as defined in § 3-301 of this article; (2) a sexual act, as defined in § 3-301 of this article; (3) an act in which a part of the offender’s body penetrates, however slightly, into the victim’s genital opening or anus; or (4) the intentional touching, not through the clothing, of the victim’s or the offender’s genital, anal, or other intimate area for sexual arousal, gratification, or abuse” and “continuing course of conduct with a child under § 3-315 of the Criminal Law article.”

2. The Civil Rule

The hearsay exception provision applicable in civil cases, new Md. Rule 5-804(b)(5), which became effective January 1, 2006, does not incorporate the latter two standards that are codified in the criminal statute.¹²

3. Shared Characteristics of the Statute and the Rule

The **types of statements** potentially admissible under both **Maryland codifications**, however, are narrowed from those permissible under FRE 804(b)(6), to only **recorded or written and signed** statements (the same types that also are potentially substantively admissible prior inconsistent statements under Md. Rule 5-802.1(a)). Thus, statements made by those witnesses who were murdered preemptively or intimidated before their statements were recorded or written and signed are not included under the Maryland codifications.

The Maryland codifications also add a requirement that the proponent of the evidence must provide **notice** of its intent to offer evidence under those hearsay exceptions.

D. Impeachment of the Evidence Admitted under a Forfeiture Theory

If the judge decides to admit proof of any hearsay statement, then any witness who testifies to it will of course be subject to full cross-examination and **impeachment** before the jury. But, under both **FRE 806** and **Md. Rule 5-806**, an unavailable hearsay declarant, too, will be subject to impeachment. *See Vasquez v. Jones*, 496 F.3d 564 (6th Cir. 2007), *rehearing and*

¹² Md. Rule 5-804(b)(5) provides:

(b) Hearsay Exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

* * *

(5) Witness Unavailable Because of Party's Wrongdoing

(A) **Civil Actions.** In civil actions in which a witness is unavailable because of a party's wrongdoing, a statement that (i) was (a) given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding or in a deposition; (b) reduced to writing and was signed by the declarant; or (c) recorded in substantially verbatim fashion by stenographic or electronic means contemporaneously with the making of the statement, and (ii) is **offered against a party who has engaged in, directed, or conspired to commit wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness**, provided however, the statement may not be admitted unless, as soon as practicable after the proponent of the statement learns that the declarant will be unavailable, the proponent makes known to the adverse party the intention to offer the statement and the particulars of it.

(B) **Criminal Causes.** 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 Code, Courts Article, § 10-901.

rehearing en banc denied (Dec. 17, 2007) (Michigan state trial court's refusal to allow prisoner to impeach hearsay evidence — preliminary hearing testimony of unavailable declarant — with declarant's criminal record violated habeas prisoner's confrontation right, and under facts of case was not harmless error).

E. TRAILER NOW AVAILABLE: *Giles v. California* and the Common Law Forfeiture Doctrine

The common law constitutional forfeiture doctrine is considerably broader than the rules of evidence codified in either Fed. R. Evid. 804(b)(6) or the Maryland statute and rule. The common law constitutional doctrine has been applied by various state and federal courts **whenever the opposing party's wrongdoing has been preliminarily found by the trial court, by a preponderance of the evidence, to have caused the unavailability of the declarant — regardless whether that party was shown to have intended to prevent the declarant from testifying.** *E.g., United States v. Garcia-Meza*, 403 F.3d 364 (6th Cir. 2005); *State v. Jensen*, 299 Wis. 2d 267, 727 N.W.2d 518, 529-36 (2007). In this situation, the confrontation right has been held to have been forfeited by that party.

In *People v. Giles*, 40 Cal.4th 833, 152 P.3d 433 (2007), cert. granted sub nom. *Giles v. California*, 128 S.Ct. 976 (U.S. Jan. 11, 2008) (No. 07-6053), the California Supreme Court held that the defendant's killing of the victim forfeited his Confrontation Clause challenge to the victim's hearsay statements that she had made during an earlier domestic violence investigation. The court found the statements to have been properly admitted, as they fell within a California hearsay exception for prompt reports of domestic violence. Like most courts addressing the issue, the California Supreme Court held that the applicable burden of proof of preliminary facts as to the defendant's having caused the declarant's unavailability is a preponderance of the evidence. The trial judge determines whether these facts exist under the equivalent of FRE 104(a) and Md. Rule 5-104(a), outside the hearing of the jury.

The U.S. Supreme Court has granted certiorari in *Giles*. Keep a close eye on this case!

VI. CRITIC'S REVIEW: Mark Jensen's Murder Trial

In a case strangely reminiscent of *Shepard v. United States*, 290 U.S. 96 (1933), Mark Jensen was charged with first degree murder of his wife, Julie, by poisoning her — in this case, with antifreeze. In his opening statement defense counsel asserted that the evidence would show that Julie committed suicide.

Two weeks before her death, Julie gave this letter to her neighbor:

Pleasant Prairie Police Department,
Ron Kosman or Detective Reitzgenburg -

I took this picture + am writing this on Saturday
11-21-98 at 7AM. This "list" was in my husband's
business daily planner - not meant for me to see. I
don't know what it means, but if anything happens
to me, he would be my first suspect. Our re-
lationship has deteriorated to the polite superficial.
I know he's never forgiven me for the brief
affair I had with that creep seven years ago.
Mark lives for work + the kids; he's an avid surfer
of the Internet...

Anyway - I do not smoke or drink. My mother
was an alcoholic, so I limit my drinking to one
or two a week. Mark wants me to drink more -
with him in the evenings. I don't. I would
never take my life because of my kids - they
are everything to me! I regularly take Tylenol +
multi-vitamins; occasionally take OTC stuff for
colds, Zantac, or Immodium; have one prescription
for migraine tablets, which Mark use more than I.

I pray I'm wrong + nothing happens... but
I am suspicious of Mark's suspicious behaviors +
fear for my early demise. However, I will not leave
[redacted] + [redacted]. My life's greatest love, accomplishment
and wish: "My 3 D's" - Daddy (Mark), [redacted] + [redacted].

Jake C. Johnson

- (1) Is the letter hearsay?
- (2) Does it (or any part of it) fall within a hearsay exception?
- (3) Do other rules of evidence exclude it? Would admitting only part of it be misleading?

(4) Is it “testimonial”?

(5) Can Mark be held to have forfeited his confrontation right?

See <http://www.cnn.com/2008/CRIME/01/02/poisoned.wife.ap> (visited Jan. 2, 2008);
<http://www.cnn.com/2008/CRIME/02/21/jensen.verdict> (last visited Mar. 5, 2008);
<http://www.cnn.com/2008/CRIME/02/22/jensen.jurors> (last visited Mar. 5, 2008).