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The Confrontation Clause After Crawford v. Washington Montgomery County State's Attorney's Office

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**The Confrontation Clause after *Crawford v. Washington*
Montgomery County State’s Attorney’s Office**

May 2, 2007

Materials Prepared by Professor Lynn McLain
University of Baltimore School of Law

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Contents

|                                                                                                                                | <u>Page</u> |
|--------------------------------------------------------------------------------------------------------------------------------|-------------|
| § 1. Texts of the U.S. and Maryland Clauses; Citations to U.S. Supreme Court and Maryland Court of Appeals Cases . . . . .     | 2           |
| § 2. When Does the Clause Apply? . . . . .                                                                                     | 2           |
| § 3. How Can the Clause Be Satisfied? . . . . .                                                                                | 2           |
| § 4. How Does the Confrontation Clause Relate to the Hearsay Rule? . . . . .                                                   | 3           |
| § 5. What If the Hearsay Evidence is Nontestimonial? . . . . .                                                                 | 3           |
| § 6. What Did <i>Crawford</i> and <i>Davis</i> Hold as to Whether a Statement is Testimonial or Nontestimonial?. . . . .       | 3           |
| § 7. How Did the Maryland Court of Appeals Interpret <i>Crawford</i> in <i>Snowden</i> ? . . . . .                             | 8           |
| § 8. What About “Business Records” of the State? . . . . .                                                                     | 10          |
| § 9. How Are Prosecutors and Domestic Violence Victim-Advocates Likely to Adapt to these Charges?. . . . .                     | 11          |
| § 10. Forfeiture of Right to Object . . . . .                                                                                  | 12          |
| § 11. How Can We Analyze Whether Statements Outside the Holdings of <i>Crawford</i> and <i>Davis</i> are Testimonial?. . . . . | 16          |
| Appendix . . . . .                                                                                                             | 19          |

**§ 1. Texts of the U.S. and Maryland Clauses; Citations to U.S. Supreme Court and Maryland Court of Appeals Cases**

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.”

Maryland state courts construe the two *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 2006 pocket part to LYNN MCLAIN, MARYLAND EVIDENCE: STATE AND FEDERAL, vol. 6A, §§ 801:1 *et seq.* (available for purchase at Thomson/West 1-800-344-5009.)

**§ 2. 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.

**§ 3. How Can the Clause Be Satisfied?**

- (1) The out-of-court declarant who made the 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 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 either waived or forfeited his or her confrontation right by either (a) failing to object, citing the confrontation clause; **or** (b) engaging in wrongdoing (directly or in a conspiracy) that caused the declarant to be unavailable to testify at the trial.

#### **§ 4. How Does the Confrontation Clause Relate to the Hearsay Rule?**

- (1) **The confrontation clause applies only if the evidence offered is hearsay** (an out-of-court statement offered to prove the truth of some fact that was asserted by the out-of-court declarant when the declarant made the prior statement) (*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).
- (2) Thus, *the first question is whether the evidence is hearsay.*<sup>1</sup> If it is, *the next question is whether the jurisdiction’s rules of evidence exclude the evidence.* This is a very separate question from whether the confrontation clause excludes it. For one thing, evidence may be hearsay even if the out-of-court declarant testifies to her own out-of-court statement at trial.
- (3) *If the evidence rules do not exclude the evidence, the next question is whether the confrontation clause excludes it* (see § 2).

#### **§ 5. What 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. *Cf. Brown v. State*, 317 Md. 417, 564 A.2d 772 (1989) (only “reasonably reliable” hearsay is admissible in a probation revocation hearing). As to what is “reliable” we can still look to *Ohio v. Roberts*, 448 U.S. 56 (1980), for this due process purpose.

#### **§ 6. What Did *Crawford* and *Davis* Hold as to Whether a Statement is Testimonial or Nontestimonial?**

*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,

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<sup>1</sup> As to “implied assertions,” see *Stoddard v. State*, 389 Md. 681, 887 A.2d 564 (2005); *Bernadyn v. State*, 390 Md. 1, 887 A.2d 602 (2005); *Fields v. State*, 395 Md. 758, 912 A.2d 637 (2006). **When feasible, prosecutors should explicitly offer out-of-court statements for limited, nonhearsay purposes** (*e.g.*, “Circumstantial evidence connecting someone with the same name as the defendant with the premises”) **and request a limiting jury instruction** under Md. Rule 5-105.

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 later these were offered into evidence at some trials, without the accused being given a chance to cross-examine the makers of the statements.

Justice Scalia 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 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. . . .”<sup>2</sup>

The interrogation in *Crawford* was a custodial one, at the police station, of Crawford’s wife, who was suspected to be an accomplice to the ultimately charged assault.

In *Davis*, again in an opinion authored by Justice Scalia, the Court holds:

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 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**

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<sup>2</sup> The *Crawford* Court 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.

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.”

**primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.**

*Davis* involved two cases. 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*. This presents no great problem. Just as, for Fifth Amendment purposes, “police officers can and will distinguish almost instinctively between questions necessary to secure their own safety or the safety of the public and questions designed solely to elicit testimonial evidence from a suspect,” trial courts will recognize the point at which, for Sixth Amendment purposes, statements in response to interrogations become testimonial. **Through in limine procedure, they should redact or exclude the portions of any statement that have become testimonial**, as they do, for example, with unduly prejudicial portions of otherwise admissible evidence.

On the other hand, it held that in the companion case of *Hammon v. Indiana*, the domestic violence victim’s (1) 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 [in *Hammon*] that the interrogation 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. . . .**<sup>3</sup>

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<sup>3</sup> Justice Thomas roundly criticized the Court for failing to provide a workable standard for distinguishing between testimonial and nontestimonial statements:

In many, if not most, cases where police respond to a report of a crime, whether pursuant to a 911 call from the victim or otherwise, the purposes of an interrogation, viewed from the perspective of the police, are *both* to respond to the emergency situation *and* to gather evidence. See *New York v. Quarles*, 467 U.S. 649, 656 (1984) (“Undoubtedly most police officers [deciding whether to give *Miranda* warnings in a possible emergency situation] would act out of a host of different, instinctive, and largely unverifiable motives—their own safety, the safety of others, and perhaps as well the desire to obtain incriminating evidence from the suspect”). Assigning one of these two “largely unverifiable motives,” **primacy requires constructing a hierarchy of purpose that will rarely be present**—and is not reliably discernible. It will inevitably be, quite simply, an exercise in fiction. \* \* \* [T]he fact that the officer in *Hammon* was investigating Mr. Hammon’s past conduct does not foreclose the **possibility that the primary purpose of his inquiry was to assess whether Mr. Hammon constituted a continuing danger to his wife, requiring further police presence or action**. It is hardly remarkable that Hammon did not act abusively towards his wife in the presence of the officers, and his

\* \* \* 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 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 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.”

The resulting **erosion of the utility for the prosecution of the excited utterance hearsay exception, when the declarant does not testify at trial,** had been foreshadowed by Justice Scalia’s comments in footnote 8 of *Crawford*, regarding *White v. Illinois*.

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good judgment to refrain from criminal behavior in the presence of police sheds little, if any, light on whether his violence would have resumed had the police left without further questioning, transforming what the Court dismisses as “past conduct” back into an “ongoing emergency.”

*Davis v. Washington*, 126 S.Ct. 2266, 2283-85 (U.S. 2006) (Thomas, J., concurring in judgment in part and dissenting in part).



In extending “testimonial” to responses to at least some responses to initial police inquiries in the field,<sup>4</sup> the *Davis* court went beyond “formalized testimony or its equivalent” and thus lost the vote of Justice Thomas.

Hypotheticals:

**Under *Crawford* and *Davis*, are the following statements testimonial?**

- a. A domestic violence victim’s excited utterance to a police officer who arrives at her door? If she is saying, “He’s got a gun!”
- b. A 911 call by a witness to a stabbing? If he is seeking an ambulance? If he is seeking police assistance?
- c. With regard to whether a domestic violence victim’s statement is testimonial, is it significant that many/most DV victims do not cooperate with the prosecution at trial? Would they cooperate long enough to have a preliminary hearing?

Consider an October 25, 1989 911 call from Nicole Brown Simpson, attached as an Appendix.

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

In its first post-*Crawford* decision, *Snowden v. State* (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”;

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<sup>4</sup> The *Davis* court explained:

Although we necessarily reject the Indiana Supreme Court’s implication that virtually any “initial inquiries” at the crime scene will not be testimonial, we do not hold the opposite—that *no* questions at the scene will yield nontestimonial answers. We have already observed of domestic disputes that “[o]fficers called to investigate . . . need to know whom they are dealing with in order to assess the situation, the threat to their own safety, and possible danger to the potential victim.” *Hiibel*, 542 U.S. at 186, 124 S.Ct. 2451. **Such exigencies may often mean that “initial inquiries” produce nontestimonial statements. But in cases like this one, where Amy’s statements were neither a cry for help nor the provision of information enabling officers immediately to end a threatening situation, the fact that they were given at an alleged crime scene and were “initial inquiries” is immaterial.**

- 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]”;
- 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.”

Judge Harrell 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.”

In this context, the court was satisfied that the social worker was acting as “an agent of the police department.”

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*.

The court rejected the notion, however, that the analysis should consider the young age of the declarant.

The Supreme Court’s resolution of the facts before it in *Davis v. Washington* is consistent with the Court of Appeals of Maryland’s earlier decision in *Snowden*. 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 and the children were safe. **The *Snowden* court, like *Davis*, applied an objective rather than a subjective test.**

Hypotheticals:

- a. If a neighbor asks to have a 7-year-old child come over “to help around the house” and the child tells his mother, ‘I don’t want to go! He did something bad to me last time,’ is the child’s statement testimonial?
- b. If the mother calls Social Services and takes the child in for an interview because of suspected child abuse, are the child’s statements to the social worker testimonial? Does it matter whether a police officer is present during the interview? If the officer is in plain clothes and the child does not know that s/he is an officer?
- c. Would it matter if the social worker was employed by a private agency or a church, rather than the local government?
- d. If the mother instead takes the child to the hospital, are the child’s statements to the doctor and nurses – describing the abuse and identifying the abuser – testimonial? Of what import is it that all Maryland citizens have a duty to report child abuse? See *Griner v. State*, 168 Md. App. 714, 899 A.2d 189, 201-08 (2006) (post-*Crawford*, pre-*Davis*).
- e. Does it matter whether the child is 3, or 7, or 12?

#### **§ 8. What About “Business Records” of the State?**

In *Rollins v. State* (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.**

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).

Hypotheticals:

- a. A police lab technician's report on a defendant's blood alcohol level testimonial? The DNA of blood found at a crime scene?
- b. If so, are Maryland's "notice and demand" statutes constitutional?

**§ 9. How Are Prosecutors and Domestic Violence Victim-Advocates Likely to Adapt to these Charges?**

*Crawford* and *Davis* require strategic changes by the prosecution.

- a. Whereas before *Crawford* and *Davis* a case might have been prosecuted through the admission of excited utterances to police, *Crawford* and *Davis* increase the incentives to ***do everything possible to have the declarant testify at trial*** and thus be subject to cross-examination by the accused.

Practical problems:

Sometimes 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.
- b. 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.
  - c. 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 § 10.

### § 10. Forfeiture of Right to Object

As Justice Scalia explained in *Davis*:

**Domestic violence . . . is notoriously susceptible to intimidation or coercion of the victim to ensure that she does not testify at trial.** When this occurs, the Confrontation Clause gives the criminal a windfall. We may not, however, vitiate constitutional guarantees when they have the effect of allowing the guilty to go free. **But when 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.**

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). [NOTABLE EXCEPTION: Md. Cts. & Jud. Proc. § 10-901.] 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.” \* \* \* [NOTABLE EXCEPTION: Md. Cts. & Jud. Proc. § 10-901.]

We have determined that, **absent a finding of forfeiture by wrongdoing, the Sixth Amendment operates to exclude Amy Hammon's affidavit.** The Indiana courts may (if they are asked) determine on remand whether such a claim of forfeiture is properly raised and, if so, whether it is meritorious.

**The Maryland forfeiture statute** is considerably narrower than either the common law constitutional principle or Fed. R. Evid 804(b)(6). **Md. Cts. & Jud. Proc. Code Ann. § 10-901** provides:

(a) During the trial of a criminal case [Unnecessary Restriction 1:] 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) [Unnecessary Restriction 2:] The Maryland Rules of Evidence are strictly applied; and

(2) The court finds [Unnecessary Restriction 3:] 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) [Unnecessary Restriction 4:] A statement may not be admitted under this section unless:

(1) The statement was:

(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) [Additional Restriction 5:] 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.

First, unlike the federal rule, **the Maryland statute is restricted so as to apply only to trials for certain crimes: those 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 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 it was amended to include other child sexual abuse of a child under Criminal Law § 3-602. (H.B. 213, S.B. 170, awaiting Governor’s signature)

Second, the 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 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 itself might come in at trial under a preexisting, independent route, such as that of wrongful acts showing “guilty knowledge.”)**

The Md. Rule applicable in civil cases, **new Md. Rule 5-804(b)(5)**, which became effective January 1, 2006, 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.

The accompanying **Committee note** explains that "A 'party' referred to in subsection (b)(5)(A) also includes an agent of the government." It adds:

Subsection (b)(5) of this Rule does not affect the law of spoliation, 'guilty knowledge,' or unexplained failure to produce a witness to whom one has superior access. See *Washington v. State*, 293 Md. 465, 468 n.1 (1982); *Breeding v. State*, 220 Md. 193, 197 (1959); *Shpak v. Schertle*, 97 Md. App. 207, 222-27 (1993); *Meyer v. McDonnell*, 40 Md. App. 524, 533 (1978), rev'd on other grounds, 301 Md. 426 (1984); *Larsen v. Romeo*, 254 Md. 220, 228 (1969); *Hoverter v. Director of Patuxent Inst.*, 231 Md. 608, 609 (1963); and *DiLeo v. Nugent*, 88 Md. App. 59, 69-72 (1991).

The statute and the Rule share three differences from the federal rule:

- (1) The **types of statements** potentially admissible are narrowed to only those types that also are potentially substantively admissible prior inconsistent statements under Md. Rule 5-802.1(a) (but under that rule, of course, the declarant must testify at trial). Thus, neither the statute nor the Maryland civil Rule would give the courts leeway to consider possibly admitting statements made by those witnesses who were murdered preemptively or intimidated before their statements were recorded or signed.
- (2) The proponent of the evidence must provide **notice** of its intent to offer evidence under this hearsay exception.



- (3) Rather than adopting the federal rule’s language of “engaged or acquiesced in,” the party against whom the evidence is offered must be shown to have “engaged in, directed, or conspired to commit the wrongdoing that procured the unavailability of the declarant.” This language is thought to be clearer.

If the judge decides to admit proof of the hearsay statement, then **any witness** who testifies to it **will be subject to full cross-examination and impeachment** before the jury. **The unavailable hearsay declarant, too, will be subject to impeachment.** See Md. Rule 5-806.

**The common law constitutional forfeiture doctrine is considerably broader than either Fed. R. Evid. 804(b)(6), or the Maryland laws.** The common law 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 (under Rule 104(a), so that the rules of evidence do not apply at this stage), 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).

Hypotheticals:

- a. Is pleading with a domestic violence victim not to testify “wrongdoing”? Can one get a “no contact” order pending trial? Would such contact then be “wrongdoing”?
- b. What about a statement of fear to a friend, “I’m afraid my husband is going to kill me one of these days”? Testimonial or not?
- c. That same person’s writing about her husband’s physical abuse of her, in a letter, “to be opened in the event of my death”?
- d. Are statements in b. and c. admissible in the husband’s trial for her murder under our rules of evidence? Under the confrontation clause?

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

We must look at the Court’s rationales in *Crawford* and *Davis* and the clues in dicta in *Crawford* and extrapolate from them in order to predict the outcome in future cases. What happens, for example, when the declarant’s statement is not made to an agent of law enforcement? In footnote 2 in *Davis*, the Court makes clear that it is not addressing that question, as it says:

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.”**

The fact that the hearers in *Crawford* and *Davis* were law enforcement personnel — coupled with *Davis*’ reliance on the differing formality of the *Davis* and *Hammon* statements — supports an argument that the Court is adopting some *combination* of factors from the following three formulations it had quoted but declined to explicitly adopt in *Crawford*:

Various formulations of this core class of “testimonial” statements exist: “*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; “extrajudicial statements . . . contained in **formalized testimonial materials,** such as affidavits, depositions, prior testimony, or confessions,” *White v. Illinois*, 503 U.S. 346, 365 (1992) (Thomas J., Joined by Scalia, J., concurring in part and concurring in judgment); “**statements that were made under circumstances which would lead an 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. \* \* \* Regardless of the precise articulation, some statements qualify under any definition.

Justice Scalia makes several intriguing remarks in *Crawford*:

- What testimonial statements might be excepted from *Crawford*’s reach?

Justice Scalia noted in footnote 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.”

- What might be generally 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.**”

- What if the speaker does not know the hearer is involved in law enforcement?

“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. . . .**” [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.]

- Is it the speaker’s or the hearer’s state of mind (or both) that matters?

In *Davis*, Justice Scalia reiterates 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.”

*See 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.”).

- Who else might be an agent of law enforcement? A SAFE team? Other medical personnel?

Hypotheticals:

- a. Is a hospital report as to blood analysis of a “regular” patient testimonial? Of a patient brought in by police for DUI?
- b. Is a mentally disabled victim who is called by the prosecution – to demonstrate her limited mental capacity, rather than to testify to the alleged crime against her – a witness under the Sixth Amendment? (P.G. County trial, Feb. 2006).

## Appendix