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# Hearsay and the Confrontation Clause (2017)

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## Hearsay and the Confrontation Clause

Maryland Judicial Center, May 11, 2017  
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### Recent Rather Unrelated (but irresistible) Developments:

**Convicted perjurers** are now competent to testify in Maryland courts! But the fifteen-year time limit for impeachment by prior convictions does not apply to convictions for perjury. Rules Order, Dec. 13, 2016, effective to actions commencing on or after April 1, 2017 (amending Md. Rule 5-609(b) and conforming to HB 237, ch. 531, MD Laws 2016).

**General time limit for impeachment of a witness by his or her prior convictions does not necessarily preclude questioning of a character witness about the principal witness's older convictions.** *Williams v. State* (Md. App., Mar. 30, 2017) (no abuse of discretion in permitting prosecution to question character witness, who had known defendant for 15 years and testified to defendant's peacefulness, about whether knowledge of defendant's 25-year-old conviction for battery would affect witness's testimony).

**Restitution for future lost earnings.** *See In re Cody H.* (Md., March 24, 2017).

**Witness who took heroin on day of testimony.** *Cruz v. State* (Md. App., Mar. 31, 2017) (no abuse of discretion in denying motion to strike testimony of witness who testified she had used \$40 worth of heroin on day of trial; burden is on moving party to prove incompetence).

### Overview of today's topics:

**Only an out-of-court statement ("OCS") offered for the truth of the matter that was being asserted by the out-of-court declarant ("declarant") at the time when s/he made the OCS ("TOMA") = hearsay ("HS").** If evidence is not HS, the HS rule cannot exclude it.

**The Confrontation Clause also applies only to HS, but even then, only to its subcategory comprising "testimonial hearsay."**

**Cross-references to "MD-EV"** are to section numbers of L. MCLAIN, vols. 5, 6, and 6A of the Maryland Practice Series, MARYLAND EVIDENCE: STATE AND FEDERAL (Thomson Reuters 3d ed. 2013 and 2015-2016 pocket parts, which were compiled by Leonard Stamm, Esq.), which is available hardbound or on Westlaw. The books are most easily found on Westlaw by searching for "McLain" under "Secondary Sources" in the Maryland database. They contain much more detail than does vol. 7, which is softbound and provides a short overview of the Maryland Rules of Evidence.

An earlier version of the charts in this handout is found in section 800:0 of the treatise. That version may be accessed on Westlaw by clicking on the PDF icon for each particular chart.

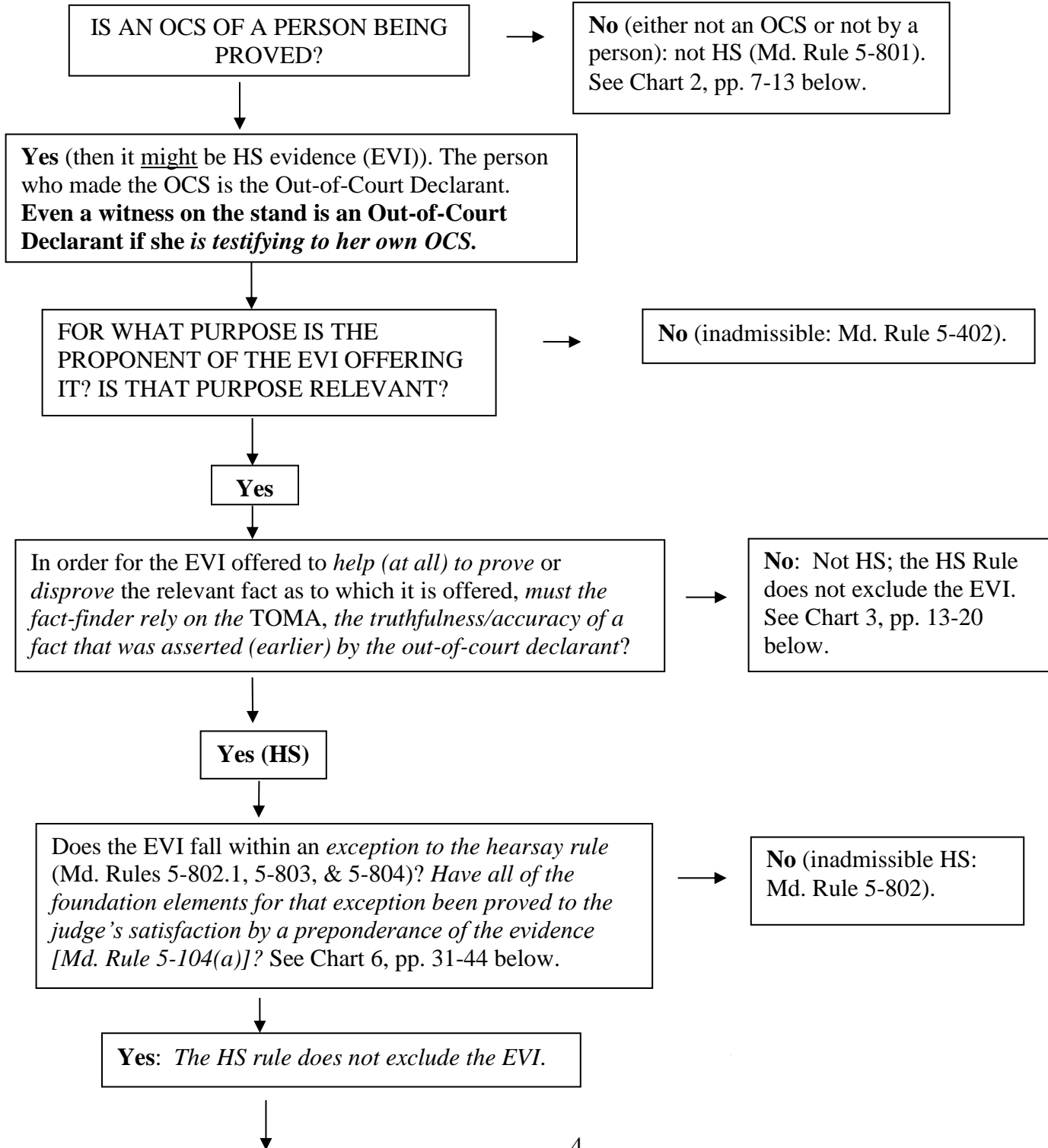
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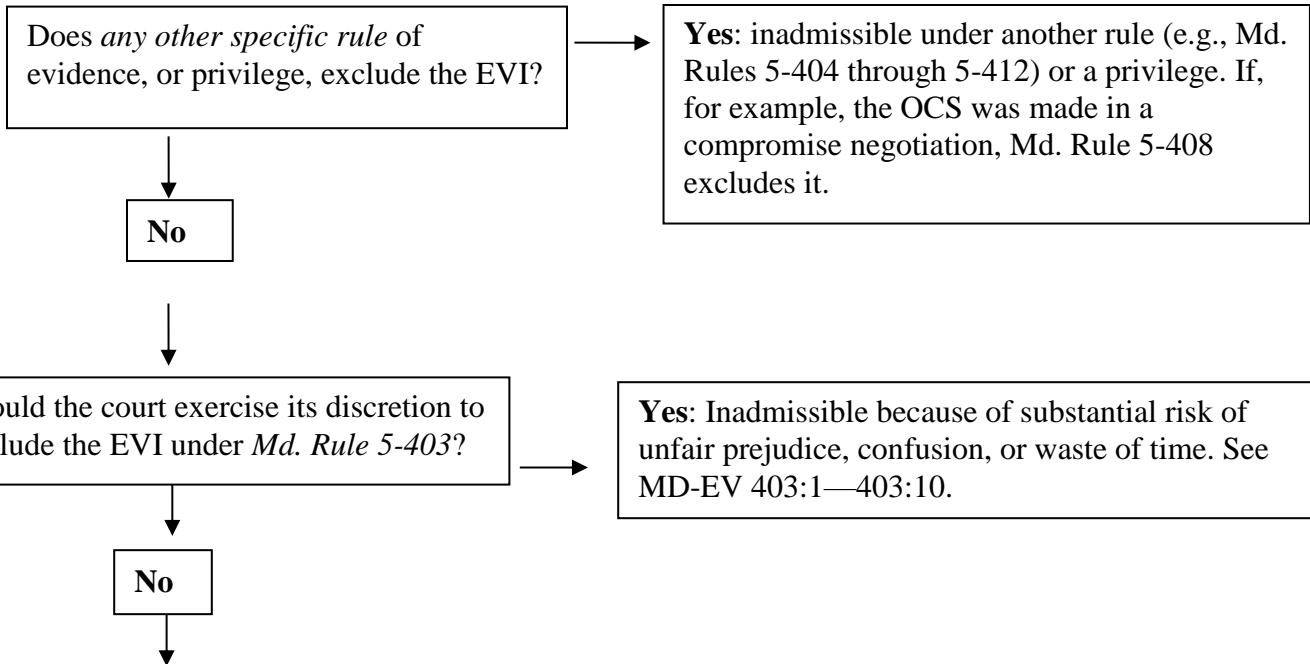
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**Chart 1 FLOW CHART FOR HEARSAY AND CONFRONTATION**

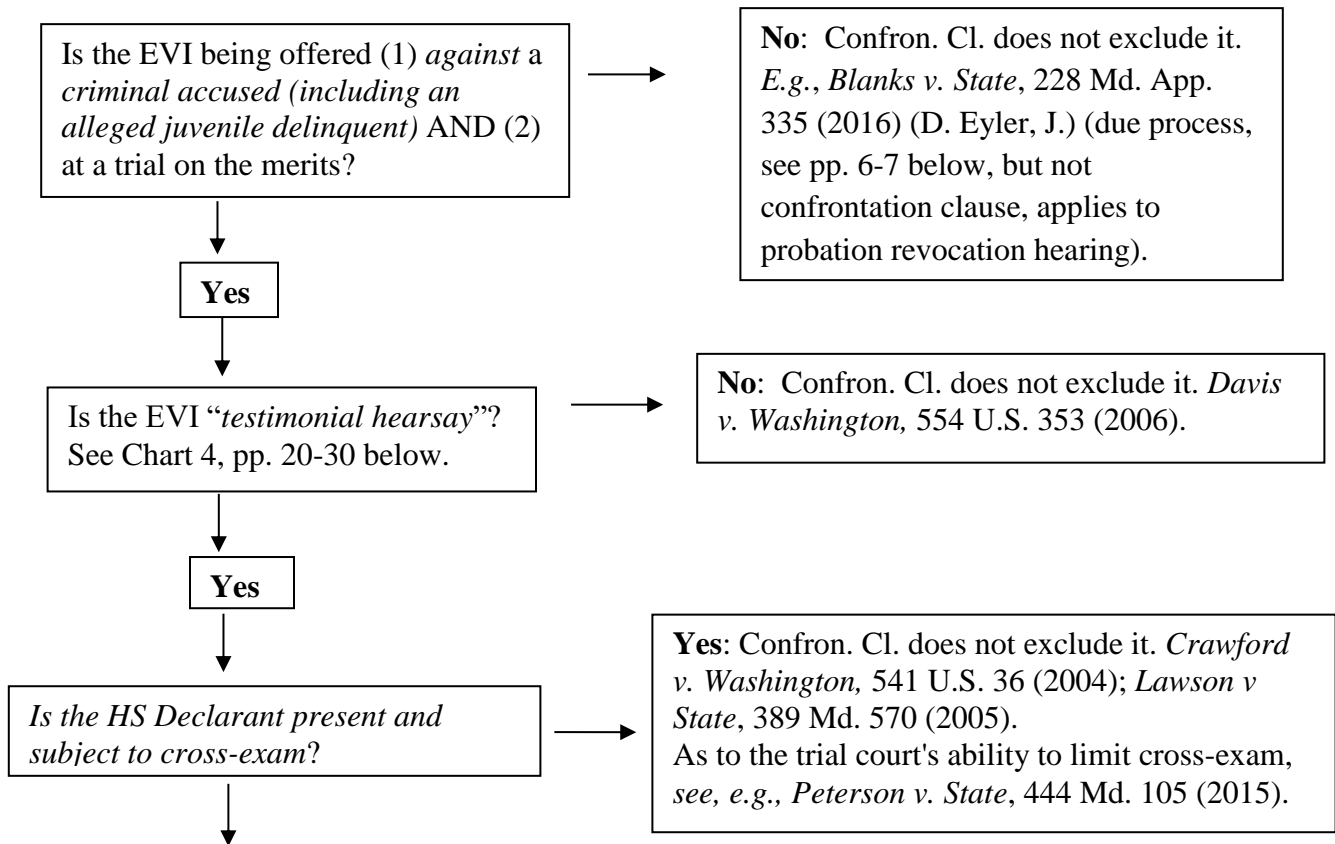
**I. ADMISSIBILITY OR EXCLUSION UNDER THE RULES OF EVIDENCE**

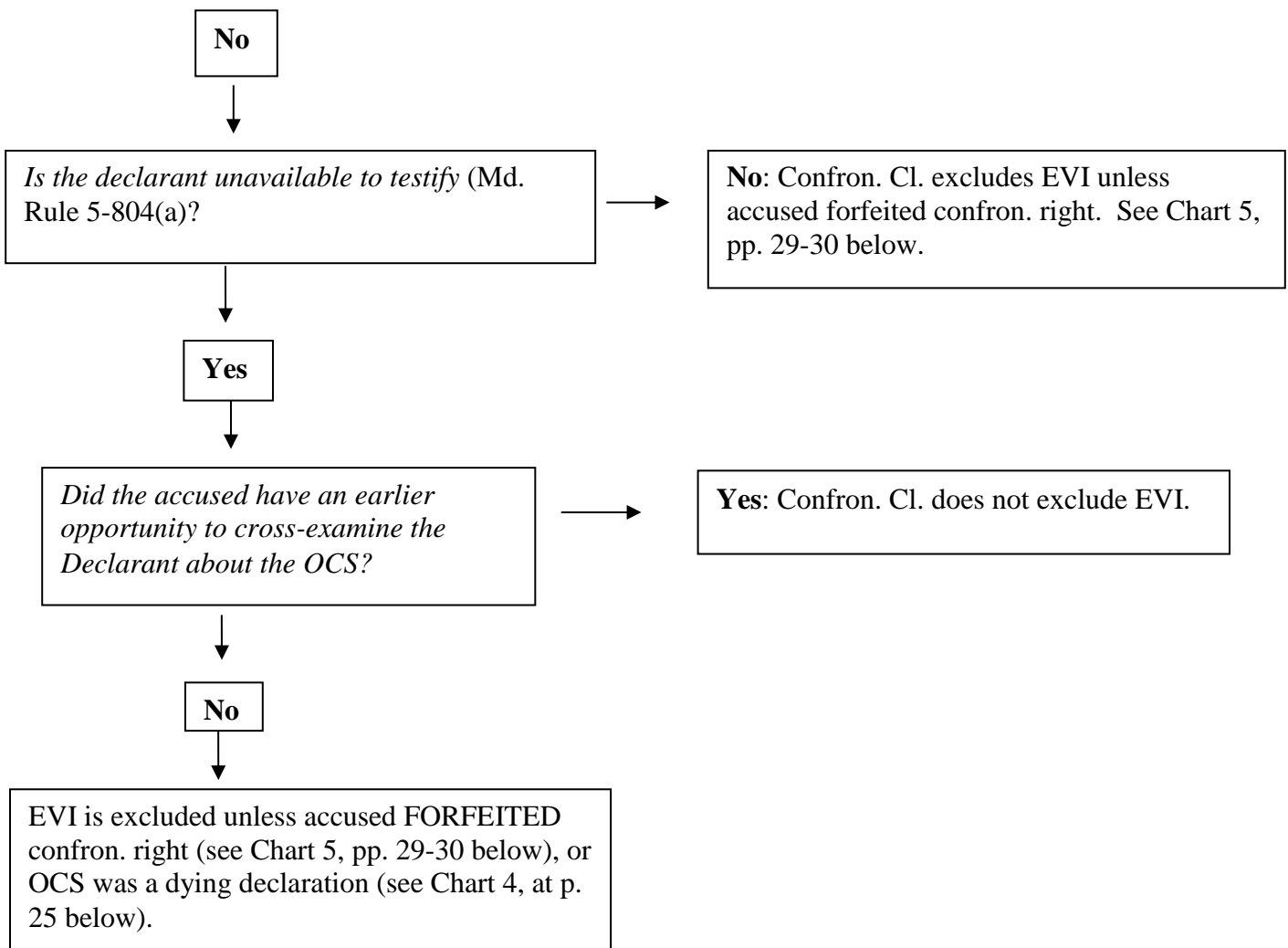




**II. THE EVIDENCE IS ADMISSIBLE UNDER THE EVIDENCE RULES! BUT DOES THE CONSTITUTION EXCLUDE IT?** See MD-EV 800:1—800:21.

**A. Confrontation Clause Overview**





**B. If the Confrontation Clause Does Not Exclude the Evidence Because It is Not Testimonial Hearsay, the Only Remaining Constitutional Safeguard Is the Due Process Clause.** See MD-EV 800:20.

Due process requires that a verdict not be *based on unreliable hearsay*.

Lower appellate courts have therefore continued to apply *Ohio v. Roberts*, 448 US.56 (1980) to evaluate the fact-finder’s reliance on nontestimonial hearsay. Dictum in *Michigan v. Bryant*, 562 U.S. 344 (2011), supports this position.

Under *Roberts*, there is no error if the nontestimonial hearsay relied upon at trial either:

- (1) Qualifies under a “firmly rooted” hearsay exception (probably all those listed in Title 5, *except* statements against penal interest, Md. Rule 5-804(b)(3)); **or**

- (2) Is shown to have had equivalent “particularized guarantees of trustworthiness.”

Current Maryland case law sometimes adds the requirement that ““there is good cause for [the hearsay’s] admission.”” See *Blanks v. State*, 228 Md. App. 335 (2016) (D. Eyler, J.) (*aff’g* Brett W. Wilson, J., Dorchester County, who in probation revocation hearing – a civil proceeding – had permitted probation agent to testify to collection of probationer’s urine sample, and California lab supervisor to testify to presence of marijuana in that urine sample; Court of Special Appeals held that probationer’s due process right to confront was satisfied).

The test results in *Blanks* qualified as business records, and the witnesses’ testimony established their reliability. Because the results met the *Roberts* reliability test, there was no need to also show good cause for their admission. In any event, however, good cause was shown, as it would be ““highly impractical”” to require the State to call every technician who had participated in the assembly-line approach to testing the sample.

**Chart 2 IS THE EVIDENCE AN “OUT-OF-COURT STATEMENT” (“OCS”) OF A PERSON?** (see MD-EV 801:2—801:6)

**A. What is a “Statement”?**

1. Md. Rule 5-801(a) defines a “statement” as either “(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.”

**“Statement” means an assertion of one or more facts or opinions.** A statement may be either an **oral** assertion, a **written** assertion (*e.g.*, note or document), or **conduct intended as an assertion.**

2. The statement is **usually “verbal”** (*i.e.*, **in words**, no matter whether written or oral).
3. A “statement” also **may be nonverbal assertive conduct” clearly intended by the actor as a substitute for particular words** (*e.g.*, nodding head to say “yes” or “no,” pointing to a person in a line-up when asked, “Do you see the person who attacked you?,” raising hand to indicate affirmative answer when asked, “who would like to volunteer ...?”).
4. “Statement **does not include implied assertions from nonverbal nonassertive conduct** (*e.g.*, walking down the street, putting a heavy coat on, raising an umbrella, even if offered to show that the person could walk, that it was cold out, or that it was raining). See MD-EV 801:5.



5. “Statement” may, however, include an implied assertion from an utterance in words (but only if the utterance is offered to prove the truth of the implied assertion and has no independent relevance as circumstantial, nonhearsay evidence. See MD-EV 801:6.
- a. *Stoddard v. State*, 389 Md. 681 (2005) (Raker, J.) (“Is Erik going to get me?” was **hearsay**, because it was relevant only if taken to mean “...like he got [killed] Calen?”).
  - b. *Bernadyn v. State*, 390 Md. 1 (2005) (Raker, J.) (hospital bill found in residence where defendant and illegal drugs were found, and addressed to defendant at that address, was inadmissible **hearsay** when the prosecutor argued in closing that the hospital would want to be sure it had the right address so it could be paid).

Judge Greene had held, while on the Court of Special Appeals, that the evidence was admissible nonhearsay. Judges Wilner and Battaglia, dissenting from Judge Raker’s opinion, agreed with Judge Greene.

The dissent would have followed those cases that hold that a name and address on a piece of mail are not intended by the writer “as an assertion,” or “not intended to communicate the thought that the [named person] lived there,” and thus do not constitute hearsay. Such evidence, rather, is properly admissible “as circumstantial evidence [making it even slightly more likely than it would be without that evidence] that [the defendant] stored his property, including his correspondence,” in the place where it was found, which in turn tends to prove that the defendant exercises control over that place. If offered only for that purpose, *Bernadyn* should not exclude it.

- c. *Fields v. State*, 168 Md. App. 22 (2006) (D. Eyler, J.) (evidence that the name “Sat Dogg” was displayed on a screen at a bowling alley was properly admitted as nonassertive, circumstantial, **nonhearsay** evidence that someone by that name was there), *aff’d on other grounds*, 395 Md. 758 (2006) (Raker, J.).
- d. In a 5 to 2 vote in *Garner v. State*, 414 Md. 372 (2010) (Murphy, J.) the Court of Appeals held that the trial court had not erred in permitting a police officer to testify that he answered the cell phone confiscated from the defendant during his arrest, said “hello,” and “a male voice” said, “Yo, can I get a 40.” The evidence was **nonhearsay**.

Judge Murphy, writing for the majority, reasoned that (1) “[w]hen a telephone is used to receive illegal wagers or to receive orders called in by persons who wish to purchase a controlled dangerous substance, the telephone becomes an instrumentality of the crime”; and (2) “the rule

against hearsay does not operate to exclude evidence of the ‘verbal act’ that established a consequential fact: Petitioner was in possession of a telephone called by a person who requested to purchase cocaine.”

The result of admissibility reached by this decision conformed to the results obtained for decades in the Court of Special Appeals and around the country as to similar evidence of **telephone calls placing bets or requesting drugs**. The “verbal act” rationale would differentiate the bookie-betting parlor and drug order cases like *Garner* from cases like *Stoddard* and *Bernadyn*. **But *Garner* may indicate a partial retreat from the *Stoddard* majority’s approach.**

The *Garner* majority could have affirmed under the facts there by looking at the evidence as nonassertive, circumstantial, nonhearsay evidence that a phone connected with the defendant received such a call, which was relevant even if the caller did not have any apparent intention to communicate to the person who answered the phone the fact that the defendant sold cocaine. This would be consistent with Judge Wilner’s concurrence joined by Judges Greene and Battaglia in *Stoddard*, p. 8 above.

If the *Garner* majority opinion is read as following this approach, then the evidence in *Fields* also was not hearsay; nor would the evidence in *Bernadyn* have been hearsay if offered for the proper, relevant, limited purpose that something with the defendant’s name on it was found at the address where the drugs were found.

Interestingly, the *Garner* majority stated: “We need not either reaffirm or overrule either of those fact-specific cases in [*Stoddard* or *Bernadyn*] in order to hold that the rule against hearsay was not violated by Trooper Gussoni’s testimony about the telephone call at issue [in *Garner*].” Judges Battaglia and Greene were in the majority in *Garner*, and were joined by three judges who joined the court after *Stoddard*, *Bernadyn*, and *Fields*: Judges Adkins, Barbera, and Murphy. Chief Judge Bell and Judge Harrell, the only two remaining on the Court of Appeals who were in the majority in *Stoddard*, found themselves alone in the dissent in *Garner*.

- e. *Carpenter v. State*, 196 Md. App. 212, 224-25 (2010) (Thieme, J.) (numbers shown on cell phone as to missed and received calls were not statements of a person; even if they had been, their relevance did not depend upon the belief or accuracy of the person(s) who made the calls, and the testimony of police detective to the numbers he saw was **not hearsay**).
- f. In *Fair v. State*, 198 Md. App. 1 (2011) (Kenney, J.), a paycheck with the defendant’s name on it, with a pay date of the day before a police officer testified he found the paycheck in a car console with a handgun and

underneath a bag of marijuana, was held to have been properly admitted by the trial court “to show the Defendant’s possessory interest in the vehicle’ ....”

Relying on *Garner*, as well as several federal cases (including a U.S. Supreme Court decision) holding that paychecks and money orders were not factual assertions, the Court of Special Appeals held that the paycheck was a **nonhearsay** verbal act, **relevant and offered as “merely circumstantial nonassertive crime scene evidence.”**

The latter part of the rationale is more intellectually appealing here, because the fact that the paycheck bore the defendant’s name and was found in the vehicle linked someone with that name to the vehicle, and it was offered for that limited purpose, rather than to show that the payor owed or had paid a certain sum. If it had been offered as to the latter purpose, and that fact had been relevant, it would have been relevant as a nonhearsay “verbal act.”

**B.** When is a Statement an “**Out-of-Court**” Statement? See MD-EV 801:2.

1. Md. Rule 5-801(c) defines an out-of-court statement (“OCS”) as “a statement, other than one made by the declarant while testifying at the trial or hearing ....”
2. **“Out-of-court” thus means that the evidence offered today at trial is of a statement made by any person somewhere else at another time.** *The other place may even have been another court proceeding.*
3. **It is still “out-of-court” EVEN IF THE DECLARANT IS AT TRIAL TESTIFYING TO HIS OR HER OWN EARLIER STATEMENT.** Some hearsay exceptions even require that the declarant also testify at trial, see Md. Rule 5-802.1: certain of the declarant-witness’s prior inconsistent or consistent statements, the declarant-witness’s prior identification of a person, the declarant-witness’s prompt report of sexual assault, and the declarant-witness’s recorded recollection. These hearsay exception rules would be unnecessary if the fact that the declarant is testifying at trial made his or her out-of-court statements nonhearsay.
4. **Why** the strong preference for live testimony rather than out-of-court statements, even of a declarant who is now on the stand?
  - a. Better evaluation of demeanor evidence as the witness is testifying to the underlying facts, rather than reciting a statement;
  - b. Better ability to cross-examine live memory;
  - c. Out-of-court statement may not have been under oath;
  - d. Much time is saved and undue emphasis avoided, if live memory serves, so there is no need to prove prior consistent statements; and

- e. Removal of an incentive for the unethical manufacture of perfectly scripted out-of-court statements.

**C. To Be Covered by the Hearsay Rule, a Statement Must Have Been Made by “a Person”** (see MD-EV 801:3)

- 1. Md. Rule 5-801 defines a “statement” as having been by “a person.” It **does not include “statements” by animals** – such as a talking parrot, a crowing rooster, or a barking dog – or **“statements” by machines**, *because neither can be cross-examined*.

Rules *other than the hearsay rule* require a showing of **relevance and reliability**, such as foundation evidence regarding the training of the dog, or the routine maintenance of the machines – or the soundness of the principles they apply. *Cf. In re A.N.*, 226 Md. App. 283 (2015) (reliance on mother’s polygraph results was reversible error).

- 2. **Numbers Shown on Cell Phone for Incoming Calls was Nonhearsay.**

*Carpenter v. State*, 196 Md. App. 212, 224-25 (2010) (Thieme, J.) (numbers shown on cell phone designating missed and received calls were *not assertions or statements of a person*; additionally, their relevance did not depend upon the belief or accuracy of the person(s) who made the calls, and the testimony of the police detective to the numbers he saw was not hearsay).

- 3. **Whether the Statement is By a Person is a Critical Issue in the Confrontation Clause Context**

*See, e.g., United States v. Washington*, 498 F.3d 225 (4th Cir. 2007) (Niemeyer, J.) (20 pages of **data generated by Armed Forces Institute’s Forensic Toxicology Laboratory chromatograph machine and computers, showing that the defendant’s blood sample contained ethanol and phencyclidine, were nonhearsay**, because the *machine performing chromatography on the defendant’s blood was not a “person” and could not be a “declarant”* under Fed. R. Evid. 801), *cert. denied* (U.S. 2009); *United States v. Moon*, 512 F.3d 359, 361-62 (7th Cir. 2008) (**instruments’ readings were not statements, though expert’s conclusions based on them were**), *cert. denied* (U.S. 2008); *United States v. Summers*, 666 F.3d 193, 202 (4th Cir. 2011) (*Washington* still good law after *Bullcoming*, see p. 21 below).

The facts of *Melendez-Diaz* and *Bullcoming*, p. 21 below, did not directly raise this question, because there the evidence was not a machine printout but a certificate by a person, based on the machine readings. The same was true in *Derr v. State, I and II*, pp. 23-24 below.

Note **the critical difference between a machine printout of instruments' readings, as opposed to a machine printout of data input by a person.** For the latter to be admissible for its truth, a hearsay exception, such as for business records, will be needed if the statement is offered for its truth.

In her thoughtful opinion in *Baker v. State*, 223 Md. App. 750 (2015), Judge Graeff stated for the Court:

[T]he better reasoned view is that computer-generated records [such as cell phone call records] generally do not constitute hearsay. When records are entirely self-generated by the internal operations of the computer, they do not implicate the hearsay rule because they do not constitute a statement of a "person." In that situation, the admissibility of such "should be determined on the basis of the reliability and accuracy of the process' used to create and obtain the data."

\* \* \*

Courts have made a distinction between computer-generated records, where the data is generated by the internal operations of the computer itself, and computer-stored [such as text messages] records, which reflect human input. (Emphasis added.)

The *Baker* court accordingly held that, because it was "likely that the assertion in the computer records that the phone number that called the victim was appellant's number was an assertion made by a person," it could not affirm their admission on the ground that they were nonhearsay. Because the State failed to have the records certified as business records, or have the foundation for their qualification as business records proved by testimony of their custodian, their admission was error. (On the somewhat related issue of the need for an expert to testify to the significance of a cell phone call's being relayed from a particular tower, see *State v. Payne*, 440 Md. 680 (2014).)

In a case very similar to *Washington, United States v. Drayton*, 2014 WL 2919792 (D. Md. 2014) (Grimm, J.), *aff'd*, 589 Fed. Appx. 153 (4th Cir. 2015) (per curiam), *cert. denied*, 136 S. Ct. 101 (U.S. 2015), the blood of a defendant driving erratically on the Baltimore-Washington Parkway was tested by the D.C. Office of the Chief Medical Examiner. The court affirmed the magistrate judge's admission, in a bench trial, of the lab's Deputy Chief Toxicologist's testimony (without the testimony of the technicians who ran the tests) to his conclusion, based on "the raw data that was generated" by the chromatograph, as to the concentrations of alcohol and PCP in the defendant's blood. Under *Washington*, that machine-generated raw data was not hearsay.

As Judge Grimm pointed out in *Drayton*, "Given the fractured nature of *Williams [v. Illinois]*, see p. 23 below, its limited precedential value, and most critically, the fact that it seems to approve of the admissibility of the evidence in *Washington*

(p. 11 above) and *Summers* (pp. 11 above and 23 below), the Supreme Court cannot be said to have overruled those cases.” *Drayton* at fn. 6. Nor was the packet containing that data ever admitted into evidence, so that Fed. R. Evid. 703 (corollary to Md. Rule 5-703) applied.

The prosecution had failed to provide a witness who could authenticate that the tested blood was the defendant’s, but the defense had failed to preserve that ground for objection.

Compare with this well-reasoned Fourth Circuit line of cases the less intellectually satisfying, strained rationale of *United States v. Brooks*, 715 F.3d 1069, 1079-80 (8th Cir. 2013) (affirming admission of computer printouts of data generated by GPS tracking device hidden in packet of bank currency as nontestimonial business records generated for “the purpose of locating a robber and recovering stolen money” rather than “for the purpose of establishing or proving some fact *at trial*”).

The recent Maryland case, *Gross v. State*, 229 Md. App. 24 (2016) (Woodward, J.), addressed the lack of need for an expert to testify as to GPS data in records generated from the GPS on a stolen box truck, but did not address the hearsay or confrontation issue. The best analysis would be that they were machine-generated nonhearsay; but if found to be hearsay, they would have been nontestimonial business records, as they were routinely generated by the truck's movements, not for the primary purpose of accusing a targeted individual of engaging in criminal conduct.

### **Chart 3 IS THE OCS OFFERED FOR “TOMA”?**

#### **A. Hearsay Schemata**

**(1) What is the evidence offered? Does it include an OCS of a person? (The evidence may be more than the OCS itself, e.g., it may include to whom and under what circumstances an OCS was made.) (2) If so, how is the evidence relevant to the proponent's case: what is it offered to help to prove? (3) Finally, how does the evidence help to prove that fact? Does the OCS only have probative value as to that fact if an assertion by the declarant, when making the OCS, was true/factually accurate?**

(1) EVI offered (determined to include an OCS OF A PERSON)

(2) MATERIAL FACT that EVI #(1) is offered to help to prove

(3) Is the OCS offered for “TOMA”?

**1. If the evidence offered includes an “OCS” of a person, it is hearsay only if it is offered at trial to prove “TOMA.”**

2. **TOMA = the truth of any fact that was being asserted by the declarant, AT THE EARLIER TIME when the declarant made the out-of-court statement.**

*When the OCS is offered for TOMA, all four hearsay dangers are potentially present: perception (did the declarant know what he was talking about?); memory (had the declarant forgotten before making the OCS?); sincerity (did the declarant have reason to lie? or was her statement intended in jest?); and narration/ambiguity (did the declarant mean what the words reported to have been uttered seem to mean?)*

**B. TOMA Analysis** (see MD-EV 801:7)

**The OCS is offered for TOMA if the proponent is asking the jury to rely on, as true, accurate, or correct, something the declarant asserted in his/her OCS.**

The step-by-step analysis:

1. **Who was the out-of-court declarant?**
2. **What was the declarant asserting at the time s/he made the OCS?**
3. **For what purpose, to help to prove what relevant fact, is the proponent offering the evidence at trial?**
4. **HOW DOES THE EVIDENCE TEND TO PROVE THAT FACT?**

Md. Rule 5-401 relevance requires only the slightest probative value, not even necessarily persuasive probative value. See MD-EV 401:1.

5. If the evidence offered simply HELPS (even a little) TO PROVE the fact as to which it is offered, even if the out-of-court declarant was either insincere or inaccurate, the evidence is NOT HEARSAY.

*Ask, “Even if the assertions made in the OCS were incorrect, is it still relevant that the declarant made the statement?” If the answer to this question is yes, then the evidence is nonhearsay.*

**The evidence may come in for the relevant nonhearsay purpose (subject to exclusion under Md. Rule 5-403). A limiting instruction should be given upon request (Md. Rule 5-105). As to Md. Rule 5-403:**

*See Graves v. State, 334 Md. 30 (1994) (reversible error to admit arrestee’s hearsay statement to police that defendant was his accomplice, for nonhearsay purpose of showing why police included defendant’s picture in photographic array to be shown to victim: limited probative value for that purpose was substantially outweighed by danger of unfair prejudice);*

*Sanders v. State*, 194 Md. App. 162, 179-87 (2010) (no abuse of discretion in excluding fact that defendant made a post-*Miranda* statement to police when offered by defense for nonhearsay purpose, as it “likely would have confused the jury and caused it to speculate why the statement was not introduced into evidence”), *vacated on other grounds*, 418 Md. 368 (2011).

C. Frequently Recurring Categories of **Nonhearsay When an OCS is Relevant Short of Helping to Prove TOMA**

1. **Sometimes THE MERE FACT THAT THE OCS WAS MADE HAS RELEVANCE, regardless of whether the declarant was either sincere or accurate.** In this event, the question is simply whether the OCS was made as testified to; because a person testifying to the OCS can be fully cross-examined as to whether the OCS was made as s/he has testified, there is no need for the hearsay rule to apply. The witness on the stand can be cross-examined as to faulty perception or memory or impeached as to credibility for truthfulness.

a. **VERBAL ACTS** (a/k/a “legally operative facts”): **the substantive law regarding the particular type of claim or defense either requires that an out-of-court statement have been made, e.g., defamation, contracts (including the offer and the acceptance), wills; or gives a particular legal effect to that type of statement (e.g., “Your money or your life!”).** See MD-EV 801:8-801:9.

These utterances are “**magic words**” under the substantive law; they automatically take the speaker to a particular legal destination, **without the need to inquire into the declarant's sincerity or accuracy.** See *Garner v. State* (caller’s utterance, “Yo, can I get a 40?”) and *Fair v. State* (paycheck), pp. 8-10 above.

See *Foster v. University of Maryland Eastern Shore*, 908 F. Supp. 2d 686, 691-92 (D. Md. 2012) (Grimm, J.) (statement that constituted part of alleged harassment), *on reconsideration*, 2013 WL 5487813 (D. Md. 2013) (granting defense motion for summary judgment on Title VII claim), *rev’d on other grounds*, 787 F.3d 243 (4th Cir. 2015);

*Windsor v. State*, 2016 WL 4076198 (Md. App. 2016) (unreported) (Thieme, J.) (initialed note, “acquired eight tools, amount owed \$120,” found in partially filled Oxycodone bottle in defendant's car, was a verbal act, a promissory note, and admissible nonhearsay, helping to prove that defendant’s possession of the drug was commercial; alternate holding, admissible under Md. Rule 5-703 as part of basis of expert’s opinion);



*Johnson v. State*, 228 Md. 27 (2016) (Woodward, J.) (in prosecution for harassment by electronic mail, the harassing emails, sufficiently authenticated by circumstantial evidence linking them to defendant).

- b. ***STATEMENTS OFFERED TO PROVE THEIR EFFECT ON THE HEARER OR READER***, to prove that the hearer or reader was put on notice, or affecting the reasonableness of the hearer's or reader's subsequent conduct, e.g., "Be careful, the floor is wet," or, in a negligent hiring or retention case, what the employer had been told about the employee. See MD-EV 801:10.

*E.g., Foster v. University of Maryland Eastern Shore*, 908 F. Supp. 2d at 691-92 (D. Md. 2012), p. 15 above (co-worker's offensive statements to plaintiff, her responses telling him she wanted no part of his behavior, and her complaints to human resources and public safety officers were all admissible nonhearsay, to show their effect on the listeners);

*Jarrett v. State*, 220 Md. App. 571, 579-83 (2014) (Berger, J.) (in defendant's prosecution for murder of his wife, son's comments to father in recorded telephone call were properly admitted to show their putting him on notice of son's intent to cremate his mother's remains, which was relevant when defense argued that it had not had opportunity to examine remains);

*Harris v. Housing Authority of Baltimore City*, 227 Md. App. 617, 644 n. 15 (2016) (housing authority's employees' statements to affiant that they could not recall was relevant, not to show that they did not recall, but merely for nonhearsay purpose to show affiant's difficulty in finding information);

*Wagner v. State*, 213 Md. App. 419, 471 (2013) (Graeff, J.) (witness's statement that he could not read or write, made to police detective, was properly admitted to show why detective had not required witness to write on back of photo witness had identified, when detective had required another witness to do so).

Rehabilitation of an Impeached Witness by Evidence of Threats He Had Received:

*Armstead v. State*, 195 Md. App. 599 (2010) (Kenney, J.) (no error in admitting State's witness's testimony that he was scared and that his life had been threatened, when witness was nervous and made inconsistent statements, and court had given limiting instructions that evidence was relevant only to witness's credibility and that there was no evidence that defendant was involved in or knew of the threats), *cert. denied*, 418 Md. 191 (2011).

EXCLUSION UNDER MD. RULE 5-403: Statements offered to prove why the police took certain actions are relevant for the effect on the hearer, but are often excluded under Md. Rule 5-403 when offered for this limited purpose, due to the risk that the jury will consider them for their truth. *See Graves v. State*, p. 14 above.

*Morris v. State*, 418 Md. 194 (2011) (Harrell, J.) reaffirms this general principle, but found no error under the facts there when the detective did not repeat the OCS, but testified that, based on the victim's, another officer's, and codefendant's statements, he retrieved certain items as associated with the alleged robbery.

- c. **STATEMENTS THAT ARE OFFERED AS CIRCUMSTANTIAL EVIDENCE TO PROVE ONLY SUCH MATTERS AS THE DECLARANT'S BEING ALIVE, CONSCIOUS** (which may be relevant, *e.g.*, to pain and suffering), **ABLE TO SPEAK A PARTICULAR LANGUAGE, ETC., AT THE TIME S/HE MADE THE OCS.** See MD-EV 801:12. Here it doesn't matter what the declarant said, only that she said something.
- d. **PRIOR STATEMENTS MADE BY THE DECLARANT, THAT ARE OFFERED ONLY TO IMPEACH OR REHABILITATE THE DECLARANT'S CREDIBILITY**, but not as substantive evidence. See MD-EV 801:13.
  - i. **Prior inconsistent statements made by the person who is sought to be impeached** (Md. Rules 5-613, witnesses, and 5-806, nontestifying hearsay declarants).

*See Handy v. State*, 201 Md. App. 521 (2011) (Sharer, J.) (defendant's OCS, recounting a witness's OCS, was properly admitted: defendant's as a statement of a party opponent, and the witness's OCS within it was admitted only to impeach witness with witness's own statement).

A party can impeach a witness or declarant with that witness's or declarant's own prior inconsistent statements. But a party cannot impeach one witness with someone else's out-of-court statement; to do that would be to offer the non-witness's statement for its truth, which is a hearsay purpose.

*Sweetney v. State*, 423 Md. 610 (2011) (Murphy, J.) (trial court properly precluded cross-examination of police officer-witness with out-of-court statement made by another officer in the same department, regarding search warrant "return" which did not list item that witness testified was found).

As to Md. Rule 5-806, *cf. Taylor v. State*, 407 Md. 137 (2009) (**impeachment of a key, non-testifying declarant** – whose OCS has been admitted for its TOMA – by extrinsic evidence of a prior bad act under Md. Rule 5-608(b) must be allowed, if it would have been permitted if the declarant had testified at trial).

- ii. **Under certain circumstances the credibility of a witness or out-of-court declarant may be rehabilitated by proof that that person’s prior statements were consistent with his trial testimony.** Md. Rule 5-616(c)(2). OCS is to be offered for a limited purpose under Md. Rule 5-105 and is subject to possible exclusion under Md. Rule 5-403.

*See Holmes v. State*, 350 Md. 412 (1998) (Chasanow, J.) (use for this purpose may be permitted when substantive use under Md. Rule 5-802.1(c), see p. 32 below, is not).

- 2. **STATEMENTS THAT DEPEND, FOR THEIR RELEVANCE, ON THE DECLARANT’S HAVING BEEN SINCERE, BUT NOT ON HIS/HER HAVING BEEN FACTUALLY ACCURATE, ARE ALSO NOT OFFERED FOR TOMA.** Here the OCS is offered for a nonhearsay purpose, as **circumstantial evidence to prove the declarant’s emotion, state of mind, knowledge, belief, intent, sanity, affection, ill will, etc., when it is a relevant issue in the case.** The OCS is not a direct assertion by the declarant of his state of mind. See MD-EV 801:11.

*See, e.g., Thomas v. State*, 397 Md. 557, 575-80 (2007) (Raker, J.) (evidence of defendant’s initial refusal to provide a blood sample was properly admitted as circumstantial evidence of consciousness of guilt, as State had laid proper foundation by showing that defendant was told blood was needed in reference to the victim’s health); *Holland v. State*, 122 Md. App. 532 (1998) (Moylan, J.).

**Examples:**

(1) In A’s trial for murder of B, the State offers, as relevant to A’s motive or intent, C’s testimony that A said to C a week before the murder, “B is a mean, nasty, rotten so-and-so.”

How is this evidence relevant to the State’s case? Is it relevant *only* if A was *correct* as to the facts A asserted, *i.e.*, that B was *really* mean, nasty, etc.?

No. It will be probative of A’s motive or intent simply *if the declarant A believed* that the fact he asserted was true: here, that B was nasty, etc., even if A was inaccurate, and mistaken about B. The evidence may be properly admitted for a limited, nonhearsay purpose, as circumstantial evidence that A disliked or thought

ill of B, which is relevant to A's motive and intent. **The evidence would help to prove the fact it is offered at trial to prove, even if A was factually wrong,** and B was really a kind and lovely person.

Now assume instead that the State calls C to testify to A's OCS one week before the murder, "I hate B." This OCS is a *direct assertion by A of A's state of mind*, and is **offered to prove that A was accurate, i.e.,** did have the state of mind, *i.e.,* A hated B. This OCS is offered to prove TOMA and is hearsay, so it must fall within a hearsay exception in order for the hearsay rule not to exclude it. (Here it will qualify under the state of mind hearsay exception, Md. Rule 5-803(b)(3).)

(2) In a CINA case, suppose that the social worker wishes to testify that the child's father told her, "[Eight-year-old child] is a crybaby. I knew [my girlfriend's 12-year-old daughter] was beating on him. But I didn't feel like being bothered with him. I went out to have a smoke." **Would all or part of this be relevant only for TOMA?** If for TOMA, which hearsay exception(s) would apply?

**D. Evidence Offered for a Nonhearsay Purpose is Not Subject to the Confrontation Clause: An Important Threshold Question Not to Be Overlooked** (see MD-EV 800:7 and 801:7—801:14)

*Crawford v. Washington*, 541 U.S. 36, 59 n.9 (2004) ("The Clause...does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted."); *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). See *Williams v. Illinois*, 132 S. Ct. 2221, 2227-78 (U.S. 2012) (four justices of a plurality of five held that Cellmark DNA report that was part of basis of testifying expert's opinion, under equivalent of Md. Rule 5-703, was admitted as nonhearsay, under Illinois law).

**Hypo:** Juvenile is charged with assault and burglary for allegedly breaking into home where teenaged mother [A.R.] of his child lived with her parents and punching A.R. in the face. Juvenile's defense is that the door was open and that A.R. fabricated her testimony because he wanted to get custody of their child.

Defense counsel proffers that Juvenile wishes to testify that, when he entered the home, he told A.R.: "I'm tired of all your mess. I've hired a lawyer. We're going to take you to court and say you are unfit. I have all your text messages, and I am going to get the baby." At this point, A.R. said, "I'm going to get your ass in jail. You will never get [the baby.]"

Is any of this evidence nonhearsay? Hearsay? If hearsay, does it fall under any hearsay exception? Does the confrontation clause apply to it?

*See Redfearn v. State*, 212 Md. App. 785 (2013) (unreported) Sept. Term, 2012, no. 1379), *cert. denied*, 434 Md. 314 (2013).

**Chart 4 THE CONFRONTATION CLAUSE: IS THE HEARSAY “TESTIMONIAL?”**  
See MD-EV 800:10—800:19.

Text of U.S. Constitution, amend. VI: An accused has the right to confront “the witness” against him or her. *In pari materia*, Md. Decl. of Rights art. 21.

**I. HEARSAY IS TESTIMONIAL (AND THUS SUBJECT TO THE RIGHT TO CONFRONT) IF IT IS:**

**A. U.S. Supreme Court Cases: Testimonial Hearsay**

- (1) **Ex parte testimony at a preliminary hearing; or**
- (2) **A plea allocution; or**
- (3) **Grand jury testimony; or**
- (4) **Prior trial testimony; or**
- (5) **“Statements taken by police officers in the course of interrogations...”**  
*Crawford v. Washington*, 541 U.S. 36 (2004).

In *Crawford*, the testimonial statements were made during a “**structured, recorded**” **interrogation** at the police station, when the declarant and her husband were suspected of having committed an assault.

*Crawford* focused on the historical context of the Sixth Amendment: antipathy toward Queen “Bloody Mary’s” government’s gathering of formal, solemn, ex parte statements to be used in criminal prosecutions.

- (6) **Police “interrogations solely directed at establishing the facts of a past crime, in order to identify (or provide evidence to convict), the perpetrator. The product of such interrogations, whether reduced to a writing signed by the declarant or embedded in the memory (and perhaps notes) of the interrogating officer, is testimonial.”** *Davis v. Washington*, 554 U.S. 353 (2006).

Both an affidavit signed by a domestic violence (DV) victim and her oral statements to police at the marital home, where her husband, Mr. Hammon, was in another room, with another officer, were testimonial. *Davis*’s companion case, *Hammon v. Indiana*, 554 U.S. 353 (2006). (J. Thomas dissented as to *Hammon* facts.)

The *Davis/Hammon* Court looked at (1) **the “primary motive” (viewed “objectively”) of the police or the police agent, in asking the particular**

**questions: was it to resolve an ongoing emergency (yielding *nontestimonial* statements) or to help to prove past criminal conduct/agency “some time after the events described were over” (yielding *testimonial* statements)? and (2) the relative degree of *solemnity* and *formality* of the interrogation.** Both of these factors were held to be relevant to what an objective declarant would take to be the primary purpose of his or her statements.

Dictum: “volunteered testimony” in absence of interrogation would still be testimonial.

- (7) **Notarized certificates by analysts of “a state laboratory required by law to conduct chemical analysis upon police request”** that a seized substance was cocaine and how much it weighed.

*Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009) (5 to 4 decision: dissent by Kennedy, J., joined by Roberts, C.J., and Breyer and Alito, JJ.).

But dictum: “*notice and demand*” statutes are constitutional. Note: The State must provide notice, e.g., under Md. Code Ann., Cts. & Jud. Proc. §§ 10-1001 through 10-1003, of a state chemist’s report regarding a controlled substance before each trial, including retrials, even where the defense had cross-examined the expert at the first trial. *Harrod v. State*, 423 Md. 24 (2011).

- (8) **In a case like #7, the witness subject to cross must be either the person who performed or who witnessed the tests.** *Bullcoming v. New Mexico*, 564 U.S. 647 (2011) (Here, the lab analyst who performed the tests, and certified and signed the blood alcohol concentration results, had been put on unpaid leave.) (same 4 dissenters as in *Melendez-Diaz*, #7 above) (Sotomayor, J., concurred in part, stressing that the testifying expert “had no involvement whatsoever in the relevant test and report,” and leaving for another day a case in which the witness “is a supervisor, reviewer, or someone else with a personal, albeit limited connection to the scientific test at issue....”). See *Malaska v. State*, 213 Md. App. 492 (2014), p. 22 below. Be sure to see *Williams v. Illinois*, 132 S. Ct. 2221 (U.S. 2012), *Norton*, and the *Derr* saga, pp. 23-24 below, for limitations on *Melendez-Diaz* and *Bullcoming*.

## **B. Maryland Cases: Testimonial Hearsay**

### Statements To or By Agents of Police

- (9) **Co-defendant’s statements made during proffer sessions for plea bargaining.** *Butler v. State*, 231 Md. App. 533 (2017) (reversible error in denying defendant’s motion for mistrial after detective used knowledge from nontestifying co-defendant’s proffer statements to testify to meaning of recorded jail conversations between the two defendants, e.g., “air holes” meant “gun”;

limiting instruction to use only as to co-defendant who made statements did not cure error).

- (10) Statements of 8 and 10-year-old children in **an interview by a social worker working in tandem with and in presence of police officers, when child abuse had been reported and the children had already accused defendant to the police.** *Snowden v. State*, 385 Md. 641 (2005) (Harrell, J.) (adopting test of “whether the statements were made under circumstances that would lead an objective declarant reasonably to believe that the statements would be available for use later at trial”).

- (11) **Nontestifying codefendant’s written and taped statements to police at the police station.**

Codefendant had made a “miscellaneous agreement” functionally equivalent to a guilty plea agreement that would become effective after defendant’s jury trial (unless the codefendant made a successful motion for acquittal). Because the codefendant had waived his right to actively participate in the trial, the trial court should have treated his confession under *Crawford*, rather than simply under *Bruton*. *Morris v. State*, 418 Md. 194 (2011) (Harrell, J.).

- (12) **Domestic violence assault victim’s excited statements to responding police, where defendant was known to be sitting on steps outside victim’s apartment and there were no apparent severe injuries requiring immediate medical attention.** *State v. Lucas*, 407 Md. 307 (2009) (Adkins, J.).

- (13) *Brock v. State*, 203 Md. App. 245 n.5 (2012) (D. Eyler, J.) (State conceded that **statements declarant made to police in months following stabbings** were testimonial).

#### Autopsy Reports

- (14) *See Malaska v. State*, 216 Md. App. 492 (2014) (autopsy report was sufficiently formalized to be testimonial, in part perforce, due to the medical examiner's statutory obligations, but **defendant’s right to confront was satisfied by testimony of and ability to cross examine supervisor who was present during the autopsy, reviewed the slides, and made the conclusion as to cause and manner of death**), *cert. denied*, 439 Md. 696 (2014), *cert. denied*, 135 S. Ct. 1162 (U.S. 2015). But as to lab reports attached to the autopsy report, *see Reaves*, p. 24 below.

The first post-*Crawford v. Washington* analysis of this issue in Maryland concluded that certain parts of autopsy reports, “Opinions, speculation and other conclusions drawn [in autopsy reports] from the objective findings in autopsy report,” were necessarily testimonial. *Rollins v. State*, 392 Md. 455 (2006)

(Greene, J.). *Accord Costley v. State*, 175 Md. App. 90 (2007). But *Rollins's* rationale no longer holds. See p. 29 below.

### Lab Results

- (15) **DNA and the *Derr* saga:** Although no longer good law, *Derr v. State*, 422 Md. 211 (2011) (Greene, J.) (*Derr I*) held, relying on *Bullcoming*, p. 21 above, that the Confrontation Clause demands that either the analyst who performed the test leading to DNA results or a supervisor who observed it must testify at trial. *Derr I* held inadmissible a testifying expert's testimony relying in part on the results of another's 2002 DNA analysis, when she had supervised only the subsequent "matching" 2004 DNA analysis. *Derr I* applied the same reasoning to the results obtained by a serology examiner in 1985 regarding blood and semen at the time of the charged rape.

Judge Harrell, joined by Judge Battaglia, concurred as to the testimony based on the 2002 DNA analysis, but dissented as to the expert's testimony relying on the 1985 serological results, which they found to be merely "raw data" and different in several significant ways from the certificates in *Melendez-Diaz* and *Bullcoming*, p. 21 above.

The U.S. Court of Appeals for the Fourth Circuit had held the opposite way to the *Derr I* majority in *United States v. Summers*, 666 F.3d 192 (4th Cir. 2011).

*Derr I* was vacated and remanded for reconsideration, 133 S. Ct. 63 (U.S. 2012), in light of *Williams v. Illinois*, 132 S. Ct. 2221 (U.S. 2012), where the plurality had **found no confrontation violation when DNA analysis by Cellmark of a vaginal swab from the victim was relied on under the equivalent of Md. Rule 5-703** and compared by the testifying expert to her own analysis of the *defendant's* blood sample. The reasoning was fractured: (1) four justices held that the Cellmark analysis was not admitted for its truth, but for a nonhearsay purpose; (2) four held, alternately, that the Cellmark report was nontestimonial, because its authors lacked "the primary purpose of accusing a targeted individual of criminal conduct," 132 S. Ct. at 2242; and (3) five justices found that, in any event, the Cellmark report was insufficiently solemn and formalized (unlike an affidavit, deposition, or a formalized dialogue such as custodial interrogation) to be testimonial, so that it was nontestimonial. See MD-EV 703:1 and 800:15.

On remand in *Derr II*, 434 Md. 88 (2013) (Greene, J.), *cert. denied*, 134 S. Ct. 2723 (U.S. 2014), the Court of Appeals, relying on the agreement of the five Supreme Court justices in *Williams*, held that **the DNA report was insufficiently formal to be testimonial.**



Four days after its decision in *Derr II*, the Court of Appeals similarly held in *Cooper v. State*, 434 Md. 209 (2013) (Greene, J.), *cert. denied*, 134 S. Ct. 2723 (U.S. 2014) (also holding that the trial court did not err either in concluding that sufficient evidence of the chain of custody of the bodily fluid from the alleged attacker had been shown, or in admitting the resulting DNA report as having been shown to be trustworthy, reasonably relied upon by the testifying supervisor in forming her opinion that the tested sample showed the DNA profile of – at that point – an unidentified male, and necessary to illuminate her testimony; another witness testified to having compared those results with the profile made from a sample taken from the defendant by a buccal swab).

**But the Maryland Court of Appeals subsequently held that a Forensic DNA Case Report**, comparing the DNA from a buccal swab of the defendant and the laboratory’s analysis of DNA on a ski mask, and **concluding “within a reasonable degree of scientific certainty” that the defendant was a major source of the saliva tested, was testimonial.** *State v. Norton*, 443 Md. 517 (2015) (Battaglia, J.). Admitting the report without testimony of the analyst who authored and signed it was reversible error. Testimony of the supervisor who had “reviewed all the materials, all of the notes, the lab notes, all of the data that was generated, the paperwork and the final report” did not satisfy the defendant's confrontation right.

The Court of Appeals **shifted its analysis from that which it had followed in *Derr II***. The approach adopted in *Norton* is **instead whether the report was “created to accuse ‘a targeted individual of engaging in criminal conduct’.**” Applying this rule, from Justice Alito’s plurality opinion in *Williams*, the *Norton* court concluded, would still lead to the result that the *Derr* reports were nontestimonial, while the *Norton* report was testimonial. The *Norton* report would also have been testimonial under *Bullcoming*, p. 21 above, so that the defendant has the right to “cross-examine the responsible analyst.”

*Bullcoming* will apply when a report “includes the signatures of laboratory officials, identifies the accused as the culprit in the underlying investigation, conveys conclusory statements and certifies that proper procedures were followed in reaching the ultimate conclusion.” *Norton*, 443 Md. at 553. *Norton*, at fn. 32, distinguished from the case before it a Washington state case in which the supervisor had testified, but the underlying draft report was not admitted into evidence. That situation would seem to be more akin to *Williams* and *Cooper*.

The result in *Cooper* seems to remain correct, post-*Norton*.

*Compare Reaves v. State*, 2015 WL 6470501 (Md. App. 2015) (Zarnoch, J.) (unreported) (in grandmother’s prosecution for child abuse resulting in death caused by rubbing methadone on toddlers’ gums to help them sleep, toxicology report was included in autopsy report, and relied on by medical examiner in

reaching her conclusion that cause of death was methadone intoxication; toxicology report, although signed by two reviewers, contained no certification, such as a representation as to the accuracy of the results, and was not sufficiently formal or solemnized to be testimonial; if, however, the report were testimonial, its author's testimony satisfied defendant's confrontation right; although she did not conduct the tests, she reviewed the results and signed the report).

#### Statements to and by Medical Personnel

- (16) **Report prepared by SAFE nurse** employed by the Sexual Assault Center at Prince George's Hospital, where victim had been taken by police officer (who requested certain tests) after victim had been examined and bandaged at another hospital; the 2nd hospital performed forensic tests and prescribed antibiotics; report showed location of physical injuries observed by SAFE nurse. *Green v. State*, 199 Md. App. 386 (2011).

#### Interpreters

- (17) *Taylor v. State*, 226 Md. App. 317 (2016) (Arthur, J.) (reversible error to admit interpreter's statements as to what deaf defendant was saying during police interrogation, without providing defendant an opportunity to cross-examine the interpreter).

N.b. **The Confrontation Clause will not exclude, even if testimonial HS:**

- (1) **The accused's own statement, or another's adopted by the accused** (see Md. Rule 5-803(a)(1)-(2)). *Crawford v. Washington*, 541 U.S. 36 (2004); *Cox v. State*, 421 Md. 630 (2011) (Greene, J.); or
- (2) **Dying declarations** (see Md. Rule 5-804(b)(2)). *Crawford* n.6; *Hailes v. State*, 442 Md. 488, 506-14 (2015) (for reasons of justice, dying declarations were an exception to the confrontation right at common law that was not intended to be abrogated by the Sixth Amendment).

## **II. HEARSAY IS NONTESTIMONIAL (AND THUS NOT REACHED BY THE CONFRONTATION CLAUSE), see MD-EV 800:10 and 800:12—800:19, IF IT IS:**

### **A. U.S. Supreme Court Cases: Nontestimonial Hearsay**

- (1) **Business records (generally)** (see Md. Rule 5-803(b)(6)); or
- (2) **"Casual remarks to an acquaintance"** or overheard, off-the-cuff remarks; or
- (3) **Statements by a coconspirator during and in furtherance of a conspiracy** (see Md. Rule 5-803(a)(5)); or
- (4) **Statements made "unwittingly" to an informant or undercover officer.** *Crawford v. Washington*, 541 U.S. 36 (2004).

- (5) 911 call where a declarant reasonably would conclude that operator, as agent of police, “objectively” had “primary purpose” “to enable police assistance to meet an ongoing emergency.” *Davis v. Washington*, 554 U.S. 353 (2006).

Declarant-victim’s initial call in *Davis* was “plainly physical a call for help against a bona fide physical threat”; victim’s responses were “frantic.”

- (6) Dictum in *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009), p. 21 above: **Merely routine records kept in the ordinary course of business**, such as of routine maintenance of equipment. *E.g.*, *United States v. Cabrera-Beltran*, 660 F.3d 742 (4th Cir. 2011) (Treasury Enforcement Communications Systems records of vehicles crossing into the United States and their license plates were nontestimonial).
- (7) Dictum in *Melendez-Diaz*: **Certificates of authentication of a pre-existing official document.**
- (8) **Shooting victim’s statements in response to police’s questions, as victim lay mortally wounded, outside a gas station, under all the pertinent circumstances, showing primary purpose of resolving emergency.** *Michigan v. Bryant*, 562 U.S. 344 (2011) (over vehement dissent of Scalia and Ginsburg, JJ.).

Majority opinion by Justice Sotomayor held that whether statements are testimonial is determined by a multi-factor analysis, and the presence or absence of one factor is not dispositive.

The factors include **(1) whether there seemed to be an ongoing emergency; (2) the degree of formality of the interrogation; and (3) an objective evaluation of the questions posed and answers given under all the circumstances in which the declarant made the statements** at issue.

As to factor (1), she noted that **a deadly weapon** had been used; the **medical condition** of the victim (who had asked several times when medical help would arrive); the shooter had not been located; and that the **“zone of potential victims”** was broader than in a domestic violence case.

Seemingly veering away from *Crawford’s* historical reasoning and back toward that of *Ohio v. Roberts’* focus on reliability, Justice Sotomayor wrote: “implicit in *Davis* is the idea that because the prospect of fabrication in statements given for the primary purpose of resolving that emergency is presumed significantly diminished, the Confrontation Clause does not require such statements to be subject to the crucible of cross-examination.”

- (9) **Cellmark report on DNA analysis.** *Williams v. Illinois*, 132 S. Ct. 2221 (U.S. 2012) (plurality), p. 23 above. See MD-EV 800:15.
- (10) **Young child’s statements to his preschool teachers, identifying the defendant as the person who had caused his injuries.** *Ohio v. Clark*, 135 S. Ct. 2173 (2015) (Alito, J.) (“neither the child nor his teachers had the primary purpose of assisting in [defendant]’s prosecution”) (Scalia, Ginsburg, and Thomas, JJ., concurred in the judgment). The teachers needed to ascertain whether it was safe to return the child to his home environment, and whether other children might be at risk. The Court noted “strong evidence that statements made in circumstances similar to those facing [the child victim] were admissible at common law” and thus it is “highly doubtful that statements like [the child’s] ever would have been understood to raise Confrontation Clause concerns.” That the teachers were required by Ohio law to report suspected child abuse to government authorities did not convert that into the teachers’ primary mission. Moreover, “the fact that the witness is unavailable because of a different rule of evidence [incompetency due to youth, under Ohio law] does not change our analysis.”

The conviction was affirmed on remand, 2016 WL 2586638 (Ohio App. 2016) (no error in admission of three-year-old’s statements under the Ohio “tender years” hearsay exception, which required independent proof of abuse and analysis of several factors as to whether the child was particularly likely to be telling the truth). See MD-EV 800:19.

## B. Maryland Cases: Nontestimonial Hearsay

### Statements to Police and Their Agents

- (11) **Dying declaration by victim**, under facts similar to those in *Michigan v. Bryant*, p. 26 above: a **chaotic situation, and shooter’s whereabouts were unknown.** *Head v. State*, 171 Md. App. 642 (2006). The Court of Appeals has subsequently held that the Confrontation Clause is inapplicable to all dying declarations. *Hailes v. State*, 442 Md. 488 (2015). See p. 25 above.
- (12) **Domestic violence victim’s excited utterances, imploring defendant to stop, heard by 911 operator** over cell phone that had been left on during the assault. *Marquardt v. State*, 164 Md. App. 95 (2005) (Kenney, J.), *cert. denied*, 390 Md. 9 (2005).
- (13) **Domestic violence victim’s sobbing utterances in two 911 calls, requesting police and an ambulance** and describing defendant and his car (defendant hung up phone the first time; the second time victim says he has left but she knows he is coming back). *Clark v. State*, 188 Md. App. 110 (2009) (Alpert, J.).

- (14) **911 call reporting license tag numbers and color of car in which shooter had just fled** after leaving carry-out where shooting occurred; caller noted that she was not summoning the police: they were already on the way. *Langley v. State*, 421 Md. 560 (2011) (4 to 3 decision) (Harrell, J.) (majority relied on *Bryant*, p. 26 above; Bell, C.J., and Greene and Eldridge, JJ., dissented).
- (15) Several **excited utterances** made by declarant while pacing back and forth, **to responding police officer's questions; declarant had himself been stabbed, while trying to prevent flight of assailant who had fatally stabbed declarant's friend** at a crowded tavern. When officer arrived, both victims were bleeding, and assailant's whereabouts were unknown. Officer called for medical assistance twice, and testified it took the police about 30 minutes to secure the tavern and make sure the suspect was not still there. Weapon was a knife. Not a domestic violence case.
- “Viewed objectively, the total circumstances...make clear that ‘the primary purpose’ of the officer’s questioning...was to meet an ongoing emergency.”**  
*Brock v. State*, 203 Md. App. 245 (2012) (D. Eyler, J.).
- (16) **Certain DNA reports.** *Derr II*, 434 Md. 88 (2013), p. 24 above.

Statements to Medical Personnel (see MD-EV 800:14)

- (17) **Statements by injured child to nurse examining him when admitting him to pediatric ward**, describing who had harmed him, even though child had been brought to emergency room by police, who were questioning defendant. *Griner v. State*, 168 Md. App. 714 (2006) (Salmon, J.).

Casual Remarks

- (18) *State v. Payne*, 440 Md. 680, 714-18 (2014) (**wiretapped conversations** between defendant and cohorts triggered neither *Crawford* nor *Bruton*, but nonetheless, severance of retrials should be considered);

**Casual remarks made by one inmate to another**, describing the alleged crime. *Cox v. State*, 421 Md. 630 (2011) (Greene, J.) (noting similarity of facts to those of *Dutton v. Evans*, 400 U.S. 74, (1970)). See *Cox*, 421 Md. at 650. *Cox*:

“We hold that when the State seeks to introduce an out-of-court statement against a criminal defendant, the proper inquiry under *Crawford* and *Bryant* [p. 26 above] is to determine **whether a reasonable person in the declarant’s situation would have made the statement ‘with a primary purpose of creating an out-of-court substitute for trial testimony.’** *Bryant*, 562 U.S. at \_\_\_, 131 S. Ct. at 1155.”

## Parts of Autopsy Reports

- (19) In its earliest post-*Crawford* ruling on this subject, the Court of Appeals strained to hold, “[R]outine, descriptive and not analytical, [but] objectively ascertained and generally reliable facts” in autopsy reports are nontestimonial; the recording of them is required by Md. Code Ann., Health Gen. § 5-311. *Rollins v. State*, 392 Md. 455 (2006).

The rationale of *Rollins* was **implicitly overruled** by *Melendez-Diaz* and *Bullcoming*. See *Derr I*, p. 23 above; *Green v. State*, 199 Md. App. 386, 403-04 (2011). See MD-EV 800:15 at notes 127-60 and accompanying text.

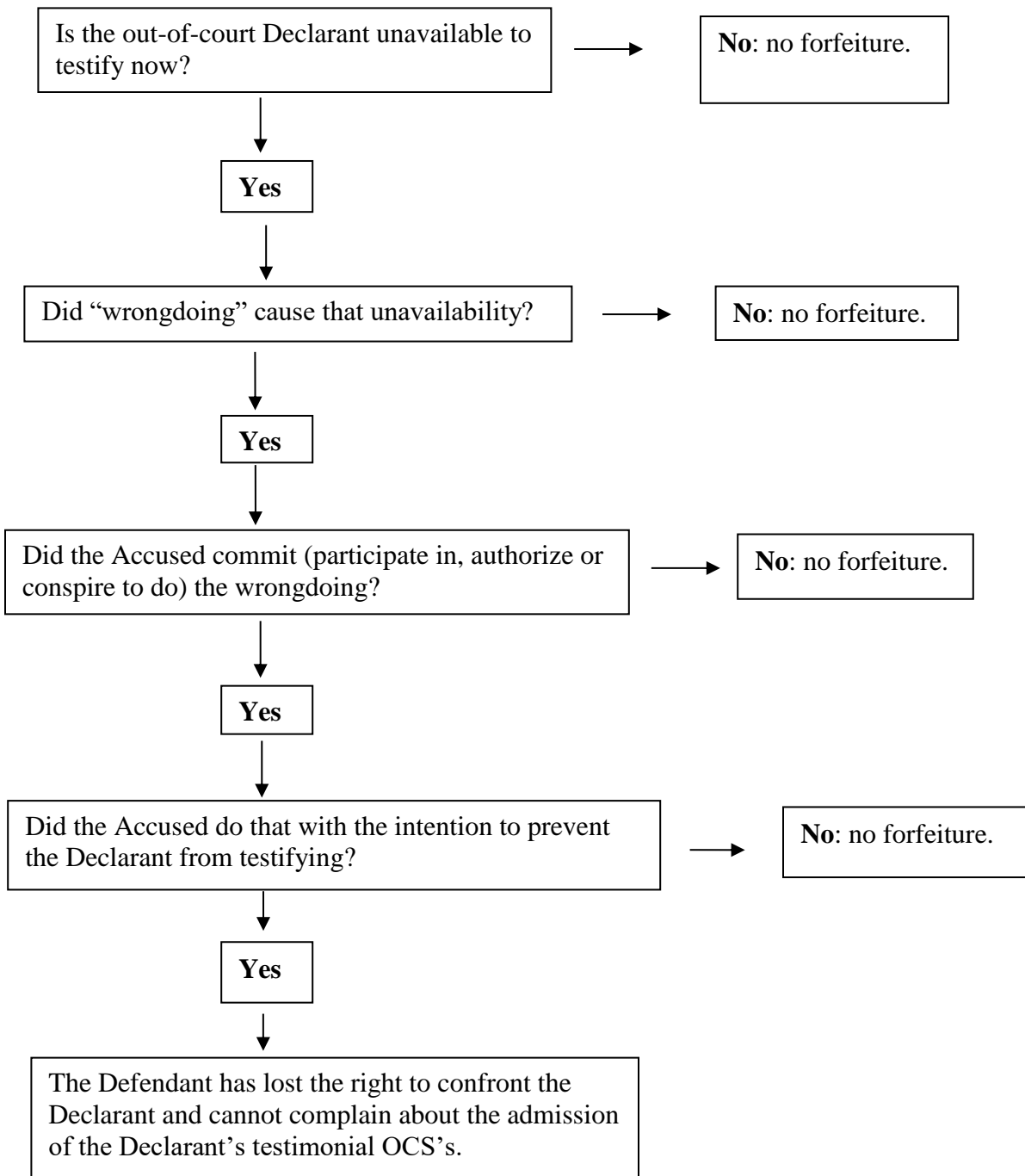
In *Malaska v. State*, 216 Md. App. 492 (2014) (Kehoe, J.), p. 23 above, the Court of Special Appeals, relying on *Williams* and *Derr II*, pp. 23-24 above, held that the victim’s autopsy report, complying with Maryland statutes and signed by three physicians, was **testimonial, but that the medical examiner’s supervisor’s testimony, subject to cross-examination by the defendant, satisfied his confrontation right**, so that the autopsy report was properly admitted into evidence. The supervisor testified that he was present during the dissection, reviewed all the slides, and made the ultimate determination as to the cause and manner of death.

## Statements by Coconspirators During and in Furtherance of Conspiracy

- (20) *State v. Payne*, 440 Md. 680 (2013) (insufficient evidence that Payne had distinctly and explicitly agreed to other coconspirators’ pact to conceal the underlying murder).

## **Chart 5 DID THE ACCUSED “FORFEIT” HIS OR HER CONFRONTATION RIGHT?**

Contrast with this doctrine of “forfeiture by wrongdoing” the related question of a defendant’s waiver of face-to-face confrontation by, e.g., being disruptive in the courtroom, *Cousins v. State*, 231 Md. App. 417 (2017) (having discharged counsel though court had found no reason to do so, defendant announced intention to disrupt proceedings and embarked on profane rant against judge; defendant was ordered from the courtroom and refused numerous opportunities to reenter, if he agreed to behave civilly; there was no requirement to contemporaneously record the proceedings so that the defendant could see or hear them); *Shiflett v. State*, 229 Md. App. 645 (2016) (defendant refused to comply with judge’s order to wear stun cuff, which judge had determined was required for courtroom security); *In re D.M.*, 228 Md. App. 451 (2016) (Sharer, J.) (same **presumption against shackling** applies in juvenile proceedings as in adult criminal courts; “[W]e hold that juveniles should not be shackled while appearing at juvenile court hearings, unless and until there has been a finding on the record that the juvenile poses a security concern or threat that would disrupt those particular proceedings or involve danger to the juvenile or others.”).



Authority: *Giles v. California*, 554 U.S. 353 (2008). *N.b.* not only dicta in majority opinion (Scalia, J.) but also the partial concurrence (Souter and Ginsburg, JJ.) and the dissent (Breyer, Stevens, and Kennedy, JJ.) leave the door open for finding such intent upon proof of an intent to “isolate the victim and to stop her from reporting abuse to the authorities.” See MD-EV 800:9.

## **Chart 6 HEARSAY EXCEPTIONS**

### **A. Multiple Hearsay: OCS'S Within OCS's : Md. Rule 5-805**

When offered evidence contains OCS's by more than one declarant, each OCS must be evaluated independently.

Moreover, if there is more than one "level" of evidence, i.e., we are asked to rely on one OCS to prove another OCS made earlier (as is often the case with medical records or social workers' reports), then we can't get to the earlier OCS unless the more recent one is admissible (either as nonhearsay or hearsay falling within a hearsay exception). See *Handy v. State*, p. 17 above; *Cooley v. State*, 157 Md. App. 101 (2004) (one level of OCS was nonhearsay and the other was hearsay falling within an exception), *rev'd on other grounds*, 385 Md. 165 (2005); *State v. Jones*, 138 Md. App. 178 (2001) (Hollander, J.). See MD-EV 805:1-805:2.

### **B. Hearsay Exceptions that Are Applicable Only if the Declarant Testifies at Trial and is Subject to Cross-Examination: Md. Rule 5-802.1**

*N.b.*: The hearsay may be proved by the testimony either of the declarant or of someone other than the declarant, as long as the prerequisites of the Rule are met.

1. Md. Rule 5-802.1(a): **A subcategory of a testifying witness's prior inconsistent statements ("Nance statements")**. See MD-EV 801(2):1.

#### **The required foundation:**

- a. The witness-declarant must testify at trial and be subject to cross-examination concerning the statement; and
- b. If this requirement is met, then Md. Rule 5-802.1(a) permits substantive use of a witness's prior inconsistent statements if they are either:
  - (1) written and signed; or
  - (2) stenographically or electronically recorded; or
  - (3) made under oath at deposition, trial, or in a hearing or another proceeding, including a grand jury proceeding.

*E.g.*, *Marlin v. State*, 192 Md. App. 134, 144-47 (2010) (Hollander, J.) (recanting witness's prior inconsistent, audio-recorded statement to police was properly admitted), *cert. denied*, 415 Md. 339 (2011).

2. **Md. Rule 5-802.1(b): A Subcategory of a Testifying Witness's Prior Consistent Statements**. See MD-EV 801(2):1 and 801(2):3.



The required foundation:

- a. The witness-declarant must testify at trial and be “subject to cross-examination concerning the statement”;
- b. The prior statement by the witness-declarant must be consistent with his or her testimony at trial;
- c. The prior statement must be “offered to rebut an expressed or implied charge against the declarant of fabrication, or improper influence or motive;” and
- d. The prior statement must precede the alleged improper influence or motive in order to be admissible as substantive evidence under Md. Rule 5-802.1(b). *Holmes v. State*, 350 Md. 412, 712 A.2d 554 (1998) (Chasanow, J.); *Thomas v. State*, 202 Md. App. 386 (2011) (Raker, J.) (motive to lie arose as soon as witness knew he was under investigation and/or stopped by police).

**But** *Acker v. State*, 219 Md. App. 210 (2014) (Kehoe, J.), *cert. denied*, 441 Md. 62 (2014), importantly held that “factually unsupported and conclusory allegations of bias or fabrication,” including broad-brush “bald assertions such as that the victim of alleged child sexual abuse was ‘starved for attention’ and therefore is inherently unworthy of belief,” as well as an allegation, unsupported by evidence, that the child was motivated to lie because the defendant had rebuffed an advance by the child’s mother, do not suffice to act as a bar to the admission of the declarant’s prior consistent statements as substantive evidence, when those statements predated a temporally-specific allegation of bias, regarding the defendant’s filing of a lawsuit against a family friend. (The court distinguished *Hajireen v. State*, 203 Md. App. 537 (2012), *cert. denied*, 429 Md. 306 (2012), where only one theory of bias had been argued.)

3. **Md. Rule 5-802.1(c): The Witness’s Prior Identification of a Person (at a Line-Up, etc.)** See MD-EV 801(3):1—801(3):2.

*E.g.*, *Marlin v. State*, 192 Md. App. 134, 144-47 (2010) (Hollander, J.) (finding evidence of identification at photo array by recanting witness admissible), *cert. denied*, 415 Md. 339 (2011).

*N.b.*: Due process issue arises only if *state action* has made the circumstances of the identification unduly suggestive. *In re D.M.*, 228 Md. App. 451 (2016) (no error in master’s denial of defense motion to suppress identification, as “there were sufficient indicia of reliability overall to support the court’s decision to admit..., even were we to find that the show-up procedure utilized by the police

rendered it impermissibly suggestive”); *Wood v. State*, 196 Md. App. 146, 151-63 (2010) (Moylan, J.), *cert. denied*, 418 Md. 192 (2011). *Accord Perry v. New Hampshire*, 132 S. Ct. 716 (U.S. 2012).

4. **Md. Rule 5-802.1(d): Prompt Report of Sexual Assault, Consistent with Declarant’s Trial Testimony.** See MD-EV 801(2):2.

Required foundation:

- a. Witness-declarant must testify at trial and be “subject to cross-examination concerning the statement”;
- b. Prior statement must be consistent with the witness’s testimony at trial;
- c. Prior statement must have been a victim’s “prompt complaint of sexually assaultive behavior.” See *Choate v. State*, 214 Md. App. 118, 143-49 (2013) (Moylan, J.), *cert. denied*, 436 Md. 328 (2013) victim's sister's testimony to victim's prompt phone call to her, reporting rape, and contextual statements, were properly admitted as substantive evidence; there is no requirement that the defense have made an issue about the promptness of any report);

*Nelson v. State*, 137 Md. App. 402 (2001) (Moylan, J.) (13-year old girl’s statement to her 11-year-old sister, made shortly after defendant left their apartment, that defendant had raped her, qualified for admission under Md. Rule 5-802.1(d); victim’s statements a day later to her school counselor and to a nurse-sexual assault examiner would likely also have qualified, but no objections to them were preserved).

- d. These are admissible in both civil and criminal cases.

The Court of Appeals declined to address how much detail may be admitted under this exception, and when, in *Cooper v. State*, 434 Md. 209, 236-37 (2013).

5. **Md. Rule 802.1(e): Recorded Recollection.** See MD-EV 803(5):1—803(5):2.

6. **Child Abuse Cases**

- a. “**Tender years**” exception, Md. Code Ann., Crim. Pro. § 11-304. See MD-EV 803(27):1.

**In a criminal proceeding or in a juvenile proceeding *other than* a CINA proceeding, when this hearsay exception is relied upon, the child victim *must also testify* at the proceeding.**

*Compare Ohio v. Clark*, 135 S. Ct. 2173 (2015), p. 27 above (no violation of confrontation clause to admit, under Ohio’s “tender years” hearsay exception, nontestimonial statements of three-year old child abuse victim to his preschool teachers as to who caused his injuries, when child was incompetent to testify under Ohio law).

*See In re J.J.*, 231 Md. App. 304 (2016) (Graeff, J.) (no clear error in juvenile court’s factual findings, nor error on law in ruling, after hearing social worker testify to nine-year old child’s statements to her, in E.R. treatment room, regarding sexual abuse by father, and listening to the audio-recorded interview, and considering – on the record – all thirteen 11-304 factors, that child’s statements in question were reliable and admissible; due to availability of recording, no requirement to have child testify as to admissibility under this statute; child’s competency as a witness was not relevant to 11-304 determination, nor were DNA results, nor questions that went merely to impeachment of child’s credibility, rather than to 11-304 factors).

Evidence included (1) that J.J. said her father had rubbed his “wee-wee” on her “private part” and had made her “suck his wee-wee”; (2) that J.J. indicated with her hands the length and width of the penis; (3) had then drawn a picture of it; and, (4) in answer to a question as to “what happens when you have to suck someone’s wee-wee,” performed an act with a pen. Under these facts, were all of these “statements” by the child? Were they all offered for TOMA?

**2017 General Assembly:** House Bill 483, which passed the House and was heard in the Senate Judicial Proceedings Committee on March 28, 2017, would have amended 11-304 by adding to subsection (c) an alternative to admissibility for a statement other than one made to a person in one of the listed professions or occupations. The amendment reads:

or (2) The statement: (i) describes the charged offense; (ii) was made to the first adult other than the defendant to whom the child victim made a statement about the offense; (iii) was promptly reported in accordance with section 5-704 or section 5-705 of the Family Law Article; and (iv) was documented in writing or by audio or video recording.

If this bill had passed, it will provide a route of admissibility for important evidence that need not comply with Md. Rule 5-802.1(d).

- b. **Closed-circuit TV testimony**, Md. Crim. Pro. Code Ann. § 11-303. See MD-EV 803(26):1.

- c. Recent related case law: *Bey v. State*, (Md., Mar. 27, 2017) (in a prosecution under Md. Code Ann., Crim. L. 3-315, **continuing course of conduct against a child**, multiple convictions and sentences per victim are precluded).

**C. Md. Rule 5-803: Hearsay Exceptions Applicable No Matter Whether the Declarant is Available or Unavailable to Testify at Trial, and No Matter Whether the Declarant Testifies or Not**

These OCS's may be proved by the declarant's own testimony to his or her OCS or by the testimony of any other witness having first-hand knowledge of the OCS. See MD-EV 803:1.

- 1. **Md. Rule 5-803(a), Statement by Party-Opponent:** An opposing party's own, adopted, authorized, or agent's statement, or an opposing party's coconspirator's statement (often misleadingly referred to as an "admission of a party-opponent." See MD-EV 803(a):1 and 801(4):1—801(4):12.
  - a. **Any such statement offered by one party, against the opposing party who made, adopted, etc. the statement will not be excluded by the hearsay rule.** See MD-EV 801(4):1.

If it is to be excluded, it will be due to some other rule. See, e.g., *Smith v. Delaware North Companies*, 446 Md. 290 (2016) (Greene, J.) (reversible error to admit, as evidence against the plaintiff-physician – here, by impeaching her expert – a consent order entered into between the physician and the Board of Physicians; admissibility is prohibited by Md. Code Ann., Health Occ. § 14-410, which applies to any type of action); *Butler v. State*, 231 Md. App. 533 (2017) (reversible error to admit defendant's statements made during first proffer session, in which he had lied, when detectives told him he had "started fresh" in second session).

- b. The phrase "admission against interest," found in some case law, is a misleading, mythological creature. Unlike under Md. Rule 5-804(b)(3) ("declaration against interest" by a now unavailable declarant), under Md. Rule 5-803(a) **there is no requirement that the OCS of a party opponent have been disserving to the declarant at the time it was made.**
- c. ***Md. Rule 5-803(a)(1): Statement of party opponent by that party himself or herself*** (See MD-EV 801(4):2 and 801(4):8)

See *Oku v. State*, 433 Md. 582 (2013) (Barbera, C.J.) (defendant's testimony in district court is admissible against him in a de novo trial in circuit court).

**Flight Evidence:** See *State v. Shim*, 418 Md. 37, 56-59 (2011) (Adkins, J.) (error to have given “flight” instruction to jury when evidence showed only that defendant left scene of crime and took various steps to avoid being apprehended: these steps did not amount to “flight”).

**Song Lyrics/Fiction:** *Hannah v. State*, 420 Md. 339 (2011) (Murphy, J.) held that the trial court had committed reversible error in permitting the prosecutor to admit on cross-examination, after the alleged shooter-defendant had testified that he had no access to handguns and had never held one, the defendant’s drawing of a gun and ten rap lyrics he had written about guns and shootings.

The appellate court distinguished **inadmissible works of fiction from possibly admissible autobiographical statements of historical fact**. It found that the evidence in this case lacked the special relevance needed to make it admissible under Md. Rule 5-404(b), and amounted to mere propensity evidence as to violence. The door had not been opened by defendant’s *direct* examination.

- d. **Md. Rule 5-803(a)(2): Adoptive Statements** (See MD-EV 801(4):3 and 801(4):(9))
  - (i) Defendant adopted alleged coconspirator’s statements to a fellow inmate by **standing by and adding details**. *Cox v. State*, 194 Md. App. 629 (2010) (Graeff, J.) (affirming J. Watts), *aff’d*, 421 Md. 630 (2011) (Greene, J.) (Court of Appeals did not reach this issue: see 421 Md. at 641 n.4).
  - (ii) State’s plea agreement with a witness that the witness would testify truthfully did **not** make that witness’s actual testimony at the trial of a likely codefendant admissible as an adoptive admission by the State in the subsequent trial of the defendant. Defense was permitted to call witness, but not to prove plea agreement. *Armstead v. State*, 195 Md. App. 599 (2010) (Kenney, J.), *cert. denied*, 418 Md. 191 (2011).
  - (iii) **Tacit Admissions:** A person’s silence in the face of another’s statement can be interpreted as acquiescence in the truth of (adoption by silence of) the other’s statement when three conditions are met:
    - (1) The party-opponent (or party’s agent, etc.) heard the other’s statement;
    - (2) The circumstances allowed for the party-opponent (or agent, etc.) to reply; and

- (3) Under the circumstances, ordinarily a person similarly situated who was in disagreement would “speak up” and correct the speaker.

These preliminary facts regarding tacit admissions (and other adoptive admissions also addressed by Md. Rule 5-803(a)(2)) fall under **Md. Rule 5-104(b)**. If a reasonable jury could find them to be met, the judge should admit the evidence (subject to Md. Rule 5-403).

- e. **Statements Authorized by a Party-Opponent** (see MD-EV 801(4):4 and 801(4):10)
- f. **Statements by a Party-Opponent’s Coconspirator During and in Furtherance of the Conspiracy** (see MD-EV 801(5):1—801(5):2)

*See, e.g., State v. Payne*, 440 Md. 680 (2014); *Ross v. State* (Md. App. Mar. 3, 2017) (J. Moylan) (text message from one coconspirator to another, that defendant was “moving too fast,” put defendant in conspiracy; in any event, evidence was admitted without objection).

2. **Md. Rule 5-803(b): Other Exceptions that Apply Whether or Not the Declarant Testifies at Trial or is Available or Unavailable to Testify**

- a. Md. Rule 5-803(b)(1), **Present sense impressions**: a very small window of time. See MD-EV 803(1):1—803(1):2.

Foundation elements:

- (i) The OCS was made **while the declarant was perceiving the event, or immediately afterwards**; and
- (ii) The OCS merely describes or explains the event.

- b. Md. Rule 5-803(b)(2), **Excited utterances**: a bigger window, **as long as the declarant was still so upset by the event that s/he was not thinking before speaking, so as to be able to fabricate a self-serving statement**. See MD-EV 803(2):1—803(2):2.

Foundation elements:

- (i) a startling event occurred;
- (ii) OCS was **made while the declarant remained under such stress that s/he could not stop to think (and thus to fabricate a self-serving statement)** (look at all the relevant circumstances, including

declarant's emotional state, the time lapse between the startling event and the OCS, and whether leading questions were asked); and

(iii) The OCS relates to the starting event.

Witness, such as the declarant herself or another who heard the OCS, such as a police officer, must lay foundation: describe affect of declarant; time lapse; questions asked, if any; other evidence of startling event, injuries, etc. *See Cooper v. State*, 434 Md. 237-45 (2013) (rape victim's statements to roommate and police detective were properly admitted).

- c. **Md. Rule 5-803(b)(3), Statements by declarant as to his or her present state of mind or physical condition:** nonhearsay if not offered for TOMA, but admissible hearsay under Md. Rule 5-803(b)(3) if offered for TOMA of the declarant's asserted state of mind, rather than to prove the truth of a fact that had led to the declarant's state of mind. *Shepard v. United States*, 290 U.S. 96 (1933). See MD-EV 803(3):2 and 803(3):4 (physical condition); 803(3):1 and 803(3):3 (state of mind).

**Rule 5-803(b)(3) Then Existing Mental, Emotional, or Physical Condition**

A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), offered to prove the declarant's then existing condition or the declarant's future action, but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

*Declarant's OCS as to his/her state of mind existing at time of OCS is:*

- (i) *Admissible to show **declarant's state of mind**, when relevant. See *Edery v. Edery*, 193 Md. App. 215 (2010) (Meredith, J.) (decedent's statements that she wanted to be buried in Israel were improperly excluded when offered to show her wishes).*

**Ex.** Victim's statements of her fear of the defendant, made before her murder, and a domestic violence protective order that prohibited the defendant from entering the victim's home, were admissible as *relevant to defense raised that victim had invited defendant into her home*, and gun went off accidentally. *Case v. State*, 188 Md. App. 279 (1997) (Murphy, J.).

- (ii) *Admissible to show **declarant's subsequent action, after the statement, in accordance with stated intent**. *Mutual Life Ins. Co. v. Hillmon*, 145 U.S. 285 (1892).*

**Ex.** “I’m going to skip school tomorrow,” admissible to show declarant played hooky the next day.

See *Figgins v. Cochrane*, 174 Md. App. 1, 27-31 (2007) (Moylan, J.) (*Hillmon* analysis inapplicable when no contention that declarant subsequently acted in accord with stated intent), *aff’d*, 430 Md. 392 (2008).

In *Smith v. State*, 423 Md. 573 (2011) (Rodowsky, J.) where the critical issue was whether the defendant had shot the victim or the victim had committed suicide, it was reversible error to *admit* State’s evidence tending to show that the victim was not depressed, but to *exclude* testimony of a trooper – who had arrested the victim for DWI one month before the victim’s death – that the victim appeared to be depressed, stressed about the situation, and that the victim said to trooper, “This is the last thing I need in my life right now on top of all the...other shit going on in my life.”

The Court of Appeals did not analyze whether the OCS was offered for TOMA. The OCS could have been relevant just to show that was how the victim *felt*, not that a lot really was going on in the victim’s life, in which case it would have been admissible as nonhearsay; but in either case it was admissible.

- (iii) **But inadmissible (under this hearsay exception only) to show something that occurred prior to the statement**, that caused declarant to have the particular state of mind. *Shepard v. United States*, 290 U.S. 96 (1933).

**Ex.** “I hate Phil because he hits me and breaks my toys.” Admissible to show that declarant hates/dislikes Phil, if that is relevant to the case; inadmissible, if offered under Md. Rule 5-803(b)(3), to show that Phil has hit the declarant.

- d. **Md. Rule 5-803(b)(4), Statement of past or present facts, made while seeking medical treatment or diagnosis in contemplation of possible treatment.** See MD-EV 803(4):1—803(4):2.



**Md. Rule 5-803(b)(4) Statements for Purposes of Medical Diagnosis or Treatment**

Statements made for purposes of medical treatment or medical diagnosis in contemplation of treatment and describing medical history, or past or present symptoms, pain, or sensation, or the inception or general character of the cause or external sources thereof insofar as reasonably pertinent to treatment or diagnosis in contemplation of treatment.

Required foundation:

- (i) OCS made by person seeking medical treatment, should medical treatment become necessary; and
- (ii) Declarant knew that OCS would be relied on for possible treatment. (This is the circumstantial guarantee of sincerity.)

**If a patient is a child, it is particularly important that the doctor or nurse explains to the patient** (or other declarant, *e.g.*, parent) **that what is said** by the declarant **will determine treatment**. See *State v. Coates*, 405 Md. 131 (2008) (Greene, J.) (reversible error to admit evidence); *Low v. State*, 119 Md. 413 (1998) (Thieme and Byrnes, JJ.).

- (iii) *Only the facts related in the OCS that are reasonably pertinent to medical treatment or diagnosis in contemplation of treatment* will be properly admissible.

**Query:** Can the identification of the person who causes injuries ever be pertinent to medical treatment and thus admissible under Md. Rule 5-803(b)(4)?

Yes, *e.g.*, to identify poison given, and thus the proper antidote. If child abuse, “not ordinarily.” *State v. Coates*, 405 Md. 131 (2008) (Greene, J.), *aff’d* 175 Md. App. 588 (2002) (Hollander, J.) (it was known at time of OCS that child no longer had any contact with its perpetrator). *But see In re Rachel T.*, 77 Md. App. 20, 33-36 (1988) (R. Bell, J.) (yes, due to possible testing for sexually transmitted disease; possible removal from home).

A number of federal cases hold that relevance to psychological treatment, because of abuse, is sufficient.

- e. **Md. Rule 5-803(b)(6), Business records** (see MD-EV 803(6):1—803(6):2)

- f. **Absence of entries in business records** (see MD-EV 803(7):1—803(7):2)
- g. **Public (governmental agent is the declarant) records and reports** (see MD-EV 803(8):1—803(8):2)

Note that a new subsection, Md. Rule 5-803(b)(8)(A)(iv,) was added by Rules Order of September 17, 2015, creating a hearsay exception, **in a final protective order hearing, for factual findings made by the Department of Social Services, regarding abuse of a child or vulnerable adult**, reported to the court pursuant to Md. Code Ann., Fam. Law § 4-505. A Committee note adds that a continuance may be granted if necessary to provide the parties a fair opportunity to review the report and prepare for the hearing, including an opportunity to subpoena the author. The amended Rule applies to all actions commenced on or after January 1, 2016 and, insofar as practicable, to all actions then pending.

Because of **body cameras now used by police**, an amendment was needed to Md. Rule 5-803(b)(8), as subsection (C) generally precludes the admission against an accused of records of matters observed by law enforcement. New subsection (D) provides for the admissibility of such camera recordings (subject to Md. Rule 5-805, re: multiple hearsay), if properly authenticated, made contemporaneously with the matter recorded, and circumstances do not indicate lack of trustworthiness.

- h. **Records of vital statistics (birth, death)** (see MD-EV 803(9):1—803(9):2)
- i. **Absence of public record or entry** (see MD-EV 803(10):1—803(10):2)
- j. **Records of churches and other religious organizations** (see MD-EV 803(11):1—803(11):2)
- k. **Certificates of marriage, baptism, etc.** (see MD-EV 803(12):1—803(12):2)
- l. **Family records** (see MD-EV 803(13):1—803(13):2)
- m. **Records of documents** (rather than the documents themselves) **affecting an interest in property** (see MD-EV 803(14):1—803(14):2)
- n. **Statements in documents affecting an interest in property** (see MD-EV 803(15):1—803(15):2)
- o. **Ancient documents** (more than 30 years old; new controversy in the works, as computer documents reach that age) (see MD-EV 803(16):1—803(16):2)

- p. **Market reports and commercial publications** (see MD-EV 803(17):1—803(17):2)
- q. **Learned treatises** (nascent case law with regard to Internet sources) (see MD-EV 803(18):1—803(18):2)
- r. **Reputation concerning personal or family history** (see MD-EV 803(19):1—803(19):2)
- s. **Reputation concerning boundaries or general history** (see MD-EV 803(20):1—803(20):2)
- t. **Reputation as to character** (see MD-EV 803(21):1—803(21):2)
- u. **Judgment of previous conviction: see Md. Code, Cts. & Jud. Proc. § 10-912** (see MD-EV 803(22):1)
- v. **Judgment as to personal or family history, general history, or boundaries** (see MD-EV 803(23):1—803(23):2)
- w. **Md. Rule 5-803(b)(24), the “catch-all” exception** (see MD-EV 803(24):1—803(24):2 and 807:1—807:2)

*Brock v. State*, 203 Md. App. 245 (2012) (D. Eyler, J.) (trial court properly excluded unavailable declarant’s OCS, in which declarant recanted prior statements identifying defendant to police, when offered by defense for TOMA; finding also that defense barely preserved the issue of whether the OCS was admissible to impeach the declarant under Md. Rule 5-806, the court held that exclusion of the OCS was harmless error, in light of the other evidence in the case, where the OCS offered by State did not directly identify defendant).

**D. *Hearsay Exceptions Applicable Only When the Declarant is Shown, under Md. Rule 5-804(a), to be Unavailable to Testify*** (see MD-EV 804:1—804:2)

As to one of the possible bases for unavailability, the declarant’s “then existing physical or mental illness or infirmity,” under Md. Rule 5-804(a)(4), *see Vielot v. State*, 225 Md. App. 492, 498-504 (2015) (Reed, J.), *cert. denied*, 446 Md. 706 (2016) (no abuse of discretion in finding that witness was unavailable to attend retrial when she had had shoulder surgery that required extensive physical therapy and could not drive from New Jersey to Maryland – State had offered witness’s disability certificate and a doctor’s note – and thus no error in admitting declarant’s prior testimony, which otherwise qualified under Md. Rule 5-804(b)(1)).

1. **Md. Rule 5-804(b)(1), Prior testimony now offered against a party who had an opportunity and similar motive to examine the declarant at the earlier proceeding.** See MD-EV 804(1):1—804(1):2.

In *Williams v. State*, 416 Md. 670 (2010) (Raker, J.), the State had violated its discovery obligation under Md. Rule 4-263(d), when it had not disclosed impeaching information known to a police officer that had come to light after the first trial: that a key eyewitness had said she was “legally blind.” The eyewitness died before the retrial.

The second trial judge admitted the witness’s videotaped testimony, along with medical records about her vision and the detective’s testimony that she had told him she was legally blind. The Court of Appeals’ majority found these steps an inadequate substitute for the ability to cross-examine the eyewitness. It concluded that: “On remand, if the State wishes to introduce portions of the previously recorded testimony, the trial court should redact any portion which relates to what she might have seen or testimony depending upon her vision.” Judge Murphy, joined by Judge Rodowsky, dissented.

2. **Md. Rule 5-804(b)(2), Dying declarations.** See MD-EV 804(2):1—804(2):2.

*Hailes v. State*, 442 Md. 488, 505-06 (2015) (statement made 2 years before death qualified; “[W]e hold that the length of time between a statement and the declarant's death is entitled to little, if any, weight in determining whether a declarant believed that the declarant's death was imminent when the declarant made the statement.”); *Head v. State*, 171 Md. App. 642 (2006).

3. **Md. Rule 5-804(b)(3), Statements against the unavailable declarant’s pecuniary, proprietary, or penal interest.** See MD-EV 804(3):1—804(3):2.
4. **Md. Rule 5-804(b)(4), Statements of personal or family history,** such as lineage. See MD-EV 804(4):1—804(4):2.
5. **The “forfeiture by wrongdoing” hearsay exceptions: Md. Rule 5-804(b)(5) (civil); Md. Code Ann., Cts. & Jud. Proc. § 10-901 (certain criminal cases only).** See MD-EV 804(5):1.

Both rules restrict the **types of statements** potentially admissible to only **recorded** or **written and signed** statements (the same types that are also potentially substantively admissible prior inconsistent statements under Md. Rule 5-802.1(a), a rule that applies when the declarant testifies at trial). They also impose a **notice requirement** on the party seeking to offer evidence under the forfeiture exception.

The **criminal statute** foregoes the usual preliminary fact standards of Md. Rule 5-104(a) and imposes higher burdens: (1) proof “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”; and (2) that the rules of evidence are “strictly applied” by the court in making this determination.

The criminal statute applies only in trials for certain crimes (generally, crimes of violence and drug crimes).

As to the concomitant forfeiture of the confrontation right, see Chart 5, pp. 29-30 above.