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Criminal Practice Developments In Maryland Evidence Law And Confrontation Clause Jurisprudence

Lynn McLain

University of Baltimore, lmclain@ubalt.edu

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**Criminal Practice Developments in Maryland Evidence Law
and Confrontation Clause Jurisprudence¹**

**Prof. Lynn McLain
University of Baltimore School of Law**

**Harford County Public Defender's Office
Bel Air, MD
July 9, 2010**

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¹ Copy to be made available on the Social Science Research Network, www.ssrn.com (click on "search" and under author's first name put in Lynn and under last name put in McLain). More information will also be included in the 2010 pocket parts to McLain, volumes 5, 6, and 6A of Maryland Evidence: State and Federal, which is accessible on Westlaw as [vol. no.] Maryland Evidence [sec. no.]. The section numbers generally correlate with the root of the Md. Rule number; e.g., Md. Rule 5-103 is discussed at §§ 103:1 et seq. Volume 5 addresses the 100's-400's Rules; volume 6 covers privileges through the 700's Rules; Volume 6A covers 800's-1000's, plus the parol evidence rule at 1101:1.

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I. Discovery of Witnesses' Identities: Protective Orders

In *Lancaster v. State*, 410 Md. 352, 355, 978 A.2d 717 (2009), the Court of Appeals acknowledged “the increasing problems posed by cases of gang-related intimidation of witnesses, which cannot be overstated,” but held that the circuit court had abused its discretion and deprived the defendant of effective assistance of counsel by granting a pretrial protective order that required criminal defense counsel in a drug distribution-related case to delay disclosing to the defendant, until the day of trial, “ ‘the names, [current] addresses, and statements of certain prosecution witnesses.’ ” The majority, in an opinion authored by Judge Thieme, distinguished the seminal case of *Coleman v. State*, 321 Md. 586, 583 A.2d 1044 (1991), and upbraided the circuit court as follows:

Here, unlike in *Coleman*, the State failed to present any evidence at the protective order hearing about the victim witnesses' testimony or the facts surrounding the alleged crime, other than the fact that it took place inside a home. With respect to the non-victim civilian witnesses, the State failed to present any evidence regarding their identity, their expected testimony regarding Lancaster's alleged robbery, or the importance of that testimony to the State's case. Moreover, the State failed to present any evidence regarding “specific threats” from Lancaster, his brother, or their associates against the witnesses. No evidence was presented regarding Lancaster's reputation for violence, or the reputation for violence, if any, of his brother and associates. The State also failed to identify any persons who might have carried out the alleged threats against the witnesses, as Lancaster and his brother were incarcerated at the time that the alleged threats were made.

410 Md. at 379-80.

II. Jury Selection

A. *Voir Dire*

- *Charles v. State*, ___ A.2d ___, 2010 WL 2431083 (June 18, 2010) (abuse of discretion and reversible error in instructing prospective jurors that CSI dramas are unrealistic and asking them whether they would be able to “convict” without “CSI-type” “scientific” evidence).
- *Moore v. State*, 412 Md. 635, 989 A.2d 1150 (2010) (abuse of discretion and reversible error to decline to ask voir dire question requested by defense, “ ‘Would any prospective juror tend to view the testimony of a witness called by the defense with more skepticism than witnesses called by the State, merely because they were called by the defense?’ ”)
- *Wright v. State*, 411 Md. 503, 983 A.2d 519 (2009) (reversible error and violation of defendant's constitutional right to trial by fair and impartial jury to pose seventeen questions in rapid succession and only then permit prospective jurors to answer); *James v. State*, 191 Md. App. 233, 991 A.2d 122 (2010) (declining to find plain error under circumstances similar to those in *Wright*).

B. *Batson*

- *Thaler v. Haynes*, 130 S. Ct. 1171 (U.S. 2010) (in habeas case, holding that no Supreme Court case clearly establishes that a judge, in ruling on an objection to a peremptory challenge, must reject a demeanor-based explanation, unless the judge personally observed and recalls the aspect of the prospective juror’s demeanor on which the explanation is based).

III. Communications from Jurors

- *Harris v. State*, 189 Md. App. 230, 236-52, 984 A.2d 314 (2009), cert. granted, 412 Md. 689, 990 A.2d 1046 (2010) (reversible error, and grounds for mistrial, due to failure to promptly disclose—which, here, would have been before alternative jurors were discharged—juror’s communication with judge’s secretary after juror learned of his grandmother’s death, affirming that he was “okay to continue”).

IV. Preservation of the Record: Rules 4-323, 5-103, and 5-702

A. Need to Request a *Frye-Reed* Hearing to Preserve Objection on Ground Expert Testimony Does not Meet that Standard

- *Addison v. State*, 188 Md. App. 165, 981 A.2d 698 (2009), cert. denied, 412 Md. 255, 987 A.2d 16 (2010) held that counsel had failed to preserve an objection that expert testimony did not meet the *Frye-Reed* test when counsel did not request a *Frye-Reed* hearing at trial. The state alleged that the defendant had attacked the victim after she broke up with him. The victim had initially named the defendant as her assailant but had recanted. The defense had objected generally, during discovery, to the State’s expert’s testimony regarding the psychological symptoms of battered women, though the objection was apparently treated by the trial judge as an objection to the expert’s qualifications, rather than as a *Frye-Reed* objection. The defense had also made eleven separate general objections during the witness’s testimony, as well as a continuing objection to her testimony. The Court of Special Appeals, in an opinion by Judge Wright, held that none was sufficient to allow the defendant to raise a *Frye-Reed* issue on appeal.

B. To Preserve Constitutional Grounds, Be Sure to State Them in Your Objection

- *See, e.g., Robinson v. State*, 410 Md. 91, 976 A.2d 1072 (2009) (declining to address question of violation of defendant’s right to a public trial, when counsel failed to object to exclusion of defendant’s family and certain other non-witnesses from courtroom).

C. Objection to Impeachment of Accused by His or Her Prior Convictions

- *Dallas v. State*, 413 Md. 569, 993 A.2d 655 (2010) (distinguishing *Luce* and cases regarding motions in limine, and holding question preserved in case where court declined to rule immediately prior to accused's opportunity to take the stand).

D. Need to Seek a Ruling

Compare Malarkey v. State, 188 Md. App. 126, 155-57, 981 A.2d 675 (2009) (counsel waived claim that trial court should have granted motion for acquittal, when "the defense repeatedly moved for acquittal, and the court repeatedly reserved. But, appellant never made known to the court that he was entitled to a ruling before submission to the jury.") *with Parker v. State*, 189 Md. App. 474, 492, 985 A.2d 72 (2009) ("the court's refusal to permit counsel to approach the bench to argue the motion [for a mistrial] in greater detail effectively denied the motion").

E. Need to Offer for Limited Admissible Purpose

- *Washington v. State*, 191 Md. App. 48, 67-70, 990 A.2d 549 (2010) (failure to argue to trial court that witness's prior convictions were admissible to show propensity and not just to impeach failed to preserve that question for appeal).

F. Both Polling the Jury and Harkening the Verdict Cannot Be Waived

- *State v. Santiago*, 412 Md. 28, 985 A.2d 556 (2009) (although a defendant may waive the polling of the jury regarding a guilty verdict, the verdict will be a nullity if it is neither polled nor hearkened).

V. Judicial Notice: Rule 5-201

A. Drug Traces on Currency: No

- *Johnson v. State*, 408 Md. 204, 962 A.2d 262 (2009) (judicial notice is inappropriate of proposition that most currency in circulation contains detectable traces of illicit drugs).

B. Handprint and Fingerprint Evidence: Yes

- *Markham v. State*, 189 Md. App. 140, 157-65, 984 A.2d 262 (2009) (upholding, as a proper subject of judicial notice, and without the need for a *Frye-Reed* hearing, the admissibility of fingerprint evidence based on the ACE-V method of identification; any issues concurring the reliability of a particular identification could be adequately addressed on cross-examination of the fingerprint examiner). The case involved handprint evidence, but the parties agreed that the same law applied as to fingerprint evidence.

VI. Balancing Risk of Unfair Prejudice and Confusion against Probative Value: Rule 5-403

A. Impeachment Evidence

- *Rodriguez v. State*, 191 Md. App. 196, 991 A.2d 100 (2010) (no abuse of discretion in sustaining objection to cross-examination of burglary victim concerning his original statement to the police that he suspected a third party in the first of the charged burglaries, when defense failed to offer any factual predicate for the line of questioning, and it would have served only to confuse the jury).
- *Washington v. State*, 191 Md. App. 48, 72-76, 79-85, 990 A.2d 549 (2010) (no abuse of discretion in exclusion of evidence that witness had failed to register as a sex offender).

B. Photographs; Sympathy

- *Morris v. State*, 192 Md. App. 1, 993 A.2d 716 (2010) (no abuse of discretion to permit murder victim's wife to identify an autopsy photograph of him and to testify about his activities with their children before he went to work to guard appellant, an inmate, while he was in hospital).

VII. Character Evidence

A. Prior Acts of Police Officers: Rules 5-404(b) and 5-608(b)

Md. Public Safety Code Ann. § 3-110 was amended, effective October 1, 2010, as follows:

(A) On written request, a law enforcement officer may have expunged from any file the record of a formal complaint made against the law enforcement officer if:

(1) (i) the law enforcement agency that investigated the complaint:

1. exonerated the law enforcement officer of all charges in the complaint; or

2. determined that the charges were unsustainable or unfounded; or

(ii) a hearing board acquitted the law enforcement officer, dismissed the action, or made a finding of not guilty; and

(2) at least 3 years have passed since the final disposition by the law enforcement agency or hearing board.

(B) EVIDENCE OF A FORMAL COMPLAINT AGAINST A LAW ENFORCEMENT OFFICER IS NOT ADMISSIBLE IN AN ADMINISTRATIVE OR JUDICIAL PROCEEDING IF THE COMPLAINT RESULTED IN AN OUTCOME LISTED IN SUBSECTION (A)(1) OF THIS SECTION.

Query: What does this do to evidence of the acts underlying the complaint?

- *Odum v. State*, 412 Md. 593, 600 n.2, 607, 989 A.2d 232 (2010) (State did not oppose defense’s offering evidence of acquittals, but defense did not offer it; “The acquittals of Petitioner [of some of the originally charged crimes] at the first trial did not preclude the State at the retrial from offering evidence of his involvement in the commission of those crimes [at his retrial on the remaining charges], by application of the *Dowling* rationale that a defendant’s acquittal of a crime does not erect a collateral estoppel bar to admission of evidence of the defendant’s commission of that crime at a later proceeding. As the *Dowling* Court held, other crimes evidence, under Fed. R. Evid. 404(b), is subject to a lower burden of proof than is required for conviction. 493 U.S. at 348, 110 S. Ct. at 672, 107 L.Ed.2d at 718. For reasons we shall discuss in the next part of this opinion, evidence that Petitioner was involved in the other criminal activity that occurred during the same episode as the charged kidnappings is not ‘other crimes’ evidence, as that term is used in Md. Rule 5-404(b). Even so, the *Dowling* rationale for why the State is not collaterally estopped from offering evidence of the offenses of which Petitioner was acquitted applies with equal force to the present case, because the admissibility of that evidence is not dependent on the State’s having to establish, beyond a reasonable doubt, that Petitioner committed those offenses.”); *Parker v. State*, 185 Md. App. 399, 428-31, 970 A.2d 968 (2009) (fact that complaining witness’s claims against others resulted in stets or nolle prosequis did not establish their falsity) (Rule 5-608(b)).

B. Acts that Are Not “Other Acts” under Rule 5-404(b)

- *Odum v. State*, 412 Md. 593, 608-15, 989 A.2d 232 (2010) (no abuse of discretion in admitting, in defendant’s retrial on kidnapping charges, evidence of the other offenses and murders that occurred “during the criminal episode,” immediately before and after the kidnappings, even though this defendant had been acquitted of those charges at first trial; “[T]he strictures of ‘other crimes’ evidence law, now embodied in Rule 5-404(b), do not apply to evidence of crimes (or other bad acts or wrongs) that arise during the same transaction and are intrinsic to the charged crime or crimes. We define ‘intrinsic’ as including, at a minimum, other crimes that are so connected or blended in point of time or circumstances with the crime or crimes charged that they form a single transaction, and the crime or crimes charged cannot be fully shown or explained without evidence of the other crimes.”).

C. Opening the Door under Rule 5-404(a): The “People Who Live in Glass Houses Shouldn’t Throw Stones” Provision

The defense chooses whether to open the door to unfavorable reputation or opinion evidence from character witnesses called by the State regarding the defendant’s character trait relevant to the charged crime.

Currently that door will be opened if the defense either (1) offers favorable reputation or opinion evidence regarding the accused or (2) makes a sweeping claim of innocence. A 2000 amendment to the corollary federal rule adds another way: (3) when the defense offers unfavorable reputation or opinion evidence regarding the *victim*, that opens the door for the prosecution to offer similar evidence regarding the *same trait of the accused*. The Rules Committee has proposed a similar amendment to Md. Rule 5-404(a).

VIII. Fifth Amendment Privilege: *Miranda*

- *Maryland v. Shatzer*, 130 S. Ct. 1213 (U.S. 2010), held that the rule of *Edwards v. Arizona*, 451 U.S. 477 (1981), under which a suspect who has invoked his right to the presence of counsel during custodial interrogation is not subject to further interrogation until either counsel has been made available or the suspect himself further initiates exchanges with the police, does not apply if a break in custody lasting at least 14 days has occurred).
- *Florida v. Powell*, 130 S. Ct. 1195 (U.S. 2010) (form of *Miranda* warnings that was used sufficed to convey their substance).
- *Berghuis v. Thompkins*, ___ S. Ct. ___, 2010 WL 2160784 (U.S. Jun. 1, 2010) (No. 08-1470).

The question before the *Berghuis* Court was whether the Michigan state courts had unreasonably applied clearly established federal law when they found that no *Miranda* violation had occurred under these facts: the defendant had been read his *Miranda* rights; he did not say that he wanted either to remain silent or an attorney, nor that he did not want to talk to the police; and he made an oral, one-word, incriminating response after about 2 hours and 45 minutes into the custodial interrogation (during which he had remained largely silent), but declined to sign a written waiver. The defense made no contention that he did not understand his rights.

But Justice Kennedy, writing for the majority, held more broadly that the defendant had not invoked his *Miranda* rights, as such invocation must be “unambiguous”:

Thompkins did not say that he wanted to remain silent or that he did not want to talk with the police. Had he made either of these simple, unambiguous statements, he would have invoked his “‘right to cut off questioning.’” Here he did neither, so he did not invoke his right to remain silent.

The majority also held that the prosecution had shown that the defendant had waived his rights: “Where the prosecution shows that a *Miranda* warning was given and that it was understood by the accused, an accused’s uncoerced statement establishes an implied waiver of the right to remain silent.”

IX. Competency of Witnesses: Rule 5-601

- *Jones v. State*, 410 Md. 681, 685-92, 697-99, 980 A.2d 469 (2009) (no clear error in trial court’s determination that six-year-old child was competent to testify, even though he gave some incorrect responses during voir dire).

X. Impeachment by Prior Convictions: Rule 5-609

- *Dallas v. State*, 413 Md. 569, 993 A.2d 655, 665 & n.11 (2010) held that the defendant’s election not to testify, when based on the trial court’s deferring a ruling on whether it will permit the defendant to be impeached by his or her prior convictions, is not an issue “of constitutional dimension.”

Under the facts in *Dallas*, the majority of the Court of Appeals held, in an opinion by Judge Barbera, that the trial court had not abused its discretion in deferring a ruling on a defense motion in limine to exclude prior conviction impeachment evidence until the defendant testified, when the judge had initially said he would permit the impeachment, but then said he would reserve the ruling until he heard defendant’s testimony, so he could perform the Md. Rule 5-609 balancing test. Nonetheless, Judge Barbera stressed that trial courts should rule on such motions as early as practicable, and that the best practice is to accept a proffer of the defendant’s testimony and make an in limine ruling before the defendant takes the stand, with the understanding that alteration in the testimony may change the 5-609 result.

XI. Questioning by Court: Rule 5-614

- *Diggs v. State*, 409 Md. 260, 973 A.2d 796 (2009) (finding trial judges’ questioning of State’s defense witnesses to so evidence a bias on behalf of the prosecution as to constitute reversible plain error) (over dissent of Murphy, J.); *Green v. State*, 409 Md. 302, 973 A.2d 820 (2009) (per curiam) (vacating and remanding in light of *Diggs*).

XII. Expert Testimony: Rules 5-702 – 5-706

A. Police Officer: Fact Witness or Expert? Rules 5-701 and 5-702

- *Wilder v. State*, 191 Md. App. 319, 347-69, 991 A.2d 172 (2010) (reversible error in a trial court’s allowing, over objection, a police officer neither qualified nor disclosed as an expert to testify concerning his use of mapping software and cellular telephone hacking codes on cell phone records to plot locations of the cell phone user on a map). *See Ragland v. State*, 385 Md. 706, 870 A.2d 609 (2005).

B. Expert Testimony on Frailties of Eyewitness I.D.’s: Rule 5-702

- *Bomas v. State*, 412 Md. 392, 407, 417, 419, 987 A.2d 98 (2010), rejected the defendant-petitioner’s argument that expert testimony on the frailties of eyewitness identification should be presumptively admissible, or at least be favored, especially in cases like *Bomas*, where eyewitness testimony forms the foundation of the State’s case. The court held that the motions judge had not abused her discretion in excluding the testimony of the defense’s proffered expert when it was “extremely general, vague, and inconclusive,” would have been “unhelpful” and “confusing” to the jury, and “lacked adequate citation to studies or data. . . .”

C. Opinion on Ultimate Issue: Rule 5-704

- *Gauvin v. State*, 411 Md. 698, 985 A.2d 513 (2009) (because Rule 5-704(b) makes a “critical distinction between (1) an explicitly stated opinion that the criminal defendant had a particular mental state, and (2) an explanation of why an item of evidence is consistent with a particular mental state,” trial court did not err in admitting officer’s testimony that amount of PCP and presence of rubber gloves indicated an intent of possessor to distribute; failure to sustain objection to improper question whether seized drugs were “for [defendant’s] personal consumption or for distribution” was harmless error, because officer did not so testify).

XIII. Hearsay

A. Implied Assertions No More? *Stoddard* to *Bernadyn* to *Fields* to *Garner*: Rule 5-801

In a 5 to 2 vote in *Garner v. State*, ___ Md. ___, 2010 WL 1957227 (May 18, 2010) (Sept. Term 2009, No. 26), 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.” Judge Murphy, writing for the majority, reasoned that “[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 that “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.”

At first blush, this “verbal act” rationale would differentiate the bookie-betting parlor and drug order cases like *Garner* from cases like *Stoddard* and *Bernadyn*. But whether *Garner* is so limited—and indeed exactly what its rationale is—is unclear. . . .

B. Rule 5-802.1: Declarant Must Testify at Trial

- *Dickson v. State*, 188 Md. App. 489, 982 A.2d 850 (2009) (trial court committed reversible error in not conducting proper inquiry into why State’s witness was refusing to testify; if witness was entitled to privilege, her prior statements would have been inadmissible under Md. Rule 5-802.1(a)).

XIV. The Confrontation Clause

A. Which Statements Are Testimonial?

1. *Davis v. Washington*, 547 U.S. 813, 822, 826-27 (2006)

Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

* * *

The product of such interrogation [as in *Hammon*], whether reduced to a writing signed by the declarant or embedded in the memory (and perhaps notes) of the interrogating officer, is testimonial. It is, in the terms of the 1828 American dictionary quoted in *Crawford*, “[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.”

* * *

And finally, the difference in the level of formality between the two interviews [in *Crawford* and in *Davis*] is striking. *Crawford* was responding calmly, at the station house, to a series of questions, with the officer-interrogator taping and making notes of her answers; McCottry’s frantic answers were provided over the phone, in an environment that was not tranquil, or even (as far as any reasonable 911 operator could make out) safe.

2. *Michigan v. Bryant*, 768 N.W.2d 65 (Mich. 2009), cert. granted, 130 S Ct. 1685, 176 L.Ed.2d 179 (U.S. 2010)

Facts:

The victim lived with his brother within a few houses of defendant, from whom he had been purchasing cocaine for three years. The victim's brother testified that defendant sold drugs to the victim at defendant's back door. On April 28, 2001, the victim told his brother that he planned to redeem an expensive coat that he had pawned with defendant in exchange for some cocaine. On April 29, 2001, **between 3:00 and 3:30 a.m., the brother heard gunfire, and at about 3:25 a.m., five police officers responded to a radio dispatch indicating that a man had been shot. They found the victim lying on the ground next to his car at a gas station about six blocks from defendant's house. The victim had a gunshot wound in his abdomen and appeared to be in considerable pain. In**

response to the officers' questioning, the victim indicated that he had been shot at approximately 3:00 a.m. while standing outside defendant's back door. The victim stated that before being shot he had a short conversation through a closed door with defendant. **He identified defendant as the shooter** because, although he did not see defendant shoot him, he knew that it was defendant who had shot him because he recognized defendant's voice. While the victim described defendant as being 40 years old, 5' 7" tall, and about 140 pounds, according to defendant's driver's license, defendant was actually 30 years old, 5' 10" tall, and 180 pounds. Although the brother testified that the victim knew defendant's last name, the victim himself told the police that he did not know defendant's last name. **The victim told the police that, after he was shot, he drove himself to the gas station.** The victim died within a few hours after he was transported to the hospital. **When the police left the gas station, they immediately proceeded to defendant's house.** The police found what appeared to be blood and a bullet on defendant's back porch and what the police believed to be a bullet hole in the back door. The victim's wallet and identification were also discovered outside defendant's house. However, the police did not discover any drugs, guns, bullets, or the victim's coat when they searched defendant's house at approximately 5:30 a.m. on the morning of the shooting. Defendant's girlfriend testified that defendant was not home at the time of the shooting and that she had not heard any gunfire that morning. The medical examiner testified that the bullet that killed the victim had passed through an intermediary target, such as a door. Toxicology tests showed that the victim had consumed cocaine within four hours of his death. **Defendant was arrested one year later in California** and was extradited to Michigan.

Query: Is the victim's statement testimonial?

Query: Is the lack of solemnity and formality critical? (Remember J. Thomas's view, as well as J. Alito's concurrence in *Giles*.)

Compare *State v. Lucas*, 407 Md. 307, 323, 965 A.2d 75 (2009) relevant factors include "(a) the timing of the statements (whether made while the events were occurring, or describing past events); (b) whether a reasonable listener [?] would realize that the declarant was facing an ongoing emergency; (c) the nature of what was asked and answered (were the statements necessary to resolve the emergency or only to learn what had happened); and (d) the interview's level of formality."

- *Washington v. State*, 191 Md. App. 48, 95 n.14, 990 A.2d 549 (2010) ("statement to a fellow employee before either had the slightest intimation that anything was seriously amiss was obviously not testimonial").

3. *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 174 L.Ed.2d 314 (U.S. 2009)

- In *Melendez-Diaz*, a majority of five, in an opinion by Justice Scalia, held that notarized certificates by analysts from “a state laboratory required by law to conduct chemical analysis upon police request” that a seized substance (that the arresting officer’s testimony linked to the defendant) was cocaine and how much it weighed were testimonial. Their admission without supporting testimony of their authors was reversible constitutional error.

a. Which records are covered?

Footnote 1 in Melendez-Diaz: “[D]ocuments prepared in the regular course of equipment maintenance may well qualify as nontestimonial records.”

Both in text and in footnotes, Justice Scalia suggested that merely routine records kept in the regular course of business (such as routine calibration records, perhaps?) and mere certificates of authentication of an official document (where the document, not the authentication, provides the substantive evidence) would not be considered testimonial. 129 S. Ct. at 2538-39 & nn.7-8.

Lower courts have seized upon these comments to find to be nontestimonial such documents as those that record routine testing of radar or routine maintenance of breathalyzer equipment. *United States v. Bacas*, 662 F.Supp.2d 481 (E.D. Va. 2009); *United States v. Forstell*, 656 F.Supp.2d 578 (E.D. Va. 2009). They have also admitted standard INS forms taken from immigration files of aliens and warrants of deportation. *United States v. Caraballo*, 595 F.3d 1214, 1225-29 (11th Cir. 2010); *United States v. Fernandez-Gomez*, 341 Fed. Appx. 949 (4th Cir. 2009) (per curiam) (unpublished).

Query: Is *Rollins v. State*, 392 Md. 455, 897 A.2d 821 (2006) (routine objective facts in autopsy statement are nontestimonial) still good law? No?

But does Rule 5-703 provide a way to achieve the same result under facts such as those in *Rollins*? *Crawford* cites *Tennessee v. Street*, 471 U.S. 409 (1985) for the proposition that evidence that is offered for a nonhearsay purpose does not implicate the confrontation clause.

Query: In a prosecution for credit card fraud, if the State offers records of the issuing bank, made by the bank when flagging suspect purchases, are those records testimonial?

b. Who has to be called to testify?

Footnote 1 in Melendez-Diaz:

[W]e do not hold . . . that anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device, must appear in person as part of the prosecution’s case. * * * It is up to the prosecution to decide what steps in the chain of custody are so crucial as

to require evidence; but what testimony *is* introduced must (if the defendant objects) be introduced live.

Lower courts have permitted a supervising toxicologist to testify, without the lab technicians, when the supervisor had first-hand knowledge of the process followed, had personally reviewed the data generated, and reached his conclusion based on it. *United States v. Darden*, 656 F.Supp.2d 560 (D. Md. 2009).

- *Pendergrass v. Indiana*, 913 N.E.2d 703 (Ind. 2009), cert. denied, 2010 WL 197668 (Jun. 14, 2010) would have raised this question to the Court.

c. Is Maryland’s notice and demand statute, Md. Cts. & Jud. Proc. Code Ann. § 10-1003, constitutional?

Justice Scalia’s opinion for the *Melendez-Diaz* Court takes pains to say, “The right to confrontation may, of course, be waived, including by failure to object to the offending evidence; and States may adopt procedural rules governing the exercise of such objections.” He adds that “many” states’ “notice-and-demand statutes,” which “require the prosecution to provide notice to the defendant of its intent to use an analyst’s report as evidence at trial, after which the defendant is given a period of time in which he may object to the admission of the evidence absent the analyst’s appearance live at trial,” are “already in accord with the Confrontation Clause.” 129 S. Ct. at 2541, 2534 n.3.

4. When are hospital employees agents of the police?

- *See Griner v. State*, 168 Md. App. 714, 895 A.2d 189 (2006) (decided pre-*Davis*) (child’s statements to nurse nontestimonial, although child had been brought into hospital by police).

5. Dying declarations

- *Head v. State*, 171 Md. App. 642, 912 A.2d 1 (2006), cert. denied, 398 Md. 315 (2007), avoided the question, finding the statement nontestimonial under *Davis*.

6. Does “testimonial” include statements made to someone other than the police or an agent of the police?

- *See Clark v. Alaska*, 199 P.3d 1203 (Alaska App. 2009) (applying *Davis*’ primary purpose test when declarant, who told ER nurse and doctor that she had been assaulted by defendant, was brought to hospital by a friend, and there was no police involvement; because primary purpose of hospital interview was to obtain or provide medical care, her statements were nontestimonial) (note that hearsay objection was waived . . .).

B. Forfeiture

- *Giles v. California*, 128 S. Ct. 2678, 171 L.Ed.2d 488 (2008) requires a showing of the accused's intent to make the declarant unavailable as a witness.

The votes leave the prosecution a good opportunity to argue in domestic violence cases (or possibly gang cases) that the requisite intent can be inferred from a defendant's pattern of conduct intended to intimidate, control, and isolate the declarant so that he or she won't seek help elsewhere (including from the courts).

Query: What about a defendant who is charged with murdering his spouse one week before she was scheduled to testify at their child custody hearing? Has he forfeited his right to confront her, so that her earlier reports to the police about his having abused her and their child are admissible at the murder trial (as relevant to motive and intent)?

C. Nontestimonial Statements

Although the confrontation clause does not apply to these statements, the due process clause requires that a verdict not be *based on unreliable evidence*, including *unreliable* hearsay. See *Barley v. State*, 327 Md. 689, 612 A.2d 288 (1992) (standards applicable to probation revocation hearings); *Thompson v. State*, 156 Md. App. 238, 846 A.2d 477 (2004) (reversing such a revocation, where trial court had not found the hearsay on which it relied to be reasonably reliable); *Wilson v. State*, 70 Md. App. 527, 521 A.2d 1257 (1987) (reliance on drug tests, not shown to be reliable, in revoking probation violated due process). Cf. *Marlin v. State*, 192 Md. App. 134, 993 A.2d 1141 (2010) (conviction sufficiently supported by Md. Rule 5-802.1(a) and (c) statements by victim who testified at trial that he did not remember who shot him).

XV. Authentication: Rules 5-901 – 5-902

Internet evidence, like e-mails, can be authenticated under Rule 5-901(b)(4) by circumstantial evidence. *Griffin v. State*, ___ Md. App. ___, 2010 WL 2105801 (May 27, 2010) (MySpace page was adequately authenticated as belonging to defendant's girlfriend; the page contained her birth date, a photo of her and the defendant, references to his nickname, and to her having two children; evidence was relevant to show effect of posted threat "snitches get stitches" on prosecution witness, to corroborate his testimony as to why he had not identified defendant at his first trial).