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# Comment: When Does Crawford Reach Jailhouse Phone Calls That Implicate a Co-Defendant, but Are Made by Another Non-Testifying Co-Defendant?

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# COMMENT

## WHEN DOES *CRAWFORD* REACH JAILHOUSE PHONE CALLS THAT IMPLICATE A CO-DEFENDANT, BUT ARE MADE BY ANOTHER NON-TESTIFYING CO-DEFENDANT?

**By: Matthew M. Grogan**[1]

### INTRODUCTION

Sixth Amendment jurisprudence has been quite amorphous in the wake of the Supreme Court's 2004 decision in *Crawford v. Washington*.[2] This comment will explore the present state of a criminal defendant's right to confrontation while also introducing a potential, and most likely inevitable, interpretation of law awaiting Maryland appellate courts: whether jailhouse phone calls that are made by a non-testifying co-defendant and which implicate another co-defendant are "testimonial" under *Crawford* and its progeny.

The issue arises when one co-defendant, in exercising his or her right against self-incrimination under the Fifth Amendment, effectively overrides a fellow co-defendant's right to confrontation under the Sixth Amendment. Indeed, the precise issue is very fact specific, and has only been addressed by a few jurisdictions at an appellate level. To date, all such cases have found the calls in question to be non-testimonial. In addition to outlining the rationale for such rulings, this comment will present valid counterarguments as to why said calls are actually testimonial in nature.

### II. HISTORICAL BACKGROUND AND RECENT DEVELOPMENTS

#### *A. The Peculiar Relationship Between Hearsay and the Confrontation Clause*

The Confrontation Clause of the Sixth Amendment[3] and Article 21 of the Maryland Declaration of Rights[4] provide criminal defendants the right to

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[2] 541 U.S. 36 (2004).

[3] U.S. CONST. amend. VI, § 2.

[4] *See* Derr v. State, 434 Md. 88, 103, 73 A.3d 254, 263 (2013) (noting that the federal and Maryland right to confrontation are read "*in pari materia*, or as generally providing the same protection to defendants."). For purposes of this article,

cross-examine witnesses who bear testimony against the accused.[5] The rule against hearsay, a cornerstone of federal and state evidentiary rules, prohibits the admission of out-of-court statements that are offered "to prove the truth of the matter asserted."[6]

The Sixth Amendment and hearsay are intrinsically linked; implication of the right to confrontation necessarily involves the attempted use of an out-of-court statement offered for its truth.[7] Further, the rules of evidence allow for numerous hearsay exceptions, which create a "natural tension" with the strictures of the Confrontation Clause.[8]

*B. The Supreme Court Radically Altered Its Interpretation of the Sixth Amendment in 2004*

Prior to 2004, the Supreme Court's opinion in *Ohio v. Roberts* controlled the realm of confrontation.[9] Under that standard, the admissibility of an out-of-court statement hinged upon judicially determined "trustworthiness."[10] Similar to the rationale supporting the validity of hearsay exceptions, a defendant's right to confrontation would turn on the presence of certain "indicia of reliability."[11]

The watershed decision in *Crawford v. Washington* abrogated *Roberts* and fundamentally changed Sixth Amendment jurisprudence.[12] Justice Scalia's majority opinion sought to restore the state of confrontation, consistent with the objectives of the Amendment's Framers.[13]

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therefore, discussion of the Sixth Amendment incorporates the rights granted by the Maryland Constitution.

[5] *See Crawford*, 541 U.S. at 51 ("[The Confrontation Clause] applies to 'witnesses' against the accused – in other words, those who 'bear testimony.' Testimony [is defined as a] 'solemn declaration or affirmation made for the purpose of establishing or proving some fact.'") (internal citation omitted).

[6] *See* FED. R. EVID. 802; MD. RULE 5-801(c).

[7] *Derr*, 434 Md. at 106-07, 73 A.3d at 265 (citing *Crawford*, 541 U.S. at 59-60 n.9) ("[T]he Confrontation Clause only applies to hearsay, or out-of-court statements offered and received to establish the truth of the matter asserted.").

[8] This is because an out-of-court statement has the potential to pass muster under a hearsay exception, yet implicate a defendant's right to confrontation. *See generally* The Honorable Paul W. Grimm, et. al., *The Confrontation Clause and the Hearsay Rule: What Hearsay Exceptions Are Testimonial?*, 40 U. BALT. L.F. 155 (2010) (offering an in depth analysis of the interaction between the Confrontation Clause and various exceptions to the rule against hearsay).

[9] 448 U.S. 56 (1980).

[10] *See Crawford*, 541 U.S. at 60 (citing *Roberts*, 448 U.S. at 66) (criticizing the fact that *Roberts* could be satisfied solely by the existence of a hearsay exception).

[11] *Id.* at 42; *see also* Grimm, *supra* note 8.

[12] *See Crawford*, 541 U.S. 36.

[13] *See id.* at 47-50 (alleging that *Roberts* was entirely inconsistent with the original intent behind the Confrontation Clause's inclusion in the Bill of Rights). The

The Court explained that cross-examination was the Framers' selected mode of assessing the reliability of a given statement; in other words, it was a "procedural guarantee" of reliability.[14] The problem with *Roberts* was that it essentially interpreted the right to confrontation as a "substantive guarantee" of reliability, leaving in the hands of the judiciary the task of evaluating out-of-court statements under a plethora of factors on a case-by-case basis.[15] This led to unpredictable results and was inconsistent with the crux of the Sixth Amendment – cross-examination.[16]

The principle concern the Framers sought to address was the use of *ex parte* testimony or its functional equivalent in criminal trials.[17] That is, testimony against a defendant made outside of that particular judicial proceeding, offered as evidence at trial against the accused in lieu of the declarant's in-court testimony.

In light of the Amendment's history and triggered by *Roberts'* shortcomings, *Crawford* held that the Confrontation Clause bars admission of "testimonial hearsay" *unless* the "declarant is unavailable"[18] and "the defendant has had a prior opportunity to cross-examine."[19]

### *C. The Ambiguous Definition of Testimonial*

Ten years later, *Crawford* remains at the forefront of American constitutional law. This is because the Court failed to carve out a comprehensive definition of "testimonial,"[20] less describing three "core" classes of "clearly" testimonial statements:

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historic trial of Sir Walter Raleigh is today remembered for its impact on American constitutional law; Sir Raleigh was convicted for treason and sentenced to death despite demanding his right to confront his accusers in open court. *Id.* at 44. In *Crawford*, the Court lambasted *Roberts* for effectively authorizing situations akin to Sir Raleigh's case. *Id.* at 62; *see infra* Part VI.B.iv.

[14] *Id.* at 61.

[15] *Id.*

[16] *Id.* at 65 ("It is not enough to point out that most of the usual safeguards of the adversary process attend the statement, *when the single safeguard missing is the one the Confrontation Clause demands.*" (emphasis added)).

[17] *See id.* at 51.

[18] *See* Grimm, *supra* note 8, at 189 and n.17 ("unavailable" is defined in FED. R. EVID. 804(a) and MD. RULE 5-804(a); a declarant is unavailable in situations in which a privilege precludes in-court testimony).

[19] *Crawford*, 541 U.S. at 59.

[20] *Id.* at 68 ("We leave for another day any effort to spell out a comprehensive definition of 'testimonial.' Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations. These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed.").

> [*E*]*x parte* in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially; . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions; . . . statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.[21]

Statements made to police during the course of an interrogation are testimonial under all three definitions, because "[a]n accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not."[22]

Although not an exhaustive list of testimonial statements, the three core classes all support the conclusion that a testimonial statement is one in which a reasonable declarant would foresee as being available for later use at trial. This is the essence of *Crawford.*

*D. The Primary Purpose Test*

The Supreme Court decided *Washington v. Davis* and expounded on its definition of "testimonial" two years after its decision in *Crawford.*[23] In *Davis*, the Court held that the "primary purpose" of a 911 call was to respond to an "ongoing emergency," and not to acquire evidence for a later prosecution.[24] Thus the statement was non-testimonial and admissible, as its primary purpose was not evidentiary in nature.[25] In contrast, the subsequent affidavit given to police at the scene of an alleged domestic incident was testimonial where there was no ongoing emergency at the time the statement was given.[26]

Simply put, the relevant distinction between the phone call that reported a domestic assault and the subsequent statement to police on-scene was that the 911 call concerned "what is happening" (more likely non-testimonial), whereas the battery affidavit pertained to "what happened" (more likely testimonial).[27]

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[21] *Id.* at 51-52 (internal citations omitted).
[22] *Id.* at 51-53.
[23] 547 U.S. 813 (2006) (overruling Hammon v. Indiana, 546 U.S. 976 (2005)).
[24] Washington v. Davis, 547 U.S. at 828.
[25] *Id.* at 814-15.
[26] *Id.*
[27] *Id.* at 829-30. Maryland courts have also held that a statement on a 911 recording was non-testimonial, while a subsequent statement made to police at a hospital

*E. A Dual Perspective*

The primary purpose test in *Davis* was somewhat ambiguous because the Court suggested, but did not state definitively, "that both the declarant's intent and the interrogator's motives [were] relevant considerations."[28] Any such confusion was clarified by the Court in 2011.

In *Michigan v. Bryant*, a shooting victim's statement to responding officers was deemed non-testimonial in light of an apparent ongoing emergency.[29] Substantial weight was given to the perception of both the declarant and the interrogator.[30] The Court explained that the existence of an emergency is a fact-dependent inquiry.[31]

The level of formality surrounding the statement's making was also relevant. Statements made during the course of an ongoing emergency are usually "frantic," and are clearly "distinguishable from the formal station-house interrogation in *Crawford*."[32]

*F. The Right to Confrontation in Maryland*

The Maryland decision most akin to this comment's topic is *Cox v. State*.[33] The case was decided subsequent to *Michigan v. Bryant* and therefore reflects Maryland's interpretation of the current version of the Supreme Court's primary purpose inquiry.[34]

The issue in the case was whether a statement made by a co-defendant to a fellow inmate while incarcerated was testimonial under *Crawford*.[35] The court determined that the statement was non-testimonial and admissible because it was a casual remark between mere acquaintances that was not made under circumstances objectively indicating that it would be available

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following the alleged incident was testimonial. *See Grimm*, *supra* note 8, at 163 (discussing Marquardt v. State, 164 Md. App. 95, 882 A.2d 900 (2005)).

[28] Shari H. Silver, *Michigan v. Bryant: Returning to an Open-Ended Confrontation Clause Analysis*, 71 MD. L. REV. 545, 555 (2012).

[29] 131 S. Ct. 1143, 1147 (2011).

[30] *Id.* at 1160-62.

[31] *Id.* at 1158.

[32] *Id.* ("[T]he questioning in this case occurred in an exposed, public area, prior to the arrival of emergency medical services, and in a disorganized fashion.") (internal citations omitted).

[33] 421 Md. 630, 28 A.3d 687 (2011).

[34] *See id.* As will be explained, the present state of the primary purpose test is quite uncertain, as a four-Justice plurality of the Supreme Court recently proposed a modification that the other five Justices strongly denounced; therefore, *Cox* and *Bryant* still constitute good law today. *See infra* Parts IV.A, IV.B.iv.

[35] *Cox*, 421 Md. at 636, 28 A.3d at 690.

for later evidentiary use.[36] In so holding, the court distinguished statements made to government personnel, and statements between private parties.[37]

The court found the analysis in *United States v. Smalls* "particularly enlightening."[38] There, the Tenth Circuit admitted a statement made to an inmate who was serving as a governmental informant, solely because *the declarant* was unaware of the informant's status.[39] Therefore, objectively viewed from the perspective of the declarant, the statement was not for the primary purpose of establishing facts for a later prosecution, and was "more akin to casual remarks to an acquaintance than formal declarations to an official."[40]

However, what *Cox* failed to mention was that *Smalls* was decided prior to *Bryant*. The Tenth Circuit did not have to consider the perspective of all parties involved in the statement's making. Indeed, what was interesting about *Cox* was its application of *Bryant*.[41] Although the court acknowledged that *Bryant* considered the perspective of all parties involved, the court's opinion nonetheless turned exclusively on an objective declarant standard.[42]

In short, because the declarant's statements were spontaneous and against penal interest, between casual acquaintances in a non-formal setting, the court held that the statements were not made for the "primary purpose of creating a substitute for trial testimony."[43]

*Cox* is relevant to jailhouse phone calls because both scenarios involve correspondence between private parties in a jailhouse context that is not the product of an official interrogation. However, as will be presented *infra*, pointed differences exist between cases like *Cox* and the phone calls at issue herein.

## III. JAILHOUSE PHONE CALLS: THE NEXT CONFRONTATION CLAUSE DILEMMA?

The principal focus of this article is quite fact specific. Even still, it may be analyzed in a variety of ways due to the Sixth Amendment's continued evolution.

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[36] *Id.* at 651, 28 A.3d at 699.
[37] *Id.* at 642-51, 28 A.3d at 694-99.
[38] *Id.* at 647, 28 A.3d at 697 (citing United States v. Smalls, 605 F.3d 765, 779-80 (10th Cir. 2010)).
[39] *Id.*
[40] *Id.*
[41] *See Cox*, 421 Md. at 648-50, 28 A.3d at 697-99 (citing *Bryant*, 131 S. Ct. 1143).
[42] *Id.* (reflecting that Maryland attributes more weight to a declarant's point of view). It is arguable, therefore, that a declarant-driven approach is still available to Maryland practitioners.
[43] *Cox*, 421 Md. at 651, 28 A.3d at 699 (quoting Dutton v. Evans, 400 U.S. 74, 89 (1970)).

Whether jailhouse phone calls made by a non-testifying co-defendant that are incriminating against another co-defendant are testimonial under *Crawford* and its progeny may vary on a jurisdiction-by-jurisdiction basis. Although the consensus to date indicates a tendency to view said phone calls as non-testimonial, this comment will argue that, *if presented with the right fact pattern*, Maryland should hold differently.[44]

In fact, the issue has already reared its head in the trial courts of Maryland. The following will introduce a 2012 case out of the Circuit Court for Baltimore City in which certain jailhouse phone calls were admitted under *Crawford* in a joint criminal trial of Hugh Wade and Donnie Adams.

*A. Jailhouse Phone Calls Before the 2012 Case of Hugh Wade*

i. The Ninth Circuit

In 2007, a defendant appealed his conviction for robbery on the grounds that his right to confrontation was violated when a non-testifying co-defendant's jailhouse phone call was admitted at a joint criminal trial.[45] In *Saechao v. Oregon,* the United States Court of Appeals for the Ninth Circuit affirmed the lower court's finding that the phone call was non-testimonial, as the call was voluntarily between two casual acquaintances without any active governmental participation.[46] Of particular emphasis was the fact the declarant was not attempting to "minimize his own guilt or shift the blame."[47]

ii. The First Circuit

In 2010, the United States Court of Appeals for the First Circuit cited *Saechao* and concluded that a non-testifying co-defendant's jailhouse phone call was non-testimonial and admissible against another co-defendant.[48] Specifically, in *United States v. Castro-Davis*, the defendant asserted error in the phone call's admission because the co-defendant was "repeatedly

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[44] If a co-defendant's jailhouse phone call is deemed testimonial in a joint criminal trial, the Supreme Court's decision in *Bruton v. United States* is implicated. 391 U.S. 123 (1968). However, *Bruton* can essentially be disregarded for purposes of this paper, as it is only applicable *after* an out-of-court statement has been deemed testimonial. United States v. Castro-Davis, 612 F.3d 53, 65 (1st Cir. 2010) ("[T]he *Bruton* rule does not apply to non-testimonial hearsay statements.") (internal citation omitted). *See also supra* Part VI.B.vi.

[45] Saechao v. Oregon, 249 Fed.App'x 678, 679 (9th Cir. 2007).

[46] *Id.* (reflecting that the calls were *not* non-testimonial as a matter of law; rather, the court determined that is was merely acceptable, *i.e.*, "not unreasonable," for the lower court to label them as such).

[47] *Id.*

[48] *Castro-Davis*, 612 F.3d at 65.

warned" that his conversation was being recorded and had even mentioned during the call that he could not say much over the phone.[49] The defendant argued that the co-defendant's statement was testimonial because a reasonable person would perceive the statement's potential for later evidentiary use.[50]

The First Circuit disagreed and affirmed the defendant's conviction. Similar to the Ninth Circuit in *Saechao,* the court in *Castro-Davis* emphasized the difference between a statement made to a close family member, in contrast to a statement made in response to governmental questioning.[51]

*B. Jailhouse Phone Calls in Maryland*

In July of 2011, Hugh Wade was observed by a Baltimore City detective engaging in an apparent hand-to-hand drug transaction.[52] Shortly thereafter, the vehicle in which Wade was traveling was pulled over.[53] When officers asked Wade to step out of the vehicle he fled and escaped.[54] The driver, co-defendant Adams, consented to a search of the vehicle, which revealed a loaded handgun discovered within a shopping bag.[55]

Eventually, Wade and Adams were both charged with the prohibited possession of a firearm.[56] Prior to their joint trial in the Circuit Court for Baltimore City, the State moved *in limine* to admit a recorded phone conversation that Adams had made while incarcerated.[57] The contents of the recording were incriminating as to Wade, and the State moved to have the evidence admitted against both defendants on the grounds that the pertinent statements were non-testimonial.[58]

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[49] *Id.* at 64-65. This is the case with most, if not all jailhouse phone calls; when inmates make a call from jail, an automated recording states that the call is subject to monitoring. *See infra* note 58.

[50] *Castro-Davis*, 612 F.3d at 64-65.

[51] *Id.*

[52] State's Motion *in limine* to Admit Defendant's Jail Call Statements at 2, State v. Adams et al., Nos. 11217015 and 211273009 (Feb. 17, 2012) [hereinafter "State's Motion in *Wade*"] (explaining that Wade exited a vehicle to conduct the transaction, and then left the scene in the same vehicle that he arrived in).

[53] *Id.* at 3.

[54] *Id.*

[55] *Id.*

[56] *Id.* at 1.

[57] *See id.*

[58] State's Motion in *Wade* at 1, 3, 6. A transcript of the phone call indicated that co-defendant Adams was warned that his statement was being recorded, and also revealed that Adams was upset with co-defendant Wade:

| | |
|---|---|
| Recording: | You have a collect call from "Donnie" an inmate at the Baltimore Central Booking, an intake |

The State argued that the statements were the product of a casual conversation between private acquaintances without any direct governmental involvement.[59] The State acknowledged that the facts of *Wade* were inapposite to the facts of *Cox*, but nonetheless implored the court to apply *Cox* and conclude that the jailhouse recording was non-testimonial because it was an informal statement that was not elicited in response to governmental questioning, nor was it a statement in which a reasonable declarant would foresee its later availability at trial.[60]

At the motions hearing the trial judge focused the inquiry on the substance of Adams' statement, specifically whether Adams was trying to negate personal guilt and/or shift blame towards Wade.[61] In that regard, the State argued that it would be absurd to conclude that Adams intended to shift blame towards Wade, in light of the fact that the statement did not expressly mention Wade by name, and was in substance, against Adams' own penal interest.[62]

Ultimately, the circuit court would grant the State's motion.[63] The reasons for doing so were twofold. First, the trial judge did not believe that Adams intended to bear witness against Wade, in part because Adams did not explicitly name Wade.[64] Alternatively, the court opined that "[e]ven if

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|---|---|
| | center. This call is subject to recording and monitoring . . . |
| Adams: | . . . the whole day I got him hanging with me. So you know how [he] is he got that joint in his pocket the whole time. And all of a sudden. Yo. Whats up now I'm thinking he still got it and he ain't got it. Come on now. |
| Male: | So where did he put it? On his side or something? |
| Adams: | No. In the bag with the polos. |
| Male: | Oh ok, ok, ok. Damn yo. |
| Adams: | Dumb shit. Do you know how mad I was yo. |

*Id.* at 11. In its motion *in limine*, the State concluded that Adams was referring to Wade and that the "joint" referred to the recovered firearm. *Id.* at 3.

[59] *Id.* at 9.

[60] Transcript of Motions Hearing at 20-21, State v. Wade, (2012) (No. 211273009).

[61] *Id.* at 22.

[62] *Id.* at 23-24.

[63] *Id.* at 39.

[64] *Id.* In fact, the trial judge concluded that Adams' statement was not inculpatory against Wade. *Id.* ("It's not inculpatory because it turns out that Wade didn't have the handgun on him, Adams had it in his car."). However, this conclusion is plainly erroneous and it will not be addressed further in this comment. *See* United State v. Dargan, 738 F.3d 643, 649 (quoting Williamson v. United States, 512 U.S. 594, 603 (1994)) (statements are "intrinsically inculpatory to the extent they demonstrate knowledge of 'significant details about the crime.'").

Adams had intended to or did expect to use the phone call to direct the police to Wade, Adams is not exculpated from any of the handgun charges."[65] Therefore, the fact that the statement was against Adams' own penal interest was dispositive of its non-testimonial character, as applied to Wade's right to confrontation.[66]

### *C. 2012 Counterarguments to the Rule in* Wade

The case of Hugh Wade serves as an example of how the issue of jailhouse phone calls is presently being handled in the trial courts of Maryland. After granting the State's motion the case proceeded as if Adams' statement would be offered at trial against Wade. Eventually, a guilty plea was entered that effectively waived Wade's right to appeal.[67]

The following section will provide valid assertions in opposition to the circuit court's grant of the pertinent pretrial motion in *Wade*. Arguments will be presented as to why the motion was incorrectly granted at the time of its ruling and under the authority cited therein by the State.[68] While general arguments will be presented that pertain to "typical" scenarios involving co-defendants and jailhouse phone calls, it is important to bear in mind that the Confrontation Clause is required to be interpreted on a case-by-case basis.[69]

#### i. *Cox* is inapposite to the facts of *Wade*

*Cox v. State* was the sole case of comparison utilized during the portion of the pretrial hearing that dealt with Wade's Sixth Amendment rights.[70] The trial judge applied the *Cox* definition of a testimonial statement and analogized the facts of *Wade* with the pertinent facts in *Cox*.[71] Co-defendant Adams' statements were likened to those in *Cox* because both were "more akin to casual remarks to acquaintances than formal declarations to an official."[72] Additionally, both statements were self-inculpatory, and "were

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[65] Transcript of Motions Hearing at 39, State v. Wade, (2012) (No. 211273009).
[66] *Id.*
[67] Case Number 211273009, MD. JUDICIARY CASE SEARCH, http://casesearch.courts.state.md.us/inquiry/inquiry-index.jsp (follow "Continue" hyperlink, then search "Court" for "Baltimore City Circuit Court" and search "Case Number" for "211273009," then follow "Get Case" hyperlink).
[68] This comment is not intended to suggest that the trial court was undoubtedly in error when it granted the State's motion. The facts of the case surely provide for a close call. The following simply provides the arguments that could have been made by the defendant, had the case presented itself for appellate review.
[69] *See* Michigan v. Bryant, 131 S. Ct. 1143, 1156 (2011).
[70] Transcript of Motions Hearing at 37-39, State v. Wade, (2012) (No. 211273009).
[71] *Id.*
[72] *Id.* at 37.

not made for the primary purpose of creating a substitute for trial testimony."[73]

Again, however, pointed differences exist that would justify distinguishing *Wade* from *Cox* in order to find the jailhouse phone call of co-defendant Adams testimonial. The primary difference is the irrefutable fact that inmates are aware that their calls from jail are recorded.[74] This makes the scenario more akin to statements made to State actors, rather than casual conversations with private acquaintances.

Indeed, *Cox* involved a statement between inmates that was made completely unbeknownst to any sort of governmental involvement.[75] Although it is logical to state that a reasonably prudent inmate, speaking in private with another inmate, would not expect his or her statement to be later available for use at trial, this assumption is borderline nonsensical when applied to jailhouse phone calls in which inmates are notified, *every* time they make a call, that it is being monitored.[76]

In sum, while there may be other justifications supporting the Circuit Court for Baltimore City's ruling in *Wade*, simply applying *Cox* and resting on the alleged similarities of the two fact patterns should not have survived appellate scrutiny, if the case would have made it that far.

ii. Application of the primary purpose test

*Michigan v. Bryant* was the controlling case at the time the court granted the State's motion in *Wade*.[77] The post-*Bryant* primary purpose test has been interpreted as defining a testimonial statement as one that is made with the primary purpose of providing evidence.[78] A straight-forward application of this standard suggests that Co-Defendant Adams' statements were testimonial in nature.

The main reason for this conclusion is again an inmate's knowledge that jailhouse phone calls are monitored. Inmates often talk cryptically and occasionally acknowledge, as did the declarant in *Castro-Davis*, the need to

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[73] *Id.*

[74] *See supra* note 49, 58.

[75] *Cox*, 421 Md. At 647, 28 A.3d at 697 (citing United States v. Smalls, 605 F.3d 765, 779-80 (10th Cir. 2010)).

[76] *See supra* note 49, 58.

[77] *See supra* Part II.E.

[78] *See* Williams v. Illinois, 132 S. Ct. 2221, 2273-74 (2012) (Kagan, J., dissenting) ("We have previously asked whether a statement was made for the primary purpose of establishing 'past events potentially relevant to later criminal prosecution' – in other words, for the purpose of providing evidence.") (quoting *Davis*, 547 U.S. at 822) (emphasis added); *see also id.* at 2261 (Thomas, J., concurring) ("[F]or a statement to be testimonial within the meaning of the Confrontation Clause, the declarant must primarily intend to establish some fact with the understanding that his statement may be used in a criminal prosecution.").

be careful of what is said on the recording.[79] Therefore, when an inmate provides information regarding criminal activity despite such knowledge, it follows that the statement's primary purpose is evidentiary in nature.

One could also argue that the government's primary purpose in recording jailhouse phone calls is investigatory in nature, on the grounds that correctional facilities routinely monitor inmates' phone calls in an attempt to assist in the prosecution of same.[80] However, in *Cox*, the Court of Appeals of Maryland applied a declarant-driven approach without much consideration of the point of view of the State; thus the scope of *Bryant*'s dual perspective in Maryland is presently unclear.[81]

Timing was also an important factor in *Bryant*.[82] A statement describing events as they are actually occurring is more likely to be non-testimonial, whereas a statement describing past events is more likely to be for the primary purpose of providing evidence.[83] Given the custodial nature of a jailhouse, many of the relevant phone calls will pertain to past events, as was the case in *Wade*.[84]

iii. Due to co-defendant Adams' acrimonious tone, too much emphasis was placed on the statement's self-inculpatory nature

It may be argued that it was error for the Circuit Court for Baltimore City to conclude that Adams' statement was non-testimonial because it was against his penal interest.[85] This is because, viewed as a whole, the relevant recording demonstrates ill will on behalf of Adams in regard to Wade.[86] As such, *Wade* is distinguishable from *Cox*, *Saechao*, and *Castro-Davis*, as co-defendant Adams' statement can be viewed as a clear attempt to shift blame and negate guilt.[87]

In *Saechao*, the declarant stated, "too bad I happen to have been with him that night."[88] This was not an attempt to shift blame and was against the declarant's penal interest.[89] Relatedly, the declarant in *Cox* did not

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[79] *See Castro-Davis*, 612 F.3d at 64-65.
[80] *But see infra* note 177.
[81] *See Cox*, 421 Md. at 647, 28 A.3d at 697.
[82] *See supra* note 28.
[83] *Davis*, 547 U.S. at 829-30.
[84] *See supra* note 58. Theoretically, an exception to this general notion could involve cases where inmates are conducting illegal operations over the phone while incarcerated, such as selling drugs.
[85] Transcript of Motions Hearing at 39, State v. Wade, (2010) (No. 211273009).
[86] *See supra* note 58.
[87] *See supra* Parts II.F, III.A.
[88] Saechao v. Oregon, 249 F.App'x 678, 679 (9th Cir. 2007).
[89] *See id.*

demonstrate any animus towards the respective defendant, who was actually party to the pertinent jailhouse conversation.[90]

Clearly, this differs from *Wade*, where co-defendant Adams made the pertinent phone call outside of Wade's presence while well aware that his statement was being recorded.[91] Moreover, Adams' statement was a clear attempt to shift blame, as he essentially claimed that the recovered firearm was Wade's exclusively, and that he only consented to a search because he was under the impression that the weapon was in Wade's possession and no longer in the vehicle.[92]

The State avoided Adams' apparent animus in its motion *in limine* by focusing on the fact that the statement reflected Adams' own "consciousness of guilt."[93] This supported a non-testimonial finding because a reasonable declarant would not typically make a statement against their own penal interest where there is the potential for its later use at trial.[94]

However, considering Adams' situation in its entirety yields a conclusion contrary to the position advocated by the State and eventually accepted by the court.[95] The facts underlying Adams' position at the time of his phone call were not in his favor, as a handgun was discovered in his possession at the time of his arrest.[96] Thus he was unlikely to escape prosecution unscathed, whereas at that point Wade had not even been charged after having fled and escaped.[97]

It can be argued that this reality was reflected in Adams' negative tone. Although the court relied on the fact that the recording was, in part, self-inculpatory, that does not change the overall and plain language interpretation of the statement: Adams was rather upset because a firearm that allegedly belonged to Wade was discovered in the vehicle that Adams was driving.[98]

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[90] *Cox*, 421 Md. at 651, 28 A.3d at 699.

[91] *See supra* note 58.

[92] *Id.* (reflecting that Adams' stated: "[w]hats up now I'm thinking he still got it and he ain't got it"); State's Motion in *Wade* at 3; Transcripts of Motions Hearing at 37-39, State v. Wade, (2012) (No. 211273009).

[93] State's Motion in *Wade* at 2.

[94] *See id.* at 7.

[95] *See Crawford*, 541 U.S. at 66 ("[E]ven if the assessment of the officer's ['neutral'] motives was accurate, it says nothing about Sylvia's *perception of her situation.* Only cross-examination could reveal that.") (emphasis added).

[96] State's Motion in *Wade* at 1.

[97] *Id.* In other words, it is arguable that Adams intended to "shift blame" because he was of the mindset that he had nothing to lose by making a statement against his own penal interest, while simultaneously extracting some vengeance against Wade. *See supra* Part III.A.

[98] *See supra* note 58.

More simply put, the inculpatory nature of the statement, while potentially relevant to a *Crawford* analysis, was given far too much weight in light of the actual circumstances present at the time.[99]

## IV. THE CONFRONTATION CLAUSE IN THE CONTEXT OF FORENSIC REPORTS

The remainder of this comment will discuss the state of confrontation in Maryland and at the federal level subsequent to the case of Hugh Wade. Though the foregoing section analyzed *Wade* from a 2012 point of view, this article will conclude with 2014 recommendations, while also discussing how a court could address a case like *Wade* today. To do so, a recent hot topic in Sixth Amendment jurisprudence must be discussed – forensic reports.[100]

In the 2009 case of *Melendez-Diaz v. Massachusetts*, the Supreme Court addressed the admissibility of a "certificate of analysis" that outlined a lab report's conclusions and certified the report's accuracy and authenticity.[101] The certificate was offered at trial in lieu of the live testimony of the analyst who conducted the testing, in order to show that the substance allegedly possessed by the defendant was cocaine.[102] The Court held that the lab report's conclusions were inadmissible absent the in-court testimony of the analyst who compiled the report.[103] The Court viewed the certificate as an affidavit, "functionally identical to live, in-court testimony, doing 'precisely what a witness does on direct examination.'"[104]

In 2011, the principles of *Melendez-Diaz* were affirmed in *Bullcoming v. New Mexico*.[105] There, the lab report at issue pertained to a defendant's blood alcohol content. The State did not call the author of the signed report to testify, but rather had a "surrogate" witness take the stand and recite the report's findings.[106] The Court held, as it did in *Melendez-Diaz*, that the report was testimonial because its primary purpose was clearly evidentiary.[107]

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[99] *See supra* notes 65-66.

[100] *See, e.g.*, Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009); Bullcoming v. New Mexico, 131 S. Ct. 2705 (2011).

[101] *Melendez-Diaz*, 557 U.S. at 308.

[102] *Id.*

[103] *Id.* at 310-11.

[104] *Id.* (quoting *Davis*, 547 U.S. at 830).

[105] *Bullcoming*, 131 S. Ct. at 2707.

[106] *Id.* at 2715.

[107] *Id.* at 2717 ("In all material respects, the laboratory reports in this case resembles those in *Melendez-Diaz*.").

*A. The Supreme Court's Latest Interpretation of the Sixth Amendment*

The Supreme Court's latest substantive interpretation of the right to confrontation came in June 2012.[108] Once again, the Court was faced with assessing the constitutionality of introducing forensic reports via surrogate testimony.[109]

The specific issue in *Williams v. Illinois* was whether a defendant's right to confrontation was violated when the trial court admitted "basis testimony" by a police forensics expert.[110] Basis testimony is a type of surrogate testimony in which an expert forms an opinion that is "based" on some external data, even if the underlying data is inadmissible in and of itself.[111]

The police expert testified during a bench trial that the defendant's DNA matched a sample taken from a rape victim and analyzed at an outside laboratory.[112] The defendant argued that it constituted testimonial hearsay for the expert to base her opinion on the conclusions of a report in which she took no part in compiling.[113]

A bitterly divided Court affirmed the Illinois state courts' finding that the Sixth Amendment was not violated by the admission of the expert's testimony.[114] Justice Thomas, whose opinion helped create the very narrow holding that the pertinent statement was non-testimonial, concurred in judgment only, on grounds wholly incongruent with that of the plurality.[115] As such, *Williams* serves as a prime example of the oscillatory nature of today's Confrontation Clause.

The plurality sided with the state courts on two alternative grounds: (1) the Confrontation Clause was not implicated because the expert's basis was not offered to prove the truth of the matter asserted;[116] (2) and even if the

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[108] Williams v. Illinois, 132 S. Ct. 2221 (2012).

[109] *See supra* note 100.

[110] *Williams*, 132 S. Ct. 2221.

[111] *Id.* at 2233-35 (plurality opinion). This presents an issue because the expert lacked personal knowledge of the opinion's underlying "basis," and thus a criminal defendant is unable to cross-examine the declarant as to the validity of the basis of the expert opinion. *Id.* at 2269 (Kagan, J., dissenting).

[112] *Id.* at 2222-23 (plurality opinion).

[113] *Id.* at 2223 (plurality opinion).

[114] *Id.*

[115] *See id.* at 2255-56 (Thomas, J., concurring) (agreeing with the plurality that the lab report was non-testimonial, but also sharing the "dissent's view of the plurality's flawed analysis"); *see also id.* at 2265 (Kagan, J., dissenting) (characterizing the plurality opinion as, in essence, a dissent because "[f]ive Justices specifically reject every aspect of its reasoning and every paragraph of its explication").

[116] *Id.* at 2240. The Confrontation Clause applies solely to out-of-court statements that qualify as hearsay. *See supra* note 7. Under state evidentiary law, basis testimony is not admissible for its truth; the *Williams* plurality was influenced by this and the fact the case involved a bench trial, asserting that judges are presumed to understand such subtleties in the rules of evidence. *Williams*, 132 S. Ct. at 2234-35

report was offered for its truth, the Confrontation Clause was not violated because the underlying basis, *i.e.*, the DNA report, was non-testimonial.[117]

i. A very narrow holding

The holding of *Williams* is limited because the plurality's "not-for-its-truth" rationale was rejected by a majority of the Court;[118] thus the holding is simply that the Confrontation Clause was not violated because the underlying DNA analysis was non-testimonial.[119] This was the shared view of the plurality and Justice Thomas.[120] Though reached on completely different grounds, the end result was a five-Justice majority holding that the Sixth Amendment was not offended by the State's use of surrogate testimony.[121]

At first glance, the outcome seems to contradict *Melendez-Diaz* and *Bullcoming*, where certain forensic reports were deemed testimonial.[122] However, both the plurality and Justice Thomas distinguished *Williams* from past case law, concluding that the differing outcomes were entirely consistent with one another.[123] The dissent vehemently disagreed.[124]

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(plurality opinion). However, this conclusion was hotly contested by Justice Thomas's concurrence and the four Justices in dissent, *i.e.*, a majority of the Court. The plurality was accused of inappropriately allowing evidentiary rules to trump constitutional rights. *Id.* at 2256 (Thomas, J., concurring) ("[W]e have recognized that concepts central to the application of the Confrontation Clause are ultimately matters of federal constitutional law that are not dictated by state or federal evidentiary rules."); *id.* at 2272 (Kagan, J., dissenting) ("[W]e do not typically allow state law to define federal constitutional requirements.").

[117] *Williams*, 132 S. Ct. at 2242 (plurality opinion).

[118] *See supra* note 116.

[119] *Williams*, 132 S. Ct. at 2226 (plurality opinion).

[120] *See id.*

[121] *See id.* at 2244. When construing the decision based on a five justice majority, regardless of specific rationale, the outcome in *Williams* is twofold: (1) the expert's testimony triggered consideration of the Sixth Amendment regardless of applicable evidentiary rules as its underlying "basis" was offered for its truth and equated to hearsay (per Justice Thomas's concurrence and the four dissenting Justices); (2) though implicated, the defendant's right to confrontation was not violated as the underlying DNA report was non-testimonial (per Justice Thomas's concurrence and the four-Justice plurality).

[122] *Melendez-Diaz*, 557 U.S. at 310-11; *Bullcoming*, 131 S. Ct. At 2707.

[123] *Williams*, 132 S. Ct. at 2240 (plurality opinion); *id.* at 2260 (Thomas, J., concurring).

[124] *See infra* note 140.

ii. The plurality's rationale for finding the lab report non-testimonial

What is most noteworthy in *Williams* is the plurality's modification of the primary purpose test, in which a novel ingredient was added to the analysis, a factor that, when absent, was alleged to be dispositive of a statement's non-testimonial character.[125] However, as was the case with the plurality's "not-for-its-truth" conclusion, five Justices of the Court expressly rejected the proposed alteration to what heretofore had been the primary purpose test of *Michigan v. Bryant*.[126]

In order to distinguish *Williams* from *Bullcoming* and *Melendez-Diaz*, the plurality summarized the post-*Crawford* Confrontation Clause as applying to formalized statements that have the "primary purpose of accusing a *targeted individual* of engaging in criminal conduct."[127] The plurality reasoned that the forensic reports in *Bullcoming* and *Melendez-Diaz* had a primary purpose of targeting a specific individual, whereas the lab report in *Williams* was compiled long before the defendant was identified as a suspect.[128]

*Williams* serves as the first instance in which the Court explicitly mentioned a "particular individual" aspect of the primary purpose test.[129] For this reason, among others, five Justices rejected the proposed modification, which has been dubbed the "accusation" test.[130]

iii. The concurrence's rationale for finding the lab report non-testimonial.

Justice Thomas has established himself as a recluse in his Sixth Amendment analysis.[131] He has filed concurring opinions in many of the

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[125] *Williams*, 132 S. Ct. at 2242-43 (plurality opinion).

[126] *See infra* note 129; *see also supra* note 34.

[127] *Williams*, 132 S. Ct. at 2242 (plurality opinion) (emphasis added).

[128] *Id.* at 2243 (plurality opinion) (internal citations omitted); *but see id.* at 2262 (Thomas, J., concurring) ("[T]he text of the Confrontation Clause does not constrain the time at which one becomes a 'witness' . . . . Historical practice confirms that a declarant could become a 'witness' before the accused's identity was known.").

[129] *See id.* at 2262 (Thomas, J., concurring) ("[The plurality's] test lacks any grounding in constitutional text, in history, or in logic."); *id.* at 2274 (Kagan, J., dissenting) ("None of our other cases have suggested that, in addition, the statement must be meant to accuse a previously identified individual; indeed, in *Melendez-Diaz*, we rejected a related argument that laboratory 'analysts are not subject to confrontation because they are not 'accusatory' witnesses.'") (internal citations omitted).

[130] *See id.*; *see also infra* Part IV.B.iv (further discussing the problems with the "accusation" test).

[131] *See, e.g.*, Derr v. State, 434 Md. 88, 142, 73 A.3d 254, 286 (2013) (Eldridge, J., dissenting) ("The opening paragraph of Justice Thomas's *Williams* opinion also referred to his previous concurring opinion in *Michigan v. Bryant*, also an opinion which no other Justice joined.") (internal citation omitted).

landmark decisions that have come in *Crawford*'s wake, oftentimes agreeing with a case's outcome, but on grounds that are not shared by any of his brethren.[132]

According to Justice Thomas, "the Confrontation Clause reaches 'formalized testimonial materials,' such as depositions, affidavits, and prior testimony, or statements resulting from '*formalized dialogue*,' such as custodial interrogation."[133] Under that standard, the DNA report in *Williams* was viewed as non-testimonial because it was not prepared by a "witness" in the historical sense, as it lacked the requisite "formality and solemnity necessary to come within the scope of the Clause."[134]

Justice Thomas distinguished the reports in *Melendez-Diaz* (which were sworn before a notary), and *Bullcoming* (which included a "certificate of analysis"), from the lab report in *Williams* that was "neither a sworn nor certified declaration of fact."[135] Expressed differently, the certifications in *Melendez-Diaz* and *Bullcoming* were considered to be, in essence, affidavits, whereas the DNA report in *Williams*, "in substance, certifie[d] nothing."[136] This distinction, *i.e.*, whether a lab report formally certifies its authenticity, somewhat akin to the taking of an oath, was of constitutional significance because such certifications "are functionally identical to live, in-court testimony, doing precisely what a witness does on direct examination."[137]

iv. The four Justices in dissent found the lab report testimonial in nature

Justice Kagan was joined in dissent by Justice Scalia, Justice Ginsburg, and Justice Sotomayor.[138] In their view, the expert's testimony should have been withheld as testimonial hearsay because the case was functionally indistinguishable from *Bullcoming* and *Melendez-Diaz*.[139] Further, the

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[132] *Id.*

[133] *See Williams*, 132 S. Ct. at 2260 (Thomas, J., concurring) (quoting Michigan v. Bryant, 131 S. Ct. 1143, 1167 (2011) (Thomas, J., concurring)) (emphasis added); *see also* Davis v. Washington, 547 U.S. 813, 836-37 (2006) (Thomas, J., concurring).

[134] *Williams*, 132 S. Ct. at 2261-62 (Thomas, J., concurring) (internal citations omitted). "Solemnity" is consistent with the historical principles behind the Sixth Amendment because it reflects "the practices that the Confrontation Clause was designed to eliminate," *i.e.*, "the *ex parte* examination of witnesses" or its functional equivalent. *Id.*

[135] *Williams*, 132 S. Ct. at 2260 (Thomas, J., concurring) (internal citations omitted).

[136] *Id.* (Thomas, J., concurring).

[137] *Id.* at 2260-61 (Thomas, J., concurring) (internal citations omitted).

[138] *Id.* at 2264 (Kagan, J., dissenting).

[139] *Id.* at 2277 (Kagan, J., dissenting).

dissent acknowledged the fragmented nature of the Court's disposition and suggested that past precedent still controls.[140]

*B. The Aftermath of* Williams v. Illinois

Because the Supreme Court agreed on very little in *Williams*, the scope of today's right to confrontation is very much unsettled.[141] Of course, certain basic conclusions can be stated with certainty,[142] but generally, *Crawford* has failed to instill the consistency it sought.[143] Thus far, courts have seemed to follow the advice of Justice Kagan by continuing to treat *Williams*' predecessors as controlling.[144]

i. *Williams*' reverberations in Maryland

The Court of Appeals of Maryland's 2011 decision in *Derr v. State* ("*Derr I*") appeared entirely consistent with *Melendez-Diaz* and *Bullcoming*.[145] Following the Supreme Court's 2012 opinion in *Williams*, however, *Derr I* was reversed and remanded for further consideration.[146]

The facts of the case are strikingly similar to the facts of *Williams*. In *Derr I*, the State called a forensic DNA examiner from the FBI to provide expert testimony during a 2006 trial in which Norman Derr was charged with first-degree rape.[147] Over Derr's objection, the expert opined that the DNA recovered from a 1984 rape victim matched the DNA recovered from the defendant in 2004.[148]

In 2011, the Court of Appeals of Maryland reversed the trial court and ordered a new trial after concluding that the Sixth Amendment was violated by the admission of the expert's testimony.[149] However, in 2013, when Derr's conviction on retrial was appealed to the Court of Appeals of Maryland, *Derr v. State* ("*Derr II*") shifted course following remand and

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[140] *Williams*, 132 S. Ct. at 2277 (Kagan, J., dissenting) ("I would decide this case consistently with, and for the reasons stated by, *Melendez-Diaz* and *Bullcoming*. And until a majority of this Court reverses or confines those decisions, I would understand them as continuing to govern, in every particular, the admission of forensic evidence." (internal citations omitted)).

[141] *See supra* note 11.

[142] *Crawford*, 541 U.S. at 51-52.

[143] *See generally id.* at 60-68.

[144] *See, e.g.*, State v. Kennedy, 229 W. Va. 756, 770 (2012) ("[W]e construe *Williams* with extreme caution and admonish lower courts to do likewise.").

[145] 422 Md. 211, 29 A.3d 533 (2011) (judgment vacated by Maryland v. Derr, 133 S. Ct. 63 (2012)).

[146] *See* Maryland v. Derr, 133 S. Ct. 63 (2012).

[147] *Derr*, 422 Md. at 219-20, 29 A.3d at 539.

[148] *Id.*

[149] *Id.* at 253, 29 A.3d at 559.

affirmed the defendant's conviction, finding the DNA report not "sufficiently formalized."[150]

ii. The *Marks* test

Given the fragmented nature of the Supreme Court's decision, the court in *Derr II* was tasked with interpreting the holding of *Williams*.[151] This required applying the standard set forth by the Supreme Court in *Marks v. United States*:

> When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.[152]

The court read *Williams* to require "that statements be, at a minimum, *formalized* to be testimonial."[153] To arrive at this conclusion, the *Derr II* majority considered "[t]he common point of agreement between the plurality opinion and Justice Thomas's concurring opinion."[154]

Although the *Williams* "plurality did not clarify how to determine if a statement is sufficiently formalized," it referenced "nearly the same examples" as Justice Thomas.[155] Accordingly, the Court of Appeals of Maryland adopted Justice Thomas's definition of "formalized."[156]

Judge Greene's majority opinion was joined by three other judges.[157] Judge McDonald concurred in judgment only, and Judge Eldridge was joined by Chief Judge Bell in dissent.[158] Judge McDonald's concurrence agreed

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[150] *See* Derr v. State, 434 Md. 88, 105, 73 A.3d 254, 264 (2013) (hereinafter "*Derr II*") ("Applying the narrowest holding of the plurality opinion and Justice Thomas's concurring opinion in *Williams* we further conclude that the information relied upon and presented as the basis for [the expert's] in-court testimony is not testimonial.").

[151] *Derr II* completely disregarded the *Williams* "accusation" test. *See id.* 434 Md. at 115, 73 A.3d at 270, n.15 ("[The *Williams*] plurality's assertion that forensic evidence must be prepared for the 'primary purpose' of accusing a targeted individual was expressly rejected by both Justice Thomas's concurring opinion and the dissenting opinion. Because the plurality opinion's 'primary purpose' test has the support of only four Justices it is not an aspect of the narrowest grounds leading to the judgment of the Court." (internal citation omitted)).

[152] *Id.* at 114, 73 A.3d at 269 (quoting Marks v. United States, 430 U.S. 188, 193 (1977)).

[153] *Derr II*, 434 Md. at 114, 76 A.3d at 270 (emphasis added).

[154] *Id.* at 115, 73 A.3d at 270.

[155] *Id.* at 116, 73 A.3d at 271 (internal citation omitted).

[156] *Id.*

[157] *Id.* at 88, 73 A.3d at 254.

[158] *Id.*

that application of *Williams* to the facts of *Derr II* required concluding that the DNA report was non-testimonial, but questioned the validity of the majority's application of the *Marks* standard.[159] Judge Eldridge's dissent also criticized the majority's application of *Marks*.[160] The dissent likened the majority's opinion to *Grutter v. Bollinger*, where "the Supreme Court seemed particularly concerned about applying the *Marks* test to conclude that a portion of the opinion of one Justice, not joined by any other Justice, represented the Court's holding."[161] Because Justice Thomas's opinion was not joined by any of his brethren in *Williams*, the Court's qualms in *Grutter* were realized in *Derr II*.

iii. *Derr II* is limited to forensic reports

The Court of Appeals of Maryland decided *Cooper v. State* four days after announcing its opinion in *Derr II*.[162] The court again addressed the admissibility of expert basis testimony in the context of DNA analysis, finding a forensic report non-testimonial under *Williams*, as interpreted by *Derr II*.[163] However, whereas *Derr II* was unclear as to its scope, *Cooper* limited its reach to forensic reports.[164] Outside of that narrow context, therefore, an inquiry into a statement's testimonial character in Maryland includes more than simply considering whether Justice Thomas would find sufficient "solemnity."[165]

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[159] *Derr II*, 434 Md. at 139-40, 73 A.3d at 284 (McDonald, J., concurring) (noting that rather than construing the narrowest holding in Williams, the majority in *Derr II* "latched upon the narrowest definition of 'testimonial hearsay'").

[160] Rather than trying to discern similarities between the *Williams* plurality and Justice Thomas, the dissent would have simply affirmed *Derr I* "as a matter of Maryland law." *Id.* at 140-41, 73 A.3d at 285 (Eldridge, J., dissenting) ("[B]ecause there was no opinion by the Court in *Williams*, and probably no holding shared by the *Williams* plurality and Justice Thomas, I would no longer attempt to reach the Sixth Amendment issue in this case." (internal citation omitted)).

[161] *Id.* at 140-42, 73 A.3d at 286 (Eldridge, J., dissenting) (citing Grutter v. Bollinger, 539 U.S. 306 (2003)) ("If Justice Thomas's opinion in *Williams* did represent the holding of the Court, it is difficult to understand why no member of the plurality joined the Thomas opinion, or why Justice Thomas did not join a portion of the plurality opinion.").

[162] 434 Md. 209, 73 A.3d 1108 (2013).

[163] *Id.* at 233, 73 A.3d at 1122.

[164] *Id.* at 234, 73 A.3d at 1122-23 ("In *Derr II*, we were able to discern . . . an applicable standard for determining whether *forensic test results* are testimonial." (internal citation omitted) (emphasis added)).

[165] *See supra* notes 34, 135.

iv. The Fifth Circuit shares the views of the five Justices of the Supreme Court who rejected the "accusation" test

In December 2013, the United States Court of Appeals for the Fifth Circuit strongly rebuked the *Williams* plurality's "accusation" test, while also succinctly describing the views of the "majority" of the Court, embodied in the opinions of Justice Kagan and Justice Thomas.[166]

In *United States v. Duron-Caldera*, the Fifth Circuit held that an immigration affidavit was testimonial even though it was compiled in 1968 by the defendant's grandmother for purposes of an immigration proceeding.[167] The government sought to admit the affidavit in a 2011 criminal trial to prove the defendant's alienage.[168] The government urged the court to apply the "accusation" test to find the affidavit non-testimonial, on the grounds that the declarant-grandmother did not intend to bear witness against the defendant-grandson at the time the statement was made.[169]

The court refused to adopt the "'accusation' test for a number of reasons."[170] Among them, the test relied on an "overly-narrow view" of the right to confrontation and was expressly rejected by a five Justice majority of the Court.[171] Instead, the Fifth Circuit described a testimonial statement in accordance with Supreme Court precedent, as one that is "made for the primary purpose of establishing 'past events potentially relevant to later criminal prosecution.'"[172]

To that end, the government argued that the affidavit was non-testimonial because it was prepared for an immigration proceeding, and not for a criminal trial.[173] The court, however, was not persuaded because the 1968 "affidavit was taken as part of a document fraud investigation," in which the declarant negated personal guilt and shifted blame elsewhere.[174] Given the substance of such a statement, the court held that a reasonable person would view the affidavit as "potentially relevant" to a later criminal proceeding, even if originally created for a non-criminal matter.[175]

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[166] United States v. Duron-Caldera, 737 F.3d 988, 994 (5th Cir. 2013) (internal citations omitted).
[167] *Id.* at 993.
[168] *Id.* at 991.
[169] *Id.* at 994 (noting that "it was not made to 'accuse'" the particular defendant of a crime).
[170] *Id.*
[171] *Id.* at 994-95.
[172] *Duron-Caldera*, 737 F.3d at 995 (quoting *Davis*, 547 U.S. at 822; citing *Bullcoming*, 131 S. Ct. at 2714, n.6; citing *Bryant*, 131 S. Ct. 1155-57; citing *Melendez-Diaz*, 557 U.S. at 310-11; citing *Crawford*, 541 U.S. 51-52). *See also supra* note 78.
[173] *Duron-Caldera*, 737 F.3d at 993.
[174] *Id.* at 994.
[175] *Id.* at 994-96.

The Fifth Circuit also explained why the "accusation" test is inconsistent with the Constitution's text:

> The Sixth Amendment provides a criminal defendant ("the accused") with the right "to be confronted with the *witnesses against him*." The textual juxtaposition, therefore, is not between "the accused" and his "accuser"; it is between "the accused" and "the witnesses against him." To the extent [the defendant] was a witness (discussed earlier), she "certainly provided testimony *against* petitioner, proving one fact necessary for his conviction" – his alienage. "The text of the [Sixth] Amendment contemplates two classes of witnesses – those against the defendant and those in his favor. . . . [T]here is not a third category of witnesses, helpful to the prosecution, but somehow immune from confrontation."[176]

In other words, if the Fifth Circuit would have found the affidavit non-testimonial on the basis that the declarant did not intend to bear witness against the defendant, the declarant-grandmother would have equated to a "third category witness," useful to the prosecution because the statement was inculpatory against the defendant-grandson, yet "immune from confrontation" because the defendant would be precluded from cross-examination.[177]

## V. 2013 Case Law Out of the Fourth Circuit Relevant to Jailhouse Phone Calls

### *A. Jailhouse Phone Calls in the Wake of Hugh Wade's Case*

There have been a few decisions in the wake of Hugh Wade's 2012 guilty plea that have dealt with *Crawford*, but only one has dealt with the precise issue as presented in *Wade*. Specifically, the United States Court of Appeals for the Fourth Circuit addressed the testimonial character of a non-testifying co-defendant's jailhouse phone call in May 2013.[178]

In *United States v. Jones*, the Fourth Circuit found statements on certain jailhouse phone calls non-testimonial.[179] The facts of the case involved an

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[176] *Id.* at 995 (citing *Melendez-Diaz*, 557 U.S. at 313-14) (internal citations omitted) (determing that the "accusation" test was essentially rejected by a majority of the Supreme Court in *Melendez-Diaz*, when the Court refused to hold that forensic analysts were "not subject to confrontation because they are not 'accusatory' witnesses, in that they do not directly accuse petitioner of wrongdoing," again because it would create a "third category witness").

[177] *Id.*; *see also Williams*, 132 S. Ct. at 2274 (Kagan, J., dissenting).

[178] United States v. Jones, 716 F.3d 851, 855-56 (4th Cir. 2013).

[179] *Id.* at 853.

alleged conspiracy to arrange fraudulent marriages between Navy sailors and foreign nationals.[180] At trial in federal district court, three jailhouse phone calls were admitted against Jones, contributing to his eventual fifty-two month prison sentence.[181] Jones argued on appeal that his right to confrontation was violated by the admission of certain portions of the recordings.[182]

One of the relevant phone calls was a three-way call between Jones, a co-conspirator ("Otis"), and Jones' uncle ("Austin").[183] Although Jones did not challenge the admission of his personal statements on the recording in light of the party opponent exception to the prohibition against hearsay, he asserted that the statements of Otis and Austin were testimonial and inadmissible.[184]

The court disagreed and affirmed the United States District Court for the Eastern District of Virginia, finding the statements of both Otis and Austin non-testimonial because the requisite intent to "bear witness" was lacking.[185] According to the Fourth Circuit:

> [S]tatements are testimonial when a reasonable person in the declarant's position would have expected his statements to be used at trial – that is, whether the declarant would have expected or intended to "bear witness" against another in a later proceeding.[186]

The court also rejected the argument that an inmate's knowledge is dispositive of testimonial intent.[187] Specifically, Jones argued that because inmates are informed that their calls are recorded, a reasonable person in such a position would understand the potential for its later use at trial.[188] In response, the court explained that it was not the declarant's knowledge that was dispositive, but rather the declarant's intent.[189] Describing the call as a "casual conversation," the court found it clear that neither Otis nor Austin *intended* to bear witness against Jones, "primarily" because the calls

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[180] *Id.*
[181] *Id.* at 855.
[182] *Id.*
[183] *Id.*
[184] *Jones*, 716 F.3d at 855-56 (citing Fed. R. Evid. 801(d)(2)(A)).
[185] *Id.* at 856.
[186] *Id.* (quoting United States v. Udeozor, 515 F.3d 260, 268 (4th Cir. 2008)).
[187] *Jones*, 716 F.3d at 856.
[188] *Id.*
[189] *Id.* ("Even if Otis and Austin were aware that the prison was recording their conversation, a declarant's understanding that a statement could potentially serve as criminal evidence does not necessarily denote 'testimonial' *intent*." (emphasis added) (internal citations omitted)).

"concerned Otis' emotional state and the prison conditions," and were also self-inculpatory in nature.[190]

Additionally, although not explicit in the court's opinion, the decision appeared to account for *Michigan v. Bryant* because the Fourth Circuit considered the prison's role in creating the recordings.[191] The court opined that there are "significant institutional reason[s]" for recording jailhouse phone calls, such as "policing its own facility by monitoring prisoners' contact with individuals outside the prison."[192]

Even though the statements of Otis and Austin were non-testimonial, the court made clear that the Confrontation Clause is to be applied on a case-by-case basis.[193] Therefore, *Jones* could be interpreted as leaving open the possibility that certain jailhouse phone calls equate to testimonial statements, provided their declarants bear the requisite intent.

### *B. The Unanswered Question in* Jones*: How Much Weight is Due to a Statement Against Penal Interest?*

One question that remained unanswered in *Jones*, just as it did in *Saechao* and *Castro-Davis*, was the precise weight due to the self-inculpatory nature of a co-defendant's statement in situations where there is an obvious intent to bear witness by either shifting blame or negating personal guilt.[194] The case of Hugh Wade would have provided the necessary fact pattern for an appellate court to address such an issue, had it not ended in a guilty plea.[195]

It is generally accepted that the self-inculpatory nature of a given statement is at least partially relevant under *Crawford*, the rationale being that a reasonable person does not make a self-incriminating statement when under the impression that it would be available for later evidentiary use.[196] The courts in *Jones*, *Saechao*, and *Castro-Davis* all relied on such a factor in support of their non-testimonial holdings.[197] However, all three decisions were also influenced by the fact that none of the respective declarants reflected an accusatory intention.[198] Thus, it is unclear whether the courts

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[190] *Id.*

[191] *See* Michigan v. Bryant, 131 S. Ct. 1143, 1160-62 (2011).

[192] *Jones*, 716 F.3d at 856. This effectively satisfies the primary purpose test of *Bryant* from the perspective of the State, because the act of recording jailhouse phone calls is allegedly for a *primary* purpose other than acquiring evidence for use at trial; *but see supra* notes 34, 42.

[193] *Jones*, 716 F.3d at 856.

[194] *See supra* Part III.A, Part V.A.

[195] *See supra* note 67; *see generally supra* Part III.B-C.

[196] *Udeozor*, 515 F.3d at 268.

[197] *Jones*, 716 F.3d at 856; *Castro-Davis*, 612 F. 3d at 65; *Saechao*, 249 Fed. App'x at 679.

[198] *See generally Duron-Caldera*, 737 F.3d at 993-96.

would have viewed a statement against penal interest as dispositive, had there been such an intent.

Although the Circuit Court for Baltimore City determined that co-defendant Adams did not intend to bear witness against Hugh Wade, the trial judge alternatively concluded that even had such an intent been present, the statement was still non-testimonial because of its self-inculpatory nature.[199] Therefore, the circuit court's decision appears to have given more weight to a statement against penal interest than to an intent to bear witness.[200]

### *C. The Unanswered Question in* Jones *has Recently Been Answered*

In December 2013, the Fourth Circuit announced its decision in *United States v. Dargan*.[201] The case involved a co-conspirator's statement to his cellmate while the two were incarcerated.[202] The statement was offered at trial against the defendant ("Dargan"), who was not present at the time the statement was made.[203] Following his conspiracy conviction in the United States District Court for the District of Maryland, Dargan posited two separate but related theories on appeal regarding the admissibility of the jailhouse statement.[204]

First, Dargan proffered that it was improper for the trial judge to utilize the hearsay exception found in Federal Rule of Evidence 804(b)(3) to admit the co-conspirator's statement as a statement against penal interest.[205] Next, Dargan argued that the admission of the out-of-court statement deprived him of his right to confrontation under the Sixth Amendment.[206] Thus, the Fourth Circuit was charged with separately addressing the statement's admissibility on constitutional grounds, as well as under the rules of evidence.[207]

What is most noteworthy about the opinion is that the self-inculpatory nature of the co-conspirator's statement was not included in the court's discussion of *Crawford*.[208] The court first thoroughly considered the statement as a hearsay exception; the various factors that must be established, typically geared to ensure reliability, were described before the court concluded that the co-conspirator's statement constituted a statement against penal interest under Rule 804(b)(3).[209]

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[199] Transcripts of Motions Hearing at 39, State v. Wade, (2012) (No. 2112730009).
[200] *See id.*
[201] United States v. Dargan, 738 F.3d 643 (4th Cir. 2013).
[202] *Id.* at 646.
[203] *Id.*
[204] *Id.* at 649.
[205] *Id.*
[206] *Id.*
[207] *Dargan*, 738 F.3d at 649; *see also supra* Part II.A.
[208] *Dargan*, 738 F.3d at at 650-51.
[209] *Id.* at 650.

After affirming the United States District Court for the District of Maryland's application of the Federal Rules of Evidence, the Fourth Circuit addressed the defendant's Confrontation Clause argument.[210] Consistent with decisions such as *Cox* and *Smalls*,[211] the court "noted, as a general matter that 'statements from one prisoner to another' are 'clearly non-testimonial.'"[212] More specifically, the statement was described as a "jailhouse disclosure to a casual acquaintance," made in an "informal setting" with "no plausible expectation of 'bearing witness' against anyone."[213]

Despite the thorough explanation as to why the statement constituted a statement against interest for purposes of an exception to the rule against hearsay, the fact that the pertinent statement was self-incriminating was not even referenced in the court's Sixth Amendment analysis.[214] This suggests that the Fourth Circuit views a statement's self-inculpatory character as negligible, if not completely irrelevant under *Crawford.*

This is also consistent with *Jones*.[215] Only after thoroughly discussing its reliance on the declarant's lack of an intent to bear witness did the court mention in one sentence that the statement was also against the declarant's penal interest.[216] While this may suggest that such a factor is at least partially relevant, it is clear that under the views of the Fourth Circuit, it would constitute error for a court to view a statement's self-inculpatory character as dispositive, as was done in the case of Hugh Wade.[217]

### *D. Additional Conclusions That Can Be Drawn From the Fourth Circuit*

If and when the Court of Appeals of Maryland is faced with an issue in line with Hugh Wade's case, the court would have the option of considering the recent views of its federal circuit court. Because the Fourth Circuit is only persuasive authority and not binding on state courts, Maryland could adopt portions of the standard and reject others, pursuant to other relevant case law.[218]

The following are conclusions that may be drawn from the Fourth Circuit, in addition to the above stated reading of *Dargan*; however, as will be

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[210] *Id.*

[211] *See supra* note 38.

[212] *Dargan*, 738 F.3d at 650-51 (quoting *Davis*, 547 U.S. at 825).

[213] *Dargan*, 738 F.3d at 651 (citing *Jones*, 716 F.3d at 856).

[214] *See Dargan*, 738 F.3d at 651.

[215] *See supra* Part V.A.

[216] *Jones*, 716 F.3d at 856.

[217] *Id.*; *see also supra* Part III.B.

[218] Davis v. Director, Patuxent Inst., 29 Md. App. 705, 713, 351 A.2d 905, 910 (1976) (citing Wiggins v. State, 275 Md. 689, 344 A.2d 80 (1975)).

demonstrated in Part VI of this article, the majority of said conclusions will not be recommended for adoption in Maryland.[219]

i. Knowledge is not dispositive of testimonial intent, but lack of knowledge is dispositive of non-testimonial intent

A threshold question in *Jones* dealt with a declarant's knowledge.[220] The court held that the presence of knowledge does *not* make a statement testimonial *per se*.[221] Specifically, the Fourth Circuit rejected the argument that an inmate's "knowledge that he is being recorded is dispositive."[222] Rather, such knowledge is a mere factor – and as reflected by the outcome in *Jones* – a factor that can be overcome.[223]

Knowledge was also not dispositive in *Washington v. Davis* and *Michigan v. Bryant*.[224] In fact, knowledge was a non-issue.[225] Obviously, a reasonably prudent person who calls 911, or who makes a comment directly to an investigating officer, is expected to perceive the blatant governmental involvement in that particular situation. Thus the declarant's knowledge was not in controversy; it was a non-issue.

Relevant to jailhouse phone calls is the fact that knowledge is present in cases like *Davis* and *Bryant*, in regard to a declarant's awareness of the "governmental presence" at the time of a statement's making.[226] In neither case was such knowledge dispositive. Therefore, it is possible that *Jones*, *Saechao*, and *Castro-Davis* were correct in refusing to view the jailhouse notification of recording as conclusive of a declarant's testimonial intent.[227]

Alternatively, *Dargan* suggests that a statement is non-testimonial *per se* in the absence of knowledge, when a declarant is completely unaware of the State's involvement in a statement's making.[228] That is, when a person makes an assertion to whom he or she believes to be a private acquaintance without any governmental affiliation, that statement is non-testimonial as a matter of law, even if the other person is in actuality a confidential informant acting under orders to obtain information in furtherance of a future

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[219] The exception being the amount of weight due to a statement against penal interest; as will be discussed, it is the suggestion of this comment that Maryland should find the rationale of *Dargan* "particularly enlightening," in regard to an out-of-court statement's self-inculpatory character. *See infra* Part VI.B.ii.

[220] *Jones*, 716 F.3d at 856.

[221] *Id.*

[222] *Id.*

[223] *Id.*

[224] *See Davis*, 547 U.S. at 828; *Bryant*, 131 S. Ct. at 1150.

[225] *See id.*

[226] *Castro-Davis*, 612 F.3d at 65; *Bryant*, 131 S. Ct. at 1150.

[227] *See Jones*, 716 F.3d at 856; *Saechao*, 249 Fed. App'x 679; *Castro-Davis*, 612 F.3d at 65.

[228] *See Dargan*, 738 F.3d at 651.

prosecution. This conclusion is also congruent with the Court of Appeals of Maryland's opinion in *Cox*.[229]

ii. The predominate inquiry focuses on an intent to bear witness, which is analogous to the "accusation" test

*United States v. Jones* stands for the proposition that the predominate inquiry into a statement's testimonial character is whether there exists "an intent to bear witness."[230] This is not a novel consideration. The courts in *Castro-Davis* and *Saechao*, while not doing so as heavily as the court in *Jones*, also considered the intentions of the declarant in the making of a statement.[231]

Consistent with the Court of Appeals of Maryland's decision in *Cooper v. State*, it appears that the Fourth Circuit also views *Williams* as limited solely to Confrontation Clause inquiries involving forensic reports.[232] *Jones* made absolutely no mention of the fragmented decision, despite having had the opportunity to do so. *Jones* very well could have cited the "accusation" test, because a declarant who "expect[s] or intend[s] to bear witness against another," oftentimes *necessarily* targets a "particular individual."[233]

## VI. PROPOSALS UNDER THE 2014 RIGHT TO CONFRONTATION

Despite the manifest ambiguity in Justice Scalia's *Crawford* opinion, the present state of confrontation is even more abstruse than it was in 2004. Although *Crawford* sought to remedy the unpredictability of the prior *Roberts* standard,[234] decisions like *Williams* and *Derr II* reveal the mission's utter failure.[235]

The remainder of this comment will make recommendations as to how Maryland should proceed in its analysis of the Confrontation Clause, particularly in regard to jailhouse phone calls. These proposals will consider the case law available as of early 2014. Although the case of Hugh Wade will be referenced and its outcome refuted, it is debatable whether the ruling would have survived appellate scrutiny under the standards of 2012.

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[229] *See Cox*, 421 Md. at 647, 28 A.3d at 697 (discussing *Smalls*, 605 F.3d 765, 779-80). This may seem at odds with *Bryant*'s mandate to consider the primary purpose of the State in a statement's making; however, because the Court of Appeals decided *Cox* after the Supreme Court's decision in *Bryant*, it may be argued that a lack of knowledge is dispositive in Maryland irrespective of the State's role in a statement's origin. *See supra* notes 34, 42.

[230] 716 F.3d at 856.

[231] *See supra* Part III.A.

[232] *See Cooper*, 434 Md. at 234, 73 A.3d at 1122-23.

[233] *See Jones*, 716 F.3d at 856; *Williams*, 132 S. Ct. at 2242 (plurality opinion).

[234] *Crawford*, 541 U.S. at 60-68.

[235] *See supra* Part IV.

*A. How Maryland Should Define a Testimonial Statement*

After considering applicable Maryland and Supreme Court case law, in addition to the recent views of the Fourth and Fifth Circuits, Maryland should define a testimonial statement as one that is made with the primary purpose of establishing facts of past events that are potentially relevant prosecutorially, in which a reasonable person in the declarant's position would foresee as being available for later evidentiary use. Hence, there are two aspects to the proposed primary purpose inquiry, and while the two prongs can be viewed as separate, they do at times overlap.

i. The evidentiary prong of the primary purpose test

For the evidentiary prong, Maryland should adopt the recent views of the Fifth Circuit and the five Justices who oppose the plurality in *Williams*; *i.e.*, whether a statement is "made for the primary purpose of establishing past events *potentially relevant* to later criminal prosecution."[236] This standard is entirely consistent with the goals of *Crawford* and does not reflect an element of accusation.[237] This also coincides with Maryland precedent, as the Court of Appeals of Maryland spurned the *Williams* plurality in *Derr II*.[238]

The Confrontation Clause applies to "witnesses *against* the accused."[239] Thus the Fourth Circuit's standard is too narrow, as a declarant need not "intend to bear witness" against another, so long as the testimony is useful to the prosecution by establishing at least "one fact necessary for [a] conviction."[240] To be sure, qualifying as a "witness" for confrontation purposes is not a tall task.

ii. The foreseeability prong of the primary purpose test

In addition to having a *primary* purpose that is evidentiary in nature, a testimonial statement must also reflect sufficient foreseeability. The common thread shared by the three "core classes" described in *Crawford* is that they all involve scenarios where a reasonable declarant would perceive the statement's potential for later evidentiary use.[241] In this regard, the Fourth Circuit's standard is again too narrow. A declarant need not "intend

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[236] *Duron-Caldera*, 737 F.3d at 993 (quoting *Davis*, 547 U.S. at 822) (emphasis added) (citations omitted).
[237] *Crawford*, 541 U.S. at 60-68.
[238] *See supra* note 151.
[239] *See supra* note 3.
[240] *Duron-Caldera*, 737 F.3d at 995; *cf. Jones*, 716 F.3d at 856.
[241] *Crawford*, 541 U.S. at 51-52.

or expect" that a statement be later used; rather, a reasonable declarant must merely *foresee* such potential.[242]

*B. How Maryland Should Apply the Sixth Amendment to Jailhouse Phone Calls*

i. An inmate's knowledge should be dispositive

The Court of Appeals of Maryland should not adopt the views of the United States District Court for the District of Maryland. Instead, Maryland should view an inmate's knowledge that jailhouse phone calls are recorded as dispositive of a statement's testimonial character. Simply put, jailhouse phone calls fall under *Crawford*'s third "core" class of testimonial statements, being "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial."[243]

This scenario is distinguishable from *Davis* and *Bryant*, where the declarant's knowledge was not viewed as dispositive.[244] There, the pertinent statements were non-testimonial because their primary purposes were *not* evidentiary in light of an apparent ongoing emergency.[245] Thus the statements were non-testimonial regardless of the declarants' knowledge, as statements made in the course of genuine emergencies are for a primary purpose in which the right to confrontation is not concerned.

In contrast, it is hard to think of a situation where a jailhouse phone call would be made for a non-evidentiary purpose. Surely, the vast majority would be expected to pertain to past events, and would not be for the primary purpose of seeking emergency assistance.[246]

Relatedly, the Fourth Circuit in *Jones* held that the primary purpose of monitoring inmates' telephone conversations, from the point of view of jails and prisons, is non-evidentiary due to "significant institutional concerns."[247] Assuming the validity of this assertion, it is plausible that courts could overlook an inmate's knowledge on these grounds. However, while *Bryant* expressly authorized consideration of a "dual perspective,"[248] Maryland case law has made clear that more weight is to be attributed to the perspective of a statement's declarant.[249]

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[242] *Duron-Caldera*, 737 F.3d at 995; *cf. Jones*, 716 F.3d at 856.
[243] *Crawford*, 541 U.S. at 52.
[244] *See supra* Part II.C-D.
[245] *See Davis*, 547 U.S. at 822; *Bryant*, 131 S. Ct. at 1151-52.
[246] *See supra* note 84.
[247] *Jones*, 716 F.3d at 856.
[248] *See supra* Part II.D.
[249] *Cox*, 421 Md. at 648-50, 28 A.3d at 697-99 (citing *Bryant*, 131 S. Ct. 1143). The Fourth Circuit also advocates a declarant driven approach. *Dargan*, 738 F.3d at 649. *See also supra* note 42.

At the very minimum, Maryland should refuse to follow the First, Fourth and Ninth Circuits' description of jailhouse phone calls as "casual" conversations between private acquaintances.[250] Surely, an inmate's knowledge of the government's presence distinguishes jailhouse phone calls from other jailhouse scenarios.

In short, even if Maryland courts were to find jailhouse phone calls non-testimonial, the rationale for such a conclusion would be more credible by simply acknowledging the distinction between cases like *Wade* and cases like *Cox*, rather than trying to create an analogy where one does not exist.

ii. A statement against penal interest is not a factor that should trump an intent to bear witness

The reality is that courts do not view knowledge on jailhouse phone calls as dispositive, perhaps because it would just be too simple of an outcome for a progeny of *Crawford.* Maryland will therefore most likely weigh other applicable factors in addition to an inmate's knowledge, such as a statement against penal interest and an intent to bear witness.

Under the fact specific situation involving a non-testifying co-defendant in a joint criminal trial, blatantly accusatory statements are oftentimes also self-inculpatory.[251] This is because a co-defendant, in discussing another's involvement in a crime, necessarily reflects personal knowledge of the incident in which a co-defendant is also charged.[252] Statements are "intrinsically inculpatory to the extent they demonstrate knowledge of 'significant details about the crime.'"[253]

Maryland should find the Fourth Circuit's decision in *Dargan* persuasive, insofar as a statement against penal interest is concerned.[254] As with other hearsay exceptions grounded in inherent reliability, consideration of a statement against interest lacks textual support in the Sixth Amendment, and is inconsistent with the crux of the Confrontation Clause, cross-examination.[255]

In *Dargan*, an appeal out of the United States District Court for the District of Maryland, the Fourth Circuit concluded that a co-defendant's statement equated to a hearsay exception as a statement against penal interest.[256] Although such a consideration would have only bolstered the

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[250] *See Castro-Davis*, 612 F.3d at 65; *Saechao*, 249 Fed.App'x 678; *Jones*, 716 F.3d at 856.

[251] *See, e.g., supra* note 58.

[252] *Dargan*, 738 F.3d at 649.

[253] *Id.* (quoting Williamson v. United States, 512 U.S. 594, 603 (1994)).

[254] *See generally id.*

[255] *Crawford*, 541 U.S. at 60-68.

[256] *Dargan*, 738 F.3d at 650-51.

subsequent non-testimonial finding, it was completely ignored in the court's Sixth Amendment analysis.[257]

Ironically, in its hearsay analysis, the court considered whether the co-defendant had anything to gain under the circumstances and at the time that the particular statement was made.[258] Specifically, whether there existed a "motive to shift blame or curry favor" called into question a statement's "self-inculpatory quality."[259] Therefore, under the rules of evidence, an intent to bear witness against another retracts from the inherent reliability, and thus applicability, of a statement against penal interest.

Although federal and state evidentiary rules are immaterial in regard to the application of constitutional rights,[260] it is interesting to see the interaction of the two factors, relevant to inquiries in both contexts. At a minimum, it would seem to follow that where a non-testifying co-defendant has an "obvious motive to shift blame or curry favor,"[261] a statement's self-inculpatory character warrants less weight, under either the rules of evidence or the Sixth Amendment.

Despite the fact that *Dargan* disregarded a statement's self-inculpatory nature in its Confrontation Clause analysis,[262] Maryland caselaw has not.[263] While there are arguments that support simply following the Fourth Circuit in this regard, at a minimum, Maryland should declare that a statement against penal interest does not trump an "intent to bear witness," where it is clear a co-defendant is attempting to negate personal guilt or shift blame towards an accomplice.[264]

More simply put, where there is express notification of recording plus evidence of an accusatory intention, a statement on a jailhouse phone call is testimonial *per se*, even if inherently self-inculpatory.

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[257] *Id.*

[258] *Id. See supra* Part V.C.

[259] *Dargan*, 738 F.3d at 649.

[260] *See supra* note 116. *See also Crawford*, 571 U.S. at 61 ("Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of "reliability.'").

[261] *Dargan*, 738 F.3d at 649.

[262] *See id.* at 649-51; *but see Jones*, 716 F.3d at 856.

[263] *Cox*, 421 Md. at 651, 28 A.3d at 699 (quoting *Dutton*, 400 U.S. at 89); *see also* Transcript of Motions Hearing at 39, State v. Wade, (2012) (No. 211273009).

[264] This is not to recommend that Maryland adopt any sort of "accusation" mandate in its Sixth Amendment analysis; this is simply to state that where such intent is present, a jailhouse phone call is testimonial *per se*.

iii. "Third category witnesses" are created when a statement against penal interest is dispositive

Again, the general rationale for viewing a statement against penal interest as non-testimonial is that a reasonable declarant does not make such a statement when under the impression that it would be available for later prosecutorial use.[265] This concerns the foreseeability prong of the primary purpose inquiry. The evidentiary prong is not at issue because the above-rationale does not pertain to criminal relevance, but rather subsequent availability.

Arguing that a statement against penal interest is dispositive may be construed as suggesting that a statement is not sufficiently accusatory for confrontation purposes, as a declarant does not intend to bear witness against another when a statement is also self-incriminating.[266] That argument, however, was expressly rejected by the Court in *Melendez-Diaz*,[267] and again by the five Justices who opposed the "accusation" test in *Williams*.[268]

The *Williams* plurality argued that DNA analysts were not "witnesses" in the historical sense, in part because DNA analysis is an impersonal scientific practice in which analysts compile reports without any sense of whether they will "be incriminating or exonerating."[269] The dissent and Justice Thomas, however, rejected this perspective, reiterating that "the Sixth Amendment contemplates [only] two classes of witnesses – those against the defendant and those in his favor . . . there is not a third category of witnesses, helpful to the prosecution, but somehow immune from confrontation."[270]

Expressed differently, the plurality posited that the lab report was non-testimonial because the DNA analysts did not *foresee* its later use at trial and thus "did not intend to bear witness against a particular individual."[271] Clearly, the evidentiary prong was not at issue, as the report established facts relating to past events and *potentially* relevant to criminal prosecution.[272]

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[265] *Udeozor*, 515 F.3d at 268.

[266] *See supra* note 128; *see also Duron-Caldera*, 737 F.3d at 993-96.

[267] 129 S. Ct. at 2533.

[268] *Williams*, 132 S. Ct. at 2274 (Kagan, J., dissenting) ("[I]n Melendez-Diaz, we rejected a related argument that laboratory analysts are not subject to confrontation because they are not 'accusatory' witnesses." (internal citations omitted)).

[269] *Williams*, 132 S. Ct. at 2244 (plurality opinion).

[270] *Id.* at 2263 (Thomas, J., concurring) (quoting *Melendez-Diaz*, 557 U.S. at 313-14). *See also supra* Part IV.B.iv.

[271] *Williams*, 132 S. Ct. at 2228 (plurality opinion).

[272] That being said, the *Williams* plurality, however, did attempt to invoke the ongoing emergency exception to establish a non-evidentiary primary purpose, but this too was expressly rejected by a majority of the Court. *See id.* at 2243-44 (plurality opinion) (asserting that the DNA report was compiled for a primary purpose of responding to an ongoing emergency because an unknown sexual predator was at large at the time the report was compiled); *but see id.* at 2263

In this regard, a statement against penal interest is akin to the "accusation" test, in that neither suggests a lack of criminal relevance, but rather pertains to foreseeability. The same can be said of the government's failed argument in *Duron-Caldera*, where it was alleged that the defendant's grandmother did not intend to bear witness against her grandson because she did not *foresee* the use of her immigration affidavit forty-years later at a criminal trial.[273]

Herein lies the distinction between a statement against penal interest and, for example, a statement made during a genuine emergency situation. The former has an evidentiary primary purpose, whereas the latter does not. As such, implication of the ongoing emergency exception, which was expressly carved out of the right to confrontation by the Court in *Davis*, is non-testimonial because of its non-evidentiary nature.[274]

A declarant is not a "witness" for confrontation purposes when a statement is made for a non-evidentiary primary purpose.[275] For that reason, even though statements made in the course of an emergency may in fact be "helpful to the prosecution [yet] immune from confrontation," the pertinent declarants are not "third category witnesses," as described by the Court in *Melendez-Diaz*.[276]

Statements against penal interest, on the other hand, when made by a co-defendant while incarcerated pretrial, are typically made to establish facts relating to past events.[277] Thus their primary purpose is very clearly evidentiary, and their testimonial character turns on foreseeability, just like the government's argument in *Duron-Caldera*, as well as the *Williams* plurality's "accusation" test.[278]

In short, unless an explicit exception to the Confrontation Clause is carved out for statements against penal interest, as was done with ongoing emergencies, then the rationale in the case of Hugh Wade cannot stand.[279]

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(Thomas, J., concurring) ("[I]t strains credulity to assert that the police and [laboratory] were primarily concerned with the exigencies of an ongoing emergency, rather than with producing evidence."); *id.* at 2274 (Kagan, J., dissenting) ("On their face, the [ongoing emergency] decisions have nothing to say about laboratory analysts conducting routine tests far away from a crime scene. And this case presents a peculiarly inapt set of facts for extending those precedents.").

[273] *See supra* Part IV.B.iv.

[274] To clarify, such a statement is not considered "non-evidentiary" for failing to establish facts of criminal relevance; rather, it is non-evidentiary because the *primary* purpose of the statement is not for that reason. *See Davis*, 547 U.S. at 814-15.

[275] *Id.*

[276] *Melendez-Diaz*, 557 U.S. at 313-14.

[277] *See supra* note 84.

[278] *See Duron-Caldera*, 737 F.3d at 992-93; *Williams*, 132 S. Ct. at 2274 (Kagan, J., dissenting).

[279] *See supra* Part III.B.

Such an exception, however, would not find support alongside the other exceptions to *Crawford*, which again are fundamentally non-evidentiary in nature.[280] Accordingly, if such an exception were to be expressly carved out by a Maryland court, it would undoubtedly be vulnerable to appellate scrutiny.

iv. Factors grounded in inherent reliability should not circumvent a defendant's right to confrontation

Furthermore, determining that a statement is non-testimonial because it is against penal interest resembles the practices under the former *Roberts* standard, in that a defendant's right to confront adverse witnesses turns on judicial determinations of, in essence, the need for cross-examination.[281] This is precisely what *Crawford* sought to abrogate.[282] Justice Scalia described cross-examination as a procedural guarantee of reliability, which *Roberts* misconstrued as substantive.[283]

To rely on a statement against penal interest as the basis for a non-testimonial finding would function as if the Sixth Amendment's aims were that of substantive reliability. In *Williams*, the plurality cited the inherent reliability of DNA analysis, arguing that it did not resemble the type of out-of-court statements in which the Sixth Amendment's Framers were concerned.[284] However, this interpretation was also rejected by a majority of the Supreme Court:[285]

> It is not up to us to decide, *ex ante*, what evidence is trustworthy and what is not. That is because the Confrontation Clause prescribes its own "procedure for determining the reliability of testimony in criminal trials." That procedure is cross-examination. And "[d]ispensing with [it] because testimony is obviously reliable is akin to

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[280] *See supra* note 267.

[281] *Crawford*, 541 U.S. at 61-62 ("Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation.").

[282] *Id.* at 60-68.

[283] *See id.* at 61.

[284] *See Williams*, 132 S. Ct. at 2243-44 (plurality opinion).

[285] *Id.* at 2275 (Kagan, J., dissenting) (internal citations omitted). Both Justice Thomas's concurrence and the dissent cited *Melendez-Diaz* to reject the *Williams* plurality's reliance on the reliability of DNA testing. *See, e.g.*, *id.* at 2261 (Thomas, J., concurring) (citing *Crawford*, 541 U.S. at 61; *Melendez-Diaz*, 557 U.S. at 309-10) ("The Confrontation Clause does not require that evidence be reliable, but that the reliability of a specific 'class of testimonial statements' – formalized statement bearing indicia of solemnity – be assessed through cross-examination.").

> dispensing with a jury trial because a defendant is obviously guilty."[286]

In other words, dispensing with cross-examination because DNA analysis is reliable reflects an overly narrow view of the right to confrontation, similar to that of the former *Roberts* standard.

The *Williams* plurality argued that DNA testing is inherently reliable because there is no "prospect for fabrication," as it is "unlikely that a particular researcher has a defendant-related motive to behave dishonestly."[287] However, this too was unequivocally rejected as overly narrow, because "the typical problem with laboratory analyses – and [thus] the typical focus of cross-examination – has to do with careless or incompetent work, rather than with personal vendettas."[288]

The same logic applies to a statement against penal interest in the context of jailhouse phone calls. The assertion that a declarant does not intend to bear witness against another when a statement is self-inculpatory presents an overly narrow interpretation of the Sixth Amendment. It assumes that the sole concern of the Amendment's Framers was a declarant's devious intent. Obviously, the Confrontation Clause is broader than that, providing the right to cross-examine adverse witnesses in regard to much more than simply a declarant's motives.[289] For example, other topics worthy of Sixth Amendment protection include a declarant's perception, recollection, etc.[290]

More fundamentally, the *Crawford* court made clear that it would be inappropriate to preclude cross-examination on the basis of a self-exculpatory statement being found sufficiently reliable.[291] Specifically, the Court traced the right to confrontation back to its English common law routes and discussed the infamous 1603 trial of Sir Walter Raleigh:

> Lord Cobham, Raleigh's alleged accomplice, had implicated him in an examination before the Privy Council and in a letter. At Raleigh's trial, these were read to the jury . . . . Suspecting that Cobham would recant, Raleigh demanded that the judges call him to appear . . . . The judges refused

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[286] *Crawford*, 541 U.S. at 60.

[287] *Williams*, 132 S. Ct. at 2250.

[288] *Id.* at 2274-75 (Kagan, J., dissenting) ("Scientific testing is technical, to be sure; but it is only as reliable as the people who perform it. That is why a defendant may wish to ask the analyst a variety of questions: How much experience do you have? Have you ever made mistakes in the past? Did you test the right sample? Use the right procedures? Contaminate the sample in any way?" (internal citations omitted)).

[289] *Id.*

[290] *See supra* note 95.

[291] *See generally Crawford*, 541 U.S. at 60-68.

> . . . . [T]he jury convicted, and Raleigh was sentenced to death.[292]

Sir Raleigh's case was one on which the Framers relied while drafting the Sixth Amendment.[293] It was also again referenced in *Crawford*, as evidence of how *Roberts* had gotten away from the original intent behind the right to confrontation:

> The Raleigh trial itself involved the very sorts of reliability determinations that *Roberts* authorizes. In the face of Raleigh's repeated demands for confrontation, the prosecution responded with many of the arguments a court applying *Roberts* might invoke today: that Cobham's *statements were self-inculpatory*, that they were not made in the heat of passion, and that they were not "extracted from [him] upon any hopes or promise of Pardon." It is not plausible that the Framers' only objection to the trial was that Raleigh's judges did not properly weigh these factors before sentencing him to death. Rather, the problem was that the judges refused to allow Raleigh to confront Cobham in court, where he could cross-examine him and try to expose his accusation as a lie.[294]

Applying this rationale to the case of Hugh Wade again reveals that the Circuit Court for Baltimore City was in error when it found Adams' self-inculpatory statement dispositive of non-testimonial intent.[295] While it may remain subject to debate whether a statement against penal interest should be considered at all under *Crawford*, one thing is clear – such a factor does not, in and of itself, eviscerate one's right to confrontation.

v. Jailhouse phone calls "resemble" custodial interrogation

The strongest argument in favor of finding jailhouse phone calls non-testimonial is the lack of express questioning or "formalized custodial interrogation."[296] In addition to lying at the heart of Justice Thomas's analysis, the *Crawford* Court also expressly described the testimonial nature inherent in statements to police, as opposed to statements to private

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[292] *Id.* at 44 (internal citations omitted).
[293] *See id.*
[294] *Id.* at 62 (internal citations omitted) (emphasis added).
[295] *See supra* Part III.B.
[296] *Crawford*, 541 U.S. at 51-52; *Cox*, 421 Md. 648, 28 A.3d at 697 (interpreting Supreme Court precedent to "strongly suggest that most, if not all, statements that are not made to state actors are non-testimonial").

acquaintances.[297] At a minimum, the relative lack of governmental involvement makes jailhouse phone calls distinguishable from other examples of "core" testimonial statements, such as confessions and grand jury testimony.[298]

In *Cooper*, the Court of Appeals of Maryland applied Justice Thomas's definition of formality and concluded that a DNA report was non-testimonial because it did not "result" from a police interrogation.[299] Clearly, applying this rationale to jailhouse phone calls would also result in a non-testimonial finding. However, Justice Thomas did not require that testimonial statements "result" from formal interrogation.[300] Rather, he defined a statement as testimonial if it constitutes "formalized dialogue" that merely *resembles* custodial interrogation.[301]

Through the lens of Justice Thomas, therefore, it is reasonable to assert that jailhouse phone calls are sufficiently formal for *resembling* custodial interrogation, which again is accomplished via an inmate's knowledge.

*Derr II*'s adoption of Justice Thomas's definition of testimonial as the standard in Maryland was quite puzzling because no other member of the Supreme Court shared his views.[302] Subsequently, *Derr II* was limited solely to forensic reports by the Court of Appeals of Maryland's opinion in *Cooper*.[303] This effectively rendered the 2011 decision in *Cox* the applicable standard in Maryland for all other confrontation inquires.[304]

Once more, the argument in favor of finding jailhouse phone calls testimonial under *Bryant* and *Cox* is that the calls are sufficiently formal given their custodial context, generally made for the primary purpose of recanting past events, rarely involve emergency situations, and are objectively viewed as a scenario in which the statement's substance would be available for later use at trial.[305] Moreover, because inmates are aware that their phone conversations are monitored, it can be said that certain

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[297] *See Crawford*, 541 U.S. at 51-53.
[298] *Id.*
[299] *Cooper*, 434 Md. at 231-36, 73 A.3d at 1121-24.
[300] *See Williams*, 132 S. Ct. at 2255-64 (Thomas, J., concurring).
[301] *Id.* at 2260 (Thomas, J., concurring) ("[A]lthough the [DNA] report was produced at the request of law enforcement, it was not the product of any sort of formalized dialogue *resembling* custodial interrogation.") (emphasis added).
[302] *Derr II*, 434 Md. at 141-42, 73 A.3d at 286 (Eldridge, J., dissenting) (citing Grutter v. Bollinger, 539 U.S. 306 (2003)) ("If Justice Thomas's opinion in *Williams* did represent the holding of the Court, it is difficult to understand why no member of the plurality joined the Thomas opinion, or why Justice Thomas did not join a portion of the plurality opinion.").
[303] *See supra* Part IV.B.iii.
[304] *See Cox*, 421 Md. at 648-49, 28 A.3d at 298-99.
[305] *See supra* Part III.C.

statements are made for the "primary purpose of creating a substitute for trial testimony."[306]

vi. Policy considerations

In Maryland, it is permissible in certain circumstances to try criminal defendants jointly for purposes of judicial economy.[307] However, if a jailhouse phone call that is made by a non-testifying co-defendant and incriminating against another co-defendant is deemed to be testimonial in nature, then the Supreme Court's decision in *Bruton v. United States* is implicated.[308] Though triggered solely by the Confrontation Clause,[309] *i.e.*, only if an out-of-court statement is testimonial, where applicable, *Bruton* provides a prejudiced co-defendant with either a severance, limiting instruction, or redaction of the pertinent out-of-court statement.[310]

Without question, the ideal of judicial economy, though necessary in its own right, pales in comparison to rights of constitutional dimension.[311] Further, the directives of *Bruton* cannot be said to be overly burdensome, on either the State or the judiciary.

Admittedly, there is no clear-cut answer to the principle issue addressed in this comment. For that reason, it would seem prudent for a court to tread carefully, and in an abundance of caution elect to safeguard fundamental liberties.

## VII. CONCLUSION

*Crawford* aimed to remedy the unpredictability of Sixth Amendment jurisprudence but its ambiguities have led to a state of confrontation no more predictable than the former *Roberts* standard. In regard to jailhouse phone calls, Maryland will have to decide whether to coin the calls "casual" conversations between acquaintances, or properly acknowledge the obvious governmental presence at play.

It is the recommendation of this author that Maryland refrain from likening jailhouse phone calls to other, more private conversations in the context of jails and prisons. In doing so, an inmate's knowledge of recording should be dispositive of testimonial character, as the scenario *resembles*

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[306] *Cox*, 421 Md. at 651, 28 A.3d at 699.

[307] Conyers v. State, 345 Md. 525, 553, 693 A.2d 781, 794 (1997).

[308] 391 U.S. 123 (1968).

[309] *See supra* note 44; *Dargan*, 738 F.3d at 651 ("[M]ore significantly, *Bruton*, is simply irrelevant in the context of non-testimonial statements." (internal citation omitted)).

[310] *See id*; *Castro-Davis*, 612 F.3d 53, 65-66 ("[T]he *Bruton* rule does not apply to non-testimonial hearsay statements.").

[311] *See generally Williams*, 132 S. Ct. at 2242 (plurality opinion), 2256 (Thomas, J., concurring), 2272 (Kagan, J., dissenting).

"formalized dialogue," similar to statements made directly to State actors during the course of an interrogation. Although the current trend has not found such knowledge dispositive, at a minimum, where there is a clear accusatory intent in addition to knowledge, Maryland should find a co-defendant's jailhouse phone call testimonial, regardless of the statement's self-inculpatory nature.