UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1918

September Term, 2013

ANTONIO ROBERT PEDZICH

v.

STATE OF MARYLAND

Woodward,
Nazarian,
Salmon, James P.
(Retired, Specially Assigned),

JJ.

Opinion by Woodward, J.

Filed: January 5, 2014

After a jury trial in the Circuit Court for Baltimore County, Antonio Robert Pedzich, appellant, was convicted of driving under the influence of alcohol and driving while impaired by alcohol. He was sentenced to incarceration for a term of 3 years for driving under the influence of alcohol and the remaining charge was merged for sentencing purposes. This timely appeal followed.

QUESTIONS PRESENTED

Appellant presents the following questions for our consideration:

> I. Did the circuit court err by denying appellant's motion to dismiss based on a violation of his constitutional right to a speedy trial?
>
> II. Were appellant's federal and state constitutional rights of confrontation violated when the circuit court admitted into evidence appellant's laboratory results, reflecting his blood alcohol concentration, but the persons who drew his blood and the analyst(s) who analyzed his blood did not testify at trial?

For the reasons set forth below, we shall affirm.

FACTUAL BACKGROUND

At 11:02 p.m. on September 15, 2011, Baltimore County paramedic Matthew Beeker responded to the intersection of Harford Road and Oak Forest Drive in Parkville for a single vehicle accident. Upon arrival, he found appellant about 9 feet away from a moped-type vehicle that was lying on its side. There was "a copious" amount of blood between the appellant and the moped. Debris, including shards of glass and fiberglass material, surrounded the moped. Beeker described appellant as "semi responsive," "disoriented," and "kind of agitated." He had "multiple facial injuries" including deep lacerations on his face, head, and multiple abrasions and lacerations on all four

extremities, and his blood pressure was elevated. No helmet was found at the scene of the accident. Appellant was transported to the University of Maryland's Shock Trauma Center.

Baltimore County Police Officer Steven Russo was also dispatched to the scene of the accident. He arrived as appellant was being transported to Shock Trauma by the medics. Officer Russo, who testified as an expert in collision reconstruction, observed a green Taotao "Rainbow 50" model scooter with no tags lying on the shoulder of the northbound lane of Harford Road. He also observed scruff marks, scrapes and gouges leading to the scooter's final resting place and a pool of blood about 9 feet away from the scooter. Officer Russo determined that the scooter impacted the curb at the point where the scruff mark began, and after scraping and gouging about 100 feet along the curb, came to rest. Officer Russo checked the road surface but did not find any debris that would interfere with the smooth operation of a vehicle. He concluded that the scooter was driven at approximately 25 to 30 miles an hour when it impacted the curb and then slid approximately 100 feet to its final location.

Officer Russo went to Shock Trauma and attempted to talk to appellant, but he was unable to do so, because he "detected an alcoholic beverage emanating from [appellant's] breath." Officer Russo filled out a form indicating that appellant was in an "[i]ncoherent state on 9/15/2011 at 01:25 hours." He did not read appellant the DR-15 form, which he described as a Motor Vehicle Administration form that sets forth a person's right to

refuse to take a blood test for the presence of alcohol, because he was unable to determine whether appellant was responding yes or no. Instead, he decided to "summons in the hospital records." Officer Russo checked appellant's driving record and determined that his license had been both suspended and revoked.

Dr. David Gens, a trauma surgeon at Shock Trauma, testified that he first saw appellant at about 7:30 a.m. on the day after the accident. According to Dr. Gens, appellant's blood alcohol level on the night he arrived at Shock Trauma was 189, which was above Maryland's legal limit of 80. Over objection, appellant's medical records were admitted in evidence. Those records showed that appellant's blood was drawn at about 11:57 p.m. and that testing established that his blood contained 189 milligrams of ethanol per deciliter of blood. There was no dispute that 80 milligrams of ethanol per deciliter of blood constituted legal intoxication.

We shall include additional facts as necessary in our discussion of the questions presented.

DISCUSSION

I.

Appellant first contends that the circuit court erred in denying his motion to dismiss for violation of his right to a speedy trial under the Sixth Amendment to the

United States Constitution[1] and Article 21 of the Maryland Declaration of Rights.[2] In reviewing the circuit court's denial of appellant's request for dismissal for violation of his constitutional right to a speedy trial, we conduct our own independent constitutional analysis. *Glover v. State*, 368 Md. 211, 220 (2002). We perform a *de novo* constitutional appraisal in light of the particular facts of the case before us and, in doing so, we accept the lower court's findings of fact unless clearly erroneous. *Id.* at 222.

The constitutional analysis to be applied in a speedy trial context was articulated by the United States Supreme Court in *Barker v. Wingo*, 407 U.S. 514 (1972), where the Court set forth the following four factors to be weighed as part of a balancing test to determine if an accused was denied a speedy trial: (1) the length of delay, (2) the reason

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[1] The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted by the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

[2] Article 21 of the Maryland Declaration of Rights provides:

> That in all criminal prosecutions, every man hath a right to be informed of the accusation against him; to have a copy of the Indictment, or charge, in due time (if required) to prepare his defence; to be allowed counsel; to be confronted with the witnesses against him; to have process for his witnesses; to examine the witnesses for and against him on oath; and to a speedy trial by an impartial jury, without whose unanimous consent he ought not to be found guilty.

for the delay, (3) the defendant's assertion of his right, and (4) prejudice to the defendant. *Id.* at 530-32. None of the four factors is a necessary or sufficient condition to finding a denial of speedy trial rights. Rather, they are related factors and must be considered together with such other circumstances as may be relevant. *Id.* at 533; *Divver v. State*, 356 Md. 379, 394 (1999). Maryland courts consistently have applied the *Barker* factors when considering alleged violations of both the Sixth Amendment to the United States Constitution and Article 21 of the Maryland Declaration of Rights. *Glover*, 368 Md. at 221-22.

A. *Length of Delay*

Under *Barker v. Wingo*, the first factor we must consider is the length of delay, which is measured from the date of arrest or filing of an indictment, information, or other formal charges to the date of trial. *Divver*, 356 Md. at 388-89. This case originated in the District Court. Appellant argues that the appropriate starting date for determining the length of delay is September 15, 2011, the date of the accident because that is the date when the tickets that were issued against him were filed. Using that date, appellant maintains that the total length of delay was 2 years, one month and 23 days. The State argues that the more appropriate starting date for speedy trial purposes is November 29, 2011, the first date the case was called in the District Court. Using that starting date, the State maintains that the total length of delay was 1 year, 11 months and 9 days.

We need not resolve the dispute as to the starting date, because under either date the delay was long enough to trigger a speedy trial analysis. *See e.g., Doggett v. United States*, 505 U.S. 647, 652 n.1 (1992)(delays approaching one year generally trigger speedy trial inquiry); *Howard v. State*, 66 Md. App. 273, 291 (1986)(delay of eight months and 26 days triggered speedy trial inquiry).

The delay was not long enough, however, to compel dismissal. The length of delay, in and of itself, is not a weighty factor, and is the least determinative of the four factors we consider under *Barker*. *State v. Kanneh*, 403 Md. 678, 689-90 (2008). In addition, on a number of occasions delays of similar or longer length have been held not to violate constitutional speedy trial rights. *See Id.* at 688 (35 month delay); *Malik v. State*, 152 Md. App. 305, 317-18 (2003) (23 month delay); *Wheeler v. State*, 88 Md. App. 512, 517-26 (1991) (23 month delay). In light of these considerations, we do not give the length of delay in this case much weight.

B. Reason for Delay

The next factor to consider is the reason for the delay. In *Barker*, the Supreme Court explained that not all reasons for delay carry the same weight:

> A deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government. A more neutral reason such as negligence or overcrowded courts should be weighed less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than the defendant. Finally, a

> valid reason, such as a missing witness, should serve to justify appropriate delay.

Barker, 407 U.S. at 531 (footnote omitted).

In the instant case, there is no explanation for the delay between the date of the accident and the first scheduled District Court trial date of May 15, 2012, a period of 8 months. We note, however, that there is no allegation that the delay was caused by a deliberate attempt on the part of the State to hamper the defense. Because there is nothing before us to suggest that the delay was anything other than normal pre-trial preparation time, we conclude that the initial 8 month delay was for a neutral reason. *See Id.* at 531 (overcrowded court dockets a "more neutral reason" for delay than deliberate attempt to delay trial); *Davidson v. State*, 87 Md. App. 105, 111 (1991) (almost 7 month delay properly attributable to trial preparation and the requirements of orderly procedure).

On the first scheduled trial date of May 15, 2012, appellant filed a plea of not guilty and claimed that he was not competent to stand trial. The District Court ordered a competency evaluation and set a new trial date of September 11, 2012. This delay of 119 days is attributable to appellant.

On September 11, 2012, the case was again postponed because appellant was not transported from the detention center to the courthouse. The case was rescheduled for December 4, 2012, and the resulting delay of 84 days is attributable to the State. *Carter v. State*, 77 Md. App. 462, 467-68 (1988).

Shortly before the next scheduled trial date, appellant requested a jury trial. His case was docketed in the circuit court on November 26, 2012, and a trial date was set for January 4, 2013. The resulting delay of 39 days was due to the requirements of orderly procedure and is thus neutral.

On January 4, 2013, defense counsel requested a postponement because additional discovery needed to be reviewed and appellant was seeking to change counsel. Trial was rescheduled to March 22, 2013. This delay of 77 days is attributable to appellant.

On March 22, 2013, defense counsel, a public defender, requested a postponement because she had just entered her appearance and needed time to review the records. The case was postponed to July 18, 2013. This delay of 118 days is attributable to appellant. Appellant contends that he did not want the January 4, 2013 or March 22, 2013 postponements and that "it was not his fault that his attorneys were not ready to try the case." That contention is without merit. Appellant was represented by counsel, the postponements were requested on his behalf and were, as the lower court recognized, necessitated by his change in counsel.

On July 18, 2013, the State requested a postponement because one of its witnesses was unavailable due to surgery. The court found good cause for the postponement and reset the case for August 21, 2013. This delay of 34 days is attributed to the State.

On August 21, 2013, the State again requested a postponement because none of its witnesses were present due to the unexpected resolution of another case that counsel

anticipated would go to trial. In addition, the same witness who was unavailable for trial on July 18th was again unavailable because he was out of the country. Appellant requested that the case be dismissed for violation of his right to a speedy trial. The court denied that motion, reset the case for trial on November 7, 2013, and stated that there would not be any more postponements. Ultimately, trial began on November 7, 2013. The delay of 78 days is attributable to the State.

In considering the total delay, we view as neutral the initial 8 month period (normal pre-trial preparation time) and the 39 days for scheduling the first jury trial date (requirements of orderly procedure). Of the remaining delay, 196 days are attributed to the State, and 314 days are attributable to appellant. Under the facts of this case, the reasons for delay do not support appellant's claim that his right to a speedy trial was violated.

C. Assertion of the Right

A defendant's assertion of his or her speedy trial right "is entitled to strong evidentiary weight" in determining whether the right has been denied. *Barker*, 407 U.S. at 531-32. The more serious the deprivation of the right to a speedy trial, "the more likely a defendant is to complain." *Id.* at 531. Appellant raised the issue of his speedy trial rights on 3 occasions. First, on July 18, 2013, appellant advised the court that he had "never requested a postponement" and argued that prior requests for postponements were made by his attorneys, not him, and that he never consented to them. The court rejected

appellant's argument on the ground that the postponements were requested on his behalf by his attorneys.

Appellant next raised the speedy trial issue on August 21, 2013, when defense counsel requested that the case be dismissed for a violation of appellant's right to a speedy trial. The court denied that request but stated that the case "won't be postponed again."

On November 7, 2013, appellant argued that he had not been tried within the 180-day deadline imposed by Maryland law and frequently referred to as the *Hicks* date. *See* Md. Code Ann., Crim. Proc. §6-103[3]; *State v. Hicks*, 285 Md. 310, *on motions for reconsideration*, 285 Md. 334 (1979); Md. Rule 4-271.[4] Appellant asked the court "to be

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[3] Section 6-103 of the Criminal Procedure Article of the Maryland Code provides, in relevant part:

> (a) *Requirements for setting date*. — (1) The date for trial of a criminal matter in the circuit court shall be set within 30 days after the earlier of:
>
> (i) the appearance of counsel; or
>
> (ii) the first appearance of the defendant before the circuit court, as provided in the Maryland Rules.
>
> (2) The trial date may not be later than 180 days after the earlier of those events.

[4] Maryland Rule 4-271(a)(1) provides, in relevant part:

> (a) **Trial date in circuit court**. (1) The date for trial in the circuit court shall be set within 30 days after the earlier of the appearance of counsel or the first appearance of the defendant before the circuit court pursuant to Rule 4-213, and shall be not later than 180 days after the earlier of those events.

heard on, on the Motion why I haven't been brought to trial within, in a time frame of, under the HICKS law?" Defense counsel clarified that the case came before the circuit court on a prayer for a jury trial and that, although he did not "believe there is an associated HICKS date," appellant had been denied a speedy trial and dismissal was appropriate.

Notwithstanding appellant's assertions of his right to a speedy trial and his complaint that he was not tried within 180-days, the record is clear that appellant sought and was granted several postponements. One postponement was granted as a result of appellant's claim that he was not competent to stand trial and two postponements were made as a result of his decision to obtain new counsel. In light of the facts before us, we conclude that appellant's assertion of his right to a speedy trial was inconsistent, and this factor does not weigh heavily in his favor.

D. Prejudice

Appellant argues that, although he was incarcerated for another case while he was awaiting trial in the instant case, he had to endure interference with his liberty, the disruption of his employment, the drain of his financial resources, the curtailment of his associations, his subjection to public obloquy and the creation of anxiety in him, his family and friends, "most notably anxiety and concern over [his] unresolved case."

In *Barker*, the Supreme Court identified the following three interests to be protected: (1) oppressive pretrial incarceration; (2) anxiety and concern of the accused;

and, (3) the possibility that the defense will be impaired. *Barker*, 407 U.S. at 532. The most serious interest to be protected is the possibility that the defense will be impaired. *Id.* Generalized anxiety is accorded little weight compared to the actual impairment of a defendant's defense. *Brown v. State*, 153 Md. App. 544, 564 (2003), *cert. denied*, 380 Md. 618 (2004).

In the case at hand, the pretrial incarceration was not oppressive because appellant was serving a three-year sentence in another matter. Accordingly, he was in no different position as a result of the charges against him in this case. More importantly, appellant does not contend, and the record is devoid of any evidence to suggest, that his defense was impaired. This factor does not weigh heavily in favor of appellant.

E. Balancing of the Factors

Our independent review of the record as a whole, and our balancing of the four required factors of *Barker*, convince us that appellant's constitutional right to a speedy trial was not violated. Although the total amount of delay was of constitutional significance, it was not particularly egregious. Much of the delay was occasioned by appellant's requests for postponements. There is absolutely no indication that the State intentionally attempted to delay the trial or that the defense was impeded by the delay. Further, appellant was incarcerated on another charge while awaiting trial in the instant case. After balancing all of the required factors, we conclude that the circuit court did not

err in denying appellant's motion to dismiss for violation of his constitutional right to a speedy trial.

II.

Appellant next contends that his federal and state constitutional rights of confrontation were violated when his medical records, which contained a laboratory test result showing his blood alcohol concentration, were admitted in evidence even though the person who drew the blood and the analyst who performed the blood test did not testify at trial. Appellant maintains that the medical records which contained the blood test "were formalized by the certification and solemn affirmation under the penalty of perjury by the Director of Health Information Management at the University of Maryland Medical Center" that accompanied them.

At trial, defense counsel argued that admitting appellant's medical records "solely as a business record" denied appellant the ability to confront the individuals who generated the toxicology report. He asserted that the toxicology report was testimonial and that the blood work was not germane to the medical treatment that was rendered to appellant as a result of the subject accident. In support of his argument that the blood work was not germane to his medical treatment, appellant pointed to Dr. Gens's testimony that the blood test was done for the secondary purpose of identifying patients who have alcohol issues.

The State maintained that the toxicology report was not testimonial because appellant's blood was drawn for medically germane purposes and the medical records were authenticated by the certification provided by the hospital. That certification appeared as a cover page to the medical records. It was signed by Eugene Jones, the Director of Health Information Management at the University of Maryland Medical Center, and provided, in relevant part:

> I do hereby certify and solemnly affirm under the penalties of perjury that to the best of my knowledge, information and belief, the enclosed medical records are an accurate reproduction of the medical record pertaining to:
>
> Name: Antoni Pedzich
> Date of birth: 9/3/57
>
> These records were created and kept in the course of the regularly conducted business activity, as regular practice of that business activity. These records were made at or near the time of the occurrence of the matters set forth, by and from information transmitted by a person with knowledge of those matters. These records are housed in the Health Information Management Department of the University of Maryland Medical System from the time of patient discharge or release. Both inpatient and outpatient records are housed in one medical record.
>
> To the best of my knowledge, these records are the complete medical record of this patient. I further certify that I am the Custodian of said record.

A. Preservation

The State argues, preliminarily, that appellant's contention is not preserved properly for our consideration because he did not specifically argue below that the

certification signed by Jones rendered the medical records sufficiently formalized so as to make the toxicology report testimonial in nature. We disagree. Not only did the prosecutor reference the certification specifically, but defense counsel asserted that the toxicology report has "an associated formality similar to what Justice Thomas seems to think you would need in *Williams* [*v. Illinois*, ___ U.S. ___, 132 S.Ct. 2221 (2012)] [], to be able to confront." The trial judge rejected the argument that the toxicology report qualified as testimonial evidence stating, in part, that there was "no signed statement," that "what's on this document certainly lacks the [solemnity] of an affidavit or deposition," and that the report was "neither sworn nor a certified declaration of fact."

Pursuant to Md. Rule 8-131(a), we ordinarily will not consider any point or question not plainly raised or decided by the trial court. *See Fitzgerald v. State*, 384 Md. 484, 505 (2004); *Taylor v. State*, 381 Md. 602, 612 (2004); *Conyers v. State*, 354 Md. 132, 148 (1999). One of the primary purposes of that rule is to "require counsel to bring the position of their client to the attention of the lower court at the trial so that the trial court can pass upon, and possibly correct, any errors in the proceedings[.]" *Fitzgerald*, 384 Md. at 505.

In the instant case, defense counsel made many arguments in opposition to the admission of the toxicology report, including that it was sufficiently formalized to be testimonial in nature and, as a result, appellant had a right of confrontation. The only signed statement of any kind discussed below was the certification signed by Jones. The

trial judge specifically rejected the argument that there was a signed statement that constituted a sworn or certified declaration of fact or had "the [solemnity] of an affidavit or deposition." As the court clearly considered and decided the issue below, we hold that it was preserved for our consideration.

B. Testimonial Nature of the Toxicology Report

The Sixth Amendment to the United State Constitution provides, in part, that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. The Confrontation Clause is applicable to the States by virtue of the Fourteenth Amendment. *See Pointer v. Texas*, 380 U.S. 400, 403 (1965). Article 21 of the Maryland Declaration of Rights similarly provides that "in all criminal prosecutions, every man hath a right . . . to be confronted with the witnesses against him." Md. Decl. Rts., Art. 21. A determination of whether the admission of a statement was proper under the Confrontation Clause is a question of law that we review *de novo*. *Langley v. State*, 421 Md. 560, 567 (2011).

Prior to 2004, the Supreme Court held that the Confrontation Clause allowed admission of an out-of-court statement against a criminal defendant if the statement fit "within a firmly rooted hearsay exception" or bore "particularized guarantees of trustworthiness." *Ohio v. Roberts*, 448 US. 56, 66 (1980). That understanding was rejected when, in *Crawford v. Washington*, the Supreme Court held that an accused's right to confront witnesses applied to all out-of-court statements that are "testimonial."

Crawford v. Washington, 541 U.S. 36, 68 (2004). The *Crawford* Court held that "[t]estimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine." *Id.* at 59. After reviewing and analyzing the history of the Confrontation Clause, the Court concluded "that the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." *Id.* at 53-54. Stated otherwise, "[w]here testimonial evidence is at issue [] the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." *Id.* at 68.

The Supreme Court did not determine what constituted a "testimonial" statement. It did, however, note as follows:

> Various formulations of this core class of "testimonial" statements exist: *ex parte* in-court testimony or its functional equivalent–that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially[;] extrajudicial statements . . . 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[.]

Crawford, 541 U.S. at 51-52 (internal quotations and citations omitted).

According to *Crawford*, statements need not be taken under oath to be testimonial. The Court noted that unsworn statements taken by police officers during the course of an

interrogation are testimonial because they bear "a striking resemblance to examinations by justices of the peace in England." *Id.* at 52. *Crawford* established a new three-part test for determining whether the Confrontation Clause was violated that required courts to determine: (1) whether the statement was testimonial, (2) whether the witness was unavailable to testify and (3) whether there was a prior opportunity for cross-examination. *Id.* at 68.

Since *Crawford*, the Supreme Court has considered a number of cases involving forensic reports. In *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009), a case involving the distribution and trafficking of cocaine, the State did not call the forensic analysts to testify that a substance found in Melendez-Diaz's possession was cocaine. *Id.* at 308-09. As a result, the defendant did not have an opportunity to cross-examine the analysts. *Id*. Rather, the State submitted notarized "certificates of analysis" from the analysts stating that the drugs tested were, in fact, cocaine. *Id.* at 308. The trial court admitted the certificates of analysis in evidence and the defendant was convicted. *Id.* at 309.

In a five-to-four decision reversing the conviction, the Supreme Court held that the certificates fell "within the 'core class of testimonial statements'" and were, therefore, inadmissible. *Id.* at 310. The Court determined that the lab reports were "plainly affidavits" that constituted testimonial statements because they were "declaration[s] of facts written down and sworn to by the declarant before an officer authorized to

administer oaths." *Id.* The reports were also "solemn declaration[s] or affirmation[s] made for the purpose of establishing or proving some fact" 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." *Id.* at 310-11. The Court concluded that the reports were "functionally identical to live, in-court testimony, doing precisely what a witness does on direct examination." *Id.* As a result, the analysts constituted witnesses against the defendant and, absent a showing that they were unavailable to testify at trial and that the defendant had a prior opportunity to cross-examine them, the defendant was entitled to confront them at trial. *Id.* at 311.

In 2011, the Supreme Court considered whether the Confrontation Clause permitted the prosecution to introduce a forensic laboratory report containing a testimonial certification through the in-court testimony of a scientist who did not sign the certification or perform or observe the test reported in the certification. *Bullcoming v. New Mexico*, ___ U.S. ___, 131 S.Ct. 2705, 2710 (2011). In *Bullcoming*, the defendant was arrested and charged with driving while intoxicated. *Id.* ___U.S. ___, 131 S.Ct. at 2710. Police obtained a sample of the defendant's blood, and analysts at a laboratory run by New Mexico's Department of Health used gas chromatograph machines to identify and quantify the defendant's blood alcohol concentration level. *Id.* at ___, 131 S.Ct. at 2711. The test results were recorded on a form that included a certificate signed by the forensic analyst who was assigned to test the blood sample and an affirmation that

provided, among other things, the blood alcohol concentration, a statement that the proper procedures were followed, and a certification that the analyst was qualified to conduct the test. *Id.* at ___, 131 S.Ct. at 2710-11. There was also a section where an examiner from the laboratory certified that the forensic analyst who conducted the test was qualified and that established procedures for handling and analyzing the sample had been followed. *Id.* at ___, 131 S.Ct. at 2711.

At trial, the State did not call either the examiner or the forensic analyst as a witness. *Id.* Over objection, the trial court admitted the blood test report as a business record during the testimony of a scientist from the laboratory who had neither observed nor reviewed the forensic analysts's work. *Id.* at ___, 131 S.Ct. at 2712.

The New Mexico Supreme Court affirmed the defendant's conviction. Although the Court acknowledged that the report was testimonial, it concluded that the substitute analyst who testified at trial served as a surrogate witness, such that there was no violation of the defendant's right of confrontation. *Id.* at ___, 131 S.Ct. at 2713.

The United States Supreme Court reversed and held that the "surrogate testimony" did not meet the constitutional requirement of confrontation. *Id.* at ___, 131 S.Ct. at 2710. In finding the report to be testimonial, the Court noted that the documents were "created solely for an 'evidentiary purpose' made in aid of a police investigation." *Id.* at ___, 131 S.Ct. at 2717. It underscored the similarities with the certifications in *Melendez-Diaz*, noting that the analysts in both cases "tested the evidence and prepared certificates

concerning the results" which were "'formalized' in a signed document." *Id.* at ___, 131 S.Ct. at 2717. The Court concluded that the report in *Bullcoming* was sufficiently formalized so as to render its contents testimonial. *Id.* at ___, 131 S.Ct. at 2714. The Court held that the surrogate witness did not satisfy the defendant's confrontation rights because the surrogate's testimony "could not convey what [the forensic analyst] knew or observed about the events his certification concerned, *i.e.*, the particular test and testing process he employed." *Id.* at ___, 131 S.Ct. at 2715.

More recently, the Supreme Court addressed the admissibility of forensic evidence in light of the Confrontation Clause in *Williams v. Illinois*, ___ U.S. ___, 132 S.Ct. 2221 (2012). In *Williams*, the defendant was convicted of, among other things, sex-related crimes. ___ U.S. ___, 132 S.Ct.at 2227-31. After a sexual assault, the victim was taken to a hospital where blood samples and vaginal swabs were collected using a sexual assault kit. *Id.* ___ U.S. at ___, 132 S.Ct. at 2229. The vaginal swabs were sent to Cellmark Diagnostics Laboratory ("Cellmark"), which produced a report containing a male DNA profile produced from semen taken from the vaginal swabs. *Id.* A computer search by State police later revealed a match to a DNA profile belonging to the defendant. *Id.* After the victim identified the defendant in a line up, the defendant was indicted and eventually convicted. *Id.*

The Confrontation Clause issue in *Williams* involved the DNA profile produced by Cellmark. That profile was discussed at trial during the testimony of a police analyst who

matched the Cellmark profile to the defendant's DNA that she had obtained from a buccal swab. *Id.* at ___, 132 S.Ct. at 2227, 2240, 2243-44. In rendering her opinion that the Cellmark profile matched the DNA profile of the defendant that she herself had prepared, the police analyst used information from the Cellmark DNA profile that was created from crime scene samples by another analyst. *Id.* at ___, 132 S.Ct. at 2240, 2243-44.

A plurality opinion by Justice Alito, joined by Chief Justice Roberts and Justices Kennedy and Breyer, included several rationales for concluding that the defendant's right of confrontation was not violated by the police analyst's reliance on the Cellmark profile. Justice Alito's analysis, however, was criticized by a majority of the Court, including Justice Thomas, who joined in the judgment but disavowed the reasoning. *Id.* at ___, 132 S.Ct. at 2255. Justice Thomas concluded that the disclosure of Cellmark's out-of-court statements through the expert testimony of the analyst who performed the DNA match did not violate the Confrontation Clause "because Cellmark's statements lacked the requisite 'formality and solemnity' to be considered 'testimonial' for purposes of the Confrontation Clause." *Id.* (quoting *Michigan v. Bryant*, 562 U.S. 344, 131 S.Ct. 1143 (2011)) (Thomas, J., concurring in judgment).

Justice Alito's four-justice plurality opinion concluded (1) that there had been no Confrontation Clause violation because the reference to the Cellmark report was not an assertion that the information in that report was true and (2) that the report was not testimonial because it was not produced for the primary purpose of accusing a specific,

known defendant. *Williams*, ___ U.S. at ___, 132 S.Ct. at 2240, 2243-44. In a four-justice dissent, Justice Kagen concluded that the report was testimonial because it was intended to serve as evidence in a criminal trial and that the manner of its introduction failed to satisfy the defendant's confrontation rights. *Id.* at ___, 132 S.Ct. at 2267-68.

Recently, in *Derr v. State*, 434 Md. 88, 116 (2013), Maryland's Court of Appeals expressed its understanding of the holding in *Williams* and concluded that "courts should rely on Justice Thomas's concurrence to determine whether a statement is formalized." *Derr*, 434 Md. at 116 (hereinafter "*Derr II*"). In reaching that conclusion, the Court of Appeals stated:

> The plurality opinion [in *Williams*] expressed that statements are testimonial when they both have "the primary purpose of accusing a targeted individual of engaging in criminal conduct" and are formalized statements such as affidavits, depositions, prior testimony, or confessions." Justice Thomas's concurrence expressed that for statements to be testimonial both "the declarant must primarily intend to establish some fact with the understanding that his statement may be used in a criminal prosecution,"and the statements must "bear[] [an] indicia of solemnity." Those statements, Justice Thomas explained, include "formalized testimonial materials, such as depositions, affidavits, and prior testimony, or statements resulting from formalized dialogue, such as custodial interrogation. The common point of agreement between the plurality opinion and Justice Thomas's concurring opinion is that statements must, at least, be formalized, or have "indicia of solemnity" to be testimonial. Therefore, we conclude that the narrowest holding of *Williams* is that a statement, at a minimum, must be formalized to be testimonial.

Id. at 114-115.

In *Derr II*, the defendant, Norman Bruce Derr, was convicted of multiple sexual offenses relating to the rape of a woman in 1984. *Derr II*, 434 Md. at 98. After the

sexual assault, the victim was transported to a hospital where she was examined by medical personnel who, using a rape kit, collected evidence including a blood sample, a genital swab, two vaginal swabs, and an anal swab. *Id.* That evidence was sent to the Federal Bureau of Investigation ("FBI") laboratory for serological testing. *Id.* In 1985, a serological examiner identified sperm and semen on parts of the swabs and detailed the findings in serological examination notes. *Id.* The case remained unsolved and became inactive. *Id.*

In 2002, the sheriff's office submitted the rape kit to the FBI laboratory for additional forensic analysis. *Id.* The laboratory generated a DNA profile of the suspect from the DNA in the biological material on the vaginal swabs. *Id.* The DNA profile was entered in the FBI's national database and in 2004, a match was discovered between the DNA profile and Derr's existing profile. *Id.* at 98-99. Pursuant to a search warrant, the sheriff's office obtained a buccal swab from Derr which was sent to the FBI laboratory in order to create a new "reference DNA sample" and to verify that Derr's profile was accurate. *Id.* at 99. Ultimately, Derr was charged with five counts of sex-related crimes. *Id.*

At trial, Jennifer Luttman, a forensic DNA examiner for the FBI, testified as an expert in forensic serology and forensic DNA analysis. She testified that her role included making comparisons between known and unknown DNA samples. *Id.* at 100.

With regard to Derr's DNA, Luttman's "team" had participated in the actual analysis of some, but not all of the DNA, and Luttman formed her conclusions after reviewing the "bench work" of the DNA analysis conducted by her team and that which was performed by analysts she did not supervise. *Id.* Over objection, the DNA profile produced in 2004 and the results of the DNA testing and the profiles developed from the 2002 DNA test were entered in evidence. *Id.* at 100-01. Luttman concluded that Derr was the source of the DNA found on the vaginal swabs to a reasonable degree of scientific certainty. *Id.* at 102.

Luttman did not conduct or supervise the 1985 serological testing or the 2002 DNA testing of the rape kit, nor did she perform the actual DNA testing in 2004. *Id.* at 101-02. There was no indication at trial that she observed the bench work at the time it was performed by her team. *Id.* The results of those tests, however, formed the basis for her testimony, in court, that Derr was the source of the DNA found on the victim. *Id.* at 102.

After he was convicted, Derr appealed to this Court, where he challenged his convictions on numerous grounds. Prior to our decision in the case, the Court of Appeals granted *certiorari* on its own motion. *Derr II*, 434 Md. 88, 96 (2013). After supplemental briefing and oral argument, the Court of Appeals considered Derr's claim that his constitutional right of confrontation was violated. The Court concluded that, although Luttman relied upon 1985 serological examination notes, test results and DNA

profiles from the 2002 DNA test, and results from the 2004 DNA test of Derr's buccal swab, that information was not testimonial and introduction of the test results as a basis for Luttman's in-court testimony did not offend Derr's right to confront witnesses. *Id.* at 105.

In reaching that conclusion, the Court of Appeals noted that "none of the challenged forensic test results" were sufficiently formalized to be testimonial. *Id.* at 118. The Court explained:

> Notably, the serological exam results are not sufficiently formalized to be testimonial. The exhibit in the record pertaining to the serological examination appears to be the notes from the bench work of the serological examiner. There are no signed statements or any other indication that the results or the procedures used to reach those results were affirmed by any analyst, examiner, supervisor, or other party participating in its development. Like the Cellmark report at issue in *Williams*, the serological examiner's notes "lack[ ] the solemnity of an affidavit or deposition, for [they are] neither a sworn nor a certified declaration of fact[,]" nothing on the notes "attest[s] that [their] statements accurately reflect the . . . testing processes used or the results obtained[,]" there is no signed statement from a person who did the test or someone "certify[ing] the accuracy of those who did" and, although the serological examination was performed "at the request of law enforcement," the results are "not the product of any sort of formalized dialogue resembling custodial interrogation."

Id. at 118-19 (citations omitted).

Maryland appellate courts have addressed similar issues in *Cooper v. State*, 434 Md. 209 (2013), *Malaska v. State*, 216 Md. App. 492 (2014), *cert. denied*, 439 Md. 696 92014 and *Norton v. State*, 217 Md. App. 388 (2014). In *Cooper*, the Court of Appeals applied Justice Thomas's reasoning and concluded that a DNA report that was developed

at the request of the police, but not as the result of a formal police interrogation, that did not contain any certification or affirmation concerning the accuracy of the test results, was not sufficiently formalized to be testimonial. *Cooper*, 434 Md. at 236.

We reached a contrary result in *Malaska*, in which we held that an autopsy report that contained the signatures of several doctors who participated in the autopsy, as well as the signature of the Chief Medical Examiner, was sufficiently formalized to be "testimonial" for purposes of the Confrontation Clause. *Malaska*, 216 Md. App. at 510-11.

Similarly, in *Norton*, we held that a signed DNA report that included language guaranteeing "'within a reasonable degree of scientific certainty' that Norton [was] the major source of the biological material obtained from" [a] ski mask," was sufficiently formalized to render it testimonial. *Norton*, 217 Md. App. at 404-05. We noted that the report "was intended to be an authoritative, accurate document, prepared in conformity with specific federal standards and based upon specific, validated procedures." *Id.* at 405. That report was admitted through the testimony of an expert witness who acknowledged that "he had not performed any analysis of Norton's DNA sample, but merely reviewed the report and associated lab notes and data after the analysis was performed." *Id.* Relying on *Bullcoming*, we held that such surrogate testimony did not meet the constitutional requirement. *Id.*

In the case *sub judice*, there was no statement at all from the analyst who conducted the blood test and there was no certification or affirmation attesting to the

accuracy of the result. The sole certification in the record was provided by Jones, the custodian of records for the University of Maryland Medical System, who certified that appellant's medical records were created and kept in the normal course of business. Jones's certification did not establish who tested appellant's blood or discuss in any way the procedures used in the testing process. As the State asserts, Jones's certification merely met the requirements of Md. Rule 5-803(b)(6) to allow admission of a business record. There is nothing before us to suggest that Jones was personally involved in testing appellant's blood or that he had any personal knowledge of that test.

Moreover, while the *Williams* Court expressed that statements are testimonial when they are both formalized and when they have the primary purpose of accusing a targeted individual of engaging in criminal conduct, the evidence presented at trial established that appellant's blood was drawn for the purpose of medical treatment. Dr. Gens testified that appellant's blood was drawn for medically germane purposes including concern about alcohol withdrawal and to identify and obtain treatment for patients who have alcoholism. For all these reasons, we hold that the toxicology report contained in appellant's medical records was not sufficiently formalized to be testimonial for purposes of the Confrontation Clause.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.