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## **[Court of Appeals of Maryland Affirms Deathbed Blink an Admissible Identification](#)**



As previously [discussed in this blog](#), in the spring of 2014, the Maryland Court of Special Appeals in *State v. Hailes*,<sup>[1]</sup> made important rulings regarding several evidentiary issues. The *Hailes* court held that a “hard blink” can be a statement, that a “Dying Declaration” does not require *actual* imminent death, only a belief of imminent death, and that the Confrontation Clause of the Sixth Amendment does not suppress a dying declaration.<sup>[2]</sup> After further appeal, the Court of Appeals of Maryland recently [affirmed that decision](#).

On November 22, 2010, Melvin Pate was shot once in the right side of his face. The bullet passed through Pate’s neck and severed his spinal cord. Pate lost the ability to speak and to could no longer move any of his extremities. Two days after Pate was shot he was transferred to the Shock Trauma Center at the University of Maryland Medical Center in Baltimore. Immediately after Pate arrived at Shock Trauma doctors told him that he had twenty-four hours to live. His eyes welled up with tears.

Two days later, on November 26, 2010, detectives showed Pate a photographic array that included a photo of Hailes. Pate “blinked hard” when shown a photo of Jermaine Hailes, thereby identifying him as his assailant. When Pate blinked, his prognosis had not changed, he was on medical life support, and “by all indications, believed that his death was imminent.”<sup>[3]</sup> Nonetheless, Pate survived for two more years, eventually passing away on November 27, 2012 as a result of complications caused by the gunshot wound. Hailes was indicted for first-degree murder on December 11, 2012.<sup>[4]</sup>

In the trial court, Hailes moved to suppress Pate’s out-of-court identification, alleging that Pate could not “communicate,” that Pate’s hard blink was not a dying declaration, and that such an identification violated Hailes’ rights under the Confrontation Clause of the Sixth Amendment.<sup>[5]</sup> Hailes prevailed on his motion and the State took an interlocutory appeal.<sup>[6]</sup> For the first time in Maryland, the court had

to determine whether a hard blink was an admissible Dying Declaration and whether its use violated Hailes' Sixth Amendment Rights.

The Court of Special Appeals first held that blinking "is a legally acceptable mode of communication."<sup>[7]</sup> The Court of Special Appeals then went on to say that the actual time of death is immaterial, and that the necessary element is a subjective one – the declarant's expectation of imminent death.<sup>[8]</sup> After recognizing that Pate's hard blink amounted to a dying declaration, the court turned to whether its admission would violate the Sixth Amendments' Confrontation Clause. After analyzing the Supreme Court's decision in *Crawford v. Washington*,<sup>[9]</sup> the court held that the Confrontation Clause does not apply to Dying Declarations so the Clause's various requirements need not be addressed, let alone satisfied.

In affirming the Court of Special Appeals, the Court of Appeals agreed that Pate's identification was a "communication"; it agreed that Pate's hard blink amounted to a Dying Declaration; and that a Dying Declaration was indeed an exception to the Sixth Amendment.

The Court of Appeals reviewed the factual evidence for clear error. It held that the trial court was correct in determining that Pate's identification of Hailes was a dying declaration. The Court stated that it was undisputed that: Pate was shot in the face, that Pate lost the ability to speak and move, that a doctor told his mother in front of him that he "wouldn't make it," and that Pate's eyes welled up with tears.<sup>[10]</sup> The Court of Appeals was, likewise, "unconvinced" by Hailes' reliance on the fact that Pate died two years after he identified Hailes.

The Court then moved on to its analysis of the Confrontation Clause. In reviewing historic precedent, the Court of Appeals affirmed the Court of Special Appeals and ruled that "we reach the same conclusion that Supreme Court has consistently endorsed for more than a century, and hold that the Confrontation Clause does not apply to dying declarations."<sup>[11]</sup> The Court then went on to say that "although it is accurate that, in *Crawford* and its progeny, the Supreme Court has not yet held that the Confrontation Clause does not apply to dying declarations, our holding is entirely consistent with *Crawford* and its progeny."<sup>[12]</sup> Dying declarations were an exception to the common law Right of Confrontation when the Sixth Amendment was ratified, and remain so today. The Court, like the Court of Special Appeals then declined to address whether Pate's identification of Hailes was testimonial or non-testimonial.<sup>[13]</sup>

The law in the State of Maryland is now settled.

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<sup>[1]</sup> *State v. Hailes*, 217 Md. App. 212, 92 A.3d 544 cert. granted, 440 Md. 114, 99 A.3d 778 (2014) and *aff'd*, 442 Md. 488, 113 A.3d 608 (2015).

<sup>[2]</sup> *Id.*

<sup>[3]</sup> *Hailes v. State*, 442 Md. 488, 493-94, 113 A.3d 608, 611 (2015).

<sup>[4]</sup> *State v. Hailes*, 217 Md. App. 212, 219, 92 A.3d 544 cert. granted, 440 Md. 114, 99 A.3d 778 (2014) and *aff'd*, 442 Md. 488, 113 A.3d 608 (2015).

[5] *Id.*

[6] The court of special appeals determined that the State's appeal was authorized because it arose from constitutional grounds. *Id.* at 220-21, *citing to* Md. Code, Courts and Judicial Proceedings § 12-302(c)(3).

[7] *Id.* at 233.

[8] *Id.* at 234.

[9] *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

[10] *Hailes v. State*, 442 Md. 488, 502, 113 A.3d 608 (2015).

[11] *Id.* at 510.

[12] *Id.* at 510.

[13] *Id.* at 513-14.

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