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No Witness? No Admission: The Tale of Testimonial Statements and *Melendez-Diaz v. Massachusetts*

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No Witness? No Admission: The Tale of Testimonial Statements and *Melendez-Diaz v. Massachusetts*

In *Melendez-Diaz v. Massachusetts*,[1] the United States Supreme Court held that the Massachusetts trial court's admission into evidence of forensic "certificates of analysis" violated the Confrontation Clause of the Sixth Amendment.[2] Following *Crawford v. Washington*,[3] the Supreme Court held that the accused has a right to be confronted with the forensic analysts at trial unless "the analysts [are] unavailable to testify at trial" and the accused "had a prior opportunity to cross-examine" the analysts.[4] *Melendez-Diaz* will have an important impact on criminal evidence procedure, specifically in regard to the potential growth of notice-and-demand statutes.

1. 129 S. Ct. 2527 (2009).
2. *Id.* at 2530–32. The Confrontation Clause of the Sixth Amendment to the United States Constitution states 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.
3. 541 U.S. 36 (2004).
4. *Melendez-Diaz*, 129 S. Ct. at 2532.

I. FACTUAL BACKGROUND

In 2001 Luis Melendez-Diaz was arrested with two other men outside of a K-Mart in Boston, Massachusetts. While being transported to the police station, the police officers observed the passengers fidgeting in the back seat of the police cruiser. Upon arrival at the police station, the police officers searched the back seat of the cruiser and discovered nineteen small plastic bags hidden in the seat.[5] Per police request, the bags were submitted to a state laboratory for chemical analysis in accordance with state law.[6] After the laboratory confirmed that the bags contained cocaine, Melendez-Diaz was charged with cocaine distribution and trafficking.[7]

During trial, the prosecution placed into evidence three "certificates of analysis" that showed the forensic analysis results of the plastic bags discovered in the police cruiser.[8] Relying on the United States Supreme Court's application of the Confrontation Clause in *Crawford v. Washington*,[9] Melendez-Diaz objected to the prosecution's admission of the certificates into evidence because the prosecution failed to produce the analysts who had conducted the testing as witnesses at trial.[10] The trial court overruled the objection, however, and admitted the certificates into evidence "as 'prima facie evidence of the . . . narcotic . . . analyzed.'"[11] Melendez-Diaz was subsequently found guilty by a jury.[12]

Melendez-Diaz appealed the trial court's ruling, asserting that the "admission of the certificates violated his Sixth Amendment right[s]," namely, the "right to be confronted with the witnesses against him."[13] Citing *Commonwealth v. Verde*,[14] a decision by the Supreme Judicial Court of Massachusetts, the Appeals Court of Massachusetts rejected Melendez-Diaz's claim, reaffirming that "the authors of certificates of . . . analysis are not subject to confrontation under the Sixth Amend-

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5. Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527, 2530 (2009).
6. *Id.* (citing MASS. ANN. LAWS, ch. 111, § 12 (LexisNexis 2004)).
7. *Id.*
8. *Id.* at 2531.
9. 541 U.S. 36 (2004).
10. *Melendez-Diaz*, 129 S. Ct. at 2531.
11. *Id.* (quoting MASS. ANN. LAWS, ch. 111, § 13 (LexisNexis 2004)) (second alteration in original).
12. *Id.*
13. *Id.*
14. 827 N.E.2d 701 (Mass. 2005). In *Commonwealth v. Verde*, the Massachusetts Supreme Judicial Court held that "drug certificates are well within the public records exception to the confrontation clause." *Id.* at 705.

ment."[15] The supreme judicial court denied review, but the United States Supreme Court granted certiorari.[16]

The Supreme Court held that admitting the certificates into evidence without offering the analysts as witnesses at trial violated Melendez-Diaz's right to confront the witnesses against him under the Confrontation Clause of the Sixth Amendment.[17]

II. LEGAL BACKGROUND

A. *Ole' Reliable: Ohio v. Roberts*

For nearly a quarter of a century after the United States Supreme Court's ruling in *Ohio v. Roberts*,[18] the "indicia of reliability" test determined whether or not a declarant's statements violated the Confrontation Clause.[19] Following the *Roberts* test, when a witness was unavailable for cross-examination by the defendant at trial, the Confrontation Clause required both a showing that the witness was unavailable and proof that the witness's statements bore an "indicia of reliability."[20] Under the test, reliability could be established by either evidence that fell "within a firmly rooted hearsay exception" or by evidence that showed "particularized guarantees of trustworthiness."[21]

In *Roberts* the defendant was charged with forgery and possession of stolen credit cards. At Roberts's preliminary hearing, Anita Isaacs was called as the defense's witness but was never cross-examined by the defense counsel. Following the preliminary hearing, Roberts was indicted on all charges. At trial, Anita's preliminary testimony was offered by the prosecution as evidence of Roberts's guilt. Roberts objected to the use of the transcript, claiming a violation of his Sixth Amendment right under the Confrontation Clause. Nevertheless, the transcript was admitted and Roberts was convicted on all charges.[22]

The Court of Appeals of Ohio reversed, stating that the prosecution failed to make a "good-faith effort" to ensure that Anita appeared at trial.[23] The Ohio Supreme Court concluded that the defendant's prior opportunity to cross-examine Anita at the preliminary hearing did not

15. *Melendez-Diaz*, 129 S. Ct. at 2531 (citing *Verde*, 827 N.E.2d at 705–06).
16. *Id.*
17. *Id.* at 2532, 2542.
18. 448 U.S. 56 (1980), *overruled by* Crawford v. Washington, 541 U.S. 36 (2004).
19. *Id.* at 66.
20. *Id.*
21. *Id.*
22. *Id.* at 58–60.
23. *Id.* at 60 (internal quotation marks omitted).

destroy the defendant's right to confrontation at trial.[24] The United States Supreme Court reversed, holding "that Anita was constitutionally unavailable for purposes of [Roberts's] trial,"[25] and the transcript of Anita's preliminary testimony "bore sufficient 'indicia of reliability.'"[26]

In holding that Anita was constitutionally unavailable, the Supreme Court relied on the reasoning of several previous decisions construing the test of Sixth Amendment unavailability. Under the test, the prosecution must make a reasonable, good-faith effort to present the witness at trial before the witness is considered unavailable.[27] Following similar reasoning in *Mancusi v. Stubbs*,[28] the Supreme Court concluded that the prosecution's efforts to find Anita were made in good faith because, after numerous subpoenas and communications with Anita's parents months before trial, "Anita's whereabouts were [still unknown] and there was no assurance that [if found] . . . she could be forced to" appear in court.[29]

The Supreme Court relied on its reasoning in *California v. Green*[30] in holding that there was sufficient "indicia of reliability" in the transcript of Anita's preliminary testimony.[31] In *Green* several factors were presented to establish reliability: (1) the statements made at preliminary hearings are given under circumstances very similar to a typical trial, (2) the defendant had the opportunity to cross-examine witnesses about the statements made, and (3) the "'proceedings [are] conducted before a judicial tribunal [that] provide[s] a judicial record of the hearings.'"[32] Following similar reasoning, the Supreme Court concluded that because Roberts had a sufficient opportunity to cross-examine Anita at his preliminary hearing, and because his attorney questioned Anita, there was clear "indicia of reliability," which allowed the trial court to evaluate the truth of the witness's statement.[33]

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24. *Id.* at 61–62. The Ohio Supreme Court's ruling, although subsequently reversed by the United States Supreme Court, was already in conflict with the United States Supreme Court's prior decision in *Mattox v. United States*, 156 U.S. 237, 244 (1895) (holding that preliminary hearing testimony is admissible provided that the defendant had an adequate prior opportunity to cross-examine the witness).

25. *Roberts*, 448 U.S. at 77.

26. *Id.* at 73 (quoting Mancusi v. Stubbs, 408 U.S. 204, 216 (1972)).

27. *Id.* at 74 (citing Barber v. Page, 390 U.S. 719, 724–25 (1968)).

28. 408 U.S. 204 (1972).

29. *Roberts*, 448 U.S. at 75–77.

30. 399 U.S. 149 (1970).

31. *Roberts*, 448 U.S. at 69.

32. *Id.* (quoting *Green*, 399 U.S. at 165).

33. *Id.* at 73.

For nearly a quarter of a century, the holding in *Roberts* remained the foundation for determining whether admitting a declarant's statements into evidence violated a defendant's right to confrontation. The Supreme Court reconsidered the *Roberts* test in *Crawford v. Washington*[34] and overruled more than two decades of precedent, holding that admission based on a mere finding of reliability "is fundamentally at odds with the right to confrontation."[35]

B. Confrontation Today: The Crawford Approach

In 2004 the Supreme Court held in *Crawford v. Washington*[36] that when "testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is . . . confrontation."[37] In *Crawford* the defendant, Michael Crawford, was charged with assault and attempted murder. The prosecution offered into evidence tape-recorded statements given by Crawford's wife to police, asserting Crawford's guilt.[38] Crawford objected to admission of the recorded statements as a violation of his Sixth Amendment "right to be 'confronted with the witnesses against him.'"[39] The trial court admitted the statements, however, finding that the statements were trustworthy and thus complied with the *Roberts* test. The Washington Court of Appeals reversed, applying the *Roberts* test as well and finding that the statements were not trustworthy.[40] The Washington Supreme Court then reversed the court of appeals, applying the *Roberts* test yet again and unanimously concluding that the recorded statements "bore guarantees of trustworthiness."[41] As the United States Supreme Court later noted in its opinion, the failings of the *Roberts* test "were on full display."[42]

Acknowledging the inherent flaws in the *Roberts* test,[43] the United States Supreme Court granted certiorari to settle the dispute.[44] To determine the meaning of the Sixth Amendment's Confrontation Clause, the Supreme Court conducted a survey of the historical background of the Confrontation Clause, most notably the English common law trial of

34. 541 U.S. 36 (2004).
35. *Id.* at 61.
36. 541 U.S. 36 (2004).
37. *Id.* at 68–69.
38. *Id.* at 40.
39. *Id.* (quoting U.S. CONST. amend. VI).
40. *Id.* at 41.
41. *Id.*
42. *Id.* at 65.
43. *Id.* at 65–66.
44. *Id.* at 42.

Sir Walter Raleigh[45] and the American colonial "declarations of rights adopted [during] . . . the Revolution."[46] Finding historical support for a common law right of confrontation, the Supreme Court noted two principles inferred from this history: (1) the Confrontation Clause was primarily directed at the "use of *ex parte* examinations as evidence against the accused,"[47] and (2) the Framers would have only allowed testimonial statements of a witness who did not appear at trial if the witness "was unavailable to testify[] and the defendant had had a prior opportunity for cross-examination."[48]

Applying these principles, the Supreme Court reasoned that the text of the Confrontation Clause is not implicated by all hearsay, but only by "'testimonial' statements."[49] The Court established three different formulations of testimonial statements: "*ex parte* in-court testimony or its functional equivalent,"[50] "extrajudicial statements . . . contained in formalized testimonial materials,"[51] and "statements . . . made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial."[52] Having established what testimonial statements were, the Court went on to note that for the most part, "case law ha[d] been largely consistent with these" formulations of testimonial statements.[53]

Despite this consistency, the Supreme Court acknowledged that the rationale employed by it had not been consistent, referring specifically to *Roberts* and the Court's use of the notion of reliability.[54] The Court rejected the reasoning used in *Roberts*, stating that the right to confrontation is a procedural guarantee rather than a substantive one.[55] Moreover, the Court noted that the Confrontation Clause's goal of reliability of testimonial statements can only be achieved by cross-examination—the right to confrontation—not "judicial determination."[56]

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45. *Id.* at 44. Sir Walter Raleigh was convicted of treason, and although he argued that he had a right to confront the witness against him, "[t]he judges refused . . . and Raleigh was sentenced to death." *Id.* English law eventually "developed a right of confrontation," although for Sir Raleigh it was several decades too late. *See id.*

46. *Id.* at 48.

47. *Id.* at 50.

48. *Id.* at 53–54.

49. *Id.* at 51.

50. *Id.* (internal quotation marks omitted).

51. *Id.* at 51–52 (alteration in original) (internal quotation marks omitted) (quoting White v. Illinois, 502 U.S. 346, 365 (1992) (Thomas, J., concurring in part)).

52. *Id.* at 52 (internal quotation marks omitted).

53. *Id.* at 57.

54. *Id.* at 60.

55. *Id.* at 61.

56. *Id.* at 61–62.

As the Court noted, "[d]ispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes."[57]

The United States Supreme Court reversed the Washington Supreme Court.[58] Because Crawford had no opportunity to cross-examine his wife, the State had violated Crawford's right to confrontation by admitting his wife's testimonial statements.[59] The Court held that the right to confrontation requires that the witness whose testimonial statements are being offered be unavailable and the defendant have had a prior opportunity to cross-examine the witness.[60] The Court reasoned that when "testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation."[61]

Two years after *Crawford*, the Supreme Court elaborated on its definition of testimonial statements in *Davis v. Washington*,[62] holding that testimonial statements include statements taken as part of a police interrogation that were made with the primary purpose of establishing or proving past events relevant to future criminal prosecution.[63]

Although the Supreme Court stated the requirements for the admission of testimonial statements into evidence,[64] lower courts strayed from the Supreme Court's holdings in *Crawford* and *Davis*.[65] This waver prompted the Supreme Court to reaffirm *Crawford* by applying it in *Melendez-Diaz v. Massachusetts*.[66]

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57. *Id.* at 62. In dispensing with the *Roberts* test, the Court also pointed to the failure of the *Roberts* test to keep out testimonial statements "that the Confrontation Clause plainly meant to exclude" in the absence of the defendant's opportunity to cross-examine. *Id.* at 63. For example, the Confrontation Clause was designed to exclude "accomplice confessions implicating the accused," *id.* at 64 (citing United States v. Photogrammetric Data Servs., Inc., 259 F.3d 229, 245–46 (4th Cir. 2001)), "plea allocution[s] showing [the] existence of a conspiracy," *id.* (citing United States v. Aguilar, 295 F.3d 1018, 1021–23 (9th Cir. 2002)), "grand jury testimony," *id.* (citing United States v. Papajohn, 212 F.3d 1112, 1118–20 (8th Cir. 2000)), and "prior trial testimony," *id.* at 65 (citing State v. Bintz, 650 N.W.2d 913, 918–20 (Wis. Ct. App. 2002)).

58. *Id.* at 69.

59. *Id.* at 68.

60. *Id.*

61. *Id.* at 68–69.

62. 547 U.S. 813 (2006).

63. *Id.* at 822.

64. *Crawford*, 541 U.S. at 68.

65. *See, e.g.*, Magruder v. Commonwealth, 657 S.E.2d 113 (Va. 2008), *vacated and remanded sub nom.* Briscoe v. Virginia, 128 S. Ct. 2856 (2009) (mem.). For further discussion of the *Briscoe* case, see *infra* text accompanying notes 131–37.

66. 129 S. Ct. 2527 (2009).

III. COURT'S RATIONALE

In *Melendez-Diaz* the Supreme Court granted certiorari to consider whether a forensic analyst's certificates of analysis were testimonial statements and, therefore, under *Crawford v. Washington*,[67] subject to the defendant's Sixth Amendment[68] right of confrontation.[69]

A. No Witness? No Admission: The Majority

Justice Scalia's majority opinion addressed six key points: (1) a forensic analyst's certificates of analysis are "within the core class of testimonial statements";[70] (2) forensic analysts are witnesses against the defendant and, therefore, are subject to the defendant's "right to be confronted with the witnesses 'against him'";[71] (3) forensic analysts are conventional—typical or ordinary—witnesses, regardless of whether their testimony is voluntary or gathered through interrogation;[72] (4) forensic analyst reports might be considered neutral scientific testing, but the Constitution guarantees the defendant the right to challenge the reports through confrontation;[73] (5) because forensic analyst reports are created "for the sole purpose of providing evidence against a defendant" at trial, the reports are not admissible as official or business records;[74] and (6) even though a forensic analyst may be subpoenaed by a defendant, that fact does not remove the prosecution's burden of producing witnesses against the defendant.[75]

The Supreme Court began by explaining its previous holding in *Crawford* and acknowledging that this case was a straightforward application of that holding.[76] In *Crawford* the Supreme Court held that testimonial statements were covered under the Sixth Amendment Confrontation Clause and, therefore, such statements are inadmissible at trial unless the witness is unavailable and the defendant was able to

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67. 541 U.S. 36 (2004).

68. U.S. CONST. amend VI.

69. Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527, 2530 (2009).

70. *Id.* at 2532 (internal quotation marks omitted).

71. *Id.* at 2534 (quoting U.S. CONST. amend. VI).

72. *Id.* at 2534–35.

73. *Id.* at 2536. The Supreme Court relied on its original response to this argument in *Crawford v. Washington*, 541 U.S. 36 (2004), stating that "'[d]ispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty.'" *Id.* (quoting *Crawford*, 541 U.S. at 61–62).

74. *Melendez-Diaz*, 129 S. Ct. at 2538–40.

75. *Id.* at 2540.

76. *Id.* at 2531–33.

cross-examine the witness prior to trial.[77] Following *Crawford*'s core class of testimonial statements, the Supreme Court determined that forensic analyst reports—or certificates of analysis—fell within that class of testimonial statements as affidavits.[78] The certificates of analysis were testimonial because they "'were made under circumstances which would lead an objective witness reasonably to believe that the statement[s] would be available for use at a later trial.'"[79] Applying *Crawford*, the Supreme Court held that under the defendant's Sixth Amendment right to confrontation, the certificates of analysis "were testimonial statements[] and the analysts were 'witnesses.'"[80]

After the Supreme Court applied *Crawford*, it addressed and subsequently rejected five of the respondent's and dissent's arguments. First, the respondent argued that the forensic analysts were not "accusatory" witnesses[81] and, therefore, were not subject to the Confrontation Clause.[82] The Supreme Court rejected this argument based on the text of the Confrontation Clause: the text distinguishes between two types of witnesses, those against the defendant and those for the defendant.[83] Here the forensic analysts "provided testimony *against*" Melendez-Diaz and, as such, were accusatory witnesses within the text of the Confrontation Clause.[84]

Second, the respondent and dissent both stated that the forensic analysts were not conventional witnesses because the analysts' reports contained "near-contemporaneous observations,"[85] the analysts did not observe the crime or any human action related to the crime, and the analysts' "statements were not provided in response to interrogation."[86] The Court rejected this argument, concluding that (1) the analysts' reports were not "near-contemporaneous observations" because the

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77. *Id.* at 2531.

78. *Id.* at 2532. The Supreme Court defined *affidavits* as "'declaration[s] of facts written down and sworn to by the declarant before an officer authorized to administer oaths.'" *Id.* (quoting BLACK'S LAW DICTIONARY 62 (8th ed. 2004)).

79. *Id.* at 2531 (quoting *Crawford*, 541 U.S. at 51–52).

80. *Id.* at 2532.

81. *Id.* at 2533. Accusatory witnesses are witnesses who do not directly accuse a defendant of wrongdoing. *Id.* An accusatory witness's "testimony is inculpatory only when taken together with other evidence." *Id.*

82. *Id.*

83. *Id.* at 2534.

84. *Id.* at 2533–34.

85. *Id.* at 2535 (internal quotation marks omitted). The dissent explained that a conventional witness is one who "recalls events observed in the past," as opposed to an analyst who reports "near-contemporaneous observations of [a] test." *Id.* at 2551 (Kennedy, J., dissenting).

86. *Id.* at 2535 (majority opinion).

analysts' affidavits were completed a week after the tests were conducted, (2) there was no cited authority that required witnesses subject to confrontation to observe the actual crime or human action related to the crime, and (3) there was no cited authority to show that voluntary testimony from a witness against the defendant removes the right of the defendant to confront the witness.[87]

Third, the respondent argued that there is a difference between past testimony and testimony regarding neutral scientific testing and that confrontation of the latter has little value.[88] The Court rejected the argument, concluding that there is no guarantee of neutral scientific testing because forensic evidence is not free from exploitation.[89] As the Court noted, the methodology used in forensic analysis "requires the exercise of judgment and presents a risk of error."[90] Even if forensic testing was neutral, the neutrality of the testing would not be a substitute for the defendant's right to confront the witnesses against him.[91] Relying on its holding in *Crawford*, the Court reiterated that denying the right to confrontation because testimony is clearly reliable is no different than disregarding the right to a "'jury trial because a defendant is obviously guilty.'"[92] The Constitution guarantees the defendant the right "to challenge or verify the results of a forensic test" through the right to confrontation.[93]

Fourth, the respondent argued that the analysts' reports were admissible without confrontation because the reports are considered official or business records.[94] The Court rejected this argument, stating that records created solely for "providing evidence against a defendant" at trial are not official or business records.[95] The Court further noted that even if analyst reports were considered official or business records, the authors of the reports, as adverse witnesses presenting testimonial statements against the defendant, would still be subject to the defendant's right to confrontation.[96]

Finally, the respondent argued that the Confrontation Clause was not violated because the defendant had the ability to subpoena the analysts

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87. *Id.*
88. *Id.* at 2536.
89. *Id.*
90. *Id.* at 2537.
91. *See id.* at 2536.
92. *Id.* (quoting *Crawford*, 541 U.S. at 61–62).
93. *Id.*
94. *Id.* at 2538.
95. *Id.* at 2539. Official or business records are records kept in the normal course of business and are not created essentially for use in court. *Id.* at 2538.
96. *Id.* at 2538.

and call them as his own witnesses.[97] The Court rejected this argument, stating that the defendant's ability to subpoena a witness is useless if "the witness is unavailable or . . . refuses to appear."[98] Requiring the defendant to subpoena adverse witnesses would shift the burden placed on the prosecution by the Confrontation Clause to the defendant.[99] Although the respondent argued that this shift would help alleviate the burden of prosecuting criminals, the Court stated that the Confrontation Clause was binding and could not be disregarded simply for convenience.[100]

The Court concluded by reiterating that its decision was a straightforward application of *Crawford*: when testimonial statements are at issue, a defendant has the right to confront the witnesses against him or her.[101] The Court reversed the judgment of the Appeals Court of Massachusetts and remanded the case for proceedings consistent with its opinion.[102]

B. The Same-Difference: Justice Thomas's Concurrence

Justice Thomas concurred with the majority, writing separately to reiterate his position that the Confrontation Clause can only be raised by extrajudicial statements found in, for example, affidavits and other testimonial statements.[103] Justice Thomas concluded by stating that he joined the majority's opinion because the forensic analysts' reports were affidavits and, therefore, "within the core class of testimonial statements."[104]

C. Ninety Years Wasted: Justice Kennedy's Dissent

Justice Kennedy's dissenting opinion, joined by Chief Justice Roberts, Justice Breyer, and Justice Alito,[105] addressed several concerns with the majority's opinion. Justice Kennedy began by indicating that the majority was single-handedly overturning ninety years of court authority by requiring testimony from the analysts of scientific evidence to introduce the evidence at trial.[106] According to Justice Kennedy, the

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97. *Id.* at 2540.
98. *Id.*
99. *Id.*
100. *Id.*
101. *Id.* at 2542.
102. *Id.*
103. *Id.* at 2543 (Thomas, J., concurring).
104. *Id.* (internal quotation marks omitted).
105. *Id.* (Kennedy, J., dissenting).
106. *Id.*

majority relied on only two cases to overturn its precedent: *Crawford v. Washington*[107] and *Davis v. Washington*.[108] Justice Kennedy stated that these cases contemplated only conventional witnesses being subject to the Confrontation Clause and not that *any* person "who [made] a testimonial statement [would be] a witness for purposes of the Confrontation Clause."[109]

Justice Kennedy next addressed the problem of identifying who the analyst is for purposes of calling that individual as a witness.[110] As Justice Kennedy pointed out, more than one individual may be responsible for producing a forensic analyst report.[111] Justice Kennedy stated that based on the majority's opinion, there is no indication as to who would qualify as the analyst.[112] Without any clarity from the majority, Justice Kennedy stated that *analyst* could be argued to mean either every person involved in the report process or any one person in the chain of individuals.[113]

Justice Kennedy further took issue with the majority's conclusion that the defendant's ability to subpoena a witness is useless if the witness is unavailable or fails to appear.[114] Justice Kennedy wrote that it is neither difficult to locate nor to compel a laboratory analyst to appear at trial; therefore, the defendant's ability to subpoena the analyst is an adequate way to ensure that the defendant can question an analyst at trial.[115] Justice Kennedy wrote that here, Melendez-Diaz made no attempt to question the analysts' work, and absent such an action, the ability to confront the analysts added nothing to Melendez-Diaz's case.[116]

Justice Kennedy next noted that analysts were not conventional—or ordinary—witnesses for three reasons: (1) conventional witnesses recall past events while analysts report "near-contemporaneous observations,"[117] (2) conventional witnesses observe the crime or human action

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107. 541 U.S. 36 (2004).

108. 547 U.S. 813 (2006); *Melendez-Diaz*, 129 S. Ct. at 2543 (Kennedy, J., dissenting).

109. *Melendez-Diaz*, 129 S. Ct. at 2543 (Kennedy, J., dissenting).

110. *Id.* at 2544.

111. *Id.* For example, this might include a person to prepare the sample to be tested and to retrieve the results, a person to interpret the results, a person to calibrate the machine when needed, and a person to certify that every individual under him or her performed the tasks correctly. *Id.*

112. *Id.* at 2546.

113. *Id.* at 2544–45.

114. *Id.* at 2547–48.

115. *Id.* at 2547.

116. *Id.* at 2549.

117. *Id.* at 2551.

related to the crime while analysts do not,[118] and (3) conventional witnesses answer "questions under interrogation" while analysts submit reports under no such interrogation.[119] Absent any historical evidence to extend the Confrontation Clause to cover non-conventional witnesses, the majority effectively enabled the defendant to confront anyone who makes a formal statement relevant to future criminal prosecution, "no matter how [far] removed from the crime."[120]

Finally, Justice Kennedy disagreed with the majority's assurance that its decision would not result in additional burdens on the criminal justice system because defense lawyers will often decline to raise a *Melendez-Diaz* objection.[121] Justice Kennedy noted two distinct flaws with the majority's reasoning: (1) the majority speculates that judges will sanction lawyers who act as zealous advocates by raising *Melendez-Diaz* objections too often, and (2) even if sanctions were levied by the courts, there is no authority to allow a lawyer to skirt his duties as counsel for the defendant to avoid judicial sanctions.[122] Justice Kennedy further wrote that the majority's claim that its decision will not be a disruption because some courts have already independently followed the majority's holding is problematic; seven of the ten courts mentioned by the majority indicated that they felt bound by the Supreme Court's decision in *Crawford*.[123] Justice Kennedy argued that had the courts not felt bound, the courts would have changed their rulings.[124]

For these reasons, Justice Kennedy concluded that laboratory analysts are not conventional witnesses under the Confrontation Clause.[125] He stated that the ruling of the Appeals Court of Massachusetts—that forensic analysts are not subject to confrontation[126]—should be affirmed.[127]

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118. *Id.* at 2552.
119. *Id.*
120. *Id.*
121. *Id.* at 2555.
122. *Id.* at 2555–56.
123. *Id.* at 2557–58. Justice Kennedy failed to identify specifically which seven courts felt bound by the Supreme Court's decision in *Crawford*. *See id.*
124. *Id.* at 2558.
125. *Id.*
126. *Id.* at 2531 (majority opinion).
127. *Id.* at 2558 (Kennedy, J., dissenting).

IV. IMPLICATIONS

A. *And Your Point Is? The Future of Melendez-Diaz*

Although not exhaustive, the Supreme Court's decision in *Melendez-Diaz v. Massachusetts*[128] presents two specific implications. First, the Court's decision acknowledged the constitutionality of the use of notice-and-demand statutes yet failed to rule definitively on their proper form,[129] suggesting that states will most likely turn to these types of statutes in the future specifically to avoid Confrontation Clause violations. The Court did not "pass on the constitutionality of every variety of statute . . . given the notice-and-demand label."[130] But because the Supreme Court has not determined what constitutes an invalid notice-and-demand statute, states now face the challenge of trying to determine what the proper form of a notice-and-demand statute will be.

Prior to the Supreme Court's ruling in *Melendez-Diaz*, numerous states employed, and still employ, notice-and-demand statutes requiring the defendant to subpoena the analyst.[131] Recently before the Supreme Court on grant of certiorari, for example, was the case of *Briscoe v. Virginia*,[132] in which the Supreme Court had been asked to determine whether Virginia's notice-and-demand statute "adequately protects a criminal defendant's rights under the Confrontation Clause."[133] The Virginia notice-and-demand statute requires the defendant to call an analyst as the defendant's own witness, "and examine [the analyst] in the same manner as if [the analyst] had been called as an adverse witness."[134] Under Virginia's statute, the defendant's failure to call the analyst as a witness operates as a waiver of the right to confront the analyst.[135]

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128. 129 S. Ct. 2527 (2009).

129. The proper form of notice-and-demand statutes was not at issue in *Melendez-Diaz*. *See id.*

130. *Id.* at 2541 n.12.

131. *Id.* at 2540–41.

132. 129 S. Ct. 2858 (2009) (mem.).

133. Petition For a Writ of Certiorari at 4, Briscoe v. Virginia, 129 S. Ct. 2858 (2009) (mem.) (internal quotation marks omitted) (quoting Magruder v. Commonwealth, 657 S.E.2d 113, 115 (Va. 2008), *vacated and remanded sub nom.* Briscoe v. Virginia, No. 07-11191, 2010 WL 246152 (U.S. Jan. 25, 2010) (mem.)).

134. *Magruder*, 657 S.E.2d at 119.

135. *Id.*

The United States Supreme Court vacated the Virginia Supreme Court's decision and instructed the state court to proceed consistent with the opinion in *Melendez-Diaz*.[136] In light of the Supreme Court's decision in *Melendez-Diaz*, Virginia's notice-and-demand statute will likely be held unconstitutional in *Briscoe*. The procedural rules adopted by Virginia in its notice-and-demand statute do away with exactly what the Supreme Court required in *Melendez-Diaz*: the prosecution must produce the witnesses against the defendant; it is *not* the defendant's burden.[137] It matters not that the Virginia statute requires the Commonwealth to pay the defendant's costs of calling an analyst as a witness because the burden still rests on the defendant to call the adverse witness against him or her. In remanding *Briscoe*, the Supreme Court passed on an opportunity to establish criteria for what a notice-and-demand statute can and cannot require.

The second major implication of the Supreme Court's holding that forensic certificates of analysis—forensic reports—are testimonial statements is that a floodgate has been opened in which various types of reports must now be distinguished as testimonial or non-testimonial statements.[138] DNA reports, blood alcohol concentration (BAC) reports, and medical physician reports, to name a few, have already been addressed by the lower courts as potentially testimonial statements.[139] One can only assume that the types of reports being considered as testimonial statements will continue to increase, leaving the Supreme Court to decide how much more definitive the confines of testimonial statements should be.

To date, DNA reports,[140] BAC reports, and medical physician reports

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136. *Briscoe*, 2010 WL 246152, at *1.

137. *Melendez-Diaz*, 129 S. Ct. at 2534.

138. The Supreme Court has yet to address this issue.

139. *See, e.g.*, Gov't of the V.I. v. Vicars, 340 F. App'x 807 (3d Cir. 2009) (addressing medical physician reports in relation to the Confrontation Clause); State v. Crager, 879 N.E.2d 745 (Oh. 2007) (addressing DNA reports in relation to the Confrontation Clause), *vacated and remanded sub nom.* Crager v. Ohio, 129 S. Ct. 2856 (2009) (mem.); Grant v. Commonwealth, 682 S.E.2d 84 (Va. Ct. App. 2009) (addressing BAC reports in relation to the Confrontation Clause).

140. The United States Supreme Court, following its ruling in *Melendez-Diaz*, remanded *Crager v. Ohio*, 129 S. Ct. 2856 (2009) (mem.) to the Ohio Supreme Court to address the issue in light of the Court's ruling in *Melendez-Diaz*. *Id.* The Ohio Supreme Court, in turn, remanded to the trial court. State v. Crager, 914 N.E.2d 1055, 1056 (2009). At issue in *State v. Crager*, 879 N.E.2d 745 (Oh. 2007), was whether a DNA report was subject to the Confrontation Clause even though the court found the report to be admissible as a business record. 879 N.E.2d at 751. The Ohio Supreme Court held that the DNA reports were business records because the reports "were prepared in the ordinary course of . . . business." *Id.* at 754. Applying *Melendez-Diaz*, however, the Ohio courts are likely

have been addressed as testimonial statements. In *Grant v. Commonwealth*,[141] the Virginia Court of Appeals held that the attestation clause in a BAC certificate was testimonial and, therefore, subject to the Confrontation Clause.[142] Applying *Melendez-Diaz*, the court of appeals determined that the attestation clause on the BAC certificate was testimonial because the certificate was used by the prosecution to prove facts at trial.[143] Likewise in *Government of the Virgin Islands v. Vicars*,[144] the United States Court of Appeals for the Third Circuit relied on *Melendez-Diaz* to hold that physician reports or exams used to determine potential criminal allegations are testimonial statements.[145] Such a report is testimonial because it is "prepared under circumstances that would lead an objective witness reasonably to believe that it would be used prosecutorially at trial."[146]

Courts are continuing to clarify the definition of *testimonial statements*, and the Supreme Court's remand in *Briscoe* is only one piece of the puzzle.

B. Georgia Says What?

The Georgia courts have yet to specifically discuss *Melendez-Diaz*. This could be because the Georgia Supreme Court had already reached a conclusion similar to *Melendez-Diaz* in *Miller v. State*.[147] In *Miller* the Georgia Supreme Court held that Georgia's notice-and-demand statute was unconstitutional.[148] The supreme court held that section 35-3-16 of the Official Code of Georgia Annotated (O.C.G.A.)[149] was

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to find that the DNA report was in fact testimonial because the requested report was prepared with the knowledge that the report would likely be used for trial. *Id.* A straightforward application of *Melendez-Diaz* will acknowledge that DNA reports are testimonial statements—a conclusion that Judge Pfeifer had already reached in *Crager*. *See id.* at 760–65 (Pfeifer, J., dissenting).

141. 682 S.E.2d 84 (Va. Ct. App. 2009).

142. *Id.* at 89; *see also* United States v. Forstell, 656 F. Supp. 2d 578 (E.D. Va. 2009).

143. *Grant*, 682 S.E.2d at 88.

144. 340 F. App'x 807 (3d Cir. 2009).

145. *Id.* at 810–11.

146. *Id.* at 811.

147. 266 Ga. 850, 472 S.E.2d 74 (1996).

148. *Id.* at 856, 472 S.E.2d at 80.

149. O.C.G.A. § 35-3-16 (Supp. 1994), *repealed by* 1997 Ga. Laws 1421, 1422. Prior to being repealed, O.C.G.A. § 35-3-16(c) stated in relevant part:

> Whenever a party intends to tender in a criminal . . . proceeding a certificate executed pursuant to this Code section, notice of an intent to proffer that certificate and any reports relating to the analysis in question, including a copy of the certificate, shall be served on the opposing party . . . at least ten days before the proceeding begins. An opposing party who intends to object to the admission

unconstitutional because the statue: (1) created a catch-22, requiring the defendant to first call the witnesses against him and then explain why the defendant required the witness's presence to obtain the defendant's right to confrontation; and (2) shifted the burden of proof from the prosecution to the defendant.[150] It is apparent from the Georgia Supreme Court's decision in *Miller* that Georgia was years ahead of the United States Supreme Court's holding in *Melendez-Diaz*.

After the Supreme Court decided *Melendez-Diaz*, the Georgia Supreme Court in *Rector v. State*[151] held that the admission of testimony from a toxicologist, who independently reviewed the findings of a physician's report and reached the same conclusions as the physician, did not violate the Confrontation Clause.[152] A similar conclusion was reached by the Georgia Court of Appeals one year prior to *Melendez-Diaz* in *Dunn v. State*.[153] In *Dunn* the defendant Mitchell Dunn was arrested and charged with possession of marijuana after a search of Dunn's vehicle revealed a plastic bag containing a white powdered substance. The substance was sent to the state crime lab for testing and was identified as methamphetamine. At trial, the prosecution failed to bring the laboratory analyst who tested the powdered substance as a witness, relying instead on the expert testimony of the laboratory supervisor.[154] Relying on the Supreme Court's decision in *Crawford v. Washington*,[155] Dunn argued that the testimony of the laboratory supervisor was inadmissible as a violation of his right to confront the witnesses against him.[156] The Georgia Court of Appeals rejected Dunn's argument, holding that the laboratory supervisor's testimony as an expert witness did not violate Dunn's right to confrontation because the witness came to an independent conclusion about the nature of the powdered substance based on the analyst's report.[157] The court of appeals noted in part that when machine-generated data is generated mainly by "'well-

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> into evidence of a certificate shall give notice of objection and the grounds for the objection within ten days of receiving the adversary's notice of intent to tender the certificate . . . . A proffered certificate shall be admitted into evidence unless it appears from the notice of objection and specific grounds for that objection that the composition, quality, quantity, or chain of custody of the substance submitted to the laboratory for analysis will be contested in good faith at trial.

O.C.G.A. § 35-3-16(c) (Supp. 1994).

150. *Miller*, 266 Ga. at 856, 472 S.E.2d at 79–80.

151. 285 Ga. 714, 681 S.E.2d 157 (2009).

152. *Id.* at 715–16, 681 S.E.2d at 160.

153. 292 Ga. App. 667, 665 S.E.2d 377 (2008).

154. *Id.* at 668, 665 S.E.2d at 378.

155. 541 U.S. 36 (2004).

156. *Dunn*, 292 Ga. App. at 668, 665 S.E.2d at 378.

157. *Id.* at 671, 665 S.E.2d at 380.

accepted scientific . . . techniques,'" the reliability of the machine must be proven, which may be shown through expert testimony.[158] Because the laboratory supervisor testified that the laboratory analyst was required to perform general calibration tests before analyzing or testing substances, the court of appeals held that the reliability of the machine had been established.[159]

With the recent decision in *Melendez-Diaz*, the Georgia courts will be faced with re-evaluating and perhaps even re-examining opinions such as *Dunn*. For example, in *Dunn* the Georgia Court of Appeals allowed the forensic test results and the establishment of the reliability of the forensic analysis machine to be verified by expert testimony alone.[160] The court did not require testimony from the laboratory analyst who conducted the actual forensic test.[161] However, in *Melendez-Diaz* the United States Supreme Court specifically stated that although there may be other ways of verifying results of forensic tests, the Constitution provides only one way: confrontation.[162] Without the testimony of the actual analyst who conducted the forensic testing, the forensic results (for example, test results, test procedure, and data reliability) are inadmissible as testimonial statements, regardless of whether the prosecution provides testimony about the results by other means.[163]

V. CONCLUSION

The exact effects of *Melendez-Diaz* have yet to be fully realized, but it can be said with confidence that the impact of *Melendez-Diaz* will be far reaching. Given the divided opinion in *Melendez-Diaz*, it will be interesting to observe the effect that the recent appointment of Justice Sotomayor will have on the Confrontation Clause debate.[164] The next

158. *Id.* at 672, 665 S.E.2d at 381 (quoting United States v. Washington, 498 F.3d 225, 231 (4th Cir. 2007)).

159. *Id.*

160. *Id.*

161. *Id.*

162. 129 S. Ct. at 2536.

163. *See id.*

164. *See, e.g.*, Posting of Lyle Denniston to SCOTUSblog, Analysis: Is *Melendez-Diaz* Already Endangered?, http://www.scotusblog.com/wp/new-lab-report-case-granted (June 29, 2009, 13:51 EST). Justice Sotomayor's prosecutorial background might have suggested that had she taken the bench prior to *Melendez-Diaz*, the state of the Confrontation Clause would not be where it is today. *Id.* However, as discussed above, the Supreme Court (with Justice Sotomayor sitting), vacated the Virginia Supreme Court's decision in *Briscoe* and remanded with instructions to proceed in accordance with *Melendez-Diaz*. *See supra* note 136 and accompanying text.

few years could prove to be the defining period of the Confrontation Clause for the twenty-first century.

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