MELENDEZ-DIAZ v. MASSACHUSETTS: LABORATORY TESTING AND THE CONFRONTATION CLAUSE

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I. INTRODUCTION

Luis E. Melendez-Diaz was convicted of distributing and trafficking cocaine.[1] The evidence against him included nineteen plastic bags of cocaine that he and his co-defendant dropped in a squad car.[2] The evidence also included sworn certificates from a laboratory technician that affirmed the bags contained cocaine and stated its weight and concentration.[3] Melendez-Diaz did not have the opportunity to cross-examine the technician responsible for writing these certificates and argued that they therefore should not be admitted into evidence.[4]

The Massachusetts Appeals Court upheld the admission of the certificates,[5] and the Massachusetts Supreme Court denied review.[6] The U.S. Supreme Court granted certiorari to determine whether a drug analysis certificate is testimonial evidence under *Crawford v. Washington*,[7] and thus, whether a defendant must have the opportunity to cross-examine the person who issues one before such

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1. Commonwealth v. Melendez-Diaz, No. 05-P-1213, 2007 WL 2189152 at *1 (Mass. App. Ct. 2007).

2. *Id*. at *2.

3. *Id*. at *4.

4. *See id.* at *4 & n.3 (upholding the admission of the certificates under *Commonwealth v. Verde*, 827 N.E.2d. 701 (2005), which ruled that admitting such certificates without cross-examination does not violate the Confrontation Clause).

5. *Id*. at *4.

6. Commonwealth v. Melendez-Diaz, 874 N.E.2d 407 (Mass. 2007) (unpublished table decision).

7. Crawford v. Washington, 541 U.S. 36 (2004).

evidence is constitutionally admissible under the Confrontation Clause.[8] Because drug analysis certificates are prepared under oath and for use at trial, the Court will likely conclude that such certificates are testimonial evidence and that the Confrontation Clause requires cross-examination.

II. FACTS

In the fall of 2001, the loss prevention manager of a K-Mart store in Dorchester, Massachusetts, reported an employee's suspicious behavior to Boston Police Detective Robert Pieroway.[9] The employee, Thomas Wright made and received several phone calls,[10] after which he would usually leave the store and get into a blue four-door Mercury Sable sedan driven by Ellis Montero, who occasionally was accompanied by another passenger.[11] The car would depart for roughly ten minutes before returning to drop Wright off at the store.[12] In response to this report, Pieroway set up surveillance at the store[13] and observed Wright exit, look around for a few minutes, and then go back inside.[14] Moments later, a blue Mercury Sable sedan drove by, made a U-turn, and again picked up Wright as he emerged from the building.[15]

After Wright entered the vehicle, the driver, Ellis Montero, drove slowly through the store's parking lot, at one point passing within ten feet of Detective Pieroway.[16] When Wright ultimately exited the car and began walking back toward the store, Pieroway stopped him for questioning.[17] Wright admitted to Pieroway that he was carrying cocaine; Pieroway then searched Wright's person and found four bags containing a total of 4.75 grams of cocaine in Wright's possession.[18]

Pieroway notified Boston Police Officers Ryan and Anderson who stopped the Mercury Sable and arrested the driver, Montero, and the

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8. Melendez-Diaz v. Massachusetts, 2007 WL 2189152 (Mass. App. Ct. 2007), *cert. granted*, 128 S. Ct. 1647 (U.S. Mar. 17, 2008) (No. 07-591).
9. *Id.*
10. Commonwealth v. Melendez-Diaz, 2007 WL 2189152 at *1.
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*

passenger, Melendez-Diaz.[19] The officers searched neither the suspects nor the vehicle for contraband at this time because, according to police regulations, drug unit officers would conduct the search later.[20] The officers returned to the storefront to arrest Wright and transported all three suspects to the station in their cruiser's backseat.[21]

During the brief trip to the station, Montero and Melendez-Diaz spoke in Spanish, fidgeted, "ma[de] furtive movements," and tried to create space between them.[22] While the suspects were being booked, Anderson returned to the cruiser and found $320 by the door that Montero and Melendez-Diaz had used to exit the vehicle.[23] Anderson also found nineteen plastic bags of cocaine, identical to the bags Pieroway recovered from Wright.[24]

The State charged Melendez-Diaz with distributing and trafficking cocaine.[25] The packets of cocaine found on Wright and those found in the cruiser were admitted into evidence against Melendez-Diaz,[26] as were drug analysis certificates for the tests that technicians had performed on the packets.[27] A jury convicted Melendez-Diaz of both counts.[28]

On appeal, Melendez-Diaz challenged the sufficiency of the evidence against him, the admission of the drug certificates, and the effectiveness of his trial counsel.[29] The Massachusetts Appeals Court rejected all three arguments[30] and the Massachusetts Supreme Court denied review.[31] Melendez-Diaz appealed to the Supreme Court, which granted certiorari.[32]

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19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.* at *1.
26. *Id.* at *1–2.
27. *Id.* at *4.
28. *Id.* at *1.
29. *Id.*
30. *Id.* at *5.
31. Commonwealth v. Melendez-Diaz, 874 N.E.2d 407 (Mass. 2007) (unpublished table decision).
32. Melendez-Diaz v. Massachusetts, 2007 WL 2189152 (Mass. App. Ct. 2007), *cert. granted*, 128 S. Ct. 1647 (U.S. Mar. 17, 2008) (No. 07-591).

III. LEGAL BACKGROUND

Massachusetts has long admitted drug certificates without requiring the court to allow the defendant to cross-examine the responsible technician.[33] Prior to 2004, such certificates were constitutionally admissible without confrontation so long as the technician was unavailable and the certificates were sufficiently reliable.[34] Since the Supreme Court's decision in *Crawford v. Washington* in 2004, however, defendants must be given the opportunity to cross-examine the maker of any testimonial statement used against them, either at trial or at some earlier time.[35] The question in this case is whether drug analysis certificates are testimonial evidence.

The Confrontation Clause of the Sixth Amendment provides: "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."[36] This guarantee applies to the states via the Due Process Clause of the Fourteenth Amendment.[37] The Supreme Court has rejected a literal reading of the provision, which would exclude from evidence any statement made by an individual not examined at trial, as unintended and extreme.[38] Instead, the Court has permitted some limited departures from a strict reading in order to balance defendants' procedural rights against state interests in effective law enforcement.[39]

In *Ohio v. Roberts*, the Court articulated a two-part test to determine when hearsay evidence may be admitted without violating the Confrontation Clause.[40] First, the prosecution must demonstrate the unavailability of the witness whose statement it seeks to use.[41] Second, the hearsay in question must bear adequate indicia of reliability, so as to afford some basis to evaluate the credibility of the

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33. Commonwealth v. Verde, 827 N.E.2d. 701, 704 (2005) (citing Commonwealth v. Slavski, 140 N.E. 465 (1923) and Commonwealth v. Harvard, 253 N.E.2d. 346 (1969)).

34. Ohio v. Roberts, 448 U.S. 56, 63 (1980), *overruled by* Crawford v. Washington, 541 U.S. 36, 54 (2004).

35. Crawford v. Washington, 541 U.S. 36, 54 (2004).

36. U.S. CONST. amend. VI.

37. *Crawford*, 541 U.S. at 42; Pointer v. Texas, 380 U.S. 400, 406 (1965) (applying the Sixth Amendment to the states).

38. *Roberts*, 448 U.S. at 63.

39. *Id.* at 64; Mattox v. United States, 156 U.S. 237, 243 (1895) (detailing the policy behind hearsay rules).

40. *Roberts*, 448 U.S. at 65.

41. *Id.*

evidence in the absence of cross-examination.[42] This test remained in effect until 2004.[43]

In *Crawford*, the Court rejected the *Roberts* standard.[44] Justice Scalia, writing for the Court, examined the history of the right to confrontation[45] and concluded that the Framers intended the Confrontation Clause to bar the use of *ex parte* examinations as evidence against the accused.[46] As a result, some unreliable hearsay (such as offhand, overheard remarks) is non-testimonial, admissible evidence that does not run afoul of the Confrontation Clause, while some reliable hearsay (particularly *ex parte* examinations) is constitutionally inadmissible because it is testimonial.[47] In essence, the Confrontation Clause permits the defendant the right to confrontation when the prosecution seeks to introduce "testimonial" statements[48] Yet, the *Crawford* Court did not adopt a universal standard for lowers courts to use to determine whether evidence is testimonial.[49]

Under *Crawford*, the Confrontation Clause prohibits admission of testimonial statements unless the declarant is unavailable to testify and the defense had a prior opportunity to cross-examine the declarant.[50] Exceptions are allowed if they existed at the time of the Framing, but these exceptions apply primarily to statements that are not testimonial in nature, such as business records.[51] With the exception of dying declarations,[52] the Framers did not envision that prior testimony[53] or other testimonial evidence could be admitted without the defendant having the opportunity to cross-examine the declarant.[54] Accordingly, the Court held that, even when testimonial hearsay is reliable, the Constitution requires the right to confrontation because "[d]ispensing with confrontation because testimony is

42. *Id.* at 66.
43. Crawford v. Washington, 541 U.S. 36, 42, 68–69 (2004) (citing the *Roberts* standard as the then-current test before overruling it).
44. *Id*. at 68–69.
45. *Id*. at 44.
46. *Id*. at 50–51.
47. *Id*. at 51.
48. *Id.*
49. *Id*. at 52 (declining to adopt any of various formulations).
50. *Id*. at 54.
51. *Id*. at 56.
52. *Id*. at 56 n.6 (recognizing that dying declarations were an exception at the time of the Framing and therefore are admissible without cross-examination).
53. *Id*.
54. *Id*. at 56 n.7.

obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes."[55]

The Court has yet to articulate a clear standard for whether evidence is testimonial.[56] In *Davis v. Washington*, the Court continued to avoid establishing a universal standard, holding only that statements are not testimonial when made with the primary purpose of enabling police to meet an ongoing emergency.[57] On the other hand, statements are testimonial if made to the police absent an emergency or made in order to prove past events for later criminal prosecution.[58]

The first class of statements—in *Davis*, answers given during a 911 call—are not testimonial because they are not offered in a formal context and are not meant primarily to prove a past fact.[59] Such statements are not analogous to trial testimony; witnesses do not take the stand at trial to seek assistance with an ongoing emergency.[60] In contrast, statements from the latter class—in *Davis*, answers given to police during the stable aftermath of a domestic dispute—are testimonial because they are made primarily to assist police in investigating a possible crime.[61] Such statements are therefore analogous to live testimony at trial, because they serve to establish past facts.[62]

The issue in *Melendez-Diaz v. Massachusetts* is whether drug analysis certificates are testimonial under the *Crawford* and *Davis* standards.[63]

IV. HOLDING BELOW

Petitioner Melendez-Diaz appealed his conviction on three grounds: sufficiency of the evidence, improper admission of the drug certificates, and ineffective assistance of counsel.[64] The Court granted

55. *Id*. at 61–62.
56. Davis v. Washington, 547 U.S. 813, 822 (2006).
57. *Id*.
58. *Id.*
59. *Id*. at 826–27.
60. *Id*. at 828.
61. *Id*. at 830.
62. *Id*. at 830–31.
63. Melendez-Diaz v. Massachusetts, 2007 WL 2189152 (Mass. App. Ct. 2007), *cert. granted*, 128 S. Ct. 1647 (U.S. Mar. 17, 2008) (No. 07-591).
64. Commonwealth v. Melendez-Diaz, No. 05-P-1213, 2007 WL 2189152 at *1 (Mass. App.

certiorari on only the second issue—whether admission of the drug certificates violated Melendez-Diaz's Sixth Amendment right to confront witnesses against him.[65]

The Massachusetts Appeals Court relied on *Commonwealth v. Verde*[66] to flatly reject Melendez-Diaz's argument that admitting the drug certificates at trial violated his Sixth Amendment right to confront witnesses against him.[67] In *Verde* the Massachusetts Supreme Court held that drug certificates were non-testimonial business records that do not implicate the Confrontation Clause.[68]

In prior cases, the Massachusetts Supreme Court had held that the admission of liquor or drug as evidence does not violate the defendant's right to confrontation.[69] The defendant in *Verde* argued that *Crawford v. Washington* had overturned these cases[70] and required the court to permit the defendant to cross-examine the certificates' technician even if the court deemed the evidence reliable.[71] The Massachusetts Supreme Court disagreed because the Supreme Court in *Crawford* had indicated in dicta that business and official records fell under an established hearsay exception not subject to the Confrontation Clause.[72]

The court said that public records were an acknowledged exception to the Confrontation Clause, dating to at least to the adoption of the Massachusetts Constitution.[73] This exception established that, when a public officer in the performance of his or her official duty makes a record of a primary fact, that record may serve as prima facie evidence of that fact.[74] In contrast, records "involving the exercise of judgment and discretion, expressions of opinion, and making conclusions are not admissible in evidence as public records."[75]

Ct. 2007).

65. *Id.*

66. Commonwealth v. Verde, 827 N.E.2d 701 (2005).

67. Commonwealth v. Melendez-Diaz, 2007 WL 2189152 at *4.

68. *Id.*

69. *Verde*, 827 N.E.2d at 704 (citing Commonwealth v. Slavski, 140 N.E. 465 (1923) and Commonwealth v. Harvard, 253 N.E.2d 346 (1969)).

70. Crawford v. Washington, 541 U.S. 36 (2004).

71. *Verde*, 827 N.E.2d. at 704.

72. *Id.* (citing *Crawford*, 541 U.S. at 56).

73. *Id.* at 705 (citing *Slavski*, 140 N.E. at 465; Commonwealth v. Bergstrom, 524 N.E.2d 366 (Mass. 1988)).

74. *Id.* (quoting *Slavski*, 140 N.E. at 465).

75. *Id.*

Drug analysis certificates, like those admitted against Melendez-Diaz, are not discretionary or based on opinion because they merely state the results of an established scientific test as to the quantity and composition of a substance.[76] The court noted that several other jurisdictions had reached the same conclusion in admitting such evidence,[77] though it also recognized disagreement in this area.[78] Refusing to analogize drug certificates to *ex parte* examinations, the court wrote that drug certificates do not implicate "the principal evil at which the Confrontation Clause was directed," specifically *ex parte* examinations by investigating magistrates.[79]

The court also found it significant that a defendant can rebut the figures stated in the certificate, and that the defendant in *Verde* had tried and failed to do so.[80] Furthermore, the issue about which Verde's expert had wished to question the State's chemist—the purity of a cocaine sample—was not a required element of the State's case.[81] Regardless, "the jury w[as] free to credit [the expert's] testimony and to discredit the certificate of analysis as [it] saw fit."[82]

Because the drug certificates contained records of fact only, and because the defendant could rebut those records, the court held that such certificates are non-testimonial business records.[83] Therefore, the defendant's inability to cross-examine the State chemist did not violate his confrontation right.[84]

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76. *Id.* (citing Commonwealth v. Harvard, 253 N.E.2d 346, 352 (Mass. 1969); Commonwealth v. Westerman, 611 N.E.2d 215, 223–24 (Mass. 1993)).

77. *Id.* at 705 n.4 (citing Perkins v. State, 897 So. 2d 457, 462–65 (Ala. Crim. App. 2004) (permitting admission of an autopsy report as a business record); Smith v. State, 898 So. 2d 907, 910–11 (Ala. Crim. App. 2004) (rejecting admission of a particular autopsy report because it contained opinion but allowing admission of autopsy reports generally as non-testimonial business records); People v. Johnson, 18 Cal. Rptr. 3d 230, 231–33 (Cal. Ct. App. 2004) (holding that a laboratory report is routine documentary evidence); State v. Thackaberry, 95 P.3d 1142, 1145 (Or. Ct. App. 2004) (holding that a laboratory report of urinalysis is "analogous to—or arguably even the same as—a business or official record")).

78. *Id.* (citing Las Vegas v. Walsh, 91 P.3d 591, 595 (Nev. 2004), *modified by* Las Vegas v. Walsh, 100 P.3d 658 (Nev. 2004) (rejecting admission of a statutorily required affidavit made by a nurse in order to show the presence of alcohol in blood because the affidavit had been prepared specifically for use by the prosecution at trial); People v. Rogers, 780 N.Y.S.2d 393, 393 (N.Y. App. Div. 2004) (holding that a blood test report prepared in anticipation of litigation was not admissible as a business record)).

79. *Id.* at 705 (quoting Crawford v. Washington, 541 U.S. 36,50 (2004)).

80. *Id.*

81. *Id.* at 706 n.5.

82. *Id.* at 706.

83. *Id.* at 705–06.

84. *Id.* at 706.

V. ANALYSIS

The Court of Appeal's holding that drug certificates can be admitted without cross-examination rests on three justifications. First, drug certificates contain only facts, not opinion or discretion.[85] Second, they are business records, which are non-testimonial under *Crawford v. Washington*.[86] Third, the defendant can rebut these certificates and the jury is free to discredit them.[87] All three arguments, however, are untenable under *Crawford*.

The first justification—that the certificates reflect only facts, not opinions—sounds suspiciously like the "indicia of reliability" test used in *Ohio v. Roberts*.[88] The Court forcefully renounced this standard in *Crawford*, declaring that the Confrontation Clause does not demand reliability but rather a particular means of discerning reliability: cross-examination.[89] In *Davis v. Washington*, the Court did not ask whether the statements in question were reliable, but whether the declarant's primary purpose was to establish a past fact at trial.[90] These certificates are no less able to prove a past fact at trial just because they contain only facts, so this factor has no bearing on whether or not drug analysis certificates are testimonial.[91]

The second justification—that these certificates are business records and thus are not testimonial—is also at odds with *Crawford*.[92] The Court in *Crawford* did note that business records fall within a hearsay exception recognized by the Framers and that such records are normally non-testimonial.[93] The Court also specifically noted, however, that testimonial evidence demands confrontation, even when it falls within a hearsay exception, implying that some business records may be testimonial.[94] Thus, even if drug certificates are business records within the hearsay exception, they still might be testimonial statements and thus require an opportunity for the defendant to cross-examine the declarant.[95] The certificates here were

85. *Id*. at 705.
86. *Id*. at 705.
87. *Id*. at 705–706.
88. Ohio v. Roberts, 448 U.S. 56, 63 (1980).
89. Crawford v. Washington, 541 U.S. 36,61–62 (2004).
90. Davis v. Washington, 547 U.S. 813, 826–27, 830–31 (2006).
91. *See id*. (stating the importance of whether evidence would establish a past fact at trial).
92. *Verde*, 827 N.E.2d. at 705.
93. *Crawford*, 541 U.S. at 56.
94. *Id*. at 56 n.7.
95. *See id*. (implying that business records may be testimonial in some cases).

signed under oath and include the name of the criminal defendant, indicating that they were solemn pronouncements made for the purpose of establishing facts at trial.[96] Because *Davis* strongly suggests that such statements are testimonial,[97] the business records exception does not obviate the constitutional right to cross-examination.[98]

Finally, the court's concluding justification—that these certificates are not testimonial because the defendant can rebut them and because the jury may discredit them—conflicts directly with *Crawford*.[99] First, a key purpose of cross-examination is the defendant's opportunity to cross-examine the declarant before the jury in order to give the jury grounds to believe or disbelieve the declarant. Therefore, the mere chance for rebuttal is not an adequate substitute for such a key purpose of cross-examination.[100] Second, the Court in *Crawford* noted that the opportunity to rebut statements does not satisfy the common law doctrine of confrontation, and so the Appeals Court was plainly wrong to accept an opportunity for rebuttal as an adequate substitute for cross-examination.[101]

VI. ARGUMENTS AND DISPOSITION

In his appeal to the Supreme Court, Melendez-Diaz argues primarily that prosecutors offer drug analysis certificates in lieu of testimony—in order to prove a fact at trial—and are thus testimonial under the standard discussed in *Davis v. Washington* and require that the defendant have an opportunity to confront the certificates' technician.[102] Melendez-Diaz's arguments in response to the lower court's rationale were substantially laid out above. First, though the certificates are documents of fact, their purported reliability is no longer a constitutional ground on which to admit them.[103] Second, Melendez-Diaz argues, the certificates are not business records, and even if they were, the Court in *Crawford* stated that testimonial

96. Petition for Writ of Certiorari, App. at 24a–29a, Melendez-Diaz v. Massachusetts, 2007 WL 2189152 (Mass. App. Ct. 2007) (No. 07-591).

97. Davis v. Washington, 547 U.S. 813, 826–27, 830–31 (2006).

98. *Crawford*, 541 U.S. at 56 n.7.

99. Commonwealth v. Verde, 827 N.E.2d 701, 706 (2005).

100. Ohio v. Roberts, 448 U.S. 56, 64 (2004) (citing Mattox v. United States, 156 U.S. 237, 242–43 (1895) (overruled on other grounds)).

101. *See Crawford*, 541 U.S. at 51 (noting that the opportunity to challenge those who read accusatory letters in court was not enough).

102. Petition for Writ of Certiorari, *supra* note 96, at 20.

103. *Id*. at 23.

evidence is not insulated by hearsay exceptions.[104]

The State offers an additional rationale. It argues that drug certificates are a contemporaneous recording of observable events, akin to the 9-1-1 call in *Davis*, rather than a narrative of past fact.[105] Melendez-Diaz responds that these certificates do not implicate the emergency setting present in *Davis*.[106] He further argues that the test in *Davis* is not whether statements are contemporaneous but whether the prosecution offers them primarily for the purpose of establishing a fact at trial.[107]

The State's arguments that drug certificates are non-testimonial, largely ignore the Court's concern in *Davis* regarding whether particular statements are offered to prove a fact at trial.[108] Because the certificates are prepared specifically for use at trial—they even feature a defendant's name[109]—they are probably testimonial under *Davis*.[110] Thus, Melendez-Diaz likely has a stronger argument than the State based solely on *Crawford* and *Davis*.

The State argues that regardless of whether the certificates are testimonial, the effect that requiring cross-examination for drug certificates would have on the justice system should insulate them from Confrontation Clause challenges.[111] In Massachusetts alone, laboratories analyze between 38,000 and 40,000 drug samples each year.[112] Requiring scientists to testify about each of their examinations "would greatly reduce the amount of time those scientists have to actually conduct the examinations and analyses"[113] and would be of little use because scientists often would rely on the certificate to jog their memory of a specific test."[114] Thirty-five states and the District of Columbia agree that, if the Court ruled for Melendez-Diaz, systematic

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104. *Id*. at 23–24.

105. Brief for the Respondent at 27, Melendez-Diaz v. Massachusetts, No. 07-591 (U.S. Feb. 5, 2008).

106. Petition for Writ of Certiorari, *supra* note 96, at 25.

107. *Id*.

108. *See supra* notes 85–101 and accompanying text.

109. Petition for Writ of Certiorari, *supra* note 96, at App. 24a–29a.

110. *See* Davis v. Washington, 547 U.S. 813 826–27, 830–31 (2006).

111. Brief for the Respondent, *supra* note 105, at 34.

112. *Id*. at 35 (citing Brief for the Attorney General and Department of Public Health as Amici Curiae Supporting the Commonwealth, Commonwealth v. Verde, No. SJC-09320, 2004 WL 3421947, at *5 (2004)).

113. *Id*. (citing Pruitt v. State, 954 So. 2d 611, 615 (Ala. Crim. App. 2006)).

114. *Id*. (citing People v. Johnson, 18 Cal. Rptr. 3d 230, 233 (Cal. Ct. App. 2004)).

gridlock would result.[115]

Melendez-Diaz responds, however, that several states require forensic examiners to testify if the defendant so requests, and that in these states the criminal justice system has not collapsed.[116] To explain this phenomenon, Melendez-Diaz points to language authored by the State:

> [I]t is almost always the case that [forensic laboratory reports] are admitted without objection. Generally, defendants do not object to the admission of drug certificates most likely because there is no benefit to the defendant from such testimony. The testimony of the analyst will only serve to resolve any possibility of reasonable doubt, not only in the identification of the substance as contraband but also as to the weight of the substance for trafficking offenses.[117]

Several law professors who support Melendez-Diaz assert that the burdens will be slight because stipulations,[118] notice-and-demand statutes,[119] clever courtroom scheduling,[120] video testimony,[121] and (in some narrow circumstances) surrogate testimony will all reduce the impact of requiring cross-examination for forensic reports,[122] but that, in those rare cases when forensic evidence is manipulated or defective, cross-examination is critical to check the prosecution.[123]

The State's concerns are considerable, especially because of the Supreme Court's practice of balancing the accused's interests with law

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115. Brief for the State of Alabama, et al. as Amici Curiae Supporting Respondent, Melendez-Diaz v. Massachusetts, No. 07-591 (U.S. Sep. 9, 2008)).

116. Reply Brief for the Petitioner at 10–11, Melendez-Diaz v. Massachusetts, No. 07-591 (U.S. Feb. 19, 2008).

117. *Id*. at 11 (citing Brief for the Commonwealth as Amicus Curiae at 7, Commonwealth v. Verde, 827 N.E.2d 701 (Mass. 2005), *available at* 2004 WL 3421945).

118. Brief for Law Professors as Amici Curiae Supporting Petitioner at 10, Melendez-Diaz v. Massachusetts, No. 07-591 (U.S. Jun. 23, 2008).

119. *Id*. at 13 (describing a mechanism by which prosecutors would service defendants' notice of intent to offer forensic testimony without cross-examination and in which defendants would have the right to demand cross-examination).

120. *Id*. at 16 (describing the use of courtroom scheduling to mitigate the need for repeated travel for individual analysts).

121. *Id*. at 17 (describing how such testimony would allow the jury to view body language and demeanor while reducing the expense of bringing the analyst to court).

122. *Id*. at 23 (arguing that, when "(1) conducting another test is infeasible; (2) the original test was conducted in accordance with regularized procedures and documented in sufficient detail for another expert to understand, interpret, and evaluate the results, and (3) the original expert is now unavailable," the Confrontation Clause permits testimony by another qualified expert about the analysis).

123. *Id*. (citing Brief for Professor Pamela R. Metzger et al. as Amici Curiae Supporting Petitioner at 12–20 & App., Melendez-Diaz v. Massachusetts, No. 07-591 (U.S. Dec. 12, 2007)).

enforcement's interests in the Confrontation Clause area.[124] Melendez-Diaz and the law professor *amici* convincingly argue, however, that the State exaggerates the dangers of permitting cross-examination here.[125] The State's policy arguments are unlikely to prevail given the strength of petitioner's argument that drug analysis certificates are testimonial evidence under *Crawford* and *Davis*, which provide Melendez-Diaz with a constitutional right to cross-examine the issuer.[126]

The real questions in this case do not involve who will prevail—Melendez-Diaz will, in all likelihood, if the above analysis is correct—but instead involve (1) whether the Court will articulate a more complete standard for what statements are testimonial and (2) whether the Court will again rule unanimously or 8-1, as it has done in *Crawford* and *Davis*. These two questions are in tension and a more detailed articulation may spark dissent. I offer tentative hypotheses on each question.

First, because *Davis*, without any significant elaboration, supports Melendez-Diaz's case, the Court can follow the language of that decision with little additional reasoning.[127] The Court has been reluctant to articulate a full standard thus far, and it is likely that they will not do so here.[128]

Second, the Court will likely remain unanimous, or nearly so, particularly if the Justices refuse to adopt a more exact test. Among the sitting Justices, only Justice Thomas has expressed reservations about the *Crawford* line of cases. Justice Thomas dissented in part in *Davis*, arguing that whether evidence is testimonial should be determined by its formality.[129] He also wrote that the Confrontation Clause should apply when the prosecution seeks to avoid cross-examination.[130] *Melendez-Diaz v. Massachusetts* implicates both issues, because the certificates are sworn statements,[131] which for policy reasons the State introduced to avoid cross-examination.[132] As such,

124. Ohio v. Roberts, 448 U.S. 56, 64 (1980).

125. *See* Reply Brief for the Petitioner, *supra* note 116, at 10–11; Brief for Law Professors as Amici Curiae Supporting Petitioner, *supra* note 118, at 10, 13, 16–17, 23.

126. *See supra* notes 108–110 and accompanying text.

127. *See supra* notes 85–101 and accompanying text.

128. *See supra* notes 56–57 and accompanying text.

129. Crawford v. Washington, 547 U.S. at 834, 840 (2004).

130. *Id*. at 840.

131. Petition for Writ of Certiorari, *supra* note 96, App. at 24a–29a.

132. Brief for the Respondent, *supra* note 105, at 34.

Justice Thomas will likely also side with the Melendez-Diaz here, though it would be unsurprising if he dissented again.

The likely result then, is a narrow, unanimous (or 8-1) ruling for the petitioner that drug analysis certificates are testimonial evidence that are subject to the requirements of the Confrontation Clause.