

2010

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### Recommended Citation

Joseph Henn (2010) "Melendez-Diaz v. Massachusetts: The Future of the Confrontation Clause," *Barry Law Review*: Vol. 15: Iss. 1, Article 6.

Available at: <http://lawpublications.barry.edu/barryrev/vol15/iss1/6>

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## **MELENDEZ-DIAZ V. MASSACHUSETTS: THE FUTURE OF THE CONFRONTATION CLAUSE**

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### **I. INTRODUCTION**

The latest development in the saga of the ever encompassing Confrontation Clause comes from the Supreme Court, via a five-four vote, in the case of *Melendez-Diaz v. Massachusetts* (*Melendez-Diaz*), which takes the Sixth Amendment to lengths hard to fathom.<sup>2</sup> Simply stated, the Confrontation Clause now demands that a laboratory technician, who merely performs a routine analysis to determine if a substance is an illegal drug, is considered a testimonial witness against the accused. Under the guise of the Confrontation Clause, the accused has the constitutional right to haul the technician into court. The purpose of this article is to show the error in the majorities' decision in *Melendez-Diaz* by approaching the issue from two perspectives. First, by investigating the cases and legal doctrines created by the Supreme Court in the years preceding *Melendez-Diaz*, I will demonstrate why the case was erroneously decided.<sup>3</sup> Second, I will explore the possibility that the majority decision was correct and thus the recently devised standard in *Crawford v. Washington* (*Crawford*) is inherently flawed.<sup>4</sup> This article will discuss the prior application of law before the *Melendez-Diaz* decision, offer analysis on the string of cases that led to the *Melendez-Diaz* decision, and evaluate where the law went wrong. Finally, this article will introduce a revised legal doctrine on what should be considered testimonial evidence against an accused based upon sound policy considerations and the Sixth Amendment rights of the accused.

### **II. THE MASSACHUSETTS LAW PRIOR TO THE DECISION IN *MELENDEZ-DIAZ***

Prior to the decision handed down in *Melendez-Diaz*,<sup>5</sup> the country had nearly five years to conform to the sweeping change that the *Crawford* opinion made to the Confrontation Clause.<sup>6</sup> Only one year after the *Crawford* decision, Massachusetts was confronted with the case of *Commonwealth v. Verde* (*Verde*), which was essentially indistinguishable from the issue in *Melendez-Diaz*. When *Verde*

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2. See *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009).

3. See *Id.*

4. See *Crawford v. Washington*, 541 U.S. 36 (2004).

5. See *Melendez-Diaz*, 129 S. Ct. at 2527.

6. See *Crawford*, 541 U.S. 36 (2004).

reached the Massachusetts Supreme Court, the panel of Judges stated: “This appeal raises the question whether, in light of [*Crawford*], the Confrontation Clause of the Sixth Amendment to the United States Constitution requires that laboratory technicians who analyze drugs seized as part of a criminal investigation authenticate their laboratory findings by appearing at a defendant’s trial.”<sup>7</sup> The Court, adhering to the standard established by *Crawford* that testimonial evidence required confrontation of the witness, determined that a drug certificate or certificate of analysis was akin to a business record, and this type of evidence does not trigger the Confrontation Clause.<sup>8</sup> The Massachusetts Supreme Court formulated this decision not only in adherence to *Crawford*, but also in accordance with established case precedent: “Certificates of chemical analysis are neither discretionary nor based on opinion; rather, they merely state the results of a well-recognized scientific test determining the composition and quantity of the substance.”<sup>9</sup> The prior law, established by almost ninety years of Massachusetts’ jurisprudence, was clear; it was properly distinguished from the holding in *Crawford*, and most importantly it was narrowly tailored as not to offend the Sixth Amendment or its Confrontation Clause.

The *Verde* Court dealt with the same arguments propounded in the case of *Melendez-Diaz*: (1) the admission of the drug analysis certificates denied the defendant his constitutional right to confrontation because the technician who analyzed the substances and prepared the certificates did not testify; and (2) “testimonial” hearsay statements are barred under the Confrontation Clause unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness.<sup>10</sup> The court, however, disagreed with the defendant’s application of *Crawford* and understood the term “testimonial evidence,” as it was described in *Crawford*, “applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations.”<sup>11</sup> The Massachusetts court, after evaluating the historical analysis constructed by Justice Scalia in the *Crawford* opinion, concluded that it was these types of practices that resembled the closest affinity for abuse at which the Confrontation Clause sought to prevent.<sup>12</sup> However, this decision came down shortly after the *Crawford* opinion was published, and the Massachusetts court was forced to formulate this opinion without the guidance of what exactly constituted testimonial evidence. Although the verdict in *Crawford* stated that testimonial evidence gives rise to the defendant’s right of confrontation, the Court “[left] for another day any effort to spell out a comprehensive definition of ‘testimonial.’”<sup>13</sup> The Nation’s

7. Commonwealth v. Verde, 827 N.E.2d 701, 703 (Mass. 2005).

8. *Id.* at 703.

9. *Verde*, 827 N.E.2d at 705 (citing Commonwealth v. Harvard, 253 N.E.2d 346 (Mass. 1969)) (This legal theory is established by almost 100 years of jurisprudence, and Massachusetts has held since the early 1920’s that it was not unconstitutional to admit a lab report without an authenticating witness, *see, e.g.* Commonwealth v. Slavski, 140 N.E. 465 (Mass. 1923)).

10. *Verde*, 827 N.E.2d at 704-05.

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

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

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

courts had to wait until 2006, two years after *Crawford*, once *Davis v. Washington* and its companion case *Hammon v. Indiana* were decided.<sup>14</sup> There, the Supreme Court formulated a guideline of what constitutes testimonial evidence.<sup>15</sup> *Davis*, coupled with the foundation laid out in *Crawford*, created the legal doctrines used to decide the issue of the Confrontation Clause and drug analysis certificates in *Melendez-Diaz*.

### III. MELENDEZ-DIAZ V. MASSACHUSETTS: WHERE DID THE COURT GO WRONG?

A brief recitation of the facts of *Melendez-Diaz* is necessary to understand the potential consequences this decision could have on the approximately 180,000 drug cases that face the American criminal justice system annually.<sup>16</sup> In 2001, the Boston police, acting on a tip, stopped a Kmart employee, Thomas Wright, for suspicious activity after exiting a car in the Kmart parking lot.<sup>17</sup> After a search of Wright turned up four bags containing a substance resembling cocaine, the police officers arrested Wright, along with two other men in the car, one being Luis Melendez-Diaz.<sup>18</sup> While being transported to the police station, the officers noticed the men fidgeting in the backseat and a subsequent search of the rear seat turned up nineteen additional bags.<sup>19</sup> All of the bags were turned over to the state laboratory to conduct a chemical analysis on the substances, and indeed the bags did contain cocaine.<sup>20</sup> The police officials and the state laboratory technicians were strictly adhering to Massachusetts' law requiring them to conduct an analysis on any potential illegal substance.<sup>21</sup> Upon completion of the laboratory work, the technician submitted three "certificates of analysis showing the results of the forensic analysis performed on the seized substances."<sup>22</sup> Faced with this evidence against him, counsel for Luis Melendez-Diaz made the objection that the Confrontation Clause decision in *Crawford v. Washington* required the technician to testify in person.<sup>23</sup> The motion was overruled and Luis Melendez-Diaz was found guilty, and this simple drug possession/distribution case made its way to the highest court in America.

14. See *Davis v. Washington*, 547 U.S. 813 (2006), *aff'g* *State v. Davis*, 111 P.3d 834 (Wash. 2005), *rev'g* *Hammon v. Indiana*, 829 N.E.2d 444 (Ind. 2005) (hearing in tandem both *Davis* and *Hammon*. Both cases involve an issue that flows directly from *Crawford*, where the Court held that testimonial statements in a criminal trial are prohibited by the Confrontation Clause of the Sixth Amendment if the defendant was not able to cross examine the person who made the statement).

15. See *Id.*

16. See Bureau of Justice Statistics, <http://bjs.ojp.usdoj.gov/content/DCF/enforce.cfm> (last visited Dec. 5, 2010) (showing the latest statistical data for the year 2007, where there were over 1.8 million arrests for drug offenses; statistically 90% will enter a plea deal, leaving a potential 180,000 cases to be tried in criminal court).

17. *Melendez-Diaz*, 129 S. Ct. at 2530.

18. *Id.*

19. *Id.*

20. *Id.* at 2530-31.

21. MASS. GEN. LAWS ANN. ch. 111, §§ 12, 13 (West 2006).

22. *Melendez-Diaz*, 129 S. Ct. at 2531.

23. *Id.*

When this case reached the Supreme Court it was just four years after the decision handed down in *Crawford*. Justice Scalia, who also wrote the opinion in *Crawford*, penned the opinion in *Melendez-Diaz*. Scalia began by quoting himself, stating that “[i]n *Crawford*, after reviewing the Clause’s historical underpinnings, we held that it guarantees a defendant’s right to confront those ‘who bear testimony’ against him.”<sup>24</sup> However, rather than use a smooth form of synthesis to reconcile the two cases, or at least demonstrate the application of *Crawford* to the facts in the current case, Justice Scalia was more concerned with attempting to discredit the dissenting opinions. He mentioned that the *Crawford* opinion used the word affidavits twice, as a form of testimonial evidence.<sup>25</sup> Justice Scalia then concludes with, “[T]he analysts’ affidavits were testimonial statement, and the analysts were ‘witnesses’ for purposes of the Sixth Amendment.”<sup>26</sup> Justice Scalia did a fine job of noticing the similar words contained in his two opinions, but he failed to connect the dots that would offer any support for his position. First, one must approach the theory that the majority holding in *Melendez-Diaz* was incorrect, and principally so because the decision did not adhere to precedent generated by its own author only several years earlier.

#### A. Tracking the Changes Made by *Crawford* and What the Decision Really Means for the Confrontation Clause

To understand the position taken by the majority, and in particular Justice Scalia, one must evaluate the central holding and logic in the *Crawford* decision to determine where the analysis departed from precedent. Prior to the dramatic change *Crawford* required of the Confrontation Clause, the United States Supreme Court held that a defendant’s right, under the Sixth Amendment, to be confronted by the witnesses against the defendant did not bar admission of an unavailable witness’ statement.<sup>27</sup> The Court looked to see if the statement bore “adequate indicia of reliability”; and to meet this test, evidence had to fall within a firmly rooted hearsay exception, or bear particularized guarantees of trustworthiness.<sup>28</sup>

Justice Scalia took the opportunity in *Crawford* to examine the Confrontation Clause from a historical approach, because as Justice Scalia himself stated, “[the Confrontation Clause’s] text does not alone resolve this case . . . [w]e must therefore turn to the historical background of the Clause to understand its meaning.”<sup>29</sup>

One common theme emerges from the *Crawford* narrative, a defendant should have his “‘accusers,’ *i.e.* the witnesses against him, brought before him face to face.”<sup>30</sup> The primary example is the 1603 trial of Sir Walter Raleigh for treason.<sup>31</sup>

24. *Id.*

25. *Id.* at 2532.

26. *Id.*

27. *See* *Ohio v. Roberts*, 448 U.S. 56, 65 (1980).

28. *Id.*

29. *Crawford v. Washington*, 541 U.S. 36, 42-43 (2004).

30. *Id.* at 43.

31. *Id.*

The motif that emerges from this portion of Justice Scalia's opinion can best be summarized by Sir Raleigh himself: "[T]he Proof of the Common Law is by witness and jury: let Cobham be here, let him speak it. Call my *accuser* before my face."<sup>32</sup> A general theme that Justice Scalia himself harps upon in the historical narrative is that an *accuser*, or a witness who bears testimony against a defendant, demands confrontation and cross-examination. Cobham, Raleigh's alleged accomplice, declared the accusation against Raleigh during an examination before the Privy Council and again in a letter; then at Raleigh's trial, the accusations of Cobham were read to the jury.<sup>33</sup> Justice Scalia arrives at the determination that the Confrontation Clause applies to "witnesses" against the accused, those who "bear testimony."<sup>34</sup> With the historical foundation in mind, Justice Scalia devised a two part test: "First, that we apply the Confrontation Clause only to testimonial statements, leaving the remainder to regulation by hearsay law . . . [;] Second, that we impose an absolute bar to statements that are testimonial, absent a prior opportunity to cross-examine."<sup>35</sup>

The facts in *Crawford* were rather straightforward: Sylvia Crawford, the wife of the defendant, made certain statements to the police during an interrogation after she witnessed an assault involving her husband.<sup>36</sup> She did not testify at trial, invoking the right of marital privilege, and the State introduced into evidence the statements she made to the police during the interrogation.<sup>37</sup> Justice Scalia, and the majority, had no reluctance in assertively concluding that: "In this case, the State admitted Sylvia's testimonial statement against petitioner, despite the fact that he had no opportunity to cross-examine her. That alone is sufficient to make out a violation of the Sixth Amendment."<sup>38</sup> One can picture an immediate impression of what constitutes a "testimonial witness" as devised by the Court, perhaps a witness who bears direct testimony against the defendant and which the Sixth Amendment guarantees the right of confrontation for cross-examination, to test the knowledge and reliability of such a witness. However, the Court states "[w]e leave for another day any effort to spell out a comprehensive definition of 'testimonial.'"<sup>39</sup>

A brief look at the consolidated cases contained in *Davis v. Washington* and *Hammon v. Indiana* illustrates two situations where police officials gathered information that, in turn, was used as evidence and testimony in court.<sup>40</sup> In *Davis*, the evidence was gathered during an assault; and in *Hammon*, similar evidence was gathered immediately after an alleged assault.<sup>41</sup> The opinion establishes a "testimonial witness/statement" standard focusing on the situation and/or

32. *Id.* at 44. (emphasis added).

33. *Id.*

34. *Id.* at 51.

35. *Id.* at 61.

36. *Id.* at 36.

37. *Crawford*, 541 U.S. at 36.

38. *Id.* at 68.

39. *Id.*

40. See *Davis v. Washington*, 547 U.S. 813, 817 (2006).

41. *Id.* at 817-20.

circumstances in which the information is gathered.<sup>42</sup> The facts in *Davis* reveal a 911 call was placed during an assault in which the operator gathered information from the victim to assist the police in resolving the situation.<sup>43</sup> In *Hammon*, the police arrived at the scene after an alleged assault, and at that point, when no ongoing emergency was occurring, began to gather information from the victim against the defendant.<sup>44</sup> The Court determined that, “[a] 911 call . . . at least the initial interrogation conducted in connection with a 911 call, is ordinarily not designed primarily to ‘establish or prove’ some past fact, but to describe current circumstances requiring police assistance.”<sup>45</sup> The Court held the statements made to the 911 operator were distinguishable from *Crawford*, because the witness stated the events as they were actually happening, rather than describing past events.<sup>46</sup> In *Hammon*, with facts almost completely analogous to those in *Crawford*, the witness did not appear at the trial, and the statements she made to the police were used as evidence against the defendant.<sup>47</sup> By viewing the combination of these three cases; *Crawford*, *Davis*, and *Hammon*, a logical formulation can be observed of what exactly a “testimonial witness or statement” would entail. This article’s plain interpretation of a testimonial witness is: a witness, (1) who directly observes or is intimately involved in an event or matter, (2) whose testimony has criminal implication against the defendant, and (3) the testimony or statements are based upon their knowledge and recollection of the event or matter. Only then does the Sixth Amendment ensure the right of confrontation. From the facts of *Davis* and *Hammon*, the Court formulated a rule stating:

Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.<sup>48</sup>

It appears this article’s understanding of what creates a “testimonial witness” is on par with the workable outline the court provides with its guidelines on police interrogations. The focus is constantly centered on the witnesses’ personal knowledge of the event, when and in what manner the witnesses’ statements were obtained, and then finally the defendant’s Sixth Amendment right to confrontation

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42. *Id.* at 822.

43. *Id.* at 817-18.

44. *Id.* at 820.

45. *Id.* at 827.

46. *Id.*

47. *Id.* at 820.

48. *Id.* at 822.

to challenge the knowledge and reliability of the witness if the statements are testimonial.

### **B. *Melendez-Diaz* Five-Four Decision: Why the Minority Was Right and How *Crawford* Was Misapplied**

With the foundation of *Crawford*, and what appears to be a comprehensible framework of a “testimonial witness/statement”, the stage is now set for the Supreme Court to confront the issue in *Melendez-Diaz*. The question undoubtedly becomes how did the Supreme Court reach the holding in *Melendez-Diaz*, that a laboratory technician who submits an affidavit identifying the nature of a substance can be considered a “testimonial witness” against the defendant? The problem lies with Justice Scalia’s application of broad conceptual doctrines of what potentially constitutes a “testimonial witness” rather than focusing on the facts in the particular case. As the dissenting opinion in *Melendez-Diaz* notes, the main facts in *Crawford* and *Davis/Hammon* are completely distinguishable from the facts in *Melendez-Diaz*.<sup>49</sup> The Court decided that the witnesses in *Crawford* and *Hammon* were testimonial witnesses against the defendant. A common relationship between the two witnesses is that they can both be described as two ordinary, or conventional witnesses, meaning they were personally involved in the events, both happened to be victims, and both offered personal firsthand accounts as they perceived the facts to be.<sup>50</sup> In the case against Luis Melendez-Diaz, a laboratory technician was given an unknown substance, and then used technology such as: infrared spectrophotometry, magnetic resonances, gas chromatography, or mass spectrometry to determine the characteristic of the substances, which enabled another technician to identify the substances.<sup>51</sup> Then one of the technicians swore by a certificate of identification, which was notarized, and used the certificate in court to show the nature and identity of the substances.<sup>52</sup> If one thing can be understood from *Crawford* and *Hammon*, it is that both arguments were based on the common premise that the witnesses had *personal knowledge* of some aspect of the defendant’s guilt or actions, and that evidence or testimony may not be admitted without the accused having the right to confront these types of witnesses.<sup>53</sup> That was the central concern of the Sixth Amendment, the fear the Founders had of the common practice in the colonies of examining witnesses against particular men *ex parte*.<sup>54</sup> This concern is what *Crawford* establishes in its holding, that Sylvia Crawford’s *ex parte* police interrogation and tape-recorded statements that the stabbing was not in self-defense, cannot be used as evidence against the defendant simply because it fell into an unavailable witness hearsay

49. *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2543 (2009) (Kennedy, J., dissenting) (arguing that the legal doctrine of a “testimonial witness” was crafted based upon the particular facts of these cases).

50. *Id.*

51. See 2 PAUL GIANNELLI & EDWARD IMWINKELRIED, *SCIENTIFIC EVIDENCE* § 23.03 (4th ed. 2007).

52. *Melendez-Diaz*, 129 S. Ct. at 2531.

53. See *Id.* at 2543 (Kennedy, J., dissenting).

54. *Crawford*, 541 U.S. at 47.

exception.<sup>55</sup> Sylvia Crawford was interrogated twice; and under the circumstances of first being read her Miranda rights, and second, making statements during a police interrogation, one would assume Sylvia Crawford, or any objective witness, would reasonably believe that her statements would be used at a later trial.<sup>56</sup> Using this same mode of analysis, a different result should have been apparent in *Melendez-Diaz*; yet, somehow the majority is able to reach the conclusion that a laboratory technician performing a chemical analysis is analogous to a witness like Sylvia Crawford.

The flaw, once again, comes from focusing on the doctrinal theories in *Crawford* and incorrectly applying the applicable law. Justice Scalia focuses on the fact in the *Crawford* opinion he mentions the use of affidavits twice when describing possible classification of testimonial evidence.<sup>57</sup> However, placed into context, the term ‘affidavit’ refers to “*ex parte* in-court testimony or its functional equivalent . . . pretrial statements that declarants would reasonably expect to be used prosecutorially.”<sup>58</sup> Justice Scalia is right in one regard, the “certificates of analysis” were indeed “affidavits”, but they were not what *Crawford* or the Sixth Amendment envisioned within the meaning of the Confrontation Clause.<sup>59</sup> In *Melendez-Diaz*, the laboratory technician submitted an affidavit based on the systematic readout and identification of the substance, in this case cocaine, generated by a machine. The actual analysis process, which entails the work of more than one technician, further complicates the issue of whom to call as a witness against the defendant.<sup>60</sup> The analysis process itself is rather uncomplicated. Taking infrared spectrophotometry as an example, a technician introduces the unknown substance into the machine, the machine prints out a graph, which another technician compares to known graphs, either by using knowledge of peak properties or using a computer database, probably both; then the identity of the drug is confirmed.<sup>61</sup> The process does not result in a guess or an assumption of what a technician perceives the substance to be. If that were the case, the technician would be a testimonial witness and cross-examination would be necessary to ensure the defendant was receiving a fair trial. Before *Melendez-Diaz*, the Fourth, Seventh, and Eleventh Circuits all held that these types of lab reports were nontestimonial statements produced by machines or computers.<sup>62</sup> Until *Melendez-Diaz*, there had always been a morally conscious objective to the requirement of confrontation and the use of cross-examination of a witness. A

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55. *Id.* at 41.

56. *Id.* at 38-39.

57. *Melendez-Diaz*, 129 S. Ct. at 2531-32.

58. *Id.* at 2531.

59. BLACK’S LAW DICTIONARY 62 (8th ed. 2004). (“[D]eclaration of facts written down and sworn to by the declarant before an officer authorized to administer oaths.”).

60. *Melendez-Diaz*, 129 S. Ct. at 2546-50. (Kennedy, J., dissenting).

61. Marcela A. Oliveira-Antunovich, *Interdisciplinary Applications of Chemistry through Engineering in Modern Medicine*: CSI New Haven (2006), <http://www.yale.edu/ynhti/curriculum/units/2006/5/06.05.07.x.html>. (last visited Dec. 5, 2010).

62. Joe Bourne, *Prosecutorial Use of Forensic Science at Trial: When Is a Lab Report Testimonial?*, 93 MINN. L. REV. 1058, 1079 (2009).

defendant may wish to challenge the reliability or credibility of the witness, or demonstrate the potential bias or prejudice of a witness; but whatever the reason, there has been an understandable right for an accused to cross-examine the witness. This is where logic comes to a screeching halt in the *Melendez-Diaz* decision. Any Sixth Amendment rationale behind confrontation and cross-examination becomes useless. Technicians have no knowledge of the defendant or of any facts in the case, and the line of questioning would be limited to: “Did you receive X substance? Yes. Did you place it in Y machine? Yes. Did the results indicate it was an illegal drug? Yes. Did you tamper with the substance or the results? No.” There is a clear distinction between “mechanical” testing, like the test performed in *Melendez-Diaz*, and more complex testing. “A defendant cannot effectively cross-examine statements in the former ‘mechanical’ category even when the technician is present, whereas the complex, conclusion-heavy tests . . . often require explanation from the person responsible for the procedure.”<sup>63</sup>

There must be some minimal level of a relationship between the witness and the defendant to reach the valid concerns of Sixth Amendment protection. As demonstrated by the historical analysis illustrated in *Crawford*, and in the case’s holding, confrontation was meant for a witness in the sense that the witness had personal knowledge of the matter. In the context of an expert witness, confrontation, again, falls within the right of the defendant if the expert is formulating an opinion based upon an understanding of the relevant facts of the case and the defendant. An additional fallacy, exuberantly expressed by Justice Scalia, was that technicians could reasonably believe that their statements would be available for use at a later trial.<sup>64</sup> Again, Justice Scalia is taking this idea out of context from his opinion in *Crawford*. The technician is not making a statement based from memory, nor is the purpose to make a statement that will be used later in court, that is the objective or expectation of the prosecutor. The sole purpose of the technician is to identify the substance. Technicians, as demonstrated in *Melendez-Diaz*, have no knowledge of the defendant or of the facts in the case; they are focused on matching up faceless samples.<sup>65</sup> What Justice Scalia neglected to recall when selecting quotes from his former decision in *Crawford* was one of the few examples deciphering the meaning of testimonial: “Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations. These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed.”<sup>66</sup> How this central statement can extend itself to a technician’s affidavit, based on a mechanical analysis of a substance, is a question the majority opinion in *Melendez-Diaz* failed to answer.

63. Thomas F. Burke III, *The Test Results Said What? The Post-Crawford Admissibility of Hearsay Forensic Evidence*, 53 S.D. L. REV. 1, 16 (2008).

64. *Melendez-Diaz*, 129 S. Ct. at 2532-34.

65. See CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, *FEDERAL EVIDENCE* 398.1 (2d ed. 1999 & Supp. 2004).

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

The holding in *Melendez-Diaz* not only deviates from *Crawford*, but it does not find support in the Sixth Amendment itself. The Sixth Amendment states:

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 with the witnesses against him*; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.<sup>67</sup>

As Justice Scalia notes in *Crawford*, the Framers of the Constitution included the Confrontation Clause to ensure that criminal defendants would face their accusers.<sup>68</sup> The plain meaning of the Sixth Amendment, even coupled with *Crawford*'s historical analysis is of little help, nor is it persuasive for the holding in *Melendez-Diaz*, because the Framers could not have imagined the role scientific evidence would play in the modern legal system.<sup>69</sup> So how did Justice Scalia arrive at the decision in *Melendez-Diaz* when the text of the Confrontation Clause states only that the accused shall have the right "to be confronted with witnesses against him," and even the *Crawford* opinion acknowledges that "[o]ne could plausibly read 'witnesses against' a defendant to mean those who actually testify at trial, those whose statements are offered at trial, or something in-between."<sup>70</sup> The majority decision in *Melendez-Diaz* failed to realize that the affidavits submitted by the technicians were not within any conceptual range of the previously mentioned field. As was held in virtually every state across the country, laboratory reports were considered to be routine documentary evidence, and thus non-testimonial by their very nature.<sup>71</sup> It is not the statement of the technician that is essentially used to identify the substance in the affidavit, but rather the statement of the machine being used to conduct the test.

In Massachusetts, the origin of *Melendez-Diaz*, the state court evaluated the use of the analysis reports, and observed that the test results were non-discretionary and presented a "primary fact" rather than opinion.<sup>72</sup> The laboratory technician was not submitting an affidavit based on an opinion of the identity of the substance. The Massachusetts court noted the affidavit was essentially fact, the genuine evidence against the defendant was the illegal substance itself, the affidavits were no different than any other non-testimonial statement and they

67. U.S. CONST. amend. VI.

68. *Crawford*, 541 U.S. at 48-49.

69. See Bradley Morin, *Science, Crawford, and Testimonial Hearsay: Applying the Confrontation Clause to the Laboratory*, 85 B.U. L. REV. 1243, 1255 (2005).

70. *Crawford*, 541 U.S. at 42-43 (citations omitted).

71. See *People v. Johnson*, 18 Cal. Rptr. 3d 230, 233 (Cal. Ct. App. 2004); see also *Commonwealth v. Verde*, 827 N.E.2d 701, 705 n.4 (Mass. 2005) (showing that from California to Massachusetts the common judicial decree that laboratory reports were akin to business documents and did not fall with the Confrontation Clause).

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

easily fell within the business or official record hearsay exception.<sup>73</sup> The accused had the same access to the incriminating substance used against them, and could conduct their own laboratory analysis.<sup>74</sup> Justice Scalia stated that the affidavits in *Melendez-Diaz* fell within the “core class of testimonial statements” described in *Crawford*.<sup>75</sup> However, as stated in *Crawford* and reiterated in *Melendez-Diaz*, the core class of testimonial statements is “*ex parte* in court testimony or its functional equivalent,”<sup>76</sup> and even though Justice Scalia listed one of the examples as being an affidavit, it is not the same type of testimonial statement as the diction suggests. This was not a situation where one of the two other men arrested with Luis Melendez-Diaz made a confession or statement to the police affirming Luis Melendez-Diaz’s possession of the cocaine and then used the statement as evidence without confrontation; but was rather a scientific analysis report merely stating the identity of the substance. The Sixth Amendment and the holding in *Crawford* were designed to protect the accused from the former scenario not the latter.

#### IV. IF THE *MELLENDEZ-DIAZ* DECISION WAS CORRECT WHAT DOES THAT MAKE OF *CRAWFORD*?

This article thus far has demonstrated why the decision in *Melendez-Diaz* was incorrect. However, if the Court focuses just on the strict diction in *Crawford*, as was done here, this can be viewed as an appropriate decision that follows established precedent. Justice Kennedy’s dissenting opinion in *Melendez-Diaz* sees the Court’s holding as: “[A] body of formalist and wooden rules, divorced from precedent, common sense, and the underlying purpose of the Clause.”<sup>77</sup> The dissent was correct in all respects except one; the holding is not “divorced from precedent,” and this is where a serious problem arises. If a strict interpretation of *Crawford* can yield this result, then it was *Crawford* that contained an inherent flaw in its reasoning. Viewed in its most inclusive application, *Crawford* can encompass scientific affidavits as “testimonial statements.” As Professor Farb illustrates, taken verbatim from the *Crawford* opinion, the holding can include the affidavits from a chemical analysis:

The Court did not set out a complete definition of testimonial statement. However, it ruled that such a statement includes, at a minimum, prior testimony at a preliminary hearing, testimony before a grand jury or at a former trial, police interrogation, and a plea allocution showing the existence of a conspiracy. The opinion also gave other examples without explicitly ruling that they are testimonial statements. The examples relevant to a chemical analyst’s affidavit include: (1) affidavits or similar

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73. *See Id.* at 706.

74. *See Id.*

75. *Melendez-Diaz*, 129 S. Ct. at 2532.

76. *Id.* at 2531.

77. *Id.* at 2544 (Kennedy, J., dissenting).

pretrial statements that declarants would reasonably expect to be used prosecutorially; (2) extrajudicial statements contained in formalized testimonial materials, such as affidavits; and (3) statements made under circumstances that would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.<sup>78</sup>

From this austere application of *Crawford*, several factors would suggest that a technician's affidavit would be considered testimonial statements.<sup>79</sup> Justice Scalia provides a range of potential guidelines or definitions of what would constitute a testimonial statement in *Crawford*. Applying these broad definitions to the facts in *Melendez-Diaz*, it becomes evident that a chemical technician who prepares an affidavit identifying an illegal substance that will be used at trial would fall under the guidelines of a testimonial statement:

(1) the analyst preparing the affidavit would reasonably expect it to be used prosecutorially; (2) the affidavit contains an extrajudicial statement in formalized testimonial material; and (3) the statement in the affidavit is made under circumstances that would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.<sup>80</sup>

Justice Scalia noted in his opinion that certificates specified on their face their evidentiary purpose, so the analysts must have been aware that their certificates would be used in criminal trials.<sup>81</sup> For these reasons, the opinion in *Melendez-Diaz* is correct, and contrary to what the dissent believed, there was no divorce from precedent. The problem now becomes what *Crawford*, and its subsequent application in *Melendez-Diaz*, will confer to the nation's criminal justice system.

The country's effort to immediately confront the many questions that now face the judicial system is evident in the Court's decision in *Melendez-Diaz*.<sup>82</sup> The decision "has thrown state and federal prosecutions into disarray as familiar modes of proof are called into question."<sup>83</sup> By no means should the Sixth Amendment and the Confrontation Clause be infringed upon because of possible inconveniences to the courts or the prosecution. However, the holding in *Melendez-Diaz* had no

78. Richard L. Farb, Constitutionality of G.S. 20-139.1(e1) (Use of Chemical Analyst's Affidavit in District Court) After *Crawford v. Washington*, 541 U.S. 63, 124 S. Ct. 1354 (2004) (June 4, 2004) (unpublished manuscript, on file with author).

79. See *Id.*

80. *Id.*

81. *Melendez-Diaz*, 129 S. Ct. at 2532.

82. See Christina Miller & Michael D. Ricciuti, *Legal Analysis: Crawford Comes to the Lab: Melendez-Diaz and the Scope of the Confrontation Clause*, 53 B.B.J. 13, 13 (2009).

83. *Id.* (citing *Tabaka v. District of Columbia*, 976 A.2d 173, 175-76 (D.C. Cir. 2009) (reversing an operating a motor vehicle without a permit conviction on *Melendez-Diaz* grounds because certificate of no-record inadmissible); *Grant v. Commonwealth*, 682 S.E.2d 84, 89 (Va. Ct. App. 2009) (reversing driving while intoxicated conviction because certificate of the results of a breathalyzer-type device admitted into evidence without the testimony of the breathalyzer operator in violation of *Melendez-Diaz*)).

rational relationship to the historical underpinnings of the Sixth Amendment. Fundamentally, what is of concern here is that *Melendez-Diaz* raises new questions about “just how far *Crawford* reaches.”<sup>84</sup> A practical examination of potential consequences from the decision in *Melendez-Diaz* gives rise to significant concerns. Focusing again on the State of Massachusetts, where the case originated, in the year 2007 alone, the district courts saw 46,685 narcotics cases.<sup>85</sup> The two laboratories that performed narcotics analysis employed just twenty-three people.<sup>86</sup> In 2007, one of these laboratories analyzed 42,583 items, resulting in delays of approximately four months for certificates.<sup>87</sup> This delay was only for the needed certificate or affidavits, and not an actual appearance by a technician. A reasonable concern, and one articulated by Attorney General Martha Coakley, who argued *Melendez-Diaz* in the Supreme Court, is that “the ruling will result in the dismissal of drug cases based exclusively on the unavailability of analysts.”<sup>88</sup> According to the Attorney General, “arranging for the testimony of these analysts at every drug prosecution is ‘virtually impossible with current staffing.’”<sup>89</sup> This, unfortunately, is what *Crawford* demands. The “testimonial standard,” when broadly applied, reveals the intrinsic flaws in the standard, as is seen in the result of the *Melendez-Diaz* decision. Furthermore, although the Court’s decision in *Melendez-Diaz* focuses on a technician’s drug analysis certificate:

[the] holding applies to all forensic evidence if that evidence takes the form of a declaration of facts sworn to and provided to the prosecution for the purpose of establishing or proving some fact for the purposes of criminal prosecution. Evidence such as DNA analysis, blood-alcohol or other bodily fluid analysis, breathalyzer tests, ballistic or other firearm-related tests and hair or fingerprint analysis would certainly require a witness to testify about the analysis. The question remains as to whether an analyst would be able to testify based on facts as developed by another analyst.<sup>90</sup>

The substance analysis process requires more than one technician; the problem will become at what stage or which technician will be making an accusation against the defendant, and thus have to testify.<sup>91</sup> Lastly, the problem of whether one

84. *Id.*

85. Brief for The National District Attorneys Association et al. as *Amici Curiae* supporting Respondent at 12 n.5, *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009) (No. 07-591, 2008 WL 4185393, 12 n.5.)

86. *Id.* at 14.

87. *Id.* at 15.

88. Miller & Ricciuti, *supra* note 82, at 14 (citing David E. Frank and Kimberly Atkins, *Dismissals Feared in Wake of Landmark Lab-Report Decision*, 37 MASS. LAWYERS WEEKLY 1873, 1897 (July 6, 2009)).

89. *Id.*

90. *Id.* at 15 (citing *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2559-61 (2009)) (listing, in Appendices A and B, state cases from around the country that allow admission of forensic reports without confrontation of the reports’ author, and those that require confrontation before admission).

91. *See Id.*

technician would be able to testify based on facts developed by another technician's analysis will have to be resolved.<sup>92</sup>

Unfortunately, what Justice Scalia quickly brushed aside, and afforded no time for any analysis, is the respondents' claim that the confrontation is not required because the analysts are not "accusatory" witnesses.<sup>93</sup> By comparing the two standards – *Crawford's* testimonial standard and the Respondent's "accusatory" standard – it appears that the Respondent's "accusatory" witness standard is more aligned with both the concerns of the Sixth Amendment, and the public policy concerns of an effective and fair criminal justice system. By examining these two Confrontation Clause doctrines and applying them to the same facts presented in *Melendez-Diaz*, it is evident that the "accusatory witnesses" standard propounded by the respondent is superior and more readily conforms to the Sixth Amendment than does Justice Scalia's "testimonial witness" standard adopted in *Crawford*. A laboratory report differs in important aspects from the sort of statement that the Confrontation Clause was designed to address.<sup>94</sup> Lab reports do not *accuse* the defendant of any criminal activity, but are merely the result of objective, scientific analysis.<sup>95</sup>

Under the umbrella of a "testimonial witness" standard, this far removed drug analysis report is now considered a principle evil that the Confrontation Clause sought to avoid.<sup>96</sup> Was this the reasonable intention of the Framers when they constructed the Sixth Amendment: To protect an accused from an affidavit stating the chemical composition of a substance? No. "These facts are entirely neutral and do not . . . accuse anyone of any criminal conduct."<sup>97</sup> The source of the accusation against the defendant is not the technician submitting an affidavit on the identity of a substance, but other witnesses that link the substance to the person on trial.<sup>98</sup> Simply put, the Confrontation Clause's, "origins [are] unmistakably accusation-based terms: 'The proof was usually given by reading depositions, confessions of accomplices, letters, and the like; and this occasioned frequent demands by the prisoner to have his 'accusers,' i.e., the witnesses against him, brought before him face to face."<sup>99</sup> The text of the Sixth Amendment also supports an accusation-based focus, "[the] modified repetition of the word accused strongly confirms that the Sixth Amendment as a whole is accusation based."<sup>100</sup> As counsel for *Melendez-Diaz* noted, "[t]his same focus is reflected in the Confrontation Clause's text, which refers specifically to 'witnesses against' the accused, not any 'witness with relevant testimony.'"<sup>101</sup> This is where the "testi-

92. See *Id.*

93. See *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2533 (1008); See also Brief for Respondent at 10, *Melendez-Diaz*, 129 S. Ct. 2533 (No. 07-591, 2008 WL 4103864, 10).

94. See Brief for Respondent, *supra* note 93, at 14.

95. See *Id.*

96. See *Id.*

97. *Id.* at 16-17.

98. See *Id.* at 17.

99. *Id.* at 17-18 (citing 1 J. STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND 326 (1883) (quoted in *Crawford v. Washington*, 541 U.S. 36, 43 (2004)).

100. A. AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE FIRST PRINCIPLES 102-03 (1997).

101. See Brief for Respondent, *supra* note 93, at 18; U.S. CONST. amend. VI.

monial witness” standard is inherently flawed; it loses focus on what the Sixth Amendment sought to avoid and what protection it sought to enable.

“A drug analysis certificate bears no resemblance to the types of accusations that historically have been the ‘core concern of the Confrontation Clause.’”<sup>102</sup> What *Crawford* attempts to do is meaningful, but when Justice Scalia strayed too far from the actual text of the Confrontation Clause itself, the results became unstable. The holding in both *Davis* and *Hammon* were a logical application of *Crawford* and fit neatly into the understanding of the Sixth Amendment Confrontation Clause. It only took another two years, when the Court heard *Melendez-Diaz*, to realize that the application of *Crawford* departed significantly from what the Framers could have ever intended or envisioned. When a witness makes an accusation, the typical focus is on historical facts explaining “what [the accused] did, when, where, why, how, with whom, to whom, and so on.”<sup>103</sup> A technician who prepares drug analysis certificates has no knowledge of these historical facts.<sup>104</sup> Their job, instead, is to study the current physical state of a substance, confirming both its chemical composition and weight.<sup>105</sup> When adhering to the text and historical meaning of the Confrontation Clause, an “accusatory witness” standard has the ability to produce more favorable results, compared to the “testimonial witness” standard, when dealing with policy concerns of an overburdened criminal justice system. It affords the full rights and protections that the Sixth Amendment was designed to ensure.

## V. CONCLUSION

The *Melendez-Diaz* decision has implications that reach far beyond the its holding in the present case. The already overburdened criminal justice system now faces the difficulty of losing precious time while technicians are busy testifying in court rather than working in the laboratory performing their jobs. In the last few years alone, there have been monumental changes to the Court’s interpretation of the Sixth Amendment, from the Rehnquist’s Court standard of “indicia of reliability” to the Robert’s Court distinction between “testimonial” and “non-testimonial” statements with the former requiring confrontation. Unfortunately, it seems that neither of these two systems is able to perform the delicate balance of upholding Sixth Amendment rights while applying practical policy concerns. If one thing is evident, the “testimonial witness” standard devised by Justice Scalia – which sought to simplify and return the Sixth Amendment to its originally constructed meaning – was simply too smart by half. If held narrowly, by strict application to the facts in the cases, it can provide a workable standard that honors what the Framers sought to accomplish, that is, guaranteeing the accused the right to confront their accusers. The problem is the application of “testimonial state-

102. See Brief for Respondent, *supra* note 93, at 23.

103. A. Amar, *Sixth Amendment First Principles*, 84 GEO. L. J. 641, 688 (1996); see also *Davis v. Washington*, 547 U.S. 813, 827-28 (2006) (statements “describing past events” are testimonial).

104. See Morin, *supra* note 69, at 1258.

105. See *Id.*

ments” as a legal doctrine, and the flaw that is apparent in *Melendez-Diaz*. But, as the often quoted phrase goes, hindsight is twenty-twenty; this article has the luxury to re-examine *Crawford* through the lens of *Melendez-Diaz* and advocate for an “accusatory” standard based on this hindsight. With the narrow five-four decision *Melendez-Diaz* assembled, this issue will likely find its way to the halls of the Supreme Court in the near future, with the distinct possibility of a different outcome.