MELENDEZ-DIAZ V. MASSACHUSETTS: UPHOLDING THE GOALS AND GUARANTEES OF THE CONFRONTATION CLAUSE

INTRODUCTION

The Sixth Amendment's Confrontation Clause guarantees criminal defendants the right to confront witnesses who bring testimony against them.[1] The Clause is generally interpreted to afford criminal defendants the right to cross-examine adversarial witnesses live in court, under oath, and in the presence of the trier of fact.[2] Historically, accusatory testimony by absent witnesses was admissible in some situations, though with the adoption of the Sixth Amendment, the right to have an accuser present at a criminal trial became virtually absolute.[3] Nevertheless, as advances in technology ushered in new kinds of evidence, courts often disagreed about which of these novel categories were subject to the Clause.[4]

The admissibility of scientific evidence has certainly been no exception to this ongoing debate.[5] One issue stemming from this uncertainty—whether scientific evidence in the form of affidavits containing test results is admissible in court absent live testimony[6]—was answered by the United States Supreme Court in *Melendez-Diaz v. Massachusetts*.[7] Concluding such affidavits constitute testimonial evidence,[8] *Melendez-Diaz* rightly subjected scientific analysts to confrontation under the Sixth Amendment.[9]

Part I of this Comment gives a brief description of the history and case law behind the Supreme Court's Confrontation Clause jurisprudence. Part II summarizes the facts, procedural history, and opinions in *Melendez-Diaz*. Part III commends the *Melendez-Diaz* Court for upholding the purposes, guarantees, and historical intentions behind the Con-

1. U.S. CONST. amend. VI.
2. Maryland v. Craig, 497 U.S. 836, 845–46 (1990).
3. *See generally* Crawford v. Washington, 541 U.S. 36, 43–50 (2004) (discussing the history of the Confrontation Clause).
4. *See* Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527, 2533 (2009) (commenting on conflicting state laws exempting scientific affidavits from confrontation).
5. *See* Lisa Gonzalez, *The Admissibility of Scientific Evidence: The History and Demise of* Frye v. United States, 48 U. MIAMI L. REV. 371, 371–72 (1993) (noting that "rapid developments in scientific knowledge" have forced courts to readdress the admissibility of scientific evidence).
6. *Melendez-Diaz*, 129 S. Ct. at 2530 (presenting this question).
7. 129 S. Ct. 2527 (2009).
8. *Id.* at 2530.
9. *See id.* at 2532 (holding certificates of analysis subject to the Confrontation Clause).

frontation Clause. This Comment concludes by noting that the practical implications of *Melendez-Diaz* are aligned with the overall goals of the Confrontation Clause.

I. BACKGROUND

A. The Confrontation Clause

The Sixth Amendment sets forth the constitutional rights afforded to defendants in "all criminal prosecutions."[10] The Confrontation Clause—made applicable to the states by virtue of the Fourteenth Amendment[11]—provides that all criminal defendants have the right "to be confronted with the witnesses against" them.[12] As interpreted by the Supreme Court, the Clause ensures that criminal defendants retain the right to be confronted face-to-face with sworn-in witnesses, in the presence of the trier of fact, by reserving the right to cross-examine witnesses that testify against them.[13] Designed to ensure the reliability of evidence,[14] the Clause acts as a safeguard for the basic rights guaranteed to all criminal defendants.[15]

Prior to 2004, out-of-court accusatory statements[16] were admissible in criminal trials if they bore an adequate indicia of reliability.[17] Today, however, the Confrontation Clause requires that a criminal defendant have the opportunity to cross-examine an accusatory witness who is unavailable for trial in order for his or her statements to be admissible.[18]

10. U.S. CONST. amend VI ("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.").

11. Pointer v. Texas, 380 U.S. 400, 406 (1965) (holding that the Confrontation Clause applies to both state and federal governments through the Fourteenth Amendment).

12. U.S. CONST. amend. VI.

13. Maryland v. Craig, 497 U.S. 836, 845–46 (1990) (citing California v. Green, 399 U.S. 149, 158 (1970)).

14. Crawford v. Washington, 541 U.S. 36, 61 (2004) (Thomas, J., concurring).

15. *See id.* at 42 (majority opinion) (identifying the Confrontation Clause as a "bedrock procedural guarantee" and noting its importance).

16. *See* Ohio v. Roberts, 448 U.S. 56, 58–61, 77 (1980) (holding a transcript of a witness's preliminary examination testimony constitutionally admissible evidence), *abrogated by* Crawford v. Washington, 541 U.S. 36, 68–69 (2004).

17. *Roberts*, 448 U.S. at 66. "Indicia of reliability" can be defined as those factors or circumstances that allow a jury to hear an out-of-court statement, despite a lack of confrontation of the declarant. *See* Dutton v. Evans, 400 U.S. 74, 88–89 (1970) (finding an indicia of reliability in a statement that contained "no express assertion about past fact," contained a high level of personal knowledge, was not likely to be based on poor memory, and was made spontaneously).

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

B. Ohio v. Roberts[19] *and the Now Abrogated "Reliability" Test*

In *Ohio v. Roberts*, the Court held that the admission of preliminary hearing testimony without the speaker's presence in court satisfied constitutional standards.[20] In *Roberts*, the defendant was charged with forgery and possession of stolen credit cards.[21] During the preliminary hearing, the defense unsuccessfully tried to elicit an admission from the victim's daughter that she provided the defendant with the checks and credit cards.[22] The victim's daughter never appeared at trial despite being served with five subpoenas.[23] At trial, the defendant testified that the victim's daughter had given him the checkbook and credit cards—along with permission to use them.[24] On rebuttal, the State offered the transcript of the daughter's preliminary hearing testimony as evidence to the contrary.[25] The trial court admitted the evidence and the defendant was convicted.[26]

After the Ohio Supreme Court vacated the conviction,[27] the United States Supreme Court granted certiorari and held that an unavailable witness's out-of-court statement was admissible if the statement bore an adequate "indicia of reliability."[28] The Court reasoned that the preliminary hearing testimony fit this reliability requirement because it "afforded the trier of fact a satisfactory basis for evaluating the truth of the prior statement."[29] The majority further held that reliability could be inferred "where the evidence falls within a firmly rooted hearsay exception"[30] or upon a "showing of particularized guarantees of trustworthiness."[31]

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19. 448 U.S. 56 (1980).
20. *See id.* at 74–77.
21. *Id.* at 58.
22. *Id.*
23. *Id.* at 59.
24. *Id.*
25. *Id.* (relying on the Ohio statute that permitted the use of preliminary hearing testimony when a witness was unavailable).
26. *Id.* at 60.
27. *Id.* at 60–61.
28. *Id.* at 62, 66.
29. *Id.* at 73 (quoting Mancusi v. Stubbs, 408 U.S. 204, 216 (1972) (internal quotation marks omitted) (noting that "there was an adequate opportunity to cross-examine [the witness], and counsel . . . availed himself of that opportunity" (alterations in original) (internal quotation marks omitted)).
30. *Roberts*, 448 U.S. at 66. "Hearsay" is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." FED. R. EVID. 801(c). Hearsay exceptions include, among others, present sense impression, excited utterance, then existing mental, emotional, or physical condition, statements for purposes of medical diagnosis or treatment, recorded recollection, and records of regularly conducted activity. FED. R. EVID. 803(1)–(6).
31. *Roberts*, 448 U.S. at 66. The Court went on to explain that the purpose of cross-examination is "to challenge 'whether the declarant was sincerely telling what he believed to be the truth, whether the declarant accurately perceived and remembered the matter he related, and whether the declarant's intended meaning is adequately conveyed by the language he employed.'" *Id.* at 71 (quoting David S. Davenport, *The Confrontation Clause and the Co-Conspirator Exception in Criminal Prosecutions: A Functional Analysis*, 85 HARV. L. REV. 1378, 1378 (1972)).

In dissent, Justice Brennan criticized the majority for dispensing with the right of confrontation "so lightly."[32] The decision was also criticized for creating an unpredictable rule that produced results contrary to the intentions of the Confrontation Clause.[33] Abrogated by *Crawford v. Washington*[34] in 2004,[35] the *Roberts* reliability approach was rejected as a "malleable standard [that] often fails to protect against paradigmatic confrontation violations."[36]

C. Crawford v. Washington

In *Crawford v. Washington*, the defendant stabbed the victim after learning that the victim tried to rape his wife.[37] Officers took a recorded statement from the defendant's wife after the stabbing.[38] At trial, the prosecution introduced into evidence the wife's tape-recorded statement describing the stabbing to the police.[39] The defense did not have an opportunity to cross-examine the defendant's wife[40] and the defendant was convicted.[41] The Supreme Court overturned the conviction and created a new standard, holding that testimonial statements in a criminal prosecution are only admissible—absent live testimony—where the witness is unavailable[42] and where the defendant had a prior opportunity to cross-examine the witness.[43] Distinguishing between testimonial and non-testimonial evidence, the majority recognized the "core class of 'testimonial' statements"[44] as including affidavits, depositions, prior statements not subject to cross-examination, 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."[45]

The *Crawford* Court abrogated the *Roberts*[46] decision, relying heavily upon the text and history of the Confrontation Clause.[47] The majority

32. *Roberts*, 448 U.S. at 82 (Brennan, J., dissenting).

33. *See* Crawford v. Washington, 541 U.S. 36, 63 (2004) (criticizing the *Roberts* test for admitting "core testimonial statements that the Confrontation Clause plainly meant to exclude").

34. 541 U.S. 36 (2004).

35. *See id.* at 68–69.

36. *Id.* at 60.

37. *Id.* at 38.

38. *Id.* at 39–40.

39. *Id.* at 40.

40. *Id.* (explaining that the defendant's wife did not testify because of the state marital privilege law, which barred her from testifying without the defendant's consent).

41. *Id.* at 41.

42. Ohio v. Roberts, 448 U.S. 56, 74 (1980) (describing "unavailability" as the inability to procure a witness despite good-faith attempts to locate and present the witness).

43. *Crawford*, 541 U.S. at 59.

44. *Id.* at 51–52.

45. *Id.* (quoting Brief for the National Ass'n of Criminal Defense et al. as Amici Curiae Supporting Petitioner, Crawford v. Washington, 541 U.S. 36 (2004) (No. 02-9410), 2003 WL 21754961 at *3).

46. *Id.* at 63–64.

47. *See id.* at 60–63 (stating that the *Roberts* reliability approach departed from the historical principles of discouraging the use of *ex parte* evidence and the admission of testimonial statements

reasoned that the *Roberts* reliability approach operated on a model that was "amorphous, if not entirely subjective."[48] The *Crawford* Court went on to conclude that "[w]here testimonial statements are at issue, the only indicium of reliability sufficient to satisfy the constitutional demands is the one the Constitution actually prescribes: confrontation."[49]

D. Davis v. Washington[50]

In *Davis v. Washington*, the Court granted certiorari to the consolidated cases of Adrian Davis and Hershel Hammon in order to further define "testimonial" in the context of out-of-court statements made to law enforcement personnel.[51] Davis's case involved the admissibility of statements made during a 911 call related to an in progress domestic disturbance.[52] The victim made statements to a 911 operator both during the attack and after the defendant left the house.[53] Although,the victim did not appear for trial, the State successfully admitted a portion[54] of the victim's 911 call into evidence—leading to the defendant's conviction.[55] The Court, reviewed the constitutionality of the admitted evidence and held that the statements were nontestimonial, and therefore, immune from the reach of the Confrontation Clause.[56] The majority noted that because the statements were made "about events *as they were actually happening*" and were "necessary to be able to *resolve* the present emergency,"[57] they did not constitute testimonial evidence. Moreover, the Court reasoned that statements made during 911 calls or at crime scenes are generally nontestimonial in nature if "circumstances objectively indicat[e] that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency."[58] The Court considered several factors in making this determination: the timing of the statement, the existence of an emergency, the primary purpose of the statement, and the level of formality surrounding the circumstances under which the statements were made.[59]

Hammon's case involved a domestic violence dispute and centered on the admissibility of the victim's written statements in an affidavit

not subjected to cross-examination because the test "often fail[ed] to protect against paradigmatic confrontation violations").

48. *Id.* at 63.

49. *Id.* at 68–69.

50. 547 U.S. 813 (2006).

51. *See id.* at 817.

52. *Id.*

53. *Id.* at 817–18.

54. *See id.* at 826-29 (stating that the admissible portion of the call consisted only of the victim's nontestimonial statements like those that relayed information vital to police intervention).

55. *Id.* at 819.

56. *Id.* at 828.

57. *Id.* at 827.

58. *Id.* at 822.

59. *See id.*

recorded by the police after the incident concluded.[60] Because the victim did not appear for the defendant's trial, the State admitted the affidavit as evidence of the defendant's guilt.[61] As a result, the defendant was convicted of battery.[62] The Supreme Court, reversing the conviction, reasoned that the lack of an ongoing emergency, in tandem with police questioning, constituted "part of an investigation into possibl[e] criminal past conduct," rendering the statements testimonial and subject to the Confrontation Clause.[63] The Court explained that a statement is 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."[64]

II. *MELENDEZ-DIAZ V. MASSACHUSETTS*

A. Facts

In 2001, Boston police responded to a tip reporting the suspicious behavior of Thomas Wright.[65] An informant alleged that Wright frequently received phone calls at work that prompted him to leave, wait for a blue sedan outside his place of employment, enter the car, and return in the same vehicle a short time later.[66] After observing this exact succession of events, officers arrested Wright and the two men in the blue sedan—one of whom was Luis Melendez-Diaz—on suspicion of drug possession.[67]

On the drive to the police station with the three men, the officers observed the men "fidgeting and making furtive movements in the back of the car."[68] A search of the police car revealed nineteen small plastic bags containing a substance resembling cocaine hidden in the back seat.[69] A similar substance was found during a personal search of Wright.[70] Police submitted the substance to a state laboratory for chemical analysis and identification.[71]

Laboratory analysts produced and swore to certificates of analysis stating the substance in the bags was found to be cocaine.[72] Melendez-

60. *Id.* at 820.
61. *Id.*
62. *Id.* at 821.
63. *Davis*, 547 U.S. at 829–30 (stating that "the product of the interrogation in *Hammon* is a much easier task, since they were not much different from the statements we found to be testimonial in *Crawford*").
64. *Id.* at 822.
65. Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527, 2530 (2009).
66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.* (noting that the bags were hidden in a partition between the front and back seats).
70. *Id.*
71. *Id.*
72. *Id.* at 2531 (mentioning that the certificates were sworn to before a public notary).

Diaz was charged with distributing and trafficking cocaine.[73] Three certificates of analysis were submitted into evidence at trial, along with the bags seized from Wright and the police car.[74]

B. Procedural History

At trial, Melendez-Diaz argued that the Supreme Court's recent Confrontation Clause decision, *Crawford v. Washington*, required the state lab analyst to offer live testimony.[75] Despite this argument, the trial court admitted the scientific certificates into evidence as "'prima facie evidence of the composition, quality, and net weight of the narcotic . . . analyzed.'"[76] Consequently, the jury convicted Melendez-Diaz of distributing and trafficking cocaine.[77]

On appeal, Melendez-Diaz again asserted a violation of his Sixth Amendment right to confrontation.[78] The Appeals Court of Massachusetts held the admission of the certificates constitutional, relying on a Massachusetts Supreme Judicial Court case,[79] which exempted certificates of analysis from confrontation under the Sixth Amendment.[80] After the Supreme Judicial Court of Massachusetts denied review, the United States Supreme Court granted certiorari.[81]

C. Majority Opinion

In a 5–4 decision authored by Justice Scalia, the Supreme Court reversed the decision of the Massachusetts appellate courts, finding the admission of the certificates unconstitutional.[82] The majority, applying *Crawford*,[83] held that because the certificates of analysis constituted affidavits, they fell within the "core class of testimonial statements" covered by the Confrontation Clause.[84] The Court further held that because Melendez-Diaz was never provided with an opportunity to cross-examine the analyst who prepared the certificates, his right to confront the witness under the Sixth Amendment had been violated.[85]

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73. *Id.* at 2530.
74. *Id.* at 2530–31.
75. *Id.* at 2531 (noting Melendez-Diaz's objection to the admission of the certificates at trial).
76. *Id.* (alteration in original) (quoting MASS. GEN. LAWS ch. 111, § 13 (2006)).
77. *See id.*
78. *Id.*
79. *Id.*
80. *Id.*
81. *Id.*
82. *Id.* at 2542.
83. *Id.* at 2532–33 (stating that the decision is a "rather straightforward application" of *Crawford*).
84. *Id.* at 2532. The forensic reports contemplated in *Melendez-Diaz* fall firmly within the testimonial category; and therefore the emergency/non-emergency distinction in *Davis* is not useful in the discussion of scientific analysts. *Id.*
85. *Id.*

The majority went on to reject various arguments raised by the State of Massachusetts and the dissent.[86] First, the Court rejected the argument that the non-accusatory nature of the certificates rendered them nontestimonial.[87] Instead, the Court concluded that the certificates themselves constituted the "witnesses against [the defendant],"[88] whom Melendez-Diaz had a right to confront.[89] Second, relying primarily on *Davis*, the Court found that the scientific nature of the testimony was not grounds for removing analysts from the coverage of the Confrontation Clause.[90] Third, the Court dismissed the respondent's arguments that the neutral, scientific nature of the testimony excluded analysts from confrontation as "little more than an invitation to return to our overruled decision in *Roberts*."[91] The majority also held that a defendant's right to subpoena the analyst who prepared the report was not a substitute for his or her right to confrontation.[92]

Finally, the Court reasoned that the demands of the Confrontation Clause may not be relaxed in order to expedite the judicial process.[93] While acknowledging the increased burden its holding places on prosecutors, the Court ultimately rejected the dissent's claim that requiring analysts to testify imposed too high a burden on criminal prosecutions.[94] In doing so, the "simplest form" of notice-and-demand statutes[95] were upheld as a constitutional way to expedite trials of this nature.[96]

D. Justice Thomas's Concurring Opinion

In his concurrence, Justice Thomas clarified his position that out-of-court statements governed by the Confrontation Clause were limited to those "contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions."[97] Justice Thomas joined the opinion of the Court because the certificates of analysis were "quite plainly affidavits" and therefore, subject to the right of confrontation.[98]

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86. *Id.* at 2532–42 (responding to "a potpourri" of arguments advanced by the dissent and respondent).

87. *Id.* at 2533.

88. *Id.*

89. *Id.* at 2532.

90. *Id.* at 2535.

91. *Id.* at 2536. The Court relied on *Crawford*'s holding that a statement's purpose will determine whether it is testimonial or nontestimonial. *Id.* at 2532.

92. *Id.* at 2540.

93. *Id.*

94. *Id.*

95. *Id.* at 2541 ("In their simplest form, notice-and-demand statutes require the prosecution to provide notice to the defendant of its intent to use an analyst's report as evidence at trial, after which the defendant is given a period of time in which he may object to the admission of the evidence absent the analyst's appearance live at trial.").

96. *Id.*

97. *Id.* at 2543 (Thomas, J., concurring) (quoting White v. Illinois, 502 U.S. 346, 365 (1992)).

98. *Id.*

E. Dissent

The dissent, authored by Justice Kennedy and joined by Chief Justice Roberts, Justice Breyer, and Justice Alito, criticized the majority for discarding "an accepted rule governing the admission of scientific evidence."[99] Justice Kennedy offered numerous arguments as to why the introduction of scientific analysis into evidence should be allowed without an analyst's testimony.[100] First, he noted that the Court's failure to define the word "analyst" could lead to confusion and inconsistencies as to *which* scientists must testify at trial.[101] Next, Justice Kennedy argued that a number of suitable alternatives were available for defendants who wished to challenge scientific evidence brought against them.[102] These options included serving subpoenas, seeking independent scientific tests, forming opposing arguments, and objecting to the admission of evidence.[103] The dissent further stated that laboratory analysts were not the kind of conventional witnesses subject to the Confrontation Clause.[104] Justice Kennedy distinguished between analysts and conventional witnesses by reasoning that analysts record near-contemporaneous events as opposed to past observations,[105] they do not testify "against the defendant,"[106] and they do not respond to questions under interrogation.[107]

The dissent also listed a number of adverse results that could stem from the majority's decision[108]—including unjust, technical dismissals on account of analysts unavailable to give testimony for reasons such as death, illness, or travel.[109] He further argued that requiring analysts to testify at trial could result in an increase of "not guilty" verdicts,[110] an increase in administrative costs, the creation of a "new prosecutorial duty,"[111] a substantial burden on analysts' time, and an inundation of cases requiring the presence of analysts in court.[112]

99. *Id.* (Kennedy, J., dissenting).

100. *See id.* at 2543–53.

101. *See id.* at 2544 (noting that many people play a role in preparing a test's results and the majority opinion does not clarify which of these people the defendant has a right to confront).

102. *See id.* at 2547–49.

103. *Id.* at 2547.

104. *Id.* at 2550–51.

105. *Id.* at 2551.

106. *Id.* at 2552 (noting that analysts rarely have knowledge of the defendant's identity or "of an aspect of the defendant's guilt").

107. *Id.*

108. *See id.* at 2549–50.

109. *Id.* at 2550.

110. *Id.* ("The result, in many cases, will be that the prosecution cannot meet its burden of proof, and the guilty defendant goes free on a technicality that, because it results in an acquittal, cannot be reviewed on appeal.").

111. *Id.* at 2556.

112. *See id.* at 2549–50.

III. ANALYSIS

The *Melendez-Diaz* Court properly aligned its decision with the goals and guarantees of the Confrontation Clause. First, the limitations and deterrents created by *Melendez-Diaz* furthered the fundamental goals of ensuring the reliability of evidence[113] and avoiding the use of *ex parte*[114] examinations as evidence against criminal defendants.[115] Second, the guarantees of face-to-face confrontation[116] and cross-examination[117] remain strong after the Court's decision. Furthermore, *Melendez-Diaz* advanced the Framer's intent of securing rights for criminal defendants by firmly reinforcing the underlying principles behind the Confrontation Clause.

A. Upholding the Fundamental Goals of the Confrontation Clause

The holdings of *Melendez-Diaz* and *Crawford* reveal two primary goals of the Confrontation Clause: (1) ensuring the reliability of evidence,[118] and (2) preventing the use of *ex parte* examinations and accusatory out-of-court statements where the defendant is unable to cross-examine.[119] The Supreme Court recognized the reliability of evidence as the Clause's "ultimate goal."[120] *Melendez-Diaz* maintained this goal by establishing a deterrent for admitting unreliable evidence and broadening the class of testimony subject to the Confrontation Clause.[121] Similarly, *Crawford* identified the use of *ex parte* examinations as the "principal evil" the Confrontation Clause was intended to prevent.[122] The Court's decision in *Melendez-Diaz* advanced this goal by moving Confrontation Clause jurisprudence in a direction that avoids the admission of *ex parte* testimony.

1. Reliability

The *Melendez-Diaz* Court identified the Confrontation Clause's "ultimate goal" as ensuring the reliability of evidence, which is accomplished by requiring that the evidence undergo cross-examination.[123] The Court found that there was nothing uniquely reliable about scientific evidence and it is subject to cross-examination under the Sixth Amend-

113. Crawford v. Washington, 541 U.S. 36, 61 (2003) (Thomas, J., concurring) (identifying reliability of evidence as the Confrontation Clause's "ultimate goal").

114. *See id.* at 49 (describing *ex parte* depositions as statements made by witnesses who have not been subject to cross-examination).

115. *Id.* at 50.

116. Maryland v. Craig, 497 U.S. 836, 847–48 (1990) (discussing the importance of face-to-face confrontation to the Confrontation Clause).

117. *See Crawford*, 541 U.S. at 53–56 (discussing the importance of cross-examination as it relates to the Confrontation Clause).

118. Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527, 2536 (2009).

119. *Id.* at 2531.

120. *Id.* at 2536 (quoting *Crawford*, 541 U.S. at 61).

121. *See Melendez-Diaz*, 129 S. Ct. at 2532.

122. *Crawford*, 541 U.S. at 50.

123. *Melendez-Diaz*, 129 S. Ct. at 2536 (quoting *Crawford*, 541 U.S. at 61).

ment.[124] The *Melendez-Diaz* Court stated that "[c]onfrontation is one means of assuring accurate forensic analysis."[125] Confrontation is meant to expose both fraudulently and honestly produced erroneous evidence.[126] Finally, the right to confrontation does not vanish because other state or federal procedures, such as the ability to subpoena analysts, are aimed at ensuring reliability.[127] Instead, the Confrontation Clause stands as a fundamental safeguard in criminal prosecutions against unreliable evidence.[128]

The Court's decision in *Melendez-Diaz* furthers the goal of ensuring the reliability of evidence by reducing opportunities for false information to go unnoticed and by providing criminal defendants every opportunity to expose fraudulent data.[129] After *Melendez-Diaz*, prosecutors are on notice that their forensic evidence will be subject to the Confrontation Clause.[130] The case, therefore, acts as a deterrent to introducing unreliable evidence in the first place.[131] For example, knowledge that lab analysts are subject to cross-examination will likely compel prosecutors to investigate the reliability of any forensic analysis before trial. Consequently, *Melendez-Diaz* results in more reliable evidence because it discourages the prosecution from initially introducing inadequate evidence.[132]

Furthermore, *Melendez-Diaz* broadened the categories of evidence requiring cross-examination and provided criminal defendants with an opportunity to expose certain weaknesses in the evidence brought against them.[133] As a result, *Melendez-Diaz* ensures that more reliable evidence will be available to the trier of fact by allowing them to consider a broader range of facts surrounding the evidence presented.[134] For example, before *Melendez-Diaz*, some juries would only be presented with the fact that a laboratory affidavit confirmed the identification of a substance.[135] Now, juries will receive information regarding an analyst's proficiency, a machine's calibration, and a lab's reputation.[136] Confrontation may even lead to the discovery that no testing was ever performed

124. *See Melendez-Diaz*, 129 S. Ct. at 2536 (explaining how forensic evidence is not immune to manipulation because forensic scientists often need to answer precise questions regarding a specific case and may feel pressured to compromise methodology for the sake of expediency).

125. *Id.*

126. *Id.* at 2537 ("Confrontation is designed to weed out not only the fraudulent analyst, but the incompetent one as well.").

127. *Id.* at 2540.

128. *See id.* at 2536.

129. *Id.* at 2536–37.

130. *See id.* at 2532.

131. *See id.* at 2537.

132. *See id.*

133. *See id.* at 2532.

134. *See id.*

135. *See id.* at 2554–55 (Kennedy, J., dissenting).

136. 5 CLIFFORD S. FISHMAN & ANNE T. MCKENNA, JONES ON EVIDENCE § 34:27.35 (7th ed. 2010).

on the substance at issue.[137] Conversely, cross-examination may reveal that a lab had a 99.9% accuracy rate and employed the most esteemed analysts in the country. Either way, the trier of fact will gain more information about the evidence brought against the defendant, and will therefore have a deeper understanding about that evidence's reliability.

Finally, had the *Melendez-Diaz* Court affirmed the lower court's decision, the reliability of evidence in criminal prosecutions would have deteriorated.[138] This is true because many kinds of evidentiary facts would be held to very low standards of accountability.[139] The trier of fact would never have the opportunity to learn how some evidence was collected, analyzed, or handled.[140] Juries and judges would lack crucial knowledge about the reliability of certain facts and the truth regarding weaknesses in the prosecution's case.[141] Furthermore, analysts that produce the evidence ultimately used against a defendant at trial might never be called to testify regarding the grave impact of their work product.[142] Had the *Melendez-Diaz* court held differently, the decision would not promote reliable evidence.

2. Avoiding *Ex Parte* Examinations as Evidence

The decision in *Crawford* centered on avoiding the use of *ex parte* evidence.[143] Instead of shifting the goal of the Confrontation Clause away from reliability,[144] *Crawford* simply shed light on another purpose of the Clause. In *Crawford*, the Court stated that "the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused."[145] In this statement, the *Crawford* Court referred to the practice of admitting out-of-court statements into evidence without providing the defendant with an opportunity to cross-examine the speaker.[146] *Ex parte* evidence has been deemed "utterly incompe-

137. *See Melendez-Diaz*, 129 S. Ct. at 2536–37 (majority opinion) (discussing "drylabbing"—a procedure in which some analysts prepare scientific reports authenticating results of tests that were never performed).

138. *Id.* at 2536 (discussing how confrontation assures accurate forensic analysis by exposing and deterring fraudulent scientific reports).

139. *Id.* (stating that cross-examination may be the only way to challenge the results of scientific tests that cannot be repeated—like autopsies and breathalyzers).

140. *Id.* at 2537 ("Like expert witnesses generally, an analyst's lack of proper training or deficiency in judgment may be disclosed in cross-examination.").

141. *Id.* at 2535. For example, Melendez-Diaz's trier of fact would be unaware of the fact that the scientific affidavits were completed almost a week after the tests were performed. *Id.*

142. *Id.* at 2533–34.

143. *See* Crawford v. Washington, 541 U.S. 36, 68 (2004).

144. Christopher B. Mueller, *Cross-Examination Earlier or Later: When is it Enough to Satisfy* Crawford*?*, 19 REGENT U. L. REV. 319, 320 (2006) (advancing the argument that *Crawford* properly shifted the goal of the Confrontation Clause away from reliability).

145. *Crawford*, 541 U.S. at 50.

146. *Id.* (referring specifically to *ex parte* statements wrongly admitted at Sir Walter Raleigh's trial).

tent"[147] and abhorrent[148] because of its unreliable and malleable nature.[149] The Confrontation Clause is a crucial safeguard against this kind of practice.[150]

The holding in *Melendez-Diaz* advanced the goal of avoiding the use of *ex parte* testimony as evidence. By holding that forensic analysts are subject to cross examination, the Court made it clear that Confrontation Clause jurisprudence should move toward, and not away from, allowing confrontation. As the Court reasoned, "the paradigmatic case identifies the core of the right to confrontation, not its limits."[151] *Melendez-Diaz* established these limits in a way that avoids a slippery-slope toward admission of *ex parte* examinations.

B. Upholding the Fundamental Guarantees of the Confrontation Clause

Not only did *Melendez-Diaz* promote the goals at which the Confrontation Clause is aimed, it also upheld the guarantees promised to individual criminal defendants. It is generally accepted that the Clause guarantees the right of face-to-face confrontation and the right to cross-examination.[152] The Court's *Melendez-Diaz* decision guarded these two guarantees, which are fundamental to the right of confrontation.

1. Face-to-Face Confrontation

As the *Crawford* Court noted, the right to face one's accusers dates back to early Roman and English common law.[153] This right allows the trier of fact to observe the witness under questioning,[154] provides an opportunity for an accuser to tell the truth under oath,[155] and gives the defendant an opportunity to face his or her accuser.[156] *Melendez-Diaz* rightly granted defendants the opportunity to come face-to-face with the scientific analysts who produced the evidence used against them at trial. As Justice Scalia opined, "the analyst who provides false results may, under oath in open court, reconsider his false testimony."[157] The re-

147. *Id.* at 49.
148. *Id.* at 48.
149. *Id.* at 50.
150. *Id.*
151. Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527, 2534 (2009) (referring again to Sir Walter Raleigh's trial).
152. Marc C. McAllister, *The Disguised Witness and* Crawford*'s Uneasy Tension with* Craig*: Bringing Uniformity to the Supreme Court's Confrontation Jurisprudence*, 58 DRAKE L. REV. 481, 519 (2010) (referring to "Face-to-Face Confrontation and Cross-Examination as the Two Pillars of Confrontation"). *See generally* Crawford v. Washington, 541 U.S. 36 (2004) (discussing throughout the importance of face-to-face confrontation and cross-examination).
153. *Crawford*, 541 U.S. at 43.
154. *See id.*
155. *See Melendez-Diaz*, 129 S. Ct. at 2536–37.
156. Jeffery L. Fisher, *Preface: Reclaiming Criminal Procedure*, 38 GEO L.J. ANN. REV. CRIM. PROC., at iii, ix (2009) (expounding on the importance of face-to-face confrontation in the criminal justice system).
157. *Melendez-Diaz*, 129 S. Ct. at 2537.

quirement of live confrontation will cause analysts to be more careful in their work and more conscious of its effect at trial. Furthermore, the Court ensured that the right to face-to-face confrontation would not be chipped away at over the years. The majority did this by holding forensic test results to the same standard as any other testimonial evidence offered against criminal defendants.[158] Had the Court held otherwise, it would have undermined the fundamental guarantee to confront one's accuser face-to-face.

2. Cross-Examination

The right to cross-examination is so fundamental that the Supreme Court held testimonial evidence inadmissible if the defendant was not afforded such a right.[159] Cross-examination allows the defense and prosecution alike to show weaknesses in the opposing arguments and reveal evidentiary facts. As the *Melendez-Diaz* Court noted, "[A]n analyst's lack of proper training or deficiency in judgment may be disclosed in cross-examination."[160] By subjecting analysts to cross-examination, *Melendez-Diaz* furthered this protection of the integrity of the adversarial process.

The Confrontation Clause is a constitutional guarantee that is meant to prevent the conviction of the innocent. The dissent in *Melendez-Diaz* worried that subjecting analysts to cross-examination would result in "guilty" defendants going free on purely technical grounds.[161] However, this apprehension is misguided because every defendant is afforded a presumption of innocence,[162] which is removed only when the prosecution proves beyond a reasonable doubt that the defendant is guilty. If, through the "crucible of cross-examination,"[163] among other means, the prosecution fails to meet this burden, the defendant remains innocent. This may result in the dismissal of some cases on technical grounds. However, that result is better than stripping criminal defendants of their constitutional rights based on a presumption of guilt. The *Melendez-Diaz* decision correctly operated under the premise that revoking a defendant's right to cross-examination based on a presumption of guilt would reorder the prosecutorial system.

Additionally, the dissent's "parade of horribles,"[164] if it does ensue, will be short lived. If courts do become swamped with requests for live

158. *Id.* at 2532.
159. *Crawford*, 541 U.S. at 68.
160. *Melendez-Diaz*, 129 S. Ct. at 2537.
161. *Id.* at 2550 (Kennedy, J., dissenting).
162. Coffin v. United States, 156 U.S. 432, 453 (1859) ("The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.").
163. *Crawford*, 541 U.S. at 61.
164. *Melendez-Diaz*, 129 S. Ct. at 2542 (characterizing the dissent's numerous arguments against the majority decision as a "parade of horribles").

testimony of analysts, it will not last for long. Once analysts are called to the stand to testify regarding their work, labs will begin to increase training, accuracy, and accountability.[165] Defense lawyers will soon realize that calling a credible, careful, well-trained analyst is of no help to their case; ultimately resulting in more reliable data, less court costs, and a protection of the criminal defendant's right to cross-examination.

C. Upholding the Historical Intentions Behind the Confrontation Clause

Not only did the *Melendez-Diaz* decision uphold the purposes of the Confrontation Clause, it also upheld the historical principles[166] and intentions behind the Sixth Amendment. The Bill of Rights was drafted as a guarantee of individual rights and freedoms. Each specified right is one the Founders considered important enough to enumerate. The Sixth Amendment is an enumeration of the rights guaranteed to criminal defendants.[167] The Confrontation Clause, specifically, was enacted in response to the concern that evidence would be admitted unjustly against criminal defendants.[168]

By interpreting the Confrontation Clause as a text that imparts, rather than limits, rights of criminal defendants, the *Melendez-Diaz* Court upheld the historical purposes and intentions behind the Clause. The Sixth Amendment grants privileges, it does not limit them. If scientific data was not subject to cross examination, the rights of criminal defendants, as the Founders desired, would deteriorate. As the Founders intended, *Melendez-Diaz* protected the rights of defendants.

D. Pendergrass v. State[169]*: Begging an Unanswered Question of Melendez-Diaz*

Eventually, the Supreme Court will need to address some unanswered questions created by *Melendez-Diaz.* Which analyst is required to testify is one such uncertainty.[170] While the Court's *Melendez-Diaz* decision did "not mean that everyone who laid hands on the evidence must be called,"[171] it did not specify any requirements for selecting which analyst should testify. Many phases are required for the production of most

165. Mark Hansen, *Taking Techs to Trial: Two Terms in a Row, Justices Weigh Bringing Lab Analysts into Court*, 96 JAN. A.B.A. J. 17, 18 (2010) ("Stanford University law professor Jeffery L. Fisher, who represented Melendez-Diaz, says the decision will help ensure that analysts will be careful when they do their testing and will be held accountable when they make mistakes.")

166. *See* Justin Chou, *Melendez-Diaz v. Massachusets: Raising the Confrontation Requirements for Forensic Evidence in California*, 14 BERKLEY J. CRIM. L. 439, 442–43 (2009) (discussing various historical principles behind the Confrontation Clause).

167. U.S. CONST. amend. VI.

168. *See Crawford*, 541 U.S. at 49 (describing concerns of some early Americans regarding the admission of evidence at trial and noting that "[t]he First Congress responded by including the Confrontation Clause in the proposal that became the Sixth Amendment").

169. 913 N.E.2d 703 (Ind. 2009), *cert. denied*, 130 S. Ct. 3409 (2010).

170. *See Melendez-Diaz*, 129 S. Ct. at 2544 (Kennedy, J., dissenting).

171. *Id.* at 2532 (majority opinion).

scientific reports submitted at trial. For example, DNA test results alone go through several phases of analysis and exchange hands many times before the results are finalized. Each report involves the work product and supervision of numerous scientists.

The Supreme Court recently denied certiorari to *Pendergrass v. State*,[172] a case involving DNA certificates of analysis.[173] In *Pendergrass*, the prosecution submitted DNA and paternity test results as evidence against the defendant.[174] Pursuant to *Melendez-Diaz*, a supervisor employed by the laboratory that produced the DNA results offered live testimony at trial. The supervisor, Lisa Black, testified to the certificates of analysis produced by her employers and general lab procedures, among other things.[175] Ms. Black did not personally conduct the DNA testing.[176] The defendant was convicted and appealed based on a Confrontation Clause violation, arguing that *Melendez-Diaz* required the analyst who actually produced the results to offer live testimony.[177] The Supreme Court of Indiana upheld the conviction and the United States Supreme Court denied certiorari.

Pendergrass was correctly decided in light of the goals of the Confrontation Clause. The analyst offering live testimony should be one who is in a position to testify to the general and specific scientific procedures that lead to the data submitted as evidence against the defendant. The purpose behind the analysts live testimony is to ensure reliable evidence through cross examination. Subjecting Ms. Black to cross-examination accomplished this goal. First, she was able to testify to the general testing procedures that were used in conducting the scientific tests. Second, she was able to testify to the specific procedure that occurred in order to produce the certificates of analysis that were ultimately submitted at trial. In doing so, she offered the trier of fact information regarding the general reliability of DNA testing in her laboratory and specific information regarding the reliability of the evidence presented against the defendant.

For now, courts are left to their own discretion in determining which analyst's testimony is sufficient to satisfy the Confrontation Clause requirements set forth in *Melendez-Diaz*. These determinations must be made in light of the goal of achieving reliability through cross-examination. However, the Supreme Court may eventually need to address this unanswered question.

172. 913 N.E.2d 703 (Ind. 2009), *cert. denied*, 130 S. Ct. 3409 (2010).
173. *See Pendergrass*, 913 N.E.2d at 704–05.
174. *Id.*
175. *Id.*
176. *Id.* at 705.
177. *Id.* at 708.

CONCLUSION

As new technologies expand, courts must determine what role, if any, these scientific developments will play in criminal prosecutions. These determinations must be made in light of and in a manner consistent with constitutional guarantees and limits. Accordingly, the *Melendez-Diaz* holding was decided correctly in light of the goals and guarantees of the Confrontation Clause. The decision promotes the reliability of evidence and opposes the use of *ex parte* examinations; it upholds the fundamental Confrontation Clause guarantees of face-to-face confrontation and cross-examination. Finally, the *Melendez-Diaz* Court upheld the historical goals behind the Sixth Amendment by protecting the rights of criminal defendants. The long-term, practical implications of *Melendez-Diaz* remain to be seen. If negative conditions do result, these consequences will be short lived. The true long-term effects of *Melendez-Diaz* will be more reliable evidence, more accountability in the criminal justice system, more information available to the trier of fact, and a strong guarantee of the rights of criminal defendants.

Laura Bowzer[*]

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