

3-2011

The Aftermath of *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009)—Identifying the Analyst Who Can Satisfy Confrontation

Ryan Sullivan
University of Nebraska College of Law

Follow this and additional works at: <https://digitalcommons.unl.edu/nlr>

Recommended Citation

Ryan Sullivan, *The Aftermath of Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009)—*Identifying the Analyst Who Can Satisfy Confrontation*, 89 Neb. L. Rev. (2010)
Available at: <https://digitalcommons.unl.edu/nlr/vol89/iss3/6>

This Article is brought to you for free and open access by the Law, College of at DigitalCommons@University of Nebraska - Lincoln. It has been accepted for inclusion in Nebraska Law Review by an authorized administrator of DigitalCommons@University of Nebraska - Lincoln.

Note*

The Aftermath of *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009)—Identifying the Analyst Who Can Satisfy Confrontation

TABLE OF CONTENTS

I. Introduction	562
II. Background	564
A. Development of the Confrontation Clause Over the Last 30 Years	564
B. <i>Melendez-Diaz v. Massachusetts</i>	566
1. Facts and Procedural Posture of the Case	566
2. Discussion and Holding	567
3. The Majority’s Response to Arguments Opposing Its Ruling	568
i. Analyst Reports are Accusatory	568
ii. The Confrontation Clause Extends Beyond the “Conventional Witness”	569
iii. Analyst Reports Are Not Neutral	569
iv. The Business Records Exception Does Not Apply to Analyst Reports	570
v. The Right to Subpoena Is Not Enough	571
vi. Requiring Analyst Testimony Will Not Cripple the Justice System	572
III. Analysis	574
A. The Unresolved Issue: Who Must Testify?	574
B. Resolving the Issue Through Legislative Action	578
1. Characteristics of the “Testifying Analyst”	580
2. Surrogate Testimony Will Not Satisfy Confrontation	581
3. Examination of Identifying Language in Ohio Notice-and-Demand Statute	583
IV. Conclusion	585

© Copyright held by the NEBRASKA LAW REVIEW.

* Ryan Sullivan, J.D., 2010, University of Nebraska College of Law; M.S., 2005, California University of Pennsylvania; B.S., 2002, Colorado State University.

I. INTRODUCTION

A citizen's ability to confront his or her accuser is a right so fundamental that it was inscribed in the Sixth Amendment of the United States Constitution.¹ This "Confrontation Clause" has been a topic of great debate in recent decades. The broad language of the Clause spawns many questions of interpretation. The question at the core of most Confrontation Clause issues has been which out-of-court statements violate the Clause.

In recent years, the Supreme Court has increasingly addressed concerns over the interpretation of the Confrontation Clause. The most significant decision was *Crawford v. Washington*,² where the Court determined that the Clause prohibited the admission of statements that were "testimonial," regardless of their indicia of reliability.³ Although the Court did not expressly define "testimonial,"⁴ it did provide some examples in *Crawford* and in subsequent decisions. The list of testimonial statements identified by the Court included sworn statements made to the police,⁵ statements made to 911 operators,⁶ affidavits,⁷ and other "prior testimony that the defendant was unable to cross-examine."⁸ The Court's findings made clear that most out-of-court statements made to law enforcement are inadmissible without affording the defendant an opportunity to cross-examine the declarant.⁹ With this issue resolved, the next question to emerge was whether certified analyst reports would bear the same fate. For years, prosecutors have freely admitted the contents of certified analyst re-

-
1. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . ."). This fundamental right to confrontation can be traced as far back as Roman law where Roman governor Porcius Festus stated, "It is not the manner of the Romans to deliver any man to destruction before the accused meets the accusers face to face, and has opportunity to answer for himself concerning the charges against him." *Acts of the Apostles* 25:16.
 2. 541 U.S. 36 (2004).
 3. Under the "testimonial" standard of *Crawford*, if the out-of-court statement is deemed testimonial, the statement is inadmissible unless the witness is unavailable and the defendant had a prior opportunity to cross-examine. *See id.* at 59. Prior to *Crawford*, reliability was the standard for determining whether certain out-of-court statements violated the Confrontation Clause. *See Ohio v. Roberts*, 448 U.S. 56 (1980), *abrogated by Crawford v. Washington*, 541 U.S. 36 (2004). Under the *Roberts* "indicia of reliability" standard, the evidence satisfied confrontation requirements if it fell "within a firmly rooted hearsay exception," or possessed "particularized guarantees of trustworthiness." *Id.* at 66.
 4. *Crawford*, 541 U.S. at 68 ("We leave for another day any effort to spell out a comprehensive definition of 'testimonial.'").
 5. *Id.* at 52.
 6. *Davis v. Washington*, 547 U.S. 813, 826 (2006).
 7. *Crawford*, 541 U.S. at 51.
 8. *Id.*
 9. *Id.* at 53; *Davis*, 547 U.S. at 826.

ports as prima facie evidence against defendants to prove the composition, weight, or quantity of an illegal substance.¹⁰ Many jurisdictions allowed such admissions without providing the defendant an opportunity to cross-examine the analyst who prepared the report.¹¹ After *Crawford*, defense attorneys challenged such admissions, arguing that analyst reports were “testimonial.” They took the position that admitting the lab reports would violate the Confrontation Clause unless the prosecution presented the analyst for cross-examination.¹²

The Supreme Court addressed this issue in *Melendez-Diaz v. Massachusetts*,¹³ the latest victory for proponents of a broader application of the Confrontation Clause. In *Melendez-Diaz*, the Court examined a Massachusetts law¹⁴ which authorized the admission of certified analyst reports as prima facie evidence against the accused.¹⁵ The Supreme Court found that this statute unconstitutionally deprived the defendant of his Sixth Amendment right to confrontation.¹⁶ The Court concluded that analyst reports are “testimonial” under *Crawford* and therefore require the live testimony of the analyst who performed the tests.¹⁷ Although the Court found the Massachusetts law unconstitutional, it approved a handful of other statutes which provide for the admission of analyst reports as prima facie evidence.¹⁸ Unlike the Massachusetts law, however, these “notice-and-demand”¹⁹ statutes contain additional language requiring the prosecution to give notice to the defendant of its intent to admit the reports and grant the defendant the right to demand the live testimony of the analyst preparing the report.²⁰ While the Court’s holding in *Melendez-Diaz* was a proper application of *Crawford*—and provides courts and legislatures with additional guidance as to the scope of the Confrontation Clause—

-
10. Pamela R. Metzger, *Cheating the Constitution*, 59 VAND. L. REV. 475, 478 (2006) (“The vast majority of jurisdictions in the United States authorize the state to prove its forensic allegations by relying upon a forensic certificate in lieu of live testimony.”) (footnote omitted).
 11. See, e.g., ARIZ. REV. STAT. ANN. § 36-254 (2009); D.C. CODE § 48-905.06 (Lexis-Nexis 2004); R.I. GEN. LAWS § 9-19-43 (LEXIS through Jan. 2009 Sess.).
 12. Thomas F. Burke III, *The Test Results Said What? The Post-Crawford Admissibility of Hearsay Forensic Evidence*, 53 S.D. L. REV. 1, 5–7 (2008).
 13. 129 S. Ct. 2527 (2009).
 14. MASS. GEN. LAWS, ch. 111, § 13 (2009).
 15. *Melendez-Diaz*, 129 S. Ct. at 2531.
 16. Although the Massachusetts statute granted the defendant the ability to subpoena the analyst, the Court found this unconstitutionally shifted the burden to the defendant to offer adverse witnesses for cross-examination. *Id.* at 2540.
 17. *Id.* at 2532 (citing *Crawford v. Washington*, 541 U.S. 36, 54 (2004)).
 18. *Id.* at 2541 (citing GA. CODE ANN. §35-3-154.1 (2006); OHIO REV. CODE ANN. § 2925.51(C) (West 2006); TEX. CODE CRIM. PROC. ANN. art. 38.41, § 4 (West 2005)).
 19. These statutes are also known as “waiver statutes” or “forensic ipse dixit statutes.” Burke III, *supra* note 12, at 24.
 20. See, e.g., GA. CODE ANN. §35-3-154.1 (2006).

the Court failed to clearly identify who must testify in order to admit the contents of the lab report. This Note proposes that jurisdictions adopt legislation which identifies a single analyst whose testimony would satisfy confrontation requirements for admitting the entire contents of the lab report.

This Note begins by briefly exploring the development of the Confrontation Clause over the last thirty years, followed by a discussion of the holding in *Melendez-Diaz* and a summary of the Court's responses to arguments made in opposition to its ruling. Part III begins by identifying a significant issue on which the Court's ruling left inadequate guidance: Who must testify in order to admit the contents of the analyst report?²¹ Oftentimes, several technicians are involved in the analysis of a single sample, yet *Melendez-Diaz* fails to identify which of these analysts alone would satisfy confrontation requirements, leaving open the possibility that multiple analysts must testify in order to admit all the contents of a lab report. Section III.B proposes and discusses how jurisdictions can take legislative action in order to preemptively resolve this issue. *Melendez-Diaz* does not require the testimony of every analyst involved in the testing of the substance. In fact, the testimony of a single analyst may be sufficient as long as this analyst participated in the testing of the substance and possesses adequate knowledge regarding the equipment used and the methods employed. This Note proposes that jurisdictions adopt statutory language identifying the characteristics of this "testifying analyst," which would allow for the admission of the lab report through the testimony of a single analyst.

II. BACKGROUND

A. Development of the Confrontation Clause Over the Last Thirty Years

Three decades ago, in *Ohio v. Roberts*,²² the Supreme Court concluded that the Confrontation Clause did not bar the admission of an unavailable witness's statement against a criminal defendant if the statement bore "adequate 'indicia of reliability.'"²³ The Court found that one could infer reliability in cases where the statement falls "within a firmly rooted hearsay exception."²⁴ The Court also found reliability where the evidence contained "particularized guarantees of trustworthiness."²⁵ Although the Court never fully defined these guarantees, it later ruled in *Idaho v. Wright* that "to be admissible

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

22. 448 U.S. 56 (1980), *abrogated* by *Crawford v. Washington*, 541 U.S. 36 (2004).

23. *Id.* at 66 (quoting *Mancusi v. Stubbs*, 408 U.S. 204, 213 (1972)).

24. *Id.*

25. *Id.*

under the Confrontation Clause, hearsay evidence used to convict a defendant must possess indicia of reliability by virtue of its inherent trustworthiness, not by reference to other evidence at trial.”²⁶ That is, the statement must be shown to be trustworthy on its own—no corroborating evidence could be admitted to prove the trustworthiness of the statement. The standard established by *Ohio v. Roberts* remained for nearly thirty years, and during this time courts and legislatures developed rules and adopted criteria to comply with this “reliability” standard. In 2004, with seven of the nine *Roberts* Court Justices no longer serving,²⁷ the Supreme Court overruled its “reliability” standard and replaced it with a broader, yet equally unclear “testimonial” standard.²⁸

In *Crawford v. Washington*, the court ruled that the Confrontation Clause applied to all “testimonial” statements.²⁹ Writing for the majority, Justice Scalia found that history clearly demonstrated that the Confrontation Clause was intended to exclude ex parte testimony from “witnesses” against the accused—“those who ‘bear testimony.’”³⁰ Justice Scalia further opined that “the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had a prior opportunity for cross-examination.”³¹ Justice Scalia concluded that “[d]ispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty.” Of course, this raised the issue of which statements qualified as testimonial. The *Crawford* Court failed to provide a user-friendly, bright-line definition of “testimonial,”³² but it did identify what it called a “core class” of testimonial statements, “such as affidavits, custodial examinations . . . or similar pretrial statements that declarants would reasonably expect to be used prosecutorially.”³³

Two years later, the Court provided further guidance in *Davis v. Washington*.³⁴ There, the Court labeled certain portions of a 911 telephone recording testimonial, and it ruled that admitting those portions would violate the defendant’s rights under the Confrontation

26. 497 U.S. 805, 822 (1990).

27. Only Justice Stevens and Justice Rehnquist remained.

28. See generally *Crawford v. Washington*, 541 U.S. 36 (2004) (finding that the *Roberts* standard unconstitutionally allowed the admission of testimonial statements that the Confrontation Clause clearly intended to exclude).

29. *Id.* at 51.

30. *Id.*

31. *Id.* at 53–54.

32. David A. Doellman, Comment, *The Crawford Confusion Marches On: The Confrontation Clause and Hearsay Laboratory Drug Reports*, 73 Mo. L. REV. 583, 604 (2008).

33. *Id.* at 51.

34. 547 U.S. 813 (2006).

Clause.³⁵ In reaching this conclusion, the Court held that an out-of-court statement is testimonial when its primary purpose is “to establish or prove past events potentially relevant to later criminal prosecution.”³⁶ The Court further held that the statement is “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.”³⁷

Davis was helpful in quashing speculation over whether certain sworn statements to police, taped interrogations, and other out-of-court statements made to law enforcement officers were testimonial. Of course, *Davis* by no means signaled the end of the Court’s ongoing task of interpreting the scope of the Confrontation Clause. Appeals arising from Confrontation Clause issues continued to pour in, demanding the Court’s attention.³⁸ The most recent Confrontation Clause case heard by the Supreme Court was *Melendez-Diaz v. Massachusetts*,³⁹ where the Court added certified analyst reports to the ever-expanding “core class” of testimonial statements.⁴⁰

B. *Melendez-Diaz v. Massachusetts*

1. *Facts and Procedural Posture of the Case*

Luis Melendez-Diaz and two other suspects were arrested while allegedly dealing cocaine in a K-Mart parking lot in Boston, Massachusetts.⁴¹ While transporting the three detainees to the police station, the police officers observed them fidgeting and “making furtive movements” and felt them kicking the back of the front seats.⁴² After dropping the three men off at the police station, the officers searched the back seat of the police car and found nineteen small plastic bags containing a white substance “hidden in the partition between the front and back seats.”⁴³ The police officers submitted the bags to the state laboratory for analysis.⁴⁴ Following the analysis, the state laboratory provided the prosecution with certificates of analysis which described the weight of the seized bags and identified the substance as

35. *Id.* at 830.

36. *Id.* at 822.

37. *Id.*

38. *See, e.g.*, *Giles v. California*, 554 U.S. 353 (2008); *State v. Romero*, 156 P.3d 694 (N.M. 2007), *cert. dismissed*, 552 U.S. 1135 (2008).

39. 129 S. Ct. 2527 (2009).

40. *Id.* at 2532.

41. *Id.* at 2530.

42. *Commonwealth v. Melendez-Diaz*, No. 05-P-1213, 2007 WL 2189152, at *2 (Mass. App. Ct. July 31, 2007) (internal quotation marks omitted), *appeal denied*, 874 N.E.2d 407 (Mass. 2007) (unpublished table decision), *cert. granted*, 552 U.S. 1256 (2008) (mem.), *rev’d*, 129 S. Ct. 2527 (2009).

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

44. *Id.*

cocaine.⁴⁵ Melendez-Diaz was subsequently charged with distributing and trafficking cocaine.⁴⁶ As permitted by Massachusetts law,⁴⁷ the certificates containing the results of the analysis were sworn before a notary public and admitted as prima facie evidence against Melendez-Diaz.⁴⁸ Melendez-Diaz objected to the admission of the reports, arguing that under *Crawford*, he had a right to confront the analyst creating the reports.⁴⁹ The trial court disagreed.⁵⁰

After a jury found him guilty on both counts, Melendez-Diaz appealed, arguing that the admission of the certified lab reports violated his Sixth Amendment right to confront witnesses against him.⁵¹ Melendez-Diaz characterized the lab analysis as testimonial and argued that the Court's ruling in *Crawford* required the live testimony of the technician.⁵² The Commonwealth argued that under *Commonwealth v. Verde*,⁵³ these lab reports were not testimonial.⁵⁴ Relying on this decision, the Massachusetts Appeals Court rejected Melendez-Diaz's claims in an unpublished opinion, finding they were without merit.⁵⁵ The Massachusetts Supreme Court also denied his appeal.⁵⁶ However, the United States Supreme Court granted certiorari in 2008 to resolve the admissibility of certified analyst reports,⁵⁷ and it issued its opinion in June 2009.

2. Discussion and Holding

In *Melendez-Diaz*, the Supreme Court evaluated the constitutionality of admitting certified analyst reports as prima facie evidence against the defendant. Melendez-Diaz took the stance that admitting these reports absent live testimony from the certifying analyst was

45. *Id.* at 2531.

46. *Id.* at 2530.

47. MASS. GEN. LAWS, ch. 111, § 13 (2009).

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

49. *Id.*

50. *Id.*

51. Brief and Record Appendix for the Defendant–Appellant Luis Melendez-Diaz on Appeal from the Suffolk Superior Court at 38, *Commonwealth v. Melendez-Diaz*, 69 Mass. App. Ct. 1114 (2007) (No. 05-P-1213), 2006 WL 5003338, at *38.

52. *Id.* at 38–39.

53. 827 N.E.2d 710, 705–06 (Mass. 2005).

54. Brief for the Commonwealth on Appeal from a Judgment of the Suffolk Superior Court at 26, *Melendez-Diaz*, 69 Mass. App. Ct. 1114 (No. 05-P-1213), 2006 WL 2189352, at *26.

55. *Commonwealth v. Melendez-Diaz*, No. 05-P-1213, 2007 WL 2189152, at *4 n.3 (Mass. App. Ct. July 31, 2007), *appeal denied*, 874 N.E. 2d 407 (Mass. 2007) (unpublished table decision), *cert. granted*, 552 U.S. 1256 (2008) (mem.), *rev'd*, 129 S. Ct. 2527 (2009).

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

57. *Melendez-Diaz v. Massachusetts*, 552 U.S. 1256 (2008) (mem.).

inconsistent with the Court's holding in *Crawford*.⁵⁸ Massachusetts⁵⁹ (and eventually the dissent⁶⁰) argued for a more narrow reading of *Crawford*—one that made the Confrontation Clause applicable only to “traditional” witness testimony. Ultimately, a majority of the Court concluded that certified analyst reports clearly fell within the “class of testimonial statements covered by the Confrontation Clause.”⁶¹ The certificates, the Court found, were essentially affidavits by another name.⁶² The certificates were “functionally identical to live, in-court testimony, doing ‘precisely what a witness does on direct examination.’”⁶³ Applying the rule established in *Crawford*,⁶⁴ the Court held that “the analysts’ affidavits were testimonial statements, and the analysts were ‘witnesses’ for purposes of the Sixth Amendment.”⁶⁵ The Court concluded that “absent a showing that the analysts were unavailable to testify at trial *and* that petitioner had a prior opportunity to cross-examine them, petitioner was entitled to ‘be confronted with’ the analyst at trial.”⁶⁶

3. *The Majority’s Response to Arguments Opposing Its Ruling*

Writing for the majority, Justice Scalia addressed the various arguments proffered in opposition to the Court’s ruling. The majority’s conclusions in response to each of these arguments are discussed in turn below.

i. Analyst Reports are Accusatory

In its brief, Massachusetts first argued that analyst reports are not subject to confrontation because they are not “accusatory.”⁶⁷ In response, the Court cited Sixth Amendment language guaranteeing the right “to be confronted with the witnesses *against him*.”⁶⁸ Where the

58. Brief for Petitioner at 10–11, *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009) (No. 07-591), 2008 WL 2468543, at *10–11 (citing *Crawford v. Washington*, 541 U.S. 36, 51 (2004)).

59. Brief for Respondent at 28, *Melendez-Diaz*, 129 S. Ct. 2527 (No. 07-591), 2008 WL 4103864, at *28 (“Drug analysis certificates are non-testimonial because they do not involve, and are not analogous to, *ex parte* examinations of witnesses—the principal evil the Confrontation Clause was designed to prevent.”).

60. *Melendez-Diaz*, 129 S. Ct. at 2551 (Kennedy, J., dissenting) (“There is no evidence that the Framers understood the Clause to extend to unconventional witnesses.”).

61. *Id.* at 2531–32 (majority opinion).

62. *Id.* at 2532.

63. *Id.* (quoting *Davis v. Washington*, 547 U.S. 813, 830 (2006)).

64. *Crawford* stands for the rule that statements of a witness who did not appear at trial are inadmissible “unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.” *Crawford*, 541 U.S. at 54.

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

66. *Id.* (citing *Crawford*, 541 U.S. at 54).

67. Brief for Respondent, *supra* note 59, at 10.

68. *Melendez-Diaz*, 129 S. Ct. at 2533 (quoting U.S. CONST. amend. VI).

purpose of the analysis was to prove facts necessary for the conviction of the defendant, the contents of the analyst report were clearly *against* the defendant.⁶⁹

The Court contrasted the Confrontation Clause, which guarantees the right of the defendant to be confronted with witnesses “against him,” with the adjacent Compulsory Process Clause, which guarantees a defendant the right to call witnesses “in his favor.”⁷⁰ Thus, the Sixth Amendment identifies “two classes of witnesses—those against the defendant and those in his favor. The prosecution *must* produce the former; the defendant *may* call the latter.”⁷¹

ii. The Confrontation Clause Extends Beyond the “Conventional Witness”

Massachusetts and the dissent argued that analysts are not the “conventional witnesses” contemplated by drafters of the Clause and that the certified reports do not encompass the “principal evil the Confrontation Clause was designed to prevent.”⁷² Indeed, Justice Kennedy, writing for the dissent, concluded that the “Framers were concerned with a typical witness—one who perceived an event that gave rise to a personal belief in some aspect of the defendant’s guilt.”⁷³ However, the majority rejected this assertion, finding no support for the contention that witnesses who testify regarding facts other than those observed at the crime scene are exempt from the Clause.⁷⁴ Under the dissent’s theory, all “expert witnesses—a hardly ‘unconventional’ class of witnesses”—would be exempt.⁷⁵ The Court also found the absence of interrogation was irrelevant.⁷⁶

iii. Analyst Reports Are Not Neutral

Massachusetts also argued that concerns addressed by the Confrontation Clause are inapplicable to analysts because the contents of the certified analyst report “reflect the results of neutral, scientific

69. *Id.*

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

71. *Id.* (footnote omitted).

72. Brief for Respondent, *supra* note 59, at 28–31; see *Melendez-Diaz*, 129 S. Ct. at 2551–52 (Kennedy, J., dissenting).

73. *Melendez-Diaz*, 129 S. Ct. at 2551 (Kennedy, J., dissenting).

74. *Id.* at 2535 (majority opinion) (“The dissent provides no authority for this particular limitation of the type of witnesses subject to confrontation. Nor is it conceivable that all witnesses who fit this description would be outside the scope of the Confrontation Clause.”).

75. *Id.*

76. *Id.* (“[T]he Framers were no more willing to exempt from cross-examination volunteered testimony or answer to open-ended questions than they were to exempt answers to detailed interrogation.” (quoting *Davis v. Washington* 547 U.S. 813, 822 n.1 (2006))).

testing performed by government officials pursuant to a statutory duty.”⁷⁷ Further, Massachusetts explained, “the testing results recorded on the certificates speak for themselves; unlike witness accounts, they cannot be . . . ‘dress[ed] up’ by police officers passing along hearsay testimony.”⁷⁸

However, the majority dismissed this “neutrality” argument as “little more than an invitation to return to our overruled decision in *Roberts*.”⁷⁹ The Court reiterated its conclusion in *Crawford*—that the goal of the Confrontation Clause was to “ensure reliability of evidence,” but the Court noted that “it is a procedural rather than a substantive guarantee. It commands, not that the evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.”⁸⁰ The Court found that confrontation of analysts is necessary to reduce false testimony⁸¹ and expose an analyst’s potential “lack of proper training or deficiency in judgment.”⁸² Further, the Court pointed out that “[a]t least some . . . methodology requires the exercise of judgment and presents a risk of error that might be explored on cross-examination.”⁸³ The Court’s conclusions were likely fueled by an amicus curiae brief describing numerous accounts of crime lab scandals, wrongful convictions, dry-labbing, bad science, and other forensic errors that in many cases could have been exposed during proper cross-examination, if allowed.⁸⁴

iv. The Business Records Exception Does Not Apply to Analyst Reports

Massachusetts contended that analyst reports are similar to “business records generally admissible at common law because they are prepared in the ordinary course of the laboratory’s day-to-day busi-

77. Brief for Respondent, *supra* note 59, at 29.

78. *Id.* at 30 (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES *373).

79. *Melendez-Diaz*, 129 S. Ct. at 2536 (citing *Roberts v. Ohio*, 448 U.S. 56 (1980)). Under the overruled *Roberts* standard, if the out-of-court statement was sufficiently reliable, it could be admitted as evidence against the accused without meeting confrontation requirements. *Roberts*, 448 U.S. at 66.

80. *Id.* (quoting *Crawford v. Washington*, 541 U.S. 36, 61–62 (2004)).

81. *Id.* at 2536–37 (“Like the eyewitness who has fabricated his account to the police, the analyst who provides false results may, under oath in open court, reconsider his false testimony.”).

82. *Id.* at 2537.

83. *Id.*

84. See generally Brief of Amicus Curiae the National Innocence Network in Support of Petitioner, *Melendez-Diaz*, 129 S. Ct. 2527 (No. 07-591), 2008 WL 2550614. In the majority opinion, Justice Scalia commented extensively on the recently publicized unreliability of forensic testing and the need for cross-examination to expose inherent fraud, fabrication, and incompetence. *Melendez-Diaz*, 129 S. Ct. at 2536–38.

ness.”⁸⁵ The majority rejected this argument and concluded that the business records exception does not apply to analyst reports because, although they were kept in the regular course of business, they were produced with the intention to become evidence at a trial—a purpose which removes the evidence from the business records exception.⁸⁶

The Court also rejected the dissent’s parallel between an analyst’s report and a clerk’s certificate authenticating an official record, which does not require confrontation.⁸⁷ The evidentiary purpose of the clerk’s certificate is to “*authenticate* or provide a copy of an otherwise admissible record,” whereas the purpose of a certified analyst report is to “*create* a record for the sole purpose of providing evidence against a defendant.”⁸⁸ On this same principle, a clerk providing a certificate “attesting to the fact that the clerk had searched for a particular relevant record and failed to find it,” is subject to confrontation.⁸⁹ Like the testimony of an analyst, the clerk’s statement here “would serve as substantive evidence against the defendant whose guilt depended on the nonexistence of the record.”⁹⁰

v. The Right to Subpoena Is Not Enough

Under Massachusetts law, when the prosecution offers a certified analyst report as evidence at trial, the defendant has the ability to subpoena the analyst to appear at trial.⁹¹ Further, the law “ensures that a defendant retains the right to cross-examine the analyst in the same manner as if he had been called by the prosecution.”⁹² Massachusetts argued that this ability to subpoena the analyst satisfies confrontation requirements.⁹³ The majority, however, refused to equate the *ability* to subpoena with the *right* to confront.⁹⁴ Unlike the rights provided by the Confrontation Clause, provisions merely providing the defendant with the right to subpoena are “of no use to the defendant when the witness is unavailable or simply refuses to appear.”⁹⁵ The Court concluded that “the Confrontation Clause imposes a burden on

85. Brief for Respondent, *supra* note 59, at 11 (citing Crawford v. Washington, 541 U.S. 36, 56 (2004)).

86. *Melendez-Diaz*, 129 S. Ct. at 2538.

87. *Id.* at 2538–39.

88. *Id.* at 2539.

89. *Id.* (citing *People v. Bromwich*, 93 N.E. 933, 934 (N.Y. 1911)).

90. *Id.*

91. MASS. GEN. LAWS, ch. 111, § 13 (2009).

92. Brief for Respondent, *supra* note 59, at 64–65 (citing MASS. GEN. LAWS, ch. 111, § 13).

93. *Id.* at 55–58, 64–65.

94. *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2540 (2009).

95. *Id.* (citing *Davis v. Washington*, 547 U.S. 813, 820 (2006)).

the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court.”⁹⁶

vi. Requiring Analyst Testimony Will Not Cripple the Justice System

The dissent warns that the Court’s ruling in *Melendez-Diaz* will result in uncertainty, disruption, and “heavy societal costs.”⁹⁷ Similarly, Massachusetts cautioned that the majority’s interpretation of the Confrontation Clause “would result in a significant waste of public resources, with no apparent gain in the truth-seeking function.”⁹⁸ Massachusetts also argued that such an application of the Confrontation Clause “would violate the fundamental principle that ‘the rights of the public [in the prosecution of crime] shall not be wholly sacrificed in order that an incidental benefit may be preserved to the accused.’”⁹⁹ Similarly, the National District Attorneys Association, in its amicus brief in support of Massachusetts, expressed concern that the position advocated by *Melendez-Diaz* would result in a decrease in guilty pleas¹⁰⁰ and delays in the administration of justice.¹⁰¹

Nevertheless, the Court determined that these fears were unfounded, in part because they were based on exaggerated predictions¹⁰² of the frequency with which analysts would be called to testify.¹⁰³ The Court found that the projected number of required an-

96. *Id.*

97. *Id.* at 2547, 2550 (Kennedy, J., dissenting).

98. Brief for Respondent, *supra* note 59, at 59–60.

99. *Id.* at 60 (quoting *Mattox v. United States*, 156 U.S. 237, 243 (1895)); *see also* *State v. Crow*, 974 P.2d 100, 111 (Kan. 1999) (“[T]he public has a significant interest in avoiding the unnecessary expense of insuring the presence of laboratory technicians at trials where the content of their testimony will not be challenged by defendants.”), *overruled by* *State v. Laturner*, 218 P.3d 23 (Kan. 2009), *cited in* Brief for Respondent, *supra* note 59, at 60.

100. Brief of Amici Curiae the National District Attorneys Ass’n et al. in Support of Respondent at 17, *Melendez-Diaz*, 129 S. Ct. 2527 (No. 07-591), 2008 WL 4185393 at *17.

101. *Id.* at 15.

102. *See id.* (“[R]equiring live testimony in each and every drug-related case would cause significant delays in the administration of justice”); *see also* *Melendez-Diaz*, 129 S. Ct. at 2550 (Kennedy, J., dissenting) (“For example, the district attorney in Philadelphia prosecuted 25,000 drug crimes in 2007. Assuming that number remains the same, and assuming that 95% of the cases end in a plea bargain, each of the city’s 18 analysts will be required to testify in more than 69 trials next year.” (citations omitted)). In calculating this result, however, Justice Kennedy makes the unrealistic assumption that all drug cases that do not result in a plea will require the in-court testimony of the analyst. *See* Brief for Respondent, *supra* note 59, at 59 (“Petitioner’s rigid interpretation of the Confrontation Clause would establish a categorical rule requiring live testimony in every case where drug analysis is performed”).

103. *Melendez-Diaz*, 129 S. Ct. at 2540 (“We also doubt the accuracy of the respondent’s dire predictions.”).

alyst appearances proposed by the dissent, respondent, and various amicus briefs in support of respondent's position all relied on false assumptions: namely that since every drug prosecution will involve analyst certificates, no defendant will stipulate to the nature of the substance, and every defendant will object to the evidence or demand the appearance of the analyst.¹⁰⁴

Bolstering the Court's conclusion that the judicial system would survive its ruling is the fact that several jurisdictions have already adopted this rule, and each has avoided the significant negative effects about which the dissent warned.¹⁰⁵ As the Court pointed out, even in Massachusetts "a defendant may subpoena the analyst to appear at trial, and yet there is no indication that obstructionist defendants are abusing the privilege."¹⁰⁶

Next, the Court directed attention to certain statutes that the dissent believed would be invalidated by the Court's decision or otherwise made ineffective by the ruling.¹⁰⁷ On the contrary, the Court held that notice-and-demand statutes do not violate the Confrontation Clause where, unlike the Massachusetts statute, they do not shift the state's burden of satisfying the Confrontation Clause to the defendant.¹⁰⁸ Although these statutes allow for the admission of analyst certificates as prima facie evidence¹⁰⁹ and procedurally limit the defendant's ability to confront the analyst,¹¹⁰ they nonetheless satisfy the Confrontation Clause by providing the defendant a right to demand the live testimony of the analyst.¹¹¹ The Court found that "[t]he defendant *always* has the burden of raising his Confrontation Clause objection; notice-and-demand statutes simply govern the *time* within which he must do so."¹¹²

104. *Id.* at 2540 n.10.

105. *Id.* at 2540–41 ("Despite these widespread practices, there is no evidence that the criminal justice system has ground to a halt in States that, in one way or another, empower a defendant to insist upon the analyst's appearance at trial.")

106. *Id.* at 2541 (citation omitted).

107. *Id.* (addressing the dissent's remarks concerning the potential invalidation of state "burden-shifting statutes").

108. *Id.*

109. *See, e.g.*, GA. CODE ANN., § 35-3-154.1(a) (2006) ("A copy of a report of the methods and findings of any examination or analysis conducted [by a state employed or contracted analyst] . . . is prima-facie evidence in court proceedings in this state of the facts contained therein.")

110. *See Metzger, supra* note 10, at 482 n.22, 517 ("The demand must typically be filed within a specified time after the receipt of notice or before the commencement of trial. . . . [F]ailure to demand that the State prove its case by live witnesses forever forecloses the defendant from confronting and cross-examining crucial State witnesses.")

111. *See, e.g.*, OHIO REV. CODE ANN. § 2925.51(C) (West 2006) ("The report shall not be prima-facie evidence . . . if the accused . . . demands the testimony of the person signing the report . . .").

112. *Melendez-Diaz*, 129 S. Ct. at 2541.

III. ANALYSIS

A. The Unresolved Issue: Who Must Testify?

Although the Court correctly determined that a forensic analyst's lab report prepared for use in a criminal prosecution is "testimonial" and is therefore subject to the demands of the Sixth Amendment's Confrontation Clause, the ruling left unresolved several issues that should be addressed by state legislative action.

Following *Melendez-Diaz*, the law is now clear that a defendant has a right to confront the analyst—and thus the practice of admitting certified lab reports as prima facie evidence without also granting the right to confront is no longer an option for prosecutors. The Court did not make clear, however, whose live testimony will satisfy the demands of the Confrontation Clause. In other words, who must the prosecution present for cross-examination, if demanded, in order to admit the contents of the analyst report? Writing for the dissent, Justice Kennedy pointed out that "[t]here is no accepted definition of analyst,"¹¹³ and the majority's ruling could be read to require the testimony of all those participating in the analysis.¹¹⁴ In response, the majority explained that the rules governing chain of custody are applicable here, and these rules generally rebut the dissent's concerns that "everyone" must testify.¹¹⁵ In particular, the Court cited *United States v. Lott*,¹¹⁶ where the Seventh Circuit held that "the government need not prove a perfect chain of custody for evidence to be admitted at trial; gaps in the chain normally go to the weight of the evidence rather than its admissibility."¹¹⁷ Further, the Court implied that the testimony of those maintaining and calibrating the testing equipment likely would not be necessary for confrontation purposes.¹¹⁸ Although the Court's remarks narrowed the scope of who must testify in order to meet Sixth Amendment demands,¹¹⁹ the issue remains: Who must testify?

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

114. *Id.* at 2544–45. For example, the dissent proffers a hypothetical substance analysis involving four people: two analysts, an independent contractor who calibrated the testing equipment, and a laboratory director who certified that his subordinates followed proper procedure. Accordingly, the dissent cautioned that "it is not all evident which of these four persons is the analyst to be confronted under the rule the Court announces today." *Id.* at 2544.

115. *Id.* at 2532 n.1 (majority opinion).

116. 854 F.2d 244 (7th Cir. 1988).

117. *Id.* at 250 (citing *United States v. Jefferson*, 714 F.2d 689, 696 (7th Cir. 1983); *United States v. Lampson*, 627 F.2d 62, 65 (7th Cir. 1980)).

118. *Melendez-Diaz*, 129 S. Ct. at 2532 n.1 ("[W]e do not hold . . . that anyone whose testimony may be relevant in establishing the . . . accuracy of the testing device must [testify] Additionally, documents prepared in the regular course of equipment maintenance may well qualify as nontestimonial records.").

119. *Id.* (stating that not "everyone who laid hands on the evidence must be called").

Chain of custody rules govern who must testify in order to admit *tangible evidence*, but they are not similarly applicable in determining whose testimony is required to admit the contents of a lab report. In cases involving tangible evidence, the prosecution determines whose testimony best establishes chain of custody and then produces that witness for cross-examination.¹²⁰ Additional testimony may be warranted to establish chain of custody or authenticity of the evidence,¹²¹ but it is not required by the Confrontation Clause.¹²² The Clause does not require the testimony of a particular witness; it merely requires that “what testimony *is* introduced must . . . be introduced live.”¹²³ Only when the prosecution attempts to enter testimony through out-of-court statements does a confrontation issue arise. Hence, chain of custody and authenticity do not pose confrontation issues because they traditionally do not involve out-of-court statements. In contrast, lab reports are themselves out-of-court statements made by the analyst who prepared them. In trial, these out-of-court statements would be offered as evidence against the accused and, therefore, are subject to the requirements of the Confrontation Clause.

The Court “tempered the most extreme concerns of critics over the scope of its ruling” by insisting that not all individuals involved in the testing process need to testify.¹²⁴ However, the Court’s ruling only removes from the list those involved in the “chain of custody, authenticity of the sample, and accuracy of the testing device.”¹²⁵ In short, the Court provided a list of who does not need to testify, but it failed to provide a clear description of who must testify. Unfortunately, chain of custody rules provide no guidance to a trial judge faced with determining which analyst must testify. Compare the following two hypotheticals, one involving chain of custody of tangible evidence and the other involving the process of analyzing a seized substance.

Chain of Custody. Officer A finds a pistol on the floor board of the defendant’s car during a lawful search. Officer A remits this pistol to the evidence clerk at the police station. Officer B checks out the pistol on the day of trial and delivers it to the bailiff.

At trial, the prosecution calls Officer A, who testifies to the location of the pistol when it was found and to the fact that he delivered it to the evidence clerk for processing. In most cases, this will be enough to

120. Cf. THOMAS A. MAUET, *TRIAL TECHNIQUES* 180–81 (7th ed. 2007).

121. See *id.* at 183–85 (providing examples of testimony necessary to establish chain of custody and authenticity of evidence).

122. *Melendez-Diaz*, 129 S. Ct. at 2532 n.1 (implying that the Confrontation Clause does not require the testimony of all those involved in the chain of custody).

123. *Id.*

124. Bennett L. Gershman, *Confronting Scientific Reports Under Crawford v. Washington*, 29 *PACE L. REV.* 479, 497–98 (2009).

125. *Id.*

lay adequate foundation to admit the pistol as evidence in trial.¹²⁶ The defendant will have the ability to cross-examine Officer A as to the events surrounding the discovery of the weapon, the standard procedure for remitting evidence to the evidence clerk, and the department's policies for storage and handling of evidence. The gaps left in the chain of custody go to the weight of the evidence, e.g., the jury may determine that the failure to provide testimony of the evidence clerk or Officer B leaves doubt as to whether the pistol in court is the same one found in the defendant's car. The testimony of the evidence clerk and Officer B are not required to satisfy the Confrontation Clause for the same reason the Clause does not require the testimony of a clerk authenticating an official record.¹²⁷ Like the clerk authenticating an official record, neither the evidence clerk nor Officer B "create a record for the sole purpose of providing evidence against the defendant."¹²⁸ Consequently, in this scenario, no confrontation issues arise because no out-of-court statements or records are being offered against the accused. However, more complex confrontation issues do arise in the context of analyzing a controlled substance.

Substance Analysis. Officer A finds a bag of white substance on the floor board of the defendant's car during a lawful search. Officer A remits this substance to the State Lab for analysis. Lab Employee checks the substance into the lab and assigns it to Analyst 1 for testing. Analyst 1 retrieves the substance and conducts the first stage of analysis: determining the weight and volume of the contents of the bag. Analyst 1 then passes the substance to Analyst 2, who prepares it for testing and places it in the gas chromatograph.¹²⁹ Analyst 3 retrieves the printout from the testing machine and interprets the results. Analyst 4, who manages the lab, but played no role in the analysis, signs a prepared analyst report to be used as evidence at trial. Prior to the testing of the substance, the gas chromatograph was inspected and calibrated by Technician.

126. Foundation for the admission of a piece of tangible evidence may be properly established through the testimony of a single witness where the witness can testify that "the evidence fairly and accurately depicts what it purports to depict and that it will be helpful to the witness in explaining his or her testimony." 23 C.J.S. *Criminal Law* § 1141 (2009) (quoting *Andrews v. State*, 811 A.2d 282, 293 (Md. 2002)).

127. See *supra* subsection II.B.3.d.

128. *Melendez-Diaz*, 129 S. Ct. at 2539.

129. The gas chromatograph (GC) is an instrument that separates the components of the mixture (gases) so that each compound can be identified. The GC operates on the theory that, under controlled conditions, different chemical compounds in a mixture will separate in the GC column at different rates. This separation is how the compounds are identified by the GC. The amount of the chemical present can also be determined by this process, using a mathematical formula.

Lawrence E. Wines, *Non-Breath Chemical Testing*, in UNDERSTANDING DUI SCIENTIFIC EVIDENCE 317, 338 (Lawrence E. Wines et al. eds., 2d ed. 2009).

At trial, the prosecution would likely call Officer A to testify as to the location of the bag of substance found, and the prosecution would seek to admit the certified analyst report as prima facie evidence of the contents of substance. If the defendant objects to the admission of the report and exercises his right to live testimony, the trial court must determine whose testimony will satisfy the Confrontation Clause. Because chain-of-custody goes to the weight of the evidence and is not subject to the requirements of the Confrontation Clause, the testimony of Lab Employee is not required.¹³⁰ Further, any testimony from Technician used to prove the accuracy of the gas chromatograph may likely be submitted via affidavit.¹³¹ Yet, among Analysts 1, 2, 3 and 4, whose testimony can satisfy the Confrontation Clause as to the entire contents of the report? If the prosecution calls Analyst 1—who can only testify as to the weight and volume of the substance—the defendant will be denied the ability to cross-examine the witness testifying as to its chemical composition. Under *Melendez-Diaz*, this likely would prevent the admission of this portion of the report. If the prosecution calls only Analyst 2 or Analyst 3, then the part of the report indicating weight and volume may be inadmissible. It is also clear after *Davis*,¹³² and even more certain after *Melendez-Diaz*,¹³³ that Analyst 4 could not testify to the contents of the report because he had no firsthand knowledge of the data contained therein.¹³⁴ Further, unlike Lab Employee, the analysts “create[d] a record” to be used against the defendant at trial.¹³⁵

Melendez-Diaz provides guidance in reducing the class of participants who must testify in order to admit the contents of a lab report,

130. *Melendez-Diaz*, 129 S. Ct. at 2532 n.1.

131. *Id.*

132. *Davis v. Washington*, 547 U.S. 813, 826 (2006) (holding that a testifying police officer is not permitted to relay out-of court statements of a non-testifying witness).

133. *Melendez-Diaz*, 129 S. Ct. at 2537–38 (stating that cross-examination is necessary to test the “analyst’s honesty, proficiency, and methodology”). Only cross-examination of the analyst performing the tests will provide this information.

134. A supervisor testifying to the contents of a lab report in which he played no part in preparing will be subject to evidentiary objections relating to both lack of firsthand knowledge and hearsay. “[I]f the witness’s testimony on its face purports to describe observed facts, but the testimony rests on statements of others, the objection is that the witness lacks firsthand knowledge. In contrast, when on its face the testimony indicates the witness is repeating out-of-court statements, a hearsay objection is appropriate.” KENNETH S. BROUN ET AL., *MCCORMICK ON EVIDENCE* §10 (6th ed. 2006); see also *State v. Belvin*, 986 So. 2d 516, 523 (Fla. 2008) (holding that the testimony of a supervisor of the chemist who actually performed the tests at issue failed to satisfy confrontation requirements where the supervisor “under cross-examination, could not have answered questions concerning chain of custody, methods of scientific testing, and analytical procedures regarding the contraband at issue”).

135. *Melendez-Diaz*, 129 S. Ct. at 2539 (emphasis omitted).

and now trial courts can be somewhat comfortable overruling confrontation objections which demand the appearance of all chain-of-custody witnesses or those involved in testing equipment maintenance. Still, how shall a trial court rule if the defendant demands the testimony of all four analysts involved in the analysis?¹³⁶ The *Melendez-Diaz* Court made clear that individuals creating a record to be used at trial to prove a fact necessary for the defendant's guilt must be presented for cross-examination.¹³⁷ In the above scenario, all four analysts participated in creating the lab report. It would appear they all must testify in order to admit the entirety of the results. Although requiring a single analyst to testify in support of a particular lab report would have only negligible effect on the state's ability to prosecute,¹³⁸ requiring all four analysts could prevent the efficient application of justice.¹³⁹

B. Resolving the Issue Through Legislative Action

To avoid the inherent problems in requiring the testimony of multiple analysts, jurisdictions should enact statutory language which specifically identifies who may testify to the entire contents of the lab report. To satisfy Confrontation Clause requirements, this individual must have directly supervised or participated in all portions of the analysis, and they must possess adequate knowledge of the methods and equipment used, as well as the qualifications of others involved in the analysis.¹⁴⁰ *Melendez-Diaz* does not stand for the proposition that all analysts involved in the testing of the substance must testify. Rather, if a record was created in the form of test results, those results are admissible only if a creator of that record is available for cross-examination, not *all* contributors. If multiple analysts participate in the same portion of the analysis, there is nothing in *Melendez-Diaz* that would prevent the admission of this evidence through the testi-

136. *Id.* at 2544–46 (Kennedy, J., dissenting).

137. *Id.* at 2537–39 (majority opinion).

138. *Id.* at 2542.

139. Requiring all analysts involved to testify at trial would likely cause serious delays in the trial process and potentially deny a defendant his right to a speedy trial. Brief of Amici Curiae the National District Attorneys Ass'n et al. in Support of Respondent, *supra* note 100, at 16. Further, requiring the analyst to appear in court will clearly "curtail the amount of time available for analyzing drugs." *Id.* Requiring two, three, or even four analysts to testify to the contents of a single lab report only multiplies this effect. *See supra* notes 132–35 and accompanying text.

140. The person testifying must have firsthand knowledge of the methods used in the analysis and the contents of the report. *See* FED. R. EVID. 602, 701; *see also* Paul C. Giannelli, *Expert Testimony and the Confrontation Clause*, 22 CAP. U. L. REV. 45, 58 (1993) (noting that the testifying analyst must have "personal knowledge about issues such as chain of custody and adherence to proper procedures during the time the subordinate had possession of the evidence").

mony of a single participant, provided that participant had firsthand knowledge of the entire testing process. In the “Substance Analysis” scenario above, none of the analysts possess this knowledge, and thus confrontation will likely require the appearance of all four.¹⁴¹ A properly drafted statute identifying the particular characteristics of a “testifying analyst” will not only provide courts with guidance in determining who must testify, it will also encourage state laboratories to adopt procedures which create an analyst who has adequate knowledge to testify to all portions of the report.¹⁴²

The Court’s ultimate holding in *Melendez-Diaz* was considerable—a defendant now has a right to confront the analyst who prepared the report being used as evidence against him. Although some jurisdictions granted this right prior to *Melendez-Diaz*, many states allowed the admission of certified analyst reports without also providing the defendant with the right to object and demand the presence of the analyst who prepared the report.¹⁴³ Thus, the Court’s ruling in *Melendez-Diaz* will likely result in an increased number of defendants demanding live testimony.¹⁴⁴ In the aftermath of *Melendez-Diaz*, trial courts will be scrambling to determine whose testimony will satisfy confrontation requirements. The Supreme Court’s “chain-of-custody” guidance is inadequate. Moreover, the Court’s holding “offers no principles or historical precedent to determine” whose testimony shall be required to meet Sixth Amendment demands.¹⁴⁵ As stated in the dissent, there is “no accepted definition of analyst, and there is no established precedent to define the term.”¹⁴⁶ While true, nothing would

141. “[A] person who has no knowledge of a fact except what another has told him does not satisfy the requirement of knowledge from observation.” BROWN, *supra* note 134, §10.

142. Most tests are performed by a single analyst, and in these situations, that analyst’s testimony will satisfy confrontation. Where multiple analysts are involved in an analysis, the lab should institute procedures which allow for a single participant to gain firsthand knowledge of the entire process.

143. See, e.g., ARIZ. REV. STAT. ANN. § 36-254 (2009); D.C. CODE § 48-905.06 (Lexis-Nexis 2004); IDAHO CODE ANN. § 37-2745 (2002); NEB. REV. STAT. § 28-1439 (Reissue 2008); UTAH CODE ANN. § 41-6a-515 (LEXIS through Apr. 2010 legislation). Although some of the aforementioned statutes provide the defendant a right to subpoena the analyst, *Melendez-Diaz* makes clear that this is not sufficient to satisfy the requirements of the Sixth Amendment. *Melendez-Diaz*, 129 S. Ct. at 2540.

144. Knowing that the prosecution could not prove its case absent the results of the analysis, defendants may refuse to stipulate to the contents of the lab report and instead demand live testimony in hopes that the analyst will be unavailable and the charges will be dismissed. Brief of Amici Curiae the National District Attorneys Ass’n et al. in Support of Respondent, *supra* note 100, at 19. On similar logic, there are fears that defendants will now require the presence of the analyst before pleading guilty. See *id.*

145. *Melendez-Diaz*, 129 S. Ct. at 2545 (Kennedy, J., dissenting).

146. *Id.* at 2544.

prevent a state from enacting legislation to resolve this issue. This Note proposes that jurisdictions adopt statutory language identifying a “testifying analyst” who can *constitutionally* testify to the entire contents of the lab report.¹⁴⁷

1. Characteristics of the “Testifying Analyst”

To satisfy the Confrontation Clause, the analyst testifying to the contents of the lab report must have supervisory authority over other technicians involved in the testing process,¹⁴⁸ if any, and must have adequate knowledge regarding the testing methods employed,¹⁴⁹ the reliability and effectiveness of the machines utilized,¹⁵⁰ and the location of the substance through all steps of the testing process.¹⁵¹ Further, to possess adequate knowledge for cross-examination¹⁵² and to comply with basic rules of evidence,¹⁵³ this individual also must have performed a substantial portion of the analysis.

Practically speaking, requiring testimony from an analyst who performed a substantial portion of the testing and analysis ensures that the defendant is given an opportunity to cross-examine the analyst’s

147. This provision could be incorporated into a constitutional notice-and-demand statute or simply included among a state’s other evidentiary statutes.

148. This requirement will help to ensure that the designated analyst has adequate knowledge of the methods and techniques used during various stages of analysis. Although many laboratories do not currently employ analysts with such authority, these statutory criteria will encourage labs to adapt their procedures to create such a role within the lab. See BUREAU OF JUSTICE STATISTICS, NCJ 222181, CENSUS OF PUBLICLY FUNDED FORENSIC CRIME LABORATORIES, 2005, at 2 tbl.2 (2008), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/cpffcl05.pdf> (reporting that 58% of crime laboratory employees were analysts or examiners and 13% were directors or supervisors).

149. “For a report from a crime laboratory to be deemed competent, [the report] should contain . . . a description of the analytical techniques used in the test . . .” *Symposium on Science and the Rules of Legal Procedure*, 101 F.R.D. 599, 632 (1984) (remarks of Professor Anna Harrison, Department of Chemistry, Mount Holyoke College). It follows then, for a report to contain the techniques used in the test, the signer of the report must know the techniques or methods used in the test.

150. In *Melendez-Diaz*, the Supreme Court stated that maintenance reports are likely not testimonial and thus can be admitted as prima facie evidence of the condition of the equipment. 129 S. Ct at 2532 n.1. Nonetheless, the defendant may still want to cross-examine regarding the *reliability* of a particular machine. The person testifying in court should have adequate knowledge of these facts. *Id.*

151. As a practical matter, a testifying analyst with knowledge of the chain of custody of drug being analyzed may serve as a witness for establishing both the contents of the report and chain of custody of the substance. See, e.g., MAUET, *supra* note 120, at 183–84 (providing sample testimony).

152. Edward J. Imwinkelried, “*This Is Like Déjà Vu All Over Again*”: *The Third, Constitutional, Attack on the Admissibility of Police Laboratory Reports in Criminal Cases*, 38 N.M. L. REV. 303, 326–27 (2008).

153. See FED. R. EVID. 602, 701.

“techniques, procedures, and handling of the contraband.”¹⁵⁴ Requiring this testimony also allows the defendant to question the analyst’s proficiency, experience, and training in interpreting particular test results. In fact, demonstrating that an analyst lacks the necessary expertise is a “well-accepted method of challenging the weight of the [analyst’s] testimony.”¹⁵⁵ In *Melendez-Diaz*, Massachusetts argued that the analyst reports at issue did not pose confrontation issues because the results were mechanically produced by a testing instrument.¹⁵⁶ In a subsequent footnote, however, Massachusetts admitted that these machine-generated data must ordinarily be interpreted by an analyst.¹⁵⁷ In interpreting these data, the analyst must rely on “personal, subjective standards to draw the inference.”¹⁵⁸ It is for precisely this reason that only the testimony of an individual who performed a substantial portion of the analysis will satisfy confrontation requirements. Only the analyst interpreting the results will be able to respond accurately to questions regarding the subjective standards used in forming their conclusions. This logic prevents the live testimony of a supervisor or testifying expert—essentially surrogate testimony—from meeting the stringent requirements of the Confrontation Clause.

2. *Surrogate Testimony Will Not Satisfy Confrontation*

An amicus brief supporting *Melendez-Diaz* suggested that in cases where the actual analyst was unavailable, a surrogate analyst could testify in his or her place.¹⁵⁹ This alternative poses numerous problems. First, allowing a supervisor or trial expert to testify would prevent the defendant from exposing the analyst’s weak creden-

154. *Rivera v. State*, 917 So. 2d 210, 211 (Fla. Dist. Ct. App. 2005); see also Paul C. Giannelli, *The Admissibility of Laboratory Reports in Criminal Trials: The Reliability of Scientific Proof*, 49 OHIO ST. L.J. 671, 688–95 (1988) (discussing various problems with the reliability of lab testing and lab reports and providing numerous examples of deficiencies in crime lab analysis that could be brought out during cross-examination).

155. Imwinkelried, *supra* note 152, at 325.

156. Brief for Respondent, *supra* note 59, at 10 (“[D]rug analysis certificates do not accuse anyone of anything criminal; instead, they merely establish the current physical composition and weight of a chemical substance. These neutral, objective facts become inculpatory only when a testifying witness, who is properly subject to confrontation, provides the necessary evidentiary links to connect the substance tested in the laboratory to the accused’s past criminal conduct.”).

157. *Id.* at 30 n.10.

158. Imwinkelried, *supra* note 152, at 327.

159. Brief of Law Professors as Amici Curiae in Support of Petitioner at 20, *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009) (No. 07-591), 2008 WL 2521264 at *20; see also Brief for the United States as Amicus Curiae Supporting Respondent at 25, *Melendez-Diaz*, 129 S. Ct. 2527 (No. 07-591), 2008 WL 4195142 at *25 (suggesting that Federal Rule of Evidence 703 permits expert analysts to testify to the contents of reports generated by other technicians).

tials.¹⁶⁰ Despite the “expert” designation, many forensic analysts receive very little substantive training.¹⁶¹ It would be difficult to expose the extent of an analyst’s education and training deficiencies through the cross-examination of a surrogate who can testify only to his own educational background. Permitting a supervisor or other designated witness to testify in place of the analyst who actually performed the tests will allow the prosecution to screen the lesser qualified chemist from cross-examination by substituting his testimony with that of a professional witness possessing both trial experience and stronger credentials.¹⁶²

Further, a surrogate will not be able to respond adequately to questions regarding the methods and techniques used during the analysis in question.¹⁶³ The Confrontation Clause is satisfied only when the defendant is given ample opportunity to “probe and expose . . . through cross-examination.”¹⁶⁴ An illustrative case on this point is *Delaware v. Fensterer*, where on cross-examination the analyst admitted he could not remember which method was used in performing the analysis.¹⁶⁵ Had the findings been introduced through a surrogate, there would have been no opportunity to expose this infirmity. Although a testifying expert may be able to explain the methods that *should* have been utilized, unless this expert directly supervised the

160. An article on drug testing describes the cross-examination of a drug expert with forty-three years of experience and more than 2500 court appearances as follows:

[The expert] admitted that not only did he not have a college degree, but that he had never even finished high school. He claimed that heroin was an alkaloid, which it is, but did not remember what an alkaloid was. He could not draw the structure of heroin or benzene, one of the commonest and simplest organic molecules. . . . In addition, he could not explain any single chemical reaction about which he had testified.

Bruce Stein et al., *An Evaluation of Drug Testing Procedures Used by Forensic Laboratories and the Qualifications of Their Analysts*, 1973 WIS. L. REV. 727, 728; see also *Melendez-Diaz*, 129 S. Ct. at 2537 (“Like expert witnesses generally, an analyst’s lack of proper training or deficiency in judgment may be disclosed in cross-examination.”).

161. Craig M. Cooley, *Forensic Science and Capital Punishment Reform: An “Intellectually Honest” Assessment*, 17 GEO. MASON U. C.R. L.J. 299, 411 (2007).

162. See Giannelli, *supra* note 140, at 58–59 (providing an example where a well-trained toxicologist substitutes for lesser qualified subordinates and misleads the jury into thinking that he actually performed the tests).

163. See *Melendez-Diaz*, 129 S. Ct. at 2537 (noting that some “methodology requires the exercise of judgment and presents a risk of error that might be explored on cross-examination”); see also *State v. Navarro*, 621 A.2d 408, 412 (Me. 1993) (“[T]he State has the burden of producing a witness who can testify as to the analysis procedures and results.”).

164. *Delaware v. Fensterer*, 474 U.S. 15, 22 (1985).

165. *Id.* at 20. It is interesting to note, however, that the Court concluded that the analyst’s lack of memory did not “frustrate any opportunity for cross-examination [so] that admission of the witness’ direct testimony violates the Confrontation Clause.” *Id.* The Confrontation Clause was satisfied as long as the defendant had the ability to expose the analyst’s lack of memory. *Id.* at 22.

analysis, she would be unable to verify whether proper techniques were indeed employed. It is important to note that in larger labs, a credentialed toxicologist may “supervise” fifty cases a day.¹⁶⁶ Such oversight does not meet the level of “direct supervision” necessary to permit the supervisor to testify to the contents of the report.

Although a true surrogate analyst would fail to satisfy the demands of the Confrontation Clause, this would not prevent a lab from designating a “testifying analyst,” assuming this individual is sufficiently cross-examinable regarding the analysis of the substance.¹⁶⁷ Statutory language identifying the necessary qualifications of this “testifying analyst” would provide guidance to both trial court judges and state laboratories. Unfortunately, there are currently no model statutes available which contain the criteria proposed by this Note, but, as discussed below, Ohio’s notice-and-demand statute¹⁶⁸ is helpful in supplying relevant language that could be used in developing a provision defining a “testifying analyst.” Ultimately, however, the statute fails to clearly identify a single analyst whose testimony would satisfy confrontation requirements. Thus, although the Ohio statute provides an excellent framework, jurisdictions must also incorporate the criteria identified in subsection III.B.1.

3. *Examination of Identifying Language in Ohio Notice-and-Demand Statute*

The Ohio statute requires the certificate of analysis to be “signed by the person performing the analysis . . . stating that the substances . . . have been weighed and analyzed.”¹⁶⁹ Further, the statute requires the signer to “attest that scientifically accepted tests were performed with due caution, and that the evidence was handled in accordance with established and accepted procedures while in the custody of the laboratory.”¹⁷⁰ The demand portion of this statute allows the defendant the opportunity to “demand the testimony of the person signing the report.”¹⁷¹

In Ohio, when a defendant demands live testimony, the prosecution must provide the person who performed the analysis and who can testify to both the scientific standards of the tests performed and to whether the evidence was handled “in accordance with established

166. Giannelli, *supra* note 140, at 57.

167. See FED. R. EVID. 602, 701; see also BROWN, *supra* note 134, §10 (“However, when the witness bases his testimony partly upon firsthand knowledge and partly upon the accounts of others, the problem calls for a practical compromise.”).

168. OHIO REV. CODE ANN. § 2925.51 (West 2006).

169. *Id.* § 2925.51(A).

170. *Id.*

171. *Id.*

and accepted procedures.”¹⁷² This means the Ohio statute functionally narrows the field of lab employees who can testify. Only a technician who both performed the analysis and had knowledge of the methods and procedures used by the lab can testify. However, the Ohio statute fails to completely resolve the issue highlighted in the “Substance Analysis” scenario discussed in section III.A. above: What if the substance was weighed by one person and analyzed by another? Must they both testify?

The Ohio statute requires that the person performing the analysis must sign the report¹⁷³ and must testify to its contents if the defendant makes a timely demand.¹⁷⁴ When multiple analysts are involved, the statute appears to require the production of several distinct reports and the live testimony of every analyst involved in order to admit the results of a single analysis. Although this requirement is unlikely to result in the end of all drug prosecutions, it could lead to unnecessary testimony and abuse by defense attorneys.¹⁷⁵

It is difficult to ascertain from the statute itself whether the Ohio legislature intended each person performing the analysis to sign the report¹⁷⁶ or whether it intended a supervising analyst to sign the report on behalf of all those involved in the process.¹⁷⁷ A better approach would be to eliminate this ambiguity altogether by using the criteria discussed in subsection III.B.1 above to statutorily identify a single person within the lab who both participated in a substantial portion of the analysis and had direct supervisory authority over the entire testing process.

172. *Id.*

173. *Id.*

174. *Id.* § 2925.51(C).

175. *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2557 (2009) (Kennedy, J., dissenting) (“The defense bar today gains the formidable power to require the government to transport the analyst to the courtroom at the time of trial. Zealous counsel will insist upon concessions: a plea bargain, or a more lenient sentence in exchange for relinquishing this remarkable power.”).

176. If each person performing portions of the analysis must testify, this could lead to the dire consequences described by the dissent in *Melendez-Diaz*. *Id.* at 2544–45 (majority opinion).

177. Ohio has not yet addressed the issue of whether a supervisor’s testimony will satisfy confrontation. However, other jurisdictions have ruled in the negative. See *Rivera v. State*, 917 So. 2d 210, 211–12 (Fla. Dist. Ct. App. 2005) (finding the testimony of the supervisor of the chemist who tested the substance and wrote the report to be insufficient to satisfy the Confrontation Clause for admission of the findings in the report); see also *People v. Williams*, 183 P.3d 577, 579 (Colo. App. 2007) (holding that a laboratory report cannot be admitted through the testimony of the supervisor where the supervisor had played no part in the testing of the substance and, further, rejecting the prosecution’s assertion that it had no obligation to provide the actual employee performing the analyst where the defendant’s written demand requested the testimony of “any technician or employee”).

IV. CONCLUSION

In *Melendez-Diaz* the Supreme Court properly concluded that analyst reports are testimonial under the *Crawford* standard and are therefore inadmissible as evidence against the accused, unless the defendant is afforded an opportunity to cross-examine the analyst preparing the report. Preparing reports with the sole purpose of establishing facts necessary to prove the defendant's guilt at trial—created at law enforcement's request—is precisely the kind of practice the Sixth Amendment was intended to prohibit.

The Court ruled that when the defendant makes a proper demand, the prosecution must present live testimony in order to admit the contents of the report into evidence. The Court noted that not all those involved in the analysis must testify in order to admit the results. Specifically, the Court found that those involved in the chain of custody and in the maintenance of the testing equipment need not testify to satisfy confrontation requirements. The Court did not identify, however, who specifically must testify in order to admit the entire contents of the report. The Court's ruling left open the possibility that several analysts may have to testify in order to admit the results of a single forensic analysis.

In order to resolve this issue, jurisdictions should adopt legislation identifying the particular characteristics of a single analyst whose testimony would meet the demands of the Sixth Amendment. In order to satisfy the Confrontation Clause, the testifying analyst must be sufficiently cross-examinable. To achieve this, the analyst should possess ample knowledge of the testing procedures used and the reliability of the methods employed, and the analyst must have participated in a substantial portion of the analysis. Evidentiary statutes and case law reject the notion that the testimony of a lab supervisor is sufficient to satisfy confrontation. Only an analyst who took part in the analysis will possess the knowledge necessary to allow the defendant to sufficiently cross-examine the witness against him.

Hundreds of thousands of drug, DNA, and blood tests are performed by crime labs every year.¹⁷⁸ Many of the current testing procedures used by these labs involve multiple analysts testing a single substance.¹⁷⁹ Under *Melendez-Diaz*, the testimony of all analysts involved in the test may be required to admit the results. States can either wait patiently for the Supreme Court to identify a single analyst who can satisfy confrontation requirements, or they can take immediate legislative action. This Note proposes the latter.

178. See BUREAU OF JUSTICE STATISTICS, *supra* note 148, at 3 & tbl. 6.

179. Cf. NAT'L RESEARCH COUNCIL, STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD 15 (2009), available at http://www.nap.edu/openbook.php?record_id=12589&page=15 (discussing the "extreme disaggregation" of forensic science practitioners).

