

## MELENDEZ-DIAZ AND THE RIGHT TO CONFRONTATION

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### INTRODUCTION

In *Melendez-Diaz v. Massachusetts*,<sup>1</sup> the United States Supreme Court hewed to its holding in *Crawford v. Washington*<sup>2</sup> and decided that reports of scientific tests cannot be introduced as evidence in a criminal trial without live testimony by the person who wrote the report.<sup>3</sup> This holding was based on the definition of “testimonial” developed in *Crawford*, but will likely result in hundreds of pending cases,<sup>4</sup> and an unknown, but much smaller number of future cases becoming un-prosecutable because such analysts are not available to testify at the trial. Nevertheless, I agree with the basic thrust of the opinion because defendants should have the opportunity to cross-examine those who have prepared scientific reports that may be the basis of their convictions. Still, I remain unconvinced by the Supreme Court’s reading of the Sixth Amendment as to the definition of “witness” and argue that the *Crawford/Melendez-Diaz* approach is both too narrow and too broad.

In *Melendez-Diaz*, the defendant was charged with distributing cocaine in an amount between fourteen and twenty-eight grams.<sup>5</sup> He was convicted on the basis of “certificates of analysis” that declared the substance’s weight and that the substance seized from him was cocaine.<sup>6</sup> No person appeared before the trial court to verify the conclusions in the certificates.<sup>7</sup> The petitioner’s objections, based on the Confrontation Clause, were overruled, and his conviction was affirmed by the Massachusetts appellate courts.<sup>8</sup> The Supreme Court granted certiorari and reversed the con-

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1. *Melendez-Diaz v. Massachusetts*, No. 07-951 (U.S. June 25, 2009).
2. 541 U.S. 36 (2004).
3. *Melendez-Diaz*, No. 07-951, slip op. at 23.
4. See *Shea v. Louisiana*, 470 U.S. 51 (1985).
5. *Melendez-Diaz*, No. 07-951, slip op. at 2.
6. *Id.*
7. *Id.*
8. *Id.* at 3.

viction.<sup>9</sup>

The Court's decision was based on its interpretation of the Sixth Amendment developed in *Crawford*. According to *Crawford*, defendants have the right to cross-examine people who offer "testimony" against them.<sup>10</sup> While it seems obvious to me that *everyone* who testifies for the prosecution, whether offering live or hearsay testimony, is a "witness" against the defendant under the terms of the Sixth Amendment, the Supreme Court does not mean that when it says "testimony." Rather, certain hearsay, without the presence of the declarant, is still admissible against defendants under the *Crawford* holding because these statements—including most of the content of 911 calls and various other statements that may incriminate defendants—are not considered "testimony" by the Court. That is to say, defendants are offered no protection under the Confrontation Clause when a witness gives a statement that the Court deems "nontestimonial" hearsay.<sup>11</sup>

The *Melendez-Diaz* Court quoted the following passage from *Crawford* as to what is "testimonial":

Various formulations of this core class of "testimonial" statements exist: "ex parte in court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially"; "extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions"; [and] "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial. . . ."<sup>12</sup>

By contrast, statements about "events as they were actually happening," such as 911 calls, are considered "nontestimonial" and therefore are not subject to cross-examination, as opposed to statements "describing [to the police] past events" which are considered "testimonial" and are subject to cross-examination.<sup>13</sup>

In *Melendez-Diaz* the Court held that "[t]he documents at issue here,

9. *Id.*

10. 541 U.S. at 51–52 (2004).

11. This was made clear in *Whorton v. Bockting*, 549 U.S. 406, 420 (2007) ("*Crawford* [eliminates] Confrontation Clause protection against the admission of unreliable out-of-court nontestimonial statements."); see also Robert P. Mosteller, *Confrontation as Constitutional Criminal Procedure: Crawford's Birth Did Not Require That Roberts Had to Die*, 15 J.L. & POL'Y 685 (2007) (questioning this holding because of the value of providing some protection for what the Court deems nontestimonial hearsay). My proposal would provide full protection for both "testimonial" and "nontestimonial" hearsay.

12. *Crawford*, 541 U.S. at 51–52 (internal citations omitted).

13. *Davis v. Washington*, 547 U.S. 813, 827 (2006).

while denominated by Massachusetts law ‘certificates,’ are quite plainly affidavits” and are “functionally identical to live, in court testimony, doing precisely what a witness does on direct examination.”<sup>14</sup> Therefore, the Court held that they were “testimonial” and, accordingly, that the author of the certificate must appear at trial to be subject to cross-examination by the defendant, rather than just submit the certificates.<sup>15</sup>

My difficulty with this holding lies not with the result but with the Court’s entire approach to the Sixth Amendment. The result in many cases not only reflects the apparent meaning of the Sixth Amendment, but it also comes to the only fair outcome. There are too many examples of faulty scientific testing leading to false convictions (as discussed by the Court)<sup>16</sup> to allow “scientific tests” to be used automatically in criminal trials without being subject to cross-examination. Rather, my objection is that the Court’s definition of “testimony” is too narrow because it allows certain hearsay statements that cry out for cross-examination to be used against defendants. But the definition of “testimony” is also too broad because it does not recognize that a more extensive Sixth Amendment privilege can also be subject to certain practical exceptions, as the Court has done with the Sixth Amendment’s right to counsel.<sup>17</sup>

Establishing a wooden rule that *all* scientific reports must be subject to cross-examination, regardless of whether the defendant has any need to do so, will mean that much scientific evidence will be lost because of the unavailability of the analyst, who may have, in some cases, performed the test years before and is now dead or otherwise truly unavailable. There is a middle ground between the extremes announced by the majority (scientific reports are *always* subject to cross-examination) and the dissent (scientific reports are *never* subject to cross-examination) that is more obviously justified by the terms of the Sixth Amendment itself. To discover this middle ground requires an examination of *Crawford*, its predecessor *Ohio v. Roberts*,<sup>18</sup> and other cases in which the Court has tried to explicate its rule regarding the scope of the right to confrontation.

#### I. BACKGROUND

In *Crawford*, the Supreme Court vitalized, to some extent, the defendant’s right to confront witnesses against him by overruling *Ohio v. Rob-*

14. No. 07-951, slip op. at 4 (quoting *Davis*, 547 U.S. at 830).

15. *Id.* at 4–5.

16. *Id.* at 13.

17. See *Scott v. Illinois*, 440 U.S. 367 (1979) (holding that the Constitution requires only that no indigent criminal defendant be sentenced to a term of imprisonment unless the State has afforded him the right to counsel).

18. 448 U.S. 56 (1980).

*erts. Roberts* held that the defendant's confrontation right did not bar admission of an unavailable witness' hearsay statement against the defendant if the statement bore "adequate 'indicia of reliability.'"<sup>19</sup> This test was satisfied when evidence either fell within a "firmly rooted hearsay exception" or exhibited "particularized guarantees of trustworthiness."<sup>20</sup>

The problem with *Roberts* was that once a court determined that a given type of statement fell within one of many hearsay exceptions, such as an "excited utterance," the statement was admitted against the defendant, regardless of whether cross-examination might have exposed some weakness in the statement in an individual case. Thus, as Professor Richard Friedman has pointed out, under the *Roberts* regime:

[T]he Clause . . . had only a very limited effect. The lower courts usually could find a basis for admitting a statement, either by fitting it within an exemption or making a case-specific determination of reliability. And though the Supreme Court occasionally swooped down and held the admission of a given statement to be a violation of the Clause, the law was highly unpredictable because it was not rooted in any solid underlying theory.<sup>21</sup>

The Washington Supreme Court opinion in *Crawford* was a good example of the cavalier attitude toward confrontation rights that had been exhibited by the lower courts. In that case, the defendant stabbed a man who allegedly had tried to rape his wife on a previous occasion.<sup>22</sup> The defendant claimed that the stabbing was in self-defense.<sup>23</sup> His wife, who was present at the stabbing, was unavailable to testify because of the spousal privilege.<sup>24</sup> However, the prosecution got around this by introducing her statement to the police that contradicted the self-defense claim.<sup>25</sup> The Washington Supreme Court affirmed the conviction on the ground that the wife's statement "bore guarantees of trustworthiness" because it partially interlocked with the defendant's own statement.<sup>26</sup> That is to say, much of what the wife said agreed with what the defendant said, except when it incriminated the defendant.<sup>27</sup>

The United States Supreme Court reversed.<sup>28</sup> The Court properly held

19. *Id.* at 66.

20. *Id.*

21. Richard D. Friedman, *Crawford, Davis and Way Beyond*, 15 J. L. & POL'Y 553, 554 (2007).

22. *Crawford v. Washington*, 541 U.S. 36, 38 (2004).

23. *Id.* at 40.

24. *Id.*

25. *Id.*

26. *Id.* at 41.

27. *See id.* at 41-42.

28. *Id.* at 69.

that the Clause's protection is not limited to those who "actually testify at trial" but extends to those "whose [hearsay] statements are offered at trial."<sup>29</sup> But the Court, after a lengthy disquisition on the history of the Confrontation Clause, went on to explain that not *all* hearsay statements offered at trial are covered by the Clause, because the Clause is primarily concerned with those statements that were "testimonial" at the time they were made.<sup>30</sup>

As to the difference between testimonial and nontestimonial statements, the Court declined to spell out a "comprehensive definition."<sup>31</sup> But it did hold that

[w]hatever else the term [testimonial] covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; *and to police interrogations*. These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed.<sup>32</sup>

Concurring, Chief Justice Rehnquist opined that

[t]he Court's distinction between testimonial and nontestimonial statements, contrary to its claim, is no better rooted in history than our current doctrine. . . . [W]hile I agree that the framers were mainly concerned about sworn affidavits and depositions, it does not follow that they were similarly concerned about the Court's broader category of testimonial statements.<sup>33</sup>

While Rehnquist was right about history, his view—leaving the Confrontation right to the tender mercies of state court hearsay doctrine—was worse than the result in *Crawford*, which at least gave some content to the constitutional right.

In 2006, the Court set out to better explain what it meant by "testimonial" versus "nontestimonial" in the combined cases of *Davis v. Washington*<sup>34</sup> and *Hammon v. Indiana*.<sup>35</sup> In *Davis* the issue was whether the contents of a 911 call could be used against the defendant in the absence of

29. *Id.* at 43.

30. *Id.* at 51–52. That "nontestimonial" statements were not covered at all by the Clause was only made clear in the subsequent case of *Davis v. Washington*. 547 U.S. 813, 824–25 (2006).

31. *See Crawford*, 541 U.S. at 68.

32. *Id.* at 68 (emphasis added).

33. *Id.* at 69–71 (Rehnquist, C.J., concurring in the judgment). Subsequently, Professor Thomas Davies, after a thorough examination of the subject, concluded that the Court was wrong in its historical analysis. Thomas Y. Davies, *What Did the Framers Know, and When Did They Know It? Fictional Originalism in Crawford v. Washington*, 71 BROOK. L. REV. 105, 189–206 (2005). Compare *id.*, with Akhil Reed Amar, THE CONSTITUTION AND CRIMINAL PROCEDURE, 125–31 (1997), and Richard Friedman, *Confrontation: The Search for Basic Principles*, 86 GEO. L.J. 1011 (1998) (both relied on by *Crawford* as advancing the Court's view of history).

34. 547 U.S. at 817.

35. *Id.*

the declarant. *Hammon* concerned a statement to the police by a battered woman after they had responded to a domestic disturbance call. The Court held that the 911 call in *Davis* was nontestimonial and consequently could be used at the defendant's trial.<sup>36</sup> The statement to the police in *Hammon*, by contrast, was considered testimonial and its use was a violation of the defendant's Sixth Amendment rights.<sup>37</sup>

In the course of distinguishing between these two statements, the Court made further declarations as to the testimonial/nontestimonial distinction:

Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.<sup>38</sup>

Later the Court said that the difference in result between *Davis* and *Crawford* was that in *Crawford* the interrogation was "solely directed at establishing the facts of the past crime," whereas in *Davis* the declarant "was speaking about events *as they were actually happening* rather than describing past events."<sup>39</sup> But, at some point, a 911 call may shift to "questions designed solely to elicit testimonial evidence from a suspect," at which point, it is by definition testimonial and not admissible.<sup>40</sup> How the Court derived all of this from the history of the Sixth Amendment, which, of course, predated police forces as we know them (not to mention 911 calls), is a mystery.

More importantly, this apparent focus on the intent of the questioner is extremely unhelpful. During the course of their interviews with witnesses, police and 911 operators are likely to have the intent both to defuse the emergency and to capture and prosecute the perpetrator. For example, if police arrive on the scene of a domestic battery after the perpetrator has fled and ask the woman to describe the perpetrator and whether he was armed, are they asking "questions necessary to secure their own safety or the safety of the public" (nontestimonial says the Court) or "questions designed solely to elicit testimonial evidence" (testimonial says the Court)?<sup>41</sup>

36. *Id.* at 827–28.

37. *Id.* at 831–32.

38. *Id.* at 822.

39. *Id.* at 826–27 (emphasis in original).

40. *Id.* at 829.

41. *Id.*

Because the officer's purpose is likely mixed—he wants to protect himself and the public from a possibly armed criminal, and he wants to develop evidence for possible prosecution—this question is not “solely” designed to elicit testimonial evidence. But earlier the Court had said that it was the “primary purpose” of the interrogation that counted,<sup>42</sup> and that will be very hard to gauge. This requires the very sort of probing of the mind of the police that the Court has condemned in the Fourth Amendment context.<sup>43</sup>

Likewise, if we focus on the temporal distinction that the Court emphasized—whether the declarant is speaking about events as they are “actually happening” or “describing past events”—the testimonial/nontestimonial distinction is still unclear. In the example above, while the emergency of the woman being battered is over, a second emergency, of a possibly armed batterer at large, is still ongoing. Thus the police question: “did he take the knife with him or leave it in the house?” has both evidence gathering (testimonial) and emergency defusing (nontestimonial) aspects.

But the main problem is not that *Crawford/Davis* has given rise to difficult questions. Rather, it is that the testimonial/nontestimonial distinction has nothing to do with the defendant's right to cross-examine witnesses against him. As noted, the Court was correct in *Crawford* to make it clear that the confrontation right was not limited to live testimony in court but extended to the use of hearsay statements by declarants who are not present. But given the right, why should the Court snatch it away in cases where it deems a hearsay statement “nontestimonial?” The defendant's need to cross-examine the declarant is no less when the statement is made to police or 911 operators while the defendant is still there than it is after he has fled.

“Nontestimonial” statements include not only 911 calls reporting ongoing emergencies, but also, as the Court explained in the subsequent case of *Giles v. California*,<sup>44</sup> “[s]tatements to friends and neighbors about abuse and intimidation, and statements to physicians in the course of receiving treatment.”<sup>45</sup> But surely all of these statements are at least as likely as statements to the police to benefit from cross-examination. For example, suppose a woman calling 911 to report domestic abuse shouts, “he's trying to kill me!” According to the Court this “nontestimonial” hearsay statement

42. *Id.* at 822.

43. “[T]he subjective motivations of individual officers have no bearing on whether a search is ‘unreasonable’ under the Fourth Amendment.” *Brigham City v. Stuart*, 547 U.S. 398, 404–05 (2006) (citations omitted).

44. No. 07-6053, slip op. at 1 (U.S. June 25, 2008).

45. *Id.* at 22.

is admissible, despite the unavailability of the declarant for cross-examination. But she might very well admit on cross-examination that she did not really think he was trying to kill her and this declaration was made in the heat and fear of the moment. And why should the defendant's right to confrontation not extend to statements to friends and neighbors by the victim? The Court cannot explain this one because in *Davis* it held that "a young rape victim's" explanation of the circumstances of the rape to her mother was "an account of past events and consequently 'testimonial'"<sup>46</sup>—the opposite of what it said in *Giles*.<sup>47</sup>

The Court's answer (except for the confusion just noted) is: "the history made us do it!" But, as previously noted, the history in no way compels the Court's testimonial/nontestimonial distinction, especially as to police questioning (not to mention 911 operators) since there were no police at common law. *Crawford* went wrong in the following passage:

The text of the Confrontation Clause . . . applies to "witnesses" against the accused—in other words, those who "bear testimony." "Testimony," in turn, is typically a solemn declaration or affirmation made for the purpose of establishing or proving some fact. An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not.<sup>48</sup>

This statement involves a subtle shift in the meaning of the term "testimony." Leaving aside the various and conflicting views of the historical meaning of "testimony," it seems obvious that "testimony" in the context of the Confrontation Clause refers to what occurs at *trial*. Statements offered by the prosecution to prove its case against the defendant, whether through live witnesses or hearsay, are "testimony" and the people who offer those statements are "witnesses." And that is what we, and the Framers, have always called them. Statements by people which are not offered by the prosecution to prove its case against the defendant are *not* "testimony."<sup>49</sup> It does not matter what the intent of the police was in obtaining a statement, nor the intent of the declarant in giving it. No one would argue, for example, that if the police took statements from ten people concerning a crime and the prosecution used only two of those as witnesses at trial, the defendant's right to cross-examination should extend to the other eight people. He may have a right to discover those statements and to use those

46. 547 U.S. at 828.

47. No. 07-6053, slip op. at 22.

48. 541 U.S. 541 U.S. 36, 51 (2004).

49. Grand jury testimony is, of course, "testimony." However, since a grand jury is not part of a "criminal case," the defendant's right does not extend into its chambers. But grand jury testimony cannot be used in court unless the defendant has the opportunity to cross-examine the declarant.

witnesses himself,<sup>50</sup> but this has nothing to do with his right to confrontation.

By contrast the defendant does, according to the Sixth Amendment, have a right to “confront” (i.e. cross-examine) “the witnesses against him.”<sup>51</sup> This, self-evidently, applies to *all* witnesses offered by the prosecution to prove its case, whether as live witnesses or through hearsay testimony.

## II. EXCEPTIONS

Having established that the only sensible way to view the defendant’s confrontation right is that it applies to *all* statements offered against him at trial, including those of scientific analysts, the remaining question is whether the law should recognize any exceptions. As usual, the answer must be “yes.” Sometimes the defendant’s right must give way to reasonable limitations that ensure the efficient conduct of trials. For example, in *Scott v. Illinois*<sup>52</sup> the Court did not deny that trials in which prison sentences are not imposed are “criminal trials” under the Sixth Amendment to which the right to counsel would apply. Nevertheless the Court refused to extend the right to free counsel to such cases on practical grounds: such application “would create confusion and impose unpredictable, but necessarily substantial, costs on 50 quite diverse States.”<sup>53</sup> The Court, of course, has made similar accommodations to practicality in limiting the First Amendment’s absolute command that “Congress shall make no law . . . abridging the freedom of speech.”<sup>54</sup>

In *Melendez-Diaz* the Court continues its historic practice of recognizing exceptions to the Confrontation Clause. In addition to the “nontestimonial” exception previously discussed, at least three further exceptions are specifically recognized, though these are evidently just examples of “nontestimonial” statements.<sup>55</sup> These exceptions are apparently designed to be

50. See *Brady v. Maryland*, 373 U.S. 83 (1963). The Court emphasized the difference between the defendant’s right to *call* witnesses under the Compulsory Process clause of the Sixth Amendment and his right to confront them. *Melendez-Diaz v. Massachusetts*, No. 07-951, slip op. at 7 (U.S. June 25, 2009).

51. U.S. Const. amend. VI. As the dissenters in *Melendez-Diaz* pointed out, we must not focus too strongly on what the Framers may have understood the word “testimony” to mean because that word is not in the Sixth Amendment. No. 07-951, slip op. at 1 (Kennedy, J., dissenting). But contrary to the view of the dissent, scientific analysts who testify against the defendant are also, obviously, “witnesses against” him.

52. 440 U.S. 367 (1979).

53. *Id.* at 373.

54. U.S. Const. amend. I. See, for example, *Schenk v. United States*, 249 U.S. 47 (1919), where the “clear and present danger” exception to the Amendment’s absolute command was adumbrated.

55. “Most of the hearsay exceptions covered statements that . . . were not testimonial.” *Melendez-Diaz*, No. 07-951, slip op. at 18.

applied automatically in every case, regardless of the fact that, in a particular case, the defendant might have a need to cross-examine the witness in question. The first exception is business records. The Court makes it clear that while records of scientific tests have sometimes been included in the “business records” exception, they should not be because they were prepared for use at trial.<sup>56</sup>

The Court is also clear, however, that ordinary business records that were not so prepared remain an automatic exception to the Confrontation Clause.<sup>57</sup> This will lead to an unacceptable dichotomy. If a hospital has a record of a blood test of the defendant, or some other witness, that was originally made for medical, rather than prosecutorial purposes, that blood test is automatically admissible as “nontestimonial” regardless of the absence of the analyst and regardless of what deficiencies that the defense attorney might have reason to raise about the lab’s procedures. But if the test is performed for the purposes of trial, then cross-examination of the analyst is required,<sup>58</sup> even if the defense attorney has no basis to challenge the results. Are not the analysts who prepared the report “witnesses” in either case?

Secondly, the Court recognizes that “a clerk’s certificate authenticating an official record—or a copy thereof—for use in evidence” is an additional exception. But though a clerk could “by affidavit *authenticate* or provide a copy of an otherwise admissible record [he] could not do what the analysts did here: *create* a record for the sole purpose of providing evidence against a defendant.”<sup>59</sup>

While both business records and clerk’s certificates will, in 99% of cases, be reliable, why should there be a blanket rule that they are *always* admissible without cross-examination?<sup>60</sup> If the defendant can demonstrate some reason why cross-examination has a reasonable prospect of challenging the reliability of this evidence, then cross-examination must be allowed. If not, the records should be admitted. It is certainly easy to see, for example, why some of Bernard Madoff’s business records, though not prepared with an eye toward use in court, might be unreliable and that their unreli-

56. *Id.* at 16.

57. “Documents kept in the regular course of business may ordinarily be admitted at trial despite their hearsay status.” *Id.* at 15.

58. *See* State v. Johnson, 982 So. 2d 672, 676–78 (Fla. 2008) (making this distinction). This case was cited with approval in *Melendez-Diaz*. *See*, No. 07-951, slip op. at 20 n.11.

59. *Melendez-Diaz*, No. 07-951, slip op. at 16–17 (emphasis in original).

60. The Federal Rules of Evidence require that both business and public records be “trustworthy.” FED. R. EVID. 803(6), (8). But without cross-examination, and given the widespread belief that they are trustworthy, this would seem to be an empty requirement.

ability might affect the guilt or innocence of one of his associates.<sup>61</sup>

The proper way to view the Sixth Amendment is that it applies, as it says, to *all* witnesses against the defendant—that is to say, everybody who testifies for the prosecution, whether as a live witness or through hearsay.<sup>62</sup> However, as in *Scott*, we must further recognize that, as a practical matter, there must be some limitation lest we grind trials to a halt by requiring testimony when it is totally unnecessary. The solution is simply that the defense attorney must offer some reasonable explanation of *why* she needs to cross-examine the declarant of a given hearsay statement. If she cannot offer such an explanation, any cross-examination would have been futile anyway.

This approach is totally different than the old approach in *Ohio v. Roberts*. It is similar to *Roberts* in that it calls for a case-by-case decision—one that only comes up after the prosecution has established that the declarant is unavailable. But unlike *Roberts*, it is irrelevant whether a given piece of evidence “bears adequate ‘indicia of reliability’” or “falls within a firmly rooted hearsay exception.”<sup>63</sup> Moreover, the defense attorney need only offer a reasonable explanation of why cross-examination is necessary in order for the witness to be required to be produced, or his hearsay statement excluded.

In the usual case of scientific or business records, the defense attorney will have no such reason. The Court’s ruling in *Melendez-Diaz* will simply be an attendance requirement. Once the prosecution has demonstrated that it can produce the witness, the defense will waive the testimony because to have it, with no effective cross-examination, will only reinforce the prosecution’s case.<sup>64</sup> But if the defense attorney has some articulable reason to doubt the competence or honesty of the business or scientific record, then she will have a reason to demand that the declarant testify and the judge order the prosecution to produce the witness. As it is, under the absolute rule of *Melendez-Diaz*, some prosecutions will fail, not because there was any reason to produce the witness for cross-examination, but simply be-

61. The final category set forth by the Court is “statements in furtherance of a conspiracy.” *Melendez-Diaz*, No. 07-951, slip op. at 18. Though it is unclear why these statements by criminals among themselves are thought to bear any “indicia of reliability,” they are clearly “nontestimonial” under the *Crawford* definition.

62. In an article immediately following *Crawford*, Professor Miguel Mendez proposed extending the Sixth Amendment right to include “nontestimonial statements” but did not further propose the limitation of the right to a “reasonable need to cross-examine” as I suggest. *Crawford v. Washington: A Critique*, 57 STAN. L. REV. 569, 609 (2004).

63. *Ohio v. Roberts*, 448 U.S. 56, 66 (1980).

64. In my three and a half years as a prosecutor in Washington, D.C., I cannot recall a case in which a defense attorney was able to make any headway in cross-examining the expert, even though we regularly produced scientific experts for testimony.

cause the witness could not be produced.

*United States v. Feliz*,<sup>65</sup> a Second Circuit case that had reached the opposite conclusion from *Melendez-Diaz*, provides a thoughtful explanation of why the *Melendez-Diaz* result will cause unnecessary trouble when applied to autopsies:

Years may pass between the performance of the autopsy and the apprehension of the perpetrator. This passage of time can easily lead to the unavailability of the examiner who prepared the report. Moreover, medical examiners who regularly perform hundreds of autopsies are unlikely to have any independent recollection of the autopsy at issue in a particular case and in testifying invariably rely entirely on the autopsy report. Unlike other forensic tests, an autopsy cannot be replicated by another pathologist. Certainly it would be against society's interests to permit the unavailability of the medical examiner who prepared the report to preclude the prosecution of a homicide case.<sup>66</sup>

The *Melendez-Diaz* Court claims that these sorts of concerns are overblown, arguing, for example, that only a small percentage of drug cases "actually proceed to trial."<sup>67</sup> But this is beside the point. In this entire discussion, we have only been concerned with cases that "actually go to trial." The question is how those cases will be affected. And many more such cases will either go to trial or be dismissed now that the analysts must appear. As the dissent points out, under the Court's ruling, in Philadelphia, for example, "each of the city's 18 drug analysts will be required to testify in more than 69 trials next year," with much more time spent waiting around the courthouse than actually testifying.<sup>68</sup>

Nevertheless, while this holding will cause many completed cases to now be dismissed because the analyst did not appear at trial, going forward, as the Court points out, the impact of this ruling will not result in many lost cases because now that they know that they have to, prosecutors will produce the analysts to testify. *State v. Johnson*<sup>69</sup> is a typical case. In that case, the drug analyst had left Florida and was working for the FBI in Virginia.

65. 467 F.3d 227 (2d Cir. 2006).

66. *Id.* at 236 (quoting *People v. Durio*, 794 N.Y.S.2d 863, 869 (N.Y. Sup. Ct. 2005)). Professor Friedman has suggested getting around this problem with regard to autopsies by having two pathologists conduct every autopsy in the hope that one will still be available when the trial takes place, thus requiring states to dramatically increase their coroner staffs. See Richard D. Friedman, *Thoughts on Melendez-Diaz: chain of custody, products of a machine, who must testify, etc.*, <http://confrontationright.blogspot.com/2008/11/thoughts-on-melendez-diaz-chain-of.html> (Nov. 13, 2008, 6:24 PM).

67. No. 07-951, slip op. at 20 (U.S. June 25, 2009).

68. *Id.* at 13 (Kennedy, J., dissenting). The dissent continues: "[t]he Court's decision means that before any of those million [FBI lab] tests reaches a jury, at least one of the laboratory's analysts must board a plane, find his or her way to an unfamiliar courthouse, and sit there waiting to read aloud notes made months ago." *Id.* at 14.

69. 982 So.2d 672 (Fla. 2008).

The state took the position that she was “unavailable” because it would be an “unreasonable expense and inconvenience” to fly her in for the trial.<sup>70</sup> The trial court agreed, but the Florida Supreme Court, following *Crawford*, reversed the conviction on Confrontation Clause grounds.<sup>71</sup> Obviously, if it knew it had to, the State could have made her available and the conviction need not have been lost.<sup>72</sup> But, as noted above, the cost in manpower will be great.

Under my approach, at some point before the trial, in order to compel her attendance, the defense attorney would have to offer the court some reason why he needed to cross-examine the expert before her attendance would be compelled. It could be argued that “the only way he can find out about problems in the lab is through cross-examination.” This, in all but the rarest case, gives cross-examination more credit than it deserves. If the defense attorney is simply on a fishing expedition hoping, with no basis, to uncover some defect in the lab procedures, it is unlikely that cross-examination of the analyst will uncover this. However, if he has some reason to believe there are problems in the lab (whether through newspaper accounts of problems in the lab, information obtained from other defense attorneys, or the like), then he has the reason needed to demand the appearance of the analyst and subject her to cross-examination.

While scientific experts will rarely be truly unavailable for trial, other witnesses, covered under my proposed elimination of the testimonial/nontestimonial distinction, will more frequently be unavailable. Battered women will have fled to unknown locations or refuse to come to court. Other witnesses will simply have disappeared or died, and the husband-wife privilege, as in *Crawford*,<sup>73</sup> may keep witnesses off the stand. In those cases, if the defense attorney can give a reason why he needs to cross-examine them—which will ordinarily be obvious (as it was in *Crawford*)—then the witness’s testimony cannot be used. This will confer a far greater benefit on defendants than the off-chance that cross-examination of a scientific expert might turn up some unexpected flaw in her testimony.

#### CONCLUSION

In sum, the Court, beginning with *Crawford*, has imposed a “testimo-

70. *Id.* at 674.

71. *Id.* at 681.

72. Still, as the dissent again notes: “Guilty defendants will go free. . . . The analyst will not always make it to the courthouse in time. He or she may be ill; may be out of the country; may be unable to travel due to inclement weather; or may at that very moment be waiting outside some other courtroom for another defendant to exercise the right the Court invents today.” *Melendez-Diaz*, No. 07-951, slip op. at 14 (Kennedy, J., dissenting).

73. 541 U.S. 36, 40 (2004).

nial/nontestimonial” distinction on the Sixth Amendment that depends on the nature of the statement at the time it was made. That distinction is not supported by either the history or the language of the Amendment. The defendant has a Sixth Amendment right to confront *all* witnesses against him as its language suggests. “Testimonial” statements are those offered by the prosecution in trial testimony against the defendant. They do not include statements of witnesses to the crime that are not, for whatever reason, offered by the prosecution at trial. The way to deal with the practical problems posed by this broad approach to the Sixth Amendment right is to simply recognize, as the Supreme Court did regarding the right to counsel in *Scott v. Illinois*, that a broad constitutional right can be subject to practical limitations: in this case, that the defense attorney must offer a reasonable explanation of why he needs to cross-examine a government witness before the government will be required to produce that witness.

Ordinarily it will be obvious why cross-examination is reasonable. But in the case of witnesses testifying as to business records or the results of scientific tests, it will not be obvious and in most, but not all, cases, such records or tests will be admitted without the necessity of the person who prepared them being available for trial. But when the defense attorney can articulate a reason to suspect problems with the tests, the analyst must be produced and the defense attorney allowed to cross-examine.

What is the future of confrontation law? This turns out to be a vexing question since, no sooner did the Court decide *Melendez-Diaz* than it granted certiorari in *Briscoe v. Virginia*.<sup>74</sup> In the appellate decision that led to the petition of the United States Supreme Court,<sup>75</sup> the Virginia Supreme Court upheld a scheme in which objection to an analyst’s non-appearance was deemed waived unless the defense attorney called her as his own witness. Since *Melendez-Diaz* concluded that the power to subpoena witnesses is “no substitute for the right of confrontation,”<sup>76</sup> it seems clear that this Virginia scheme is flatly unacceptable under *Melendez-Diaz*. Why then did the Court grant certiorari in this case rather than simply sending it back to Virginia to be reversed? Maybe the *Melendez-Diaz* dissenters voted for certiorari in hopes to attracting a fifth vote in Justice Sotomayor next year. Alternatively, the majority may want to disapprove the Virginia approach but adopt something similar to my approach where appearance of the expert is waived unless the defense attorney can show good cause to cross-

74. *Magruder v. Commonwealth*, 657 S.E.2d 113 (Va. 2008), *cert. granted sub nom. Briscoe v. Virginia*, 77 U.S.L.W. 3709 (U.S. June 29, 2009) (No. 07-11191).

75. *Magruder*, 657 S.E.2d at 124.

76. *Melendez-Diaz*, No. 07-951, slip op. at 19.

examine.<sup>77</sup> This would solve the overbreadth problem of *Melendez-Diaz*, but not the narrowness flaw of the entire line of *Crawford* cases.

77. See Pamela R. Metzger, *Cheating the Constitution*, 59 VAND. L. REV. 475, 482 (2006) (noting that some states have “notice and demand” statutes requiring the expert to appear if demanded by the defense or, in some states, demanded upon a showing of good cause). The Court spoke approvingly of such schemes in *Melendez-Diaz*, and I agree that they would meet constitutional requirements. See *Melendez-Diaz*, No. 07-951, slip op. at 20.