CRIME LABS AND PRISON GUARDS: A COMMENT ON *MELENDEZ-DIAZ* AND ITS POTENTIAL IMPACT ON CAPITAL SENTENCING PROCEEDINGS

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I. INTRODUCTION

The Sixth Amendment to the United States Constitution guarantees a criminal defendant the right "to be confronted with the witnesses against him."[1] Four years ago, in *Crawford v. Washington*,[2] the United States Supreme Court held that this right bars the admission of testimonial hearsay statements against criminal defendants, regardless of whether or not the statements fall within an evidentiary hearsay exception.[3] It was a decision that other courts later described as a "bombshell," a "renaissance," and "a newly shaped lens" through which to view the Confrontation Clause.[4] The case generated an extensive

1. U.S. CONST. amend. VI.
2. 541 U.S. 36 (2004).
3. *Id.* at 61.
4. *See* Fred O. Smith, Jr., Crawford's *Aftershock: Aligning the Regulation of Nontestimonial Hearsay with the History and Purposes of the Confrontation Clause*, 60 STAN. L. REV. 1497, 1498 (2008) (citing People v. Cage, 15 Cal. Rptr.

amount of discussion among legal commentators.[5]

Since its decision in *Crawford*, the Court has had to grapple regularly with questions that *Crawford* left unanswered.[6] This term, the Court is poised to determine yet another unanswered *Crawford* question in *Melendez-Diaz v. Massachusetts*:[7] "[w]hether a state forensic analyst's laboratory report prepared for use in a criminal prosecution is 'testimonial' evidence subject to the demands of the Confrontation Clause as set forth in *Crawford v. Washington*, 541 U.S. 36 (2004)."[8]

The outcome in *Melendez-Diaz* will have a significant impact on America's criminal justice system in general. Moreover, the case could raise important implications in capital sentencing proceedings.

Parts I and II of this comment provide a brief overview of *Crawford* and its progeny. Part III discusses the issue raised in *Melendez-Diaz* and its potential impact. Part IV explains how

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3d 846, 854 (Cal. Ct. App. 2004)) (calling *Crawford* a "bombshell"); State v. Alvarez-Lopez, 98 P.3d 699, 707 (N.M. 2004) (stating that after *Crawford*, the courts view the Confrontation Clause through "a newly shaped lens"); State v. Hale, 691 N.W.2d 637, 646 (Wis. 2005) (calling *Crawford* a "renaissance").

5. *See, e.g.*, W. Jeremy Counseller & Shannon Rickett, *The Confrontation Clause After* Crawford v. Washington*: Smaller Mouth, Bigger Teeth*, 57 BAYLOR L. REV. 1 (2005); 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 (2005); John G. Douglass, *Confronting Death: Sixth Amendment Rights at Capital Sentencing*, 105 COLUM. L. REV. 1967 (2005); Miguel A. Mendez, Crawford v. Washington*: A Critique*, 57 STAN. L. REV. 569 (2004); Robert P. Mosteller, Crawford v. Washington*: Encouraging and Ensuring the Confrontation of Witnesses*, 39 U. RICH. L. REV. 511 (2005); Thomas J. Reed, Crawford v. Washington *and the Irretrievable Breakdown of a Union: Separating the Confrontation Clause from the Hearsay Rule*, 56 S.C. L. REV. 185 (2004); Ariana J. Torchin, *A Multidimensional Framework for the Analysis of Testimonial Hearsay Under* Crawford v. Washington, 94 GEO. L.J. 581 (2006); Penny J. White, *"He Said," "She Said," and Issues of Life and Death: The Right to Confrontation at Capital Sentencing Proceedings*, 19 REGENT U. L. REV. 387 (2007).

6. *See* Giles v. California, ___ U.S. ___, 128 S. Ct. 2678 (2008); Danforth v. Minnesota, ___ U.S. ___, 128 S. Ct. 1029 (2008); Whorton v. Bockting, 549 U.S. 406 (2007); Davis v. Washington, 547 U.S. 813 (2006).

7. Melendez-Diaz v. Massachusetts, ___ U.S. ___, 128 S. Ct. 1647 (U.S. argued Nov. 10, 2008) (No. 07-591).

8. Brief for Petitioner at i, Melendez-Diaz v. Massachusetts, ___ U.S. ___, 128 S. Ct. 1647 (U.S. filed June 16, 2008) (No. 07-591), 2008 WL 2468543.

Melendez-Diaz could affect capital sentencing and uses the case of *State v. Owens*[9] as an example.

II. *CRAWFORD*'S RETURN TO THE "ORIGINAL INTENT" OF THE SIXTH AMENDMENT'S CONFRONTATION CLAUSE

A. The Lower Courts Held that Admission of Out-of-Court Testimony from Crawford's Wife Did Not Violate the Confrontation Clause

Kenneth Lee was stabbed in the torso at his apartment in Thurston County, Washington.[10] Michael Crawford admitted that he and his wife, Sylvia, went to Lee's apartment because they were upset about an earlier incident in which Lee had tried to rape Sylvia.[11] Crawford also admitted to stabbing Lee (and suffering a cut to his own hand in the process) but claimed that his actions were in self-defense, although his memory was shaky about the details:

> Q: Okay. Did you ever see anything in [Lee's] hands?
>
> A: I think so, but I'm not positive.
>
> Q: Okay, when you think so, what do you mean by that?
>
> A: I could a swore I seen him goin' for somthin' before, right before everything happened. He was like reachin', fiddlin' around down here and stuff . . . and I just . . . I don't know. I think, this is just a possibility, but I think, I think that he pulled somethin' out and I grabbed for it and that's how I got cut . . . but I'm not positive. I, I, my mind goes blank when things like this happen. I mean, I just, I remember things wrong, I remember things that just doesn't, don't make sense to me later.[12]

9. 664 S.E.2d 80 (2008). John H. Blume is currently counsel of record for Freddie Owens in proceedings before the Supreme Court of the United States.

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

11. *Id.*

12. *Id.* at 38-39.

Under police questioning, Sylvia's story was substantially similar to Crawford's, except for one significant difference:

> Q: Did [Lee] do anything to fight back from this assault?
>
> . . . .
>
> A: Okay, he lifted his hand over his head maybe to strike [Crawford's] hand down or something and then he put his hands in his . . . put his right hand in his right pocket . . . took a step back . . . [Crawford] proceeded to stab him . . . then his hands were like . . . how do you explain this . . . open arms . . . with his hands open and he fell down . . . and we ran.
>
> Q: Okay, when he's standing there with his open hands, you're talking about [Lee], correct?
>
> A: Yeah, after, after the fact, yes.
>
> Q: Did you see anything in his hands at that point?
>
> A: . . . um um, no.[13]

The State charged Crawford with assault and attempted murder.[14] Sylvia did not testify at Crawford's trial because of Washington's marital privilege, which generally bars a spouse from testifying against the other without consent.[15] Under state law, however, the marital privilege does not extend to a spouse's out-of-court statements. So, the State invoked the hearsay exception for statements against penal interest and sought to introduce Sylvia's statement as evidence that Crawford was not acting in self-defense.[16] Crawford objected on the grounds that, notwithstanding state hearsay rules, the evidence would violate his federal constitutional right "to be confronted with the witnesses against him."[17]

13. *Id.* at 39.
14. *Id.* at 40.
15. *Id.*; *see also* WASH. REV. CODE § 5.60.060(1) (West 1994).
16. *Crawford*, 541 U.S. at 40.
17. U.S. CONST. amend. VI.

In its 1980 decision in *Ohio v. Roberts*,[18] the Supreme Court held that the Sixth Amendment right to confrontation does not bar admission of an out-of-court statement if the statement bears "adequate 'indicia of reliability.'"[19] To meet that test, the evidence must either: (a) fall within a "firmly rooted hearsay exception"; or, (b) bear "particularized guarantees of trustworthiness."[20] The trial court in *Crawford* admitted Sylvia's statement on the latter ground, finding that the statement was reliable because, among other things: (a) Sylvia was not shifting blame to anyone else; (b) she was an eyewitness to the events; (c) she was describing recent events; and, (d) "she was being questioned by a 'neutral' law enforcement officer."[21] The Washington Supreme Court ultimately agreed with this outcome, based on the separate ground that Sylvia's statement was virtually identical to (i.e., "interlocked" with) Crawford's statement and was, therefore, reliable.[22]

B. The Supreme Court Overruled *Ohio v. Roberts*, Dispensing with over Twenty Years of Precedent as "Stray[ing] from the Original Meaning of the Confrontation Clause"[23]

The United States Supreme Court granted certiorari in *Crawford*.[24] The Court stated that the question presented could not be resolved solely by reading the text of the Sixth Amendment's Confrontation Clause.[25] Instead, the Court turned to "the historical background of the Clause to understand its meaning."[26] After an extensive review of old English and early Colonial jurisprudence, the Court concluded that the "history supports two inferences about the meaning of the Sixth

18. 448 U.S. 56 (1980).
19. *Id.* at 66 (internal citation omitted).
20. *Id.*
21. *Crawford*, 541 U.S. at 40.
22. *Id.* at 41.
23. *Id.* at 42.
24. *Id.*
25. *Id.*
26. *Id.* at 43.

Amendment."[27] First, the Confrontation Clause was principally directed at the "evil" of "*ex parte* examinations as evidence against the accused."[28] Second, "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 had a prior opportunity for cross-examination."[29]

Interpreting the Sixth Amendment with these two principles in mind, the Court concluded that *Roberts* failed to remain "faithful to the original meaning of the Confrontation Clause":[30]

> *Roberts* conditions the admissibility of all hearsay evidence on whether it falls under a "firmly rooted hearsay exception" or bears "particularized guarantees of trustworthiness." This test departs from the historical principles [of the Confrontation Clause] . . . in two respects. First, it is too broad: It applies the same mode of analysis whether or not the hearsay consists of *ex parte* testimony. This often results in close constitutional scrutiny in cases that are far removed from the core concerns of the Clause. At the same time, however, the test is too narrow: It admits statements that *do* consist of *ex parte* testimony upon a mere finding of reliability. This malleable standard often fails to protect against paradigmatic confrontation violations.[31]

Thus, the Court rejected *Roberts* and adopted a new test that imposed an absolute bar on out-of-court testimonial statements, absent a prior opportunity to cross-examine.[32]

The Court justified the new *Crawford* test on the basis that the Framers did not intend to leave the Sixth Amendment's protections to "the vagaries of the rules of evidence, much less to amorphous notions of 'reliability'"—at least where testimonial statements are involved.[33] The Court pointed out that the lower courts' application of *Roberts* had been unpredictable.[34] In

27. *Id.* at 50.
28. *Id.*
29. *Id.* at 53-54 (emphasis added) (internal citation omitted).
30. *Id.* at 60.
31. *Id.*
32. *Id.* at 61.
33. *Id.*
34. *Id.* at 63. Elsewhere, the Court referred to the reliability determination under the *Roberts* test as "amorphous, if not entirely subjective."

Crawford itself, the lower courts were divided on the reliability determination: the trial court found that involvement by a "neutral" law enforcement officer was a reliability factor, among others, but the intermediate court reversed, citing government involvement as one reason why Sylvia's statement was unreliable.[35] Admitting a testimonial statement on the basis that police involvement makes it more reliable, the Court said, is like "find[ing] reliability in the very factors that *make* the statements testimonial."[36]

Finally, the Court concluded that the goal of the Confrontation Clause is "a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination."[37] Thus, whether or not a particular piece of evidence falls within a state or federal hearsay exception, or is otherwise reliable, is an irrelevant fact for purposes of the Confrontation Clause. "Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty."[38] What matters is the defendant's opportunity—or lack of opportunity—for cross-examination. "Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation."[39]

Ultimately, the Court declined to provide a comprehensive definition of "testimonial," saying only that "[w]hatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations."[40] But the Court did allude to several possibilities. The Court noted that "testimony" is typically defined as "[a] solemn declaration or affirmation made for the

Id.

35. *Id.* at 66-67.
36. *Id.* at 65.
37. *Id.* at 61.
38. *Id.* at 62.
39. *Id.* at 68-69.
40. *Id.* at 68.

purpose of establishing or proving some fact."[41] The Court described various "formulations" of a "core class of 'testimonial' statements" as including "*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, [and] extrajudicial statements . . . contained in formalized testimonial materials."[42]

III. THE COURT CONTINUES TO DEAL WITH *CRAWFORD*'S APPLICATION

A. The Court Provided a Definition for "Testimonial" in the Context of Police Interrogation

After *Crawford*'s revamping of the standards applied under the Sixth Amendment's Confrontation Clause, petitioners began to consistently ask the Court to accept cases addressing further *Crawford* implications. Two years after *Crawford*, the Court refined the definition of "testimonial." In *Davis v. Washington*,[43] the Court consolidated two cases on writs of certiorari to the Supreme Courts of Washington and Indiana in *State v. Davis*[44] and *Hammon v. State*,[45] respectively.

In the specific context of police interrogations, the Court held that statements are non-testimonial where "circumstances objectively indicat[e] that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency."[46] On the other hand, statements made in the course of police interrogation *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

41. *Id.* at 51.
42. *Id.* at 51-52 (internal citations omitted).
43. 547 U.S. 813 (2006).
44. 111 P.3d 844 (Wash. 2005).
45. 829 N.E.2d 444 (Ind. 2005).
46. *Davis*, 547 U.S. at 822.

prove past events potentially relevant to later criminal prosecution."[47]

In *Davis*, the Court also confirmed that *Crawford* applies *only* to testimonial hearsay, observing that *Crawford* had already suggested as much. The Court noted that the text of the Confrontation Clause "applies to 'witnesses' against the accused—in other words, those who 'bear testimony,'" and that "[a]n 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."[48]

B. Since Its Decision in *Davis*, the Court Has Dealt with *Crawford* Issues at Least Once Each Term

After deciding *Davis* in 2006, the Court has addressed *Crawford* issues in a variety of cases. In 2007, the Court decided *Whorton v. Bockting*,[49] which held that the rule set out in *Crawford* is not retroactive and does not apply to cases already final on direct review.[50] In 2008, the Court determined a similar issue in *Danforth v. Minnesota*,[51] which confirmed that *Crawford* announced a "new rule," but further held that the states are free to apply *Crawford* more broadly if they choose to do so.[52]

Most recently, in *Giles v. California*,[53] the Court addressed the scope of the right to confrontation where there is an allegation of forfeiture by wrongdoing.[54] Common-law courts historically allowed the introduction of statements by an absent witness, even where the defendant had no prior opportunity for cross-examination, if the witness was "detained" or "kept away" by the defendant's "means or procurement."[55] In *Giles*, the lower

47. *Id.*

48. *Id.* at 823-24 (quoting Crawford v. Washington, 541 U.S. 36, 51 (2004)) (internal quotations omitted).

49. 549 U.S. 406 (2007).

50. *Id.*

51. ___ U.S. ___, 128 S. Ct. 1029 (2008).

52. *Id.* at 1035.

53. ___ U.S. ___, 128 S. Ct. 2678 (2008).

54. *Id.* at 2681.

55. *Id.* at 2682-84.

courts held that this "exception" allowed a murder victim's testimonial hearsay statements to be admitted against the defendant charged with the victim's murder because the murder itself was a wrongful act that caused the victim to be unavailable at trial.[56]

The Supreme Court reversed, holding that forfeiture by wrongdoing applies *only* when the defendant engages in conduct *designed* to prevent the witness from testifying—not when the mere murder itself makes the witness unavailable.[57] Otherwise, the right to confrontation would depend on nothing more than the trial judge's pre-trial assessment of the defendant's guilt—an outcome "repugnant to our constitutional system of trial by jury."[58]

This Term, the Court faces another open *Crawford* question in *Melendez-Diaz v. Massachusetts*.[59] The Court heard oral arguments on November 10, 2008.[60]

IV. *MELENDEZ-DIAZ* COULD SIGNIFICANTLY ALTER THE TREATMENT OF CERTAIN TYPES OF FORENSIC EVIDENCE IN CRIMINAL CASES

A. Background of the Case

Prior to the *Roberts* era, "[the United States Supreme Court] and others "generally assumed that the Sixth Amendment required the prosecution, absent a stipulation from a defendant,

56. *Id.* at 2682.

57. *Id.* at 2691.

58. *Id.*

59. ___ U.S. ___, 128 S. Ct. 1647 (2008). The Court declined to hear a separate case from Iowa raising a similar Confrontation Clause question. *Iowa v. Bently*, asked the Court to decide whether a report of an interview with a child about a sex crime may be used as evidence if the child does not testify at trial. Petition for Writ of Certiorari at i, Iowa v. Bentley, __ U.S. __, 128 S. Ct. 1655 (U.S. filed Dec. 26, 2007) (No. 07-886), 2007 WL 4661025. The decision left in place an Iowa Supreme Court ruling that such reports are barred under the Confrontation Clause. State v. Bentley, 739 N.W.2d 296, 302-03 (Iowa 2007).

60. U.S. Supreme Court Docket Report, *available at* http://origin.www.supremecourtus.gov/docket/07-591.htm (last visited Oct. 16, 2008).

to present the findings of forensic examiners through live testimony at trial."[61] But after *Roberts,* courts began admitting crime laboratory reports instead of live testimony by labeling the reports as business or public records.[62] Many state legislatures enacted laws specifically making crime lab reports admissible at trial in lieu of live testimony.[63] Massachusetts enacted a statute directing courts to admit sworn crime-laboratory reports as "prima facie evidence of the composition, quality, and . . . the net weight of the narcotic or other drug, poison, medicine, or chemical analyzed . . . ."[64] Prosecutors are not required to call the forensic analyst who performed a chemical analysis covered by Massachusetts' statute, even if defendants request that they do so. The Massachusetts Supreme Court has approved the statute, saying its purpose "is to reduce court delays and the inconvenience of having the analyst called as a witness in each case."[65]

Melendez-Diaz was arrested and charged with trafficking cocaine.[66] The primary evidence against him at trial was a set of crime-lab reports, stating that four plastic bags taken from one of his co-defendants and nineteen plastic bags taken from the back of the police car in which they were riding after they were arrested on suspicion of drug charges, contained "a substance containing cocaine."[67] The reports do not describe the qualifications or experience of the analyst who conducted the testing; they do not indicate whether any measures were taken to preserve the integrity of the items tested; they do not identify the testing methods used; they do not specify the percentage of cocaine allegedly present in the substances tested; and, they do

61. Brief for Petitioner, *supra* note 8, at 3 (citing United States v. Wade, 388 U.S. 218, 227-28 (1967); Diaz v. United States, 223 U.S. 442, 450 (1912); State v. Henderson, 554 S.W.2d 117, 120 (Tenn. 1977)).

62. *Id.*

63. *See* Pamela R. Metzger, *Cheating the Constitution,* 59 VAND. L. REV. 478 (2006).

64. MASS. GEN. LAWS ch. 111, § 13 (LexisNexis 2004); *see also* MASS. GEN. LAWS ch. 22C, § 39 (Law Co-op. 1996) (providing the same when the police department performs the chemical analysis itself).

65. Commonwealth v. Verde, 827 N.E.2d 701, 703 n.1 (Mass. 2005).

66. Brief for Petitioner, *supra* note 8, at 7.

67. *Id.*

not address why some of the samples differed in color and consistency from the others.[68]

At trial, the crime-lab reports were admitted into evidence over Melendez-Diaz's objection on *Crawford* grounds.[69] The jury found Melendez-Diaz guilty and sentenced him to three years in prison and three years probation.[70] The Appeals Court of Massachusetts affirmed, relying on *Commonwealth v. Verde*,[71] in which the Massachusetts Supreme Court held that introducing a crime-lab report in lieu of live testimony "does not deny a defendant the right to confrontation" because such a report is "akin to a business or official record, which the Court [in *Crawford*] stated was not testimonial in nature."[72] The *Verde* court further noted that drug analyses are "neither discretionary nor based on opinion," but rather are a product of "well-recognized scientific tests."[73] The Massachusetts Supreme Court denied review in *Melendez-Diaz* without comment.

B. Petitioner Argues that Lab Reports Are Testimonial Evidence Subject to the Confrontation Clause

The United States Supreme Court granted certiorari in *Melendez-Diaz*.[74] Melendez-Diaz asserts that crime-lab reports are created for the enforcement of law and, therefore, are the modern equivalent of ex parte affidavits—exactly the kind of "solemn declaration[s] or affirmation[s] made for the purpose of establishing or proving some fact" that the Court described as testimonial in *Crawford*.[75] Therefore, labeling forensic lab reports as business or public records is immaterial for purposes of the Confrontation Clause.[76]

Melendez-Diaz acknowledges that the Court referred to

68. *Id.*
69. *Id.* at 8.
70. *Id.* at 8-9.
71. Commonwealth v. Verde, 827 N.E.2d 701, 701 (Mass. 2005).
72. *Id.* at 706.
73. *Id.* at 705.
74. ___ U.S. ___, 128 S. Ct. 1647 (2008).
75. Brief for Petitioner, *supra* note 8, at 11.
76. *Id.*

common-law "shop-book" records rule as "non-testimonial" in *Crawford*, but argues that the reference was specifically about classic business records, which are not expressly prepared for law enforcement purposes to aid in criminal investigations. Forensic lab reports, however, are "fundamentally testimonial in a way that classic business and official records [are] not."[77]

Finally, Melendez-Diaz challenges the Massachusetts Supreme Court's reliance on forensic reports as "objective" evidence, noting that "[s]uch reports reflect complicated, subjective interpretations of imprecise scientific tests."[78]

C. Massachusetts Argues that Lab Reports Are Non-Testimonial Business Records to Which No Right of Confrontation Attaches

The State of Massachusetts argues that forensic lab reports are not testimonial because they are not accusatory—they "do not accuse anyone of anything criminal; instead, they merely establish the current physical composition and weight of a chemical substance."[79] According to the State, these "neutral" and "objective" facts only become inculpatory when a testifying witness "provides the necessary evidentiary links to connect the substance tested in the laboratory to the accused's past criminal conduct."[80]

Moreover, the State argues that forensic lab reports are not equivalent to ex parte affidavits because "the hearsay statement is not the product of any official examination."[81] Rather, they are simply non-testimonial business records.

Finally, the State asserts that even if a right to confrontation attaches to the records at issue in this case, Melendez-Diaz had an opportunity to examine the analyst, but chose not to do so, and any error that occurred should be subject to a harmless error

77. *Id.* at 12.

78. *Id.*

79. Brief for Respondent at 10, Melendez-Diaz v. Massachusetts, ___ U.S. ___, 128 S. Ct. 1647 (U.S. filed Aug. 29, 2008) (No. 07-591), 2008 WL 4454224.

80. *Id.*

81. *Id.* at 11.

analysis.[82]

D. *Melendez-Diaz* Could Have Broad-Ranging Effects on the Criminal Justice System

1. The Case Should Resolve Conflicting Authority on the Precise Issue of Drug Lab Reports and Provide Further Guidance on the Meaning of Testimonial Statements

One commentator has called *Melendez-Diaz* "[t]he most important case for the future of our criminal justice system."[83] The case is certainly important for a number of reasons, not the least of which is the vast amount of conflicting authority on this issue. While seeking certiorari review, Melendez-Diaz noted a "six-to-five" split among federal appeals courts.[84] Forty-four states and the District of Columbia currently permit courts to admit forensic analysts' reports to establish that seized substances are illegal drugs, even when the analysts themselves are not called to testify.[85] Both parties in *Melendez-Diaz* have referenced a particularly conflicted case from the Seventh Circuit. In *United States v. Moon*,[86] the court held that the interpretation of forensic data is testimonial, but that an expert witness may nonetheless testify in court about those data without an opportunity for cross-examination of the analyst who prepared the reports—i.e., "the Confrontation Clause does not forbid the use of raw data produced by scientific instruments, though the interpretation *of* those data may be testimonial."[87] It is no surprise that the lower courts are confused about *Crawford's* application. The Supreme Court itself acknowledged

82. *Id.* at 12.

83. Matthew G. Kaiser, *Lab Technicians, Too*, THE NAT'L L.J. (July 14, 2008) *available at* http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202422896765 (last visited Dec. 15, 2008).

84. Petition for Writ of Certiorari at 9, Melendez-Diaz v. Massachusetts, ___ U.S. ___, 128 S. Ct. 1647 (U.S. filed Oct. 26, 2007) (No. 07-591), 2007 WL 3252033, at 9.

85. *Id.* at 15.

86. 512 F.3d 359 (7th Cir. 2008).

87. *Id.* at 362.

in *Crawford* that "our refusal to articulate a comprehensive definition [of 'testimonial'] in this case will cause interim uncertainty."[88] At a minimum, *Melendez-Diaz* presents an opportunity for the Court to resolve widespread uncertainty and provide further guidance on the meaning of "testimonial."

2. Further, the Case Could Affect How Courts Handle All Types of Forensic Evidence

But *Melendez-Diaz* could create much broader results than simple, fact-specific guidance as to the definition of "testimonial." Massachusetts has complained that the outcome urged by Melendez-Diaz "would render testimonial—and, thus, subject to the Confrontation Clause—all laboratory reports prepared for use at trial."[89] The result would be to "impose enormous burdens in countless criminal cases by needlessly requiring live testimony from laboratory technicians who are unlikely to have any independent recollection of one—out of the thousands—of tests they routinely perform."[90]

The State's latter assertion is doubtful, at least in every case; many forensic technicians are able to recall and testify about their forensic testing procedures and results. Even if this assertion were true, it is hard to see how the result would be an "enormous burden." If a lab technician truly does not recall anything about the analysis, it would not take long to say so. However, the State is undoubtedly correct that *Melendez-Diaz* could dramatically change the way that forensic evidence is admitted in criminal trials. The prospect of such a dramatic shift, however, strikes us as a less-than-compelling reason to deny relief in this case. Even aside from the Court's recent Confrontation Clause jurisprudence, it seems obvious that crime lab reports should not be introduced against a criminal defendant without an opportunity to cross-examine the person who prepared the report. And, given the new *Crawford* era, it is hard

88. Crawford v. Washington, 541 U.S. 36, 68 n.10 (2004).

89. Respondent's Brief in Opposition to Certiorari at 2, Melendez-Diaz v. Massachusetts, ___ U.S. ___, 128 S. Ct. 1647 (U.S. filed Feb. 5, 2008) (No. 07-591), 2008 WL 377677.

90. *Id.*

to imagine how Melendez-Diaz could end up without at least *some* form of relief. The nature of that relief could impact how courts handle all types of forensic evidence.

Melendez-Diaz and the Commonwealth of Massachusetts seem to agree that forensic evidence is currently an integral part of many criminal prosecutions.[91] DNA, in particular, is likely to become more frequently used in criminal cases. "The federal government, and many state governments, already collect DNA from anyone convicted of a felony."[92] "[S]everal states [currently] name DNA samples in charging documents to try to preserve the statute of limitations until the owner of the DNA can be located."[93] The President's DNA Initiative, a federally funded program, encourages governmental authorities to use "cold hit" DNA technology to help solve cases without a suspect.[94] And yet, a vast body of research[95] and news reports[96] belies the claim that

91. *See* Petition for a Writ of Certiorari, *supra* note 84, at 9; Respondent's Brief in Opposition to Certiorari, *supra* note 89, at 2-3.

92. Kaiser, *supra* note 83.

93. *Id.*

94. *See* President's DNA Initiative: Advancing Justice Through DNA Technology, *available at* http://www.dna.gov/audiences/officers_court/policy_prosecutor/suspectless/coldhits (last visited Oct. 17, 2008). A "cold hit" occurs when DNA taken from a crime scene "matches" with DNA samples stored in a computer database. *See id.*

95. *See, e.g.*, Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55 (2008); Jonathan J. Koehler, *On Conveying the Probative Value of DNA Evidence: Frequencies, Likelihood Ratios, and Error Rates*, 67 U. COLO. L. REV. 859 (1996); Tania Simoncelli & Barry Steinhardt, *California's Proposition 69: A Dangerous Precedent for Criminal DNA Databases*, 33 J.L. MED. & ETHICS 279 (2005); William C. Thompson, Franco Taroni & Colin G.G. Aitken, *How the Probability of a False Positive Affects the Value of DNA Evidence*, J. OF FORENSIC SCI. 48, no. 1 (2003); William C. Thompson, *Tarnish on the "Gold Standard": Understanding Recent Problems in Forensic DNA Testing*, THE CHAMPION, Feb. 30, 2006, at 10.

96. *See, e.g.*, Maryann Spoto, *Murder, Rape Charges Dropped Due to Botched DNA Evidence*, STAR-LEDGER (Newark, N.J.), Feb. 7, 2006, at 28 (reporting that cold hit case must be dropped because the analyst who made the match had examined evidence from the old case, along with a new case involving the defendant, on the same day, raising the possibility of cross-contamination); Jeff Coen & Carlos Sadovi, *Crime Lab Botched DNA Tests, State Says*, CHI. TRIB., Aug. 19, 2005, at C1 (noting that Illinois state police found numerous errors in results reported from Bode Technology, an independent lab based in Virginia); Annie Sweeney & Frank Main, *Botched DNA Report Falsely Implicates Woman; Case Compels State to Change how It*

DNA test results are infallible, objective conclusions of fact. For example, Earl Washington, Jr. was convicted and sentenced to death for the 1982 rape and murder of Rebecca Lynn Williams in Culpepper, Virginia.[97] Mr. Washington spent seventeen years in prison, and came within hours of execution, before Virginia's governor commuted his sentence to life imprisonment, ultimately followed by a full pardon for the crime.[98] Post-conviction DNA testing contradicted results on the same samples performed earlier by the State Division of Forensic Sciences.[99] An outside

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Reports Lab Findings, CHI. SUN-TIMES, Nov. 8, 2004, at 18 (noting that a laboratory forensic profile "matched" woman, based on what ultimately turned out to be only a partial match, was revealed erroneous when woman, after arrest on warrant, was shown to be incarcerated at time of offense); Keith Matheny, *Supervisor Accused of Passing Off DNA Test*, TRAVERSE CITY RECORD-EAGLE, Dec. 19, 2004 (detailing internal investigation of supervisor in Michigan State Police Crime Lab DNA unit that had a subordinate take a proficiency test for him); *DNA Testing Mistakes at the State Patrol Crime Labs*, SEATTLE POST-INTELLIGENCER, July 22, 2004 (cataloguing a series of errors ranging from cross-contaminations samples across and within cases, including a vaginal sample with semen of positive control, along with other errors); Rick Orlov, *Lab Used by LAPD Falsified DNA Data*, L.A. DAILY NEWS, Nov. 19, 2004, at N1 (describing dismissal of Sarah Blair from Orchid Cellmark, a private DNA lab, after allegations that she manipulated DNA data); Paula McMahon, *Crime Lab Botches Murder Inquiry: Prosecutors Must Drop Charges After DNA Evidence Is Contaminated*, SUN-SENTINEL (Ft. Lauderdale, Fla.), June 24, 2003, at 1A (announcing dropping of murder and robbery charges due to "someone squeezing the eye-dropper into the wrong vial" and noting disagreement regarding whether government or defense attorney caught error); Vic Ryckaert, *Judge Asked to Halt DNA Retests: Crime Lab Less Than Candid About Cases Under Review, Attorney Says*, THE INDIANAPOLIS STAR, Aug. 13, 2003, at 1B (describing fall-out from publication of prosecutor's request that crime lab retest DNA evidence in sixty-four cases believed compromised by analyst); Keith Paul, *Audit Calls for Changes in Police DNA Lab*, LAS VEGAS SUN, May, 23, 2002, at 1 (reporting results of audit conducted after independently hired defense expert caught forensic lab in mistakenly labeling DNA typing results with name of innocent man); Glenn Puit, *Police Forensics: DNA Mix-up Prompts Audit at Lab*, LAS VEGAS REV. J., Apr. 19, 2002, at 1B (discussing audit at Las Vegas laboratory after switched names on DNA profiles led to nearly a year-long imprisonment of "suspect").

97. Innocence Project, Know the Cases: Earl Washington, *available at* http://innocenceproject.org/Content/282.php (last visited Oct. 21, 2008).

98. *Id.*

99. *See, e.g.*, *Confusion Over DNA a Threat to Justice*, VIRGINIAN-PILOT, Aug. 29, 2005; Frank Green, *Study Will Assess Whether Errors in Washington Case Are "Endemic to the System"*, RICHMOND TIMES-DISPATCH, June 14, 2005; *Alarming Indifference from Crime Lab Boss*, VIRGINIAN-PILOT, May 10, 2005.

investigation concluded that the state lab botched the DNA analysis in the case by failing to follow proper procedures and misinterpreting the test results.[100] Virginia's governor ordered a broader investigation of the lab, which unveiled problematic testing procedures and misleading testimony in two additional capital cases handled by the same lab.[101] Mr. Washington was released from prison on February 12, 2001.[102]

Extensive research demonstrates that all forensic testing, and not just DNA analysis, involves human execution and judgment, and therefore has a potential for significant error.[103] The National Innocence Network, in its amicus curiae brief in support of Melendez-Diaz, writes that more than 200 exonerations have occurred in the past decade. Of these 200-plus exonerations, "more than half involved forensic errors in the original trial—errors that ranged from simple mistakes to exaggeration and overreaching, to the reliance on faulty pseudo-science, to outright fabrication."[104] These and other reported errors have prompted a number of systemic reviews, which have established that problems with forensic practices in state and private laboratories are widespread and extend well beyond DNA testing procedures.[105]

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100. *See id.*

101. *Id.*

102. Innocence Project, *supra* note 97.

103. *See, e.g.,* Brief of National Innocence Network as Amicus Curiae Supporting Petitioner, Melendez-Diaz v. Massachussetts, __ U.S. __ , 128 S. Ct. 1647 (U.S. filed June 23, 2008) (No. 07-591), 2008 WL 2550614 (generally describing a widespread pattern of forensic errors).

104. *Id.* at 8.

105. *See, e.g., id.*; United States v. Glynn, ___ F. Supp. 2d ___, 2008 WL 4293317 (S.D.N.Y. 2008) (ruling that ballistics evidence is not a "science" and therefore ballistics examiners could be permitted only to testify that a firearms match was "more likely than not," and citing similar federal cases); Joel Rubin & Richard Winton, *LAPD Blames Faulty Fingerprint Analysis for Erroneous Accusations,* L.A. TIMES, Oct. 17, 2008 *available at* http://www.latimes.com/news/local/la-me-fingerprints17-008oct,0,6045556.story; *John Jay College to Launch Arson Screening Project with $250,000 Grant from JEHT Foundation* (July 1, 2008), *available at* http://www.jjay.cuny.edu/1520.php (last visited Oct. 21, 2008) (describing the development of an Arson Screening Project designed to screen cases involving claims of wrongful conviction based on the use of faulty, "folk-science" fire indicators); Jeffrey Toobin, *The CSI Effect: The Truth About Forensic Science,* THE NEW YORKER, May 7, 2007 *available at*

From this array of research, comments, news reports and individual examples, it is evident that forensic "science" is often not particularly "scientific" at all, and thus, in addition to the other evidentiary restrictions to ensure its reliability, all forensic evidence should be subject to the crucible of cross-examination. The Court's opinion in *Melendez-Diaz* could and should reaffirm a commitment to vigorous adversarial testing by cross-examination of all forensic evidence.

V. *MELENDEZ-DIAZ* AND ITS POTENTIAL EFFECT ON CAPITAL SENTENCING PROCEEDINGS

In addition to the issues described above, *Melendez-Diaz* could have an important impact on the penalty phase of capital trials. All death-penalty cases proceed in two parts: a guilt-or-innocence proceeding and, if the defendant is found guilty, a sentencing proceeding (sometimes also called the "penalty phase"). The United States Supreme Court has reasoned that a capital sentencing proceeding is akin to a separate trial. In *Bullington v. Missouri*,[106] the Court stated that the penalty phase "in all relevant respects was like the immediately preceding trial on the issue of guilt or innocence."[107] Similarly, in *Ring v. Arizona*,[108] the Court held that a capital defendant cannot be denied the right to a jury in the penalty phase, because the fact-finders' determination of aggravating factors, which make the defendant eligible for death as a penalty, "operate as 'the functional equivalent of an element of a greater offense.'"[109]

The Court has observed that "[b]ecause of [the qualitative difference in the penalty of death], there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case."[110] It follows that capital defendants should be afforded *at least* the

http://www.newyorker.com/reporting/2007/05/07/07/05/07fa_fact_toobin (exposing fiber and hair analyses as unreliable).

106. 451 U.S. 430 (1967).

107. *Id.* at 438.

108. 536 U.S. 584 (2002).

109. *Id.* at 609 (citing Apprendi v. New Jersey, 530 U.S. 466, 494 (2000)).

110. Woodson v. North Carolina, 428 U.S. 280, 305 (1976).

same constitutional safeguards at a sentencing proceeding as the average criminal defendant enjoys in general. These protections naturally should include the right to confrontation, the ultimate goal of which is "to ensure reliability of evidence."[111]

Pre-*Crawford* Supreme Court precedent suggests that the right to confrontation does apply to capital sentencing proceedings. In *Gardner v. Florida*,[112] the Court held that a capital defendant "was denied due process of law when the death sentence was imposed, at least in part, on the basis of information *which he had no opportunity to deny or explain.*"[113] Similarly, the Court has relied on *Gardner* to reverse death sentences on Due Process grounds where the defendant was denied the opportunity to rebut the state's case for death.[114]

Several lower courts have afforded confrontation rights in capital sentencing proceedings, either expressly,[115] or by assuming that such rights apply without noting any controversy.[116] And yet, still several other courts have disagreed.[117] Indeed, courts and counsel often treat capital sentencing proceedings as somehow warranting fewer constitutional and evidentiary protections in general.[118] The case

111. Crawford v. Washington, 541 U.S. 36, 61 (2004).

112. 430 U.S. 349 (1977).

113. *Id.* at 362 (emphasis added).

114. Simmons v. South Carolina, 512 U.S. 154, 164-65 (1994); Skipper v. South Carolina, 476 U.S. 1, 8-9 (1986).

115. Proffitt v. Wainwright, 685 F.2d 1227, 1251-55 (11th Cir. 1982); United States v. Mills, 446 F. Supp. 2d 1115, 1122 (C.D. Cal. 2006); People v. Floyd, 464 P.2d 64, 80 (Cal. 1970); Gardner v. State, 480 So. 2d 91, 94 (Fla. 1985); Grandison v. State, 670 A.2d 398, 413 (Md. 1995).

116. People v. Wharton, 809 P.2d 290, 332 (Cal. 1991); State v. Ross, 849 A.2d 648, 697-98 (Conn. 2004); Johnson v. State, 584 N.E.2d 1092, 1105 (Ind. 1992); State v. Nobles, 584 S.E.2d 765, 768-69 (N.C. 2003); State v. Moen, 786 P.2d 111, 136 (Or. 1990); Commonwealth v. Green, 581 A.2d 544, 564 (Pa. 1990); Russeau v. State, 171 S.W.3d 871, 880-82 (Tex. Crim. App. 2005).

117. *See, e.g.*, United States v. Fields, 483 F.3d 313 (5th Cir. 2007); United States v. Littlesun, 444 F.3d 1196 (9th Cir. 2006); Szabo v. Walls, 313 F.3d 392 (7th Cir. 2002); Chandler v. Moore, 240 F.3d 907 (11th Cir. 2001); Del Vecchio v. Ill. Dep't of Corr., 31 F.3d 1363 (7th Cir. 1994); Bassette v. Thompson, 915 F.2d 932 (4th Cir. 1990); United States v. Johnson, 378 F. Supp. 2d 1051 (N.D. Iowa 2005); United States v. Jordan, 357 F. Supp. 2d 889 (E.D. Va. 2005); Summers v. State, 148 P.3d 778 (Nev. 2006).

118. There are a number of other looming issues in the penalty phase of

of *State v. Owens*[119] serves as a good example.

A. In *State v. Owens*, the Lower Court Admitted Prison Incident Reports as Business Records

Freddie Eugene Owens "was convicted of murder, armed robbery, using a firearm [during] the commission of a violent crime, and conspiracy to commit armed robbery."[120] He received a death sentence for murder.[121] On his first appeal, the South Carolina Supreme Court affirmed Owens's convictions, but reversed his death sentence.[122] Following a bench re-sentencing proceeding, Owens again received a death sentence, and again the South Carolina Supreme Court vacated the sentence, finding that the trial judge's comments to Owens with regard to his right to a jury trial constituted reversible error.[123]

Owens's second resentencing proceeding was tried to a jury.[124] During the proceeding, the State sought to introduce evidence that Owens had an extensive record of prison disciplinary incidents.[125] Instead of calling live witnesses, the State wanted to introduce a series of prison incident reports that detailed sixty-four separate disciplinary infractions allegedly committed by Owens.[126] Some of these infractions were reported by prison guards, while others were reported by Owens's fellow inmates.[127] Owens was not subject to prosecution or formal proceedings related to the reported infractions. Rather, the reports were simply ex parte accounts of alleged bad acts.[128] Owens objected to the admission of the reports on the ground

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capital trials, including the admission of hearsay in victim impact evidence and evidence of unadjudicated prior bad acts.

119. 664 S.E.2d 80 (S.C. 2008).
120. State v. Owens, 552 S.E.2d 745, 749 (S.C. 2001).
121. *Id.*
122. *Id.* at 760-61.
123. State v. Owens, 607 S.E.2d 78 (S.C. 2004).
124. State v. Owens, 664 S.E.2d 80 (S.C. 2008).
125. *Id.* at 81.
126. *Id.* at 81-82.
127. Record on Appeal at 1362-65 (on file with authors).
128. *Id.* at 1382.

that they were not reliable.[129] Ultimately, the trial judge allowed the State to admit a summary showing only those incidents reported by prison guards.[130] This reduced the number of incidents to twenty-eight, which included allegations such as: "spat on a correctional officer," "stab[bed] an inmate in the shower," "threaten[ed] an officer," and "[threw] hot water on another inmate."[131] The jury sentenced Owens to death.

On appeal, Owens argued that admission of the prison incident summary violated his right to confrontation and the prohibition against hearsay.[132] The South Carolina Supreme Court found that the Confrontation Clause claim was not preserved for review,[133] but held that the summary was admissible as a business record.[134] The court communicated its thoughts on the Confrontation Clause issue, however, by citing *Crawford* as standing for the proposition that "properly administered, [business records] exceptions are among the safest against a confrontation-clause challenges [sic]."[135] This pronouncement closely mirrors the Massachusetts Supreme Court's claim that forensic lab reports are "akin to a business or official record, which the Court [in *Crawford*] stated was not testimonial in nature."[136]

129. *Id.* at 1355-57.

130. State v. Owens, 664 S.E.2d 80, 81 (S.C. 2008).

131. *Id.* at 81-82.

132. *Id.* at 81.

133. The South Carolina Supreme Court found that the Confrontation Clause argument was procedurally defaulted because defense counsel did not raise the issue to the trial court. *Id.* Trial counsel did, however, challenge admission of the records on the basis that they were not reliable. Record on Appeal, *supra* note 127, at 1406. The trial court noted that the issue was "an important matter from a Constitutional standpoint," *id.* at 1434, and described the records as "absolutely hearsay, not subject to cross-examination." *Id.* at 1414.

134. *Owens*, 664 S.E.2d at 81.

135. *Id.*

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

B. *Melendez-Diaz* Could Confirm that Prison Incident Reports Are Testimonial and Thus Inadmissible Under *Crawford*

There are a number of parallels between the crime lab reports at issue in *Melendez-Diaz* and prison incident reports, such as those introduced in *Owens*. Because of these parallels, *Melendez-Diaz* could be instructive on how the Court would deal with similar types of evidence like prison incident reports.

Both prison incident reports and crime lab reports seem calculated to "establish or prove past events potentially relevant to later criminal prosecution."[137] In fact, prison incident reports fall more squarely into this category than crime lab reports. The State of Massachusetts has argued that reports of forensic analyses do not establish or prove past "events," but merely recount "objective facts." Although we find this distinction tenuous at best, the same argument cannot be applied to prison incident reports. The reports in *Owens*—i.e., "spat on correctional officer"—cannot be described as anything other than an attempt to establish or prove past events.

Further, prison incident reports, like crime lab reports, are "*potentially* relevant to later criminal prosecution" and "would be available for use at a later trial."[138] Although not all incidents recorded in such reports ultimately lead to prosecution, it is difficult to conceive that a prison official would write an incident report describing improper or illegal activity *without* the possibility of prosecution in mind, either in prison disciplinary proceedings or in traditional criminal charges. Prison officials write such reports not only with the possibility of prosecution in mind, but also to protect themselves from civil liability. The Seventh Circuit Court of Appeals explained:

> That prison guards may be held accountable under 42 U.S.C. § 1983 for physical beatings of prisoners, deprivation of medical care, or deprivation of hygienic conditions, has been established for enough years that it can safely be assumed at least some guards write their reports on such occurrences with

137. Davis v. Washington, 547 U.S. 813, 822 (2006); *see also* Crawford v. Washington, 541 U.S. 36, 51 (2004).

138. *Davis*, 547 U.S. at 822.

that possibility in mind.[139]

Since *Crawford*, a small number of courts have faced this issue and excluded prison incident reports from capital sentencing proceedings. In *Russeau v. State*,[140] the Court of Criminal Appeals of Texas held that prison reports detailing disciplinary offenses "amounted to unsworn, *ex parte* affidavits of government employees and were the very type of evidence the [Confrontation] Clause was intended to prohibit."[141] In *United States v. Mills*,[142] a federal district court barred the admission of prison discipline reports that described alleged assaults and attempts to smuggle contraband.[143] Although the defendant was not prosecuted for each of these violations, the court nonetheless held that the reports were barred under *Crawford*, because the statements contained therein were "made 'under circumstances which would lead an objective witness reasonably to believe that [they] would be available for use at a later trial.'"[144]

Despite the parallels between the records at issue in *Melendez-Diaz* and those at issue in *Owens*, there are several important differences. For example, the State argues that forensic lab reports are not testimonial, because they do not "accuse" anyone of wrongdoing.[145] The same cannot be said of prison incident reports. The State claims that crime lab reports are not testimonial, because there is no official government involvement in the testing itself.[146] By contrast, prison guards, who reported all of the incidents ultimately introduced before the jury in *Owens*, are government officials empowered to enforce laws and rules in the prison system. Similarly, the State argues that forensic reports are not *ex parte* affidavits, because they are "not the product of any official examination"—an argument that

139. Bracey v. Herringa, 466 F.2d 702, 704 (7th Cir. 1972) (internal citations omitted).

140. 171 S.W.3d 871 (Tex. Crim. App. 2005).

141. *Id.* at 881.

142. 466 F. Supp. 2d 1115 (C.D. Cal. 2006).

143. *Id.* at 1137-38.

144. *Id.* at 1137 (quoting Parle v. Runnels, 387 F.3d 1030, 1037 (9th Cir. 2004)).

145. Brief for Respondent, *supra* note 79, at 10.

146. *Id.* at 11.

is specious in any case, nonetheless does not apply in *Owens*.

Thus, even if the Court decides against Melendez-Diaz, the Court's reasoning could shed light on similar Confrontation Clause issues in other cases. We will wait until the Court renders a decision before we brand it another "bombshell" or "renaissance," but we will certainly watch with interest for the Court's opinion in *Melendez-Diaz*.