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Crawford Means What it Says: The Birth of the Melendez-Diaz Objection

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STUDENT CASE COMMENTARY

**CRAWFORD MEANS WHAT IT SAYS:
THE BIRTH OF THE MELENDEZ-DIAZ
OBJECTION**

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

*Danielle Greer*¹

I. Summary

In *Melendez-Diaz v. Massachusetts*, with Justice Scalia writing the opinion, the Supreme Court considered the issue of whether affidavits reporting the results of forensic analysis connecting the defendant to an illegal substance are testimonial and therefore subject to the Confrontation Clause of the Sixth Amendment.² The Court held in *Pointer v. Texas* that the Confrontation Clause applies to all criminal prosecutions.³ The statute derives its authority from the Fourteenth and the Sixth Amendments.⁴ This Clause ensures defendants the right to confront adverse witnesses.⁵ The Court's holding in *Crawford v. Washington* established the rule that testimonial statements are subject to the Confrontation Clause.⁶ Therefore, the defendant has the right to confront any witness "who

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² U.S. CONST., amend. XI.

³ *Pointer v. Texas*, 380 U.S. 400 (1965) (holding that a defendant should enjoy the right to confront all the witnesses against him).

⁴ *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2529 (2009); see also *Pointer*, 380 U.S. at 404. See generally U.S. CONST., amend. VI.

⁵ See generally U.S. CONST., amend. VI.

⁶ *Crawford v. Washington*, 541 U.S. 36, 61-63 (2004).

‘bear[s] testimony’ against him.”⁷ If the witness is unavailable for trial and the defendant has not had an opportunity to cross-examine that witness, the testimony is deemed inadmissible.⁸

In *Crawford*, the Court explicitly stated that “ex parte in-court testimony” that “would lead an objective witness to reasonably believe that the statement would be” used later at trial is considered a testimonial statement.⁹ The Court listed certain statements that it considered testimonial, including affidavits, but explained that these statements can come in various forms.¹⁰ However, the testimonial issue became unclear when the Massachusetts Court of Appeals in *Commonwealth v. Melendez-Diaz*, bound by precedent of the Supreme Judicial Court of Massachusetts, held that authors of certificates of forensic analysis are not subject to confrontation under the Sixth Amendment.¹¹ The Supreme Judicial Court of Massachusetts denied review, and the United States Supreme Court granted certiorari.¹² In a five-to-four plurality decision, the Court reversed and remanded *Commonwealth v. Melendez-Diaz*, and held that certificates containing forensic analysis are testimonial and the admission of such evidence without the ability to cross-examine the author violates the Confrontation Clause of the Sixth Amendment.¹³

⁷ *Id.* at 68-69.

⁸ *Id.* at 51.

⁹ *Id.* at 51-52.

¹⁰ *Id.*

¹¹ *Commonwealth v. Melendez-Diaz*, 69 Mass. App. Ct 1114 (2007).

¹² *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2529 (2009).

¹³ *Melendez-Diaz*, 129 S. Ct. at 2529 (hereinafter “*Melendez-Diaz*”).

II. Background

This case began as a Massachusetts state court drug trial.¹⁴ Three men were arrested after police received a tip that an employee at Kmart frequently exhibited suspicious activity.¹⁵ Following up on this tip, the police monitored Kmart until they witnessed the reported activity.¹⁶ The activity suggested that the employee was leaving Kmart to sell drugs and often returned a short time later.¹⁷ Working under this assumption, the police searched the employee when he returned to Kmart and found drugs in his possession.¹⁸ Believing the substance was cocaine, the officers arrested all three men.¹⁹ During transit to jail, the officers noticed two of the three men were moving and fidgeting in the backseat of the car.²⁰ They ordered the men to stop.²¹ After the men were booked at the police station, the officers found a plastic bag with nineteen smaller bags of cocaine in it inside the police car.²² Because he was one of the two men fidgeting in the backseat of the police car during the transport, the officers assumed that Melendez-Diaz hid the drugs in the police car to avoid additional charges.²³ The officers charged the defendant, Melendez-Diaz, with distributing and trafficking cocaine.²⁴

During trial, the prosecution sought to admit three certificates of forensic analysis that identified the substance

¹⁴ *Id.* at 2530.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Melendez-Diaz*, 129 S. Ct. at 2530.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Melendez-Diaz*, 129 S. Ct. at 2530.

²⁴ *Id.* at 2531-32.

found at the scene as cocaine.²⁵ The defendant objected to the admission of these certificates absent an opportunity to cross-examine the author, citing *Crawford*.²⁶ The trial judge overruled this objection, and subsequently the jury found Melendez-Diaz guilty.²⁷

III. Court's Conclusions and Rationale

The outcome of this case turned on whether the certificates of forensic analysis were testimonial statements within the meaning of *Crawford*. However, the Court also spent considerable time addressing each of the State's and the dissent's arguments. Justice Scalia, writing for the majority, explained that in *Crawford* the Court listed affidavits in the "core class of testimonial statements."²⁸ Although the State argued that a certificate is different from an affidavit, Justice Scalia referred to *Black's Law Dictionary* and rejected this argument.²⁹ In *Black's Law Dictionary*, certificates are defined as "declaration[s] of facts written down and sworn to by the declarant before an officer authorized to administer oaths."³⁰ Justice Scalia further explains that under *Crawford*, these certificates are a "solemn declaration or affirmation made for the purpose of establishing or proving some fact."³¹ The Court also relied on its decision in *Davis v. Washington*, finding that the certificates would do "exactly what a witness would do

²⁵ *Id.* at 2532.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Crawford*, 541 U.S. at 51-52.

²⁹ *Melendez-Diaz*, 129 S. Ct. at 2532.

³⁰ BLACK'S LAW DICTIONARY 62 (8th ed. 2004).

³¹ *Melendez-Diaz*, 129 S. Ct. at 2532.

on direct examination.”³² On those facts, the Court concluded the certificates were testimonial statements.³³

The State advanced many arguments, some of which Justice Kennedy reiterated in his dissent.³⁴ However, each was unpersuasive to the majority of the Court. Nevertheless, six of the State’s arguments deserve notice. The first was that the certificate was not an accusatory witness.³⁵ Citing the Confrontation Clause of the Sixth Amendment, Justice Scalia asserted that the Clause only contemplated two classes of witnesses: a beneficial witness and an adverse witness.³⁶ The certificate certainly was not beneficial; therefore, it was adverse and subject to the Confrontation Clause.³⁷

The second argument was that neither the certificates nor their authors were conventional witnesses for three reasons: the forensic analysts only observed near-contemporaneous events; they did not observe the crime or anything related to it, and the certificates were not provided in response to interrogation.³⁸ The State argued that only conventional witnesses are subject to the Confrontation Clause and explained that the forensic analysts are not conventional witnesses.³⁹ In analyzing the confrontation issue, the focus is on the substance of the testimony, not the actual witness.⁴⁰ Therefore, the Court rejected the argument that only witnesses who observe non-

³² *Id.* at 2542 (“It is unlikely that defense counsel will insist on live testimony whose effect will be merely to highlight rather than cast doubt upon the forensic analysis.”)

³³ *Id.* at 2523-26.

³⁴ See *Melendez-Diaz*, 129 S. Ct. at 2543-61 (Kennedy, J., dissenting) (accepting some of the State’s arguments).

³⁵ 129 S. Ct. at 2534.

³⁶ *Id.* at 2535.

³⁷ *Melendez-Diaz*, 129 S. Ct. at 2534.

³⁸ *Id.* at 2534-36.

³⁹ *Id.*

⁴⁰ *Id.*

contemporaneous events are subject to the Confrontation Clause.⁴¹ Additionally, nothing about the fact that the certificates were completed almost a week after the tests were conducted cures the statement of its testimonial nature.⁴²

The fact that the forensic analyst did not observe the crime adds nothing to the issue of whether the statement is testimonial. The proposition that only witnesses who directly observe the crime are subject to the Confrontation Clause is without supporting authority and if implemented, would also exempt expert witnesses.⁴³ The State further argued that the forensic analysts' certificates were not testimonial in nature because the certificates were not provided in response to interrogation.⁴⁴ This argument was also rejected by the Court, primarily because implementing that rule would exclude another important class of witnesses: all witness who voluntarily gave their statements to police.⁴⁵ In the interests of creating a workable rule, the Court had to reject the State's argument that only conventional witnesses are subject to the Confrontation Clause.

The State's third argument was that the Confrontation Clause does not apply to scientific testing.⁴⁶ The State argued that because the Clause was designed to prevent manipulation and distortion prone to recollection testimony, it did not apply to a purely neutral, scientific testing.⁴⁷ However, the Court provided extensive evidence that scientific data is prone to human error and suggested that forcing the analyst to testify will deter other analysts

⁴¹ *Id.*

⁴² *Melendez-Diaz*, 129 S. Ct. at 2534-36.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* at 2536.

⁴⁷ *Melendez-Diaz*, 129 S. Ct. at 2536.

from committing fraud or making careless mistakes.⁴⁸ The Court also noted that of all criminal convictions eventually overturned, sixty percent of the defendants were convicted with incorrect forensic evidence that was later proven invalid.⁴⁹

The State's fourth argument was that at common law these forensic analysts' certificates were considered business records and accepted without objection.⁵⁰ The Court insinuated that this argument misses the issue.⁵¹ It is not the document's status as a business record that is dispositive, but the question of whether it was made in anticipation of trial.⁵² In the dissent, Justice Kennedy agreed with the State's argument that analysts' certificates in general have customarily been accepted without objection and cites one situation where a clerk certificate, prepared in anticipation of trial, was admitted without being subject to the Confrontation Clause.⁵³ However, the Court distinguishes the clerk's certificate from that of the forensic analyst: the clerk's certificate only certifies that a document is correct.⁵⁴ The clerk has no authority to add anything substantive or opine in any way on this certificate.⁵⁵ This is in contrast to a forensic analyst's certificate that is used as prima facie evidence of a defendant's guilt.⁵⁶ The Court did not accept the State's argument that these cases are analogous.⁵⁷ In fact, these cases are easily distinguishable.⁵⁸

⁴⁸ *Id.* at 2536-37.

⁴⁹ *Id.* at 2534.

⁵⁰ *Id.* at 2538.

⁵¹ *Id.* at 2838-41.

⁵² *Melendez-Diaz*, 129 S. Ct. at 2538-41.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* at 2539.

⁵⁶ *Id.*

⁵⁷ *Melendez-Diaz*, 129 S. Ct. at 2539.

⁵⁸ *Id.*

The fifth argument asserted by the State was that the Confrontation Clause should not apply because the defendant could have subpoenaed the analyst.⁵⁹ The subpoena power derives from the Compulsory Process Clause, but the Court retorted that this Clause is no substitute for the Confrontation Clause.⁶⁰ The latter imposes on the prosecution to present its witnesses, but requiring the defendant to present adverse witnesses would leave him with no remedy if those witnesses refused to appear or were unavailable.⁶¹ Additionally, this would shift the State's burden to present its witnesses to the defendant.⁶²

The last argument the State asked the Court to consider was the effect this ruling would have on the already strained criminal justice system.⁶³ The State predicted that defense attorneys, who are zealously advocating for their clients, would always request that analysts come to court.⁶⁴ That, in turn, would increase costs for the government and place an undue burden on the analysts.⁶⁵ The Court responded to this argument by analogizing this potential burden with the burden of a jury trial and the privilege against self-incrimination: although burdensome, "they are constitutional protections that we cannot disregard."⁶⁶

The Court also discussed notice-and-demand statutes that require a defendant to give notice of intent to use the analyst's report.⁶⁷ In his dissent, Justice Kennedy argued that these statutes face invalidation in light of the

⁵⁹ *Id.*

⁶⁰ *Id.* at 2540.

⁶¹ *Id.*

⁶² *Melendez-Diaz*, 129 S. Ct. at 2540.

⁶³ *Id.* at 2540-41.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Melendez-Diaz*, 129 S. Ct. at 2541-42.

Court's decision because they are burden-shifting statutes.⁶⁸ Similar to the State, this argument is still emphasizing the burden that this rule will place on the criminal justice system. Again, the argument failed to move a majority of the Court.⁶⁹ The Court explained that "the defendant always has the burden" to raise the Confrontation Clause objection.⁷⁰ If the defendant ever fails to raise this burden, the issue is lost on appeal.⁷¹ The Court further explained that the simplest form of notice-and-demand statutes only govern the period within which a defendant must respond, and that is constitutional.⁷² The Court noted that it was only opining on the legality of notice-and-demand statutes similar to the one described.⁷³

Despite the State's many arguments, the Court maintained that the forensic certificates were testimonial.⁷⁴ As such, the trial court should not have admitted the evidence without the analyst's trial testimony or a defendant having a previous opportunity to cross-examine.⁷⁵ The Court's decisions in *Crawford* and *Davis* dictate that the inability to cross-examine an adverse witness is a violation of the defendant's constitutional rights, and the Court adhered to that precedent.

IV. Analysis

Although the State and Justice Kennedy had compelling arguments, the Court's decision in *Melendez-Diaz* was directly in line with precedent. In *Crawford* and

⁶⁸ *Id.* at 2957.

⁶⁹ *Id.* at 2541-42

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Melendez-Diaz*, 129 S. Ct. at 2541-42.

⁷³ *Id.*

⁷⁴ *Id.* at 2532.

⁷⁵ *Id.*

Davis, the Court set precedent that the Court has an interest in following, absent overwhelming policy concerns. These cases posed the most daunting obstacles to the State's arguments because if the holdings applied, there was no question of whether the certificates were testimonial and subject to the Confrontation Clause. Realizing this, the State tried to distinguish *Crawford* and *Davis* from *Melendez-Diaz*, but offered only one distinguishable fact: that the questionable testimony in *Melendez-Diaz* was a certificate, as opposed to the verbal testimony at issue in *Crawford* and *Davis*.⁷⁶ The Court rightfully rejected this argument, explaining that the Confrontation Clause only anticipates two classes of witnesses: beneficial and adverse.⁷⁷ The certificates were clearly adverse to the defendant because this was the only evidence the prosecution had that proved the substance in question was cocaine.⁷⁸

Additionally, the factual distinction that the State and Justice Kennedy asserted is not supported by case law. In *Crawford*, the Court explicitly stated that "various formulations of . . . affidavits" are in the "core class of testimonial statements."⁷⁹ However, the State argued that the forensic analyst's certificate was not an affidavit and should not be subject to the confrontation requirement.⁸⁰ The problem with this argument is twofold. First, the Court in *Crawford* explained that affidavits come in various forms.⁸¹ Calling the document a certificate does not dispose of the issue. Second, the State neglected to address the fact that it is the content that determines whether the

⁷⁶ *Id.* at 2534.

⁷⁷ *Melendez-Diaz*, 129 S. Ct. at 2534.

⁷⁸ *Id.* at 2531.

⁷⁹ *Crawford*, 541 U.S. at 51-52.

⁸⁰ *Melendez-Diaz*, 129 S. Ct. at 2532.

⁸¹ *Id.* at 2531-21.

certificate is testimonial.⁸² Deferring to *Crawford*, the Court held that the certificates were the functional equivalent of affidavits because they were adverse to the defendant and were made in anticipation of litigation.⁸³ Because of the well-established precedent, the Court had little choice other than to render this class of evidence subject to the Confrontation Clause. To rule otherwise would question the status of those decisions and further complicate the law in this area.

Nevertheless, the State brought up two persuasive issues that the Court will likely see again: notice-and-demand statutes and emergence of “the *Melendez-Diaz* objection.”⁸⁴ The Court implied that very basic notice-and-demand statutes are constitutional, although this is likely dicta.⁸⁵ However, the Court explicitly stated that this opinion only extended to the simplest type of notice-and-demand statutes, refusing to express an opinion on the actual “burden-shifting” statutes.⁸⁶ This suggests that the Court would find that statutes imposing more than simple, procedural requirements are unconstitutional. If the precise issue on notice-and-demand statutes ever comes before the Supreme Court, the *Melendez-Diaz* decision will undoubtedly inform the Court’s decision.

Justice Kennedy warned that the Court’s holding was too expansive and unnecessarily gave defendants an unwarranted windfall.⁸⁷ He predicted that once defense attorneys were aware of *Melendez-Diaz*’s implications, upon objection, forensic analysts would have to testify

⁸² *Id.*

⁸³ *Crawford*, 541 U.S. at 52.

⁸⁴ *Melendez-Diaz*, 129 S. Ct. at 2541.

⁸⁵ *Id.* at 2541 (“[W]hat we have referred to as the ‘simplest form of notice and demand statutes,’ ... is constitutional”).

⁸⁶ *Id.*

⁸⁷ *Id.* at 2557.

because the attorneys would relentlessly use it as a tactic.⁸⁸ This would become known as the *Melendez-Diaz* objection.⁸⁹ This point is valid, and the situation is likely to come about. Although the majority dismissed this argument, it is highly likely that at least the great defense attorneys will take advantage of this requirement, forcing the prosecution to produce its witnesses. However, it is an overarching public concern that mandates this risk: the constitutional right of a defendant to have a fair trial. Requiring all forensic analysts to come to court would undoubtedly place a strain on the system, but that concern is markedly insufficient to warrant divesting a defendant of his constitutional rights.

V. Conclusion

The Court's ruling in *Melendez-Diaz* made it clear that in criminal trials the admission of forensic analysts' certificates into evidence is subject to the Confrontation Clause. Pre-*Melendez-Diaz*, the analysts' certificates had generally been admitted into evidence with little or no objection in states across the United States. Because the Court determined that forensic analysts' certificates are subject to Confrontation Clause scrutiny, the analysts will now be required to give direct testimony. If the Court follows the dicta in *Melendez-Diaz* regarding notice-and-demand statutes when deciding future cases, it is very possible that notice-and-demand statutes that go beyond simple, procedural requirements will be found unconstitutional. In balancing the constitutional rights of the criminal defendant with the need of efficiency in the judicial system, the Court must err on the side of the defendant who risks the loss of life and liberty.

⁸⁸ *Melendez-Diaz*, 129 S. Ct. at 2557.

⁸⁹ *Id.* at 2556-57.