

UCLA

UCLA Public Law & Legal Theory Series

Title

Melendez-Diaz v. Massachusetts: The Revolution Revitalized

Permalink

<https://escholarship.org/uc/item/5cr0q83z>

Author

Graham, Kenneth

Publication Date

2009-12-07

Peer reviewed

Melendez-Diaz v. Massachusetts: The Revolution Revitalized¹

Prof. Kenneth W. Graham, Jr.

Introduction

In the five years since it decided *Crawford v. Washington*², the Supreme Court has attended mostly to oral statements given by eye-witnesses to police officers.³ Some of these decisions clarified, but seemed to diminish, the promise of *Crawford*.⁴ In *Melendez-Diaz v. Massachusetts*, the Court turned to the effect of the Confrontation Clause on the use of documentary evidence against criminal defendants.⁵ The Court's opinion by Justice Scalia resolves several important questions and has implications for so many others that it rivals *Crawford* itself in furthering our understanding of the contemporary right of confrontation.⁶

Facts and Holding

At the outset, *Melendez-Diaz* seemed little more than a minor skirmish in the ongoing War on Drugs---a quagmire that corrupts our police, clogs our courts, and crams our prisons with so many convicts that some states spend more money on prisoners than they do on college students.⁷ But instead of confronting the defendant with the technician from the unaccredited crime lab who opined that the substance seized from the defendant was indeed cocaine, the state prosecutors took advantage of a state statute

¹ This essay will appear as § 6371.4 in the 2010 Supplement to Wright & Graham, 30A Federal Practice & Procedure: Evidence to be available on Westlaw at 30A FPP § 6371.4. Later supplementation of this material will appear there.

² 124 S.Ct. 1354, 541 U.S. 36, 158 L.Ed.2d 177 (2004) See generally, Wright & Graham, 30A Federal Practice & Procedure: Evidence § 6371.2 [hereafter "FPP" with volume and section number].

³ Amicus Curiae Brief of United States, 2008 WL 4195142, p. 7.

⁴ See discussion and materials collected in 30A FPP § 6371.3.

⁵ *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527, ___ U.S. ____, 174 L.Ed.2d 314 (2009).

⁶ This judgment needs to be tempered by the presence of four dissenters [the Chief Justice and Justices Alito, Breyer, and Kennedy] and a concurrence by Justice Thomas. Since dissent in past decisions seems to have had little effect, we leave it to the constitutional tea-leave readers to tell us what the impact of the present dissenters may have on the future of the case.

⁷ Amici Curiae Brief of States of Alabama, et. al, 2008 WL 4185 394, pp. 6, 16-17 (in attempting to show the importance of affidavits in drug prosecutions, state attorneys-general unwittingly suggest that the War is not going well; i.e., as drug prosecutions escalate, so does drug use).

that allowed them to present these conclusions by affidavit rather than by testimony.⁸ To compound the *Crawford* problems raised by this procedure, the conclusory affidavit did not specify the nature of the tests performed; in addition, Massachusetts law allows trial judges to take judicial notice of the qualifications of crime lab technicians.⁹

One who had only read the *Crawford* opinion might suppose that the petitioner in *Melendez-Diaz* had an easy case to make; “affidavits” fell within the “core class” typifying the evils that the *Crawford* court thought the drafters of the Confrontation Clause intended to forbid.¹⁰ But state and lower federal courts have found it easy to get around this apparent barrier;¹¹ indeed, according to the Massachusetts prosecutors the “vast majority” of the states admit crime lab affidavits despite the strictures of *Crawford*.¹² But the Supreme Court majority turned aside this tide of authority in just three paragraphs.¹³ But the Court’s holding¹⁴ says less about the future than rest of the opinion in which Justice Scalia goes through the excuses offered by the mutinous courts and hangs each of them out to dry on a yardarm of the constitutional schooner.

Rejuvenating the “Declarant’s Objective Intent” Test

In *Crawford*, Justice Scalia suggested two rules of thumb for determining what statements were “testimonial” and thus subject to the Confrontation Clause; first, “the official inducement test” that applied if the statements had been shaped by government officials for use at trial; second, “the declarant’s objective intent test” for statements “made under circumstances which would lead an objective witness to reasonably believe that the statement would be available for use at a later trial.”¹⁵ In *Davis v. Washing-*

⁸ Though the documents were labeled “certificates of analysis”, the Court treated them as affidavits---and so shall we. *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527, 2531, ___ U.S. ___, 174 L.Ed.2d 314 (2009). See also, Petitioner’s Brief, 2008 WL 2468543, p. 7 (crime lab not accredited).

⁹ Respondent’s Brief, 2008 WL 4103864 p. 10 (state concedes that the affidavit does not state what tests were used); Brief Amicus Curiae of the National Innocence Project, 2008 WL 2550614, p. 6 n.3 (judicial notice statute).

¹⁰ Petitioner’s Brief, 2008 WL 2468543, p. 9.

¹¹ See 30A FPP § 6371.2 (Supplement) text following notecall 235 [hereafter “FPP § 6371.2”].

¹² Respondent’s Brief, 2008 WL 4103864 p. 12.

¹³ *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527, 2532, ___ U.S. ___, 174 L.Ed.2d 314 (2009).

¹⁴ “In short, under our decision in *Crawford* the analysts’ affidavits were testimonial statements and the analysts were “witnesses” for the purposes of the Sixth Amendment.” *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527, 2532___ U.S. ___, 174 L.Ed.2d 314 (2009) (and therefore unless the analysts were unavailable to testify and the defendant had a prior opportunity to cross-examine them, the statements were inadmissible).

¹⁵ See 30A FPP § 6371.2 (Supplement), text at notecall 101, quoting *Crawford*, 124 S.Ct. at 1364, 541 U.S. at 52.

ton the Court relied upon and refined the official inducement test, leaving the status the of the declarant's objective intent test in some doubt.¹⁶

Seizing on this opening, the Massachusetts prosecutors quoted the rejection of the test by the Seventh Circuit: "It cannot be that a statement is testimonial in every case where a declarant reasonably believes that it might be used prosecutorially."¹⁷ As a fall-back position, the state prosecutors argued that the objective intent test was only one part of a more comprehensive test that had to also incorporate the official inducement test.¹⁸ This argument got support, and may even have been suggested by, an amicus brief filed by Professor Richard D. Friedman, the Don Quixote of confrontation scholarship.¹⁹ But, alas, the attempt to downplay the declarant's objective intent test proved to be just one more "impossible dream."²⁰ At oral argument, when the Justice Department representative tried to argue that official records were admissible at common law, Justice Scalia interrupted with "not material prepared for trial, generated to prosecute."²¹ His opinion for the majority used the declarant's objective intent test as an additional ground for their holding.²²

Thus we may reasonably suppose, along with the Gershwins, that the declarant's objective intent test "is here to stay."

Rejection of Accusatory Limit

In their brief, the Massachusetts prosecutors advanced an argument taken from this Treatise,²³ namely, that the affidavit did not fall within the Confrontation Clause be-

¹⁶ 30A FPP § 6371.3 (Supplement) at notecall 156.

¹⁷ Respondent's Brief, 2008 WL 4103864 p. 19.

¹⁸ Oral Argument, 2008 WL, 4892843 p. 14.

¹⁹ Amicus Curiae Brief of Richard D. Friedman, 2008 WL 2550613, p. 4.

²⁰ However it may have seemed substantial enough for defense counsel to add that the affidavit also satisfied the official inducement test. Petitioner's Brief, 2008 WL 2468543, p. 11 (report at issue was prepared "at the behest of the police").

²¹ Oral Argument, 2008 WL, 4892843 p.19.

²² ". . . not only were the affidavits 'made under circumstances which would lead an objective witness to reasonably believe that the statement would be available for use at a later trial' . . . but under Massachusetts law the *sole purpose* of the affidavit was to 'provide prima facie evidence of the composition, quality, and net weight' of the analyzed substance" Melendez-Diaz v. Massachusetts, 129 S.Ct. 2527, 2532, ___ U.S. ___, 174 L.Ed.2d 314 (2009) (quoting statute and adding that the analyst must have been aware of this purpose since it was printed on the affidavit).

²³ See 30A FPP § 6371.2 (Supp.) text following notecall 39,. See also, Respondent's Brief, 2008 WL 4103864 p. 15.

cause it did not “accuse” anyone of a crime.²⁴ Without defensively rehearsing my entire argument,²⁵ suffice it to say that it rests upon a rejection of the Wigmorean fantasy that the right of confrontation came from English law and shows the dissenter and colonial origins of the right; echoing the demands found in Foxe’s Book of Martyrs, the original draft of the Sixth Amendment gave the defendant the right “to be confronted with his accusers, and the witnesses against him.”²⁶

Given the phalanx of scholars armed with footnotes that the Massachusetts prosecutors arrayed against him,²⁷ counsel for the defendant seemed somewhat flummoxed.²⁸ He began promisingly enough by arguing that a statement need not be “directly accusatory” to fall afoul of the Confrontation Clause.²⁹ But he follows up with a non sequitur---if the affidavits in this case come in as non-accusatory, the prosecution could prove a case of circumstantial evidence entirely by affidavits.³⁰ But he immediately undermines this claim by arguing that the phrase “witnesses against” in the Sixth Amendment is broader than the word “accusers.”³¹ Quite so; one can be a “witness against” the defendant within the *Crawford* version of the Confrontation Clause even if the statement is not “directly accusatory.”³²

During oral argument, when the state prosecutor raised the argument that the affidavit at issue was not “testimonial” because it did not accuse anyone, Justice Souter

²⁴ Respondent’s Brief, 2008 WL 4103864 p. 12.

²⁵ The argument takes up most of Volume 30 of FPP. For a condensed version, see Graham, *Confrontation Stories: Raleigh on The Mayflower*, 3 Ohio St.J.Crim.L. 2009 (2005).

²⁶ 30 FPP § 6347, p. 762, text at notecall 785.

²⁷ Respondent’s Brief, 2008 WL 4103864 p. 17.

²⁸ Understandably so. In *Davis v. Washington* counsel had advanced a somewhat convoluted “accusation-plus” test only to it shot down by the Court. See 30A FPP § 6371.3, (Supp.), text following notecall 251.

²⁹ Petitioner’s Reply Brief, 2008 WL 4484600, p. 4. This may reflect counsel’s experience in the *Davis-Hammon* argument. When Professor Friendman advanced his “accusation-plus” test, the Court understandably pestered him about the meaning of “accusation”; for example, if a witness calls 911 and says “I saw a blue Toyota with Ohio license plates commit a hit-and-run” is this an “accusation”? See 30A FPP § 6371.3 (Supp.), text following notecall 271. As we will see, the blue car hypo popped up again in *Melendez-Diaz*.

³⁰ Petitioner’s Reply Brief, 2008 WL 4484600, p. 5.

³¹ Petitioner’s Reply Brief, 2008 WL 4484600, p. 5. As the draft version of the Sixth Amendment quoted in the text makes clear, the Founders did not suppose the two were mutually exclusive.

³² For what it is worth, I still have my own “impossible dream”; that a sophisticated understanding of the word “accusation” could eventually encompass what the Supreme Court wants to call “testimonial” without making every hearsay statement a violation of the Sixth Amendment.

raised the blue car hypo that first surfaced during the *Davis* oral arguments:³³ suppose a witness testifies “I saw a blue car go down the street at 10:00”?³⁴ The state mystified Justice Souter by conceding that the blue car statement was “testimonial.”³⁵ When Justice Souter asked how the hypo differed from the present case, the prosecutor responded that the affidavit dealt with scientific evidence that did not require cross-examination because the defendant could have the substance re-tested if he doubted the opinion that it was cocaine.³⁶

Whether or not Justice Souter found this response persuasive, Justice Scalia did not, writing in the majority opinion that the argument “finds no support in the text of the Sixth Amendment or in our case law.”³⁷ According to the majority, the Sixth Amendment contemplates only two kinds of “witnesses”---those against the defendant and those in his favor.³⁸ Since there was no third category and the affidavit fell into the “core” of the first, its author must be confronted.³⁹

Justice Scalia cinched the argument tighter with the “case law”; a discussion of *Kirby v. United States*.⁴⁰ *Kirby* was the first case in which the Supreme Court ever found a violation of the right of confrontation. *Kirby* was charged with receiving stolen property and the prosecution used the records of the convictions of the three thieves to prove that the property had been stolen.⁴¹ Notice that *Kirby* resembles *Melendez-Diaz* in involving a statement in an official record that did not directly accuse the defendant of any crime.⁴²

Justice Scalia gave equally short shrift to the state’s attempt to distinguish the affidavit in the present case from other indirectly accusatory statements on the ground that

³³ See 30A FPP § 6371.3 (Supp.) text at notecall 277. The *Davis* version is quoted in note 29, above.

³⁴ Oral Argument, 2008 WL, 4892843 p. 11.

³⁵ Oral Argument, 2008 WL, 4892843 p. 12.

³⁶ Oral Argument, 2008 WL, 4892843 p. 13.

³⁷ *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527, 2533, ___ U.S. ___, 174 L.Ed.2d 314 (2009).

³⁸ *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527, 2534, ___ U.S. ___, 174 L.Ed.2d 314 (2009).

³⁹ “. . . there is no third category of witnesses, helpful to the prosecution, but somehow immune from confrontation.” *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527, 2534, ___ U.S. ___, 174 L.Ed.2d 314 (2009).

⁴⁰ 19 S.Ct. 574, 174 U.S. 47, 43 L.Ed. 890 (1899). The case is discussed in 30A FPP § 6357, pp. 319-322.

⁴¹ *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527, 2534, ___ U.S. ___, 174 L.Ed.2d 314 (2009).

⁴² We will see *Kirby* again when we discuss the state’s attempt to assert a confrontation exception for official records.

the evidence was “scientific.”⁴³ Since the dissenters seemed to accept the argument, Scalia accuses them of seeking to create an exception to the right of confrontation for expert witnesses.⁴⁴ In responding to the argument that the evidence did not resemble the kinds of evidence that *Crawford* had identified as “core”, Justice Scalia wrote that “the paradigmatic case identifies the core of the right of confrontation, not its limits.”⁴⁵ This seems to contradict his own statement in *Davis* that a “limitation so clearly reflected in the text of the constitutional must fairly be said to mark out not merely its ‘core’ but its perimeter.”⁴⁶

The majority opinion easily demolishes the state’s “scientific evidence” argument as an attempt to return to the *Roberts* rule that found the right of confrontation satisfied when the proffered evidence was “reliable.”⁴⁷ But Justice Scalia goes significantly further, arguing that the connection between “criminal junk science” and wrongful convictions⁴⁸ shows the need for cross-examination of the lab tech in the present case.⁴⁹

Whether the Court in the future with a different majority and under different circumstances might accept an “accusatory” limit on the right of confrontation remains conjecture; but for the moment it seems an “impossible dream.”⁵⁰

A Justice Department Frolic-and-Detour: Mechanical Hearsay

The *Crawford* opinion made it clear that the right of confrontation does not extend to statements that do not qualify as “hearsay.”⁵¹ Law students have long been bedeviled by the hearsay status of “statements” made by a machine---so-called “mechanical hearsay.”⁵² A thermometer attached to a computer that records the temperature minute-

⁴³ Oral Argument, 2008 WL, 4892843 p. 13.

⁴⁴ *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527, 2535, ___ U.S. ___, 174 L.Ed.2d 314 (2009).

⁴⁵ *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527, 2534, ___ U.S. ___, 174 L.Ed.2d 314 (2009).

⁴⁶ 126 S.Ct. at 2274.

⁴⁷ See 30A FPP § 6370. Justice Scalia’s retort was foreshadowed in the defense briefs [Petitioner’s Reply Brief, 2008 WL 4484600, p. 7] and mentioned by Justice Souter during argument. Oral Argument, 2008 WL, 4892843 p. 16.

⁴⁸ See generally, Brief Amicus Curiae of the National Innocence Project, 2008 WL 2550614.

⁴⁹ *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527, 2536-2538, ___ U.S. ___, 174 L.Ed.2d 314 (2009).

⁵⁰ Or perhaps a tribute to what the author’s mother used to call his “bullheadedness.”

⁵¹ 30A FPP § 6371.2 (Supp.) text at notecall 471.

⁵² The name misleads because to call something “mechanical hearsay” is to say that it is “not hearsay.”

by-minute provides an example.⁵³ But an insurance company's computerized business records cannot qualify as "mechanical hearsay" because a human being inputs the information received from agents and customers.⁵⁴

Though the state prosecutors may have intended to make a mechanical hearsay argument, a fairly sophisticated version surfaced in the amicus curiae brief of the Justice Department.⁵⁵ The brief correctly argues that "mechanical hearsay" does not qualify as "testimonial" because the machine is not a "witness" subject to the hearsay dangers insofar as it produces statements by a nonvolitional mechanical process.⁵⁶

But "mechanical hearsay" does require human testimony; someone has to testify that the machine was operating properly at the time it made the statement.⁵⁷ The Justice Department neatly solves this problem by casting the question as one of "authenticity"; in other words, the person who testifies that the machine is operating properly is "laying the foundation" for the admission of the statement.⁵⁸

Though the amicus curiae brief of State Attorneys-General claimed that the mechanical hearsay produced by the laboratory in the instant case produced "nearly infallible results"⁵⁹, the Justice Department argument had two flaws. First, as the defense pointed out, the results produced by the machine required interpretation---much like the squiggles on a polygraph readout.⁶⁰ Second, as the Department conceded, the record did not show how the analyst performed the test, whether by hand or by machine.⁶¹

⁵³ Another example that surfaced during oral argument is a clock that chimes the hours mechanically without a sexton yanking a rope. Oral Argument, 2008 WL, 4892843 p. 20.

⁵⁴ Hence, the hearsay dangers of misperception, misrecollection, misspeaking, or fabrication must be tested by cross-examination.

⁵⁵ Amicus Curiae Brief of United States, 2008 WL 4195142, p. 10.

⁵⁶ Amicus Curiae Brief of United States, 2008 WL 4195142, p. 11. The brief collects the few extant cases in which courts have considered the application of the hearsay rule to mechanically-generated "statements."

⁵⁷ The "truth" of the mechanical hearsay statement arises not from the adversarial process since you cannot cross-examine a machine; rather it arises from the reliability of the mechanical process.

⁵⁸ The brief wisely avoids the use of the word "authentication" because under Evidence Rule 104(b), authenticity is a jury question that must be proved by admissible evidence---not hearsay. Courts accept the notion that uncontroverted hearsay can be used to prove Rule 104(b) "foundational" facts. See 30A FPP § 6371.2 (Supp.) text at notecall 696.

⁵⁹ Amici Curiae Brief of States of Alabama, et. al, 2008 WL 4185 394, p. 13.

⁶⁰ Petitioner's Reply Brief, 2008 WL 4484600, p. 9.

⁶¹ The DOJ sought to get around this obstacle by placing the burden on the defense to show the test method used. Amicus Curiae Brief of United States, 2008 WL 4195142, pp. 14-15.

Despite these problems, during oral argument members of the Supreme Court went after mechanical hearsay like a greyhound after a mechanical rabbit. Chief Justice Roberts correctly noted that because the machine results required human interpretation, the statements before the court did not qualify as true mechanical hearsay.⁶² Justice Souter, borrowing a point from the defense brief,⁶³ accused the state of simply offering a disguised version of the discarded reliability test.⁶⁴

When the DOJ lawyer took the podium, things went rapidly downhill. First, she analogized the required human interpretation of the machine results to the “laying of a foundation” to make it nontestimonial.⁶⁵ Then when Justice Scalia sprung the hoary mechanical clock hypo on her, she booted it, trying to assert that a clock was not mechanical hearsay.⁶⁶ Finally, when Justice Stevens misunderstood the Department to want a special rule for mechanical hearsay, instead of replying that since mechanical hearsay falls within the traditional rule that requires no confrontation of nonhearsay statements, she seemed to confirm his misunderstanding.⁶⁷

During his rebuttal, defense counsel cheerfully accepted the proposition that mechanical hearsay did not require confrontation, but reiterated that the case before the Court did not involve true mechanical hearsay and the defendant had a right to confront the analyst who interpreted the machine’s printout.⁶⁸ Despite all the dust kicked up by the Justice Department, Justice Scalia saw no need to mention the mechanical hearsay argument in his opinion for the majority.⁶⁹

Categorical Confrontation Exceptions: Neo-Fusionism Repudiated

After *Crawford*, lower courts popularized a number of categorical exceptions to the right of confrontation.⁷⁰ The Massachusetts courts relied on two of these categorical ex-

⁶² Oral Argument, 2008 WL, 4892843 p. 14.

⁶³ Petitioner’s Reply Brief, 2008 WL 4484600, p. 7.

⁶⁴ Oral Argument, 2008 WL, 4892843 p. 16.

⁶⁵ Oral Argument, 2008 WL, 4892843 p. 19.

⁶⁶ Oral Argument, 2008 WL, 4892843 p. 20.

⁶⁷ Oral Argument, 2008 WL, 4892843 p. 21.

⁶⁸ Oral Argument, 2008 WL, 4892843 p. 23.

⁶⁹ Given the nature of the argument, it does not seem plausible to claim that by not repudiating it, the majority approved the mechanical hearsay argument *sub silentio*.

⁷⁰ See 30A FPP § 6371.2 (Supp.), text following notecall 229. Not all of the categories spawned by the lower courts provide exceptions to confrontation, but for present purposes we can ignore that qualification.

ceptions in *Melendez-Diaz* : business records and official records.⁷¹ Justice Scalia spawned these when in *Crawford* he attempted to downplay the impact of that decision by declaring that most common law exceptions covered statements “that by their nature were nontestimonial--for example, business records.”⁷² Since Justice Scalia seemed to suppose that these exceptions were “well-established by 1791”⁷³ , lower courts justifiably supposed that they constituted true “exceptions” to the right of confrontation.⁷⁴

Once again, Wigmore’s bogus history misled the courts; in fact the hearsay rule had not emerged in anything like its modern form in 1791.⁷⁵ The business records exception was first created by a statute drafted in 1927.⁷⁶ This did not prevent some scholars from claiming a common law antecedent in the so-called “shopbook rule.” But that rule was not an exception to the hearsay rule but an exception to the rule that made witnesses incompetent to testify if they had an interest in the outcome of the case.⁷⁷ Hence, the “shopbook rule” bore about the same resemblance to the business records exception as the australopithecine, Lucy, bears to the chantuese, Mitzi Gaynor.

Given that Massachusetts could argue that most states had taken the same position,⁷⁸ defense counsel knew he must do more than simply point out that affidavits fell within the “core” of *Crawford*.⁷⁹ He began with a historical argument; since the common law “shopbook rule” covered documents not prepared with an eye toward criminal prosecution, the Founders could not have supposed that the Confrontation Clause excepted such documents.⁸⁰ So when the *Crawford* opinion suggested business records were “inherently nontestimonial”, it presupposed business records not designed for prosecutorial use.⁸¹

Turning to more modern authority, petitioner’s brief cited the Court’s own decision in *Palmer v. Hoffman* to show that the business records exception did not admit prose-

⁷¹ See 30A FPP § 6371.2 (Supp.), text following notecalls 37 9 and 389.

⁷² 124 S.Ct. at 1367, 541 U.S. at 56.

⁷³ 124 S.Ct. at 1367, 541 U.S. at 56.

⁷⁴ See 30A FPP § 6371.2 (Supp.), text following notecall 382.

⁷⁵ See 30 FPP § 6344, pp. 396-401.

⁷⁶ See 21 FPP § 5005, p. 147.

⁷⁷ McCormick, Evidence, § 282, p. 597 (1954).

⁷⁸ Respondent’s Brief, 2008 WL 4103864 p. 13.

⁷⁹ Petitioner’s Brief, 2008 WL 2468543, p. 9.

⁸⁰ Petitioner’s Brief, 2008 WL 2468543, p. 9.

⁸¹ Petitioner’s Brief, 2008 WL 2468543, p. 13.

cutorial business records.⁸² To support his claim that state courts had distorted the business records exception to evade *Crawford*, the brief collects both decisions both prior and after *Roberts* holding prosecutorial business records inadmissible under the Sixth Amendment.⁸³ Finally, defense counsel argued that the Massachusetts hearsay rule incorporates a similar ban on the use of business records prepared for litigation.⁸⁴

The state prosecutor's brief marshals all the decisions from other states that have used the business records dodge to admit affidavits.⁸⁵ Apparently conceding the accuracy of the defense history of the "shopbook rule", the state argues that the common law had another precursor to the business records exception; the "regular entries rule."⁸⁶ Though the state concedes the historical record does not reveal exactly when the rule came to be accepted on this side of the Atlantic, it argues that because some colonial lawyers studied at the Inns of Court, they must have been familiar with the English cases on point.⁸⁷ Finally, the state argued that Evidence Rule 803(6) incorporated *Palmer v. Hoffman* only as a special case of business records properly excluded as "unreliable."⁸⁸

In his reply brief, defense counsel rejects that state's historical argument as resting on speculation rather than cases showing acceptance of the regular entry rule in the colonies.⁸⁹ As for the state's reading of *Palmer v. Hoffman*, the brief dismisses that argument as a resurrection of the *Roberts* "reliability" test and an attempt to let fusionism in through the back door.⁹⁰ Professor Friedman's amicus brief, while echoing the defense arguments, also argues that calling something a "business record" does not suffice to render it nontestimonial if it otherwise falls afoul of *Crawford*.⁹¹

⁸² Petitioner's Brief, 2008 WL 2468543, p. 13. The *Palmer* opinion is reported at 63 S.Ct. 477, 318 U.S. 109, 87 L.Ed. 645 (1943). Though the scholars poured scorn on *Palmer*, see McCormick, Evidence, pp. 604-605, it seems to have been incorporated into Evidence Rule 803(6). See Advisory Committee's Note, F.R.Ev. 803(6).

⁸³ Petitioner's Brief, 2008 WL 2468543, pp. 14-15.

⁸⁴ Petitioner's Brief, 2008 WL 2468543, p. 16.

⁸⁵ Respondent's Brief, 2008 WL 4103864 p. 13, note 4.

⁸⁶ Respondent's Brief, 2008 WL 4103864 p. 26. For a discussion of this rule, see McCormick, Evidence, § 283, p. 598 (1954).

⁸⁷ Respondent's Brief, 2008 WL 4103864 p. 27.

⁸⁸ Respondent's Brief, 2008 WL 4103864 p. 28.

⁸⁹ Petitioner's Reply Brief, 2008 WL 4484600, p. 10.

⁹⁰ Petitioner's Reply Brief, 2008 WL 4484600, p. 10.

⁹¹ Amicus Curiae Brief of Richard D. Friedman, 2008 WL 2550613, pp. 3, 7-8.

During oral argument, when defense counsel argued that the document at issue was an “affidavit”, Justice Kennedy responded with a contrary conceptual argument; can’t we say they are “business records” and thus within the *Crawford* exception?⁹² The defense parried this thrust with history and *Palmer v. Hoffman*.⁹³ “But,” Justice Kennedy fired back, “the railroad case was an accident report. This is scientific analysis.”⁹⁴ Defense counsel retorted with an anti-fusionist argument; the argument from science simply smuggled the *Roberts* reliability test back into *Crawford*.⁹⁵ When defense counsel tried an analogy to a police report, Justice Kennedy grumbled that he could “easily” distinguish a crime lab report from a police report even if defense counsel could not.⁹⁶

A few moments later, after Justice Breyer announced he was torn between defense counsel and Justice Kennedy on the business records question, defense counsel again torpedoed the “reliability” argument by pointing to the amicus brief of The Innocence Project that documented the link between crime lab “junk science” and erroneous convictions.⁹⁷ The Chief Justice wanted to know how defense counsel knew the “business record” in this case was prepared for litigation; defense counsel pointed to the Massachusetts statute authorizing the use of affidavits, which was summarized on the affidavit form.⁹⁸

With the Massachusetts prosecutor at the podium, Justice Souter asked if the Supreme Court had ever decided a confrontation case where an official record was expressly prepared for trial.⁹⁹ When the prosecutor lamely cited Justice Harlan’s dissent in *Dutton v. Evans*, Justice Souter easily dismissed this as no “authority.”¹⁰⁰ When she fell back on coroner’s verdict analogy, Justice Scalia shot that down by pointing out that the verdict served as a kind of pleading, not as evidence.¹⁰¹ Justice Kennedy came to the

⁹² Oral Argument, 2008 WL, 4892843 p. 4.

⁹³ Oral Argument, 2008 WL, 4892843 p. 4.

⁹⁴ Oral Argument, 2008 WL, 4892843 p. 4.

⁹⁵ Oral Argument, 2008 WL, 4892843 p. 5.

⁹⁶ Oral Argument, 2008 WL, 4892843 p. 5.

⁹⁷ Oral Argument, 2008 WL, 4892843 p. 6. See also Brief Amicus Curiae of the National Innocence Project, 2008 WL 2550614.

⁹⁸ Oral Argument, 2008 WL, 4892843 p. 10.

⁹⁹ Oral Argument, 2008 WL, 4892843 p. 13.

¹⁰⁰ Oral Argument, 2008 WL, 4892843 p. 13.

¹⁰¹ Oral Argument, 2008 WL, 4892843 p. 13.

beleaguered prosecutor's rescue, leading to her agree that it was his argument or nothing.¹⁰²

When the prosecutor gamely returned to the business records "exception", arguing that business records were admissible because they are accurate, Justice Scalia jumped in to correct her; his dictum in *Crawford* admitted business records because they were not "testimonial."¹⁰³ When she persisted in arguing that the fusionist case that the hearsay rule and confrontation had the same philosophical and historical roots, Justice Scalia glumly replied that she had just taken the argument back to *Roberts*.¹⁰⁴

The official records branch of the fusionist argument followed a parallel path to oblivion. Petitioner's opening brief asserted that even if the official records exception existed in 1789, it did not admit records prepared for trial.¹⁰⁵ The brief bolstered this argument by pointing to the limitations Congress inserted into Evidence Rule 803(8) to bar the use of official records that might run afoul of the Confrontation Clause.¹⁰⁶

The Massachusetts prosecutors argued that the common law admitted official records in criminal cases in 1791, citing coroner's reports as an example.¹⁰⁷ But in discussing the common law limitations on the use of official records, the brief unwittingly reveals that the common law doctrine was an exception to rules governing the competence of witnesses, not an exception to the then-ill-developed hearsay rule.¹⁰⁸ Petitioner's reply brief easily disposed of these arguments, pointing out that the state had cited no cases in which an official record prepared for use at trial had been admitted against a criminal defendant.¹⁰⁹ The defense disposed of the coroner example by showing via Wigmore that the coroner's report was not admitted as "evidence" at common law, but rather as a kind of pleading.¹¹⁰

¹⁰² Oral Argument, 2008 WL, 4892843 p. 13.

¹⁰³ Oral Argument, 2008 WL, 4892843 p. 17.

¹⁰⁴ Oral Argument, 2008 WL, 4892843 p. 17.

¹⁰⁵ Petitioner's Brief, 2008 WL 2468543, p. 13.

¹⁰⁶ Petitioner's Brief, 2008 WL 2468543, p. 13. F.R.Ev. 803(8)(A) excludes "matters observed by police officers and other law enforcement personnel" while subdivision (B) bars the use of official "factual findings" in criminal cases. These restrictions did not appear in the version approved by the Supreme Court, but Congress added them in view of the defendant's right of confrontation. See Senate Report No. 93-1277, 93d Cong., Second Sess. p. 17 (1975)

¹⁰⁷ Respondent's Brief, 2008 WL 4103864 p. 12.

¹⁰⁸ Respondent's Brief, 2008 WL 4103864 p. 24.

¹⁰⁹ Petitioner's Reply Brief, 2008 WL 4484600, p. 10.

¹¹⁰ Petitioner's Reply Brief, 2008 WL 4484600, p. 11.

Sensing that the Massachusetts Attorney General's brief did not do an adequate job with it, the Attorneys General of several other states filed an amicus brief further developing the argument that public records are "inherently non-testimonial."¹¹¹ They cited an 1851 Supreme Court case, McNally's 1802 treatise on Evidence, and a 1785 English case---none of which involved a record prepared for trial and two of which reveal that the problem was not the hearsay rule but the common law rule barring testimony by persons with an interest in the case.¹¹²

Supposing it could do a better job, the Justice Department's amicus brief took another whack at the official records argument.¹¹³ The DOJ cited the same 1785 English case as the state Attorneys General, but substituted Starkie's 1876 treatise and an 1878 Supreme Court case, neither of much value in convincing the reader that the official records exception admitted records prepared for trial at the time of the Founding.¹¹⁴ A group of state district attorneys went the Justice Department one better, claiming that the official records exception was "well-established at the time the Constitution was adopted" on the strength of several 20th Century Massachusetts decisions finding no confrontation violation in proof by affidavit.¹¹⁵

Despite all the huffing and puffing by the amici, the Justices showed little interest in the official records claim during oral argument¹¹⁶ ---perhaps because the first time the state tried to raise it, Justice Scalia forced the prosecutor to concede that even the hearsay rule barred official records prepared for use at trial.¹¹⁷ In his majority opinion, Justice Scalia relied on this point and the *Palmer v. Hoffman* gloss on the official records exception to dismiss what the prosecutor's seemed to feel was their strongest argument.¹¹⁸

More significantly for future fusionists, Justice Scalia wrote that they "misunderstand" his reference to the business records exception in his *Crawford* opinion.¹¹⁹ The

¹¹¹ Amici Curiae Brief of States of Alabama, et. al, 2008 WL 4185 394, p. 9.

¹¹² Amici Curiae Brief of States of Alabama, et. al, 2008 WL 4185 394, p. 10.

¹¹³ Amicus Curiae Brief of United States, 2008 WL 4195142, p. 9.

¹¹⁴ Amicus Curiae Brief of United States, 2008 WL 4195142, p. 9.

¹¹⁵ Brief Amici Curiae The National District Attorneys Association, et. al, 2008 WL 4185393, p. 16.

¹¹⁶ Though in connection with the state's mechanical hearsay argument, Justice Breyer agreed that it would be "peculiar" if testimony of the custodian was required in every case to authenticate a public record. Oral Argument, 2008 WL, 4892843 p. 21.

¹¹⁷ Oral Argument, 2008 WL, 4892843 p. 19.

¹¹⁸ *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527, 2538-2539, ___ U.S. ___, 174 L.Ed.2d 314 (2009).

¹¹⁹ *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527, 2539, ___ U.S. ___, 174 L.Ed.2d 314 (2009).

opinion did not intend to create an “exception” to the right of confrontation, but merely to illustrate the Court’s understanding of “testimonial.”¹²⁰

Justice-on-the-cheap, Junk Science, and the Sixth Amendment

In *Melendez-Diaz* the prosecutors made explicit an argument that they had only insinuated in earlier cases; namely, that the states cannot afford to both carry on the War on Drugs (or Domestic Violence or Child Abuse) and provide defendants their right of confrontation.¹²¹ The state prosecutors stated candidly that the purpose of the affidavit statutes was to avoid a “significant waste of public resources” and “avoid the inconvenience of having busy public servants called as witnesses.”¹²² The District Attorneys’ brief claimed that it would be “physically impossible” for states to provide confrontation to the defendant in every such case.¹²³

To support this claim, the district attorneys claimed that crime labs were understaffed¹²⁴; in Massachusetts, for example, it takes four months to get an analyst’s affidavit.¹²⁵ The state attorneys general said that in the year 2006 alone, crime labs throughout the country performed more than 1.8 million tests of substances, mostly drugs.¹²⁶ According to the Justice Department brief, in 2007 federal crime labs performed 52,948 drug analyses.¹²⁷ Little wonder then that the attorneys general opined that allowing defendants to confront lab technicians would be “devastating” to the states.¹²⁸

The district attorneys believed that providing confrontation with lab technicians “would essentially nullify” the drug laws and thus “compromise public safety.”¹²⁹ The brief of the state attorneys general estimated that the states spent \$2.4 billion per year

¹²⁰ *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527, 2539-2540, ___ U.S. ____, 174 L.Ed.2d 314 (2009).

¹²¹ See 30A FPP § 6371.2 (Supp.), text at notecall 589.

¹²² Respondent’s Brief, 2008 WL 4103864 pp. 9, 32.

¹²³ Brief Amici Curiae The National District Attorneys Association, et. al, 2008 WL 4185393, p. 8.

¹²⁴ Brief Amici Curiae The National District Attorneys Association, et. al, 2008 WL 4185393, p. 9.

¹²⁵ Brief Amici Curiae The National District Attorneys Association, et. al, 2008 WL 4185393, p. 10.

¹²⁶ Amici Curiae Brief of States of Alabama, et. al, 2008 WL 4185 394, p. 16.

¹²⁷ Amicus Curiae Brief of United States, 2008 WL 4195142, p. 15.

¹²⁸ Amici Curiae Brief of States of Alabama, et. al, 2008 WL 4185 394, p. 15.

¹²⁹ Brief Amici Curiae The National District Attorneys Association, et. al, 2008 WL 4185393, p. 11.

on drug prosecutions.¹³⁰ They claim that 32% of the prosecutions in state courts concern drugs, a figure that rises to 37% in federal courts.¹³¹

The prosecutors fail to see that statistics on the “astounding” quantities of drugs seized might lead one to a different conclusion:¹³² namely, that the “War on Drugs” has failed. The prosecutors note that more than 20% of all Americans use illicit drugs--- primarily marijuana.¹³³ They estimate the public spends \$65 billion each year on such drugs.¹³⁴ But what they describe as “the staggering economic costs” of illicit drugs, an economist might see as a major contribution to an economy mired in recession.¹³⁵ Even conservatives not inclined to this libertarian view, might well select drug prosecutions as an example of “over-criminalization”---the habit of thinking that criminal prosecution can solve any social problem.¹³⁶

Given the role of the War on Drugs in our political economy¹³⁷, defense counsel wisely chose not to take on the problem of over-criminalization. Instead they accused the prosecutors of exaggerating the costs of confrontation, pointing out they conceded that 95% of all criminal cases end in a guilty plea rather than a trial.¹³⁸ In those that do go to trial, lab technicians are called to testify in only 8-10% of the cases.¹³⁹ That number might fall if more states would adopt notice-and-demand statutes that require the defense to make a demand if they wish to confront the lab technician.¹⁴⁰

Finally, the amici law professors attacked the justice-on-the cheap argument head-on, arguing that “administrative expense” cannot justify eroding “bedrock procedural

¹³⁰ Amici Curiae Brief of States of Alabama, et. al, 2008 WL 4185 394, p. 7.

¹³¹ Amici Curiae Brief of States of Alabama, et. al, 2008 WL 4185 394, p. 11.

¹³² Amici Curiae Brief of States of Alabama, et. al, 2008 WL 4185 394, p. 8.

¹³³ Amici Curiae Brief of States of Alabama, et. al, 2008 WL 4185 394, p. 12.

¹³⁴ Amici Curiae Brief of States of Alabama, et. al, 2008 WL 4185 394, p. 13.

¹³⁵ Amici Curiae Brief of States of Alabama, et. al, 2008 WL 4185 394, p. 12.

¹³⁶ Liptak, Right and Left Join Forces on Criminal Justice, New York Times, Nov. 24, 2009 (online) (describing how conservative groups such as the U.S Chamber of Commerce and the Cato Institute have joined forces with the American Civil Liberties union in filing amicus briefs in several Supreme Court cases that challenge “overcriminalization”; one law professor sees traces of this in the confrontation opinions of Justices Scalia and Thomas).

¹³⁷ Those who have an economic interest in overcriminalization include such disparate groups as prison guards and construction companies. See generally, 21 FPP § 5007, pp. 290-306.

¹³⁸ Amici Curiae Brief of States of Alabama, et. al, 2008 WL 4185 394, p. 11.

¹³⁹ Amici Curiae Brief of Law Professors, 2008 WL 2521264, p. 7.

¹⁴⁰ Amici Curiae Brief of Law Professors, 2008 WL 2521264, p. 8. See also, Petitioner’s Brief, 2008 WL 2468543, p. 15.

guarantees” like confrontation.¹⁴¹ As Professor Friedman wrote in response to the state’s argument that confronting lab technicians would be “unduly expensive”, the Sixth Amendment does not rest on cost-benefit analysis; obviously an economist might find it “cheaper and more efficient” to do away with confrontation---and juries and evidence.¹⁴²

During oral argument, the state raised the justice-on-the cheap argument¹⁴³, but only Justice Kennedy seemed to take it seriously.¹⁴⁴ Justice Scalia easily turned aside the state’s request to relax the right of confrontation to accommodate the “necessities of trial and the adversary process.”¹⁴⁵ He found it unclear “whence would derive our authority to do so.”¹⁴⁶ But in a Nineteenth Century case, the Court claimed the authority to make the right “give way to considerations of public policy and the necessities of the case.”¹⁴⁷ Justice Scalia’s opinion seems to renounce that claim, at least insofar as it arises as claim for justice-on-the-cheap.¹⁴⁸ In what may be the most significant sentence in the majority opinion, he wrote that “[t]he Confrontation Clause. . . is binding, and we may not disregard it at our convenience.”

Procedural accommodation: notice-and-demand statutes

Justice Scalia agreed with the defense in rejecting the prosecutors’ Chicken Little scenario, pointing out that sky had not fallen in those few states that had foregone the evasions used by Massachusetts and most other states.¹⁴⁹ Moreover, the majority opin-

¹⁴¹ Amici Curiae Brief of Law Professors, 2008 WL 2521264, p. 6.

¹⁴² Amicus Curiae Brief of Richard D. Friedman, 2008 WL 2550613, pp. 9-10.

¹⁴³ Oral Argument, 2008 WL, 4892843 p. 17 (would be “undue burden” on state with little benefit to the defense).

¹⁴⁴ Oral Argument, 2008 WL, 4892843 p. 8 (crime labs backed up with DNA despite spending \$1 billion of the \$6 billion federal courts budget; burden on states even higher).

¹⁴⁵ *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527, 2540, ___ U.S. ___, 174 L.Ed.2d 314 (2009).

¹⁴⁶ *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527, 2540, ___ U.S. ___, 174 L.Ed.2d 314 (2009).

¹⁴⁷ *Mattox v. U.S.*, 13 S.Ct. 337, 340, 156 U.S. 140, 243, 38 L.Ed. 917 (1892). See 30A FPP § 6357, p. 309 text at notecall 504.

¹⁴⁸ *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527, 2540, ___ U.S. ___, 174 L.Ed.2d 314 (2009) (“The Confrontation Clause may make the prosecution of criminals more burdensome, but that is equally true of the right to trial by jury and the privilege against self-incrimination.”).

¹⁴⁹ *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527, 2540 n. 11 ___ U.S. ___, 174 L.Ed.2d 314 (2009) (collecting cases that had anticipated the *Melendez-Diaz* holding).

ion hints that the Court might approve the right sort of “notice-and-demand” statute.¹⁵⁰ This response to the dissenters requires further explanation.¹⁵¹

The state argued that the defendant made a strategic decision at trial not to call the lab technician and had never challenged the conclusion in the certificate that the matter tested was cocaine.¹⁵² At oral argument, some justices worried that requiring confrontation would lead defense counsel to “game the system.” Justice Breyer wondered if defense counsel might demand the lab tech just to delay the trial or as a plea bargaining chip.¹⁵³ Justice Alito feared that defendants might imitate corporate lawyers and use scorched earth tactics.¹⁵⁴ The Chief Justice suggested that defense counsel could flummox the analyst on cross-examination and throw sand in the eyes of the jurors.¹⁵⁵

Defense counsel first pointed out that lawyers could use similar ploys even under the *Roberts* regime.¹⁵⁶ He added that no empirical evidence supported the dissenters’ dire predictions.¹⁵⁷ Finally, he argued the unlikelihood of such tactics; since public defenders and private defense counsel are “repeat players”, they have a strong incentive not to jerk the trial judge’s chain with delaying tactics.¹⁵⁸ Justice Scalia’s majority opinion endorsed this last argument¹⁵⁹ ---but also had other responses to the dissenters.

A second arrow in the dissenters’ quiver was “the futility argument”; as Justice Kennedy put it at oral argument, since the analyst will have performed so many tests, cross-examination will serve no purpose because he will not remember the specifics of the test at issue.¹⁶⁰ The defense counsel exposed the adversarial naivete of this question by noting that the lawyer could still question the analyst about his standard practice

¹⁵⁰ *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527, 2541, ___ U.S. ___, 174 L.Ed.2d 314 (2009).

¹⁵¹ As will appear, the dissenting position has several strands, most of them reflected imperfectly in the briefs.

¹⁵² Respondent’s Brief, 2008 WL 4103864 pp. 9, 13.

¹⁵³ Oral Argument, 2008 WL, 4892843 pp. 7, 8.

¹⁵⁴ Oral Argument, 2008 WL, 4892843 p. 8.

¹⁵⁵ Oral Argument, 2008 WL, 4892843 p. 7.

¹⁵⁶ Oral Argument, 2008 WL, 4892843 p. 7.

¹⁵⁷ Oral Argument, 2008 WL, 4892843 pp. 7, 8.

¹⁵⁸ Oral Argument, 2008 WL, 4892843 p. 8.

¹⁵⁹ *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527, 2542, ___ U.S. ___, 174 L.Ed.2d 314 (2009) (“Nor will defense counsel want to antagonize the judge or jury by wasting their time with the appearance of a witness whose testimony defense counsel does not intend to rebut in any fashion.”).

¹⁶⁰ Oral Argument, 2008 WL, 4892843 p. 2.

in running drug tests.¹⁶¹ Besides, *Crawford* gives defendant a procedural right to cross-examine even if judges think it might be useless.¹⁶²

One way to hinder defense gaming of the system is to impose the procedural costs of doing so on the defense rather than the prosecution by moving the issue from the right of confrontation to the right of compulsory process.¹⁶³ Defense counsel rebutted this argument in his reply brief, collecting the cases holding that the right to subpoena does not satisfy the right of confrontation.¹⁶⁴ A contrary view would render the right of confrontation superfluous.¹⁶⁵ Moreover, the jury might wonder why the defense was calling witnesses who harmed its case.¹⁶⁶

Nonetheless, the compulsory process remedy captivated the Court at oral argument. Justice Ginsburg asked why allowing the defense to call the analyst was not an adequate substitute for confrontation.¹⁶⁷ Defense counsel replied that the Sixth Amendment divides the task of providing evidence between the prosecution and the defense along the lines of the Compulsory Process and Confrontation Clauses; to conflate the two would allow the prosecution to present its case via affidavits.¹⁶⁸

Justice Breyer thought that most states left the task of calling the analyst to the defense on the ground that in most cases it would be a waste of time to require the prosecution to do it.¹⁶⁹ Defense counsel argued that the practice grew under *Roberts* ---the case that *Crawford* supposedly repudiated; a response that satisfied the Justice.¹⁷⁰

The state put a new spin on the argument; the burden properly fell on the Compulsory Process side of the line because the accuracy of the evidence rested on science,

¹⁶¹ Oral Argument, 2008 WL, 4892843 p. 3.

¹⁶² Oral Argument, 2008 WL, 4892843 p. 3.

¹⁶³ The state attorneys general gave this argument a novel twist, suggesting the failure of the defendant to invoke his right of compulsory process waived the right of confrontation. Amici Curiae Brief of States of Alabama, et. al, 2008 WL 4185 394, p. 15.

¹⁶⁴ Petitioner's Reply Brief, 2008 WL 4484600, p. 12 n. 6.

¹⁶⁵ Petitioner's Reply Brief, 2008 WL 4484600, p. 13.

¹⁶⁶ Petitioner's Reply Brief, 2008 WL 4484600, p. 13.

¹⁶⁷ Oral Argument, 2008 WL, 4892843 p. 3.

¹⁶⁸ Oral Argument, 2008 WL, 4892843 p. 3.

¹⁶⁹ Oral Argument, 2008 WL, 4892843 p. 7.

¹⁷⁰ Oral Argument, 2008 WL, 4892843 p. 7

not cross-examination.¹⁷¹ Justices Souter and Scalia did not buy this argument.¹⁷² The representative of the Department of Justice admitted that the issue before the Court was whether the Sixth Amendment assigned the task of bringing in scientific evidence to the prosecution under the Confrontation Clause or to the defense under the Compulsory Process Clause.¹⁷³ In his opinion for the majority, Justice Scalia placed the burden squarely on the prosecution.¹⁷⁴

With the stage now set, we can bring on Hamlet---the notice-and-demand statutes. In his reply brief, defense counsel responded to the state's "gaming the system" claim by suggesting that the states could discourage that by the right kind of notice-and-demand statute.¹⁷⁵ His law professor amici also argued that notice and demand statutes could lessen the burden on the state, collecting the state statutes but cautioning that some of them imposed onerous burdens on the defense that raised additional constitutional issues.¹⁷⁶ Professor Friedman, the Don of the law professor amici, noted that he had already filed a petition for certiorari in a case out of Virginia that would allow the Court to consider just what kinds of burdens the state could impose on the defendant consistent with the Sixth Amendment.¹⁷⁷

The state attorneys general pushed the notice-and-demand remedy, spreading the state statutes over the pages of their amicus brief.¹⁷⁸ The Department of Justice brief argued that a notice-and-demand statute adequately protects the defendant's constitutional rights, but admitted that the existing statutes take many forms, some of which may raise constitutional issues of their own.¹⁷⁹

During oral argument as Justice Kennedy was making the "futility argument", Justice Ginsburg asked defense counsel if a notice-and-demand statute would indeed sat-

¹⁷¹ Oral Argument, 2008 WL, 4892843 p. 12.

¹⁷² Oral Argument, 2008 WL, 4892843 p. 12.

¹⁷³ Oral Argument, 2008 WL, 4892843 p. 22.

¹⁷⁴ *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527, 2540, ___ U.S. ___, 174 L.Ed.2d 314 (2009) ("the Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court. Its value to the defendant is not replaced by a system in which the prosecution presents its evidence via *ex parte* affidavits and waits for the defendant to subpoena the affiants if he chooses.").

¹⁷⁵ Petitioner's Reply Brief, 2008 WL 4484600, p. 15 n. 8 (but noting that some of these statutes themselves raised constitutional issues that the were best left to another day).

¹⁷⁶ Amici Curiae Brief of Law Professors, 2008 WL 2521264, pp. 9, 10 n. 2 (collecting statutes), n. 3 (distinguishing burdensome statutes).

¹⁷⁷ Amicus Curiae Brief of Richard D. Friedman, 2008 WL 2550613, p. 3.

¹⁷⁸ Amici Curiae Brief of States of Alabama, et. al, 2008 WL 4185 394, pp. 17-20.

¹⁷⁹ Amicus Curiae Brief of United States, 2008 WL 4195142, pp. 18-19.

isfy the defendant's constitutional claims.¹⁸⁰ Counsel responded that his answer depended on the type of statute; so long as the statute required no more than a demand, it sufficed---but many of the statutes impose burdens of the defense inconsistent with Sixth Amendment.¹⁸¹

Later, with the Massachusetts prosecutor at the lectern, Justice Souter asked if a notice-and-demand statute would alleviate the prosecutors' fears about defendants using the right of confrontation to game the system.¹⁸² The prosecutor responded lamely that the Massachusetts system was the functional equivalent of a notice-and-demand statute and the argument drifted off.¹⁸³

In his majority opinion, Justice Scalia responded to the prosecutors' justice-on-the-cheap argument by citing notice-and-demand statutes as a workable response to prosecutorial fears that the sky would fall if the Court ruled against them.¹⁸⁴ Taking note of the variety of shapes these statutes take, Justice Scalia argued that the "simplest form" of statute did not impose an unconstitutional burden on the defense, invoking the Court's decisions approving statutes requiring the defendant to give notice in order to raise a defense of alibi.¹⁸⁵

As for the more onerous statutes, on June 29, 2009, four days after deciding *Melendez-Diaz*, the Court granted certiorari in Professor Friendman's case, *Briscoe v. Virginia*, in order to decide just what procedural hurdles states can erect to deter defense gaming of the system.¹⁸⁶

Procedural accomodation II: the "expert testifier"

Some crime labs seldom send the analyst who did the testing to court; instead they dispatch the most photogenic, highly credentialed, and glib employee to present the findings to the jury.¹⁸⁷ The "expert testifier" conceals the lack of credentials of the technician who did the tests, can better toss around scientific jargon to mislead the jury, and when caught on cross-examination with some test flaw can always retreat to "I

¹⁸⁰ Oral Argument, 2008 WL, 4892843 p. 3.

¹⁸¹ Oral Argument, 2008 WL, 4892843 p. 4.

¹⁸² Oral Argument, 2008 WL, 4892843 p. 18.

¹⁸³ Oral Argument, 2008 WL, 4892843 p. 18.

¹⁸⁴ *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527, 2541, ___ U.S. ___, 174 L.Ed.2d 314 (2009).

¹⁸⁵ *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527, 2541, ___ U.S. ___, 174 L.Ed.2d 314 (2009).

¹⁸⁶ *Briscoe v. Virginia*, 129 S.Ct. 2858, 174 L.Ed.2d 600, USLW 3709, 78 USLW (Jun 29, 2009).

¹⁸⁷ See 30A FPP § 6371.2 (Supp.), text at notecall 495..

only know what it says here in the report.”¹⁸⁸ Courts justify this practice by resort to Evidence Rule 703, though the practice conforms neither to the letter, policy, or spirit of that Rule.¹⁸⁹

The law professors brief gave cautious approval to the use of an “expert testifier” in cases where the analyst who actually performed the test was genuinely “unavailable.”¹⁹⁰ The state attorneys general wanted a more robust approval of “expert testifiers” on the grounds that because of high turnover among technicians or a “tag-team” lab practice, no specific analyst could testify to the particular test.¹⁹¹

During oral argument, Chief Justice Roberts suggested that if the lab chose to send its “expert testifier”, the defense had no right to insist that the prosecution call the analyst who actually performed the test.¹⁹² When defense counsel seemed to agree with this, Justice Scalia jumped in to insist vociferously that cross-examination of the “expert testifier” would be meaningless because he lacked personal knowledge.¹⁹³

Later Justice Ginsberg asked, in light of the defense rejection of an “expert testifier”, whether the lab could substitute a deposition for the live testimony of the testing analyst.¹⁹⁴ Defense counsel rejected this alternative, except for cases where the analyst was truly “unavailable.”¹⁹⁵ Finally, when defense counsel returned for rebuttal and Justice Kennedy implied that the defense had accepted the use of an “expert testifier”, Justice Souter asked why the defense did not insist that it had the right to cross-examine the technician who actually performed the test.¹⁹⁶ When defense counsel appeared to waffle in his response, Justice Souter finally got him to concede that he did not mean to surrender a right to examine the testing analyst.¹⁹⁷

¹⁸⁸ See Giannelli, Expert Testimony and The Confrontation Clause, 22 Cap.U.L.Rev. 45 (1993).

¹⁸⁹ Note, Testimonial Hearsay as The Basis for Expert Opinion: The Intersection of the Confrontation Clause and Federal Rule of Evidence 703 After Crawford v. Washington, 55 Hastings L.J. 1539 (2004).

¹⁹⁰ Amici Curiae Brief of Law Professors, 2008 WL 2521264, p. 12 (but not where the technician merely cannot remember the particular test).

¹⁹¹ Amici Curiae Brief of States of Alabama, et. al, 2008 WL 4185 394, p. 19.

¹⁹² Oral Argument, 2008 WL, 4892843 p. 2. Defense counsel, in an apparent misunderstanding of the question, first seemed to agree, but later agreed only if the “expert testifier” signed the affidavit).

¹⁹³ Oral Argument, 2008 WL, 4892843 p. 2.

¹⁹⁴ Oral Argument, 2008 WL, 4892843 p. 10.

¹⁹⁵ Oral Argument, 2008 WL, 4892843 p. 11.

¹⁹⁶ Oral Argument, 2008 WL, 4892843 p. 24.

¹⁹⁷ Oral Argument, 2008 WL, 4892843 p. 24.

After this flurry, Justice Scalia's majority opinion says nothing about "expert testifiers", but in light of Justice Scalia's remarks during oral argument, silence apparently does not imply acceptance.¹⁹⁸ Certainly Justice Kennedy's dissent reads the majority opinion to require the prosecution to call every lab technician who took part in the actual testing of the substance.¹⁹⁹ It remains to be seen how lower courts will read the opinion.²⁰⁰

CSI-Houston: Confrontation, Criminal Junk Science, and Daubert

Thanks to television programs that valorize forensic scientists, many Americans, including some who end up as jurors, have a distorted image of crime labs. Recognizing that the prosecutors might test whether Supreme Court justices share this false view, defense counsel in his opening brief cited a Justice Department study of deficiencies in crime labs and alerted the Court to a forthcoming critical report by a Congressionally-commissioned committee of the National Academy of Sciences.²⁰¹

Sure enough, in its brief the state argued that "science" provided a better protection for the accused than confrontation.²⁰² More defensively, the prosecutors argued that since the testing satisfied the *Frye* standard for scientific evidence²⁰³, the Court need not fret because the Massachusetts crime lab lacked accreditation.²⁰⁴ The Justice Department amicus brief backed up the state prosecutors, arguing that lab technicians had no bias.²⁰⁵

In his reply brief, in addition to arguing that the "science" argument simply attempted to revive the discredited *Roberts* reliability standard²⁰⁶, defense counsel pointed

¹⁹⁸ See text at notecall 192, above.

¹⁹⁹ *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527, 2544-2545, ___ U.S. ____, 174 L.Ed.2d 314 (2009) (repeating the argument of the attorneys general amici about "tag-team" testing and speculating about how it plays out under the majority opinion).

²⁰⁰ Look for the cases here in next year's Supplement.

²⁰¹ Petitioner's Brief, 2008 WL 2468543, p. 18 n. 7.

²⁰² Respondent's Brief, 2008 WL 4103864 p. 12.

²⁰³ Respondent's Brief, 2008 WL 4103864 p. 11. *Frye* established a widely-used test for the admissibility of scientific evidence. See 22 FPP § 5168.

²⁰⁴ Respondent's Brief, 2008 WL 4103864 p. 11.

²⁰⁵ Amicus Curiae Brief of United States, 2008 WL 4195142, p. 10. The brief also advanced the cockamamie "mechanical hearsay" argument described above, text at notecall 50.

²⁰⁶ Petitioner's Reply Brief, 2008 WL 4484600, p. 7.

to the amicus brief of the National Innocence Project to back up his claim that criminal junk science played a prominent role in the convictions of innocent defendants.²⁰⁷

Indeed. According to the Innocence Project brief, criminal junk science figured in 50% of the documented cases of false convictions.²⁰⁸ Not only are lab technicians subject to the same foibles as all witnesses, they often have no scientific training and use unverified techniques with no recognized objective standard.²⁰⁹ The brief reminded the Court of the widely publicized crime lab scandals in Houston, New York, West Virginia, San Francisco, and Dallas.²¹⁰ These scandals revealed a wide-spread practice of “dry-labbing”---a euphemism for perjury by lab technicians who testified to the results of tests never performed.²¹¹

In addition to describing each of the crime lab scandals²¹², the Innocence Project brief provides a litany of criminal junk science; FBI bullet evidence²¹³, bogus blood typing statistics²¹⁴, bad hair evidence²¹⁵, fingerprint comparison²¹⁶, and the like. The brief then ties this junk science to individual cases of false convictions.²¹⁷

²⁰⁷ Petitioner’s Reply Brief, 2008 WL 4484600, p. 8.

²⁰⁸ Brief Amicus Curiae of the National Innocence Project, 2008 WL 2550614, p. 4.

²⁰⁹ Brief Amicus Curiae of the National Innocence Project, 2008 WL 2550614, pp. 6-7.

²¹⁰ Brief Amicus Curiae of the National Innocence Project, 2008 WL 2550614, p. 11.

²¹¹ Brief Amicus Curiae of the National Innocence Project, 2008 WL 2550614, pp. 7, 11.

²¹² Brief Amicus Curiae of the National Innocence Project, 2008 WL 2550614, pp. 7 (New York Police Department crime lab “dry-labbed”); 14 (Boston crime lab dumping ground for unfit cops who faked fingerprint evidence) Montana (lab director fabricated statistical evidence) 15 (Houston, West Virginia), 16 (similar problems in California, Colorado, Illinois, Michigan, Texas, Rhode Island, Virginia, Vermont, and Washington).

²¹³ Brief Amicus Curiae of the National Innocence Project, 2008 WL 2550614, p. 8.

²¹⁴ Brief Amicus Curiae of the National Innocence Project, 2008 WL 2550614, p. 9.

²¹⁵ Brief Amicus Curiae of the National Innocence Project, 2008 WL 2550614, p. 10.

²¹⁶ Brief Amicus Curiae of the National Innocence Project, 2008 WL 2550614, p. 14.

²¹⁷ Brief Amicus Curiae of the National Innocence Project, 2008 WL 2550614, pp. 12 (Earl Washington---false blood evidence), 13 (Ronald Williamson---bad hair evidence; Gilbert Alejandro---dry-labbed DNA; Jerimiah Sutton---DNA exonerated but lab tech opined it was consistent with guilt).

Finally, the Innocence Project brief contains a series of vignettes showing the value of cross-examination in exposing junk science.²¹⁸ In one reported decision²¹⁹, cross-examination forced an FBI bullet lead expert to admit she lied.²²⁰ In the case of Hector Gonzalez, wrongfully convicted of murder, a forensic expert testified that blood on the defendant's jeans was "consistent with" victim's blood; on cross-examination she conceded that 54% of the inhabitants of Gotham City have that blood type.²²¹ Finally, in the wrongful conviction of Dwayne Allen Dail in North Carolina, the prosecutor had the expert testify that semen was found on victim's panties; only on cross-examination did the expert concede that the semen had not been matched to the defendant.²²²

So during oral argument, when Justice Breyer seemed amenable to the state's argument that lab reports differed from statements the Court had found "testimonial" in being the product of unbiased scientific experts, defense counsel could simply point to the Innocence Project's brief.²²³ And later when the state prosecutor made her scientific argument, Justice Breyer asked whether she was claiming that all the reports of crime lab scandals were wrong.²²⁴

But this embarrassing question was nothing compared to what Justice Scalia did to the state's "neutral scientific testing" argument in his opinion for the majority.²²⁵ He first adopts the defense claim that the state simply wants the Court to return to the discredited *Roberts* reliability test.²²⁶ He then quotes from the pre-publication copy of the report of the National Academy of Sciences to support his conclusion that "[f]orensic evidence is not uniquely immune from the risk of manipulation."²²⁷

Justice Scalia responds to the dissent's argument that an honest analyst has nothing to fear from cross-examination, by pointing out that the fraudulent analyst does---

²¹⁸ Brief Amicus Curiae of the National Innocence Project, 2008 WL 2550614, p. 17 (Baltimore County, Maryland case where witness completely collapsed on cross-examination, admitting that she did not understand the science behind the tests, did not perform some standard tests to blood, failed to keep accurate notes, and relied on useless tests, and finally conceded that her report was "worthless").

²¹⁹ *Ragland v. Comm.*, 191 S.W.2d 569, 581 (Ky. 2006).

²²⁰ Brief Amicus Curiae of the National Innocence Project, 2008 WL 2550614, p. 18.

²²¹ Brief Amicus Curiae of the National Innocence Project, 2008 WL 2550614, p. 18.

²²² Brief Amicus Curiae of the National Innocence Project, 2008 WL 2550614, p. 18.

²²³ Oral Argument, 2008 WL, 4892843 p. 6.

²²⁴ Oral Argument, 2008 WL, 4892843 p. 15.

²²⁵ *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527, 2536-2538, ___ U.S. ___, 174 L.Ed.2d 314 (2009)

²²⁶ *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527, 2536, ___ U.S. ___, 174 L.Ed.2d 314 (2009).

²²⁷ *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527, 2536, ___ U.S. ___, 174 L.Ed.2d 314 (2009).

invoking the “dry-labbing” documented in the Innocence Project brief.²²⁸ Cross-examination, according to the Scalia opinion can also expose the incompetent examiner, citing the sloppy affidavit submitted by the Massachusetts crime lab as an example.²²⁹ But lest the dissent suppose that he has invoked a sort of “reverse-reliability” test, Justice Scalia notes that the defendant has the right to confront a scientific witness against him, even one who “possessed the scientific acumen of Mme. Curie and the veracity of Mother Teresa.”²³⁰

This last remark leaves open the question of whether the majority believes that confrontation suffices to eliminate criminal junk science or whether it might also be open to writing another opinion insisting that lower courts apply the *Daubert* gatekeeping standard to prosecutors with the same vigor that they use it to deny plaintiffs their day in court.²³¹ If so, it would add even greater importance to *Melendez-Diaz*.

Glossing and flossing *Crawford-Davis*

We have previously seen how *Melendez-Diaz* used and thus endorsed the continued vitality of the “objective declarant’s intent test.”²³² What about the other *Crawford* rules of thumb?²³³

In his opening brief, defense counsel invoked the “official inducement test”, noting that the lab reports at issue had been prepared at the behest of the police.²³⁴ Professor Friedman pushed the test in his amicus brief, quoting the summary of the *Crawford* testimonial core as “formalized testimonial materials.”²³⁵ According to Friedman, “routine prosecutorial paperwork” satisfies the test.²³⁶ He argues that statements furnished to the prosecutor for use at trial should be “testimonial” even if the prosecutor played no role in

²²⁸ *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527, 2536-2537, ___ U.S. ____, 174 L.Ed.2d 314 (2009).

²²⁹ *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527, 2537, ___ U.S. ____, 174 L.Ed.2d 314 (2009).

²³⁰ *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527,2537 n. 6, ___ U.S. ____, 174 L.Ed.2d 314 (2009).

²³¹ See generally, 22 FPP § 5168.1 (Supplement).

²³² See above, text following notecall 13.

²³³ See generally, 30A FPP § 6371.2 (Supplement), text following notecall 132.

²³⁴ Petitioner’s Brief, 2008 WL 2468543, p. 11.

²³⁵ Amicus Curiae Brief of Richard D. Friedman, 2008 WL 2550613, p. 5.

²³⁶ Amicus Curiae Brief of Richard D. Friedman, 2008 WL 2550613, p. 4.

its preparation.²³⁷ The affidavit at issue satisfied the official inducement test because it was highly formal and made in anticipation of its use at trial.²³⁸

The briefs contain some conceptual arguments that might suggest the formality used by some courts as a short-hand for the law enforcement inducement; for example, that the certificate fell within the core class of testimonial statements as an “affidavit.”²³⁹ But the responses to the formal arguments shed no light on their relationship to the law enforcement inducement test; the Justice Department amicus brief, for example, argued that confrontation policy ought not to turn on linguistic analogy.²⁴⁰ Similarly, when the state insisted at oral argument that the document at issue was not an “affidavit”,²⁴¹ the Court evinced little interest in that argument. The majority opinion says nothing about the “official inducement test” so we can only speculate about its future.²⁴²

On the other hand, *Melendez-Diaz* does seem to drive another nail into the coffin of the so-called “resemblance test” that the Court seemingly buried in *Davis*.²⁴³ As expounded in the earlier case, this test limits “testimonial” statements to those that resemble the sort of hearsay used in historical abuses that gave rise to the *Crawford* core.²⁴⁴ Despite the scorn poured on the test in *Davis*, the prosecutors in *Melendez-Diaz* asked the Court to find the affidavits non-testimonial because they do not resemble “ex parte examinations of witnesses.”²⁴⁵

The amicus brief for the state attorneys general nicely illustrates the flaws of the resemblance test.²⁴⁶ To support their claim that the four examples cited in *Crawford* all bore a “striking resemblance” to the Marian system of criminal justice in England,²⁴⁷ the brief cites a respected historian of medieval English law.²⁴⁸ But this historian does not

²³⁷ Amicus Curiae Brief of Richard D. Friedman, 2008 WL 2550613, p. 6.

²³⁸ Amicus Curiae Brief of Richard D. Friedman, 2008 WL 2550613, p. 3.

²³⁹ Petitioner’s Brief, 2008 WL 2468543, p. 9.

²⁴⁰ Amicus Curiae Brief of United States, 2008 WL 4195142, p 9.

²⁴¹ Oral Argument, 2008 WL, 4892843 p. 11.

²⁴² One could argue that the Court did not mention the official inducement test because it agreed with defense counsel that the affidavit obviously satisfied that test.

²⁴³ 30A FPP § 6371.3 (Supp.), text at notecall 237.

²⁴⁴ 30A FPP § 6371.3 (Supp.), text at notecall 225.

²⁴⁵ Respondent’s Brief, 2008 WL 4103864 p. 19.

²⁴⁶ Respondent’s Brief, 2008 WL 4103864 p. 19.

²⁴⁷ Amici Curiae Brief of States of Alabama, et. al, 2008 WL 4185 394, p. 13.

²⁴⁸ Amici Curiae Brief of States of Alabama, et. al, 2008 WL 4185 394, pp. 12-13 (citing works of Professor John H. Langbein).

claim to be describing the English law of 1789, but rather the law of the Renaissance era.²⁴⁹ Despite whatever light history may shed on the actual English practice in 1789, the question for the Court is not what English law was, but rather what the Founders thought it was.²⁵⁰

In his majority opinion, Justice Scalia concedes the mythic role of Sir Walter Raleigh's trial as a "paradigmatic confrontation violation" in its use of ex parte examinations of witnesses.²⁵¹ "But" the opinion continues, "the paradigmatic case identifies the core of the right to confrontation, not its limits."²⁵² This repudiation of the dissenters' use of the resemblance test takes on added force when we realize that it appears to contradict something Justice Scalia said in his opinion for the majority in *Davis*.²⁵³

²⁴⁹ Amici Curiae Brief of States of Alabama, et. al, 2008 WL 4185 394, p. 12 (citing book entitled "Prosecuting Crime in the Renaissance").

²⁵⁰ The brief uses a description of practice of justice of the peace in London in "the mid-1700's" to as an example of English inquisitorial practices. Amici Curiae Brief of States of Alabama, et. al, 2008 WL 4185 394, p. 13. But very few of the folks who went to the American colonies were from London. See generally, 30 FPP § 6344, pp. 348-352.

²⁵¹ *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527, 2534, ___ U.S. ___, 174 L.Ed.2d 314 (2009).

²⁵² *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527, 2534, ___ U.S. ___, 174 L.Ed.2d 314 (2009).

²⁵³ Justice Scalia wrote in *Davis* : a "limitation so clearly reflected in the text of the constitutional provision must be said to mark out not merely its 'core', but its perimeter." 126 S.Ct. at 2274, 547 U.S. at ___.