
**TESTING THE TESTIMONIAL DOCTRINE: THE IMPACT
OF *MELENDEZ-DIAZ* v. *MASSACHUSETTS* ON STATE-
LEVEL CRIMINAL PROSECUTIONS AND PROCEDURE**

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INTRODUCTION

Boston police officers arrested Luis Melendez-Diaz and his two companions in a Kmart parking lot in 2001, after finding the men in possession of a substance that appeared to be cocaine.¹ The officers submitted several bags of the powdery substance to a state laboratory for required chemical analysis.² Melendez-Diaz was charged with distributing and trafficking in cocaine, in an amount between fourteen and twenty-eight grams.³

At Melendez-Diaz's trial, the prosecutor submitted the seized evidence, as well as three certificates of analysis that showed the results of the forensic analyst's tests on the substances.⁴ The certificates, which were notarized and signed by laboratory analysts at the Massachusetts Department of Public Health,⁵ stated that the substance had been analyzed and "was found to contain: Cocaine."⁶ Melendez-Diaz objected to the introduction of these certificates, claiming that, under *Crawford v. Washington*,⁷ the reports could not be admitted into evidence without providing the defendant his Sixth Amendment right to confront the analyst who performed the testing.⁸ The

¹ *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2530 (2009).

² *Id.*; see also MASS. GEN. LAWS ANN. ch. 111, § 12 (West 2006) ("The department shall make, free of charge, a chemical analysis of any . . . poison, drug, medicine, or chemical, when submitted to it by police authorities . . . provided, that it is satisfied that the analysis is to be used for the enforcement of law.").

³ *Melendez-Diaz*, 129 S. Ct. at 2530; see also MASS. GEN. LAWS ANN. ch. 94C, §§ 32A, 32E(b)(1) (West 2006).

⁴ *Melendez-Diaz*, 129 S. Ct. at 2530-31.

⁵ This is the required procedure under MASS. GEN. LAWS ANN. ch. 111, § 13.

⁶ *Melendez-Diaz*, 129 S. Ct. at 2531.

⁷ See *infra* notes 54-66 and accompanying text (explaining the Court's opinion in *Crawford*).

⁸ *Melendez-Diaz*, 129 S. Ct. at 2531.

objection was overruled and the certificates were introduced as prima facie evidence of the composition, net weight, and quality of the substance.⁹ A jury found Melendez-Diaz guilty.¹⁰

In June 2009, the United States Supreme Court heard the case and determined that lab affidavits¹¹ are “‘testimonial,’ rendering the affiants ‘witnesses’ subject to the defendant’s right of confrontation under the Sixth Amendment.”¹² Afterwards, many states, including Massachusetts, were forced to immediately alter trial procedures. This change in the law has caused confusion and frustration, and has serious implications for future state-level criminal prosecutions customarily involving laboratory reports.¹³ Moreover, a March 2010 report on nationwide appeals in light of *Melendez-Diaz* references eighty-four cases coming out of the Massachusetts Supreme Judicial Court and Court of Appeals, mostly appeals based on drug or ballistics certificates admitted without live testimony.¹⁴

Now, over a year after the decision, the legislature, District Attorney’s Offices, laboratories, defense bar, and courts of Massachusetts continue to experiment with approaches to uphold the Constitution without causing excessive workloads for analysts or trial delays. Footnotes twelve¹⁵ and fourteen¹⁶ in the *Melendez-Diaz* decision, in which Justice Scalia declined to define all appropriate methods of protecting the confrontation right, create openings for Massachusetts to experiment with the use of notice-and-demand statutes and circumstantial evidence in place of lab reports. Since the decision, Virginia amended its notice-and-demand statute, and Massachusetts has one still pending in the state legislature.¹⁷ Because Massachusetts was a party in

⁹ *Id.*

¹⁰ *Id.*

¹¹ I will use the terms “certificates,” “affidavits,” and “lab reports” interchangeably throughout this Note.

¹² *Melendez-Diaz*, 129 S. Ct. at 2530, 2542.

¹³ Patrick Haggan of the Suffolk County District Attorney’s Office explained how “initially, in the first couple of weeks, most prosecutors were . . . wringing their hands, banging on desks, and cursing.” Patrick Haggan, Chief Trial Counsel, Suffolk County District Attorney’s Office, Remarks at the New England Journal on Criminal and Civil Confinement Fall Symposium (Nov. 13, 2009) (transcript available in the New England School of Law library) [hereinafter Haggan Remarks], available at http://www.nesl.edu/students/ne_journal_symposia.cfm; see also Molly A. K. Connors, *Court Ruling Strains Mass. Crime Labs*, THE METROWEST DAILY NEWS, Jan. 1, 2010, <http://www.metrowestdailynews.com/news/x1444028023/Court-ruling-strains-Mass-crime-labs> (explaining how, “[w]ith the added court time keeping technicians away from their labs, there are longer and longer delays in processing evidence”).

¹⁴ Jennifer Friedman, *Melendez-Diaz* Spreadsheet Nationwide Cases 151-227 (Mar. 2010) (unpublished chart) (on file with author).

¹⁵ *Melendez-Diaz*, 129 S. Ct. at 2541 n.12.

¹⁶ *Id.* at 2542 n.14.

¹⁷ See S.B. 106, 2010 Gen. Assem., Reg. Sess. (Va. 2010) (amending, in April 2010,

Melendez-Diaz and has not yet crafted a statute that conforms to the Court's holding, this Note will focus primarily on Massachusetts' reaction to the decision. Many other states, such as Virginia, are in similar positions as Massachusetts, which makes a case study on Massachusetts useful to other states attempting to comply with *Melendez-Diaz*.

Part I of this Note will explore the historical development of the meaning of a "witness against" within the Confrontation Clause, beginning with the *Ohio v. Roberts*¹⁸ reliability framework, and evolving into the testimonial doctrine formulated in *Crawford v. Washington*¹⁹ and further defined in *Davis v. Washington*.²⁰ Part II will discuss the subsequent development of the testimonial doctrine in *Melendez-Diaz v. Massachusetts*²¹ and the remanded *Briscoe v. Virginia* decision, in which the Supreme Court declined to disturb *Melendez-Diaz* or provide a rule regarding notice-and-demand statutes.²² Part III will explore the impact of the decision in Massachusetts and Virginia, and the reaction to *Melendez-Diaz* in these states' legislatures and courts. Part IV will examine statutes and procedures in Colorado, Ohio, and California as examples of procedures that may effectively adhere to the *Melendez-Diaz* rule while maintaining a functional court system. Finally, Part V will look at the practical effects of *Melendez-Diaz* on Massachusetts' criminal justice system and explore ways for the Commonwealth or other states to uphold the Constitution without crippling the system. In attempting to address the issues *Melendez-Diaz* left open, such as those in footnotes twelve and fourteen, states will once again diverge in their interpretations of the law. Before these issues are decided by the Supreme Court,²³ however, states such as Massachusetts must turn to these openings to ease the transition. States' procedures already in compliance with the *Melendez-Diaz* holding also may provide guidance.

I. CONFRONTATION CLAUSE BACKGROUND

Making sense of the text of the Sixth Amendment Confrontation Clause has been an ongoing endeavor. The Clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."²⁴ This right of confrontation has historical origins in

Virginia's statute); H.B. 4162, 186th Gen. Ct., Reg. Sess. (Mass. 2009).

¹⁸ 448 U.S. 56, 66 (1980).

¹⁹ 541 U.S. 36, 51-53 (2004).

²⁰ 547 U.S. 813, 821-22 (2006).

²¹ 129 S. Ct. 2527, 2532 (2009).

²² See *Briscoe v. Virginia*, 130 S. Ct. 1316, 1316 (2010) (per curiam).

²³ Currently pending in the Supreme Court is *Bullcoming v. New Mexico*, No. 09-10876, (argued Mar. 2, 2011), where the Court might decide whether the prosecution may, under the Confrontation Clause, introduce testimonial statements of an analyst through in-court testimony of a supervisor who did not perform or observe the laboratory analysis.

²⁴ U.S. CONST. amend. VI.

Roman times and in the 1603 case of Sir Walter Raleigh.²⁵ In his trial for treason, Raleigh was convicted on the basis of the out-of-court accusations of Lord Cobham, who Raleigh did not have the chance to cross-examine at trial.²⁶ The injustice in Raleigh's trial is still frequently referenced as underlying the purpose of the Confrontation Clause right to cross-examine witnesses against the accused.²⁷ Justice Scalia, in recent decisions interpreting the confrontation right, has made clear that the main evil the Confrontation Clause is intended to protect against is the use of affidavits in lieu of live testimony, sometimes referred to as "trial by affidavit."²⁸ In fact, in oral arguments for the recently remanded *Briscoe* case, Justice Scalia asserted that the Confrontation Clause not only protects the reliability of the government's evidence, but also requires the prosecution to bring in and place the witnesses on the stand at the trial of an accused.²⁹

The meaning of the phrases "be confronted with" and "witnesses against" are up for constant interpretation and debate. The defendant has the undisputed right to come "face-to-face" with live witnesses, and, more importantly, to cross-examine these witnesses who testify for the prosecution; cross-examination in this more typical scenario amounts to confrontation.³⁰ The trickier question, and the question raised in *Melendez-Diaz*, arises when hearsay is offered in the prosecution's case against the defendant.³¹ The debate revolves around which type of hearsay consists of a "witness against" the

²⁵ See *Crawford*, 541 U.S. at 43 (discussing the origins of the Confrontation Clause right). Raleigh closed his defense with the following statement: "You, Gentlemen of the Jury . . . if you yourselves would like to be hazarded in your lives, disabled in your posterities . . . upon an accusation not subscribed by your accuser . . . without the open testimony of a single witness, then so judge me as you would yourselves be judged." 1 CRIMINAL TRIALS 441-42 (David Jardine ed., 1832).

²⁶ *Crawford*, 541 U.S. at 43-44; see also Sherry F. Colb, *The Right of Confrontation: A Supreme Court Decision Reveals Strong Schisms*, FINDLAW (July 2, 2009) <http://writ.news.findlaw.com/colb/20090702.html> (referring to Raleigh's trial for treason as "an outrage that was said to have motivated the creation of the confrontation right").

²⁷ See, e.g., *Crawford v. Commonwealth*, 686 S.E.2d 557, 568 (Va. Ct. App. 2009).

²⁸ See, e.g., *Crawford*, 541 U.S. at 50-51 (explaining that the principal purpose of the Confrontation Clause is to prevent use of "*ex parte* examinations as evidence against the accused").

²⁹ Transcript of Oral Argument at 34, *Briscoe v. Virginia*, 130 S. Ct. 1316 (2009) (No. 07-11191). Justice Scalia disagreed with the lawyer on behalf of Respondents, Stephen McCullough, who claimed that the historical purpose of the Confrontation Clause is protecting the reliability of the government's evidence, accomplished by subjecting the evidence to cross-examination. *Id.*

³⁰ See Richard D. Friedman, *Confrontation: The Search for Basic Principles*, 86 GEO. L.J. 1011, 1011 (1998) ("Indeed, the Supreme Court has treated the accused's right to be brought 'face-to-face' with the witness as secondary to his right of cross-examination.").

³¹ See FED. R. EVID. 801 (defining hearsay as an out of court statement offered to prove the truth of the matter asserted by the declarant).

defendant under the Sixth Amendment, and thus cannot be offered into evidence without giving the accused the opportunity to cross-examine the declarant.³²

A rise in prosecutorial use of forensic reports, including DNA analysis, fingerprint examination, controlled substance identification, and blood alcohol tests,³³ inevitably raised the question of whether such a report is a “witness against” the defendant, and whether the Confrontation Clause requires the opportunity to cross-examine the report’s preparer.³⁴ *Melendez-Diaz* answered this long-debated question, holding that such reports *are* testimonial, while leaving the door open to *how* defendants may and should secure this right.³⁵

A. Ohio v. Roberts: *The Pre-Testimonial, Reliability Framework*

In the 1980 *Ohio v. Roberts* decision, the Supreme Court set forth a framework for analyzing the interplay between the Confrontation Clause and the exceptions to the hearsay rule.³⁶ The Court upheld the trial court’s decision allowing the prosecution to introduce hearsay statements of an unavailable witness who had testified at a preliminary hearing, reasoning that the defendant had already functionally cross-examined the witness.³⁷

³² See Friedman, *supra* note 30, at 1011-12. Friedman advocates a separation between what is considered a “witness” under the Confrontation Clause and hearsay law. *Id.* at 1013. Furthermore, Friedman suggests that a “witness against” encompasses anyone who makes testimonial statements in court or beforehand, which is a narrower definition than hearsay, but without exceptions. *Id.* The definition should apply to any statements, whether made to authorities or not, against the accused. *Id.* at 1014. See also, Akhil Reed Amar, *Confrontation Clause First Principles: A Reply to Professor Friedman*, 86 GEO. L.R. 1045, 1045 (1998) (suggesting, in response to Friedman’s proposal, that “witness against” is limited to in-court testimony or government-prepared affidavits).

³³ See CENSUS OF PUBLICLY FUNDED FORENSIC CRIME LABORATORIES, 2005, BUREAU OF JUSTICE STATISTICS (July 29, 2008), <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=490> (reporting that national forensic crime laboratories received evidence for 2.7 million criminal investigations in 2005).

³⁴ See Joe Bourne, Note, *Prosecutorial Use of Forensic Science at Trial: When is a Lab Report Testimonial?*, 93 MINN. L. REV. 1058, 1060 (2009) (urging a “bright-line rule” wherein lab reports prepared by or for police in preparation for or investigation of a criminal trial are per se testimonial, and thus entail the opportunity for the accused to cross-examine the preparer); *The Supreme Court, 2008 Term – Leading Cases*, 123 HARV. L. REV. 202, 208-09 (2009) (arguing that jurors’ overreliance on forensic evidence requiring human interpretation of machine-generated reports makes such evidence “subject to the same dangers as any other type of accusatory statement from a government witness”).

³⁵ *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2532, 2542 (2009).

³⁶ *Ohio v. Roberts*, 448 U.S. 56, 62 (1980).

³⁷ *Id.* at 70-73 (explaining that counsel’s questioning of the unavailable witness at a preliminary hearing was “replete with leading questions” and therefore functioned as a cross-examination).

In an effort to balance the constitutional rights of the accused with the interests of “effective law enforcement,”³⁸ the Court acknowledged the need for a new approach to determining when the Confrontation Clause should keep hearsay out of trial.³⁹ The Court set forth a two-pronged test of *necessity* and *reliability* that governed the admission of hearsay in accordance with the Confrontation Clause.⁴⁰ Under the first prong, the prosecution had to show that the evidence was necessary and that the declarant was unavailable.⁴¹ Then, the hearsay would be admissible only if it bore “adequate indicia of reliability.”⁴² Evidence falling within a “firmly rooted hearsay exception,” or otherwise displaying “particularized guarantees of trustworthiness” generally could be admitted.⁴³ This formulation, which allowed the “firmly rooted hearsay exception[s]” to satisfy the reliability requirement, was essentially a per se rule that “was bound to create problems” with hearsay that really should be excluded by the Confrontation Clause.⁴⁴

Because the Court refrained from “map[ping] out a theory of the Confrontation Clause that would determine the validity of all . . . hearsay ‘exceptions,’”⁴⁵ *Roberts*, in effect, opened the courtroom door to more accusatory evidence while diminishing the defendant’s right to confrontation.⁴⁶ This broad reliability framework allowed many out-of-court statements into evidence, based on the concept that hearsay admitted at trial must be so trustworthy that cross-examination would be “of marginal utility.”⁴⁷

Whether scientific records would be admissible under *Roberts* was unclear, although such affidavits had historically fallen under the public or business records exceptions to the hearsay rule, and were considered reliable.⁴⁸ Although *Roberts* no longer controls, reliability of evidence is still a

³⁸ *Id.* at 64-65.

³⁹ *Id.* at 65 (“[A] general approach to the problem is discernible.”).

⁴⁰ *Id.* at 65-66.

⁴¹ *Id.* at 65.

⁴² *Id.* at 66 (citations omitted).

⁴³ *Id.*

⁴⁴ Friedman, *supra* note 30, at 1018.

⁴⁵ *Roberts*, 448 U.S. at 64-65 (quoting *California v. Green*, 399 U.S. 149, 162 (1970)).

⁴⁶ See Bourne, *supra* note 34, at 1061 (indicating that the decision “could be read as a signal to lower courts that the defendant’s confrontation right is, on balance, really not all that weighty”).

⁴⁷ *Idaho v. Wright*, 497 U.S. 805, 823 (1990) (examining the “particularized guarantees of trustworthiness” route for admitting hearsay evidence under the Confrontation Clause).

⁴⁸ See FED. R. EVID. 803(6), (7) (allowing for hearsay falling under the business and public records headings to be admitted as exceptions to the rule against hearsay); Thomas F. Burke III, *The Test Results Said What? The Post-Crawford Admissibility of Hearsay Forensic Evidence*, 53 S.D. L. REV. 1, 3 (2008). *But see* Reply Brief for Petitioner at 13-18, *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009) (No. 07-591) (refuting the Commonwealth’s view that forensic laboratory reports would have been admissible during the founding era as business or public records).

consideration in determining the credibility of evidence introduced at trial. The petitioner in *Melendez-Diaz*, however, challenged that assumption of reliability with evidence of disorganization in state crime labs.⁴⁹ Lower courts used the *Roberts* framework until 2004, when the Court assailed the reliability test, thereby overruling it.⁵⁰

B. *The Testimonial Doctrine*

Between the *Roberts* and *Crawford* decisions, Justice Thomas, in his concurring opinion in *White v. Illinois*, articulated concerns with the vague reliability formulation and the Court's view that the Confrontation Clause served *only* to limit hearsay.⁵¹ Justice Thomas suggested an alternative formulation that would adhere to the text and history of the Sixth Amendment, in which *testimonial* material, such as affidavits, would implicate the Confrontation Clause.⁵² Due to the discomfort with the reliability approach to Confrontation Clause analysis, scholars advocated this "testimonial" framework that would focus on providing confrontation for "witnesses against" the accused.⁵³

1. *Crawford v. Washington*: Erecting the Testimonial Doctrine

Justice Scalia, the Court's current Confrontation Clause guardian,⁵⁴ formally introduced the testimonial framework for Confrontation Clause analysis in an effort to provide more "meaningful protection" of the right.⁵⁵ In *Crawford*, the Court reversed the Washington Supreme Court and trial court's decisions allowing the prosecution to admit a prior statement of Sylvia Crawford, the defendant's wife.⁵⁶ Justice Scalia thoroughly attacked the *Roberts* reliability framework, calling it "amorphous," "entirely subjective," and "so unpredictable that it fails to provide meaningful protection from even core

⁴⁹ Reply Brief for Petitioner, *supra* note 48, at 11.

⁵⁰ See *Crawford v. Washington*, 541 U.S. 36, 68-69 (2004).

⁵¹ *White v. Illinois*, 502 U.S. 346, 363-66 (1992) (Thomas, J., concurring).

⁵² *Id.* at 365 (citing *Mattox v. United States*, 156 U.S. 237, 242-43 (1895)) (stating that affidavits and other testimonial materials were "historically abused by prosecutors as a means of depriving criminal defendants of the benefit of the adversary process").

⁵³ See Friedman, *supra* note 30, at 1025-26 (suggesting, while pointing to Thomas's *White* concurrence, that the "key question with respect to a pretrial statement" is whether it is testimonial, not whether it is reliable or fits under a hearsay exception); Bradley Morin, Note, *Science, Crawford, and Testimonial Hearsay: Applying the Confrontation Clause to Laboratory Reports*, 85 B.U. L. REV. 1243, 1251-52 (2005) (investigating the development of the testimonial doctrine, particularly as it applies to laboratory reports).

⁵⁴ Justice Scalia wrote the majority opinions for *Crawford*, *Davis*, and *Melendez-Diaz*.

⁵⁵ *Crawford*, 541 U.S. at 68.

⁵⁶ *Id.* at 38, 69. Sylvia Crawford was unavailable to testify due to Washington's marital privilege. *Id.* at 40.

confrontation violations.”⁵⁷ Pointing to the havoc that *Roberts*’ reliability framework wreaked upon lower courts,⁵⁸ Justice Scalia blamed the confusing framework for the incorrect result below.⁵⁹

Justice Scalia set forth a new standard governing prosecutorial use of testimonial evidence: the Sixth Amendment demands that the prosecutor prove that the declarant, or witness, is unavailable and that the defendant had a prior opportunity to cross-examine the declarant.⁶⁰ According to the opinion, the reference in the Sixth Amendment to “witnesses” reflects the Framers’ focus on “those who ‘bear testimony’. . . typically ‘[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.’”⁶¹ Thus, “[w]here testimonial statements are at issue,” the Constitution demands confrontation.⁶²

Of course, this decision created a new conundrum: what evidence, exactly, is testimonial? Although the decision outlined two categories of testimonial statements – 1) prior testimony at a preliminary hearing, before a grand jury, or at a prior trial, and 2) police interrogations – Justice Scalia wrote: “We leave for another day any effort to spell out a comprehensive definition of ‘testimonial.’”⁶³ Other language in the opinion classified testimonial evidence as that which was prepared in anticipation of litigation, used to establish an element of the crime, or statements that the preparer would reasonably believe would be used at trial.⁶⁴ In declining to further define the term, Justice Scalia dismissed Chief Justice Rehnquist’s criticism that lack of guidance would “cause interim uncertainty.”⁶⁵ Justice Scalia left open whether lower courts should admit nontestimonial evidence, allowing leeway for states to decide whether evidence, if within a hearsay exception, required confrontation.⁶⁶

Lower courts grappled with the new testimonial framework,⁶⁷ leading to disparity: some courts found that laboratory reports were not testimonial,⁶⁸

⁵⁷ *Id.* at 63.

⁵⁸ *Id.* at 63-66 (citing the disparity in opinions coming out of, among other states, Colorado, Virginia, California, and Wisconsin).

⁵⁹ *Id.* at 65 (“*Roberts*’ failings were on full display in the proceedings below.”).

⁶⁰ *Id.* at 68.

⁶¹ *Id.* at 51.

⁶² *Id.* at 59-61 (citing cases supporting the history and rationale for this formulation).

⁶³ *Id.* at 68.

⁶⁴ *Id.* This language became the basis for lower courts’ diverging opinions as to whether different types of evidence were testimonial. *See, e.g.*, *People v. Johnson*, 121 Cal. App. 4th 1409, 1411-13 (Ct. App. 2004); *Commonwealth v. Verde*, 827 N.E.2d 701, 706 (Mass. 2005), *overruled by* *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009).

⁶⁵ *Crawford*, 541 U.S. at 68 n.10.

⁶⁶ *See id.* at 68.

⁶⁷ *See* David A. Doellman, *The Crawford Confusion Marches On: The Confrontation Clause and Hearsay Laboratory Drug Reports*, 73 MO. L. REV. 583, 594-95 (2008) (“[I]t is not surprising that courts have struggled to apply the vague testimonial guidelines handed down in *Crawford* . . . jurisdictions are split on whether or not . . . laboratory reports

while others found that they were.⁶⁹ Furthermore, courts reached these decisions based on different rationales, including the business or public records exceptions to hearsay,⁷⁰ and on stricter readings of the language in *Crawford*.⁷¹ After *Crawford*, defense attorneys frequently began objecting to the use of forensic reports without the accompanying testimony of the analysts.⁷² In fact, Brownlow Speer, the Chief Appellate Attorney for the Committee for Public Counsel Services' Public Defender Offices in Boston, suggests that lawyers involved in drug possession cases began thinking more seriously that the use of drug certificates ran afoul of the Confrontation Clause under the *Crawford* rule.⁷³ The Massachusetts Supreme Judicial Court, however, held that lab certificates did not fall within the *Crawford* framework due to the business records exception to the hearsay rule.⁷⁴ Regardless, lawyers continued objecting on *Crawford* grounds, and a host of cases were appealed and set aside pending *Melendez-Diaz*.⁷⁵ *Crawford* commentators opined on the proper treatment of laboratory reports, mostly finding that such evidence was

constitute testimonial evidence.”).

⁶⁸ See, e.g., *Johnson*, 121 Cal. App. 4th at 1411-13 (holding that a laboratory report analyzing cocaine was “routine documentary evidence” and thus not testimonial under *Crawford*); *Verde*, 827 N.E.2d at 706 (finding that a drug certificate of analysis was not testimonial under *Crawford*, but was “akin to a business or official record, which the Court stated was not testimonial in nature”).

⁶⁹ See, e.g., *Belvin v. State*, 922 So. 2d 1046, 1054 (Fla. Dist. Ct. App. 2006) (en banc), *affirmed*, 986 So. 2d 516 (Fla. 2008) (finding that a breath test affidavit, particularly the part relating to the preparer’s observations and techniques, were testimonial hearsay under *Crawford*); *City of Las Vegas v. Walsh*, 91 P.3d 591, 596 (Nev. 2004) (determining that a nurse’s affidavit relating to a blood sample was testimonial evidence); *People v. Rogers*, 780 N.Y.S.2d 393, 396-97 (2004) (finding that laboratory reports prepared by a private lab, analyzing the accused’s blood alcohol level, were testimonial and did not fall within the business records exception).

⁷⁰ FED. R. EVID. 803(6), (7); see also *Belvin*, 922 So. 2d at 1051 (“[T]he statutory listing of breath test affidavits under the public records and reports exception to the hearsay rule does not control whether they are testimonial under *Crawford*.”).

⁷¹ Many of the opinions finding that laboratory reports were testimonial focused on whether the reports were made specifically for use at trial. See, e.g., *Walsh*, 91 P.3d at 595 (finding that a health professional’s affidavit accompanying a blood alcohol sample is “prepared solely for the prosecution’s use at trial” and thus testimonial).

⁷² Telephone Interview with Brownlow Speer, Chief Appellate Attorney, Comm. for Pub. Counsel Servs. of Mass. (Jan. 19, 2010) (on file with author) (explaining how, in Massachusetts, prosecutors routinely used certificates before *Crawford*).

⁷³ *Id.* at 72.

⁷⁴ See *Commonwealth v. Verde*, 827 N.E.2d 701, 706 (Mass. 2005), *overruled by Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009).

⁷⁵ Telephone Interview with Brownlow Speer, *supra* note 72; see also *Commonwealth v. Rivera*, 918 N.E.2d 871, 872 (Mass. App. Ct. 2009) (reviewing a 2005 drug case on remand from the United States Supreme Court, for further consideration in light of *Melendez-Diaz*).

testimonial.⁷⁶ Scholarly articles discussing the disparity in treatment of scientific reports post-*Crawford* illuminated the need for more guidance.⁷⁷

2. *Davis v. Washington*: Further Defining the Testimonial Doctrine

In the 2006 opinion of *Davis v. Washington*,⁷⁸ Justice Scalia embarked again on a mission to distinguish testimonial from nontestimonial statements but still declined to “produce an exhaustive classification of all conceivable statements.”⁷⁹ Because *Crawford* included police interrogations in the category of “core” testimonial evidence,⁸⁰ *Davis* set out to distinguish *types* of police investigations by examining two separate cases where reports from interrogations were introduced into evidence.⁸¹ In *Davis*, a victim of domestic violence made the statements identifying the defendant to a 911 operator, and the Washington Supreme Court concluded that the 911 conversation was *not* testimonial.⁸² The Supreme Court upheld this decision.⁸³ The companion case, *Hammon v. Indiana*, involved a police interview with the victim of a domestic disturbance and a subsequent decision by the Supreme Court of Indiana that the victim’s statements were nontestimonial.⁸⁴ The Supreme Court disagreed.⁸⁵

⁷⁶ See, e.g., Richard D. Friedman, *Adjusting to Crawford: High Court Decision Restores Confrontation Clause Protection*, 19 CRIM. JUST. 4, 11 (Summer 2004) (“In most circumstances, the lab report should probably be considered testimonial. Therefore, the lab technician who made the report should testify at trial if available to do so.”); Pamela R. Metzger, *Cheating the Constitution*, 59 VAND. L. REV. 475, 510-11 (2006) (“A state crime laboratory report is clearly intended to substitute for in-court proof of an essential element of the offense. . . . There can be no question that forensic laboratory reports are testimonial.”).

⁷⁷ See, e.g., Morin, *supra* note 53, at 1247 (proposing a “flexible, fact-specific approach when applying the Confrontation Clause to laboratory reports”); John M. Spires, Note, *Testimonial or Nontestimonial? The Admissibility of Forensic Evidence After Crawford v. Washington*, 94 KY. L.J. 187, 205 (2005) (suggesting that forensic evidence prepared for litigation purposes should be testimonial, while lab reports kept in the ordinary course of business should be nontestimonial unless evidence shows the records were prepared for litigation).

⁷⁸ 547 U.S. 813 (2006).

⁷⁹ *Id.* at 822.

⁸⁰ *Crawford v. Washington*, 541 U.S. 36, 51-52 (2004) (defining testimonial evidence to include statements given in the course of police interrogations).

⁸¹ The two cases were consolidated under the *Davis* name. *Id.* at 817-21.

⁸² *State v. Davis*, 111 P.3d 844, 851 (Wash. 2005), *cert. granted*, 546 U.S. 975-76 (2005).

⁸³ *Davis*, 547 U.S. at 834.

⁸⁴ *Hammon v. State*, 829 N.E.2d 444, 446-48, 457-58 (Ind. 2005), *cert. granted*, 546 U.S. 975-76 (2005).

⁸⁵ *Davis*, 547 U.S. at 834 (reversing the judgment of the Supreme Court of Indiana and remanding the case for review consistent with *Davis*).

In the opinion, Justice Scalia delineated a “primary purpose” test distinguishing between resolving ongoing emergencies and investigating past crimes.⁸⁶ Statements made to police with the primary purpose of resolving an ongoing emergency were nontestimonial, while statements made with the primary purpose of establishing past events that might be relevant to future prosecution were testimonial.⁸⁷ Justice Scalia called statements made under “official interrogation,” as in *Hammon*, “an obvious substitute for live testimony, because they do precisely *what a witness does* on direct examination; they are inherently testimonial.”⁸⁸

Justice Thomas criticized the opinion’s unpredictability and disconnect from the purpose of the Confrontation Clause,⁸⁹ while urging a narrower definition of testimonial. Justice Thomas suggested a distinction based on formality, where the Confrontation Clause would cover formalized statements such as affidavits, depositions, and past testimony, as well as “the use of technically informal statements when used to evade the formalized [confrontation] process.”⁹⁰ Once again, the Court left the states with slightly more guidance on the meaning of testimonial but not enough to put the issue to rest.

II. TWEAKING THE TESTIMONIAL DOCTRINE: *MELENDEZ-DIAZ* AND *BRISCOE V. VIRGINIA*

Although the Court shed more light on the meaning of the term testimonial in *Davis*, whether laboratory reports fell into the testimonial category was still uncertain. Lower courts, once again, reached different conclusions as to whether scientific records were testimonial. Using the *Davis* primary purpose test, many courts held that forensic reports, such as those identifying narcotics and blood alcohol content, were testimonial.⁹¹ Most of these decisions rested

⁸⁶ *Id.* at 822; Bourne, *supra* note 34, at 1065 (calling this formulation an “investigatory purpose test”).

⁸⁷ *Davis*, 547 U.S. at 830.

⁸⁸ *Id.* at 830 (explaining that the officer was trying to determine what happened to the victim, with the “sole” purpose being investigation of a potential crime).

⁸⁹ *Id.* at 834 (Thomas, J., concurring in the judgment in part and dissenting in part) (“[T]his test characterizes as ‘testimonial,’ and therefore inadmissible, evidence that bears little resemblance to what we have recognized as the evidence targeted by the Confrontation Clause.”).

⁹⁰ *Id.* at 838.

⁹¹ *See, e.g.*, Thomas v. United States, 914 A.2d 1, 14-15 (D.C. 2006) (finding that an analyst’s report identifying a substance as cocaine was testimonial because it was created expressly as a substitute for live testimony against the accused); State v. March, 216 S.W.3d 663, 666 (Mo. 2007) (en banc) (determining that a lab report, under *Crawford* and *Davis*, “constitute[s] a ‘core’ testimonial statement subject to the requirements of the Confrontation Clause”); State v. Kent, 918 A.2d 626, 637 (N.J. Super. Ct. App. Div. 2007) (finding that a chemist’s report was testimonial, and it could not “reasonably be argued that the ‘primary purpose’ of the lab certificate was anything other than to prove past events, specifically defendant’s blood alcohol concentration, relevant to his DWI prosecution”).

on the concept that the primary purpose of the reports was future litigation. Other courts, such as the Massachusetts Supreme Judicial Court,⁹² interpreted lab reports as nontestimonial.⁹³ Again, scholarly articles continued to propose new approaches and to advocate the need for more guidance.⁹⁴ *Melendez-Diaz* resolved this issue, finding laboratory reports testimonial, but the bounds of this ruling opened doors to further interpretation, confusion, and disorder. The Court's refusal to quell confusion through *Briscoe* leaves open the question of what types of notice-and-demand statutes comply with *Melendez-Diaz*.

A. *Massachusetts' Approach to the Testimonial Doctrine before Melendez-Diaz*

1. Procedure for Admitting Laboratory Reports in Massachusetts Pre-*Melendez-Diaz*

Before *Melendez-Diaz*, Massachusetts law permitted prosecutors to introduce forensic analysts' laboratory certificates as substitutes for live testimony.⁹⁵ Prosecutors were only required to provide defendants with a copy of the certificate during discovery⁹⁶ – this, theoretically, sufficed for notice. A state statute allowed forensic analysts to test seized evidence for presence of illegal drugs upon a police officer's representation that the analysis would be

⁹² *Commonwealth v. Verde*, 827 N.E.2d 701 (Mass. 2005), *overruled by Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009).

⁹³ *See, e.g., United States v. Ellis*, 460 F.3d 920, 922, 926-27 (7th Cir. 2006) (finding that medical records showing the presence of methamphetamine in the defendant's blood were nontestimonial and did not fall outside the business record exception simply because the analyst knew the records might be used in future criminal proceedings); *People v. Geier*, 161 P.3d 104, 140 (Cal. 2007) (holding that a DNA analysis report was nontestimonial and that, under *Davis*, whether a statement will be used at trial is not the central inquiry into whether the evidence is testimonial).

⁹⁴ *See, e.g., Burke, supra* note 48, at 5 (observing that unanswered questions after *Davis*, such as the interplay between the Confrontation Clause and the business records exceptions "have frustrated lower courts wrestling with the definition of 'testimonial' in the hearsay forensic records context"); Doehllman, *supra* note 67 (criticizing the Supreme Court for its "unwillingness to specifically address the testimonial standard from *Crawford* and provide the needed guiding light to lower courts"); Edward J. Imwinkelried, *This is Like Déjà vu All Over Again: The Third Constitutional, Attack on the Admissibility of Police Laboratory Reports in Criminal Cases*, 38 N.M. L. REV. 303, 331 (2008) (suggesting that crime laboratory analysts generate evidence against the accused, so cross-examination of these analysts would be useful to a defendant); Bourne, *supra* note 34, at 1060 (advocating a per se testimonial standard with regard to laboratory reports prepared for the police in anticipation of prosecution).

⁹⁵ *See MASS. GEN. LAWS* ch. 111, §§ 12-13 (2003); *Commonwealth v. Verde*, 827 N.E.2d 701, 706 (Mass. 2005), *overruled by Melendez-Diaz*, 129 S. Ct. 2527 (2009).

⁹⁶ MASS. R. CRIM. P. 14(a)(1)(A)(vii).

used for the enforcement of law.⁹⁷ The statute also required the analyst to convey the results of the tests to a requesting police officer in a “signed certificate, on oath.”⁹⁸ Furthermore, the law permitted, even directed, courts to admit the sworn certificate as “prima facie evidence of the composition, quality, and the net weight of the narcotic or other drug”⁹⁹ In jury instructions regarding these certificates, judges advised the jury that the results therein were only *prima facie* evidence that should be considered in light of other evidence.¹⁰⁰ Another Massachusetts statute set the standard for chemists’ certificates containing results of drug tests, stating that the results shall be prima facie evidence of the drugs’ composition, quality, and weight.¹⁰¹

According to the Brief for Petitioners in *Melendez-Diaz*, prosecutors were previously not required to “call as witnesses the forensic analysts who prepare these reports, even if defendants request that they do so.”¹⁰² Consequently, if the defendant wanted to examine the analyst, he could issue a subpoena¹⁰³ and request discovery concerning methods of qualification of the technician.¹⁰⁴ This right is grounded in the defendant’s state and federal rights to compulsory process,¹⁰⁵ and also in his Sixth Amendment right to confrontation.¹⁰⁶ The defendant could also request a pre-trial evidentiary hearing to challenge the validity of testing techniques.¹⁰⁷ Although bestowed with these rights, the burden was on the defendant to call the analyst as an adverse witness. Perhaps because the certificates were considered authoritative, defendants almost never subpoenaed the testing analysts.¹⁰⁸

⁹⁷ MASS. GEN. LAWS ch. 111, § 12.

⁹⁸ *Id.* § 13.

⁹⁹ *Id.*

¹⁰⁰ See *Commonwealth v. Rivera*, 918 N.E.2d 871, 874 n.10 (Mass. App. Ct. 2009).

¹⁰¹ MASS. GEN. LAWS ch. 22, § 39 (2010).

¹⁰² Brief for Petitioner at 5, *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009) (No. 07-591).

¹⁰³ MASS. R. CRIM. P. 17.

¹⁰⁴ MASS. R. CRIM. P. 14(a).

¹⁰⁵ *Blazo v. Superior Court*, 315 N.E.2d 857, 860 (Mass. 1974).

¹⁰⁶ See MASS. CONST. pt. 1, art. XII (“And every subject shall have a right to produce all proofs, that may be favorable to him; to meet the witnesses against him face to face, and to be fully heard in his defense by himself, or his council, at his election.”); MASS. R. CRIM. P. 17 Reporter’s Notes.

¹⁰⁷ MASS. R. CRIM. P. 11(b)(ii).

¹⁰⁸ In fact, according to John Grossman, chemists testified about five times per year, at the most, before *Melendez-Diaz*. Telephone Interview with John Grossman, Undersec’y of Forensic Sci. and Tech., Exec. Office of Pub. Safety and Sec. (Feb. 23, 2010) (on file with author).

2. Case Law Interpreting Massachusetts' Procedure Before *Melendez-Diaz*

Melendez-Diaz overturned Massachusetts' leading case on whether prosecutors could introduce the certificates in lieu of live testimony, *Commonwealth v. Verde*.¹⁰⁹ *Verde* held that drug certificates of analysis did not implicate the Confrontation Clause and that prosecutors could introduce laboratory reports without the testimony of the preparing analyst, in part to reduce court delays and avoid the inconvenience of always calling the witness.¹¹⁰ Further, the *Verde* opinion found the certificates analogous to business records, which *Crawford* held to be nontestimonial.¹¹¹ The Massachusetts Appeals Court substantiated this decision by reasoning that, because the certificates were based in science, they were neither discretionary nor based on opinion, and therefore more reliable.¹¹² In *Melendez-Diaz*, the Supreme Court ruled otherwise, thereby requiring Massachusetts to reconsider a slew of cases in which defendants were convicted without having the chance to confront the analysts who authored the evidentiary certificates, including drug and firearm certificates.¹¹³

B. *Melendez-Diaz: Laboratory Reports Are Testimonial*

The Court's recent attempt at defining testimonial evidence holds that laboratory certificates identifying the substance found in the defendant's possession are clearly testimonial: the certificates are really "affidavits," which fall within the "core class of testimonial statements,"¹¹⁴ function identically to live testimony,¹¹⁵ and are clearly made under circumstances indicating that their sole purpose is use at a later criminal trial.¹¹⁶ Justice Scalia rejected the argument that the certificates' preparers are not subject to confrontation because the records fall under the business or public records exceptions to

¹⁰⁹ *Commonwealth v. Verde*, 827 N.E.2d 701 (Mass. 2005), *overruled by* *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009).

¹¹⁰ *Id.* at 703 n.1.

¹¹¹ *Id.* at 706.

¹¹² *Id.* at 705.

¹¹³ *See, e.g., Commonwealth v. Hollister*, 916 N.E.2d 768 (Mass. App. Ct. 2009) (ballistics); *Commonwealth v. Rivera*, 918 N.E.2d 871 (Mass. App. Ct. 2009) (cocaine).

¹¹⁴ *Melendez-Diaz*, 129 S. Ct. at 2532 (citing *White v. Illinois*, 502 U.S. 346, 365 (1992) (Thomas, J., concurring)). Justice Scalia later remarked, "this case involves little more than the application of our holding in *Crawford v. Washington*." *Id.* at 2542.

¹¹⁵ *Id.* (explaining that such certificates do "precisely what a witness does on direct examination" (quoting *Davis v. Washington*, 547 U.S. 813, 830 (2006))).

¹¹⁶ *Id.* (quoting language in MASS. GEN. LAWS 111, § 13 indicating that the certificates' sole purpose is to provide evidence of the substance's composition). *But see id.* at 2551 (Kennedy, J., dissenting) (rejecting the contention that lab reports qualify as witnesses as the concept was originally understood by the Founders).

hearsay.¹¹⁷ The Court instead found that such affidavits are testimonial, concluding that the analysts are witnesses under the Sixth Amendment.¹¹⁸ Thus, criminal defendants have the Sixth Amendment right to confront the analysts who prepare reports admitted into evidence against the defendants at trial.¹¹⁹

Justice Scalia further asserted that the Confrontation Clause places a burden on the prosecution to present witnesses that are adverse to the defendant, *not* on the defense to bring those witnesses into court “if he chooses.”¹²⁰ Justice Scalia rejected Massachusetts’ argument that, under Massachusetts’ law giving defendants the right to subpoena analysts, there was no Confrontation Clause violation.¹²¹ Massachusetts had given defendants that right to subpoena analysts through other state law or the Compulsory Process Clause of the Sixth Amendment; Justice Scalia declared, however, that such provisions do not satisfy the requirements of the Confrontation Clause, as they “impose[] the burden of witness no-shows on the defense.”¹²²

Finally, Justice Scalia maintained that a system where a prosecutor may submit evidence through *ex parte* affidavits and wait for the defendant to subpoena the analyst, if he chooses, does not adequately preserve the defendant’s confrontation rights.¹²³ In scorning the automatic admission of reports without testimony, however, footnote fourteen of the decision does not bar other circumstantial methods of proof.¹²⁴ Thus, states have been making and continue to make more efforts to prove essential elements of charges with circumstantial evidence such as field tests, video testimony, and juror observation of evidence.

The opinion condemned the Massachusetts statute that allowed certificates of analysis to be admitted into evidence without the live testimony of the forensic analyst.¹²⁵ The decision distinguished between procedures such as

¹¹⁷ *Id.* at 2538-40 (explaining that the affidavits would be subject to confrontation even if the affidavits qualified as public or business records).

¹¹⁸ *Id.* at 2532.

¹¹⁹ *Id.*; see also *The Supreme Court Leading Cases – 2008*, *supra* note 34, at 207 (agreeing with the holding for constitutional and pragmatic reasons and explaining that “laboratory analysts are no more reliable than other witnesses . . . and are often accountable to the state, with their reports created at the request of the prosecution, making overreliance on them all the worse”).

¹²⁰ *Id.* at 2540.

¹²¹ *Id.* In Massachusetts, the defendant may subpoena the technician, see MASS. R. CRIM. P. 17, and seek discovery concerning methods of qualifications of the technician, see MASS. R. CRIM. P. 14.

¹²² Reply Brief of Petitioners at 1, *Briscoe v. Virginia*, 130 S. Ct. 1316 (2010) (No. 07-11191).

¹²³ *Melendez-Diaz*, 129 S. Ct. at 2540.

¹²⁴ *Id.* at 2542 n.14.

¹²⁵ Deval Patrick, Foreword to H.B. 4162, 186th Gen. Ct., Reg. Sess. 1 (Mass. 2009) (explaining that Massachusetts’ statute is unconstitutional after *Melendez-Diaz*); see also

Massachusetts' and Virginia's (also called statutory subpoena procedures), and Ohio's notice-and-demand statutes that put *some* onus on the defendant to request the analyst's presence but are still valid under the holding.¹²⁶ A typical notice-and-demand statute "[in] one way or another, empower[s] a defendant to insist upon the analyst's appearance at trial": after the defendant receives notice of a prosecutor's intent to introduce a forensic analyst's report, the defendant may demand that analyst's presence at trial.¹²⁷ In footnote twelve of the opinion, Justice Scalia attacked Massachusetts' procedure but did not "pass" on the constitutionality of notice-and-demand procedures available in other states.¹²⁸ This refusal to lay out guidelines for all forms of notice-and-demand procedures, coupled with the approval of certain notice-and-demand statutes, will lead to more litigation over the constitutionality of such statutes. Nonetheless, footnote twelve also gives states such as Massachusetts leeway in crafting appropriate responses to the decision.

The dissent criticized the majority's reasoning, arguing that notice-and-demand statutes do shift the burden from the state to the accused, and are thus unconstitutional under the holding.¹²⁹ Justice Scalia dismissed the warning that the majority's reasoning will invalidate notice-and-demand statutes, arguing that such statutes "shift no burden whatever" but merely compel the defendant to exercise his confrontation rights before – instead of during – trial.¹³⁰ In fact, Justice Scalia observed, "[t]he defendant *always* has the burden of raising his Confrontation Clause objection; notice-and-demand statutes simply govern the *time* within which he must do so."¹³¹ Rejecting the dissent's "dire predictions" of the opinion's effect on state laboratories and court systems, Scalia suggests that notice-and-demand statutes in place in some states are examples that "the sky will not fall after today's decision."¹³²

At the forefront of current debate – and explored, though only temporarily, in *Briscoe v. Virginia*¹³³ – is how states may constitutionally protect

MASS. GEN. LAWS, ch. 111, § 13 (certificates may be admitted as "prima facie evidence of the composition, quality, and . . . the net weight of the narcotic . . . analyzed").

¹²⁶ See *Melendez-Diaz*, 129 S. Ct. at 2540-41; Brief for the Public Defender Service for the District of Columbia and The National Association of Criminal Defense Lawyers as Amici Curiae Supporting Petitioner at 23, *Briscoe v. Virginia*, 130 S. Ct. 1316 (2010) (No. 07-11191) (citing numerous notice-and-demand statutes that operate in accordance with the *Melendez-Diaz* decision); Transcript of Oral Argument at 17, *supra* note 29 (referring to a "couple of jurisdictions that have perfectly valid notice and demand rules," such as Ohio).

¹²⁷ *Melendez-Diaz*, 129 S. Ct. at 2541.

¹²⁸ *Id.* at 2541 n.12 ("We have no occasion today to pass on the constitutionality of every variety of statute commonly given the notice-and-demand label.").

¹²⁹ *Id.* at 2554, 2557-58.

¹³⁰ *Id.* at 2541 (referencing state notice-and-demand statutes that "in their simplest form" maintain defendants' confrontation rights).

¹³¹ *Id.*

¹³² *Id.* at 2540.

¹³³ *Briscoe v. Virginia*, 130 S. Ct. 1316, 1316 (2010) (per curiam).

defendants' right to confront the analysts who prepare the certificates. The Court remanded to the lower court many pending cases awaiting certiorari to be reconsidered in light of *Melendez-Diaz*.¹³⁴

C. *Virginia's Approach to the Testimonial Doctrine Pre-Briscoe*

In Virginia, as in Massachusetts, criminal defendants were questioning whether the State's procedure adequately protected their confrontation rights. A statute did set forth how a defendant could request an analyst's presence in court, but the process was vague and perhaps placed too heavy a burden on the defendant. The Supreme Court remanded *Briscoe*, an appeal coming out of Virginia, in effect refusing to specify whether and how Virginia should more appropriately safeguard defendants' confrontation right.

1. Virginia's Procedure for Admitting Lab Reports Before *Melendez-Diaz* and *Briscoe*

Before *Melendez-Diaz*, Virginia was a "defense subpoena" or "subpoena statute" state, which meant that the prosecutor was required to notify the defendant of her intent to introduce a laboratory report in lieu of in-court testimony, and the defendant was then required to subpoena the analyst if he so chose.¹³⁵ The Virginia statute's procedures by which a defendant could secure an analyst's presence, prior to changes following *Melendez-Diaz*, were simple but vague: the accused "shall have the right to call the person performing such analysis . . . as a witness therein, and examine him in the same manner as if he had been called as an adverse witness. Such witness shall be summoned and appear at the cost of the Commonwealth."¹³⁶ Indeed, the language was ambiguous; petitioners in *Briscoe* suggested that the "shall be summoned" language placed the burden of calling the witness on the defense¹³⁷ and that the statute improperly made the witnesses the defendant's own.¹³⁸

¹³⁴ See, e.g., *Commonwealth v. Morales*, 884 N.E.2d 546, 546 (Mass. App. Ct. 2008), cert. granted, 129 S. Ct. 2858 (2009) (appealing conviction on weapons charges, where ballistics certificate was admitted at trial).

¹³⁵ See Brief of Respondent at 14, *Briscoe v. Virginia*, 130 S. Ct. 1316 (2009) (No. 07-11191).

¹³⁶ VA. CODE ANN. §19.2-187.1 (2008) (amended 2010).

¹³⁷ See Transcript of Oral Argument, *supra* note 29, at 14 (contending that the Virginia Court interpreted the "defunct statute" as placing the burden on the defendant to put the witness on the stand, making it a "corrupted right" that defendants rarely exercise). Later in the arguments, Richard Friedman, attorney for petitioners *Briscoe* and *Cypress*, stated that no Virginia court had ever held that the prosecution bears the risk of forensic report analysts no-shows. *Id.* at 58.

¹³⁸ Transcript of Oral Argument, *supra* note 29, at 15.

2. Case law Interpreting Virginia's Statutory Procedure Before *Melendez-Diaz* and *Briscoe*

In the 2008 case of *Magruder v. Commonwealth*, the Virginia Supreme Court case appealed in *Briscoe*, the Virginia Supreme Court held that the procedures in the pre-amended statutes adequately protected a criminal defendant's confrontation rights.¹³⁹ The defendant's failure to follow the procedures therein waived that right.¹⁴⁰ While the defendants argued, that silence cannot amount to a waiver,¹⁴¹ the Virginia Supreme Court found that the statutes clearly informed a defendant how to secure the analyst's presence and the consequences for failure to comply with the procedures, resulting in a waiver of the defendant's rights.¹⁴² The Court cast aside other state court opinions holding otherwise.¹⁴³

The dissenting opinion in *Magruder* criticized the finding that the defendants' actions constituted a valid waiver of a constitutional right,¹⁴⁴ suggesting that the majority confused waivers of statutory rights with waivers of constitutional rights.¹⁴⁵ The dissent suggested that, without a stipulation as

¹³⁹ *Magruder v. Commonwealth*, 657 S.E.2d 113, 113 (Va. 2008), *cert. granted sub nom.*, *Briscoe v. Virginia*, 130 S. Ct. 2858, (2009).

¹⁴⁰ *Id.* at 118-19. The Virginia Court based its decision on *Brooks v. Commonwealth*, 638 S.E.2d 131, 131 (Va. App. 2006). *Magruder*, 657 S.E.2d at 122 ("We agree with the holding of the Court of Appeals in *Brooks*: 'Code § 19.2-187.1 sets out a reasonable procedure to be followed in order for a defendant to exercise his right to confront a particular limited class of scientific witnesses at trial.'" (quoting *Brooks*, 638 S.E.2d at 136)). In *Brooks*, the Virginia Court characterized the statutory procedures as *mere requests* that the defendant stipulate to the admissibility of the reports, and found that waiting until trial to request the analyst's presence amounted to waiver of the right and acceptance of the stipulation. *Brooks*, 638 S.E.2d at 137. In upholding the reasonableness of the statutory requirements, the Virginia Court emphasized that the procedures benefit the system as a whole. *Id.* at 136 ("This procedure encourages judicial and governmental economy by providing that certain scientific witnesses, employees of the state, need not routinely be called to testify . . .").

¹⁴¹ Defendants also argued that lack of instructions regarding waivers in the statute does not ensure that waivers would be voluntary, knowing, and intelligent. *Id.*

¹⁴² *Id.* at 123-24 ("Failure to use the statutory procedure obviously waives the opportunity to confront the forensic analyst."). Other Virginia cases, such as *Bell v. Commonwealth*, 622 S.E.2d 751 (Va. App. 2005), similarly found that a defendant could waive his right to confront a witness if prosecutors complied with the statutory procedures, but held that the State's failure to comply with the mailing requirement in the statute was not harmless, and thus admission of the certificate without the analyst's testimony was not harmless error. *Id.*

¹⁴³ *Magruder*, 657 S.E.2d at 125.

¹⁴⁴ *Id.* at 131 (Keenan, J., dissenting) (suggesting that because the Confrontation Clause is worded in the affirmative – "to be confronted with witnesses against him" – the right arises automatically).

¹⁴⁵ *Id.*

to the results, or an affirmative waiver, the prosecutor should be required to call the testing analyst as part of its case-in-chief.¹⁴⁶ The dissent's criticisms and suggestions serve as useful guidelines for future notice-and-demand legislation.

D. *Briscoe: Unwilling to Upset Melendez-Diaz*

The Supreme Court granted certiorari to *Briscoe v. Virginia* to determine the validity of pre-amended Virginia statutes setting forth procedures for defendants who chose to confront forensic analysts.¹⁴⁷ Two weeks after oral arguments on January 11, 2010, the Court chose not to decide *Briscoe*, and remanded it to the Supreme Court of Virginia.¹⁴⁸ Perhaps the Court felt it was too soon to decide a case that might upset the *Melendez-Diaz* decision, or that *Briscoe* was a "poor vehicle" through which to provide guidance to lower courts on this issue.¹⁴⁹

Briscoe consolidated the appeals of petitioners Briscoe and Cypress, whose convictions were upheld by the Supreme Court of Virginia.¹⁵⁰ In both cases, petitioners had objected at trial, on Confrontation Clause grounds, to the introduction of the certificates showing that the seized substances contained cocaine.¹⁵¹

On appeal before the Supreme Court, respondents Virginia and the United States maintained that Virginia's procedure, as interpreted by the Supreme Court of Virginia, was a valid notice-and-demand statute that preserved a defendant's right to confrontation.¹⁵² Petitioners Briscoe and Cypress, however, contended that Virginia's statute was "not a notice-and-demand statute,"¹⁵³ but rather a subpoena statute that is "fatally defective in that it requires the defendant who wishes to examine a prosecution witness, rather than the prosecution, to bear the risk that the witness will not appear at trial."¹⁵⁴

The text of the Confrontation Clause provides little guidance on this matter, requiring only that an accused "be confronted with" witnesses against him; the passive structure of the phrase suggests that the defendant need not summons the witness. Putting the burden on the defendant to demand that the

¹⁴⁶ *Id.* at 132. *But see* *People v. McClanahan*, 729 N.E.2d 470, 476 (Ill. 2000) (finding that it is never permissible to require a defendant to affirmatively invoke his right to confrontation).

¹⁴⁷ See VA. CODE ANN. §19.2-187, -187.01, -187.1 (2008) (amended 2010).

¹⁴⁸ *Briscoe v. Virginia*, 130 S. Ct. 2858, 2858 (2009).

¹⁴⁹ See Adam Liptak, *Court Refuses Noriega Case and Disposes of Another*, N.Y. TIMES, Jan. 26, 2010, at A15.

¹⁵⁰ *Magruder*, 657 S.E.2d at 113.

¹⁵¹ *Id.* at 115.

¹⁵² See Brief of Respondent, *supra* note 135, at 13.

¹⁵³ Transcript of Oral Argument, *supra* note 29, at 57.

¹⁵⁴ Reply Brief for Petitioners, *supra* note 122, at 16.

prosecution produce the analyst at trial does not force the defendant to bear the entire burden of bringing the witness to court. A statute requiring a defendant to summons the analyst as his own witness, however, puts too heavy and unconstitutional a burden on the defendant. Requiring the defendant to take *some* action, though, may be acceptable, and ideally lessens potentially wasteful production of analysts and wasted court time.

Before *Melendez-Diaz*, statutes such as those in Massachusetts and Virginia were already scrutinized for placing little or no burden on the prosecution to present all of its witnesses.¹⁵⁵ These states are in the process of reorganizing their systems in a manner that is constitutionally permissible. Perhaps foretelling is this statement from *Melendez-Diaz* that Justice Scalia repeated during the *Briscoe* oral arguments:

More fundamentally, 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.¹⁵⁶

Thus, on this language alone, any statute imposing on the defendant a duty to subpoena or request the technician may not be acceptable. The language in footnotes twelve and fourteen of the *Melendez-Diaz* opinion, however, suggests that Massachusetts and other states attempting to comply with the decision 1) can fashion a constitutional notice-and-demand statute that places *some* responsibility on the defendant to demand the analyst's presence and 2) may not need to rely as heavily on laboratory reports but instead on other methods of proof.

III. IMMEDIATE IMPACT OF *MELLENDEZ-DIAZ* ON MASSACHUSETTS AND VIRGINIA

A. *Massachusetts*

1. Case Law Since *Melendez-Diaz*

Between the *Crawford* and *Melendez-Diaz* decisions, defendants in Massachusetts could object to the introduction of certificates of analysis, but

¹⁵⁵ See, e.g., Metzger, *supra* note 76, at 530-31 (suggesting that legislators, in drafting such notice-and-demand statutes, "rely on defense failure [to take action and request live testimony] to help prosecutors get cheaper convictions"); Steven N. Yermish, *Melendez-Diaz and the Application of Crawford in the Lab*, THE CHAMPION, Aug. 2009, at 28, 29 (discussing how the disagreement about the constitutionality of notice-and-demand statutes, between the majority and dissent in *Melendez-Diaz*, "may portend more 'notice and demand' legislation in the coming year").

¹⁵⁶ Transcript of Oral Argument, *supra* note 29, at 46 (quoting *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2540 (2009)).

judges would admit the certificates anyway, relying on state law set forth in *Verde*.¹⁵⁷ In cases where defendants did object on confrontation grounds to the introduction of certificates, courts have been reviewing the cases with a harmless error standard, the standard for constitutional error.¹⁵⁸ Under this standard, “the question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction,”¹⁵⁹ and not whether there was sufficient other evidence, had the certificates been excluded, to convict the defendant.¹⁶⁰ The certificates were usually the prosecution’s strongest or only evidence.¹⁶¹ Therefore, the “evidence complained of” very likely contributed to the conviction; the certificate of analysis identified the presence and quantity of the drugs, usually the unresolved element in a drug possession or trafficking case.¹⁶² As a result, numerous convictions for drug possession are being reversed, including *Commonwealth v. Melendez-Diaz*, on remand from the Supreme Court.¹⁶³ Convictions in firearm prosecutions, where ballistics certificates were introduced, are also being reversed.¹⁶⁴

Footnote fourteen of *Melendez-Diaz*, which does not foreclose the use of circumstantial proof in place of lab reports, may have contributed to the upholding of convictions based on the sufficiency of such circumstantial proof.¹⁶⁵ In *Commonwealth v. Connolly*, for example, the Supreme Judicial

¹⁵⁷ See *Commonwealth v. DePina*, 917 N.E.2d 781, 789 (Mass. App. Ct. 2009).

¹⁵⁸ See, e.g., *id.* at 789 (“We review a preserved constitutional error to determine whether it was harmless beyond a reasonable doubt.”).

¹⁵⁹ *Chapman v. California*, 386 U.S. 18, 23 (1967) (quoting *Fahy v. Connecticut*, 375 U.S. 85, 86-87 (1963)).

¹⁶⁰ See *Commonwealth v. Muniz*, 921 N.E.2d 981, 985 (Mass. 2010) (citing *Commonwealth v. Tyree*, 919 N.E.2d 660, 683 (Mass. 2010)).

¹⁶¹ Telephone Interview with Brownlow Speer, *supra* note 72.

¹⁶² See *DePina*, 917 N.E.2d at 789 (“[T]he Commonwealth must prove that a substance is a particular drug either by chemical analysis or by circumstantial evidence.” (quoting *Commonwealth v. McGilvery*, 908 N.E.2d 783, 787 (Mass. 2009))).

¹⁶³ *Commonwealth v. Melendez-Diaz*, 921 N.E.2d 108, 113 (Mass. App. Ct. 2010) (“We conclude that the certificates were of significant importance in the Commonwealth’s case because they were the only evidence of the composition and weight of the substances, and the other evidence against the defendant was circumstantial and certainly not overwhelming.”); see also, e.g., *Commonwealth v. Charles*, 923 N.E.2d 519, 524 (Mass. 2010) (setting aside conviction for possession of cocaine and marijuana where certificates were introduced, and remarking that “[t]his is not a case where the facts independent of the drug certificates overwhelmingly prove the nature of the substances recovered from the automobile”). On February 10, 2011, *Melendez-Diaz* was acquitted of the cocaine trafficking charges in his retrial in the Suffolk Superior Court. See Martin Finucane, *Drug defendant retried on high court’s order is acquitted*, THE BOSTON GLOBE, Feb. 11, 2011, (Metro) at 3.

¹⁶⁴ See, e.g., *Muniz*, 921 N.E.2d at 983 (finding that error in admitting ballistics certificate in firearm possession charge was not harmless beyond a reasonable doubt).

¹⁶⁵ See *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2542 n.14 (2009).

Court affirmed a finding that the admission of the certificates without the analyst's testimony was harmless beyond a reasonable doubt.¹⁶⁶ The Court in *Connolly* found "evidence other than the certificate of analysis" sufficient to uphold the conviction.¹⁶⁷ Three police officers, all with more than thirteen years' experience, testified about undercover purchases from the defendant, field tests the officers conducted, and the size of the seized substance.¹⁶⁸ Additionally, jurors examined the substance and the Court afforded their common-sense judgments some weight in reaching the decision.¹⁶⁹ Other recent decisions also demonstrate how prosecutors can avoid full reliance on laboratory certificates.¹⁷⁰ Where the prosecution presented only the certificates of analysis to prove composition and weight of an illegal substance, without other circumstantial evidence such as field-testing or police officer testimony, the Massachusetts Appeals Court has reversed drug trafficking convictions.¹⁷¹

In cases where defendants did not object to the introduction of certificates, courts generally use a "substantial risk of miscarriage of justice" standard, which is a higher, more demanding standard for the defendant to meet on appeal.¹⁷² In fewer cases, courts are applying the "clairvoyance" exception, which applies to constitutional errors on theories not sufficiently developed at the time when the defendant did not make an objection.¹⁷³ Under this exception, courts review the error using the harmless standard, the standard more favorable to defendants.¹⁷⁴ In March 2010, the Massachusetts Supreme Judicial Court held that the new rule of *Melendez-Diaz* would apply to trials held from 2005 (when the state law, interpreting *Crawford*, permitted trials without the analysts) through 2009.¹⁷⁵ The Court held, in fact, that the appeal would be available to defendants whether they objected or not.¹⁷⁶

¹⁶⁶ *Commonwealth v. Connolly*, 913 N.E.2d 356, 375 (Mass. 2009).

¹⁶⁷ *Id.* at 376.

¹⁶⁸ *Id.* at 375-76.

¹⁶⁹ *Id.* (citing *Commonwealth v. Thomas*, 787 N.E.2d 1047, 1052 (Mass. 2003)).

¹⁷⁰ *See, e.g., Commonwealth v. Johnson*, 918 N.E.2d 876, 879-80 (Mass. App. Ct. 2010) (upholding conviction where prosecution presented a certificate of analysis, citing footnote fourteen and the "ample circumstantial evidence of cocaine," as well as the prosecutors' minimal references to the certificates).

¹⁷¹ *Commonwealth v. Rodriguez*, 925 N.E.2d 21, 32 (Mass. 2010) ("The Commonwealth relied solely on the certificate to prove that the substance was cocaine. No independent evidence was presented to establish the composition of the substances.").

¹⁷² *See, e.g., Commonwealth v. Vasquez*, 914 N.E.2d 944, 949, 952 n.6 (Mass. App. Ct. 2009) (upholding conviction based on this standard, and observing that harmless beyond a reasonable doubt standard would reverse convictions).

¹⁷³ *See Connolly*, 913 N.E.2d at 375 (declining to apply the even more favorable standard of harmless standard, because under any standard the error was harmless).

¹⁷⁴ *See Commonwealth v. Mendez*, 914 N.E.2d 348, 354 (Mass. App. Ct. 2009) (discussing the clairvoyance standard, but finding that under either standard, the admission of a ballistics certificate was harmless).

¹⁷⁵ *Commonwealth v. Vasquez*, 923 N.E.2d 524, 533 (Mass. 2010); *see also* John R.

2. Proposed Notice-and-Demand Legislation in Massachusetts

Massachusetts' courts, District Attorney's Offices, defense bar, and crime laboratories are responding to the new constitutional rule in varying strides. Among various proposed and already-implemented changes, a pending "notice-and-demand" statute has been lingering in the legislature.¹⁷⁷ Governor Deval Patrick submitted this proposed statute to the State House and Senate on July 17, 2009, declaring the bill an "emergency law, necessary for the immediate preservation of the public safety."¹⁷⁸ In his letter urging support of the bill, Patrick warned of the potential detrimental effects of the *Melendez-Diaz* decision on criminal trials, including the need to dismiss cases due to backlogs in the laboratories.¹⁷⁹ The Governor called the proposal a notice-and-demand procedure that "protects defendants' constitutional rights, while at the same time allowing prosecutors and the state laboratories to better manage their limited resources."¹⁸⁰

Under the proposed notice-and-demand bill, prosecutors would file with a clerk *notice* of intent to rely on the certificate without the testimony of the preparing analyst.¹⁸¹ The notice would be included in the conference report required under Rule 11 of Massachusetts Rules of Criminal Procedure, and would identify the type of report on which the Commonwealth intended to rely.¹⁸² The notice would be filed prior to the pretrial hearing date, or later, at the court's discretion, if the Commonwealth showed good cause.¹⁸³ The prosecution must include in the report written notice to the defendant that failure to object to the admission of the certificate, according to the statute, forfeits the defendant's rights to demand that the Commonwealth call the analyst.¹⁸⁴

Once the notice is filed, the defendant could *demand* that the Commonwealth call the analyst to testify.¹⁸⁵ Thus, under the proposal, a defendant who follows the procedures *in a timely fashion* would not bear the

Ellement, *Ruling on drug cases may spur appeals; Hundreds could seek new trial, early release*, THE BOSTON GLOBE, Mar. 26, 2010, (Metro) at 2 ("[S]ome convicted drug dealers could win early release because of a ruling by the state's highest court yesterday that retroactively applies a new constitutional principle to drug trials.").

¹⁷⁶ *Vasquez*, 923 N.E.2d at 539 ("In the case of a preserved constitutional error, as we have here, the constitutional error cannot go unchecked on appeal because the defendant did not build his defense around it.").

¹⁷⁷ See H.B. 4162, 186th Gen. Ct., Reg. Sess. (Mass. 2009).

¹⁷⁸ *Id.* at 3.

¹⁷⁹ *Id.*

¹⁸⁰ Deval Patrick, Foreword to H.B. 4162, 186th Gen. Ct., Reg. Sess. 2.

¹⁸¹ H.B. 4162, 186th Gen. Ct., Reg. Sess. § 6B(a)(1).

¹⁸² *Id.*; MASS. R. CRIM. P. 11.

¹⁸³ H.B. 4162, 186th Gen. Ct., Reg. Sess. § 6B(a)(1).

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* § 6B(a)(2).

burden of calling the analyst, and the Commonwealth would not be able to present the report without the testimony.¹⁸⁶ Accordingly, the Commonwealth *may* submit the report if the defendant fails to object.¹⁸⁷ Finally, the proposal includes a provision accounting for delays induced by the defendant's demand: such holdups or continuances would not count in computing the time when a trial must commence under the speedy trial rule.¹⁸⁸

While this proposal has not been enacted yet, it has encountered resistance from the Massachusetts defense bar and may not fall within the type of notice-and-demand procedures Scalia envisioned in *Melendez-Diaz*.¹⁸⁹ The timing procedures are vague and allow substantial leeway for when and how a prosecutor may notify the defendant.¹⁹⁰ Although the prosecutor "shall" provide notice before the pretrial hearing, such notice "may" come in a pretrial conference report, which is typically submitted during the hearing.¹⁹¹ Furthermore, the defendant, unless he obtains a leave of court "for good cause shown," must make a demand "on or before" the pretrial hearing.¹⁹² Because the Commonwealth's discovery obligations often remain incomplete at the pretrial hearing, this requires the defendant to plan his strategy and make these demands before discovery is complete.¹⁹³ Due to the significant backlog in the labs, the defendant might be forced to make the decision to demand the analyst's presence before the substance is analyzed.

Additionally, the provision discounting the defendant's speedy trial right raises other issues of the bill's constitutionality. Allowing for an extension in the timeframe under which the Commonwealth must try the case seemingly penalizes the defendant for exercising the confrontation right.¹⁹⁴ When the defendant does decide to make the demand, the court proceedings will most likely extend beyond the speedy trial timeline due to the backlog in the labs and difficulty in scheduling analysts' presence in court.¹⁹⁵ Thus, while a notice-and-demand bill may ease the burden on the laboratories, a bill sacrificing another constitutional right likely will not succeed.

¹⁸⁶ *Id.* § 6B(a)(3).

¹⁸⁷ *Id.* § 6B(a)(3)-(4).

¹⁸⁸ *Id.* § 6B(4)(b); *see also* MASS. R. CRIM. P. 36.

¹⁸⁹ *See* Michael Shiposh, *The Aftermath of Melendez-Diaz v. Massachusetts* in *Massachusetts Trial Courts* 36 (Dec. 2009) (unpublished student paper) (on file with author).

¹⁹⁰ *Id.* (discussing aversions to the proposed legislation).

¹⁹¹ *See* H.B. 4162, 186th Gen. Ct., Reg. Sess. § 6B(a)(2) (Mass. 2009).

¹⁹² *Id.*

¹⁹³ *See* MASS. R. CRIM. P. 14; *see also* Shiposh, *supra* note 189, at 36.

¹⁹⁴ *See* Shiposh, *supra* note 189, at 36-37.

¹⁹⁵ *See infra*, Part III.A.3.

3. Practical Concerns in the Laboratories, Courtrooms, and District Attorneys' Offices in Massachusetts

After the decision, there is a considerable concern with the distribution of responsibility among Massachusetts' three laboratories that test substances for narcotics, and the backlog in the Department of Public Health (DPH) Laboratory, which handles the majority of drug cases.¹⁹⁶ There are three laboratories in Massachusetts that test substances for the presence of narcotics: the DPH Laboratories in Jamaica Plain and Amherst, the State Police Laboratory in Sudbury, and the University of Massachusetts Worcester Laboratory. According to John Grossman, Undersecretary of Forensic Science and Technology with the Executive Office of Public Safety and Security in Massachusetts, the consequences of *Melendez-Diaz* on the three drug labs in Massachusetts are significant, making the aftermath of the decision more of a public policy issue than a legal debate.¹⁹⁷ Furthermore, the National Academy of Sciences (NAS) report¹⁹⁸ influencing the *Melendez-Diaz* decision stated that most forensic labs are run by state law enforcement agencies, making forensic evidence "not uniquely immune from the risk of manipulation."¹⁹⁹ Implementing the changes suggested in the NAS report, such as making all crime labs independent of law enforcement (only the State Police lab is not independent in Massachusetts), will be costly.²⁰⁰ In fact, according to Grossman, such a change would require an increase in the budget from seventeen to twenty-seven million dollars, and ironically, does not apply to the most burdened DPH lab in Jamaica Plain.²⁰¹

Even before *Melendez-Diaz*, the State Police and Worcester labs had turnaround times of thirty days and twelve days, respectively, and no backlogs, while the DPH had a "huge backlog" and a turnaround time of six months.²⁰² Another significant inequity between DPH and the other two labs, which receive fixed funds from the State Legislature to test drugs or DNA samples, is that DPH receives fixed funds for testing relating to epidemiology, food safety, pandemic planning, smoking cessation, and drug testing.²⁰³ Thus, according to Grossman, unlike the other two labs, which can make decisions between

¹⁹⁶ Telephone Interview with John Grossman, *supra* note 108.

¹⁹⁷ See John Grossman, Undersec'y of Forensic Sci. and Tech., Exec. Office of Pub. Safety and Sec., Remarks at the *New England Journal on Criminal and Civil Confinement* Fall Symposium (Nov. 13, 2009) (transcript available in the New England School of Law library) (speaking on a panel entitled: "Fostering Effective Forensic Analysis") [hereinafter Grossman Remarks], available at http://www.nesl.edu/students/ne_journal_symposia.cfm.

¹⁹⁸ NAT'L RESEARCH COUNCIL OF THE NAT'L ACADS., STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD 6 (2009).

¹⁹⁹ *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2536 (2009).

²⁰⁰ See Grossman Remarks, *supra* note 197.

²⁰¹ *Id.*

²⁰² Telephone Interview with John Grossman, *supra* note 108.

²⁰³ *Id.*

“apples and apples,” DPH must contend with more stakeholders’ interests, making decisions between “apples and steaks.”²⁰⁴ In other words, the DPH lab must balance many more responsibilities than the other labs and cannot forsake food safety testing or pandemic planning in order to test all of the drug samples from the District Attorneys’ Offices (and subsequently spend more time out of the labs testifying in court).

Since the decision, the State Police lab has begun analyzing cases coming out of Middlesex County, which DPH previously handled.²⁰⁵ While this, as well as the recent decriminalization of marijuana, eases the load, DPH is still overburdened and in early 2010 had a turnaround time for drug cases of nine to ten months.²⁰⁶ Because of this backlog, requiring the analysts to appear in court further slows down testing, leading to delays in trials, and possible dismissals of charges due to speedy-trial requirements and the prosecutorial reliance on affidavits. Furthermore, the decision also affects ballistics, blood-alcohol, DMV, autopsy, and perhaps many other yet-unconsidered types of affidavits.²⁰⁷

According to Julianne Nassif, Director of the Division of Analytical Chemistry at DPH, between June 2009 and January 2010, the fifteen DPH analysts received over 900 subpoenas and were actually required to appear in court to testify in about twenty-five percent of the cases.²⁰⁸ The State Police lab received fewer – almost 400 subpoenas by December 2009 – but analysts were only required to appear less than ten percent of the time; the Worcester lab has received the least.²⁰⁹ The challenges the DPH analysts face include lost time in the lab, extra time required to prepare for testimony, travel time, wait time in court, and balancing summons to testify for several cases on one day.²¹⁰

²⁰⁴ *Id.*

²⁰⁵ *Id.* (noting that DPH has only fifteen chemists).

²⁰⁶ *Id.* (offering a possible solution that every Tuesday could be “drug day,” the day on which analysts testify, but explaining that this has not materialized).

²⁰⁷ See *Commonwealth v. Semedo*, 921 N.E.2d 57, 67 n.14 (Mass. 2010) (rejecting defendant’s objection that allowing testimony of medical examiner who did not perform an autopsy violated *Melendez-Diaz*); *Commonwealth v. Avila*, 912 N.E.2d 1014, 1028 (Mass. 2009) (ruling that a “substitute medical examiner” may, without violating *Melendez-Diaz*, testify as an expert witness and provide opinions based on another examiner’s autopsy report); *Commonwealth v. Martinez-Guzman*, 920 N.E.2d 322, 325 n.3 (Mass. App. Ct. 2010) (finding that defendant waived his right to make a *Melendez-Diaz* objection when the prosecutor submitted records from the RMV, but also that the RMV records do not fit within the *Melendez-Diaz* scope); *Commonwealth v. Mendes*, 914 N.E.2d 348, 354 (Mass. App. Ct. 2009) (finding, after the *Melendez-Diaz* decision, that “admission of the ballistics certificate would not alter the verdict” where defendant was convicted of unlawful possession of a firearm).

²⁰⁸ Telephone Interview with Julianne Nassif, Dir., Dep’t of Analytical Chem. at the Mass. Dep’t of Pub. Health (Jan. 14, 2010).

²⁰⁹ Telephone Interview with John Grossman, *supra* note 108.

²¹⁰ Telephone Interview with Julianne Nassif, *supra* note 208.

To alleviate the burden on the analysts, the Suffolk County District Attorney's Office has been putting analysts on standby, notifying them as close in time to the required testimony as possible.²¹¹

Further, in cases where multiple analysts participated in the testing, all of the analysts could be subpoenaed. In fact, DPH has received subpoenas for cases where five analysts were involved and all were summonsed; one of the analysts, since the time of testing, no longer worked in the lab.²¹² As a result, DPH is now attempting to have only one chemist complete all the steps in testing one case.²¹³ Another of several changes in the labs involves prioritizing testing of different types of possession cases: drug trafficking of Class A substances such as heroin are the highest priority, while simple possession of cocaine, a Class B drug, are a lower priority in the labs.²¹⁴ In spite of such minor modifications, DPH is still backlogged, and the current inefficiencies, without significant increases in financial and political resources, will not abate.

As crime labs endeavor to keep up with the increasing workload, prosecutors, too, are making efforts to comply with *Melendez-Diaz* while maintaining an efficient system. District Attorney's Offices around the Commonwealth are pleading drug possession cases out differently.²¹⁵ For example, with charges such as possession with intent to distribute within a school zone where defendants face mandatory minimum sentences, Suffolk and Worcester County District Attorneys' Offices, among others, have been reducing the mandatory minimum sentences for defendants who plead guilty before trial.²¹⁶ According to Suffolk County Chief Trial Counsel Patrick Haggan, such a policy is not particularly novel, as prosecutors typically offered discounts for defendants who accepted pleas before trial, sparing the Commonwealth and court system the time and cost of going to trial.²¹⁷ But now, with the added burden on the Commonwealth of producing the chemist, prosecutors may be more willing to give defendants who do not request the chemist, or who accept earlier pleas, a discount in the sentence recommendation.²¹⁸ The result may even be the de facto decriminalization of the certain types of drug possessions.

In light of *Melendez-Diaz*, District Attorney's Offices around the Commonwealth are taking steps similar to Suffolk County's, which Haggan calls the "carrot and stick" approach.²¹⁹ On one end is the carrot – the offer of a significant discount if the defendant does not require an analyst's presence –

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Id.*

²¹⁴ Haggan Remarks, *supra* note 13.

²¹⁵ Telephone Interview with John Grossman, *supra* note 108.

²¹⁶ Haggan Remarks, *supra* note 13.

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.*

and the other end the stick – a more automatic request by prosecutors to impose the mandatory minimum sentence if the case proceeds to trial.²²⁰ Of course, this is an informal policy allowing for prosecutorial discretion.²²¹ Furthermore, this is not, according to Haggan, an “unethical or invalid” approach that punishes people for exercising a constitutional right: imposing a mandatory minimum sentence is often a statutory requirement that does not even give a judge or prosecutor discretion in ultimate sentencing decisions.²²² Although most of the District Attorney’s Offices around the Commonwealth must adapt to the change, the Offices do not have a unified, formal, and publicized policy of how to handle the range of cases where laboratory reports previously provided a common, uncomplicated method of proof.

Noticeable in the aftermath is the difference in number and types of cases appealed in Massachusetts and in other states, in light of *Melendez-Diaz*. In Massachusetts, most appeals involve drug and gun certificate cases, while in New York, where prosecutors were already required to call the testing analyst, most appeals focus on whether the analysts who calibrated testing equipment must appear.²²³ The disparity in and volume of *Melendez-Diaz* appeals shows that the bounds of the decision require fine-tuning.

B. Virginia

Virginia amended its notice-and-demand statute governing this procedure on August 21, 2009, after the *Melendez-Diaz* decision.²²⁴ On March 12, 2010, Virginia passed a bill modifying the August 2009 legislation.²²⁵ The March 2010 version added more clarifying language to the August version.²²⁶

The first, general provision of the repealed, pre-*Melendez-Diaz* statute made clear that a prosecutor could admit certain certificates of analysis as prima facie evidence without the analyst’s testimony.²²⁷ The amended section requires the prosecutor, seven days before the proceeding, to file the certificate of analysis with the clerk of the court hearing the case.²²⁸ This act provides

²²⁰ *Id.*

²²¹ *Id.*

²²² *Id.* (quoting Haggan’s response to an audience member’s question about the constitutionality of an informal procedure seemingly punishing people for exercising rights).

²²³ *See, e.g.*, *People v. Harvey*, No. 09100144, 2010 N.Y. Misc. LEXIS 195, at *2-3 (Sup. Ct. Feb. 4, 2010); *People v. Di Bari*, 2010 N.Y. Misc. LEXIS 238, at *3-4 (Justice Ct. Feb. 8, 2010).

²²⁴ *See* VA. CODE ANN. § 19.2-187, -187.1(A)-(E) (2006), *amended by* § 19.2-187.1(A)-(E) (effective Sept. 15, 2009).

²²⁵ S.B. 106, 2010 Gen. Assem., Reg. Sess. (Va. 2010).

²²⁶ *Id.* (clarifying that “the term ‘certificate of analysis’ includes reports of analysis and results of laboratory examination,” and that the prosecutor need only notify a defendant when the prosecutor plans to introduce the report “in lieu of” testimony).

²²⁷ VA. CODE ANN. § 19.2-187 (2006) (amended 2009).

²²⁸ S.B. 106, 2010 Gen. Assem., Reg. Sess. (Va. 2010).

“notice” to the accused; in *Briscoe* the petitioners did not contend that this part of the procedure was unconstitutional.²²⁹ Rather, petitioners argued that the “demand” element was invalidated by *Melendez-Diaz* because it required the defendant to subpoena the analyst.²³⁰

Opponents of the now-defunct statute regard the August 2009-amended version as a more proper notice-and-demand statute.²³¹ In contrast to the former, the amended version added more specific timing requirements, waiver procedures, and continuance rules.²³² The statute does not accept waiver by silence, and instead requires an affirmative waiver – in writing or before the court.²³³ One subsection grants continuances if the person who tested the substance is not available for the trial or hearing.²³⁴ The wording suggests that securing the presence of the analyst who actually tested the substance, thereby delaying a trial or hearing for up to 180 days and sacrificing a defendant’s speedy trial right, is preferable to having a lab supervisor testify on the scheduled date of trial.

Finally, the amendment requires the prosecutor to “provide simultaneously,”²³⁵ with the copy of the certificate of analysis, a notice to the accused of his right to object to admitting the certificate in lieu of in-person testimony.²³⁶ This provision adds an extra layer of notice to the defendant, perhaps in an effort to foreclose the chance of an unknowing waiver. Interestingly, the Virginia Court of Appeals, in hearing appeals after *Melendez-Diaz*, is predominantly focusing on waiver, finding that defendants often waived the *Melendez-Diaz* issue.²³⁷

²²⁹ Cf. Brief of Respondent, *supra* note 135, at 14-15 (suggesting the Virginia law satisfied the requirement for notice, alerting defendants to steps they must take to ensure the analyst’s presence in court).

²³⁰ *Id.* at 15.

²³¹ See, e.g., *id.* at 57-58 (pointing to the revised statute as evidence that Virginia can write a “good notice and demand statute,” and observing that “[i]f Virginia wanted to write a notice and demand statute before, it could have”); Reply Brief for Petitioners, *supra* note 122, at 20-21 (“Unlike the new statute, this one provided notice to defendant only if he had thought ahead to ask for it.”).

²³² See VA. CODE ANN. § 19.2-187, -187.1(A)-(E) (2006), amended by § 19.2-187.1 (A)-(E) (effective Sept. 15, 2009).

²³³ Compare § 19.2-187.1(B) (“If timely objection is made, the certificate shall not be admissible into evidence unless . . . the objection is waived by the accused or his counsel in writing or before the court . . .”), with COLO. REV. STAT. § 16-3-309(5) (2010) (making no mention of how a defendant may waive his right to confront a testing technician).

²³⁴ VA. CODE ANN. § 19.2-187.1(C).

²³⁵ The March 2010 Virginia Senate Bill added this terminology to the statute. S.B. 106, 2010 Gen. Assem., Reg. Sess. (Va. 2010).

²³⁶ VA. CODE ANN. § 19.2-187.1(A)(2).

²³⁷ See Jennifer Friedman, *supra* note 14 (including six Virginia appeals in the chart of *Melendez-Diaz* cases).

In September 2009, two months after *Melendez-Diaz*, the Virginia Court of Appeals decided *Miller v. Commonwealth*, maintaining the reasonableness of the State's statutory requirements.²³⁸ Finding that the ballistics certificate admitted at the defendant's trial was testimonial in line with *Melendez-Diaz*, the court determined that admitting it without the testimony of the preparer did *not* violate the defendant's confrontation rights.²³⁹ The defendant, according to the Virginia Court of Appeals, waived his right to confront the witness because he failed to comply with the statutory procedure.²⁴⁰ Citing *Magruder, Brooks, Grant*, and *Melendez-Diaz*, the Court declined to find that, by shifting the burden to the defendant to call the analyst, the statute violated the defendant's rights.²⁴¹

In *Grant v. Commonwealth*,²⁴² the Virginia Appeals Court found that a breath test report's attestation clause was testimonial under *Melendez-Diaz*,²⁴³ and found that it was not harmless error to admit the report without presenting the person who prepared the report.²⁴⁴ The attestation clause was intended by the State legislature to be "self-proving" and thus obviate the need for live testimony of the breath-test operator; the Virginia Appeals Court found this interpretation of the clause impermissible in light of *Melendez-Diaz*.²⁴⁵ Furthermore, the defendant wrote a valid request two months before his trial, but the State prosecutor did not secure the witness.²⁴⁶ On the defendant's appeal after *Melendez-Diaz*, the Virginia Court held that the defendant had not waived his right to confront the analyst who prepared the certificate in failing to follow the procedures.²⁴⁷

Petitioners in *Briscoe* maintained that *Grant* still did not appropriately clarify who the former statutes burdened: "Nothing in *Grant* suggests that the statute provides that the prosecution bears the risk that, notwithstanding reasonable efforts, the technician will prove to be unavailable to testify."²⁴⁸

²³⁸ See *Miller v. Commonwealth*, No. 1353-08-2, 2009 WL 2997079, at *3 (Va. Ct. App. Sept. 22, 2009).

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² 682 S.E.2d 84 (Va. Ct. App. 2009).

²⁴³ *Grant*, 682 S.E.2d at 88 (finding that because the breath test affidavit in *Grant* was "designed to be used exactly like the certificate at issue in *Melendez-Diaz*" and thus could not be admitted without proof of essential facts that usually would be provided by in-court testimony).

²⁴⁴ *Id.*

²⁴⁵ *Id.* at 88-89 (explaining that *Melendez-Diaz* invalidated such a method of introducing evidence through a self-proving clause).

²⁴⁶ *Id.* at 86 (finding that the trial court denied defendant the chance to confront the person who prepared the report when the State called the arresting officer instead).

²⁴⁷ *Id.* at 89

²⁴⁸ Reply Brief of Petitioners, *supra* note 122, at 19 (additionally stating that "in no event can it take as established the proposition that the former Virginia statute placed in the

This issue – who bears the burden of witness no-shows – was hotly debated in the *Briscoe* oral arguments. The amended statute kept the “shall be summoned” language,²⁴⁹ leaving room for more argument over who does, in fact, bear the burden.

In September 2010, the Supreme Court of Virginia found that the former Virginia statute violated the confrontation rights of the *Briscoe* petitioners.²⁵⁰ The court found that the former statute *did* place an impermissible burden on the defendants and did not protect their confrontation rights; the defendants thus did not waive their rights through silence.²⁵¹

Statutes that set forth valid, constitutional waiver procedures may allow states such as Massachusetts and Virginia to reduce the risk of greater trial delays and laboratory backlog. While an affirmative, intentional waiver may suffice, other types of waiver, such as waivers by silence, should not. For defendants who do not waive the right, but rather demand it, Virginia may need to revisit and clarify the “shall be summoned” language. Thus, whether Massachusetts’ proposed bill and Virginia’s amended statute are valid notice-and-demand statutes after *Melendez-Diaz*²⁵² will likely remain a contested issue.

IV. GUIDANCE FROM OTHER STATES’ PROCEDURES: “THE SKY WILL NOT FALL”

Before *Melendez-Diaz*, many states already required prosecutors to call testing analysts if the prosecutor planned to introduce a lab report.²⁵³ Several of these states follow statutory procedures falling under the notice-and-demand umbrella that govern the manner in which the defendant may preserve the opportunity to cross-examine the analyst, and thus secure this right.²⁵⁴

prosecution the burden of witness-noshows”).

²⁴⁹ S.B. 106, 2010 Gen. Assem., Reg. Sess. (Va. 2010), 2010 Va. Acts ch. 656.

²⁵⁰ *Cypress v. Commonwealth*, 699 S.E.2d 206, 213 (Va. 2010) (“Thus, in light of the decision in *Melendez-Diaz*, we now hold that the procedure established in former Code § 19.2-187.1 did not adequately safeguard a criminal defendant’s rights under the Confrontation Clause.”).

²⁵¹ *Id.*

²⁵² *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2541 n.12 (2009).

²⁵³ An amicus brief submitted by thirty-five states and the District of Columbia, on behalf of Massachusetts, “offer[s] a glimpse at the myriad of statutes and practices [that states] have devised to balance [their] interest in avoiding the wasteful production of unwanted witnesses with the defendant’s interest in cross-examining a laboratory technician.” See Brief of the State of Alabama et al. as Amici Curiae in Support of Respondent at 29, *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009) (No. 07-591).

²⁵⁴ For example, Ohio has what is known formally as a “notice-and-demand” statute, and Colorado has what is known as an “anticipatory demand” statute. *Id.* at 29-30.

Amicus Briefs supporting respondent Massachusetts in *Melendez-Diaz*²⁵⁵ and Virginia in *Briscoe*²⁵⁶ laid out the array of states' practices that regulate procedures for admitting lab reports at trial.²⁵⁷ The briefs asserted that the procedures avoid wasteful production of unwanted witnesses and preserve the defendant's opportunity to cross-examine a witness if he so chooses.²⁵⁸ The briefs classified states according to the methods available to prosecutors for alerting defendants of the plan to introduce lab reports: notice-and-demand, anticipatory demand, defense subpoenas, automatic admission, and surrogate witnesses.²⁵⁹

This Part will examine practices in Colorado (an "anticipatory demand" state), Ohio (a "notice-and-demand" state), and California (a "surrogate witness" state).²⁶⁰ The slightly varied practices in these states may serve as models for Massachusetts and other states in determining how to effectively comply with *Melendez-Diaz*.

A. Colorado

1. Statutory Procedure for Admitting Laboratory Certificates

An "anticipatory demand" state such as Colorado does not require prosecutors to affirmatively notify a defendant that the State plans to introduce a certificate of analysis at trial.²⁶¹ Instead, in simply turning over the reports during pre-trial discovery, the State effectively notifies the defendant of its intent to introduce the report.²⁶² Thus, Colorado law allows for laboratory reports to enter into evidence without a technician's testimony, unless any party makes a request for the technician to testify at least ten days before the criminal trial.²⁶³ Any party, either the defendant or prosecutor, may request the employee's or technician's in-court presence and notify that witness that he

²⁵⁵ Brief of the State of Alabama et al. as Amici Curiae in Support of Respondent, *supra* note 253.

²⁵⁶ Brief of the State of Indiana et al. as Amici Curiae in Support of Respondent, *Briscoe v. Virginia*, 130 S. Ct. 1316 (2010) (No. 07-11191).

²⁵⁷ Brief of the State of Alabama et al. as Amici Curiae in Support of Respondent, *supra* note 253, at 29-33.

²⁵⁸ *Id.*

²⁵⁹ *Id.*

²⁶⁰ *See id.*

²⁶¹ *See* Brief of the State of Indiana et. al. as Amici Curiae Supporting Respondent, *supra* note 256, at 14-15.

²⁶² *Id.*

²⁶³ COLO. REV. STAT. § 16-3-309(5) (2006) ("Any report or copy thereof or the findings of the criminalistics laboratory shall be received in evidence" for any hearing or proceeding "with the same force and effect as if the employee or technician . . . had testified in person.").

must appear.²⁶⁴ Criticizing such a procedure, Confrontation Clause scholar Paula Metzger remarks that an “anticipatory demand” framework may amount to “trial-by-ambush,” because defense counsel must “blindly” make pre-trial requests without knowing whether prosecution intends to rely on the report at trial.²⁶⁵

As interpreted by the Colorado Supreme Court, this statutory requirement protects a defendant’s confrontation right.²⁶⁶ Furthermore, requiring the defendant to give notice of his desire to have a technician testify is not unconstitutional.²⁶⁷ In 2003, the Colorado Supreme Court upheld the statute as constitutional in *People v. Mojica-Simental*,²⁶⁸ reasoning that it requires only “minimal effort” for the defendant to preserve his right.²⁶⁹ Thus, the defendant’s failure to comply with the statutory prerequisite of requesting live testimony serves as a waiver of his or her right to confront the witness.²⁷⁰

2. Case Law Interpreting Colorado’s Statutory Procedure Before *Melendez-Diaz*

Four days after the Court decided *Melendez-Diaz*, the Court denied certiorari for a 2007 Colorado case,²⁷¹ *Hinojos-Mendoza v. People*, which upheld the facial constitutionality of the Colorado code governing the admissibility of lab reports at trial.²⁷² In fact, the *Melendez-Diaz* opinion cited *Hinojos-Mendoza* as a decision in a state that had “already adopted the constitutional rule we announce today.”²⁷³ Kennedy’s dissenting opinion, however, cast doubt on the positive light that Justice Scalia shed on Colorado’s statute, suggesting that Colorado’s statute *is* burden-shifting because it places the burden on the defendant to exercise his right.²⁷⁴

²⁶⁴ *Id.*

²⁶⁵ Metzger, *supra* note 76, at 483-84 (characterizing anticipatory demand statutes as imposing no notice obligation on the prosecution, thereby leaving the defense guessing whether the reports will come in at trial).

²⁶⁶ See *People v. Williams*, 183 P.3d 577, 580 (Colo. App. 2007) (finding that the trial court erred in admitting a lab report without the testimony of the testing agent, after defendant had exercised right to confront the witness by requesting agent’s presence).

²⁶⁷ See *Hinojos-Mendoza v. People*, 169 P.3d 662, 668-69 (Colo. 2007).

²⁶⁸ 73 P.3d 15, 18 (Colo. 2003) (“[T]he statute seeks only to streamline the trial process . . .”).

²⁶⁹ *Id.* at 17.

²⁷⁰ See *Hinojos-Mendoza*, 169 P.3d at 670.

²⁷¹ *Hinojos-Mendoza v. Colorado*, 129 S. Ct. 2856 (2009), *denying cert. to* 169 P.3d 662 (Colo. 2007).

²⁷² *Hinojos-Mendoza*, 169 P.3d at 662 (upholding validity of COLO. REV. STAT. § 16-3-309(5) (2006)).

²⁷³ *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2540 & n.11 (2009).

²⁷⁴ *Id.* at 2558 (Kennedy, J., dissenting) (discussing how the defendant must give notice ten days before trial of his intent to confront the analyst at trial).

Hinojos-Mendoza set out Colorado's prevailing interpretation of *Crawford*. In *Hinojos-Mendoza*, the prosecution entered into evidence a lab report including the defendant's name, the description of a "tan tape wrapped block containing 1004.5 grams of compressed white powder," and under a "results" column, a statement that the substance was cocaine.²⁷⁵ The technician did not testify and defense counsel, after objecting to the evidence, informed the court that he did not know that Colorado law required him to request the analyst's presence ten days before trial.²⁷⁶ The laboratory analyst's absence was significant because reports did not indicate whether the weight included the tan paper wrapping, and the defendant faced different maximum penalties depending on whether the weight was more or less than 1000 grams.²⁷⁷ The defendant argued that the statute requiring defendants to request the analyst's in-person testimony was unconstitutional on its face in light of *Crawford*, or, as applied in his case, because he did not "voluntarily, knowingly, and intentionally waive his right to confrontation."²⁷⁸

First, the Supreme Court of Colorado found that laboratory reports, including the one at hand, *were* testimonial under *Crawford*.²⁷⁹ The Colorado Court upheld the statute as facially constitutional, though, because the burden on the defendant did not interfere with his right to confrontation but merely changed the *timing* of when he must decide whether to exercise the right.²⁸⁰ This is consistent with language in *Melendez-Diaz*, where Justice Scalia approved of such changes in timing.²⁸¹

Furthermore, the Colorado Court found that the defense counsel's failure to comply with procedural requirements was a valid waiver of the defendant's confrontation rights.²⁸² Interestingly, in *Mojica-Simental*, the court suggested that a defendant without actual notice, or who mistakenly fails to request the technician's presence, might not voluntarily be waiving his fundamental right to confrontation.²⁸³ The court in *Hinojos-Mendoza*, however, presumed that

²⁷⁵ *Hinojos-Mendoza*, 169 P.3d at 664.

²⁷⁶ *Id.*

²⁷⁷ *Id.* at 675 (Martinez, J., dissenting) ("Such a result, if arrived at in a capital case and weighing heavily in favor of death, would be unacceptable [and] is equally unacceptable in a drug case where test results or procedures are potentially unreliable or ambiguous.").

²⁷⁸ *Id.* at 669.

²⁷⁹ *Id.* at 666-67 (agreeing with cases decided in Washington D.C., Michigan, Minnesota, Nevada, Ohio, Oregon, and Texas that held that laboratory reports were testimonial under *Crawford*).

²⁸⁰ *Id.* at 668.

²⁸¹ See *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2541 (2009).

²⁸² *Hinojos-Mendoza*, 169 P.3d at 669-71 (explaining that confrontation rights fall within a class of rights that defense counsel can waive as a strategic decision, unlike rights which require the defendant to knowingly and voluntarily waive himself, like the rights to counsel, to enter a guilty plea, or to testify).

²⁸³ *People v. Mojica-Simental*, 73 P.3d 15, 20-21 (Colo. 2003).

the defense counsel knew of the procedure and therefore did not grant counsel leeway in failing to follow the rules.²⁸⁴

The dissent in *Hinojos-Mendoza* criticized the majority's use of presumptions – both that the defense counsel knew of the procedure, and that the choice to waive the right is merely a matter of timing.²⁸⁵ In line with Metzger, who contends that it is “absurd” and “nonsensical” to find that a defendant has waived his right to confrontation without knowing whether the state will rely on a forensic report,²⁸⁶ the dissent argued that a defendant must actually know what he is doing to relinquish a fundamental right.²⁸⁷ This requirement suggests that *more* than pre-trial discovery notice may be necessary for a defendant to have “actual notice” that the prosecution will submit the report.²⁸⁸ Such a requirement could potentially invalidate many statutes like Colorado's, which give a defendant notice without actually informing him of the intent to introduce the report. Furthermore, the dissent argued that a waiver of the confrontation right cannot be waived by silence, and that a valid waiver of the right can only come at trial, where the court has a record that the defendant knowingly, voluntarily, and intentionally chose not to confront the witness on the stand.²⁸⁹

Since *Melendez-Diaz*, there is little evidence of case appeals in Colorado based on *Melendez-Diaz*.²⁹⁰ Thus, prior case law interpreting the statute continues to define the requirements therein. Under Colorado law, a defendant complies with the statute after he files notice with the prosecution; the defendant need not subpoena the analyst – rather, the prosecutor should arrange for the analyst's appearance at trial.²⁹¹ Once the defendant has made the request, neither a police officer nor a laboratory supervisor without personal knowledge of the testing may replace the testing analyst.²⁹² Furthermore, a defendant's request for “any technician or employee” need not be strictly interpreted as such; the court will determine on a factual basis whether the defendant intended to request a specific analyst's presence, usually

²⁸⁴ *Hinojos-Mendoza*, 169 P.3d at 670.

²⁸⁵ *Id.* at 672-74 (Martinez, J., dissenting).

²⁸⁶ Metzger, *supra* note 76, at 518.

²⁸⁷ *Hinojos-Mendoza*, 169 P.3d at 673.

²⁸⁸ *Cf.* State v. Caulfield, 722 N.W.2d 304, 306 (Minn. 2006) (finding that Minnesota's statutory procedure did not adequately warn defendants that failing to request live testimony would result in a waiver).

²⁸⁹ *Hinojos-Mendoza*, 169 P.3d at 673 (asserting that “any resemblance” between a knowing waiver to confront a witness at trial who just finished testifying, and an obviously unknowing, pre-trial waiver that is contradicted by facts, is “purely illusory”).

²⁹⁰ See Friedman, *supra* note 14.

²⁹¹ See People v. Williams, 183 P.3d 577, 579 (Colo. App. 2007) (finding that the defendant's notice filed with the prosecutor in December, for a trial that ended up taking place the following October, sufficiently complied with the statute).

²⁹² *Id.* at 580.

the analyst who conducted the analysis.²⁹³ However, the prosecution need not present every lab technician who came in contact with, or physically “handled” the specimen, absent tampering.²⁹⁴ Under the statute, a supervising technician may be a legitimate expert to testify if he was authorized to perform the test, did perform the test, observed and interpreted results, and drew an expert conclusion about the substances present in the sample.²⁹⁵

In Colorado, in line with footnote fourteen of *Melendez-Diaz*, circumstantial evidence has been upheld as a valid method of proof where the analyst does not testify. In *People v. Santana*, for example, the Court found that where a defendant did not comply with the statute and request the chemist’s testimony ten days before trial, a police officer could testify to the results of preliminary analysis of a substance that was allegedly cocaine.²⁹⁶ The police officer could read the results of the report, based on experience and knowledge, and would not be viewed as an expert witness such as a lab analyst.²⁹⁷ Furthermore, Colorado allows the defendant to introduce his own expert to contradict the field test report, but such an expert’s testimony will carry more weight where the expert actually tested the substance.²⁹⁸ This practice may fall within the possibility left open in footnote fourteen of *Melendez-Diaz*.

B. Ohio

Since *Melendez-Diaz*, Ohio’s statute governing admissibility of certificates of analysis has been held up as a useful and valid notice-and-demand statute.²⁹⁹

²⁹³ *Id.* at 579 (concluding that once defendant complied with the statute, and prosecution arranged for the specific analyst to testify in earlier, cancelled, trial dates, the trial court did not err in refusing to admit the report when a replacement analyst appeared).

²⁹⁴ *See* *People v. Hill*, 228 P.3d 171, 176 (Colo. App. 2009) (holding that every technician who handled the sample need not appear in court, but leaving open the possibility that the prosecution may need to present several analysts if more are involved in the testing); *People v. Sutherland*, 683 P.2d 1192, 1197 (Colo. 1984) (stating that when prosecution sufficiently maintains the chain of custody of a sample, all lab analysts who came in contact with the sample need not appear at trial).

²⁹⁵ *Hill*, 228 P.3d at 176.

²⁹⁶ *See* *People v. Santana*, No. 08-CA-0978, 2009 WL 2182596, at *7 (Colo. App. July 23, 2009) (finding that, in Colorado, lab reports may be introduced in more than one way, without accompanying testimony, or with a police offer’s testimony).

²⁹⁷ *Id.*

²⁹⁸ *Id.* at *4 (remarking that prosecution should not draw the jury’s attention to the defendant’s failure to test the substance, as this would improperly suggest that the defendant has the duty to test the substance in order to prove it was not cocaine).

²⁹⁹ OHIO REV. CODE ANN. § 2925.51 (LexisNexis 2008). Judge Lowy of Massachusetts Superior Court called notice-and-demand statutes very useful and pointed to Ohio’s as being an exemplar. Judge David Lowy, Moderator at the *New England Journal on Criminal and Civil Confinement* Fall Symposium (Nov. 13, 2009), available at http://www.nesl.edu/students/ne_journal_symposia.cfm. Richard Friedman, attorney for petitioners Briscoe and Cypress, referred to Ohio as having “perfectly valid notice and

Ohio procedure requires the prosecutor to serve a copy of the lab report on the defendant, before trial, that explains the defendant's right to confront the analyst and the procedure by which he may make that demand.³⁰⁰ If the defendant makes the demand upon the prosecutor at least seven days before trial, the prosecutor bears the burden of producing the analyst who signed the report.³⁰¹

Under Ohio law, the defendant must make a knowing, intelligent, and voluntary waiver of his confrontation rights in order for the prosecutor to admit the lab reports without giving the defendant the opportunity to confront the technician.³⁰² Thus, Ohio's notice-and-demand procedure 1) requires a valid waiver and 2) clearly places the burden on the prosecutor to produce the witness.³⁰³ In the year before *Melendez-Diaz*, Ohio had 126 court appearances by lab analysts, less than one appearance per analyst each month.³⁰⁴ Perhaps Ohio's notice-and-demand system is an example that "the sky is not falling."

C. California

California has been called a "surrogate witness" state, one where prosecutors could produce a qualified lab employee as a "surrogate" for the testing analyst to explain the procedure and offer an opinion based on original data.³⁰⁵ The case establishing California's approach to admitting laboratory reports, *People v. Geier*, held that the laboratory reports at issue (DNA testing results) were not testimonial under either *Crawford* or *Davis*.³⁰⁶ This decision was based largely on the contemporaneousness of the reports; the laboratory analyst recorded her observations of the DNA test as she performed the analysis, and the court found that the report "constitute[s] a contemporaneous recordation of observable events rather than the documentation of past events."³⁰⁷ Notably, in *Melendez-Diaz*, the reports at issue were prepared a week after the analysis, and the opinion found only "near-contemporaneous observations" testimonial, making no comment about whether

demand rules." Transcript of Oral Argument, *supra* note 29, at 17.

³⁰⁰ OHIO REV. CODE ANN. § 2925.51(B), (D) (LexisNexis 2008).

³⁰¹ § 2925.51(C).

³⁰² See *State v. Pasqualone*, 903 N.E.2d 270, 274-79 (Ohio 2009).

³⁰³ OHIO REV. CODE ANN. § 2925.51 (LexisNexis 2008).

³⁰⁴ Both Richard Friedman and Judge David Lowy have commented on Ohio's statistic. See Transcript of Oral Argument, *supra* note 29, at 17; Judge Lowy, *supra* note 299.

³⁰⁵ Brief of the State of Indiana et al. as Amici Curiae in Support of Respondent, *supra* note 256, at 17.

³⁰⁶ *People v. Geier*, 161 P.3d 104, 134-40 (Cal. 2007) (finding that testimonial evidence included statements: (1) made to law enforcement agents, (2) describing past facts related to criminal activity, and (3) that would be used later in a criminal trial).

³⁰⁷ *Id.* at 139 (drawing parallels between the DNA report and the 911 call made by the victim in *Davis*).

contemporaneous observations are testimonial.³⁰⁸ *Bullcoming v. New Mexico*, currently pending before the Supreme Court, may address this issue.³⁰⁹

In September 2009, a California Appeals Court decided that *Geier* is still controlling law after *Melendez-Diaz* because 1) a supervisor of the analyst who prepared the DNA report in *Geier* testified and 2) the reports were prepared contemporaneously with the observations of the analyst, unlike in *Melendez-Diaz*.³¹⁰ In *People v. Gutierrez*, the court determined that *Geier*, not *Melendez-Diaz*, controls in cases dealing with laboratory reports prepared contemporaneously with observable events.³¹¹ On this basis, the court found that the majority of the entries in the sexual assault examination report were not testimonial under *Geier*, and that the narrative portion, which was testimonial, was not prejudicial.³¹² The California Court of Appeals revisited *Geier* after *Melendez-Diaz* in three other cases, with varying results, only one reaching the same conclusion as *Gutierrez*.³¹³ Although California courts continue to allow surrogate witnesses to testify, in December 2009, *Gutierrez* and the three other cases were granted further review in light of *Melendez-Diaz*. The findings in these three cases may invalidate California's surrogate witness rule, a result that would indicate a more conservative application of *Melendez-Diaz*. Furthermore, the decision in *Bullcoming* may trump California's decisions if the Court finds that a supervisor cannot replace the testing analyst.³¹⁴

Although an amended Massachusetts statute may abate the current inefficiencies while securing defendants' rights, it has not yet passed and there is resistance to some of its terms.³¹⁵ For example, under the proposed statute, defendants who request the analyst's presence may be forced to sacrifice the right to a speedy trial.³¹⁶ As a baseline, however, Massachusetts should look to other states' notice-and-demand statutes that were in place before the decision, and valid in light of it, for guidance.

³⁰⁸ *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2535 (2009).

³⁰⁹ *Bullcoming v. New Mexico*, No. 09-1876 (U.S. argued Mar. 2, 2011).

³¹⁰ *People v. Gutierrez*, 99 Cal. Rptr. 3d 369, 376 (Ct. App. 2009).

³¹¹ *Id.* at 376 n.3.

³¹² *Id.* at 377.

³¹³ *People v. Rutterschmidt*, 98 Cal. Rptr. 3d 390, 390 (Ct. App. 2009) (reaching same conclusion as *Gutierrez*); *People v. Dungo*, 98 Cal. Rptr. 3d 702, 704 (Ct. App. 2009) (observing that *Melendez-Diaz* "undermines" part of *Geier*'s rationale, but declining to hold that it overrules *Geier*); *People v. Lopez*, 98 Cal. Rptr. 3d 825, 825 (Ct. App. 2009) (finding that *Melendez-Diaz* "disapproved" of *Geier*).

³¹⁴ *Bullcoming*, No. 09-1876.

³¹⁵ See *supra* notes 177-194 and accompanying text.

³¹⁶ See H.B. 4162, 186th Gen. Ct., Reg. Sess. (Mass. 2009); *supra* Part III.A.2; see also U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . .").

V. POTENTIAL NEXT STEPS FOR MASSACHUSETTS IN LIGHT OF *MELLENDEZ-DIAZ*

Massachusetts, where the question originated, demonstrates the complications courts in all states will encounter in analyzing *Melendez-Diaz*. Incorporating terminology and requirements from other states' "perfectly valid notice and demand rules"³¹⁷ may help Massachusetts and states in similar positions respond to the new constitutional rule.³¹⁸ In footnote twelve of *Melendez-Diaz*, Justice Scalia asserted the majority's approval of the "simplest form [of] notice-and-demand statutes," but declined "to pass on the constitutionality of every variety of statute commonly given the notice-and-demand label."³¹⁹ Footnote twelve may play a significant role in Massachusetts' course of action in adapting to the new constitutional rule. In approving of simple notice-and-demand statutes, and declining to "pass" on *all* varieties, this footnote leaves open the possibility of using such statutes to lessen the burden on the laboratories, backlog of cases, and sometimes unnecessary court visits by testing analysts.

Paul Gianelli, a Confrontation Clause scholar, suggested in 1988 that notice-and-demand statutes may substitute certain procedures for providing an analyst at trial, but only if there is intentional relinquishment of the right.³²⁰ Gianelli proposed an appealing standard: the prosecution should supply the defendant *not only* with the report, but also with information about the procedures employed or the analyst's qualifications.³²¹ Such a solution would be minimally intrusive, efficient, and more likely to safeguard the defendant's confrontation right.

The pending bill in the Massachusetts Legislature should incorporate changes that will better ensure that a defendant properly secures or waives his right to confront the preparing analyst. The changes should include specifications governing timing requirements that will not require the defendant to demand the analyst's presence so early in the process. Furthermore, the waiver procedures should be clearer and require, as per Colorado's *Hinojos-Mendoza* dissent,³²² an affirmative, not a silent, waiver of the confrontation right. Massachusetts's legislature could also look to Ohio's straightforward notice-and-demand statute that explicitly requires an

³¹⁷ Transcript of Oral Arguments, *supra* note 29, at 17.

³¹⁸ See COLO. REV. STAT. ANN. § 16-3-309 (West 2008); OHIO REV. CODE ANN. § 2925.51(B), (D) (West 2008).

³¹⁹ *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2542, 2541 n.12 (2009).

³²⁰ Paul C. Gianelli, *The Admissibility of Laboratory Reports in Criminal Trials: The Reliability of Scientific Proof*, 49 OHIO ST. L.J. 671, 700-01 (1988).

³²¹ *Id.*

³²² *Hinojos-Mendoza v. People*, 169 P.3d 662, 674 (Colo. 2007) (Martinez, J., dissenting).

affirmative waiver and places the burden of securing the analyst's presence on the prosecution.³²³

Giving the defendant sufficient time to make a demand should comply with the part of *Melendez-Diaz* that approves of notice-and-demand statutes and leaves states "free to adopt procedural rules governing objections" to admitting lab reports without testimony.³²⁴ Scalia insists that notice-and-demand statutes "shift no burden whatever. The defendant *always* has the burden of raising his Confrontation Clause objection; notice-and-demand statutes simply govern the *time* within which he must do so."³²⁵ The requisite amount of time, however, must be adequate to allow the defendant to make his demand, and the defendant cannot be required to call the analyst as his own witness.³²⁶ Furthermore, the statute should have a means of safeguarding against antagonistic demands on the part of the defense. The surge in subpoenas for lab analysts suggests that there is a level of gamesmanship, an effort to elude trial solely by reason of the difficulty and delay in testing the substances and bringing the analysts into court.

Footnote fourteen in *Melendez-Diaz* also clears the path for creative ways to accommodate the new constitutional requirement without wasteful production of laboratory analysts.³²⁷ At the opinion's conclusion, Scalia notes that "[t]oday's opinion, while insisting upon retention of the confrontation requirement, in no way alters the type of evidence (including circumstantial evidence) sufficient to sustain a conviction."³²⁸ In fact, Patrick Haggan has called footnote fourteen "the most important part of *Melendez-Diaz*," and suggested that the "next step" for Massachusetts should be based on footnote fourteen.³²⁹ Colorado's use and approval of circumstantial methods of proof, may serve as a model for Massachusetts in determining how to constitutionally and effectively interpret *Melendez-Diaz*.³³⁰ Massachusetts courts have been³³¹ and should continue to experiment with circumstantial methods of proof, so as

³²³ OHIO REV. CODE ANN. § 2925.51(B), (D) (West 2008).

³²⁴ *Melendez-Diaz*, 129 S. Ct. at 2541.

³²⁵ *Id.*

³²⁶ Justice Scalia clearly stated during *Briscoe* oral arguments that the discussion in *Melendez-Diaz* about notice-and-demand statutes addressed statutes which provide the defense enough time to insist that the prosecution call the witness to testify were acceptable, not statutes that gave the defense time to call the witness as his own. *See* Transcript of Oral Arguments, *supra* note 29, at 26.

³²⁷ *Melendez-Diaz*, 129 S. Ct. at 2542 n.14.

³²⁸ *Id.*

³²⁹ *See* Haggan Remarks, *supra* note 13.

³³⁰ *See* *People v. Santana*, No. 08-CA-0978, 2009 WL 2182596, at *7 (Colo. App. July 23, 2009) (permitting introduction of lab reports without accompanying testimony, or with a police officer's testimony).

³³¹ A common question, on review, is whether the Commonwealth can prove an element of a charge with circumstantial evidence, such as police officer testimony. *See* *Commonwealth v. Connolly*, 913 N.E.2d 356, 376 (Mass. 2009).

not to rely solely on the affidavits. According to John Grossman of the Executive Office of Public Safety and Security, however, field testing or video testimony “may be helpful for preliminary stages” of drug cases, but may not pass constitutional muster.³³² Furthermore, Brownlow Speer, of the Committee for Public Counsel Services’ Public Defender Offices in Boston, called some of these methods “dubious,” but also suggested that combining several types of other proof – police officers’ expertise, field tests, and circumstances of the case, among others – may create a legally sufficient basis for conviction.³³³

The recent decisions in *Connolly*³³⁴ and *Johnson*³³⁵ demonstrate some willingness in Massachusetts courts to allow police officer testimony, juror inspection of evidence, and supervisor testimony to prove elements of drug possession, ballistic,³³⁶ or drunk driving charges. Narcotics officers in Massachusetts have testified on matters involving use of small manila envelopes for bagging heroin,³³⁷ how different methods of transporting cocaine indicate whether the contents are intended for distribution,³³⁸ and the street value of cocaine.³³⁹ In a 1991 case, *Commonwealth v. Johnson*, the Massachusetts Supreme Judicial Court found that a detective with over ten years of experience, who had participated in over 100 narcotics investigations, was qualified as an expert to testify that the amount of cocaine the defendant possessed was indicative of possession with intent to distribute.³⁴⁰ All such testimony, however, does not deal with identifying that a substance *is* the drug in question, but rather the quantity. Circumstantial proof may ease the State’s transition to complying with *Melendez-Diaz*, but without the laboratory certificates prosecutors will likely face difficulty in proving essential elements of drug or ballistics cases.

Finally, according to Grossman, responding to *Melendez-Diaz* and the National Academy of Sciences Report mostly requires an increase in resources

³³² Telephone Interview with John Grossman, *supra* note 108.

³³³ Telephone Interview with Brownlow Speer, *supra* note 72.

³³⁴ 913 N.E.2d at 370.

³³⁵ *Commonwealth v. Johnson*, 918 N.E.2d 876, 879-80 (Mass. App. Ct. 2010) (referencing footnote fourteen and the “ample circumstantial evidence of cocaine,” as well as the prosecutor’s minimal references to the certificates, in upholding conviction after *Melendez-Diaz*).

³³⁶ *See, e.g., Commonwealth v. Anderson*, No. 08-P-1257, 2010 WL 152520, at *2 (Mass. App. Ct. Jan. 19, 2010) (finding admission of ballistics certificate harmless due to the “strength of [the] independent evidence,” including circumstances of arrest, defendant’s admissions, and compatibility of ammunition with firearm).

³³⁷ *Commonwealth v. Davis*, 384 N.E.2d 181, 185 (Mass. 1978) (“[The officer testified that] the probable use of the seventy-four manila envelopes was to ‘bag’ heroin.”).

³³⁸ *Commonwealth v. Sendele*, 470 N.E.2d 811, 813 (Mass. App. Ct. 1984).

³³⁹ *Commonwealth v. Fiore*, 403 N.E.2d 953, 975 (Mass. App. Ct. 1980).

³⁴⁰ *Commonwealth v. Johnson*, 571 N.E.2d 625, 625 (Mass. 1991) (finding that the detective, who “expressed an opinion within his expertise,” qualified as an expert).

and spending on the Commonwealth's criminal justice system.³⁴¹ The decision has an effect on crime laboratories, decreasing time analysts are able to spend in the labs to test substances, and leading to delays in the court system. Another option, though perhaps not easily implemented, would be for Massachusetts to spend more on hiring additional analysts or otherwise ameliorating backlogs. This would ultimately benefit District Attorney's Offices trying both to fulfill their burden and would give defendants quicker resolutions.

CONCLUSION

Massachusetts and other states that did not adequately protect defendants' confrontation rights must determine a way to comply with *Melendez-Diaz*. Doing so without dismissing cases or denying other rights will be nearly impossible, however, without spending more on laboratories, crafting a constitutional notice-and-demand statute, or ascertaining valid and sufficient circumstantial methods of proof. Since *Melendez-Diaz*, Massachusetts and many other states that previously did not consider lab reports testimonial are scrambling to uphold the Constitution and thus struggling to avoid excessive analyst workloads or trial delays.

These efforts entail, in part, new statutes such as the notice-and-demand laws already in place in states like Colorado and Ohio. In footnote twelve of *Melendez-Diaz*, the Court declined to prescribe a model constitutional notice-and-demand statute.³⁴² This opening gives states like Massachusetts leeway in crafting a statute that protects the right to confrontation while tempering, at least slightly, the increased workload for lab analysts. Furthermore, because the Supreme Court remanded *Briscoe* and refrained from spelling out such a statute, permissible forms a notice-and-demand statute may take remain ill defined. Because the decision did praise the notice-and-demand statutes in place in Colorado and Ohio, however, Massachusetts and other states may find short-term guidance in examining the intricacies of those states' procedures. The pending notice-and-demand bill in the Massachusetts Legislature is a first step in creating such a statute, but the phrasing requires changes in order to more effectively protect the right to confrontation.

Decreasing prosecutorial reliance on the laboratory certificates may be another way to handle the new rule. Footnote fourteen of *Melendez-Diaz* leaves open the option of using circumstantial methods of proof;³⁴³ to some, such as Patrick Haggan, footnote fourteen is "the most important part of *Melendez-Diaz*."³⁴⁴ Already, Massachusetts courts have been finding that independent evidence, such as expert police testimony, field-testing of a substance in question, and circumstances surrounding an arrest can prove that a

³⁴¹ See Grossman Remarks, *supra* note 197.

³⁴² *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2541 n.12 (2009).

³⁴³ *Id.* at 2542 n.14.

³⁴⁴ See Haggan Remarks, *supra* note 13.

substance is, in fact cocaine,³⁴⁵ or that a firearm was, in fact, operable.³⁴⁶ While circumstantial evidence may supplement and even prove a case that typically included a certificate of analysis, over-reliance on this tactic is ill advised and is certainly not foolproof. Many drug possession convictions turn on the exact composition of a substance, and a field test will not be as accurate in breaking down the components as would a chemical analysis.

Because the Supreme Court decided that the Sixth Amendment requires cross-examination of testing analysts, there is a consequent duty upon the District Attorney's Offices, criminal defense attorneys, and courts to uphold the right to confrontation. The practical consequences of the decision, such as increased workloads and trial delays, should not infringe upon this right, but the consequences must not be trivialized. Adequately protecting this constitutional right while maintaining an efficient criminal justice system requires, in addition to a notice-and-demand statute or increased use of circumstantial evidence, an increase in resources devoted to forensic sciences. Massachusetts is one among many states that must tweak their procedures in light of *Melendez-Diaz*, and a study of Massachusetts' proposed legislation, procedure, and case law may serve as a guide for states attempting to comply with the decision. Only with across-the-board changes will state criminal justice systems effectively safeguard this constitutional right.

³⁴⁵ See, e.g., *Commonwealth v. Connolly*, 913 N.E.2d 356, 375 (Mass. 2009).

³⁴⁶ See, e.g., *Commonwealth v. Hollister*, 916 N.E.2d 768, 771 (Mass. App. Ct. 2009).