

MELLENDEZ V. MASSACHUSETTS HANDOUT
BY MUELLER & KIRKPATRICK

INTRODUCTORY NOTE BY PROF. MALAVET:

I will cover this case following *Davis* because *Melendez* represents the last word on this subject from the Supreme Court, and because this is the first major case in the *Crawford* line in which the *declarant* is a government agent. We will then use Problem 4-Q to review the entire doctrine.

MELLENDEZ-DIAZ v. MASSACHUSETTS
United States Supreme Court
2009 WL 1789468 (2009)

JUSTICE SCALIA delivered the opinion of the Court.

The Massachusetts courts in this case admitted into evidence affidavits reporting the results of forensic analysis which showed that material seized by the police and connected to the defendant was cocaine. The question presented is whether those affidavits are “testimonial,” rendering the affiants “witnesses” subject to the defendant’s right of confrontation under the Sixth Amendment.

I

[In a trial for distributing and trafficking in cocaine, the prosecutor placed in evidence “certificates of analysis” showing that the substance seized from defendant Melendez-Diaz and a colleague was cocaine. The certificates were prepared in the State Crime Laboratory and sworn before a notary public as required by Massachusetts law. The defense objected that the *Crawford* doctrine required the analysts to testify in person.]

II

The Sixth Amendment to the United States Constitution, made applicable to the States via the Fourteenth Amendment, *Pointer v. Texas*, 380 U.S. 400, 403 (1965), provides that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.” In *Crawford*, after reviewing the Clause’s historical underpinnings, we held that it guarantees a defendant’s right to confront those “who ‘bear testimony’” against him. A witness’s testimony against a defendant is thus inadmissible unless the witness appears at trial or, if the witness is unavailable, the defendant had a prior opportunity for cross-examination.

[Court quotes *Crawford*’s description of testimonial statements.]

There is little doubt that the documents at issue in this case fall within the “core class of testimonial statements” thus described. Our description of that category mentions affidavits

twice. The documents at issue here, while denominated by Massachusetts law “certificates,” are quite plainly affidavits: “declaration[s] of facts written down and sworn to by the declarant before an officer authorized to administer oaths.” Black’s Law Dictionary 62 (8th ed. 2004). They are incontrovertibly a “solemn declaration or affirmation made for the purpose of establishing or proving some fact.” *Crawford* (quoting 2 N. Webster, An American Dictionary of the English Language (1828)). The fact in question is that the substance found in the possession of Melendez-Diaz and his codefendants was, as the prosecution claimed, cocaine – the precise testimony the analysts would be expected to provide if called at trial. The “certificates” are functionally identical to live, in-court testimony, doing “precisely what a witness does on direct examination.” *Davis v. Washington*, 547 U.S. 813, 830 (2006) (emphasis deleted).

Here, moreover, not only were the affidavits “made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial,” *Crawford*, but under Massachusetts law the *sole purpose* of the affidavits was to provide “prima facie evidence of the composition, quality, and the net weight” of the analyzed substance. We can safely assume that the analysts were aware of the affidavits’ evidentiary purpose, since that purpose – as stated in the relevant state-law provision – was reprinted on the affidavits themselves.

In short, under our decision in *Crawford* the analysts’ affidavits were testimonial statements, and the analysts were “witnesses” for purposes of the Sixth Amendment. Absent a showing that the analysts were unavailable to testify at trial *and* that petitioner had a prior opportunity to cross-examine them, petitioner was entitled to “be confronted with” the analysts at trial.¹

III

Respondent and the dissent advance a potpourri of analytic arguments in an effort to avoid this rather straightforward application of our holding in *Crawford*. Before addressing them, however, we must assure the reader of the falsity of the dissent’s opening alarum that we are “sweep[ing] away an accepted rule governing the admission of scientific evidence” that has been “established for at least 90 years” and “extends across at least 35 States and six Federal Courts of Appeals.”

The vast majority of the state-court cases the dissent cites in support of this claim come not from the last 90 years, but from the last 30, and not surprisingly nearly all of them rely on our

¹ Contrary to the dissent’s suggestion, we do not hold, and it is not the case, that anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device, must appear in person as part of the prosecution’s case. While the dissent is correct that “[i]t is the obligation of the prosecution to establish the chain of custody,” this does not mean that everyone who laid hands on the evidence must be called. As stated in the dissent’s own quotation from *United States v. Lott*, 854 F.2d 244, 250 (7th Cir. 1988), “gaps in the chain [of custody] normally go to the weight of the evidence rather than its admissibility.” It is up to the prosecution to decide what steps in the chain of custody are so crucial as to require evidence; but what testimony *is* introduced must (if the defendant objects) be introduced live. Additionally, documents prepared in the regular course of equipment maintenance may well qualify as nontestimonial records.

decision in *Ohio v. Roberts*, 448 U.S. 56 (1980), or its since-rejected theory that unconfro-nted testimony was admissible as long as it bore indicia of reliability. As for the six Federal Courts of Appeals cases cited by the dissent, five of them postdated and expressly relied on *Roberts*. The sixth predated *Roberts* but relied entirely on the same erroneous theory. . . .

A review of cases that predate the *Roberts* era yields a mixed picture. As the dissent notes, three state supreme court decisions from the early 20th century denied confrontation with respect to certificates of analysis regarding a substance’s alcohol content (citing cases from Massachusetts, Connecticut, and Virginia). But other state courts in the same era reached the opposite conclusion. At least this much is entirely clear: In faithfully applying *Crawford* to the facts of this case, we are not overruling 90 years of settled jurisprudence. It is the dissent that seeks to overturn precedent by resurrecting *Roberts* a mere five years after it was rejected in *Crawford*.

We turn now to the various legal arguments raised by respondent and the dissent.

A

Respondent first argues that the analysts are not subject to confrontation because they are not “accusatory” witnesses, in that they do not directly accuse petitioner of wrongdoing; rather, their testimony is inculpatory only when taken together with other evidence linking petitioner to the contraband. This finds no support in the text of the Sixth Amendment or in our case law.

The Sixth Amendment guarantees a defendant the right “to be confronted with the witnesses *against him*.” (Emphasis added.) To the extent the analysts were witnesses (a question resolved above), they certainly provided testimony *against* petitioner, proving one fact necessary for his conviction – that the substance he possessed was cocaine. The contrast between the text of the Confrontation Clause and the text of the adjacent Compulsory Process Clause confirms this analysis. While the Confrontation Clause guarantees a defendant the right to be confronted with the witnesses “against him,” the Compulsory Process Clause guarantees a defendant the right to call witnesses “in his favor.” U.S. Const., Amdt. 6. The text of the Amendment contemplates two classes of witnesses – those against the defendant and those in his favor. The prosecution *must* produce the former; the defendant *may* call the latter. Contrary to respondent’s assertion, there is not a third category of witnesses, helpful to the prosecution, but somehow immune from confrontation.

. . .

B

Respondent and the dissent argue that the analysts should not be subject to confrontation because they are not “conventional” (or “typical” or “ordinary”) witnesses of the sort whose *ex parte* testimony was most notoriously used at the trial of Sir Walter Raleigh. It is true, as the Court recognized in *Crawford*, that *ex parte* examinations of the sort used at Raleigh’s trial have “long been thought a paradigmatic confrontation violation.” But the paradigmatic case identifies the core of the right to confrontation, not its limits. The right to confrontation was not invented in response to the use of the *ex parte* examinations in *Raleigh’s Case*, 2 How. St. Tr. 1 (1603). That use provoked such an outcry precisely because it flouted the deeply rooted common-law

tradition “of live testimony in court subject to adversarial testing.” *Crawford*.

In any case, the purported distinctions respondent and the dissent identify between this case and Sir Walter Raleigh’s “conventional” accusers do not survive scrutiny. The dissent first contends that a “conventional witness recalls events observed in the past, while an analyst’s report contains near-contemporaneous observations of the test.” It is doubtful that the analyst’s reports in this case could be characterized as reporting “near-contemporaneous observations”; the affidavits were completed almost a week after the tests were performed (the tests were performed on November 28, 2001, and the affidavits sworn on December 4, 2001). But regardless, the dissent misunderstands the role that “near-contemporaneity” has played in our case law. The dissent notes that that factor was given “substantial weight” in *Davis*, but in fact that decision *disproves* the dissent’s position. There the Court considered the admissibility of statements made to police officers responding to a report of a domestic disturbance. By the time officers arrived the assault had ended, but the victim’s statements – written and oral – were sufficiently close in time to the alleged assault that the trial court admitted her affidavit as a “present sense impression.” Though the witness’s statements in *Davis* were “near-contemporaneous” to the events she reported, we nevertheless held that they could *not* be admitted absent an opportunity to confront the witness.

A second reason the dissent contends that the analysts are not “conventional witnesses” (and thus not subject to confrontation) is that they “observe[d] neither the crime nor any human action related to it.” The dissent provides no authority for this particular limitation of the type of witnesses subject to confrontation. Nor is it conceivable that all witnesses who fit this description would be outside the scope of the Confrontation Clause. For example, is a police officer’s investigative report describing the crime scene admissible absent an opportunity to examine the officer? The dissent’s novel exception from coverage of the Confrontation Clause would exempt all expert witnesses – a hardly “unconventional” class of witnesses.

A third respect in which the dissent asserts that the analysts are not “conventional” witnesses and thus not subject to confrontation is that their statements were not provided in response to interrogation. As we have explained, “[t]he Framers were no more willing to exempt from cross-examination volunteered testimony or answers to open-ended questions than they were to exempt answers to detailed interrogation.” *Davis*. Respondent and the dissent cite no authority, and we are aware of none, holding that a person who volunteers his testimony is any less a “‘witness against’ the defendant,” than one who is responding to interrogation. In any event, the analysts’ affidavits in this case *were* presented in response to a police request. If an affidavit submitted in response to a police officer’s request to “write down what happened” suffices to trigger the Sixth Amendment’s protection (as it apparently does, see *Davis* (THOMAS, J., concurring in judgment in part and dissenting in part)), then the analysts’ testimony should be subject to confrontation as well.

C

Respondent claims that there is a difference, for Confrontation Clause purposes, between testimony recounting historical events, which is “prone to distortion or manipulation,” and the testimony at issue here, which is the “resul[t] of neutral, scientific testing.” Relatedly, respondent and the dissent argue that confrontation of forensic analysts would be of little value

because “one would not reasonably expect a laboratory professional . . . to feel quite differently about the results of his scientific test by having to look at the defendant.”

This argument is little more than an invitation to return to our overruled decision in *Roberts*, which held that evidence with “particularized guarantees of trustworthiness” was admissible notwithstanding the Confrontation Clause. What we said in *Crawford* in response to that argument remains true:

To be sure, the Clause’s ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. . . . Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes.

Respondent and the dissent may be right that there are other ways – and in some cases better ways – to challenge or verify the results of a forensic test.⁵ But the Constitution guarantees one way: confrontation. We do not have license to suspend the Confrontation Clause when a preferable trial strategy is available.

Nor is it evident that what respondent calls “neutral scientific testing” is as neutral or as reliable as respondent suggests. Forensic evidence is not uniquely immune from the risk of manipulation. According to a recent study conducted under the auspices of the National Academy of Sciences, “[t]he majority of [laboratories producing forensic evidence] are administered by law enforcement agencies, such as police departments, where the laboratory administrator reports to the head of the agency.” National Research Council of the National Academies, *Strengthening Forensic Science in the United States: A Path Forward* 6-1 (Prepublication Copy Feb. 2009) (hereinafter National Academy Report). And “[b]ecause forensic scientists often are driven in their work by a need to answer a particular question related to the issues of a particular case, they sometimes face pressure to sacrifice appropriate methodology for the sake of expediency.” A forensic analyst responding to a request from a law enforcement official may feel pressure – or have an incentive – to alter the evidence in a manner favorable to the prosecution.

Confrontation is one means of assuring accurate forensic analysis. While it is true, as the dissent notes, that an honest analyst will not alter his testimony when forced to confront the defendant, the same cannot be said of the fraudulent analyst. See Brief for National Innocence Network as *Amicus Curiae* 15-17 (discussing cases of documented “drylabbing” where forensic analysts report results of tests that were never performed); National Academy Report 1-8 to 1-10 (discussing documented cases of fraud and error involving the use of forensic evidence). Like the eyewitness who has fabricated his account to the police, the analyst who provides false results may, under oath in open court, reconsider his false testimony. And, of course, the prospect of confrontation will deter fraudulent analysis in the first place.

⁵ Though surely not always. Some forensic analyses, such as autopsies and breathalyzer tests, cannot be repeated, and the specimens used for other analyses have often been lost or degraded.

Confrontation is designed to weed out not only the fraudulent analyst, but the incompetent one as well. Serious deficiencies have been found in the forensic evidence used in criminal trials. One commentator asserts that “[t]he legal community now concedes, with varying degrees of urgency, that our system produces erroneous convictions based on discredited forensics.” Metzger, *Cheating the Constitution*, 59 Vand. L. Rev. 475, 491 (2006). One study of cases in which exonerating evidence resulted in the overturning of criminal convictions concluded that invalid forensic testimony contributed to the convictions in 60% of the cases. Garrett & Neufeld, *Invalid Forensic Science Testimony and Wrongful Convictions*, 95 Va. L. Rev. 1, 14 (2009). And the National Academy Report concluded:

The forensic science system, encompassing both research and practice, has serious problems that can only be addressed by a national commitment to overhaul the current structure that supports the forensic science community in this country.

National Academy Report P-1 (emphasis in original).⁶

Like expert witnesses generally, an analyst’s lack of proper training or deficiency in judgment may be disclosed in cross-examination.

This case is illustrative. The affidavits submitted by the analysts contained only the bare-bones statement that “[t]he substance was found to contain: Cocaine.” At the time of trial, petitioner did not know what tests the analysts performed, whether those tests were routine, and whether interpreting their results required the exercise of judgment or the use of skills that the analysts may not have possessed. While we still do not know the precise tests used by the analysts, we are told that the laboratories use “methodology recommended by the Scientific Working Group for the Analysis of Seized Drugs.” At least some of that methodology requires the exercise of judgment and presents a risk of error that might be explored on cross-examination. See 2 P. Giannelli & E. Imwinkelried, *Scientific Evidence* §23.03[c], pp. 532-533, ch 23A, p. 607 (4th ed. 2007) (identifying four “critical errors” that analysts may commit in interpreting the results of the commonly used gas chromatography/mass spectrometry analysis); Shellow, *The Application of Daubert to the Identification of Drugs*, 2 *Shepard’s Expert & Scientific Evidence Quarterly* 593, 600 (1995) (noting that while spectrometers may be equipped with computerized matching systems, “forensic analysts in crime laboratories typically do not utilize this feature of the instrument, but rely exclusively on their subjective judgment”).

The same is true of many of the other types of forensic evidence commonly used in criminal prosecutions. “[T]here is wide variability across forensic science disciplines with

⁶ Contrary to the dissent’s suggestion, we do not “rel[y] in such great measure” on the deficiencies of crime-lab analysts shown by this report to resolve the constitutional question presented in this case. The analysts who swore the affidavits provided testimony against Melendez-Diaz, and they are therefore subject to confrontation; we would reach the same conclusion if all analysts always possessed the scientific acumen of Mme. Curie and the veracity of Mother Theresa. We discuss the report only to refute the suggestion that this category of evidence is uniquely reliable and that cross-examination of the analysts would be an empty formalism.

regard to techniques, methodologies, reliability, types and numbers of potential errors, research, general acceptability, and published material.” National Academy Report S-5. See also *id.*, at 5-9, 5-12, 5-17, 5-21 (discussing problems of subjectivity, bias, and unreliability of common forensic tests such as latent fingerprint analysis, pattern/impression analysis, and toolmark and firearms analysis). Contrary to respondent’s and the dissent’s suggestion, there is little reason to believe that confrontation will be useless in testing analysts’ honesty, proficiency, and methodology – the features that are commonly the focus in the cross-examination of experts.

D

Respondent argues that the analysts’ affidavits are admissible without confrontation because they are “akin to the types of official and business records admissible at common law.” But the affidavits do not qualify as traditional official or business records, and even if they did, their authors would be subject to confrontation nonetheless.

Documents kept in the regular course of business may ordinarily be admitted at trial despite their hearsay status. See FRE 803(6). But that is not the case if the regularly conducted business activity is the production of evidence for use at trial. Our decision in *Palmer v. Hoffman*, 318 U.S. 109 (1943), made that distinction clear. There we held that an accident report provided by an employee of a railroad company did not qualify as a business record because, although kept in the regular course of the railroad’s operations, it was “calculated for use essentially in the court, not in the business.”⁷ The analysts’ certificates – like police reports generated by law enforcement officials – do not qualify as business or public records for precisely the same reason. See FRE 803(8) (defining public records as “excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel”).

Respondent seeks to rebut this limitation by noting that at common law the results of a coroner’s inquest were admissible without an opportunity for confrontation. But as we have previously noted, whatever the status of coroner’s reports at common law in England, they were not accorded any special status in American practice. See *Crawford; Giles v. California*, 554 U.S. ___, ___ (2008) (BREYER, J., dissenting); Evidence – Official Records – Coroner’s Inquest, 65 U. Pa. L. Rev. 290 (1917).

The dissent identifies a single class of evidence which, though prepared for use at trial, was traditionally admissible: a clerk’s certificate authenticating an official record – or a copy thereof – for use as evidence. But a clerk’s authority in that regard was narrowly circumscribed. He was permitted “to certify to the correctness of a copy of a record kept in his office,” but had “no authority to furnish, as evidence for the trial of a lawsuit, his interpretation of what the record contains or shows, or to certify to its substance or effect.” *State v. Wilson*, 75 So. 95, 97 (La. 1917). See also *State v. Champion*, 21 S.E. 700, 700-701 (N.C. 1895); 5 J. Wigmore, Evidence §1678 (3d ed. 1940). The dissent suggests that the fact that this exception was “narrowly circumscribed” makes no difference. To the contrary, it makes all the difference in the world. It shows that even the line of cases establishing the one narrow exception the dissent

⁷ The early common-law cases likewise involve records prepared for the administration of an entity’s affairs, and not for use in litigation. See, e.g., *King v. Rhodes*, 168 Eng. Rep. 115 (1742) (admitting into evidence ship’s muster-book); *King v. Martin*, 170 Eng. Rep. 1094, 1095 (1809) (vestry book); *King v. Aickles*, 168 Eng. Rep. 297, 298 (1785) (prison logbook).

has been able to identify simultaneously vindicates the general rule applicable to the present case. A clerk could by affidavit *authenticate* or provide a copy of an otherwise admissible record, but could not do what the analysts did here: *create* a record for the sole purpose of providing evidence against a defendant.

Far more probative here are those cases in which the prosecution sought to admit into evidence a clerk's certificate attesting to the fact that the clerk had searched for a particular relevant record and failed to find it. Like the testimony of the analysts in this case, the clerk's statement would serve as substantive evidence against the defendant whose guilt depended on the nonexistence of the record for which the clerk searched. Although the clerk's certificate would qualify as an official record under respondent's definition – it was prepared by a public officer in the regular course of his official duties – and although the clerk was certainly not a “conventional witness” under the dissent's approach, the clerk was nonetheless subject to confrontation. See *People v. Bromwich*, 93 N.E. 933, 934 (N.Y. 1911); *People v. Goodrode*, 94 N.W. 14, 16 (Mich. 1903); Wigmore, *supra*, §1678.

Respondent also misunderstands the relationship between the business-and-official-records hearsay exceptions and the Confrontation Clause. As we stated in *Crawford*: “Most of the hearsay exceptions covered statements that by their nature were not testimonial – for example, business records or statements in furtherance of a conspiracy.” Business and public records are generally admissible absent confrontation not because they qualify under an exception to the hearsay rules, but because – having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial – they are not testimonial. Whether or not they qualify as business or official records, the analysts' statements here – prepared specifically for use at petitioner's trial – were testimony against petitioner, and the analysts were subject to confrontation under the Sixth Amendment.

E

Respondent asserts that we should find no Confrontation Clause violation in this case because petitioner had the ability to subpoena the analysts. But that power – whether pursuant to state law or the Compulsory Process Clause – is no substitute for the right of confrontation. Unlike the Confrontation Clause, those provisions are of no use to the defendant when the witness is unavailable or simply refuses to appear. Converting the prosecution's duty under the Confrontation Clause into the defendant's privilege under state law or the Compulsory Process Clause shifts the consequences of adverse-witness no-shows from the State to the accused. 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.

F

Finally, respondent asks us to relax the requirements of the Confrontation Clause to accommodate the “necessities of trial and the adversary process.” It is not clear whence we would derive the authority to do so. The Confrontation Clause may make the prosecution of criminals more burdensome, but that is equally true of the right to trial by jury and the privilege against self-incrimination. The Confrontation Clause – like those other constitutional provisions

– is binding, and we may not disregard it at our convenience.

We also doubt the accuracy of respondent’s and the dissent’s dire predictions. The dissent, respondent, and its *amici* highlight the substantial total number of controlled-substance analyses performed by state and federal laboratories in recent years. But only some of those tests are implicated in prosecutions, and only a small fraction of those cases actually proceed to trial. See Brief for Law Professors as *Amici Curiae* 7-8 (nearly 95% of convictions in state and federal courts are obtained via guilty plea).¹⁰

Perhaps the best indication that the sky will not fall after today’s decision is that it has not done so already. Many States have already adopted the constitutional rule we announce today, while many others permit the defendant to assert (or forfeit by silence) his Confrontation Clause right after receiving notice of the prosecution’s intent to use a forensic analyst’s report, *id.* (cataloging such state laws). Despite these widespread practices, there is no evidence that the criminal justice system has ground to a halt in the States that, one way or another, empower a defendant to insist upon the analyst’s appearance at trial. Indeed, in Massachusetts itself, a defendant may subpoena the analyst to appear at trial, and yet there is no indication that obstructionist defendants are abusing the privilege.

The dissent finds this evidence “far less reassuring than promised.” But its doubts rest on two flawed premises. First, the dissent believes that those state statutes “requiring the defendant to give early notice of his intent to confront the analyst,” are “burden-shifting statutes [that] may be invalidated by the Court’s reasoning.” That is not so. In their simplest form, notice-and-demand statutes require the prosecution to provide notice to the defendant of its intent to use an analyst’s report as evidence at trial, after which the defendant is given a period of time in which he may object to the admission of the evidence absent the analyst’s appearance live at trial. See, e.g., Ga. Code Ann. §35-3-154.1 (2006); Tex. Code Crim. Proc. Ann., Art. 38.41, §4 (Vernon 2005); Ohio Rev. Code Ann. §2925.51(C) (West 2006). Contrary to the dissent’s perception, these 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. States are free to adopt procedural rules governing objections. It is common to require a defendant to exercise his rights under the Compulsory Process Clause in advance of trial, announcing his intent to present certain witnesses. See FRCrimP 12.1(a), (e), 16(b)(1)(C); Comment: Alibi Notice Rules: The Preclusion Sanction as Procedural Default, 51 U. Chi. L. Rev. 254, 254-255, 281-285 (1984) (discussing and cataloguing State notice-of-alibi rules). There is no conceivable reason why he cannot similarly be compelled to exercise his Confrontation Clause rights before trial. Today’s decision will not disrupt criminal prosecutions

¹⁰ The dissent provides some back-of-the-envelope calculations regarding the number of court appearances that will result from today’s ruling. Those numbers rely on various unfounded assumptions: that the prosecution will place into evidence a drug analysis certificate in every case; that the defendant will never stipulate to the nature of the controlled substance; that even where no such stipulation is made, every defendant will object to the evidence or otherwise demand the appearance of the analyst. These assumptions are wildly unrealistic, and, as discussed below, the figures they produce do not reflect what has in fact occurred in those jurisdictions that have already adopted the rule we announce today.

in the many large States whose practice is already in accord with the Confrontation Clause.¹²

Second, the dissent notes that several of the state-court cases that have already adopted this rule did so pursuant to our decision in *Crawford*, and not “independently . . . as a matter of state law.” That may be so. But in assessing the likely practical effects of today’s ruling, it is irrelevant *why* those courts adopted this rule; it matters only *that* they did so. It is true that many of these decisions are recent, but if the dissent’s dire predictions were accurate, and given the large number of drug prosecutions at the state level, one would have expected immediate and dramatic results. The absence of such evidence is telling.

But it is not surprising. Defense attorneys and their clients will often stipulate to the nature of the substance in the ordinary drug case. It is unlikely that defense counsel will insist on live testimony whose effect will be merely to highlight rather than cast doubt upon the forensic analysis. Nor will defense attorneys want to antagonize the judge or jury by wasting their time with the appearance of a witness whose testimony defense counsel does not intend to rebut in any fashion.¹³ The *amicus* brief filed by District Attorneys in Support of the Commonwealth in the Massachusetts Supreme Court case upon which the Appeals Court here relied said that “it is almost always the case that [analysts’ certificates] are admitted without objection. Generally, defendants do not object to the admission of drug certificates most likely because there is no benefit to a defendant from such testimony.” Brief for District Attorneys in Support of the Commonwealth in No. SJC-09320 (Mass.), p7 (footnote omitted). Given these strategic considerations, and in light of the experience in those States that already provide the same or similar protections to defendants, there is little reason to believe that our decision today will commence the parade of horrors respondent and the dissent predict.

. . . .

This case involves little more than the application of our holding in *Crawford*. The Sixth Amendment does not permit the prosecution to prove its case via *ex parte* out-of-court affidavits, and the admission of such evidence against Melendez-Diaz was error.¹⁴ We therefore reverse the

¹² As the dissent notes, *some* state statutes, “requir[e] defense counsel to subpoena the analyst, to show good cause for demanding the analyst’s presence, or even to affirm under oath an intent to cross-examine the analyst.” We have no occasion today to pass on the constitutionality of every variety of statute commonly given the notice-and-demand label. It suffices to say that what we have referred to as the “simplest form [of] notice-and-demand statutes,” is constitutional; that such provisions are in place in a number of States; and that in those States, and in other States that require confrontation without notice-and-demand, there is no indication that the dire consequences predicted by the dissent have materialized.

¹³ Contrary to the dissent’s suggestion, we do not cast aspersions on trial judges, who we trust will not be antagonized by good-faith requests for analysts’ appearance at trial. Nor do we expect defense attorneys to refrain from zealous representation of their clients. We simply do not expect defense attorneys to believe that their clients’ interests (or their own) are furthered by objections to analysts’ reports whose conclusions counsel have no intention of challenging.

¹⁴ We of course express no view as to whether the error was harmless. The Massachusetts Court of Appeals did not reach that question and we decline to address it in the first instance. In connection with that determination, however, we disagree with the dissent’s contention that “only an analyst’s testimony suffices to prove [the] fact” that “the substance is cocaine.” Today’s opinion,

judgment of the Appeals Court of Massachusetts and remand the case for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE THOMAS, concurring.

I write separately to note that I continue to adhere to my position that “the Confrontation Clause is implicated by extrajudicial statements only insofar as they are contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions.” *White v. Illinois*, 502 U.S. 346, 365 (1992) (opinion concurring in part and concurring in judgment). I join the Court’s opinion in this case because the documents at issue in this case “are quite plainly affidavits.” As such, they “fall within the core class of testimonial statements” governed by the Confrontation Clause.

JUSTICE KENNEDY, with whom THE CHIEF JUSTICE, JUSTICE BREYER, and JUSTICE ALITO join, dissenting.

The Court sweeps away an accepted rule governing the admission of scientific evidence. Until today, scientific analysis could be introduced into evidence without testimony from the “analyst” who produced it. This rule has been established for at least 90 years. It extends across at least 35 States and six Federal Courts of Appeals. Yet the Court undoes it based on two recent opinions that say nothing about forensic analysts: *Crawford* and *Davis*.

It is remarkable that the Court so confidently disregards a century of jurisprudence. We learn now that we have misinterpreted the Confrontation Clause – hardly an arcane or seldom-used provision of the Constitution – for the first 218 years of its existence. The immediate systemic concern is that the Court makes no attempt to acknowledge the real differences between laboratory analysts who perform scientific tests and other, more conventional witnesses – “witnesses” being the word the framers used in the Confrontation Clause.

Crawford and *Davis* dealt with ordinary witnesses – women who had seen, and in two cases been the victim of, the crime in question. Those cases stand for the proposition that formal statements made by a conventional witness – one who has personal knowledge of some aspect of the defendant’s guilt – may not be admitted without the witness appearing at trial to meet the accused face to face. But *Crawford* and *Davis* do not say – indeed, could not have said, because the facts were not before the Court – that anyone who makes a testimonial statement is a witness for purposes of the Confrontation Clause, even when that person has, in fact, witnessed nothing to give them personal knowledge of the defendant’s guilt.

Because *Crawford* and *Davis* concerned typical witnesses, the Court should have done the sensible thing and limited its holding to witnesses as so defined. . . . The Court’s reliance on the word “testimonial” is of little help, of course, for that word does not appear in the text of the Clause.

while insisting upon retention of the confrontation requirement, in no way alters the type of evidence (including circumstantial evidence) sufficient to sustain a conviction.

The Court dictates to the States, as a matter of constitutional law, an as-yet-undefined set of rules governing what kinds of evidence may be admitted without in-court testimony. Indeed, under today's opinion the States bear an even more onerous burden than they did before *Crawford*. Then, the States at least had the guidance of the hearsay rule and could rest assured that "where the evidence f[ell] within a firmly rooted hearsay exception," the Confrontation Clause did not bar its admission. *Ohio v. Roberts*, 448 U.S. 56, 66 (1980) (overruled by *Crawford*). Now, without guidance from any established body of law, the States can only guess what future rules this Court will distill from the sparse constitutional text. See, e.g., Méndez, *Crawford v. Washington: A Critique*, 57 Stan. L. Rev. 569, 586-593 (2004) (discussing unanswered questions regarding testimonial statements).

The Court's opinion suggests this will be a body of formalistic and wooden rules, divorced from precedent, common sense, and the underlying purpose of the Clause. Its ruling has vast potential to disrupt criminal procedures that already give ample protections against the misuse of scientific evidence. For these reasons, as more fully explained below, the Court's opinion elicits my respectful dissent.

. . .

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The Court says that, before the results of a scientific test may be introduced into evidence, the defendant has the right to confront the "analyst." One must assume that this term, though it appears nowhere in the Confrontation Clause, nevertheless has some constitutional substance that now must be elaborated in future cases. There is no accepted definition of analyst, and there is no established precedent to define that term.

Consider how many people play a role in a routine test for the presence of illegal drugs. One person prepares a sample of the drug, places it in a testing machine, and retrieves the machine's printout – often, a graph showing the frequencies of radiation absorbed by the sample or the masses of the sample's molecular fragments. A second person interprets the graph the machine prints out – perhaps by comparing that printout with published, standardized graphs of known drugs. Meanwhile, a third person – perhaps an independent contractor – has calibrated the machine and, having done so, has certified that the machine is in good working order. Finally, a fourth person—perhaps the laboratory's director—certifies that his subordinates followed established procedures.

It is not at all evident which of these four persons is the analyst to be confronted under the rule the Court announces today. If all are witnesses who must appear for in-court confrontation, then the Court has, for all practical purposes, forbidden the use of scientific tests in criminal trials. As discussed further below, requiring even one of these individuals to testify threatens to disrupt if not end many prosecutions where guilt is clear but a newly found formalism now holds sway.

It is possible to read the Court's opinion, however, to say that all four must testify. Each one has contributed to the test's result and has, at least in some respects, made a representation about the test. Person One represents that a pure sample, properly drawn, entered the machine and produced a particular printout. Person Two represents that the printout corresponds to a known drug. Person Three represents that the machine was properly calibrated at the time. Person Four represents that all the others performed their jobs in accord with established procedures.

And each of the four has power to introduce error. A laboratory technician might adulterate the sample. The independent contractor might botch the machine's calibration. And so forth. The reasons for these errors may range from animus against the particular suspect or all criminal suspects to unintentional oversight; from gross negligence to good-faith mistake. It is no surprise that a plausible case can be made for deeming each person in the testing process an analyst under the Court's opinion.

Consider the independent contractor who has calibrated the testing machine. At least in a routine case, where the machine's result appears unmistakable, that result's accuracy depends entirely on the machine's calibration. The calibration, in turn, can be proved only by the contractor's certification that he or she did the job properly. That certification appears to be a testimonial statement under the Court's definition: It is a formal, out-of-court statement, offered for the truth of the matter asserted, and made for the purpose of later prosecution. It is not clear, under the Court's ruling, why the independent contractor is not also an analyst.

Consider the person who interprets the machine's printout. His or her interpretation may call for the exercise of professional judgment in close cases. If we assume no person deliberately introduces error, this interpretive step is the one most likely to permit human error to affect the test's result. This exercise of judgment might make this participant an analyst. The Court implies as much.

And we must yet consider the laboratory director who certifies the ultimate results. The director is arguably the most effective person to confront for revealing any ambiguity in findings, variations in procedures, or problems in the office, as he or she is most familiar with the standard procedures, the office's variations, and problems in prior cases or with particular analysts. The prosecution may seek to introduce his or her certification into evidence. The Court implies that only those statements that are actually entered into evidence require confrontation. This could mean that the director is also an analyst, even if his or her certification relies upon or restates work performed by subordinates.

The Court offers no principles or historical precedent to determine which of these persons is the analyst. All contribute to the test result. And each is equally remote from the scene, has no personal stake in the outcome, does not even know the accused, and is concerned only with the performance of his or her role in conducting the test.

[The remainder of the dissenting opinion is omitted.]

Notes on the Impact of *Melendez-Diaz* on the *Crawford* Doctrine

1. Are you surprised to see that *Melendez-Diaz* is a 5-4 opinion, with a bare 5-member majority concluding that a state crime laboratory report (or “certificate”) is “testimonial” under *Crawford*? Isn’t it absolutely inescapable that those who prepare such material know full well that they are helping prosecutors build a case, and that the whole purpose is to advance an investigation or produce evidence at trial? Even Justice Thomas, who agrees generally with applying the confrontation clause only to “testimonial” statements but argues for a very narrow interpretation of that concept, agrees that the material used in *Melendez-Diaz* is testimonial.

2. There is no room to doubt, is there, that *Melendez-Diaz* applies across the board to all kinds of forensic reports that might be offered in evidence in criminal cases? Thus it reaches reports on the identity of drugs seized from defendants, as in *Melendez-Diaz* itself, and surely it applies to fingerprint and ballistic reports, autopsy reports, handwriting and toolmark analysis, DNA tests, and reports on blood alcohol content, does it not? See, e.g., *Crager v. Ohio*, 2009 WL 1841607 (Sup. Ct. June 29, 2009) (vacating state conviction based in part on official DNA report, “for further consideration in light of *Melendez-Diaz*). Note how strongly the majority states the case that such material, even if “scientific” in nature, is *not* free of the risk of error, whether stemming from “subjectivity” or “bias” on the one hand, or from “unreliability of common forensic tests” on the other hand. Nor does *Melendez-Diaz* invite any kind of distinction between the work of “public” forensic laboratories, which exist in every state, and “private” laboratories that often perform similar tests on behalf of prosecutors.

3. The dissenters warn that the holding in *Melendez-Diaz* will “disrupt” criminal procedure, and argue for a far narrower interpretation of the concept of “testimonial” to apply only to the “conventional witness,” meaning someone who “has personal knowledge of some aspect of the defendant’s guilt.” On the disruption point, what does the majority have to say? On the question who is a witness for purposes of applying the testimonial concept, do the dissenters mean to say that laboratory analysts do not have personal knowledge of some aspect of guilt? Do the dissenters mean to limit confrontation rights to those who are *eyewitnesses* to criminal acts? Would they exclude people *who talk to a person* after he has committed a crime and hear him admit to having done the crime? If such people are excluded because they too lack personal knowledge bearing on guilt, then the confrontation clause would not block use of what they tell police about what the defendant has told them. Would this approach make sense?

4. The Notes after *Crawford* point out that the involvement of police has seemed important to most courts applying the “testimonial” standard. In *Melendez-Diaz*, the statements themselves *were made by state officials*, not just *made to* them. In a constitutional scheme in which the Sixth Amendment and other provisions in the Bill of Rights were intended to limit government power, wouldn’t it be astonishing to learn that *official statements* made during criminal investigations and in preparation for trial were somehow beyond reach of the confrontation clause?

5. The majority construes *Crawford* as covering state laboratory reports and that defendant was entitled to confront “the analysts” at trial (unless they were unavailable and defendant had a prior opportunity to cross-examine). Does that mean, as the dissenters argue,

that the prosecutor must call at trial everyone who might have handled, for example, a drug sample (the subject of the report in *Melendez-Diaz*)? Note the majority's comment, in footnote 1, that "it is not the case" that literally *anyone* whose testimony "may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device, must appear in person as part of the prosecution's case." Does this comment adequately address the concerns of the dissenters on this point? One trial court has concluded that a prosecutor may call a "supervisor" who works in a forensic laboratory to give her own "independent interpretation" of data contained in a DNA analysis, and that her testimony "about the test results" reached by another "is not akin to the affidavit-like certificates of analysis in *Melendez-Diaz*." See *Larkin v. Yates*, 2009 WL 2049991 (C.D. Cal. 2009). Can this be right?

6. Does *Melendez-Diaz* mean that the confrontation clause applies also to proof of the absence or nonexistence of official entries or records, offered under FRE 803(10) in order to prove that events or conditions that would ordinarily be reflected in such places did not happen or did not exist? This provision has proved surprisingly important in deportation cases, where one burden on the prosecutor is to prove that the defendant was not given special permission to "re-enter" the country after being deported, and in cases in which the prosecutor seeks to prove that the defendant did not have a gun permit or was not authorized by some official to perform some role or was not employed by an official agency. Many modern opinions, even after *Crawford*, reject challenges under the confrontation clause to the use of testimony or even certificates (also allowed by the exception) to prove such points. Can these cases continue to be right after *Melendez-Diaz*? See. E.g., *United States v. Harris*, 557 F.3d 938 (8th Cir. 2009) (admitting testimony that defendant's probation file did not indicate that defendant had called his probation officer); *United States v. Mendez*, 514 F.3d 1035 (10th Cir. 2008) (admitting testimony that officer searched immigration and customs database to prove that defendant did not enter country legally) (no *Crawford* violation).

7. Observe that the majority in *Melendez-Diaz* goes on record as approving state "notice-and-demand statutes," under which prosecutors may offer forensic reports unless the defense demands that the prosecutor call the people who prepared the reports. These, the majority says, "shift no burden whatsoever." At the same time, the majority in footnote 12 is at pains to say that it is not passing on "the constitutionality of every variety of statute commonly given the notice-and-demand label," and in fact the Court has agreed to review a Virginia case in which the state statute authorized *defendants* to call the technician, but did not require *prosecutors* to do so on defense request. See *Magruder v. Commonwealth*, 567 S.E.2d 113 (Va. 2008), *cert. granted sub. nom. Briscoe v. Virginia*, 2009 WSL 1841615 (S. Ct., June 29, 2009). See generally Mueller, *Cross-Examination Earlier or Later: When Is It Enough to Satisfy Crawford?* 19 Regent L. Rev. 319 (2007) (arguing that prosecutors must be burdened to call witnesses whose statements would be testimonial because defendants cannot afford to call them unless confident that they can destroy the expected testimony and because prosecutors must bear not only the burden of proof but the burden of calling witnesses).