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"Another Day" Has Dawned: The Maine Supreme Judicial Court Holds Laboratory Evidence Subject to the Confrontation Clause in *State v. Mangos*

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“ANOTHER DAY” HAS DAWNED: THE MAINE
SUPREME JUDICIAL COURT HOLDS LABORATORY
REPORTS SUBJECT TO THE CONFRONTATION
CLAUSE IN *STATE V. MANGOS*

Reid Hayton-Hull

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*Reid Hayton-Hull**

I. INTRODUCTION

The Sixth Amendment’s Confrontation Clause guarantees criminal defendants the right to “confront witnesses against them.”¹ Specifically, the Clause ensures a criminal defendant’s right to confront witnesses who testify against him by the unique medium, or “crucible,” of cross-examination.² Although federal and state rules of evidence prohibiting hearsay and the Confrontation Clause are designed to protect similar interests,³ whether or not admission of a piece of evidence violates a defendant’s rights under the Confrontation Clause is a separate analysis than whether that same piece of evidence is admissible under a rule of evidence.⁴ In 2004, the United States Supreme Court held in *Crawford v. Washington* that the Confrontation Clause applies only to “testimonial” statements.⁵ However, the Court left “for another day” the creation of a comprehensive definition of “testimonial.”⁶ “One of the most difficult issues presented” by *Crawford* is whether forensic laboratory reports are “testimonial” for the purposes of the Confrontation Clause.⁷ Although forensic laboratory reports are widely admitted at criminal trials in lieu of live testimony from the technicians who prepared the reports,⁸ the Supreme Court of the United States has not yet addressed this issue. The Maine Supreme Judicial Court, sitting as the Law Court, however, recently addressed this issue in *State v. Mangos* and held that forensic lab reports are “testimonial.”⁹ The Supreme Court of the United States is currently reviewing this

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Editor’s Note: This Case Note was written prior to the Supreme Court’s decision in *Melendez-Diaz*, as explained in Part VII, *infra*.

1. U.S. CONST. amend. VI.

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

3. *Ohio v. Roberts*, 448 U.S. 56, 66 (1980) (quoting *California v. Green*, 399 U.S. 149, 155 (1970)).

4. *Crawford*, 541 U.S. at 61.

5. *Id.* at 51.

6. *Id.* at 68.

7. Craig M. Bradley, *Confronting Scientific Tests*, 44 TRIAL 56, 56 (2008).

8. For example, “[f]orty-two states and the District of Columbia have statutes allowing the introduction of forensic [drug] lab reports in lieu of live testimony.” Brief of the States Alabama et al. as Amici Curiae in Support of Respondent at 2, *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009) (No. 07-591) (hereinafter “Brief of the States”).

9. 2008 ME 150, 957 A.2d 89.

issue in *Melendez-Diaz v. Massachusetts*.¹⁰

The Supreme Court should follow the Law Court's reasoning and hold forensic laboratory reports to be testimonial. Although forensic laboratory reports were plainly not within the contemplation of the Founders as they drafted the Constitution, laboratory reports, which amount to statements made by laboratory technicians at the behest of law enforcement and in preparation for litigation, are precisely the type of statements that the Confrontation Clause was designed to address.¹¹ In light of the weight jurors assign to forensic laboratory evidence¹² and the results of a recent study conducted by the National Academy of Sciences, which reveals the abysmal state of state forensic laboratories,¹³ it is imperative that the Supreme Court follow the Law Court in holding forensic laboratory results to be testimonial and, therefore, subject to the Confrontation Clause.

II. THE FEDERAL LANDSCAPE

The Confrontation Clause of the Sixth Amendment, made applicable to the states through the Fourteenth Amendment,¹⁴ provides that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.”¹⁵ The Confrontation Clause, as envisioned by the Founders, has its roots in English common law.¹⁶ In sixteenth-century England, under the reign of Queen Mary, Marian statutes “required justices of the peace to examine suspects and witnesses in felony cases,” and records of such examinations were sometimes certified by justices of the peace and then “read in court in lieu of live testimony.”¹⁷ The Marian statutes were replaced “[t]hrough a series of statutory and judicial reforms,” and “the English law developed a right of confrontation,”¹⁸ which mandated that the defendant have the opportunity to examine witnesses through the “open” means of cross-examination.¹⁹ It was this common law concept that the members of the first Congress incorporated into the

10. For the purposes of this Note, the category of “forensic laboratory reports” at issue includes, among other things, both DNA and drug analyses conducted by state forensic laboratories.

11. See *Crawford*, 541 U.S. at 51-52.

12. See Brooke G. Malcom, *Convictions Predicated on DNA Evidence Alone: How Reliable Evidence Became Infallible*, 38 CUMB. L. REV. 313, 324-25 (2008).

13. Editorial, *Crime Scene Imperfections*, N.Y. TIMES, Feb. 21, 2009, at A20 (finding the field of forensic science “grossly deficient”).

14. *Roberts*, 448 U.S. at 62 (citing *Pointer v. Texas*, 380 U.S. 400, 403-05 (1965)). See also *Douglas v. Alabama*, 380 U.S. 415, 418 (1965) (“We decide today that the Confrontation Clause of the Sixth Amendment is applicable to the States.”).

15. U.S. CONST. amend. VI.

16. *Crawford*, 541 U.S. at 43.

17. *Id.* at 43-44.

18. *Id.* at 44.

19. *Id.* at 61-62 (citing WILLIAM BLACKSTONE, 3 COMMENTARIES *373) (“This open examination of witnesses . . . is much more conducive to the clearing up of the truth.”). See also *Mattox v. United States*, 156 U.S. 237, 242-43 (1895) (The Clause envisions “a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives testimony whether he is worthy of belief.”). *Id.*

Sixth Amendment.²⁰

Looking to “interpret the Constitution in the light of the law as it existed at the time it was adopted,”²¹ the Supreme Court stated in dicta in *Mattox v. United States*, a late nineteenth-century case, that the Confrontation Clause “however beneficent in [its] operation and valuable to the accused, must occasionally give way to considerations of public policy and the necessities of the case.”²² In support of its proposition, the *Mattox* Court cited the dying declaration exception, which was “recognized long before the adoption of the Constitution” and which exists “to prevent a manifest failure of justice.”²³

The Supreme Court of the United States has recognized that, read literally, the Confrontation Clause “would require, on objection, the exclusion of any statement made by a declarant not present at trial.”²⁴ However, the Court has also recognized legitimate “competing interests,” such as public policy and the necessities of the case, which require a less stringent reading of the Confrontation Clause.²⁵ In *Ohio v. Roberts*, the Supreme Court rejected a strict reading of the Clause on the grounds that such a reading “would abrogate virtually every hearsay exception,” a result which was “unintended and too extreme.”²⁶ Drawing on several cases in which the Court “ha[d] sought to accommodate . . . competing interests,”²⁷ the *Roberts* Court formulated a framework for analysis of alleged Confrontation Clause violations. The *Roberts* Court provided for the admission of a declarant’s prior statements, where that declarant was unavailable to be cross-examined at trial, if the statements bore “adequate ‘indicia of reliability.’”²⁸ “Indicia of reliability” can be inferred principally, though not exclusively, “where the evidence falls within a firmly rooted hearsay exception.”²⁹ Reasoning that “hearsay rules and the Confrontation Clause are generally designed to protect similar values,”³⁰ the *Roberts* Court concluded that “firmly rooted” hearsay exceptions provided sufficient safeguards for criminal defendants’ rights under the Confrontation Clause.³¹

Roberts remained valid precedent, relied upon at both the federal and state levels,³² for more than twenty years. With the Court’s holding in *Crawford v. Washington*, however, the landscape of Confrontation Clause jurisprudence was

20. *Crawford*, 541 U.S. at 49.

21. *Mattox*, 156 U.S. at 243 (defendant’s right to confront at his second trial was not violated by the admission of transcripts of deceased witnesses’ testimony from the defendant’s first trial, at which defendant had cross-examined the witnesses).

22. *Id.*

23. *Id.* at 243-44.

24. *Roberts*, 448 U.S. at 63 (citing *Mattox*, 156 U.S. at 243).

25. *Id.* at 64 (citing *Mattox*, 156 U.S. at 243).

26. *Id.* at 63.

27. *Id.* at 64 (citing *California v. Green*, 399 U.S. 149, 171-72 (1970) (Burger, C.J., concurring); *Mattox*, 156 U.S. at 243).

28. *Id.* at 66.

29. *Id.*

30. *Roberts*, 448 U.S. at 66 (quoting *Green*, 399 U.S. at 155).

31. *See id.* at 66.

32. *See, e.g.* *State v. Morin*, 598 A.2d 170, 172 (Me. 1991) (admission of certificate and letter from the Secretary of State using the public records hearsay exception did not violate the Confrontation Clause because the public records were “inherently trustworthy”). *See also* RICHARD H. FIELD & PETER L. MURRAY, *MAINE EVIDENCE* 455 (6th ed. 2007).

altered dramatically. Overruling *Roberts*, the Supreme Court held in *Crawford* that “[t]estimonial statements of witnesses absent from trial [are admissible] only where the declarant is unavailable, and only where the defendant has had prior opportunity to cross-examine the declarant.”³³ Writing for the majority, Justice Scalia focused his opinion on the historic origins of the Confrontation Clause in order to glean the Framers’ intent in including the Clause in the Sixth Amendment. Contrary to the *Roberts* Court’s call for pragmatic compromise,³⁴ the *Crawford* Court inferred that, aside from those hearsay exceptions that were acknowledged at the time of the country’s founding,³⁵ “[w]here testimonial statements are involved, [the Framers did not mean] to leave the Sixth Amendment’s protection to the vagaries of the rules of evidence, much less to the amorphous notions of ‘reliability.’”³⁶ Drawing on his historical analysis, Justice Scalia determined that the Clause “reflects an especially acute concern with a specific type of out-of-court statement,”³⁷ namely testimonial³⁸ “ex parte examinations as evidence against the accused.”³⁹ Acknowledging that “[v]arious formulations of this core class of ‘testimonial’ statements exists,” the Court limited its holding to “ex parte in-court testimony or its functional equivalent”⁴⁰ and to “similar pretrial statements that declarants would reasonably expect to be used prosecutorially.”⁴¹ The *Crawford* Court “[le]ft for another day any effort to spell out a comprehensive definition of ‘testimonial.’”⁴² As the concurrence predicted, *Crawford* “cast[] a mantle of uncertainty over future criminal trials.”⁴³

In *Davis v. Washington*,⁴⁴ decided in conjunction with *Hammon v. Indiana*,⁴⁵ the Court attempted to define the “perimeter” of the *Crawford* Court’s formulation of “testimonial” statements.⁴⁶ Justice Scalia, again writing for the Court, set out to “determine when statements made to law enforcement personnel during a 911 call or at a crime scene are ‘testimonial’ and thus subject to the requirements of the Sixth Amendment’s Confrontation Clause.”⁴⁷ The Court held that:

Statements are nontestimonial when made in the course of police interrogation

33. *Crawford*, 541 U.S. at 59 (emphasis added).

34. *Id.* at 60 (citing *Roberts*, 448 U.S. at 66).

35. *Crawford*, 541 U.S. at 56 n.6 (noting the exception of dying declarations).

36. *Id.* at 61. The Court further stated that the Confrontation Clause “is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.” *Id.* at 61.

37. *Id.* at 51.

38. “‘Testimony’ . . . is typically ‘[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.’” *Id.* (quoting 2 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828)).

39. *Crawford*, 541 U.S. at 50.

40. *Id.* at 51 (emphasis added).

41. *Id.*

42. *Id.* at 68. “Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations.” *Id.*

43. *Id.* at 69 (Rehnquist C.J., concurring).

44. 547 U.S. 813 (2006), *aff’d* State v. Davis, 111 P.3d 844 (Wash. 2005).

45. 547 U.S. 813 (2006), *rev’d* Hammon v. Indiana, 829 N.E.2d 444 (Ind. 2005). These cases are known collectively as *Davis v. Washington*.

46. *Davis*, 547 U.S. at 823-24.

47. *Id.* at 817.

under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.⁴⁸

The Court went on to clarify that, in order to determine what is “testimonial” for the purposes of the Confrontation Clause, the critical factor is the nature of the *statement*, not that of the speaker.⁴⁹ Distinguishing between the two cases at hand, the Court determined that, because the victim in *Davis* placed her 911 call during the course of an incident of domestic violence,⁵⁰ the purpose of the victim’s call was to “describe current circumstances . . . as they were actually happening . . . to be able to *resolve* the present emergency.”⁵¹ Because the victim’s primary purpose was to resolve a present emergency, “she simply was not acting as a *witness*; she was not *testifying*.”⁵² Therefore, her statements to the 911 operator⁵³ were not testimonial and thus were not subject to the requirements of the Confrontation Clause.

In contrast to the statements made by the victim in *Davis*, the statements at issue in *Hammon*,⁵⁴ which were admitted at trial, were made by a victim of domestic violence after the police, in response to a 911 call, had arrived on the scene and the incident had ended.⁵⁵ After responding to the officers’ questions, the victim filled out and signed an affidavit, which the prosecution successfully introduced at trial.⁵⁶ Explaining that statements made in an effort to resolve a present emergency can “evolve into testimonial statements,”⁵⁷ the Court determined that because the emergency was no longer in progress, the victim’s statements made to officers, recorded in her affidavit, were testimonial.⁵⁸ Her statements “under official interrogation [were] an obvious substitute for live testimony, because they [did] precisely *what a witness does* on direct

48. *Id.* at 822.

49. *Id.* at 821. “Only statements of this sort cause the declarant to be a ‘witness’ within the meaning of the Confrontation Clause.” *Id.*

50. In response to concerns cited by Respondents and *amici* about the susceptibility of domestic violence victims to intimidation or coercion at the hands of their abusers, and therefore the effect of the Court’s ruling to exclude testimonial evidence where the victim is likely to be intimidated into not testifying, the Court “reiterate[d] what [it] said in *Crawford*: that ‘the rule of forfeiture by wrongdoing . . . extinguishes confrontation claims on essentially equitable grounds.’” *Davis*, 547 U.S. at 833 (quoting *Crawford*, 541 U.S. at 62).

51. *Davis*, 547 U.S. at 827. This is true even of statements regarding the identity of the assailant, “so that the dispatched officers might know whether they would be encountering a violent felon.” *Id.*

52. *Id.* at 828.

53. For the purposes of resolving the issue, the Court was careful to note that “[i]f 911 operators are not themselves law enforcement officers, they may at least be agents of law enforcement when they conduct interrogations of 911 callers. For purposes of this opinion (and without deciding the point), we consider their acts to be acts of the police.” *Id.* at 823 n.2.

54. *Id.*

55. *Id.* at 819-20.

56. *Id.* at 820.

57. *Davis*, 547 U.S. at 828 (quoting *Hammon*, 829 N.E.2d at 457).

58. *Id.* at 829-30.

examination.”⁵⁹ Accordingly, the Court reversed the judgment of the Supreme Court of Indiana.⁶⁰

III. THE STATE OF “TESTIMONIAL” IN MAINE

The new *Crawford* framework represented a dramatic change in Confrontation Clause analysis in Maine.⁶¹ In the wake of *Crawford*, Maine grappled, as did other states, to fill the holes left in the Supreme Court’s decision. Recognizing that the application of *Crawford* would “require detailed attention to the specific facts in each case,”⁶² the Law Court’s first opportunity to apply *Crawford* arose in 2004 in *State v. Gorman*.⁶³ In a fairly straightforward application of *Crawford*, the Law Court held that grand jury testimony was “testimonial” for the purposes of the Confrontation Clause.⁶⁴

Filling in the holes that would later be addressed by the Supreme Court in *Davis*, the Law Court next addressed the contours of *Crawford*’s definition of “testimonial” in *State v. Barnes*.⁶⁵ Barnes was found guilty of murdering his mother and appealed his conviction to the Law Court.⁶⁶ The Law Court affirmed his conviction, at which point Barnes filed a Motion for Reconsideration, asking the Law Court to review the trial court’s admission into evidence of statements made by his mother to a police officer shortly before her death.⁶⁷ The jury heard a police officer testify that Barnes’s mother had driven herself to a police station in a state of distress, and that once inside the station, Barnes’s mother told officers that her son had assaulted her and threatened to kill her.⁶⁸ Foreshadowing the Supreme Court’s holding in *Davis*, the Law Court held that the trial court did not commit error with its admission of Barnes’s mother’s statements because her statements were not “testimonial.”⁶⁹ The Law Court reasoned that her statements were not given during a “police interrogation” because they were made when Barnes’s mother was “still under the stress of the alleged assault” and “seeking safety and aid.”⁷⁰

Shortly after the Supreme Court issued its holding in *Davis*, the Law Court issued a very brief opinion in the case of *State v. Bennett*.⁷¹ Bennett was convicted by a jury of elevated aggravated assault, robbery, and unauthorized use of property.⁷² At trial, the judge had permitted the jury to hear a recording of the victim’s 911 call, made just after he was brutally attacked by Bennett.⁷³ Without

59. *Id.* at 830.

60. *Id.* at 834.

61. *See Morin*, 598 A.2d at 172.

62. *State v. Barnes*, 2004 ME 105, ¶ 10, 854 A.2d 208, 212.

63. 2004 ME 90, 854 A.2d 1164.

64. *Id.* ¶ 55, 854 A.2d at 1178.

65. 2004 ME 105, 854 A.2d 208.

66. *Id.* ¶ 1, 854 A.2d at 209.

67. *Id.* ¶¶ 3-4, 854 A.2d at 209 (admitted under the excited utterance hearsay exception).

68. *Id.* ¶ 3, 854 A.2d at 209.

69. *Id.* ¶ 11, 854 A.2d at 211-12.

70. *Id.*

71. 2006 ME 103, 903 A.2d 853.

72. *Id.* ¶ 1, 903 A.2d at 854.

73. *Id.* ¶ 8, 903 A.2d at 855.

spelling out its own reasoning, the Law Court simply cited *Davis* and held that “admitting the tape did not violate the Confrontation Clause.”⁷⁴

The Law Court held in *State v. Ahmed* that a trial court did not commit error by admitting, for the purposes of evaluating credibility, a domestic violence victim’s statements made during a 911 call.⁷⁵ The Law Court hinted with a footnote that although the victim refused to testify at trial, Ahmed’s rights under the Confrontation Clause would not have been violated because the 911 call was made “for the purpose of resolving a present emergency,” and therefore, per *Davis*, was not testimonial.⁷⁶

In *State v. Roberts*, the Law Court held that admission of evidence that would otherwise be “testimonial” did not implicate the Confrontation Clause if the evidence was not offered for substantive purposes.⁷⁷ Roberts was found guilty of murdering the mother of his child⁷⁸ and appealed on the grounds that his rights under the Confrontation Clause had been violated by the admission into evidence of a complaint for protection from abuse and a supporting affidavit that had been filed by the victim prior to her death.⁷⁹ The court was not persuaded by Roberts’s argument because the jury was properly instructed not to use the allegations contained in the order or affidavit for substantive purposes.⁸⁰

Finally, in 2008, the Law Court held in *State v. Tayman* that a public record, proof of notice of license suspension generated by the Department of Motor Vehicles, was not “testimonial” for the purposes of the Confrontation Clause.⁸¹ The Law Court was persuaded that “the *Crawford* Court’s exclusion of business records from the definition of ‘testimonial’ provided a basis to conclude that public records were similarly not within the purview of Confrontation Clause analysis.”⁸² The Law Court included in its holding public records that “merely reflect the routine cataloging of administrative events” and that “do not contain assertions or accusations made after the fact and *in preparation for litigation*,” which are not testimonial.⁸³

IV. MAINE LEADS THE WAY: *STATE V. MANGOS*

Although the “testimonial” nature of forensic laboratory reports has been “the most widespread subject of controversy” in the wake of *Crawford*,⁸⁴ the Supreme

74. *Id.* ¶ 9, 903 A.2d at 856.

75. 2006 ME 133, ¶¶ 12-15, 909 A.2d 1011, 1016-17.

76. *Id.* at n.1 (citing *Davis*, 547 U.S. at 826-27).

77. 2008 ME 112, ¶ 34, 951 A.2d 803, 814.

78. *Id.* ¶¶ 1-18, 951 A.2d at 806-10.

79. *Id.* ¶ 33, 951 A.2d at 813.

80. *Id.* ¶¶ 33-34, 951 A.2d at 813-14. The trial court told the jury not to “consider the allegations that appear in the 2005 complaint as evidence of anything. They’re simply allegations.” *Id.* ¶ 33, 951 A.2d at 813.

81. 2008 ME 177, ¶¶ 24-25, 960 A.2d 1151, 1158.

82. *Id.* ¶ 18, 960 A.2d at 1156. The court also looked to other state court decisions to reach its decision. *Id.* ¶¶ 15-17, 960 A.2d at 1156 (citing *State v. Shipley*, 757 N.W.2d 228 (Iowa 2008); *State v. Kronich* 161 P.3d 982 (Wash. 2007); *State v. Kirkpatrick*, 161 P.3d 990 (Wash. 2007)).

83. *Id.* ¶ 21, 960 A.2d at 1157 (emphasis added).

84. Brief of Amici Curiae Professors Paul C. Giannelli et al. in Support of Petitioner at 1, *Campbell v. North Dakota*, cert. denied, 549 U.S. 1180, (No. 05-564).

Court has not yet resolved the issue. The Law Court, in *State v. Mangos*,⁸⁵ answered this question and held that laboratory reports were testimonial.

In 2006, Vincent Mangos was convicted of robbing a convenience store in Lewiston, Maine.⁸⁶ At trial, the prosecution offered into evidence a laboratory report, prepared by the Maine State Police Laboratory, that used DNA testing to link Mangos to clothing found near the crime scene.⁸⁷ In order to establish the chain of custody, the prosecution called a laboratory supervisor to testify, based on the report of a laboratory technician who handled the clothing, about the process of taking swabs from the garments.⁸⁸ Over Mangos's objection, the laboratory supervisor testified in lieu of the laboratory technician.⁸⁹ The supervisor admitted that, because she had not performed the swabbing and only had the laboratory technician's report to speak from, "only [the laboratory technician] could testify as to whether the correct scientific method was used in creating the swabs."⁹⁰

After being convicted of robbery, Mangos appealed to the Law Court.⁹¹ He argued that because the laboratory technician's report was used to "establish both the factual and scientific foundation for the admission of the DNA evidence," the technician was a "witness *against* him," and he therefore had a right to cross-examine her under the Confrontation Clause.⁹² Underestimating the strength of Mangos's argument, the State argued simply that because the laboratory technician did not testify at trial, her report was not "testimonial," and that the defendant's right to confront was not violated because the technician's actual report was not admitted into evidence,⁹³ without considering the fact that the laboratory supervisor's testimony was based on the laboratory technician's report.⁹⁴

The Law Court was persuaded by Mangos's argument and vacated his conviction.⁹⁵ The court held that the laboratory technician's statements contained in her report were testimonial and therefore subject to the Confrontation Clause.⁹⁶ Citing *Davis* for the proposition that "[t]estimonial evidence includes statements made for the purpose of police investigation," the court concluded that the technician's statements were exactly that.⁹⁷ Accordingly, Mangos had a right to cross-examine her.⁹⁸ In holding that the trial court's error was not harmless, the Law Court was mindful of the fact that DNA "is very powerful evidence," and is

85. 2008 ME 150, 957 A.2d 89.

86. *Id.* ¶ 1, 957 A.2d at 90-91.

87. *Id.* ¶¶ 4-5, 957 A.2d at 91-92.

88. *Id.* ¶ 4, 957 A.2d at 91.

89. *Id.*

90. *Id.* ¶ 6, 957 A.2d at 92.

91. *Mangos*, 2008 ME 150, ¶ 1, 957 A.2d at 90-91.

92. Brief for Appellant at 9-10, *State v. Mangos*, 2008 ME 150, 957 A.2d 89 (No. And-07-602) (emphasis added).

93. Brief for the State, Appellee at 11, *State v. Mangos*, 2008 ME 150, 957 A.2d 89 (No. And-07-602).

94. *Mangos*, 2008 ME 150, ¶ 4, 957 A.2d at 91.

95. *Id.* ¶ 1, 957 A.2d at 91.

96. *Id.* ¶ 13, 957 A.2d at 93.

97. *Id.* ¶¶ 11, 13, 957 A.2d at 93 (citing *Davis*, 547 U.S. at 830).

98. *Id.* ¶ 13, 957 A.2d at 93.

therefore likely to have a profound impact on the jury.⁹⁹

Implicit in the court's holding in *Mangos* is the conclusion that laboratory reports are not subject to the public records exception cited in *Tayman*. The critical distinction between the statements made in each case is the time at which the statements were made. "Assertions" made "in preparation for litigation" do not fall within the business or public record exception and are therefore subject to the Confrontation Clause.¹⁰⁰ As the *Crawford* Court explained, those statements that fall under the common law business record exception "by their nature [are] not testimonial."¹⁰¹ Although the report in question in *Mangos* contained statements about the preparation of the swabs to be tested, the *Mangos* holding is broad and therefore applies similarly to the statements made "in preparation for litigation" contained in the report of a laboratory technician who actually conducted the testing and interpreted the results.¹⁰² Such statements would also fall into the purview of *Mangos* as being "in furtherance of a police investigation." The court's holding in *Mangos* is uncharted territory in Maine, as evidenced by the court's noticeable absence of supporting authority.

The Law Court did not address how its holding in *Mangos* would interact with Maine's statutes permitting admission of lab evidence via affidavit,¹⁰³ subject to a defendant's request that a technician testify as to the contents of the affidavit. Namely, section 2431 of title 29-A permits admission into evidence of the contents of duly signed and sworn certificates, prepared by analysts, stating the results of blood-alcohol or drug concentration analysis.¹⁰⁴ Section 2431 also includes a "notice-and-demand" caveat, which provides that a defendant "may request that a *qualified witness* testify to the matters of which the certificate constitutes prima facie evidence."¹⁰⁵ The statute does not demand that the witness be the person who actually conducted the test, mirroring the very procedure that the Law Court rejected in *Mangos*. Similarly, section 1112 of title 17-A provides that, after analyzing "a drug or substance from a law enforcement officer," a laboratory "shall issue a certificate stating the results of the analysis."¹⁰⁶ The duly signed and sworn certificate "is admissible in evidence" and "gives rise to a permissible inference . . . that the composition, quality and quantity of the drug or substance are as stated in the certificate."¹⁰⁷ However, the certificate is not automatically admissible unless "the defendant requests that a *qualified witness* testify as to the composition,

99. *Id.* ¶¶ 14-15, 957 A.2d at 93-94. See also Jeffrey Toobin, *The CSI Effect: The Truth About Forensic Science*, THE NEW YORKER, May 7, 2007, at 30 ("In large part because of the [television] series' success . . . [the] profession has acquired an air of glamour, and its practitioners an aura of infallibility.").

100. 2008 ME 177, ¶ 21, 960 A.2d at 1157.

101. *Crawford*, 541 U.S. at 56.

102. This interpretation of the Law Court's holding is further evidenced by the fact that Maine did not join the thirty-six states writing as amici curiae in support of Massachusetts. See Brief of the States, *supra* note 8.

103. ME. REV. STAT. ANN. tit. 29-A, § 2431 (1996 & Supp. 2008-2009).

104. *Id.*

105. *Id.* § 2431(2)(D) (emphasis added).

106. ME. REV. STAT. ANN. tit. 17-A, § 1112(1) (2006).

107. *Id.*

quality and quantity.”¹⁰⁸ After *Mangos*, the definition of a “qualified” witness must necessarily be narrowed to include only the laboratory technician who performed the analysis.

The *Mangos* opinion is sparse and leaves questions unanswered. This is likely because the Law Court knew that the United States Supreme Court had granted certiorari on the same issue in the case of *Melendez-Diaz v. Massachusetts*.¹⁰⁹ Because the *Mangos* holding is consistent with historical and Supreme Court precedent, as expounded on by Melendez-Diaz and his amicus curiae in their briefs, the Supreme Court should follow the Law Court’s reasoning.

V. FOLLOWING MAINE’S LEAD: *MELLENDEZ-DIAZ V. MASSACHUSETTS*

The question now before the Supreme Court in *Melendez-Diaz v. Massachusetts* is “[w]hether a state forensic analyst’s laboratory report prepared for use in a criminal prosecution is ‘testimonial’ evidence subject to the demands of the Confrontation Clause as set forth in *Crawford v. Washington*.”¹¹⁰ The petitioner, Luis Melendez-Diaz, was arrested in Massachusetts in 2001 on suspicion of drug dealing and was later charged with distributing and trafficking in cocaine.¹¹¹ At trial, the prosecution offered, pursuant to Chapter 111, Section 13 of the General Laws of Massachusetts,¹¹² certificates of laboratory reports reflecting the results of testing performed at the behest of the police department on the substances contained in plastic bags seized from a man with the petitioner and found in the back seat of the police cruiser in which the petitioner had been transported.¹¹³ The petitioner objected to the admission of the certificates absent an opportunity to cross-examine the analysts who prepared them, but the trial court overruled his objections.¹¹⁴ After being instructed that it was “permitted but . . .

108. *Id.*

109. *Melendez-Diaz*, 128 S.Ct. 1647 (2008).

110. Brief for Petitioner at i, *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009) (No. 07-591) [hereinafter Brief for Petitioner].

111. *Id.* at 5-7.

112. Chapter 111, section 13 of the General Laws of Massachusetts, similar to Maine’s section 1112, provides:

The analyst or an assistant analyst of the department [of public health] . . . shall upon request furnish a signed certificate, on oath, of the result of the analysis provided for in the preceding section to any police officer or any agent of such incorporated charitable organization, and the presentation of such certificate to the court by any police officer or agent of any such organization shall be prima facie evidence that all the requirements and provisions of the preceding section have been complied with. This certificate shall be sworn to before a justice of the peace or notary public, and the jurat shall contain a statement that the subscriber is the analyst or an assistant analyst of the department. When properly executed, it shall be prima facie evidence of the composition, quality, and net weight of the narcotic or other drug, poison, medicine, or chemical analyzed or the net weight of any mixture containing the narcotic or other drug, poison, medicine, or chemical analyzed, and the court shall take judicial notice of the signature of the analyst or assistant analyst, and of the fact that he is such.

MASS. GEN. LAWS ANN. ch. 111, § 13 (2003).

113. Brief for Petitioner, *supra* note 110, at 8.

114. *Id.*

not required to conclude that the substance was cocaine,”¹¹⁵ the jury found the petitioner guilty and he was sentenced to three years in prison.¹¹⁶

The Appeals Court of Massachusetts affirmed the petitioner’s conviction.¹¹⁷ The appeals court cited the Massachusetts Supreme Judicial Court’s prior holding in *Commonwealth v. Verde* that introducing “certificates of drug analysis” in lieu of live testimony does not “deny a defendant the right of confrontation.”¹¹⁸ In *Verde*, the Massachusetts Supreme Judicial Court concluded that drug analysis certificates “had very little kinship to the type of hearsay the confrontation clause intended to exclude, absent an opportunity for cross-examination.”¹¹⁹ The *Verde* Court reasoned that drug analysis certificates “are neither discretionary nor based on opinion”¹²⁰ and therefore were “akin to a business or official record, which the Court [in *Crawford*] stated was not testimonial in nature.”¹²¹ Melendez-Diaz then petitioned for, and was granted, a Writ of Certiorari by the United States Supreme Court.¹²²

Consistent with the Law Court’s holding in *Mangos*, Petitioner Melendez-Diaz contends that forensic laboratory reports are “testimonial” under *Crawford*, and to an even greater extent under *Davis*, and therefore are subject to the Confrontation Clause. As the petitioner explains, “[A] classic form of testimonial hearsay is an ex parte affidavit, . . . and modern forensic laboratory certificates are the functional equivalent of such affidavits.”¹²³ Because forensic reports “are expressly prepared for law enforcement to aid in criminal investigations . . . [they] are fundamentally testimonial in a way that classic business and official records were not.”¹²⁴ The petitioner explains that the “common-law shop-book” [or business] exception and the “common-law hearsay exception for official (or public) records,” as envisioned by the Founders, was much narrower than Massachusetts would have it be,¹²⁵ and “did not remotely encompass reports generated for use in investigations or litigation.”¹²⁶ Indeed, were ex parte statements made *in preparation for litigation* excepted under the business or public records exception, the Confrontation Clause would be practically rendered moot. As the Court extrapolated in *Crawford*, such statements were precisely what the Confrontation Clause was designed to protect

115. *Id.* at 9 n.2.

116. *Id.* at 8-9.

117. *Commonwealth v. Melendez-Diaz*, 2007 WL 2189152, at *5 (Mass. App. Ct. July 31, 2007).

118. *Id.* at *4 n.3 (citing *Commonwealth v. Verde*, 827 N.E.2d 701, 704-05 (Mass. 2005)).

119. *Verde*, 827 N.E.2d at 706.

120. *Id.* at 705.

121. *Id.* at 706 (citing *Crawford*, 541 U.S. at 56).

122. *Melendez-Diaz*, 128 S. Ct. 1647.

123. Brief for Petitioner, *supra* note 110, at 4.

124. *Id.* at 11-12.

125. *Id.* at 20-21. In response, Massachusetts contends that “drug analysis certificates are well within the common law definition official records exception because they are prepared by state officials pursuant to a duty imposed by law.” Brief for Respondent at 11, *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009) (No. 07-591) [hereinafter Brief for Respondent].

126. *Id.* at 20. See also Brief of Richard D. Friedman, as Amicus Curiae in Support of Petitioner at 13-14, *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009) (No. 07-591) [hereinafter Friedman Brief] citing *Palmer v. Hoffman*, 318 U.S. 109, 114 (1943)) (“If a document is prepared for litigation, it is testimonial in nature whether or not the state chooses to label it a business or official record.”).

against.¹²⁷

In defense of the appeals court's decision, Massachusetts contends that, more than the *Crawford* Court's focus on "testimonial" statements, the primary focus of the Confrontation Clause is on "accusatory" statements.¹²⁸ Under that analysis, because laboratory reports "reflect only . . . objective or neutral facts"¹²⁹ they do not "implicate the 'principle evil' the Confrontation Clause was designed to avoid."¹³⁰ As the petitioner counters, however, "the Commonwealth's 'directly accusatory' rule is startlingly restrictive,"¹³¹ and has no basis in either the text of the Sixth Amendment or in precedent. Indeed, the petitioner goes on, "the phrase 'witnesses against' is broader than the word 'accusers,'¹³² and "[m]any criminal prosecutions rest entirely on circumstantial evidence, none of which 'directly accuse[s] anyone of any criminal conduct.'"¹³³

Whether or not lab technicians are in fact law enforcement personnel, as *Davis* would suggest that they are,¹³⁴ they conduct tests at the behest of, and at the expense of, the prosecution. Further, laboratory technicians are unquestionably *human*. Massachusetts contends that "the primary source of the statement is not even the analyst, but the machine itself."¹³⁵ This argument perpetuates a "myth of infallibility—a myth that finds no basis in the reality of state forensic practices throughout the country."¹³⁶ The Commonwealth's argument is a fallacy and demonstrates a willful disregard of the human involvement that is essential to forensic testing. Laboratory reports are prepared by humans and "reflect complicated, subjective interpretations of imprecise scientific tests."¹³⁷ Additionally, as illustrated in *Mangos*, laboratory reports contain technicians' accounting of the means in which samples for testing were procured and prepared. The inescapable human element of laboratory testing necessarily means that laboratory reports are fallible. The ability to confront laboratory technician witnesses is even more essential in light of the statistics provided by the National

127. *Crawford*, 541 U.S. at 50-51.

128. Brief for Respondent, *supra* note 125, at 10. The respondent further contends that although it does not have case law to support this contention, "[t]he Sixth Amendment's text itself supports an accusation-based focus." *Id.* at 18.

129. *Id.* at 23.

130. *Id.* at 11 (citing *Crawford*, 541 U.S. at 50).

131. Reply Brief for Petitioner at 3, *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009) (No. 07-591).

132. *Id.* at 4.

133. *Id.* at 3 (quoting Brief of Respondent, *supra* note 125, at 16-17). *See also* Friedman Brief, *supra* note 126, at 16 ("An eyewitness who is asked to do nothing more than relate what she saw is the paradigmatic example of a witness subject to the Clause.").

134. *See Davis*, 547 U.S. at 827 (noting the difference between efforts designed to establish a past fact and efforts to determine current circumstances requiring police assistance).

135. Brief for Respondent, *supra* note 125, at 30. Writing as amicus curiae, the United States asserts that "[t]esting results that contain no human assertion are not 'statements' at all, and therefore cannot be 'testimonial statements' for Confrontation Clause purposes." Brief for the United States as Amicus Curiae Supporting Respondent, *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009) (No. 07-591) [hereinafter Brief of the United States].

136. Brief of Amicus Curiae the National Innocence Network in Support of Petitioner at 4, *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009) (No. 07-591) [hereinafter Brief of National Innocence Network].

137. Brief for Petitioner, *supra* note 110, at 12.

Innocence Network writing as amicus curiae for the petitioner. Having discovered “over [100] exonerations [wherein] the misapplication of forensic disciplines . . . played a role in convicting the innocent,”¹³⁸ the National Innocence Project posits that “state forensic examiners do exercise substantial discretion and judgment . . . and these examiners also often interpret the results of unverified techniques for which there often exists no recognized or objective standard at all.”¹³⁹ Hence, “[t]he fact that these sorts of forensic practices exist stands as a glaring example of the sort of failing that confrontation is designed to prevent and expose.”¹⁴⁰ The National Innocence Project’s conclusions are supported by a 2008 report conducted by the National Academy of Science, which found that:

Forensic evidence that has helped convict thousands of defendants for nearly a century is often the product of shoddy scientific practices that should be upgraded and standardized . . . [and] the field suffer[s] from a reliance on outmoded and untested theories by analysts who often have no background in science, statistics or other empirical disciplines.¹⁴¹

Asserting that laboratory reports are not testimonial, only report objective facts, and fall under the business records exception, Massachusetts contends that they are sufficiently “reliable” to render cross-examination of the individual who prepared the report unnecessary.¹⁴² As the petitioner explains, “[T]hese three arguments are just different ways of asserting that forensic reports should be deemed nontestimonial because they are reliable.”¹⁴³ However, the “reliability” standard was expressly rejected in *Roberts*. Furthermore, as demonstrated by the National Innocence Project and the recent report conducted by the National Academy of Science, state laboratory forensic tests results are anything but reliable.

It is certainly true that, were the Supreme Court to follow in the Law Court’s footsteps in classifying forensic laboratory reports as “testimonial” and, therefore, subject to the Confrontation Clause, the administrative burden placed on states in prosecuting many criminal cases would be increased.¹⁴⁴ However, “[w]hile the

138. Brief of National Innocence Network, *supra* note 136, at 2-3. “These are just some of the many exoneration cases that illustrate how forensic laboratory errors and overreaching plagued the criminal justice process during the past 35 years.” *Id.* at 20. See also *Houston Won’t Review Cases in Lab Inquiry*, N.Y. TIMES, Jun. 14, 2007, available at <http://www.nytimes.com/2007/06/14/us/14/houston.html?emc=eta1> (reporting on the discovery of “hundreds of criminal cases believed tainted by problems in the [Houston] Police Department’s crime laboratory”).

139. Brief of National Innocence Network, *supra* note 136, at 4-5.

140. *Id.* at 17.

141. Solomon Moore, *Science Found Wanting in Nation’s Crime Labs*, N.Y. TIMES, Feb. 5, 2009, at A1.

142. See Brief of Respondent, *supra* note 125, 14, 23, 30.

143. Reply Brief for Petitioner, *supra* note 131, at 8.

144. In its brief in support of the respondent, the National District Attorneys Association (NDAA) and District, Prosecuting, and County Attorneys argue that “[g]iven the limited resources in the state laboratories, requiring live testimony in each and every drug-related case would cause significant delays in the administration of justice.” Brief of Amici Curiae the National District Attorneys Association et al. at 15, *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009) (No. 07-591) [hereinafter Brief of National District Attorneys Association]. The NDAA posited that “[i]f live testimony of an analyst were required in each and every drug case, the current criminal justice system would effectively come to a standstill.” *Id.* at 19.

State's administrative and fiscal concerns are legitimate, they cannot control the scope of the 'bedrock procedural guarantee' of the Confrontation Clause.¹⁴⁵ Indeed, "[t]he criminal justice system would, no doubt, be cheaper and more efficient . . . if the confrontation right did not exist. So too would it be cheaper and more efficient if it did without juries, or lawyers, or even judges."¹⁴⁶ Holding forensic laboratory results to be "testimonial" would likely have the effect of rendering the results more reliable as "examiners who realize there is a possibility their work—or lack thereof—will be subjected to adversarial scrutiny can be expected to think twice before making up results and tests from scratch."¹⁴⁷ Were that the case, "[g]ood forensic practices [would] have nothing to fear in such a system. Not only [would] such procedures and methods withstand even the most vigorous cross-examination, but the accused [would] often choose to forego confrontation entirely, rather than drive home in front of the fact-finder the accuracy and reliability of the scientific evidence against him,"¹⁴⁸ thereby lessening the administrative burden.

The development of forensic testing has made the task of prosecuting defendants easier for prosecutors by providing them with a means of connecting the defendant to the crime scene or verifying the chemical composition of illicit substances found in the possession or bloodstream of a defendant. With the development of the forensic technologies that aid them in their prosecutions of criminals, the states must also bear the burden of protecting criminal defendants from abuse of the same. However, as Richard D. Friedman, writing as amicus curiae for the petitioner acknowledges, *Melendez-Diaz* presents "an easy case . . . [b]ut . . . sometimes 'easy cases make bad law.'"¹⁴⁹ There is no sense in unnecessarily consuming the states' resources by providing a live witness to present the results of forensic laboratory testing, even where the defendant does not challenge the results or feel he has anything to gain by cross-examining their preparer.¹⁵⁰ Because "[c]onfrontation rights, like many other constitutional rights, can be waived,"¹⁵¹ defendants' rights under the Confrontation Clause would be satisfied by "notice and demand" statutes that provide for confrontation of *the* laboratory technician or technicians who performed the forensic laboratory test by requiring "prosecutors [to] present live testimony from forensic examiners only in cases in which criminal defendants affirmatively choose to exercise their confrontation rights."¹⁵²

145. Brief of Law Professors as Amici Curiae in Support of Petitioner at 6, *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009) (No. 07-591) [hereinafter Brief of Law Professors] (quoting *Crawford*, 541 U.S. at 42).

146. Friedman Brief, *supra* note 126, at 18-19.

147. Brief of National Innocence Network, *supra* note 136, at 17.

148. *Id.* at 31.

149. Friedman Brief, *supra* note 126, at 2 (quoting *O'Bannon v. Town Court Nursing Ctr.*, 447 U.S. 773, 804 (1980) (Blackmun, J., concurring)).

150. "For defendants, absent a specific basis in fact for contesting the correctness of an expert's conclusion, there is little to gain and much to lose in requiring an articulate, well-credentialed expert to appear to prove an undisputed technical detail of an alleged crime." Brief of Law Professors, *supra* note 145, at 11.

151. *Id.* at 9 (citing *Brookhart v. Janis*, 384 U.S. 1, 4 (1966)).

152. *Id.* at 14-15.

VI. CONCLUSION

The Law Court was correct in holding that forensic laboratory reports are testimonial and, therefore, subject to the Confrontation Clause in *State v. Mangos*. In light of the historical purpose of the Clause and of its own Confrontation Clause precedent, the Supreme Court should classify laboratory reports prepared in anticipation of litigation as “testimonial” in *Melendez-Diaz v. Massachusetts*. The procedural protections provided by the Confrontation Clause are essential to the integrity of our adversarial system. Laboratory reports are critical to prosecutors’ cases against criminal defendants and are damning evidence in the eyes of juries. Preventing defendants from cross-examining the preparers of such evidence deprives criminal defendants of their constitutional rights, and the Supreme Court is now in a position to remedy the same.

VII. ADDENDUM

Consistent with this Note’s reasoning, but imposing important limitations not considered by the Maine Supreme Judicial Court in *State v. Mangos*, the majority opinion in *Melendez-Diaz*, written by Justice Scalia and joined by Justices Stevens, Souter, Thomas, and Ginsburg, posited that this “case involves little more than the application of our holding in *Crawford v. Washington*.”¹⁵³ Relying on the *Davis* Court’s definition of “testimonial” statements, which included affidavits, the Court explained that the “documents at issue [in *Melendez-Diaz*], 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.’”¹⁵⁴ Again, harkening back to *Davis*, the Court elaborated that “the ‘certificates’ are functionally identical to live, in-court testimony, doing ‘precisely what a witness does on direct examination.’”¹⁵⁵

The Court rejected Massachusetts’s argument that a witness’s statements must be “accusatory” in order to be subject to the Confrontation Clause by relying on the text of the Amendment, which simply guarantees a defendant’s right of confrontation of witnesses “against him.”¹⁵⁶ Citing the National Academy Report, the Court also rejected the contention that laboratory test results are always the result of “neutral scientific testing.”¹⁵⁷ The Court correctly identified the fact that the argument that laboratory test results are sufficiently reliable so as to not require confrontation “is little more than an invitation to return to [the Court’s] overruled decision in *Roberts* ‘particularized guarantees of trustworthiness.’”¹⁵⁸ Finally, with regard to Massachusetts’s contention that laboratory test results are “business records” and therefore are subject to the traditional exception to confrontation afforded such documents, the Court explained that Massachusetts “misunderstands the relationship” between the hearsay exception for business records and the

153. *Melendez-Diaz*, 129 S. Ct. at 2542.

154. *Id.* at 2532 (quoting BLACK’S LAW DICTIONARY 62 (8th ed. 2004))

155. *Id.* (quoting *Davis*, 547 U.S. at 830).

156. *Id.* at 2533.

157. *Id.* at 2536 (quotation marks omitted).

158. *Id.* (citation omitted).

Confrontation Clause.¹⁵⁹ The Court further noted that whether or not laboratory results are created in the course of conducting business, they are also created for “the purpose of establishing or proving some fact at trial,” and are therefore testimonial.¹⁶⁰

The divide between the majority and dissenting opinions is essentially that of the formalists versus the pragmatists. Because of its concerns about the practical ramifications of the majority’s opinion, the dissent offered strained arguments to arrive at its ultimate goal of excluding laboratory test results from the requirements of the Confrontation Clause.¹⁶¹ In an attempt to reach its desired outcome, the dissent essentially took issue with the Court’s precedent in *Crawford*, namely with the Court’s formulation of the category of out-of-court statements—those that are “testimonial”—that are subject to the Confrontation Clause.¹⁶² Despite the dissent’s distaste for what it viewed as the majority’s unsupported classification of “testimonial” statements, the dissent offered little support for its own formulation that the Confrontation Clause applies instead only to “conventional” witnesses. The dissent defined a “conventional” witness as “one who has personal knowledge of some aspect of the defendant’s guilt” and “one who perceived an event that gave rise to a personal belief in some aspect of the defendant’s guilt.”¹⁶³ For the contention that the right to confront is limited to “conventional” witnesses, however, there is no support to be found in the text of the Confrontation Clause, which reads quite plainly that all witnesses *against* the defendant are subject to confrontation.

The dissent was concerned that the majority’s holding “imposes enormous costs on the administration of justice” and “threatens to disrupt forensic investigations across the country and to put prosecutions nationwide at risk of dismissal based on erratic, all-too-frequent instances when a particular laboratory technician, now invested by the Court’s new constitutional designation as the analyst, simply does not or cannot appear.”¹⁶⁴ The dissent is not alone in its hand-wringing about the majority’s holding.¹⁶⁵ Holding steadfast to its understanding of the Constitutional guarantee, however, the majority maintained that “[t]he 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.”¹⁶⁶ Further, the majority “doubt[ed] the accuracy of respondent’s and the dissent’s dire predictions.”¹⁶⁷ Minimizing the dissent’s concerns, the majority offered that

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

160. *Id.* at 2540.

161. *Id.* at 2558 (Kennedy, J., dissenting).

162. *Id.* at 2551-52.

163. *Id.* at 2543.

164. *Id.* at 2549.

165. See Tom Jackman, *Lab Analyst Decision Complicates Prosecutions; High Court Requires Scientists to Testify*, WASH. POST, July 15, 2009, at A1 (noting the concerns of prosecutors). See also Adam Liptak, *Justices Rule Crime Analysts Must Testify on Lab Results*, N.Y. TIMES, June 25, 2009, at A1.

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

167. *Id.*

“[p]erhaps the best indication that the sky will not fall after today’s decision is that it has not done so already.”¹⁶⁸ In support of its position, the majority noted the ten states that had already adopted the constitutional rule announced in *Melendez-Diaz* and found that there was “no evidence that the criminal justice system has ground to a halt.”¹⁶⁹ Of the ten states cited by the majority, Maine was not among them.¹⁷⁰ This is perhaps an expression by the Court that, in its estimation, the Maine Law Court’s holding in *Mangos* is overbroad.

Although the dissent failed to offer a compelling justification for its conclusion that laboratory test results prepared by analysts are not subject to the Confrontation Clause, the dissent did identify an issue raised by *Mangos*: Who is the analyst?¹⁷¹ As illustrated by *Mangos*, the *Melendez-Diaz* dissent pointed out that there are several people involved with the preparation and testing of a sample and that each could be considered an analyst under the majority’s analysis.¹⁷² As the dissent explained, each of the individuals involved with the testing “has power to introduce error.”¹⁷³ Along those same lines, the Maine Supreme Judicial Court held in *Mangos* that the individual who *prepared* the sample, like the individual who conducted the testing, was subject to confrontation.¹⁷⁴ The *Melendez-Diaz* majority dismissed the dissent’s argument with the following reasoning:

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. . . . 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.¹⁷⁵

In responding to the dissent’s fears that *Melendez-Diaz* would create a “slippery slope” requiring the appearance of each and every laboratory employee involved at any stage of the testing process, the majority made a shrewd distinction, one not made by the Law Court in *Mangos* and one that should appease the pragmatic concerns of the dissent and catastrophizing commentators alike. The *Melendez-Diaz* majority explained, of those involved in the preparation and testing, only one person provides “testimony” subject to the Confrontation Clause, the individual who actually conducts the test which produces the result that is to be introduced in court.¹⁷⁶

VIII. LOOKING AHEAD

The disagreement about *Melendez-Diaz*’s practical implications and the uncertainty about the reach of the Supreme Court’s opinion may be short lived,

168. *Id.*

169. *Id.* at 2540-41.

170. *Id.* at 2540-41 n.11.

171. *Id.* at 2544 (Kennedy, J., dissenting).

172. *Melendez-Diaz*, 129 S. Ct. at 2544 at (Kennedy, J., dissenting).

173. *Id.* at 2545.

174. *See Mangos*, 2008 ME 150, ¶¶ 8, 13, 957 A.2d at 92-93.

175. *Melendez-Diaz*, 129 S. Ct. at 2532 n.1 (emphasis added).

176. *Id.* at 2532 & n.1.

however, in light of the Court's grant of certiorari, subsequent to its issuance of *Melendez-Diaz*, in the case of *Briscoe v. Virginia*.¹⁷⁷ *Briscoe* presents the following question:

If a state allows a prosecutor to introduce a certificate of a forensic laboratory analysis, without presenting the testimony of the analyst who prepared the certificate, does the state avoid violating the Confrontation Clause of the Sixth Amendment by providing that the accused has a right to call the analyst as his own witness?¹⁷⁸

This question would appear to have been answered by *Melendez-Diaz*. Indeed, the Court specifically explained that “[c]onverting 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.”¹⁷⁹ “More fundamentally,” the Court continued, “the Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court.”¹⁸⁰ As University of Michigan Law School Professor Richard D. Friedman, a Confrontation Clause scholar and the attorney who filed the petition for certiorari in *Briscoe*, reacted to the Court’s opinion in *Melendez-Diaz* on his blog:

[There is also the] argument that the power to subpoena the analyst, either under the Compulsory Process Clause or a state statute, adequately fulfills the confrontation right. Justice Scalia gives this argument the back of the hand that it deserves, dismissing it in a single paragraph—though several states had adopted it. And it was dangerous, too, because the principle was limitless and would have posed a significant threat to the continuing vitality of the Confrontation Clause. I confess I was a little sorry to see this part of the opinion; my petition in *Briscoe v. Virginia*, which has been held pending this decision, had raised this issue, and I would have loved to argue it. Instead, we get handed a victory without argument. Damn.¹⁸¹

Although Professor Friedman felt that *Melendez-Diaz* was “the right result, for the right reasons,” he expressed his disappointment at what he perceived to be the Court’s foreclosure of the issue presented in his case.¹⁸² Apparently, though, the Supreme Court of the United States read the situation differently.

One can only speculate about the Court’s reasoning for granting certiorari on an issue within a week of issuing an opinion that appears to have resolved that very issue. What is certain, however, is that Justice Sotomayor, instead of Justice Souter, will be a new voice on the Court in *Briscoe*. This personnel change has the potential to have a tremendous impact on the Court’s Confrontation Clause jurisprudence. As Marquette University Law School Professor Daniel D. Blinka explained:

177. 129 S. Ct. 2858 (2009).

178. Petition for a Writ of Certiorari at i, *Briscoe v. Virginia*, *petition for cert. filed*, No. 07-11191 (May 28, 2009).

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

180. *Id.*

181. The Confrontation Blog, <http://confrontationright.blogspot.com> (June 25, 2009, 20:05 EDT).

182. *Id.*

Melendez-Diaz itself may have a short shelf-life. Only four days after publishing *Melendez-Diaz*, the Supreme Court granted certiorari in a Virginia case that revisits this very evidentiary scenario. Since the recently departed David Souter provided the fifth vote for the majority, we will soon learn how justice-soon-to-be Sotomayor, a former prosecutor with a liberal bent, affects the balance.¹⁸³

There is much conjecture about Sotomayor's ideology and personal history, and the impact that both might have on the Court. The *Wall Street Journal* predicted that "[w]hile Judge Sonia Sotomayor stands in the liberal mainstream on many issues, her record suggests that the Supreme Court nominee could sometimes rule with the top court's conservatives on questions of criminal justice."¹⁸⁴

Commentator Lyle Dennison deemed that:

There is, it would seem, at least a chance that [Souter's] designated successor, Judge Sotomayor, would not be prepared to embrace *Melendez-Diaz*, at least without some restriction on its scope; she has a record on criminal law issues that appears to be somewhat more prosecution-oriented than Justice Souter's has been.¹⁸⁵

Similarly, Case Western Reserve University School of Law Professor Jonathan Adler blogged that:

[T]here are reasons to suspect that she may join the pragmatists more often than the formalists. For one thing, her criminal law opinions provide little evidence of a strong civil libertarian streak of the sort that would lead her to apply constitutional protections for criminal defendants in a strict and unyielding manner. Further, her experience as a trial court judge and prosecutor may lead her to take a more pragmatic, and less bright-line-oriented approach to these sorts of cases. If so, her ascension to the Court could have dramatic consequences for criminal law, as she could create a new Court majority on these issues and roll back recent decisions on the Confrontation Clause, sentencing rules, and other areas of criminal law.¹⁸⁶

The impact that Judge Sotomayor and the Court's decision in *Briscoe* will have on *Melendez-Diaz* remains to be seen. At this point, the only certainty is that there is uncertainty in the Court's position on laboratory results and the Confrontation Clause. As it stands now, however, *Melendez-Diaz* is, in the words of Richard Friedman, "the right result for the right reason,"¹⁸⁷ granting criminal defendants the right to confront those individuals responsible for what amounts to the "testimonial statement" of the results of laboratory testing.

183. Posting of Daniel D. Blinks to Marquette University Law School Faculty Blog, <http://law.marquette.edu/facultyblog/> (July 6, 2009).

184. Jess Bravin & Nathan Koppel, *U.S. News: Nominee's Criminal Rulings Tilt to Right of Souter*, WALL ST. J., June 5, 2009, at A3.

185. Posting of Lyle Denniston to SCOTUSblog, <http://www.scotusblog.com> (June 29, 2009, 13:51 EDT).

186. Posting of Jonathan Adler to Volokh Conspiracy, <http://www.volokh.com> (June 29, 2009, 05:55).

187. The Confrontation Blog, *supra* note 181.