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Is a Forensic Laboratory Report Identifying a Substance as a Narcotic 'Testimonial'?

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Case at a Glance

Luis Melendez-Diaz was convicted of trafficking in cocaine. Two drug analysis certificates, prepared at a state crime laboratory and indicating that bags seized after the alleged drug transaction contained cocaine, were admitted against him. A state statute purports to render the certificates admissible without the technician who performed the analysis being required to testify at trial. Melendez-Diaz contends, as he did at trial, that this procedure violates his Sixth Amendment right "to be confronted with the witnesses against him."

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ISSUE

Is a state forensic analyst's laboratory report, prepared for use in a criminal proceeding and identifying a substance as cocaine, "testimonial" evidence and so subject to the demands of the Confrontation Clause as set forth in *Crawford v. Washington,* 541 U.S. 36 (2004)?

FACTS

Acting on a tip from a senior employee of a K-Mart store, a police officer observed the movements of Thomas Wright, a store employee. The officer saw Wright get into the back seat of a car, driven by Ellis Montero, in which Luis Melendez-Diaz was a front-seat passenger. The car drove a short distance and stopped. The officer saw Wright lean forward and back. When Wright left the car, the officer stopped him and searched him. The officer found four small bags in one of Wright's pants pockets. Two contained a white powder and two contained a yellow powder with clumps. The officer arrested Wright and radioed to other officers on the scene, who arrested Montero and Melendez-Diaz. The three men were driven to the police station in a police car. While they were being booked, officers searched the police car and found in the backseat area nineteen plastic bags containing dark yellow powder with large clumps.

Suspecting that the two groups of bags contained cocaine, the police submitted them to the Massachusetts Department of Public Health's State Laboratory Institute for testing. Under Mass. Gen. Law. Ch. 111, § 12, the Department must "make ... a chemical analysis of any narcotic drug ... when submitted to it by police authorities ... provided, that it is satisfied that the analysis is to be used for the enforcement of law." Under § 13, "an analyst or assistant analyst of the department

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... shall upon request furnish a signed certificate, on oath, of the result of the analysis." Furthermore, such a certificate, if properly executed, "shall be prima facie evidence of the composition, quality, and net weight of the narcotic." The Supreme Judicial Court of Massachusetts, in upholding operation of this statutory scheme against constitutional attack, has said that its purpose "is to reduce court delays and the inconvenience of having the analyst called as a witness in each case." *Commonwealth v. Verde,* 827 N.E.2d 701, 704 n.1 (Mass. 2005).

About two weeks after the submission, analysts issued two reports on the bags seized from Wright, asserting that they contained a total of 4.75 grams of a substance containing cocaine, and another report on the bags taken from the cruiser, asserting that they contained a total of 22.16 grams of a substance containing cocaine.

The Commonwealth of Massachusetts charged Melendez-Diaz with distributing cocaine and trafficking in a substance containing cocaine in an amount between 14 and 28 grams. Before trial, the Commonwealth provided Melendez-Diaz with copies of the three certificates. At trial, the Commonwealth offered the certificates into evidence. Melendez-Diaz objected that admitting the certificates would violate his right under the Sixth Amendment to the Constitution "to be confronted with the witnesses against him." The trial judge overruled the objection, and the certificates were admitted. Melendez-Diaz made no attempt to call the analysts as witnesses. He was convicted and sentenced to three years in prison, the mandatory minimum on the trafficking count, plus three years probation.

Melendez-Diaz appealed, but the Appeals Court of Massachusetts, in a disposition not officially published (but available at 2007 WL 2189152), affirmed on the basis of *Verde*. The Supreme Judicial Court of Massachusetts denied review. 449 Mass. 1113, 874 N.E.2d 407 (2007).

Because the issue raised by the case is one of great importance that has split the states, the United States Supreme Court granted certiorari.

Case Analysis

Crawford v. Washington, 541 U.S. 36 (2004), transformed the doctrine governing the Confrontation Clause of the Sixth Amendment. The problem addressed by *Crawford* arises when a prosecutor seeks to prove a fact by introducing evidence of a statement that asserts that fact but that was made by a declarant who does not testify at trial. (Thus, in *Melendez-Diaz,* the Commonwealth attempted to prove that the substances in the seized bags contain cocaine by introducing the certificates asserting that proposition without presenting testimony of the analysts who prepared the certificates.)

Under *Crawford* and subsequent cases, the critical question for Confrontation Clause purposes is whether the statement should be characterized as "testimonial" in nature; if it is, then the declarant (here, a lab analyst) should be deemed to have been acting as a witness in making the statement, and the Confrontation Clause applies. If the Clause does apply, then—with narrow exceptions not applicable to this case (for "dying declarations" and in cases of forfeiture of the right, see *Giles v. California,* 128 S.Ct. 2678 (June 25, 2008)—the statement may not be admitted unless the declarant is unavailable to testify at trial and the accused has had a prior opportunity to be confronted with and cross-examine her. Neither condition was satisfied here. If by contrast, the statement is not deemed to be testimonial, then post-*Crawford* cases make clear that the Clause does not apply at all. Thus, with one reservation discussed below, the case is simple: If the certificates are deemed testimonial, then admitting them violated the Confrontation Clause, and if they are not deemed testimonial then the Clause is not implicated at all.

Melendez-Diaz's basic argument that the statements are testimonial is simple: Lab reports of the type offered here are—explicitly under the statutory scheme—prepared by forensic examiners at the behest of police for enforcement of the law and offered at trial in lieu of live testimony. They are, moreover, formalized statements. Therefore, Melendez-Diaz argues, they are modern-day equivalents of ex parte affidavits that are quintessentially testimonial and at the core of the concerns underlying the Confrontation Clause.

The Commonwealth and supporting amici raise a wide array of arguments in response; the summary presented here does not purport to be comprehensive. For simplicity, the discussion below is presented, except where otherwise noted, as if all the arguments are made by the Commonwealth and by Melendez-Diaz, respectively. In fact, some of the arguments are made, at least most prominently, by supporting amici: on the side of Melendez-Diaz, (1) the National Association of Criminal Defense Lawyers, the National Association of Federal Defenders, and the National College for DUI Defense; (2) the National Innocence Network; (3) six law professors; and (4) the author of this preview; on the side of the Commonwealth, (1) the United States, (2) 35 states and the District

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of Columbia, and (3) the National District Attorneys Association and nine local prosecutors.

The Commonwealth contends that the reports are nontestimonial because they make no accusation of wrongdoing. Melendez-Diaz argues that the Confrontation Clause is not limited to statements that are themselves accusatory in nature.

The Commonwealth argues that the statements are nontestimonial because, rather than being comparable to ex parte examinations of witnesses, they "reflect the results of neutral, scientific testing performed by government officials pursuant to a statutory duty." Melendez-Diaz contends that this argument is essentially an attempt to restore pre-*Crawford* law, under which a statement could avoid the Confrontation Clause bar if it was deemed "reliable" by the courts, and that the attempt to characterize the lab analysts as neutral is factually dubious and also irrelevant under *Crawford*. See *Crawford,* 541 U.S. at 66 ("The Framers would be astounded to learn that ex parte testimony could be admitted against a criminal defendant because it was elicited by 'neutral' government officers.").

The Commonwealth contends that forensic laboratory reports should be deemed to be official or business records that fall within an exemption to the hearsay rule that was extant at the time the Sixth Amendment was framed. Melendez-Diaz argues that the hearsay exceptions for such records at the time of the framing were very narrow, and did not include records that were prepared for use in prosecution. Only much later—and in the nineteenth century, only in Louisiana, the one state that did not base its adjudicative system on the common law—were coroners' reports admissible, and even then generally only to establish the fact of death, a matter that such reports often asserted in routine reports not prepared in anticipation of litigation.

The Commonwealth contends that treating forensic laboratory reports as testimonial would cast an intolerable burden on the criminal justice system. Melendez-Diaz argues that any question of burden is immaterial to the question of whether the statement is covered by the Sixth Amendment. In any event, he contends, the Commonwealth and its supporting amici exaggerate the burden that would be created. A state could, for example, provide that if the prosecution gives the defense sufficient notice, the certificate is admissible unless the accused makes a timely demand that the prosecution call the analyst to testify in person; most criminal defendants have no desire that the analyst testify live, and so most would not make the demand. The brief of six law professors (and not the others on Melendez-Diaz's side) also suggests that the testifying expert need not be the analyst who prepared the report.

The Commonwealth contends that the raw data reported by a machine is not testimonial in nature and that neither is the essentially verbatim report of that data prepared by the analyst. The first point does not appear to be in dispute. As to the second point, Melendez-Diaz denies that the certificate is merely a verbatim report of the data. Supporting this contention is the fact that the analyst must certify what sample was tested and what test was performed, and also assemble and assess the significance of the data. Further, Melendez-Diaz denies that even if the certificate were nothing more than a verbatim report by the analyst of mechanical results that would take the certificate out of the category of testimonial statements.

The Commonwealth contends that even if the report is testimonial in nature, there is no violation of the Confrontation Clause because the accused had, but did not exercise, the option of calling the analyst as a defense witness. Melendez-Diaz responds that this argument ignores the passive nature of the confrontation right—the Clause says that the accused has a right to "be confronted with the witnesses against him," which suggests that to exercise the right to examine a witness, the defense need not call the witness to the stand himself. In addition, Melendez-Diaz contends, the prosecution argument renders a nullity of the Confrontation Clause, because the Compulsory Process Clause of the Sixth Amendment guarantees the accused's right to present the analyst as a witness, if the accused so chooses. Melendez-Diaz also points out that a pending petition for certiorari, in *Briscoe v. Virginia,* No. 07-11191, brought by the present author, poses this issue. The *Briscoe* petition presents practical reasons why the accused's ability to call the analyst as a defense witness is not the equivalent of the ability to cross-examine the analyst if the prosecution calls the analyst to the witness stand.

SIGNIFICANCE

Melendez-Diaz has considerable potential significance, both in practice and in theory.

Most obviously, if Melendez-Diaz prevails, then a certificate of a forensic lab report will, at least as a presumptive matter and at least if it suggests commission of a crime, not be admissible over the objection of the accused if the analyst who prepared the report does not testify live, either at trial or at deposition. In that event, states that allow admission of such certificates in the absence of the analyst will have to adjust their procedures. Some will no doubt rely

on notice-and-demand statutes; perhaps some will place greater reliance on pretrial depositions, which can be taken more efficiently than trial procedure and which can offer a fresher recollection.

If the Court does hold that lab reports are testimonial, it is possible that the Court will also resolve the question of whether the accused's confrontation rights are satisfied by his ability to call the analyst to the stand as his own witness. If the Court answers that question in the affirmative, then many states may be expected to rely on that procedural device—and in the future the Court will have to deal with the question of how far beyond lab reports this principle extends. Of course, the Court might also answer the question in the negative, or defer resolution of it to *Briscoe* or some other case that presents it.

On a theoretical level, *Melendez-Diaz* gives the Court a chance, if it wishes, to refine further the meaning of the critical term "testimonial" for purposes of the Confrontation Clause. It is possible that the Court will say that, given that the certificates were so clearly written for purposes of aiding in law enforcement, that is sufficient to render them testimonial. If it does, the Court might highlight differences between the certificates and the initial statements to a 911 operator making an accusation of domestic violence in *Davis v. Washington,* 547 U.S. 813 (2006). Unlike the certificates, those statements were not, in the view of the Court, made primarily for a law enforcement purpose. Moreover, even though from a calmly analytical perspective one might have recognized that the statements to the 911 operator would likely be used for evidentiary purposes, in the heat of the moment that fact may not have been uppermost in the mind of the declarant. It is very possible, though, that the Court, having so far avoided establishing a comprehensive approach to the meaning of "testimonial," will again decline to do so. If it continues to take a step-by-step approach, the Court might well emphasize the facts that the certificates were not only prepared for law enforcement purposes but were formalized statements by government agents.

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