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# Potential Responses to the Melendez-Diaz Line of Cases

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CONFRONTATION

# Potential Responses to the *Melendez-Diaz* Line of Cases

By Richard D. Friedman

Criminal prosecution is increasingly dependent on proof of the results of forensic laboratory tests. They are used, for example, to prove that a given substance contains cocaine; to prove what a driver's blood-alcohol content was; and to demonstrate that the DNA profile of some substance found at the crime scene matches that of the accused. Recent U.S. Supreme Court cases have clarified that the Sixth Amendment's Confrontation Clause constrains the manner in which prosecutors may prove the results of forensic lab tests. This article discusses numerous coping mechanisms, several of unquestioned constitutional validity and others raising additional questions, that jurisdictions may adopt in response to this line of cases.

In *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009), the Supreme Court resolved a question that had divided the lower courts in the wake of *Crawford v. Washington*, 541 U.S. 36 (2004). The *Melendez-Diaz* court held by a 5-4 vote that forensic laboratory reports are testimonial for purposes of the Confrontation Clause. Therefore, even if the jurisdiction's evidence law poses no obstacle to admission of the report, the Confrontation Clause prevents a prosecutor from proving the truth of an assertion made in the report merely by presenting the report. Instead, the prosecutor must present live testimony by a competent witness. Given the volume of forensic laboratory tests, and the reliance of many jurisdictions in recent years on the presentation of written reports rather than live testimony, it was plain from the outset that the potential consequences of this decision are quite significant.

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In the course of litigating the case in the Supreme Court, Massachusetts contended that, even if the lab report were considered testimonial, introducing it as part of the prosecution's case-in-chief did not violate the Confrontation Clause because the accused could, if he wished, call the analyst to the witness stand as part of his own case. The court squarely rejected that contention:

> 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.

Some thought that the Supreme Court might slide back on this point given that, four days after the decision in *Melendez-Diaz*, it granted certiorari in *Briscoe v. Virginia*, No. 07-11191.[1] But ultimately the court remanded *Briscoe* for proceedings consistent with *Melendez-Diaz*. 130 S. Ct. 1316 (2010). Thus, *Briscoe* need be of no further concern.

But other points remained to be resolved. In June, the court decided *Bullcoming v. New Mexico*, 131 S. Ct. 2705 (2011), involving a blood-alcohol test. In *Bullcoming*, unlike in *Melendez-Diaz* or *Briscoe*, the prosecution did present the live testimony of a lab analyst to accompany the report—but not the analyst who had performed the test and prepared the report. The analyst who prepared the report was on unpaid administrative leave, and the prosecution did not attempt to secure his presence at trial. Instead, it presented a supervisor from the same lab who was familiar with its procedures. In the view of the same four justices who had dissented in *Melendez-Diaz* (Chief Justice John G. Roberts Jr. and

[1] I represented the petitioners in *Briscoe*.



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Justices Anthony M. Kennedy, Stephen G. Breyer, and Samuel A. Alito Jr.), that was satisfactory. But once again a majority of the court held otherwise. Justice Ruth Bader Ginsburg, writing for the majority, summarized the case this way:

> The question presented is whether the Confrontation Clause permits the prosecution to introduce a forensic laboratory report containing a testimonial certification—made for the purpose of proving a particular fact—through the in-court testimony of a scientist who did not sign the certification or perform or observe the test reported in the certification. We hold that surrogate testimony of that order does not meet the constitutional requirement. The accused's right is to be confronted with the analyst who made the certification, unless that analyst is unavailable at trial, and the accused had an opportunity, pretrial, to cross-examine that particular scientist.

This is not yet the end of the story. Five days after deciding *Bullcoming*, the court granted certiorari in *Williams v. Illinois*, No. 10-8505. *Williams*, which was argued on Dec. 6, is a rape case. Crucial proof of identity was evidence of a DNA match: An expert witness testified in court that the DNA profile of the accused matched one deduced from DNA found in material taken from a vaginal swab of the victim shortly after the crime. The testing on that material, and the deduction of the profile, were performed by an out-of-state lab, and no one from that lab testified at trial. Nor was the report from the lab formally introduced into evidence. The state supreme court distinguished *Melendez-Diaz* principally on the basis that the report was used as the basis for the opinion of the in-court witness as to the DNA match. The petitioner claims that the substance of the report was presented to the trier of fact and that it was used for the truth of what it asserted, because if it were not true it would not support the opinion of the in-court witness.

However the Supreme Court may decide *Williams*, the question will remain as to what states and individual prosecutors may do to ensure that they comply with the *Melendez-Diaz* line of cases and yet operate an efficient and effective system of criminal adjudication. Although prosecutors 'have tried to convince the Supreme Court that the requirements of the *Melendez-Diaz* line spell practical disaster, states should be able to comply with those requirements without undue burden. I turn now to potential responses to the *Melendez-Diaz* line that criminal justice systems might adopt. Most of these are clearly constitutional; a few, however, pose significant constitutional issues.

## 1. Stipulations to Admissibility or to Result

At the outset, it should be noted that numerous jurisdictions have always operated on the assumption that, unless the accused consented, the prosecution could not prove the results of a forensic laboratory test without presenting the live testimony of a competent witness. This requirement has not caused a crisis, in significant part, it appears, because in a high percentage of cases the accused will stipulate, if asked, to admissibility of the lab report. Most often the accused has no interest in seeing a live witness, or a succession of them, testifying to inculpatory lab results. If the accused has no interest in challenging the results of the lab test, he might even be willing to stipulate to those results.

This assertion is not mere hope; empirical evidence backs it up. I have supervised performance of a study of cases in Michigan, where, absent stipulation, a prosecutor wishing to prove the results of a test must bring in a witness with first-hand knowledge of the performance of the test. The results indicated that fears of a parade of laboratory witnesses are considerably overblown: In drug cases about .46 lab witnesses testified per trial, in driving-under-the-influence cases about .55 lab witnesses testified per trial, and in rape cases in which DNA evidence was presented, about 1.24 lab witnesses testified per trial.[2]

Why do counsel stipulate so frequently? The plus side of demanding confrontation may appear minimal. Experience may compel counsel to recognize that the lab reports will not be excluded; the prosecution will ensure that any necessary lab witnesses appear. Also, in some cases the defense does not see much likelihood of any worthwhile gains from cross-examination. And the negative side of demanding confrontation may appear substantial. For example, the defense's chance of reaching an acceptable plea bargain may be substantially impaired if counsel is perceived as game-playing in hopes of imposing costs on the prosecution.[3] And the defense may regard a live, perhaps very credible prosecution witness as far worse than introduction of a piece of paper or reading of a stipulation.

## 2. Policy of Refusing to Stipulate When Witness Appears

In some cases, even though the accused would prefer that the lab witness not testify live against him, he insists that she appear, in hopes that she will fail to do so. When the witness does appear, the accused then stipulates to admissibility of the report without live testimony. The deadweight loss of efficiency, for no good end other than to demonstrate the ability and willingness of the witness to appear, can be considerable.

To some extent, the prosecution can guard against this happening by announcing a policy that if the accused insists on the witness appearing live, and the witness does appear at trial prepared to testify, the prosecution will then insist that she do so live. Given that the accused, by hypothesis, prefers admission of the report to live testimony of the witness, such a policy might make the accused hesitant to insist that the witness appear live, especially where it appears very probable that the witness would indeed appear if required to do so.

## 3. Imposition of Costs

Judge Lance Hamner of Johnson County (Indiana) Superior Court has suggested imposing the costs of laboratory witnesses' appearance on defendants who are able to pay. He points out that, when a conviction for a noncapital offense is obtained in a federal district court, 28 U.S.C. § 1918(b) authorizes the court to order that the defendant pay the costs of prosecution. And costs include "[f]ees and disbursements for . . . wit-

[2] *Is there a multi-witness problem with respect to forensic lab tests?*, available at http://confrontationright.blogspot.com/2010/12/is-there-multi-witness-problem-with.html.

[3] In his *Melendez-Diaz* dissent, Justice Kennedy argued that it would be unprofessional for counsel to waive a client's rights for fear of incurring judicial displeasure. I am putting aside the possibility that counsel would act in that way.

nesses," 28 U.S.C. § 1920(3), which may include, in addition to a per diem, travel and subsistence expenses.[4] Some states also allow the taxation of costs, including witness fees, against criminal defendants.

Imposition of costs on the accused has considerable appeal, because it might dissuade the defense from demanding the presence of the analyst simply to impose costs on the prosecution or in hopes that the analyst will not appear. But presumably costs can be imposed only on the accused personally, not on counsel, and only if the accused is able to pay, which may be a contested matter in some cases. Furthermore, the federal cost-shifting provisions, though explicitly applicable against criminal defendants, are invoked against them only occasionally, not routinely. An accused might raise the argument that use of such provisions as a regular matter against defendants exercising a newly articulated constitutional right is an improper attempt to burden that exercise. The argument would gain force from the fact that taxation of costs against criminal defendants was unknown at common law. I am not persuaded by the analogy drawing on the fact that an accused who is able must pay for counsel. In that situation, the accused is paying for *his own* counsel. Similarly, the state may recoup costs from a formerly indigent accused who later becomes able to pay the costs associated with his own defense.[5] But the confrontation right is a passive right applicable to prosecution witnesses: the right of a defendant to *be confronted with* the witnesses *against him*.

## 4. Simple Notice-and-Demand (or Demand-Only) Statutes

The *Melendez-Diaz* court specifically endorsed the constitutional validity of the simplest form of notice-and-demand statutes, explaining that these 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. § 353154.1 (2006); Tex. Code Crim. Proc. Ann., Art. 38.41, § 4 (Vernon 2005); Ohio Rev. Code Ann. § 2925.51(C) (West 2006).... [T]hese 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.

Note that under the notice-and-demand procedure, if the defense makes the demand, the prosecution must present the witness's testimony or suffer inadmissibility of the evidence. In other words, if the defense makes the demand, it is the prosecution, not the defense, that (a) bears the risk that the witness does not appear at trial, and (b) presents the witness's live testimony as part of its case. Therefore, the simple notice-and-demand procedure does not create the problems, identified in *Melendez-Diaz*, that arise under a procedure of the type advocated by Massachusetts and Virginia in *Melendez-Diaz* and *Briscoe*, respectively.

It is possible that a demand-only statute would also be held constitutional in certain contexts. Under such a statute, the prosecution does not have to give the accused notice of intent to offer a lab report in prosecuting one of a prescribed list of crimes, such as those involving drug possession; the use of such reports in prosecutions of this type is so common that the accused is deemed to be on notice from the fact that he is being prosecuted. As under a notice-and-demand statute, if the accused wishes a live witness to testify, he must make a timely demand, and if he does, the prosecution must either present the live witness or forgo use of the evidence. So long as (1) the statute is sufficiently clear as to the consequences of failure to make a demand, and (2) the crime is one for which use of a forensic lab report would not be surprising, this type of statute should not be constitutionally troublesome.

Some notice-and-demand statutes impose additional requirements on the accused. The merits of these depend on the particulars of the requirements. For example, a requirement that at the time of making the demand the accused state an intention to cross-examine the witness raises significant constitutional problems. Ordinarily, the possibility that the witness will have an unpersuasive demeanor on direct is a possible benefit to the defense of live testimony. One might count that possibility as of little importance in this context (compared with that, say, of a witness who observed the allegedly criminal event). But even if so, the defense might have various good reasons to want to wait until after the direct examination to decide whether to cross-examine. On the other side of the ledger, requiring a statement of intent to cross-examine probably offers negligible improvements in efficiency; legislatures would be best advised to avoid including it.

By contrast, a simple requirement that the accused assert that he is not making the demand simply to impose costs on the prosecution is probably acceptable.

## 5. Examinations Before Trial

As far as the Confrontation Clause is concerned, if the prosecution takes the testimony of the witness in advance of trial, with the accused having had an adequate opportunity for confrontation, and the witness is then deemed unavailable to testify at trial, the pretrial examination may be introduced at trial in lieu of live testimony.

### *(a) Depositions for the purpose of preserving testimony*

Depositions held for the purpose of preserving testimony offer significant advantages in terms of efficiency. A deposition may be scheduled to suit the convenience of the witness and of the parties; the witness need not wait through unpredictable trial proceedings to give her testimony. Indeed, a witness can feasibly schedule several depositions in one day, minimizing travel time—an important consideration if the witness's lab is some distance from the courthouse. A deposition may also be held close to the time when the test was performed, meaning that the witness will be testifying with a memory that is fresher than at the time of trial. A deposition also ensures against the possibility that the lab analyst will be dead or otherwise unavailable at the time of trial.

Some caveats are necessary, however.

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[4] See *United States. v. Pommerening*, 500 F.2d 92 (10th Cir.), cert. denied, 419 U.S. 1088 (1974).

[5] *Fuller v. Oregon*, 417 U.S. 40 (1974).



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First, unless the witness is deemed unavailable at trial, the Confrontation Clause precludes the prosecutor from introducing deposition testimony to prove the truth of a proposition asserted in the testimony. But given that the accused has had an opportunity to be confronted with the witness at the deposition, courts should probably be rather lenient in declaring witnesses unavailable, either because of their distance from the courthouse or because of lack of memory of a test performed long before.

Second, if the deposition is held too early, the defense might not know enough about the case to conduct cross-examination adequately. With respect to many types of lab reports, however, this will not usually be a serious problem; defense counsel does not need to know much about the case to know that it is bad for the accused if the prosecution can prove that a substance allegedly found in his possession is high-quality cocaine. An accused should be allowed to argue that in the particular circumstances of the case the deposition was too early to satisfy his confrontation right—but courts should approach such arguments with considerable skepticism.

Third, many cases settle on the eve of trial; the deposition may prove to have been wasted effort. (It is possible, though, that the deposition date, like a trial date, will spur settlement efforts.)

Fourth, if the deposition is presented in the traditional manner, by reading a transcript, there is a significant loss of demeanor evidence. Jurisdictions might require, and in any event prosecutors might make it a general practice, that depositions taken to preserve testimony be video-recorded.

The laws of most jurisdictions make it far more difficult in criminal cases than in civil ones to take a deposition for the purpose of preserving testimony. Under Fed. R. Crim. P. 15(a), for example, a party wishing to depose a potential witness for preservation of testimony must make a motion, which may be granted because of exceptional circumstances and in the interest of justice. But laws of this sort can be amended to ease the standard for taking depositions.

The discussion above refers only to depositions for the purpose of preserving testimony—not to depositions taken (as allowed in some jurisdictions) for the purpose of discovery. Given the different purpose of the latter class of depositions, they should not be considered a constitutionally adequate substitute for trial testimony.[6]

### *(b) Preliminary Hearings*

Preliminary hearings, in jurisdictions that hold them, offer what the Supreme Court has deemed to be an adequate opportunity for confrontation.[7]

Given that the preservation of testimony is not the principal purpose of the preliminary hearing, an accused may regard this as unfair. An accused can protect himself by asking whether the intention of the court and the prosecutor is that he engage in a full cross-examination for purposes of preserving testimony. If the court answers in the negative, then the accused cannot be charged later with having forgone an adequate opportunity for confrontation. But if in the circumstances of the particular case the prosecutor wishes to preserve the testimony, she might indicate that the defense ought to take advantage of the opportunity—thus effectively transforming this portion of the hearing into a deposition for preservation of testimony.

## 6. Remote Testimony

Some jurisdictions have experimented with testimony taken while the witness is at a location other than the trial courtroom and televised to the courtroom. This procedure offers the promise of great efficiency in the context of forensic lab reports; an analyst can testify from a studio adjoining her lab without ever leaving the building.

It is open to question whether use of this procedure over a timely objection by the accused would be held constitutional in any circumstances with respect to lab witnesses. In *Maryland v. Craig*, 497 U.S. 836 (1990), the Supreme Court allowed video transmission of a child's testimony on a case-specific demonstration of likely trauma to the child. *Craig* provides at best weak support for a rule allowing a lab analyst to testify from a remote location via video transmission on grounds of convenience—especially given that the continued vitality of *Craig* is in some doubt after *Crawford*. Moreover, in 2002, the Supreme Court declined, over the dissents of Justices Sandra Day O'Connor and Breyer, to transmit to Congress the proposed addition of a new Fed. R. Crim. P. 26(b), which would have allowed video transmission of testimony when the parties were unable to take a deposition. In a statement accompanying the letter announcing the court's refusal to transmit the proposal, Justice Antonin Scalia said:

> Virtual confrontation might be sufficient to protect virtual constitutional rights; I doubt whether it is sufficient to protect real ones. 207 F.R.D. 89, 94.

Of course, the membership of the court has changed; technology has continued to improve; and the court may be more willing to allow a state to use video transmission, especially if it is limited to certain contexts, than it was to propose a federal rule providing broad acceptance of such transmission. But the issue remains in substantial doubt.

On consent of the accused, however, there is no serious constitutional obstacle to use of this procedure. Given that the accused often consents to doing without live testimony altogether, there is good reason to suppose that he would often be willing to have the witness testify by video transmission, so long as the quality of the transmission is good enough to allow an opportunity for cross-examination that is not significantly impaired.

## 7. Surrogate Witnesses

*Melendez-Diaz* established that the accused has a right to insist that the prosecution present forensic lab results through a witness subject to confrontation, but it left open the critical question of *whom* the prosecution must call. Though *Bullcoming* (like *Melendez-Diaz* itself) is a 5-4 decision, it adds considerable clarity: The prosecution cannot satisfy the Confrontation Clause by presenting a lab report through an analyst from the lab who had no role in performance of the test that is the subject of the report.

Though the *Bullcoming* court declared that the accused has a right to be confronted with "the analyst who made the certification," the same paragraph of the opinion also contains a suggestion that in some cases

[6] See *State v. Lopez*, 974 So.2d 340 (Fla. 2008).
[7] *California v. Green*, 399 U.S. 149 (1970).

another option is possible. The court said the question was whether the report could be introduced "through the in-court testimony of a scientist who did not sign the certification or perform *or observe* the test reported in the certification," and it held that "surrogate testimony *of that order* does not meet the constitutional requirement." (Emphasis added.) The implication is that surrogate testimony of some sort is permissible. And if a qualified laboratory worker who did not perform the test or sign the report personally observed everything that the author of the report related, then that observer ought to be able to testify to the content of the report in the same way that the author would have. It should be made clear that the in-court witness is not the author of the report and that the trier of fact is not being asked to rely on the credibility of that author; redaction of the author's signature might help make this point clear.

In many circumstances, it is not economically feasible to have an observer watch the performance of a test. But in conducting autopsies, some jurisdictions routinely have a second medical examiner present as an observer. If necessary, the observer can testify at trial as to the performance of the test, and she could testify that the autopsy report reflects the facts as she recalls them.

## 8. Retesting

As indicated by Justice Ginsburg in *Bullcoming*, in many cases in which the original analyst cannot feasibly appear at trial or for a deposition, the problem can be addressed by having another analyst conduct a retest. In essence, the prosecution can generate a perfectly proper surrogate witness simply by having another qualified analyst, who can testify live reasonably conveniently, replicate the original test. This will not always be possible. In some circumstances, tested material will have degraded to a degree making a retest impractical. And in some cases the original test will have consumed so much of the material that a retest cannot be performed. The latter difficulty has become less of a problem with the advent of sophisticated DNA procedures that require very little material to test.

Retesting does, of course, entail some additional expense, but it need be incurred only when the prosecution believes the case is highly likely to go to trial and the original analyst cannot appear.

In a situation in which presentation of lab results would otherwise require multiple witnesses, retesting can often provide a more economical solution: Proof of the vast majority of lab results never need be introduced at trial. Thus, if proof concerning a given test actually does appear very likely to be introduced at trial, repeat of the entire test by a single technician who can testify live at trial will often be feasible even though such complete vertical integration is ordinarily far from the most efficient procedure for the test.

In the pending *Williams* case, there is no reason to suppose that the state was unable to have a retest conducted by a single analyst who worked a convenient distance from the place of trial and could, without much difficulty, testify at trial to the conduct of the entire test.

## 9. Videotaping Performance of the Test

At least in the context of autopsies, videotaping the performance of the test may relieve some problems of proof. A continuous tape that showed enough of the decedent to be recognizable could demonstrate exactly what happened at the autopsy without the need for authentication by anyone who actually was present at the autopsy itself. Given the decreasing cost of videography, it may even be feasible to record the conduct of other tests; if the sample is tagged or otherwise identified in a visible manner, it may be possible for a witness who was not present at the performance of the test to authenticate the video and so prove the conduct of the test and the results.

## 10. Expert Opinion

If the prosecution presents satisfactory proof of the results of lab tests and wishes to present testimony interpreting the results, it may do so through any qualified witness. The interpretive witness does not have to be someone who participated in or observed the particular test or even someone who works at the particular lab.

If in drawing her opinion the in-court expert relies on factual propositions that have not themselves been independently proven, then additional problems arise. Federal Rule of Evidence 703 provides in part:

> If experts in the particular field would reasonably rely on those kinds of facts or data [i.e., those on which the testifying expert has based an opinion] in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.

Most jurisdictions have rules comparable in effect.[8]

Rule 703 can solve hearsay problems and other issues of ordinary evidence law, but it is not a principle of constitutional law. Nor does this portion of the rule reflect a traditional doctrine that might cast light on the original or longstanding meaning of the Confrontation Clause; rather, it is a creation of the late 20th century, of the pre-*Crawford* era in which the clause was given little independent force, and it was a self-conscious expansion of common-law doctrine.

Accordingly, analysis of the situation in which an expert relies on facts not independently proven depends in large part on the answers to two questions: Was the

[8] The version of the rule presented above went into effect on Dec. 1, 2011. It was adopted as part of the project of restyling the Federal Rules of Evidence. Between 2000 and 2011, the corresponding portion of the Rule read:

> If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject [of the opinion], the facts or data [on which the expert bases the opinion] need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

The last sentence of this version of the rule was added in 2000. Before that, the rule stood as it was originally adopted in 1975, apart from a gender-neutralization amendment in 1987. The 2011 amendment, like that in 1987, was not intended to effect any change in meaning. Most states have adopted rules based on one version or another of Federal Rule 703.



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statement by which the expert learned those facts testimonial in nature?[9] Is the prosecution trying to present that statement to the trier of fact in support of the expert's opinion? (I speak of presentment to the trier of fact, rather than formal admission into evidence, because it may be that, even if the statement is not formally introduced into evidence, the substance of the statement was made known to the trier of fact. In such a case, the better view is that the statement should be treated as if it had been formally admitted. E.g., *United States v. Meises*, 645 F.3d 5, 12-13 (1st Cir. 2011); *State v. Swaney*, 787 N.W.2d 541 554 (Minn. 2010).[10])

### *(a) Nontestimonial statement, not presented to the trier of fact*

If the statement by which the expert learned the given fact is not testimonial, then there is no problem under the Confrontation Clause. Thus, for example, suppose a physician, before formulating an opinion, makes a routine requisition for a blood test. Ordinarily, there would be no reason to suppose that the lab technician who performs the test and reports on it has any reason to suppose that she is doing so for prosecutorial purposes. Accordingly, the report should usually not be considered testimonial. Therefore, the only question is whether the standard of Rule 703 is satisfied: Are the facts reported of a type on which experts in the field reasonably rely? If the facts satisfy that standard, then the expert should be able to present an opinion based on them.

### *(b) Nontestimonial statement, presented to the trier of fact*

If a nontestimonial lab report is introduced into evidence, the constitutional analysis does not change: The statement is not testimonial, and so it lies outside the Confrontation Clause. Because the statement is being offered into evidence, it must satisfy the last sentence of Rule 703. That will usually not prove to be a great hurdle.

### *(c) Testimonial statement, presented to the trier of fact*

If the statement is testimonial—a conclusion that one can expect courts to draw when the statement was made in anticipation of prosecutorial use—then the Confrontation Clause is potentially in play. Some courts have taken the view that if the statement is presented in support of the expert's opinion, then it is not presented for the truth of what it asserts, and therefore the Confrontation Clause is not invoked. But the better view, held by other courts, is that if the statement supports the opinion only if it is true, then introducing the statement in support of the opinion is in effect introducing it for the truth of what it asserts. The pending *Williams* case may resolve the matter as a matter of constitutional law. Even if the *Williams* court holds that states may allow testimonial statements to be introduced on this basis, they should not take advantage of the opportunity, because it is a rather blatant evasion of the confrontation right.

### *(d) Testimonial statement, not presented to the trier of fact*

If the testifying expert formulates an opinion based on testimonial statements and testifies to the opinion without disclosing the statements or the information contained in them, the Confrontation Clause is less likely to be applicable. But if it becomes clear on cross-examination that the expert is relying on a testimonial statement by a person who has not testified at trial, that should suffice to invoke the clause; again, *Bullcoming* may add clarity on this point. In any event, even without explicit disclosure it still may be that the trier of fact would likely infer that the expert's opinion was based on a statement to a certain effect. And even if this is not so, courts should take care to prevent the expert's opinion from being used as a conduit to present repackaged information contained in an undisclosed testimonial statement.

## 11. Filling of Inferential Gaps

*Bullcoming* makes clear that the Confrontation Clause does not allow a prosecutor to introduce a testimonial statement reporting on a given event or condition by presenting a witness who is subject to confrontation but who did not purport to observe the reported event or condition. In appropriate cases, however, the trier of fact may draw inferences as to a particular event or condition even though no witness who observed that event or condition testifies as to it.

Thus, if the prosecution needs to prove any occurrence in the lab, it will suffice to present the testimony of a witness who did not actually observe that occurrence but who made observances from which the given occurrence may be inferred. In particular, the prosecution does not have to have direct evidence as to every second that the sample being tested was in the custody of the lab. *Melendez-Diaz*, 129 S. Ct. at 2532 n.1. Some gaps may be filled in by permissible inference. For example, if one technician gives a sample to another employee for safekeeping overnight, and the next day takes the sample in the same apparent condition, the prosecution is not obligated to produce the testimony of the second employee.

Presumably there are constitutional limits to this type of inference. If a police officer testifies that she seized from the accused and delivered to the state police lab a baggie with three small cakes of a white powdery substance, and a lab technician testifies simply that she analyzed a baggie with three small cakes of a white powdery substance and found that it contained cocaine, that should not be enough to support an inference that the material tested was that seized from the accused.

So long as the technician confines herself to what she knows from personal observation, the problem in such a case is not a Confrontation Clause violation; it is simply a lack of sufficient proof, which could lead to a due process violation. But courts need to take care lest an in-court witness attempt to cover such inferential gaps

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[9] The *Melendez-Diaz* court dropped a broad hint, 129 S. Ct. at 2532 n.1, that documents prepared in the regular course of equipment maintenance—such as certificates of calibration, not prepared with reference to any particular run of a test—will likely be deemed nontestimonial.

[10] As indicated below, I believe this is true even if the in-court witness does not disclose on direct examination that she is relying on some source other than her personal observations for the substance so conveyed. For a fuller discussion of this and related issues, see my blog post, *When is a statement presented for purposes of the Confrontation Clause?*, at http://confrontationright.blogspot.com/2011/06/when-is-statement-presented-for.html.

by testifying to factual inferences outside her personal knowledge, indulging in the simple expedient of not revealing what her sources were. Suppose, for example, a police officer was not at the crime scene but interviewed persons who said they were. She should not be able to testify, "The accused stabbed the victim." Whether the violation would be of the Confrontation Clause itself or of due process, preventing such testimony is essential to protecting the confrontation right. A similar problem may arise if a lab witness testifies with no basis in personal knowledge, "The sample I tested was that of the accused."

In short, the Constitution must create *some* demands on the prosecution to provide adequate evidence of chain of custody. The optimal rule in, for example, a typical drug case may be something like this: The prosecution must present evidence in proper form sufficient for the trier of fact to infer that the matter tested was the same as the matter seized, and in materially unchanged condition; in proper form means that testimony supporting this proposition must be given by one or more witnesses speaking from personal knowledge and without revealing the substance of testimonial statements that have not been subjected to confrontation.

Traditionally, many states have been unduly persnickety with respect to the chain of custody, and I believe that some still impose rules more restrictive than the standard I have just enunciated or than any other that the Supreme Court would plausibly impose as a matter of constitutional law. Such states might consider relaxing these standards.

Suppose, for example, that the prosecution provides good evidence that a given bag, bearing precise identifying information and containing a sample taken from the crime scene, was delivered to a forensic laboratory, and an analyst from that lab wishes to testify to the results of a given test that she performed on the sample she found in the lab. Suppose further that, for the testifying analyst to perform the test, the material first had to be taken from the bag and subjected to a particular process, but the testifying analyst did not perform that step. I believe that, if the analyst wished to testify that the usual procedure of the lab was to perform the process and return the material to the bag, the Confrontation Clause would not pose an obstacle, and neither should state evidentiary law. Removing material from a bag, performing a process on it, and replacing it do not constitute a testimonial statement. Given the usual procedures of the lab, it is a permissible inference that the material was removed, the process performed, and the material returned to the same bag.

### 12. Reorganization of Laboratories and Procedures

Some states have one central laboratory for forensic testing. Although such an organization may be optimally efficient on the assumption that the technicians will rarely have to testify at trial, it may be considerably less efficient when the state is required to adhere to the confrontation right as the Supreme Court has recently recognized it. Over the long term, therefore, these states may find it efficient to move toward the model of those states that rely on several smaller labs distributed around the state. They should, of course, take care to make sure that such labs are able to perform their functions accurately and with reasonable efficiency.

Similarly, some labs rely heavily on a division of labor, which may be optimally efficient if the confrontation right is not taken into account and it is assumed that technicians rarely have to testify at trial. Given that some defendants will insist on their confrontation rights, it may be more efficient to adopt a more vertically integrated system—that is, one in which fewer technicians participate in the performance of any single test. This is particularly true with respect to relatively complex procedures such as DNA testing. In Michigan, for example, usually no more than three technicians participate in conducting a DNA test and the result, as noted above, is that when DNA tests are introduced the average number of lab witnesses who actually testify at trial is 1.24, a very tolerable number.

## Conclusion

There is no doubt that the *Melendez-Diaz* doctrine imposes some costs on those jurisdictions that did not previously adhere to the regime that the doctrine now demands. Proving laboratory results by introducing a piece of paper will make virtually any other method of proof seem expensive by comparison. But some states have always adhered to the constitutionally required regime, and their systems of criminal justice have not broken down. States should recognize that presenting forensic lab results invokes the constitutional rights of the accused, and they should not attempt to undermine those rights. Conscientious regard for those rights does not preclude the states from adopting creative and efficient methods to cope with the newly articulated doctrine.



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