Melendez-Diaz v. Massachusetts
VERSUS
Briscoe v. Virginia

Getting The Evidentiary Nature of BAC Test Results for DUI Prosecutions Right The Second Time Around?

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On January 11, 2010, the U.S. Supreme Court revisited an issue it appeared to resolve just months before -- whether the prosecution in DUI and other criminal cases has a constitutional obligation to produce at trial toxicologists or crime lab analysts as live witnesses to testify about the findings relied upon by law enforcement to prosecute defendants. During the January 11th session of the Supreme Court in Washington DC, the nine justices heard oral arguments debating whether to recede from their own ruling from the previous summer that bars prosecutors from using forensic reports in criminal trials unless they put an expert on the stand to testify about the reports.

Seeking to reverse a decision just seven months old, prosecutors are pinning their hopes on the newest justice, Sonia Sotomayor. Prior to donning judicial robes, Ms. Sotomayor was a prosecutor in the Manhattan District Attorney's Office in New York from 1979 to 1984.

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THE ISSUE: Affidavits vs. Live Testimony. Until last year, prosecutors in forty out of fifty states could introduce a notarized affidavit from crime lab experts, attesting to their findings with respect to lab analyses evidence that often was critical to the prosecution's case. The affidavit was deemed admissible as evidence, for example, to confirm that the white powder found on a defendant was indeed cocaine, or that a defendant's Blood Alcohol Content (BAC) as revealed by a breathalyzer scan was sufficiently high to evidence intoxication in violation of pertinent DUI/DWI laws. In the majority of states, the government's toxicologists or forensic analysts only appeared in court as live witnesses if subpoenaed by the defense.[2]

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[2] This is not to suggest that the issue enjoys a nationwide consensus one way or the other. States and their courts have split over whether live testimony by the lab analyst is required under the Confrontation Clause. of the Sixth Amendment to the U.S. Constitution. States that allow for the admission as evidence of a laboratory analyst's testimony by affidavit or even a signed report include:

- **North Dakota**: ***State v. Campbell***, 719 N.W.2d 374, 378 (N.D. 2006) (applying N.D.C.C. § 19-03.1-37 that "defendants may subpoena the report's author," and an indigent may subpoena a laboratory director or employee at no cost to himself: "Because neither [defendant] attempted to subpoena the forensic scientist as provided by statute, they have waived their ability to complain of a constitutional violation.")
- **Tennessee**: *State v. Hughes*, 713 S.W.2d 58, 62 (Tenn. 1986) (Under Tenn. C. § 55-10-410, "[T]he lab technician may be subpoenaed by the accused at the State's expense and called to the stand and cross examined as a hostile witness where the State does not elect to do so.")
- **North Carolina**: *State v. Smith*, 323 S.E.2d 316, 328 (N.C. 1984) (applying N.C.G.S. § 20-139.1 so that "the defendant is entitled to subpoena the analyst and examine him as an adverse witness, as on cross-examination"; "[f]ailure to summon the analyst results in a waiver of any right to examine the analyst and contest the findings") .

In contrast, courts in a number of other states have rejected the shifting burden scheme, finding that it is not in conformity with the Confrontation Clause. Among those states that take this position are:

- **Florida**: *State v. Belvin*, 986 So.2d 516, (Fla 2008) (Even though § 316.1934(5) of the Florida Statutes gives a defendant the right to subpoena the breathalyzer test operator as an adverse witness at trial, it does not adequately preserve the defendant's Sixth Amendment right to confrontation, particularly because the burden of proof lies with the state, not the defendant.)
- **District of Columbia**: *Thomas v. United States*, 914 A.2d 1 (D.C. 2006) (Lab report was testimonial, and the Confrontation Clause was violated; noting that D.C. Code § 48-905.06 provides that the defendant can subpoena the chemist for examination but that the Sixth Amendment Confrontation Clause imposes the burden of production on the prosecution and not on the defense; if the accused was forced to call adverse witnesses, then "[u]ltimately the effect could be to blur the presumption of innocence and the principle that the burden of proof on the prosecution 'never shifts throughout the trial.")
- **Oregon**: *State v. Birchfield*, 157 P.3d 216, 220 (Or. 2007) ("The right to meet an opposing witness face to face cannot be transformed into a duty to procure that opposing witness for trial. It is the state that seeks to adduce the evidence as to which the criminalist will testify. The defendant has a constitutional right to confront the proponent of that evidence, the criminalist. The legislature may require the defendant to assert that right or to design a procedure to determine whether the defendant agrees that a written report will suffice. But, to require that a defendant do more changes the right to insist that the state present evidence the 'old-fashioned way' into an obligation to procure a witness for the state.")

But in June of 2009, the U.S. Supreme Court ruled by a 5-to-4 vote in the case of ***Melendez-Diaz v. Massachusetts*** [3] that the Confrontation Clause of the Sixth Amendment to the United States Constitution puts the burden on the state to produce not just paper certificates, but live forensic witnesses, who can be cross-examined. The Confrontation Clause provides that "*in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.*" Without these live forensic witnesses, the Court decided last year, forensic evidence cannot be introduced.

The majority opinion in *Melendez-Diaz*, written by conservative justice Antonin Scalia, did provide a procedural alternative to mandatory live testimony. According to Justice Scalia, prosecutors could notify defense lawyers before trial of the intent to introduce an affidavit or signed laboratory report so that the defense could then demand live witnesses. If the defense decided not to demand a live witness, the prosecution could rely on a written affidavit or signed report. However, if the defense insisted on live testimony, the Court's decision in *Melendez-Diaz* obligated the prosecution to call the expert to the stand as part of the government's case-in-chief.

Last term's decision was supported by an unusual majority coalition that crossed the Court's normal ideological lines. Justice Scalia was joined by the conservative Justice Clarence Thomas, as well as liberal Justices David Souter, John Paul Stevens and Ruth Bader Ginsburg.

The four dissenters, Justices Kennedy, Alioto and Breyer, as well as Chief Justice Roberts, condemned the majority's conclusions, predicting the 2009 decision would produce undue leverage for the defense, huge expense for the states, and the release of those who otherwise would have been convicted of criminal offenses. Led by Anthony Kennedy's dissenting opinion, the minority expressed strong sentiments for seeking an opportunity to reverse the majority's decision.

That opportunity arrived in Washington DC this year, in the form of a criminal case on appeal from Virginia. Two men, Mark A. Briscoe and Sheldon A. Cypress, were indicted on charges of cocaine possession in separate incidents. Each objected to the admission of a state crime lab report identifying the white substance in their possession as cocaine, because the person who conducted the test was not called to testify. The Virginia Supreme Court combined their cases and turned down their appeals, saying the men could have called the analysts on their own, rather than relying on

[3] 129 S. Ct. 2527 (U.S. 2009).

the prosecution to produce the analysts as witnesses in the Commonwealth's case-in-chief.

The defendants' appeal from the Virginia Supreme Court presented the U.S. Supreme Court with a suitable platform for revisiting *Melendez-Diaz*'s live testimony requirement. Officially, the question presented for the Court's consideration reads as follows:

> 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?

What will make this year's reconsideration different from last year's decision? Only one thing has changed since June of 2009. One member of that five-justice majority in *Melendez-Diaz* — David Souter — has retired, and been replaced by Sonya Sotomayor. Prosecutors across America now hope that having been a criminal prosecutor herself in New York, Justice Sotomayor will be sympathetic to their cause as the Court considers the new case of ***Briscoe v. Commonwealth of Virginia***.

Towards that end, twenty-six states[4] plus the District of Columbia filed a joint brief in the new case as *amici curiae* ("friends of the court"), asking the Court to reverse last year's precedent. The states cite mounting backlogs, escalating costs and other problems that have resulted from *Melendez-Diaz*'s new mandatory live testimony rule. DUI cases are especially hard hit, as prosecutions routinely rely on the admissibility of breathalyzer-derived BAC levels without the need for any live expert testimony.

THE ARGUMENTS: Judicial Economy vs. The Right to Confront. As expected, the clash between the constitutional and the practical was front and center at the Supreme Court's oral arguments. Proceedings began with the newest justice, Sonya Sotomayor, asking the advocates to define precisely what issues were before the Court. Relying on her past experience as a prosecutor, Justice Sotomayor asked the advocates to move beyond trial tactics and explain what in the Constitution required prosecutors to put a live witness on the stand merely to answer two questions, *i.e.* "Is this your lab report and do you stand by it?"

[4] Jurisdictions filing a joint brief in support of the Commonwealth of Virginia include: Alabama; Arizona; Colorado; Connecticut; Delaware; the District of Columbia; Florida; Idaho; Indiana; Iowa; Kansas; Maryland; Massachusetts; Michigan; Minnesota; New Jersey; New Mexico; North Dakota; Ohio; Oklahoma; South Carolina; South Dakota; Tennessee; Utah; Washington; Wisconsin; and Wyoming.

The debate then turned to the author of the majority decision in last year's case asking the salient question about this year's case: "Why is this case here, except as an opportunity to upset *Melendez-Diaz*?" Justice Antonin Scalia went on to reiterate his contention that the use of affidavits in lieu of live-testimony ran afoul of the constitutional right of criminal defendants to confront prosecution witnesses by limiting the use of lab reports. "The prosecution has to bring in the witness," Justice Scalia said. "That has been what the confrontation clause has meant." Reading from his own majority opinion in *Melendez-Diaz,* Justice Scalia weighed in during the presentation of Leondra Kruger, an Assistant to the Solicitor General of the United States advocating in support of the Commonwealth of Virginia, to remind the Court and the advocates:

> "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. "

However, other justices, such as Ruth Bader Ginsburg and Samuel Alito, Jr., complained the 2009 *Melendez-Diaz* decision has made prosecutions more expensive and complicated. Justice Alito was a tough questioner for University of Michigan law professor Richard D. Friedman, who represented the defendants/appellants Briscoe and Cypress. Justice Alito said there was only a "slight difference" between whether the lab analyst was called in the prosecution's case-in-chief, or as a witness in the defendant's case, so long as the accused had a chance to question the witness live. Prof. Friedman countered by arguing that placing the responsibility to subpoena the witness on the defendant would be a "transformation in the Anglo-American trial" and would mean that the analyst's failure to show at trial would hurt the defendant, not the prosecution. According to Prof. Friedman: "[T]he witness has to take the stand, has to -- has to testify live, *viva voce*, face-to-face, in the time-honored phrases which have always governed testimony in an Anglo-American trial."

That argument, however, seemed unpersuasive to Justice Alito. "Let's just not get beyond the facts of this case," Justice Alito said during the oral arguments. "All that we are dealing with is an analyst's report relating to the nature of the substance that was tested and, if it's a controlled substance, the amount. That's it."

Justice Alito also disputed Prof. Friedman's contention that the live testimony requirement imposed by last year's decision in *Melendez-Diaz* did not impose an unreasonable burden on prosecutors. Noting the concerns of the *amici curiae* states that defense counsel will abuse the process if *Melendez-Diaz* is allowed to stand, Justice Alito articulated this concern:

> **JUSTICE ALITO**: They say that there is a very substantial category of cases in which defendants really have no interest whatsoever in contesting either the nature or quantity of drugs involved, but they will refuse to stipulate to those things simply for the purpose of putting a financial burden on the prosecution, because they know if they do that it may be helpful for them in getting a better plea bargain, plus there is a certain risk that the analyst will not show up, and they will get the benefit of that.
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> **MR. FRIEDMAN**: So, Your Honor, I think that what the -- the States' amicus brief shows is that there are -- there are a lot of drug prosecutions and there are a lot of drug analyses, and then there is this speculation about the type of gamesmanship that you have mentioned. But if we look for hard data, there is nothing supporting that.

Justice Alito replied to Prof. Friedman's retort by again citing the *amici curiae* brief by 26 states and the District of Columbia, which called the *Melendez-Diaz* decision "unworkable." "If it is not a burden on these 26 states plus the District of Columbia, why are they bothering to make this argument?" Justice Alito questioned. "Just for amusement?"

THE UNANSWERWED QUESTION: Does Everyone have to testify?

The oral arguments covered a wide range of issues relating to the Confrontation Clause of the Sixth Amendment and the balancing of constitutional considerations against practical trial tactics, plus a host of procedural questions and concerns regarding pretrial notices, subpoenas for testimony at trial, and due process. Perhaps the most insightful question was raised initially by Justice Kennedy, and subsequently re-asked by several other justices. *What happens if an analytic report or a set of test results are the work of several state experts or technicians – do each and all of them have to appear in court to testify regarding the part they played in producing the final evidence of the defendant's guilt?*

This is a troubling question for the defendants/appellants as well as supporters of *Melendez-Diaz*. Imposing on every prosecutor the obligation to call for live in-court testimony by each and every technician who has anything to do with any laboratory report of analysis potentially magnifies the burden on the state exponentially, while arguably marginalizing any protection or benefit the defendant purportedly receives through such a right. Here's how the Q&A went on this issue, starting with Justice Kennedy's question to Prof. Friedman:

> **JUSTICE KENNEDY**: Suppose one person doesn't observe all the procedures. One person prepares the sample, another person puts it on the paper, another person reads the machine, another person calibrates the machine.
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> **MR. FRIEDMAN**: Yes. Right. Well, I think Melendez-Diaz indicates that it is up to the State to determine what the -- the evidence that is going to be presented, and there may be gaps. I do want to emphasize that this is an issue -
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> **JUSTICE KENNEDY**: No, no, no. The evidence is presented, and the test comes out so -- positive, so that the gun fires or that it's a drug or that it's a DNA sample. Can the conclusion be presented by one witness from the lab, when that witness did not observe all of the procedures?
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> **MR. FRIEDMAN**: I think -- I think that there probably has to be a witness who has observed the procedures. . .
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> . . .
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> **JUSTICE GINSBURG**: But, in your view it wouldn't satisfy the Confrontation Clause if, say, the supervisor shows up and said, this is the way -- this is the way the analysts operate, and describes the procedures.
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> **MR. FRIEDMAN**: In my view it wouldn't, . . .

THE LIKELY RESULT: Accommodation for Analysts? With the departure of *Melendez-Diaz* majority member David Souter, and the arrival of Sonya Sotomayor, the swing vote that will carry the this year's decision belongs to the newest justice. Having the least tenure on the Court, Justice Sotomayor will be the last to vote when the justices meet in their private conferences to discuss the case. Nevertheless, she was at the forefront of the questioning during Monday's arguments.

Justice Sotomayor gave no indication she was ready to overturn the Court's earlier decision. Instead, she used her questions to explore possibilities for implementing the *Melendez-Diaz* decision in a way that helps prosecutors without offending the Constitution's guarantee that the accused be able to question those who testify against them. For example, Justice Sotomayor asked Virginia Solicitor General Stephen R. McCullough what kind of rule would allow prosecutors to present the forensic reports without the proceeding becoming a "trial of affidavits." She also made a telling point about the minimal difference in the courtroom between requiring the prosecutor to call its expert during the case-in-chief, versus allowing the defendant to subpoena that witness. Showing off her "trial chops" during an exchange with Prof. Friedman, Justice Sotomayor observed that in either scenario, the requisite confrontation between witness and defendant will occur:

> **JUSTICE SOTOMAYOR**: . . . Once a defendant makes it known that a -- he's going to cross-examine a lab technician, don't you think that in the vast majority of cases the prosecutor is going to put that witness on?
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> **MR. FRIEDMAN**: I –
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> **JUSTICE SOTOMAYOR**: And if he does or doesn't, why shouldn't we leave it to the normal trial strategy and practice to leave to that prosecutor the burden of non-persuasion? I thought that was what confrontation was about.
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> **MR. FRIEDMAN**: Right. Yes.

Where will it wind up? Justice John Paul Stevens, the oldest member of the Court with the longest tenure of any justice, was in the majority for the *Melendez-Diaz* decision. But in this week's oral argument, he offered the following inquiry to Assistant to the Solicitor General Leondra Kruger, which allowed her to distinguish lab analyst evidence from eyewitness testimony:

> **JUSTICE STEVENS**: Ms. Kruger, can I just ask this question? I just want to be sure. Supposing you have an eyewitness. Can you follow the same procedure that you recommend for the scientific eyewitness -forensic eyewitness?
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> **MS. KRUGER**: We think that you could, so long as the defendant has an adequate opportunity to cross-examine that eye witness about the testimonial statement.
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> But even if you disagreed with that, we think that the Court could take a due account of the fact that there is a significant difference between the kind of testimony that an eyewitness provides and the kind of testimony that a forensic analyst provides. The forensic analyst's lab report is not merely a weaker substitute for live testimony. It is, in fact, I think, as we see, by the relative infrequency with which analysts are called into Court before Melendez-Diaz, something that has been seen to have equal value, regardless of the manner in which it is presented.
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> And, for that reason, we think that, in order to decide this case, all this Court needs to decide is that, in the context of forensic lab analysts, what the Court said in Crawford still stands, so long as the government presents the analyst at trial for face-to-face confrontation and cross-examination.

The "Crawford" referenced by Ms. Kruger is the U.S. Supreme Court's 2004 decision in *Crawford v. Washington*.[5] In that case, the Supreme Court held that testimonial out-of-court statements offered against a criminal defendant are rendered inadmissible by the Confrontation Clause unless the witness is unavailable at trial and the defendant has a prior opportunity for cross-examination.[6] Under *Crawford*, the crucial determination about whether the admission of an out-of-court statement violates the Confrontation Clause is whether the out-of-court statement is "testimonial" or "non-testimonial" in nature. The Court reasoned that the Confrontation Clause's express

[5] 541 U.S. 36 (2004).
[6] *See Crawford*, 541 U.S. at p. 59.

reference to "witnesses" reflects its focus on those who, in the words of the Court, "bear testimony," which is "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact."[7] "An accuser who makes a formal statement to government officers," said the Court in *Crawford*, "bears testimony in a sense that a person who makes a casual remark to an acquaintance does not."[8] Thus, the Court reasoned, the constitutional text of the Confrontation Clause reflects an "especially acute concern with a specific type of out-of-court statement." [9]

On the other hand, the majority decision in *Crawford* also made it clear that "not all hearsay implicates the Sixth Amendment's core concerns,"[10] and, in response to a point made in the dissent, the majority acknowledged that certain exceptions to the rule against hearsay in existence at the time the Confrontation Clause was originally adopted fell outside the purview of the Clause because:

> [T]here is scant evidence that the exceptions were invoked to admit testimonial statements against the accused in a criminal case. Most of the hearsay exceptions concerned statements that by their nature were not testimonial-for example, business records or statements in furtherance of a conspiracy.[11]

Back in 2004, the Court in *Crawford* declined to definitively state what constitutes a 'testimonial' statement for purposes of its discussion, but observed:

> "Various formulations of this core class of 'testimonial' statements exist: ' ex parte in-court testimony or its functional equivalent-that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially,' [citation]; 'extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions,' [citation]; 'statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.[12]

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[7] *Crawford,* 541 U.S. at 51, quoting Webster, An American Dict. of the English Language (1828).
[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] *Id*. at p. 55 (emphasis & fn. omitted).
[12] *Id.* at pp. 51-52 (citation omitted).

Moreover, the Court in *Crawford* also observed:

> "Some statements qualify under any definition -- for example, ex parte testimony at a preliminary hearing," (ibid), and "at a minimum, to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations. These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed."[13]

With Justice Stevens' inquiry as a spring board, and with Justice Sotomayor's desire to accommodate state prosecutors' practical considerations while protecting defendants' constitutional rights, it is not beyond the realm of possibility that the Court this year will answer the question left open by *Crawford* in 2004, *i.e* whether the admission of scientific evidence, like laboratory reports or BAC test results, constitutes a "testimonial" statement? If so, then such reports are inadmissible unless either: (a) the person who prepared the report testifies; or (b) the *Crawford* criteria are met, namely (i) the witness is unavailable within the meaning of the applicable rules of evidence, and (ii) the defendant has been provided a prior opportunity for cross-examination of the unavailable witness whose affidavit or written report is being entered into evidence.

As noted above, courts that have addressed this issue in the various states have disagreed as to the answer.[14] A number of state courts have held that scientific evidence is not testimonial, even though it may have been prepared for possible use at trial. Rationales to support this position include:

- Admission of such evidence does not implicate the abuses against which, according to *Crawford*, the Confrontation Clause was directed.[15]
- The language used by the majority in *Crawford* indicates that business records might fall outside the purview of Confrontation Clause concerns, and therefore such evidence is admissible without live testimony as business or public records.[16]

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[13] *Id*. at p. 68

[14] *See* fn. 2, *supra*.

[15] *See, e.g. People v. Johnson* 121 Cal.App.4th 1409, 18 Cal.Rptr.3d 230 (cal. App. Ct. 2004) ("[p]robation revocation proceedings are not 'criminal prosecutions' to which the Sixth Amendment applies.").

[16] *See, e.g. State of Ohio v. Craig*, 853 N.E.2d 621, 638 (Oh. 2006) (the Supreme Court of Ohio concluded that autopsy reports are not testimonial under *Crawford* on the grounds that such reports are 'quintessential business records' and that *Crawford* considered such records or statements to be non-testimonial in nature because they are prepared in the ordinary course of regularly conducted business and are 'by their nature' not prepared for litigation.'"). *See also Commonwealth v. Verde* 444 Mass. 279, 827 N.E.2d 701 (2005) (the Supreme Judicial Court of Massachusetts held that certificates of chemical analysis identifying as cocaine a substance seized from defendant were not testimonial; "Certificates of chemical analysis are neither discretionary nor based on opinion; rather, they merely state the results of a well-recognized scientific test determining the composition and quantity of a substance. . . Accordingly, these drug certificates are well within the public records exception to the confrontation clause.").

- The practical difficulties that would ensue if scientific reports, lab analyses and similar kinds of evidence were deemed "testimonial" under *Crawford* would result in judicial chaos.[17]

As an appellate court in Illinois noted in 2006, these arguments reject alternative judicial constructions of *Crawford* that focus narrowly on the question of whether a document was prepared for use in litigation; admissibility is but one of the several considerations that *Crawford* identified as bearing on whether evidence is testimonial [and] [n]one of these factors was deemed dispositive."[18]

Where does all this lead for *Briscoe v. Virginia*? The prospect of a judicial carve-out for forensic analyst testimony seems to be the kind of Supreme Court compromise that Justice Sotomayor just might embrace. Such a result achieves something for everyone: (a) it leaves the expansionist view of the Confrontation Clause articulated by *Melendez-Diaz* intact for the majority of criminal prosecution witnesses; while (b) providing states and the judicial system a practical alternative to hauling anyone who had anything to do with even a routine lab analysis down to the courthouse to take the stand for the purpose of simply stating: "*Yes, that's my report*."

The Court is expected to release its decision in this case sometime prior to the summer recess.

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[17] *See, e.g. State v. Lackey*, 120 P.3d 332, 351-52 (Kan. 2005) (Kansas Supreme Court citing the practical considerations that militated against considering autopsy reports to be "testimonial" under *Crawford*, ruled; "We believe the reason why these cases have not adopted the arguments and reasoning set forth by defendant is that it would have the effect of requiring the pathologist who performed the autopsy to testify in every criminal proceeding. If, as in this case, the medical examiner is deceased or otherwise unavailable, the State would be precluded from using the autopsy report in presenting its case, which could preclude the prosecution of a homicide case. We view this as a harsh and unnecessary result in light of the fact that autopsy reports generally make routine and descriptive observations of the physical body in an environment where the medical examiner would have little incentive to fabricate the result.").

[18] *People v. So Young Kim* 859 N.E.2d 92, 94 (Ill. App 2006) (certification of Breathalyzer machine used to determine blood-alcohol content deemed not testimonial.).