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Melendez-Diaz v. Massachusetts129 S. Ct. 2527

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I. INTRODUCTION

In June 2009, the United States Supreme Court announced an evidentiary ruling that will greatly impact criminal proceedings in numerous states. *Melendez-Diaz v. Massachusetts*[1] afforded the Court with an opportunity to determine whether a forensic analyst's report was considered to be testimonial evidence against the defendant and subject to the Confrontation Clause of the Sixth Amendment of the United States Constitution.[2] Relying on *Crawford v. Washington*,[3] the Court held that the analyst's report was an affidavit and a testimonial statement against the accused, so as to be a witness against the accused subject to confrontation at trial.[4] This decision potentially affects every criminal proceeding in which a party intends to present physical evidence, as many forms of evidence, such as forensic certificates and records of authenticity, may need to be substantiated by live testimony.[5] To subpoena more unconventional witnesses and require their testimony in court will frustrate courts' schedules and prosecutors' burdens of proof. The far reaching effects of this decision have yet to be felt among the criminal justice system.

II. STATEMENT OF THE FACTS

A. Factual History

The Boston police department received a tip of suspicious activity involving a Kmart employee in a vehicle located in the store's parking lot.[6] Upon further investigation, the tip proved to be accurate.[7] When a man exited the vehicle, a police officer searched him, "finding four clear white plastic bags containing a substance resembling cocaine."[8] Another police officer arrested two men sitting inside the vehicle, including Luis Melendez-Diaz.[9] All three men were taken to the police station in the same police cruiser.[10] During the drive, the police officers noticed that the men were "fidgeting and . . . [acting] furtive[ly]."[11] After the men were booked at the police station, the officers searched the passenger compartment of the cruiser and "found a plastic bag containing 19 smaller plastic bags hidden in the partition between the front and back

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[1] 129 S. Ct. 2527 (2009).

[2] *See Melendez-Diaz*, 129 S. Ct. at 2530. In pertinent part, the Sixth Amendment states "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him[.]" U.S. CONST. amend. VI.

[3] 541 U.S. 36 (2004).

[4] *Melendez-Diaz*,129 S. Ct. at 2532.

[5] *See* discussion *infra* Part IV.

[6] *Melendez-Diaz*, 129 S. Ct. at 2530.

[7] *See id.*

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Melendez-Diaz*, 129 S. Ct. at 2530.

seats."[12] The bags were seized and sent to a state forensic laboratory.[13] Upon the police department's request, the state laboratory conducted a chemical analysis on the seized evidence.[14] Subsequently, Melendez-Diaz was charged with trafficking and distributing cocaine.[15]

B. Procedural History

At trial, the plastic bags seized from the man in the Kmart parking lot, the bags found in the police cruiser, and three certificates of analysis from the forensic analyst who identified the substances in the bags were submitted into evidence.[16] The certificates identified and listed the weight of the substances.[17] The prosecution offered the certificates as prima facie evidence that the plastic bags contained cocaine.[18]

Melendez-Diaz objected to the admission of the forensic analyst's certificates of analysis, claiming it violated his rights under the Confrontation Clause.[19] Instead of having the analyst's certificates act as prima facie evidence, Melendez-Diaz argued that forensic analysts were required to testify at trial.[20] The trial court overruled the objection, and the jury found Melendez-Diaz guilty.[21]

Melendez-Diaz appealed to the Appeals Court of Massachusetts, arguing that his Sixth Amendment right to confront witnesses was violated.[22] Upon review, the Appeals Court of Massachusetts rejected his appeal, relying on the Supreme Judicial Court of Massachusetts's decision *Commonwealth v. Verde*,[23] which held that "authors of certificates of forensic analysis are not subject to confrontation under the Sixth Amendment."[24] The Supreme Judicial Court of Massachusetts denied review.[25]

The Supreme Court of the United States granted certiorari to determine whether the analyst's certificate was testimonial and, furthermore, whether the analyst was a witness subject to the defendant's Sixth Amendment right to confront witnesses against him.[26]

III. DECISION AND RATIONALE

A. Majority Opinion of Justice Scalia joined by Justice Stevens, Justice Souter, Justice Thomas, and Justice Ginsburg

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[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] *Melendez-Diaz*, 129 S. Ct. at 2530-31.
[17] *Id.* at 2531.
[18] *Id.*
[19] *See id.*
[20] *Id.*
[21] *Melendez-Diaz*, 129 S. Ct. at 2531.
[22] *Id.*
[23] 827 N.E.2d 701 (Mass. 2005).
[24] *Melendez-Diaz*, 129 S. Ct. at 2531 (citing *Verde*, 827 N.E.2d at 705-06).
[25] *Id.* at 2531.
[26] *See id.* at 2530-31.

Justice Scalia reiterated the Court's opinion in *Crawford*, which held that defendants have a right to confront witnesses against them, specifically when those witnesses intend to make testimonial statements.[27] *Crawford* defined testimonial statements as:

> [*E*]*x 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; extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions; 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.[28]

Justice Scalia asserted that "[t]here is little doubt that the documents at issue in this case fall within the 'core class of testimonial statements'"[29] because the analyst's "'certificates[ ]' are quite plainly affidavits: 'declarations[s] of facts written down and sworn to by the declarant before an officer authorized to administer oaths.'"[30] As a record of the experiment, the certificate does not qualify as an official or business record because it was created specifically for use in court;[31] however, even if the certificate fell into a hearsay exception, its author would be subject to the Confrontation Clause because forensic analysts are not an exempted class of witnesses.[32] When the investigating police officer requested for the forensic analyst to analyze the substances, he triggered the defendant's Sixth Amendment protections.[33] These protections arise even though the analyst did not witness any human participation in the crime in question.[34]

In confirming the defendant's Sixth Amendment right to confront witnesses, Justice Scalia identified forensic analysts as witnesses whom the defendant has a right to confront at trial, because analysts provide testimony against the defendant and may prove a fact necessary for conviction.[35] Justice Scalia alluded that any other categorization of forensic analysts might lead to exemptions for all expert witnesses.[36]

By considering the analyst's certificate functionally the same as in-court testimony, the Court held that defendants may request that a forensic analyst contributing evidence testify at trial.[37] Justice Scalia, writing for the majority, noted that this confrontation will better insulate forensic experiments from manipulation, because requiring forensic analysts to testify in court helps to ensure accurate analyses and deter fraudulent analyses in the future.[38] Thus, a forensic analyst is only exempted from confrontation at trial if he is unavailable to testify and the defendant had a prior opportunity to cross-examine him.[39] Additionally, all links in the chain of

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[27] *Id.* at 2531 (quoting Crawford v. Washington, 541 U.S. 36, 51(2004)).
[28] *Crawford*, 541 U.S. 36 at 51-52, (2004).
[29] *Melendez-Diaz*, 129 S. Ct. at 2532 (quoting *Crawford*, 541 U.S. at 51).
[30] *Id.* (quoting BLACK'S LAW DICTIONARY 62 (8th ed. 2004)).
[31] *Id.* at 2538*; see also* Palmer v. Hoffman, 318 U.S. 109 (1943).
[32] *Melendez-Diaz*, 129 S. Ct. at 2538-40.
[33] *Id.* at 2535.
[34] *See id.*
[35] *Id.* at 2532-34.
[36] *See id.* at 2535.
[37] *Melendez-Diaz*, 129 S. Ct. at 2532 (citing Davis v. Washington, 547 U.S. 813, 830 (2006)).
[38] *Id.* at 2536-37.
[39] *Id.* at 2532.

custody may not need to testify in court, nor do authors of "documents prepared in the regular course of equipment maintenance" because these documents may be non-testimonial records.[40]

Justice Scalia recognized some states' notice-and-demand statutes.[41] These statutes require that the prosecution give to the defendant notice of its intention to use a forensic analyst's certificate as evidence.[42] Once the defendant receives notice, he or she has the opportunity to object to evidence absent an analyst's live testimony.[43] If the defendant does not make this request, he or she waives the right to confront this witness.[44] Such laws are consistent with this decision.[45]

B. Concurring Opinion of Justice Thomas.

Justice Thomas agreed with the majority, relying on his concurring opinion in *White v. Illinois*.[46] In *White*, Justice Thomas specifically examined the history of the Confrontation Clause in relation to its application to criminal defendants and the evidentiary hearsay exceptions.[47] Justice Thomas reiterated that "the *Confrontation Clause* is implicated by extrajudicial statements only insofar as they are contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions."[48] He categorized the analyst's certificate as an affidavit.[49] Furthermore, Justice Thomas identified it as a testimonial statement against the defendant subject to the Confrontation Clause and agreed that the defendant should be able to confront the forensic analyst at trial.[50]

C. Dissenting Opinion of Justice Kennedy Joined by Chief Justice Roberts, Justice Breyer, and Justice Alito.

Justice Kennedy dissented because, as he put it, the majority disrupted a well established rule of law, unreasonably relied on the description of testimonial evidence, and failed to distinguish facts from similar cases.[51] Justice Kennedy suggested that the majority improperly used the Confrontation Clause to seek and resolve the errors of forensic tests.[52] According to Justice Kennedy, the Confrontation Clause purports to "impress upon witnesses the gravity of their conduct" so that they may alter their statements once confronted by the defendant.[53] The Confrontation Clause aims "to alleviate the danger of one-sided interrogations by adversarial government officials who might distort a witness's testimony" by projecting the statements in a

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[40] *Id.* at 2532 n.1.
[41] *Id.* at 2540-41.
[42] *Melendez-Diaz*, 129 S. Ct. at 2541.
[43] *Id.*
[44] *See id.*
[45] *Id.*
[46] *Id.* at 2543 (Thomas, J., concurring); *see* White v. Illinois, 502 U.S. 346, 358-66 (1992).
[47] *See White*, 502 U.S. at 358-66.
[48] *Melendez-Diaz*, 129 S. Ct. at 2543 (Thomas, J., concurring) (quoting *White*, 502 U.S. at 365).
[49] *Id.* at 2543.
[50] *See id.* (quoting *Melendez-Diaz*, 129 S. Ct. at 2532 (majority opinion)).
[51] *Id.* at 2543-44 (Kennedy, J., dissenting).
[52] *Id.* at 2547.
[53] *Melendez-Diaz*, 129 S. Ct. at 2548.

neutral forum, such as a courtroom.[54] To do so, the Confrontation Clause solely addresses who must testify.[55]

"The State must permit the defendant to challenge the analyst's result," and he may use expert witnesses to do so.[56] Justice Kennedy acknowledged that another expert witness's testimony, that rebuts the forensic analyst's results and methods, is a better defense against forensic evidence than requiring the analyst's testimony under the Confrontation Clause.[57]

Justice Kennedy pointed out this decision's inconsistencies with other rules of evidence and its adverse effects on the law practiced in "at least 35 States and six Federal Courts of Appeals."[58] This decision failed to define an "analyst," and no relevant precedent guides future decisions.[59] Due to the lack of an established definition of this term, Justice Kennedy questioned how useful scientific testing will be in the future.[60] He estimated that this decision will disrupt a great number of cases due to the apparent prevalence of forensic evidence.[61]

Justice Kennedy disagreed with the majority's reliance on testimonial statements by witnesses, because the Confrontation Clause refers only to witnesses against the defendant and does not consider testimonial evidence.[62] He scrutinized the majority's lack of support for its all encompassing categorization that any person making a "formal statement for the purpose of later prosecution – no matter how removed from the crime – must be considered a 'witness against' the defendant."[63]

Justice Kennedy opined that neither historical nor legal precedent extends the Confrontation Clause beyond conventional witnesses.[64] He suggested that the Framers did not intend for forensic analysts to be considered witnesses against the defendant because such witnesses have not historically been treated in that manner.[65] Specifically, he postulated that witnesses who perform forensic analyses should be treated differently from more conventional witnesses who have personal knowledge of the defendant's guilt.[66] In support, Justice Kennedy discussed how forensic analysts make their reports almost contemporaneously with their observations, the unlikelihood of forensic analysts to witness any human activity related to the crime in question, and why their scientific tests do not respond to interrogation.[67] Justice Kennedy doubted that an analyst would alter his or her reports upon confrontation because the analyst's voluminous workload lessens his or her link to the defendant, whereas conventional witnesses are more likely to recant testimony upon confrontation.[68]

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[54] *Id.*

[55] *See id.* at 2549.

[56] *Id.* at 2547-48 (citing Holmes v. South Carolina, 547 U.S. 319, 331 (2006)).

[57] *Id.* at 2548.

[58] *Melendez-Diaz*, 129 S. Ct. at 2543, 2554.

[59] *Id.* at 2544-45. Justice Kennedy explained that the forensic analysis process involves many people and expressed his confusion about which particular person would be required to appear in court pursuant to the majority's holding. *Id.* His discussion considered the different errors each analyst may perform at various steps in the process. *Id.* Further, Justice Kennedy noted the practical problems associated with having one or many of the analysts appear in the court to substantiate his or her findings. *Id.*

[60] *See Melendez-Diaz*, 129 S. Ct. at 2544.

[61] *See id.* at 2546.

[62] *Id.* at 2550-51.

[63] *Id.* at 2552 (citing *Melendez-Diaz*, 129 S. Ct. at 2535 (majority opinion)).

[64] *Id.*

[65] *Melendez-Diaz*, 129 S. Ct. at 2551-52.

[66] *Id.* at 2550-53 (Kennedy, J., dissenting).

[67] *Id.* at 2551-52.

[68] *Id.* at 2548.

IV. ANALYSIS

This decision purports to have merely reiterated the Court's holding in *Crawford*;[69] however, the decision broadens protections for defendants and impacts the criminal justice system in numerous ways. *Melendez-Diaz* established a defendant-favorable rule for confronting witnesses in criminal trials, overruled laws that involve similar pieces of evidence, and adversely affected the criminal justice system.

The Sixth Amendment states that individuals accused of crimes have a right to confront witnesses who testify against them.[70] This right, and others secured by the Constitution, affords criminal defendants protection in the criminal justice system.[71] Additional rules, such as the Federal Rules of Evidence, supplement the Constitution's protection of criminal defendants.[72] Attorneys further protect the rights of defendants, as it is the duty of defense attorneys to vigorously advocate for their clients. The *Melendez-Diaz* decision broadens some of these protections for defendants: it forces prosecutors to present all individuals involved in the investigation process at trial.

Prior to this decision, some states enacted notice-and-demand statutes, which act to set time limits for defendants to assert their rights to confront a forensic analyst after receiving notice that the prosecution will use the forensic analyst's certificate.[73] Pursuant to a notice-and-demand statute, the prosecution must notify the defendant of its intention to use a forensic analyst's report.[74] If the defendant objects to presentation of the report at trial within a set timeframe, he or she may request for the analyst to be present in court.[75] The majority applauded these efforts and, in dicta, hinted that states should enact similar procedural rules with similar time limitations.[76] Perhaps the Court's acceptance of state laws regulating the defendant's right to confront suggests that the Court would also support state laws that define "analysts" and that define "testimonial" evidence.

The dissent suggested that overzealous defense attorneys will utilize this decision to object that the prosecution failed to meet its duty of production, leading to automatic reversal.[77] As a result, if legislatures, courts, and prosecutors do not realize and correct such a objections, the number of defendants found not guilty based on technicalities will increase.[78] The majority stated that notice-and-demand statutes will not create the future problems that the dissent and others hypothesized.[79] In doing so, the majority postulated that this decision will not greatly

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[69] *Id.* at 2542.

[70] U.S. CONST. amend. VI.

[71] *See, e.g., id.* amend. V.

[72] *See* FED. R. EVID. 102 (stating that"secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined[]").

[73] *Melendez-Diaz*, 129 S. Ct. at 2540-41 (citing Brief for Law Professors as Amici Curiae Supporting Petitioner, at 13-15, Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527 (2009) (No. 07-591); *see, e.g.*, OHIO REV. CODE § 2925.51 (LexisNexis 2010).

[74] *Melendez-Diaz*, 129 S. Ct. at 2541.

[75] *Id.*

[76] *Id.* at 2540-41. While the majority recognized the notice-and-demand statutes of many states, it declined to pass judgment on the constitutionality of each state's statute. *Id.* at 2541 n.12.

[77] *Id.* at 2555-56 (Kennedy, J., dissenting).

[78] *Melendez-Diaz*, 129 S. Ct. at 2549 (Kennedy, J., dissenting).

[79] *Id.* at 2541.

disrupt legal proceedings because defense attorneys will not request unnecessary testimony to showcase their client's unfavorable forensic analysis, nor attempt to waste the court's time by calling a witness without reason to rebut or examine his or her testimony.[80] This situation has not been the case.

Some states needed to enact laws that comply with *Melendez-Diaz*, and others have had to deal with the aftermath of this decision. What has happened in Virginia may illustrate this case's effect on the Nation. The Virginia General Assembly was called to convene a special session to address the overwhelming impact of the *Melendez-Diaz* decision.[81] Following the decision, defense attorneys rapidly began requesting that the state's forty-three drug examiners and three calibrating technicians testify in court.[82] In July 2008, examiners were subpoenaed only forty-three times; in July 2009, examiners were subpoenaed 925 times.[83] The Virginia legislature hopes to hire more examiners, but presently cannot afford to do so.[84] Instead, it enacted a notice-and-demand statute that the legislators anticipate will allow for a more accommodating schedule for the courts and examiners, but not decrease the number of examiners subpoenaed.[85] Additionally, the Virginia legislature eliminated the defendant's ability to call calibration technicians to testify in court.[86] It enacted legislation that categorized calibration of instruments as a regulation, which made it non-testimonial evidence that is not subject to *Melendez-Diaz*.[87] Virginia legislators expressed concern that their specially convened session did not remedy all the problems foreseen with the *Melendez-Diaz* decision.[88] Similar problems are likely to plague other states.

If an increased number of forensic analysts are required to appear in court, the use of forensic analyses may become a severe bottleneck in the adjudication process, slowing both the amount of forensic analyses regularly processed and the pace of those trials utilizing forensic evidence, as illustrated by the situation in Virginia.[89] Massachusetts faces similar problems.[90] With only limited resources and analysts, a Massachusetts forensic laboratory reports four month delays for processing items.[91] The Massachusetts Attorney General fears that it will be impossible for the State's analysts to testify at every trial and that requiring such testimony will cause an even greater backlog of the State's ability to analyze items.[92] Furthermore, criminal trials could be dismissed pursuant to speedy trial challenges, if these delays became excessive.[93]

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[80] *Id.* at 2542.

[81] Tom Jackman, *Lawmakers Intervene in DUI Issue*, WASH. POST, Aug. 20, 2009, at B08.

[82] *Id.*

[83] *Id.*

[84] *Id.*

[85] *Id.*; *see* S.B.5003, 2009 Sess. (Va. 2009).

[86] *See* Jackman, *supra* note 81.

[87] *Id.*

[88] *Id.*

[89] *See id.*

[90] Christina Miller & Michael D. Ricciuti, *Department: Legal Analysis: Crawford Comes to the Lab:* Melendez-Diaz *and the Scope of the Confrontation Clause*, 53 BOSTON BAR J. 13, 14 (2009).

[91] *Id.* (citing Brief of The National District Attorneys Association et al., as *Amici* Curiae at 12 n.5, 15, Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527 (2009) (No. 07-591).

[92] *Id.* at 14 (citing David E. Frank & Kimberly Atkins, *Dismissals Feared in Wake of Landmark Lab-Report Decision*, 37 MASS. LAWYERS WEEKLY, 1873, 1897 (July 6, 2009)).

[93] *Id.* at 14.

The increased number of forensic analysts requested to appear in court simply cannot be solved by having one analyst prepare all of the forensic certificates.[94] For purposes of confrontation in court, an analyst who fills out the paperwork and acts as a signatory is not eligible to testify in place of the analyst who performed the tests.[95]

The *Melendez-Diaz* decision also overruled precedent and rules that may impact the criminal justice system in unanticipated ways. For instance, in *Melendez-Diaz* the majority noted that courts typically find business and public records admissible in court without confrontation, because these records are not created to prove a fact at trial.[96] These types of records are thus considered non-testimonial.[97] Whether evidence is initially created for the purpose of litigation appears to play a large role in determining which witnesses are subject to the Confrontation Clause.[98] Because of *Melendez-Diaz*'s effect on evidence, the Advisory Committee on Evidence Rules may convene to edit the rules, to ensure compliance with this decision and perhaps more closely resemble the notice-and-demand statutes.[99]

Copyists and clerks who authenticate records have routinely been exempt from testifying in court.[100] They are not subject to the Confrontation Clause because they have been considered to be unconventional authors of testimonial statements.[101] *Melendez-Diaz* holds this exception to be narrowly circumscribed and distinguishable from a forensic analyst's certificate, because the clerk only authenticates that a record exists and does not create a record to be used in court.[102] In contrast, a forensic analyst composes the record to be used as evidence against the defendant.[103] Additionally, the clerk's record may be distinguished from the analyst's certificate because the clerk only certifies that the record in question exists, regardless of whether an individual created the record for litigation. The *Melendez-Diaz* analysis of the forensic analyst's certificate suggests that a certificate may be non-testimonial, even if the records to which it attests are testimonial.[104]

This reasoning likely extends to the authors authenticating foreign business records.[105] Similarly, each prepares non-testimonial evidence of pre-existing records.[106] However, it is

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[94] *Melendez-Diaz*, 129 S. Ct. at 2545-46 (Kennedy, J., dissenting) (citing *Davis*, 547 U.S. at 826).

[95] *Id.* at 2546.

[96] *Id.* at 2539-40.

[97] *Id.*

[98] Daniel J. Capra, *Prof. Daniel Capra on Admissibility of Records and Certificates in Criminal Cases After* Melendez-Diaz, 2009 LexisNexis Emerging Issues 4017, July 14, 2009.

[99] *Id.*

[100] *Melendez-Diaz*, 129 S. Ct. at 2552-54 (Kennedy, J., dissenting).

[101] *Id.*

[102] *Id.* at 2538-39.

[103] *Id.* at 2539.

[104] Capra, *supra* note 98.

[105] The statute states:

(a)

> (1) In a criminal proceeding in a court of the United States, a foreign record of regularly conducted activity, or a copy of such record, shall not be excluded as evidence by the hearsay rule if a foreign certification attests that—
>
> > (A) such record was made, at or near the time of the occurrence of the matters set forth, by (or from information transmitted by) a person with knowledge of those matters;
> > (B) such record was kept in the course of a regularly conducted business activity;

questionable whether the same could be said for authors who authenticate business records,[107] because these records extend beyond certifying that the document exists.[108] Federal Rule of Evidence 902(11) also "certifies that the record was made at or near the time of the occurrence recorded, and was kept in the regular course of regularly conducted activity."[109] Rule 902(11) might become prohibited because, in one interpretation, it creates a record for the purposes of litigation, similar to the way in which the forensic analyst created an analysis certificate in response to a police investigation.[110] In contrast, if Rule 902(11) is interpreted as relating to a notice-and-demand statute, which *Melendez-Diaz* permits, or as a certificate of authenticity, similar to the clerk's authentication exception, Rule 902(11) may be considered exempt from the *Melendez-Diaz* objection.[111] Additional rules of evidence may be affected.

Melendez-Diaz might also affect an official's ability to submit an affidavit alerting the absence of a public record.[112] Even though Federal Rule of Evidence 803(10) regulates a non-

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(C) the business activity made such a record as a regular practice; and
(D) if such record is not the original, such record is a duplicate of the original; unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.

(2) A foreign certification under this section shall authenticate such record or duplicate.

(b) At the arraignment or as soon after the arraignment as practicable, a party intending to offer in evidence under this section a foreign record of regularly conducted activity shall provide written notice of that intention to each other party. A motion opposing admission in evidence of such record shall be made by the opposing party and determined by the court before trial. Failure by a party to file such motion before trial shall constitute a waiver of objection to such record or duplicate, but the court for cause shown may grant relief from the waiver.

18 U.S.C. § 3505 (2010).

[106] Capra, *supra* note 98.

[107] In pertinent part, the rule states:

"[e]xtrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following: . . . (11) Certified domestic records of regularly conducted activity. The original or a duplicate of a domestic record of regularly conducted activity that would be admissible under Rule 803(6) if accompanied by a written declaration of its custodian or other qualified person, in a manner complying with any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority, certifying that the record—

(A) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;
(B) was kept in the course of the regularly conducted activity; and
(C) was made by the regularly conducted activity as a regular practice.

A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them.

FED. R. EVID. 902(11).

[108] Capra, *supra* note 98.

[109] *Id.*

[110] *Id.*; *see* FED. R. EVID. 902(11).

[111] Capra, *supra* note 98.

[112] *Id.* The rule states:

[t]he following are not excluded by the hearsay rule, even though the declarant is available as a witness: . . . (10) Absence of public record or entry. To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with

testimonial record, the record it protects compares to the forensic analyst's certificate.[113] Both affidavits substitute for in-court testimony and are specifically prepared for litigation to prove a fact against the defendant.[114] Cases that examine the failure to file tax returns or illegal re-entry following deportation will be affected by the *Melendez-Diaz* decision because such cases depend on proof of a record's absence.[115]

The *Melendez-Diaz* decision will likely affect most forms of evidence used to establish a fact.[116] "Evidence such as DNA analysis, blood-alcohol or other bodily fluid analysis, breathalyzer tests, ballistic or other firearm-related tests and hair or fingerprint analysis would certainly require a witness to testify about the analysis."[117] Only subsequent case law will determine the exact impact and scope of the *Melendez-Diaz* decision.

Autopsy reports may also become suspect following *Melendez-Diaz*. If a medical examiner's report cannot be replicated or the examiner is unavailable at trial, the prosecution's case will be damaged, because it will be unable to submit the medical examiner's report if the defendant requests confrontation of the witness.[118] In *United States v. Feliz*,[119] the Court of Appeals for the Second Circuit held that autopsy reports could qualify as either business records under Federal Rule of Evidence 803(6)[120] or public records under Federal Rule of Evidence 803(8)(B)[121] because the court considered the autopsy report to be non-testimonial.[122] The court stated that, to be admissible under Rule 803(6), the record should not be prepared for litigation purposes.[123] Simply because an autopsy report could be used at trial does not make it

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rule 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.

FED. R. EVID. 803(10).

[113] Capra, *supra* note 98.

[114] *Id*.

[115] Miller, *supra* note 87, at 15.

[116] *Id*.

[117] *Id*.

[118] *Id*.

[119] 467 F.3d 227 (2d Cir. 2006).

[120] The rule states:

The following are not excluded by the hearsay rule, even though the declarant is available as a witness: . . . (6) Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), Rule 902(12), or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

FED. R. EVID. 803(6).

[121] The rule states:

[t]he following are not excluded by the hearsay rule, even though the declarant is available as a witness:. . . Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth. . . (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel.

FED. R. EVID. 803(8)(B).

[122] *Feliz*, 467 F.3d at 233.

[123] *Id.* at 234.

testimonial.[124] Arguably, autopsy reports will continue to be admissible following *Melendez-Diaz* because, as *Feliz* explained, the anticipated use of the autopsy report in litigation did not make the evidence testimonial, whereas the forensic report in *Melendez-Diaz* was not prepared with the anticipation of litigation, but solely for litigation purposes.[125]

Additionally, *Melendez-Diaz* and related rules impact the criminal justice system by making it more difficult for the prosecution to establish the chain of custody to present evidence. Following *Melendez-Diaz,* many people in the chain of custody may be subpoenaed because they prepared testimonial evidence to prove a fact against the defendant;[126] however, this process contradicts precedent regarding the chain of custody presentation. Typically, the entire chain does not need to testify in court.[127] Requiring so many people to testify in court, such as forensic analysts and others involved in the investigation processes, will increase court costs as well as administration costs for courts and laboratories and complicate judicial and laboratory schedules.[128]

V. CONCLUSION

Melendez-Diaz affects all cases within the criminal justice system that use scientific evidence to prove an element of the crime. It categorized certifications prepared by forensic analysts as testimonial evidence and identified the forensic analyst as a witness who the defendant has a right to confront in court.[129] In effect, if such evidence is necessary, the prosecution must ensure that individuals involved in the investigation appear in court to testify regarding their findings.[130] This requirement may increase difficulties for prosecutors to prove guilt beyond a reasonable doubt.[131] While the Court focused on protecting the defendant's Sixth Amendment right to confront witnesses,[132] this decision will affect thousands of cases in many unforeseen ways.

[124] *Id.* at 235.
[125] Capra, *supra* note 98.
[126] *Melendez-Diaz,* 129 S. Ct. at 2546 (Kennedy, J., dissenting).
[127] *Id.*
[128] *Id.* at 2549.
[129] *See id.* at 2532.
[130] *Id.* at 2556 (Kennedy, J., dissenting).
[131] *Melendez-Diaz,* 129 S. Ct. at 2556 (Kennedy, J., dissenting).
[132] *See id.*