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The Sky Is Not Falling: How the Anticlimactic Application of *Melendez-Diaz v. Massachusetts* to Oklahoma's Laboratory Report Procedures Allows Room for Improvement

I. Introduction

The Supreme Court's recent interpretation of the Confrontation Clause in *Melendez-Diaz v. Massachusetts*¹ has swept the criminal justice system with change. Writing for the majority, Justice Scalia applied the principles of *Crawford v. Washington*² to find that a laboratory report constitutes a testimonial statement requiring the protections of the Sixth Amendment's right to confrontation.³ Thus, laboratory reports can only be used if the analyst testifies or is shown to be unavailable and there was a prior opportunity for cross-examination.⁴

While the dissent employed "sky-is-falling" rhetoric criticizing the practical effects the majority's holding will have on the criminal justice system, the majority provided states with a roadmap for complying with the new rule.⁵ The Court approved the use of notice-and-demand statutes as an efficient method for states to structure the introduction of laboratory reports at trial.⁶ Notice-and-demand statutes create procedural rules that "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."⁷ These statutes enhance judicial efficiency by requiring the analyst to testify at trial only when the defendant exercises his right to confrontation.

The application of *Melendez-Diaz* to Oklahoma's procedures will be far less momentous than the dissent's "Chicken Little"⁸ prediction.⁹ In fact, Oklahoma may not feel any of the predicted aftershock of the case. The state is uniquely situated because Oklahoma's statutes allow the introduction of laboratory reports--without the testimony of the analyst--only at the preliminary hearing

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

2. 541 U.S. 36 (2005).

3. *Melendez-Diaz*, 129 S. Ct. at 2532.

4. *Id.*

5. *See id.* at 2541.

6. *See id.*

7. *Id.*

8. REBECCA EMBERLEY & ED EMBERLEY, CHICKEN LITTLE (2009).

9. *See Melendez-Diaz*, 129 S. Ct. at 2540.

stage.¹⁰ Because there is not an evidentiary rule allowing for the admission of laboratory reports at trial, these reports are excluded as hearsay. Consequently, if a prosecutor wishes to use a laboratory report at trial he must call the analyst who created the report to testify about its findings.¹¹ If the prosecution opts not to call the analyst to testify, the state must give up use of the information contained in the report altogether.¹²

In addressing the application of *Melendez-Diaz* to Oklahoma's current procedures for admitting laboratory reports, this note sets forth two arguments. First, Oklahoma's existing statutes regulating laboratory reports at preliminary hearings will not be altered by the application of *Melendez-Diaz* for the basic reason that the right to confrontation does not apply at a preliminary hearing.¹³ The Supreme Court has regarded the right to confrontation as a "trial right"¹⁴ that is not required for the preliminary hearing's determination of probable cause.¹⁵ Second, because Oklahoma's law does not provide procedures for introducing laboratory reports at trial, the state should expand its current statutory scheme to include a notice-and-demand statute at the trial stage. Such a scheme would promote judicial efficiency by allowing a means to use the reports while requiring the analyst to testify only when the defendant wishes to cross-examine him. Additionally, a notice-and-demand statute would lessen reliance on circumstantial evidence by making it easier to introduce scientific laboratory reports.

This note will analyze the application of *Melendez-Diaz* to Oklahoma's procedures for using laboratory reports at preliminary hearings and trials. Part II of this note begins by reviewing the Supreme Court's development of its Sixth Amendment analysis. The facts and holding of *Melendez-Diaz* will be discussed in Part III, which includes a discussion of the rationale of the majority opinion as it addressed the dissent's arguments. Part IV of this note will analyze the effect of *Melendez-Diaz* on Oklahoma's law. This note concludes in Part V.

10. 22 OKLA. STAT. § 751 (2001), amended by Act of May 22, 2009, ch. 274, § 2, 2009 Okla. Sess. Laws 541.

11. See *State v. \$2,200.00 in U.S. Currency*, 1993 OK CIV APP 22, ¶ 6 n.1, 851 P.2d 1081, 1083 n.1; cf. *Chambers v. State*, 1982 OK CR 1983, ¶¶ 13-14, 649 P.2d 795, 798 (noting the defendant was barred from asserting the laboratory reports as hearsay because it was an error he "committed or invented"), overruled on other grounds by *Richardson v. State*, 1992 OK CR 76, ¶ 7, 841 P.2d 603, 605.

12. See *Melendez-Diaz*, 129 S. Ct. at 2532.

13. See *Barber v. Page*, 390 U.S. 719, 725 (1968) (holding that "the right to confrontation is basically a trial right").

14. *Id.*

15. See *Gerstein v. Pugh*, 420 U.S. 103, 122 (1975); WAYNE R. LAFAYE ET AL., CRIMINAL PROCEDURE § 14.2(a) (4th ed. 2004).

II. *The Right to Confrontation Before Melendez-Diaz v. Massachusetts*

The Supreme Court has recognized that the primary object of the Confrontation Clause is to prevent the use of *ex parte* testimony.¹⁶ This purpose is fulfilled by providing the defendant with the opportunity to “test[] the recollection and sift[] the conscience of the witness” while “compelling [the witness] to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.”¹⁷ The roots of Sixth Amendment history reach back to Sir Walter Raleigh’s trial in 1603.¹⁸

Raleigh was accused of conspiring with Lord Cobham against the Queen of England.¹⁹ At his trial for treason, the forced confession of Cobham was introduced into evidence and Raleigh demanded that the court allow him to question Cobham face-to-face.²⁰ The court denied Raleigh’s demand and he was subsequently sentenced to death.²¹ In response to these practices in England, the American colonies included the right to confrontation in their charters and bills of rights.²² Ultimately, the United States Constitution provided for the right of confrontation in the Sixth Amendment.²³ Three years after the amendment’s adoption, an early American court affirmed the right to confrontation by recognizing, “[I]t is a rule of common law . . . that no man shall be prejudiced by evidence which he had not the liberty to cross

16. *Mattox v. United States*, 156 U.S. 237, 242-43 (1895).

17. *Id.*

18. See Frank R. Herrmann & Brownlow M. Speer, *Facing the Accuser: Ancient and Medieval Precursors of the Confrontation Clause*, 34 VA. J. INT’L L. 481, 481-82 (1994).

19. See Daniel H. Pollitt, *The Right of Confrontation: Its History and Modern Dress*, 8 J. PUB. L. 381, 388 (1959).

20. *See id.*

21. *See id.*

22. See 30 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 6346 (2007). Virginia’s Declaration of Rights provided a right “to be confronted with the accusers and witnesses”; similarly, Delaware provided a right “to be confronted with the accusers or witnesses.” *Id.* Both Pennsylvania and Vermont provided the right “to be confronted with the witnesses.” *Id.* North Carolina’s Declaration of Rights allowed citizens “to confront the accusers and witnesses with other testimony.” *Id.* Maryland’s Declaration of Rights was the longest, and is often thought to be the model for the Sixth Amendment. It provided the accused the right “to be confronted with the witnesses against him.” *Id.* Finally, Massachusetts and New Hampshire’s Declarations provided the right “to meet the witnesses against him face to face.” *Id.* In 1965, this right was held to be applicable to the states through the Fourteenth Amendment’s due process clause. See *Pointer v. Texas*, 380 U.S. 400, 403 (1965).

23. U.S. CONST. amend VI; see *Pointer v. Texas*, 380 U.S. 400, 403 (1965).

examine.”²⁴ Despite the long history of the clause, courts have struggled to determine its intended scope and application.

The analysis of the Confrontation Clause often encompasses a discussion of the hearsay rule. Hearsay and confrontation are two closely related, but entirely separate, concepts.²⁵ In Oklahoma, hearsay is defined as an oral or written “statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.”²⁶ The hearsay rule deems hearsay evidence inadmissible unless it satisfies an exception.²⁷ A laboratory report is hearsay because it is an out of court statement, offered as evidence of the report’s findings. As such, a report can only be introduced at trial if there is an applicable hearsay exception or rule allowing for its admittance. If a report surpasses the hearsay hurdle, it is then subject to confrontation under the Sixth Amendment because it is a testimonial statement.²⁸

A. *The Reliability Test of Ohio v. Roberts*

For many years, the Supreme Court decided Confrontation Clause questions on a case-by-case basis without establishing a test to guide lower courts.²⁹ In the 1980 case of *Ohio v. Roberts*,³⁰ the Supreme Court outlined a test for determining the admissibility of hearsay evidence against a criminal defendant in light of the Sixth Amendment. The defendant, Herschel Roberts, was accused of using stolen checks and credit cards.³¹ At his preliminary hearing, the defense called the victim’s daughter to testify.³² The daughter had previously let Roberts stay at her apartment, but she denied that she had given him permission to use her parents’ checks or cards.³³ When Roberts subsequently testified at trial that the daughter did in fact give him permission, the prosecution could not rebut his testimony by calling the daughter as a witness because she could not be found for trial.³⁴ To counteract Roberts’ statements, the prosecution introduced the transcript of the daughter’s

24. *State v. Webb*, 2 N.C. (1 Hayw.) 77 (Super. L. & Eq. 1794) (per curiam).

25. *See California v. Green*, 399 U.S. 149, 155 (1970).

26. 12 OKLA. STAT. § 2801(A)(3) (2001).

27. *Id.* § 2802.

28. *See Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2532 (2009).

29. *See generally Mancusi v. Stubbs*, 408 U.S. 204 (1972); *Dutton v. Evans*, 400 U.S. 74 (1970); *Green*, 399 U.S. 149; *Bruton v. United States*, 391 U.S. 123 (1968); *Barber v. Page*, 390 U.S. 719 (1968); *Mattox v. United States*, 156 U.S. 237 (1895).

30. 448 U.S. 56 (1980), *overruled by Crawford v. Washington*, 541 U.S. 36 (2004).

31. *Id.* at 58.

32. *Id.*

33. *Id.*

34. *See id.* at 59-60.

preliminary hearing testimony.³⁵ Ultimately, Roberts was found guilty.³⁶ On appeal, he claimed the trial court's use of the preliminary hearing transcript was a violation of his right to confront the daughter and her valuable evidence against him.³⁷

The Supreme Court constructed a test to reflect the relationship between the hearsay rules and the Confrontation Clause.³⁸ The Court's holding rested on a test of reliability, finding that certain hearsay exceptions were so inherently reliable that their admission would comply with the "substance of the constitutional protection."³⁹ The Court held that hearsay testimony would be allowed under the Sixth Amendment if the witness were unavailable to testify at trial and the hearsay statement bore "adequate indicia of reliability."⁴⁰ The Court found that the requirement of reliability was inferred when the evidence fell "within a firmly rooted hearsay exception," otherwise it was inadmissible "absent a showing of particularized guarantees of trustworthiness."⁴¹

The Court found that the daughter's preliminary hearing testimony met its new test.⁴² The prosecution satisfied the first requirement of unavailability when they made a good-faith effort to locate the daughter by issuing five separate subpoenas over several months time and attempting to reach her through her parents.⁴³ The Court also found that when the daughter testified at the preliminary hearing, her testimony met the requirement of reliability because it sufficiently fulfilled the form of true cross-examination by questioning the declarant's perception and memory for the purpose of discovering the truth.⁴⁴ Therefore, during the preliminary hearing there was an adequate opportunity for cross-examination and her testimony bore a sufficient "indicia of reliability."⁴⁵

The Supreme Court adhered to the *Roberts* test for over twenty years. The test was refined in *White v. Illinois*,⁴⁶ where the Court held that proof of unavailability of the witness was required only when the prosecution sought

35. *Id.* at 59.

36. *Id.* at 60.

37. *See id.* at 59-60.

38. *Id.* at 62.

39. *See id.* at 66 (citing *Mattox v. United States*, 156 U.S. 237, 244 (1895)).

40. *Id.* (internal quotations omitted).

41. *See id.*

42. *See id.* at 70. Interestingly, Anita's testimony would satisfy the requirements of *Crawford*—she was unavailable for trial, and there was a prior opportunity for cross-examination. *See Crawford v. Washington*, 541 U.S. 36, 68 (2004).

43. *See Roberts*, 448 U.S. at 75.

44. *See id.* at 70-72.

45. *See id.* at 73.

46. 502 U.S. 346 (1992).

to introduce testimony from a prior proceeding.⁴⁷ Furthermore, the Court also recognized that the Confrontation Clause was automatically satisfied when the hearsay at issue fell within a firmly rooted exception.⁴⁸ Over time, state and federal courts began to recognize several hearsay exceptions in the Federal Rules of Evidence as firmly rooted, including excited utterances,⁴⁹ statements regarding medical diagnosis,⁵⁰ coconspirator statements,⁵¹ statements reflecting an individual's state of mind,⁵² dying declarations,⁵³ agency admissions,⁵⁴ past-recorded recollections,⁵⁵ and business records.⁵⁶ To a large degree, the hearsay exceptions determined the defendant's Sixth Amendment rights; that is, an exception that was firmly rooted met the *Roberts* test and confrontation was not required. Even when an exception was not firmly rooted, a court's determination that a statement bore a particularized guarantee of trustworthiness still precluded the defendant from confrontation because the statement's inherent reliability was held to comply with constitutional protections.⁵⁷ Thus, the *Roberts* reliability test allowed unfronted hearsay statements to be introduced against a criminal defendant.

47. *See id.* at 354.

48. *See id.* at 357.

49. *See* Woodward v. Williams, 263 F.3d 1135, 1140 (10th Cir. 2001) (recognizing that when the witness is deceased and her testimony was an "excited utterance" or "spontaneous declaration" under Rule 803(2), then it is admissible as a firmly rooted exception).

50. *See* United States v. McHorse, 179 F.3d 889, 900 (10th Cir. 1999) (stating "the Rule 803(4) exception to the hearsay rule which applies to statements made for purposes of medical diagnosis or treatment . . . is a 'firmly rooted' exception to the hearsay rule which carries 'sufficient indicia of reliability' to satisfy the aims of the Confrontation Clause" (quoting *White*, 502 U.S. at 355 n.8)).

51. *See* Bourjaily v. United States, 483 U.S. 171, 183-84 (1987) (holding that a co-conspirator's statements provide an exception that is firmly rooted and admissible under 801(d)(2)(E), therefore there was no need for a reliability inquiry).

52. *See* United States v. Veltmann, 6 F.3d 1483, 1494-95 (11th Cir. 1993) (allowing state of mind testimony under Rule 803(3)).

53. *See* Webb v. Lane, 922 F.2d 390, 393 (7th Cir. 1991) (recognizing that dying declarations are firmly rooted under Rule 804(b)(2)).

54. *See* United States v. Saks, 964 F.2d 1514, 1525-26 (5th Cir. 1992) (holding the agency exception is firmly rooted and sufficiently reliable as a provision of 801(d)(2)(D)).

55. *See* United States v. Smalls, 438 F.2d 711, 714 (2d Cir. 1971) (noting that the use of past recorded recollection under Rule 803(5) is not in violation of the Confrontation Clause).

56. *See* United States v. Waters, 1998 FED App. 0299P, 158 F.3d 933, 941 (6th Cir. 1998) (recognizing that documents meeting the business records requirements under Rule 803(6) were admissible as a firmly rooted hearsay exception).

57. *See* Ohio v. Roberts, 448 U.S. 56, 66 (1980), *overruled by* Crawford v. Washington, 541 U.S. 36 (2004).

B. Crawford v. Washington's Application of the Confrontation Clause to Testimonial Statements

In 2004, the Supreme Court departed from twenty years of *Ohio v. Roberts* precedent to implement a new Confrontation Clause standard in *Crawford v. Washington*.⁵⁸ Michael Crawford was charged with stabbing a man who allegedly attempted to rape his wife, Sylvia.⁵⁹ Both Crawford and Sylvia were arrested and interrogated on tape, each providing conflicting testimony regarding the incident.⁶⁰ When Crawford asserted a claim of self-defense at trial, the prosecution introduced Sylvia's tape-recorded statements as evidence against Crawford.⁶¹ The jury convicted Crawford of assault.⁶²

Illustrating the malleability of the *Roberts* test, the trial court, the Washington Court of Civil Appeals, and the Washington Supreme Court all reached different results in their determination of the admissibility of Sylvia's testimony.⁶³ While all three courts agreed that Sylvia's testimony constituted a statement against penal interest that did not fall within a firmly rooted hearsay exception, the courts disagreed as to whether it bore a particularized guarantee of trustworthiness.⁶⁴ The Supreme Court granted certiorari to re-examine the application of the Confrontation Clause to hearsay against an accused.⁶⁵

To understand its meaning, the Court looked beyond the literal language of the Confrontation Clause by examining its history.⁶⁶ The Court recognized that the Confrontation Clause was meant to protect against the English practices evidenced in the notorious conviction of Sir Walter Raleigh.⁶⁷ Moreover, the Court traced the history to the first cases following the adoption

58. See 541 U.S. at 68.

59. *Id.* at 38.

60. See *id.* at 38-40.

61. *Id.*

62. *Id.* at 41.

63. See *id.* at 40-41.

64. See *id.* The trial court found the statement to be trustworthy because "Sylvia was not shifting blame but rather corroborating her husband's story . . . ; she had direct knowledge as an eyewitness; she was describing recent events; and she was being questioned by a 'neutral' law enforcement officer." *Id.* at 40. The Washington Court of Appeals reversed, holding that Sylvia's statement did not bear a particularized guarantee of trustworthiness because she admitted to shutting her eyes during the fight, and her statements were made in response to police questioning. See *id.* at 41. The Washington Supreme Court reinstated Crawford's conviction, concluding that Sylvia's statements were trustworthy because they were "virtually identical to" Crawford's. See *id.*

65. *Id.* at 42.

66. See *id.* at 43-50.

67. See *id.* at 44.

of the Sixth Amendment, which recognized the common law rule precluding the admission of *ex parte* examinations.⁶⁸ From this historical analysis, the Court found the Framers intended to exclude statements from out of court witnesses when they are unavailable and there was not a prior opportunity for their cross-examination.⁶⁹

The Court tailored its focus to the Confrontation Clause's application to testimonial hearsay statements.⁷⁰ The majority interpreted the language of the clause to mean that "witnesses" against the accused included "those who bear testimony."⁷¹ Thus, the Court concluded that the Sixth Amendment's protections extend to all testimonial statements.⁷² Under *Crawford*, a party cannot use a testimonial statement as evidence at trial unless the witness who made the statement: (1) testifies and is subject to cross-examination, or (2) is unavailable for trial and there was a prior opportunity for cross-examination of that witness.⁷³ The Court recognized that the downfall of the *Roberts* reliability test was its failure to preclude core testimonial statements against which the Confrontation Clause was meant to protect.⁷⁴ Determining reliability under *Roberts* created unpredictable results that magnified the amorphous nature of reliability and its inadequate protection from *ex parte* testimonial statements.⁷⁵ Justice Scalia stated it best when he reasoned that "[d]ispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty."⁷⁶

Unlike *Roberts*, the rigid test of *Crawford* is not driven by hearsay rules because the determinative factor is whether the statement at issue is testimonial. Nevertheless, a key question remained after *Crawford* — what does "testimonial" mean?⁷⁷ Foreshadowing *Melendez-Diaz*, the Court explicitly left this definition open, recognizing that "[v]arious formulations of this core class of 'testimonial' statements exist," including affidavits arising from *ex parte* in-court testimony and affidavits given under circumstances that "would lead an objective witness reasonably to believe that the statement would be available for use at a later trial."⁷⁸

68. *See id.* at 49-50.

69. *See id.* at 53-54.

70. *See id.* at 51-52.

71. *See id.* at 51 (internal quotations omitted).

72. *See id.* at 68.

73. *See id.*

74. *See id.* at 63-64.

75. *See id.*

76. *Id.* at 62.

77. *See id.* at 68. ("We leave for another day any effort to spell out a comprehensive definition of 'testimonial.'")

78. *See id.* at 51-52.

C. *The First Application of Crawford's New Rule in Davis v. Washington*

After the dramatic changes in *Crawford*, the Supreme Court considered *Davis v. Washington*⁷⁹ to address the meaning of “testimonial” in the Court’s newest test.⁸⁰ Before *Davis*, many lower courts were still applying *Roberts* to nontestimonial statements, believing *Crawford* only applied to testimonial statements.⁸¹ In *Davis*, the Court explicitly recognized that there are no Sixth Amendment protections for nontestimonial statements; rather, the protection of testimonial hearsay “must fairly be said to mark out not merely its core, but its perimeter.”⁸² Thus, *Roberts* no longer applied because the characterization of the hearsay as testimonial or nontestimonial determined the admissibility of the statement.⁸³

In *Davis*, the Court considered the consolidated cases of *State v. Davis*,⁸⁴ involving a recorded 911 call, and its companion case, *Hammon v. Indiana*,⁸⁵ concerning a crime scene statement by a victim of domestic violence.⁸⁶ The Court found that a statement made to police during interrogation is not testimonial when the declarant’s purpose in making the statement is to assist in a current emergency, and not for future use at trial.⁸⁷ By contrast, a statement regarding a past event given during an apparent non-emergency is testimonial because the declarant’s purpose is to establish facts for future use in a criminal prosecution.⁸⁸

79. 547 U.S. 813 (2006).

80. *See id.* at 823-24.

81. *See, e.g.*, *Summers v. Dretke*, 431 F.3d 861, 877 (5th Cir. 2005) (finding that *Roberts* still controls with respect to “nontestimonial out-of-court statements in furtherance of a conspiracy”); *United States v. Hinton*, 423 F.3d 355, 358 n.1 (3d Cir. 2005) (“[T]he admission of non-testimonial hearsay is still governed by *Roberts*.”); *United States v. Brun*, 416 F.3d 703, 707 (8th Cir. 2005) (recognizing that *Roberts* applies to a nontestimonial excited utterance); *United States v. Franklin*, 2005 FED App. 0302P, 415 F.3d 537, 546 (6th Cir. 2005) (recognizing that *Crawford* “did not quite over-rule” *Roberts* which still applies to nontestimonial statements); *Horton v. Allen*, 370 F.3d 75, 84 (1st Cir. 2004) (finding that *Crawford* only applies to testimonial statements); *United States v. Saget*, 377 F.3d 223, 227 (2d Cir. 2004) (“*Crawford* leaves the *Roberts* approach untouched with respect to nontestimonial statements.”); *Mungo v. Duncan*, 393 F.3d 327, 336 n.7 (2d Cir. 2004) (“*Crawford* did not rule on whether the Confrontation Clause has any application to nontestimonial hearsay.”).

82. *See Davis*, 547 U.S. at 824 (internal quotations omitted).

83. *See id.* at 823-24.

84. 111 P.3d 844 (Wash. 2005).

85. 829 N.E.2d 444 (Ind. 2005).

86. *See Davis*, 547 U.S. at 819.

87. *See id.* at 822.

88. *See id.*

Recognizing the distinction, the Court analyzed the two statements under *Crawford*.⁸⁹ The Court found the 911 call to be a nontestimonial statement because the declarant's purpose was to assist police in a current crisis by answering the operator's questions and describing the emergency.⁹⁰ The Court left open the possibility that a nontestimonial 911 call could evolve into a testimonial statement as an emergency dissipates.⁹¹ Furthermore, the Court found that the statement of the domestic violence victim was testimonial because the police interrogation was strikingly similar to civil law *ex parte* examinations.⁹² In England, examinations were conducted by justices of the peace and were sometimes read in place of live testimony.⁹³ In *Hammon*, the victim and the defendant were separated from each other for questioning.⁹⁴ Additionally, the accused was forcibly denied from participating in the victim's examination, during which the police prompted her to recount the details of the disturbance.⁹⁵ The Court was quick to note that initial inquiries at crime scenes may be nontestimonial when the officer arrives during an ongoing emergency and he must investigate to end a threatening situation.⁹⁶

After *Crawford* and *Davis*, courts struggled to apply the new rigid guidelines that did not take into account *Roberts*' firmly rooted hearsay exceptions. New challenges arose as different types of testimonial statements faced the courts. Many courts were forced to determine the point at which an emergency began and ended, and thus when a nontestimonial statement evolved into an inadmissible testimonial statement.⁹⁷ Additional issues surfaced as courts dealt with statements in child abuse cases that fell into a gray area between "spontaneous statement[s] to a police officer" and "statement[s] to a parent after questioning."⁹⁸ The vagueness of what "testimonial" means has still left many questions lingering. An area not explicitly discussed in *Crawford* or *Davis* was the admissibility of laboratory reports containing the hearsay statements of the analyst.

89. *See id.* at 817.

90. *See id.* at 827-29.

91. *See id.* at 828-29.

92. *See id.* at 830.

93. *See Crawford v. Washington*, 541 U.S. 36, 43 (2004).

94. *Davis*, 547 U.S. at 830.

95. *See id.*

96. *See id.* at 832.

97. *See United States v. Proctor*, 505 F.3d 366, 371-72 (5th Cir. 2007); *United States v. Arnold*, 486 F.3d 177, 199-201 (6th Cir. 2007) (Griffin, J., concurring in part and dissenting in part).

98. *See David M. Gersten & Amy Karan, Crawford v. Washington One Year Later: Its Practical Effects in Child Abuse and Domestic Violence Cases*, 56 JUV. & FAM. CT. J. 4, 3 (2005).

III. Laboratory Reports as Testimonial Statements Under Melendez-Diaz v. Massachusetts

Laboratory reports provide an effective means for the prosecution to utilize scientific evidence.⁹⁹ Such reports commonly include determinations regarding “drug analyses, fingerprint examinations, intoxication tests, [or] rape victim examinations.”¹⁰⁰ For example, the state may send evidence it has seized from the defendant to laboratories for testing to determine if it is in fact an illegal controlled substance; the laboratory will then generate a report containing its conclusions.¹⁰¹ The increased use of forensic science in criminal cases has created no shortage of work for state and federal laboratories across the nation. The FBI laboratory estimates that it conducts over one million scientific tests each year.¹⁰² In 2009, the Oklahoma State Bureau of Investigation analyzed 43,615 items, and the sixty-seven analysts made 219 court appearances.¹⁰³

Prior to *Melendez-Diaz*, states disagreed as to whether laboratory reports were testimonial under *Crawford*.¹⁰⁴ Many states used the language in *Crawford* to reason that reports were inadmissible testimonial statements because they were made under circumstances that would lead an objective witness to believe that the statement would be used at trial.¹⁰⁵ Conversely,

99. See 1 PAUL C. GIANNELLI & EDWARD J. IMWINKELRIED, SCIENTIFIC EVIDENCE § 6.01 (4th ed. 2007).

100. See *id.*

101. See, e.g., *Winters v. State*, 1976 OK CR 4, ¶ 21, 545 P.2d 786, 791 (requiring the State to prove the substance in question was marijuana as an element of the offense for unlawful distribution of marijuana).

102. See *Message from the FBI Laboratory Director*, in FBI, U.S. DEP'T OF JUSTICE, FBI LABORATORY 2007, (2007), available at <http://www.fbi.gov/about-us/lab/lab-annual-report-2007/fbi-lab-report-2007-pdf/view>.

103. See OKLA. STATE BUREAU OF INVESTIGATION, OSBI FY 2009 ANNUAL REPORT 11 (2009) [hereinafter OSBI FY 2009 ANNUAL REPORT], available at <http://www.ok.gov/osbi/documents/2009%20Annual%20Report.pdf>. This means that on average from July 2008 to June 2009, each of the sixty-seven analysts made approximately 3.3 court appearances.

104. See *Hinojos-Mendoza v. People*, 169 P.3d 662, 666-67 (Colo. 2007).

105. See *Crawford v. Washington*, 541 U.S. 36, 52 (2004); see also *Hinojos-Mendoza*, 169 P.3d at 667 (concluding that when the only purpose of a laboratory report was to analyze a substance for future use at trial it was testimonial under *Crawford*); *Roberts v. United States*, 916 A.2d 922, 938 (D.C. 2007) (recognizing that the admission of written conclusions from three FBI laboratory scientist regarding DNA testing was testimonial and subject to the protection of the Confrontation Clause); *State v. Johnson*, 982 So. 2d 672, 680 (Fla. 2008) (holding the trial court erred in allowing a laboratory report under the business record hearsay exception because it was prepared for the purpose of trial, to prove the crime, and it was therefore testimonial); *People v. Lonsby*, 707 N.W.2d 610, 619 (Mich. Ct. App. 2005) (finding

several other courts continued to admit laboratory reports under business and public records hearsay exceptions,¹⁰⁶ finding that because the reports were not made for a prosecutorial purpose, they were nontestimonial and free from Sixth Amendment scrutiny.¹⁰⁷ After *Crawford*, the California Supreme Court found a DNA report to be nontestimonial because the report differed greatly from the ordinary witnesses against whom the Confrontation Clause was meant to protect.¹⁰⁸ Prior to *Melendez-Diaz*, the Massachusetts Supreme Court allowed a chemical analysis report as a nontestimonial statement because it did not implicate *ex parte* examinations—“the principal evil at which the Confrontation Clause was directed”¹⁰⁹ The Massachusetts Supreme Court found the report was more akin to a nontestimonial business or official record than it was to testimonial hearsay.¹¹⁰ In light of the growing role of these reports and lower courts’ vastly inconsistent application of the Confrontation Clause, the Supreme Court granted certiorari in *Melendez-Diaz v.*

that a state crime laboratory report is testimonial because it was performed to uncover evidence to use in a criminal prosecution); *State v. Caulfield*, 722 N.W.2d 304, 309 (Minn. 2006) (concluding that a laboratory report analyzing cocaine was testimonial because it was prepared for litigation); *People v. Rogers*, 780 N.Y.S.2d 393, 397 (N.Y. App. Div. 2004) (holding a laboratory report was testimonial “[b]ecause the test was initiated by the prosecution and generated by the desire to discover evidence against the defendant”).

106. *See* *United States v. Feliz*, 467 F.3d 227, 233-37 (2d Cir. 2006) (holding that an autopsy report admitted under Rule 803(6) as a business record, or Rule 803(8) as a public record, cannot be testimonial under *Crawford*); *United States v. Thornton*, 209 Fed. App’x 297, 299 (4th Cir. 2006) (allowing FBI fingerprint cards as business or public records); *Rollins v. State*, 866 A.2d 926, 953 (Md. Ct. Spec. App. 2005) (recognizing “[a]n autopsy report, prepared by an ostensibly neutral party—the medical examiner—documenting objective findings, is the quintessential business record”; additionally finding the report met the public record exception); *Commonwealth v. Verde*, 827 N.E.2d 701, 705 (Mass. 2005) (holding that certificates of chemical analysis were “well within the public records exception to the Confrontation Clause”), *abrogated by* *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009).

107. *See* *United States v. Ellis*, 460 P.3d 920, 926-27 (7th Cir. 2006) (holding medical records were business records because they were made in the ordinary course of business and the fact that the person creating the record might have known it could be used as evidence in a future criminal prosecution did not make it testimonial); *People v. Brown*, 801 N.Y.S.2d 709, 711-13 (N.Y. Sup. Ct. 2005) (holding a DNA report from the Office of the Chief Medical Examiner was not testimonial under *Crawford* because its sole purpose was not for litigation), *abrogated by* *People v. Rawlins*, 844 N.E.2d 1019 (N.Y. 2008); *State v. Craig*, 110 Ohio St. 3d 306, 2006-Ohio-4571, 853 N.E.2d 621, at ¶ 88 (recognizing an autopsy report is a nontestimonial business record under *Crawford*).

108. *See* *People v. Geier*, 161 P.3d 104, 139-41 (2007).

109. *See* *Crawford*, 541 U.S. at 50; *Verde*, 827 N.E.2d at 706.

110. *See* *Verde*, 827 N.E.2d at 706.

Massachusetts to resolve whether laboratory reports are testimonial under *Crawford*.¹¹¹

A. Facts

In *Melendez-Diaz*, Boston police officers set up surveillance on a Kmart employee after receiving a tip regarding his suspicious behavior; the employee received excessive phone calls at work, and he was regularly picked up in front of the store and returned shortly thereafter by the same car.¹¹² One day after being returned to work in the suspicious car, the police detained and searched the employee, finding four clear plastic bags of cocaine.¹¹³ The police also arrested two other men in the car, including Luis Melendez-Diaz.¹¹⁴ During the ride to the police station, the men were caught stuffing more plastic bags into the seats of the police car.¹¹⁵ The bags were seized as evidence and taken to a state laboratory to conduct a chemical analysis.¹¹⁶ Melendez-Diaz was charged with distributing and trafficking cocaine.¹¹⁷

Without the testimony of the analyst, three certificates of analysis were submitted into evidence at trial to show the laboratory's conclusion that the substance in the plastic bags was cocaine, and Melendez-Diaz was convicted.¹¹⁸ The Appeals Court of Massachusetts affirmed the conviction, relying on a Massachusetts Supreme Court case holding that analysts are not subject to the Confrontation Clause.¹¹⁹ The United States Supreme Court granted certiorari.¹²⁰

B. Holding and Rationale

The issue before the Court was whether a laboratory report is testimonial evidence requiring the opportunity for confrontation under the Sixth Amendment.¹²¹ In a 5-4 decision authored by Justice Scalia, the Supreme Court ruled that laboratory reports are testimonial statements under *Crawford v. Washington*.¹²² Therefore, the admission of the report without a prior

111. *See Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2531 (2009).

112. *See id.* at 2530.

113. *See id.*

114. *See id.*

115. *See id.*

116. *Id.*

117. *Id.*

118. *See id.* at 2531.

119. *See id.*

120. *Id.*

121. *See id.* at 2530.

122. *See id.* at 2532.

opportunity for cross-examination or the testimony of the analyst violated the Confrontation Clause.¹²³

The first step in the Court's analysis was to explain why a laboratory report is a testimonial statement.¹²⁴ The majority relied on *Crawford's* previous description of testimonial statements, which included two different types of affidavits.¹²⁵ The Court acknowledged that a laboratory report fulfills the definition of an affidavit as a "solemn declaration or affirmation made for the purpose of establishing or proving some fact."¹²⁶ The reports were found to be testimonial because they were made for the sole purpose of future use at trial as "prima facie evidence of the composition, quality, and the net weight" of the substance.¹²⁷ Additionally, the analysts were recognized as "witnesses against" the accused because the reports provided a necessary element of the prosecution's case as evidence of the composition of the analyzed substances.¹²⁸ Therefore, by applying the principles in *Crawford*, a laboratory report can be used as evidence without the testimony of the analyst when there is a prior opportunity for the accused to cross-examine the analyst and the analyst is unavailable for trial.¹²⁹

After the majority concluded that the analysts' affidavits fell within the scope of the Confrontation Clause, the Court proceeded to address the potpourri of arguments set forth by Justice Kennedy in the dissenting opinion.¹³⁰ The dissent and respondent based their arguments on five main points: the Framers did not intend the Confrontation Clause to extend to unconventional witnesses¹³¹; it will add very little value to cross-examine forensic analysts because of the reliability of scientific testing¹³²; the reports are admissible under the business records exception to the hearsay rule¹³³; cross-examination is not required because the defendant can subpoena the analyst¹³⁴; and the Confrontation Clause should be applied in light of the realities of the adversary process.¹³⁵

123. *See id.*

124. *See id.* at 2531-32.

125. *See id.*

126. *Id.* at 2532 (quoting *Crawford v. Washington*, 541 U.S. 36, 51 (2004)).

127. *See id.* (citing MASS. ANN. LAWS ch. 111, § 13 (LexisNexis 2004)).

128. *See id.* at 2532-33.

129. *See id.* at 2532.

130. *See id.*

131. *See id.* at 2551 (Kennedy, J., dissenting).

132. *See id.* at 2536, 2548-49.

133. *See id.* at 2538.

134. *See id.* at 2540.

135. *See id.*

The majority rejected the argument that analysts are not the type of conventional witnesses against the accused to which the Framers intended the Confrontation Clause to apply.¹³⁶ The dissent focused on three primary differences between ordinary witnesses and the laboratory analyst.¹³⁷ To begin, the majority addressed the dissent's argument that ordinary witnesses recall past events by pointing to *Davis*, where a statement was held to be testimonial even when it was made to law enforcement near-contemporaneous to the time of the crime.¹³⁸ Next, the majority rejected the claim that witnesses must be observers of the crime or those involved in it.¹³⁹ The Court noted that experts are often accepted as witnesses even though they do not observe the events of or anyone involved in the crime.¹⁴⁰ The Court then denied the dissent's assertions that conventional witnesses' statements are made in response to interrogation.¹⁴¹ The majority acknowledged that the analyst volunteers her testimony, but recognized that this fact fails to make her any less of a witness against the accused.¹⁴²

After addressing the dissent's concerns, the majority rejected the respondent's claims that the reports are neutral scientific evidence, different from the ordinary testimony of a witness, which may be prone to distortion.¹⁴³ The Court criticized this reasoning as a return to the constitutionally inadequate reliability test of *Roberts*.¹⁴⁴ Additionally, the Court noted that scientific testing is not immune from error; most scientific tests are conducted by law enforcement agencies that may be pressured to produce a quick answer at the expense of accurate methodology.¹⁴⁵ The opportunity for cross-examination protects against these problems because it provides for the deterrence of fraudulent analysis, the occasion for a dishonest analyst to reconsider his testimony, and the possibility of weeding out an incompetent analyst.¹⁴⁶

136. *See id.* at 2533.

137. *See id.* at 2551-52 (Kennedy, J., dissenting).

138. *See id.* at 2535.

139. *See id.*

140. *See id.* Additionally, the majority could have found that the analyst was an observer of the crime and the human action involved therein because he analyzed hard evidence involved in the events of the case.

141. *See id.*

142. *See id.*

143. *See id.* at 2536.

144. *See id.*

145. *See id.*

146. *See id.* at 2536-37.

Next, the majority discussed the relationship between the hearsay rule and the Confrontation Clause.¹⁴⁷ The Court explained that true business and public records are admissible as an exception to hearsay but are not subject to confrontation because they are not testimonial.¹⁴⁸ These records are inherently nontestimonial because they were not created for use at trial, but rather for the administration of the organization that created them.¹⁴⁹ Here, regardless of whether laboratory reports satisfy a hearsay exception, they are testimonial and thus subject to the Confrontation Clause.¹⁵⁰

The majority rejected the respondent's fourth argument that the defendant could protect his confrontation rights through his ability to subpoena the analyst.¹⁵¹ The Court recognized that although the defendant could subpoena the analyst through applicable state law or the Compulsory Process Clause, these procedures are not a substitute for the separate guarantees provided by the Confrontation Clause.¹⁵² Moreover, the Court expounded by explaining that the state bears the burden of bringing the analyst to trial, and requiring the defendant to subpoena the analyst improperly shifts that burden.¹⁵³

Finally, the Court refused to entertain the request to relax the Confrontation Clause to meet the demands of trial.¹⁵⁴ The Court stood by the principle that the Constitution could not and would not be ignored for the sake of convenience.¹⁵⁵ To answer the dissent's cry that the Court's holding would be a "crushing burden,"¹⁵⁶ the majority called attention to the several states that already successfully utilize procedures requiring confrontation of the analyst.¹⁵⁷ The majority further hypothesized that state and federal laboratories would not be overly burdened because approximately ninety-five percent of convictions are obtained by a guilty plea, thereby avoiding trial and confrontation altogether.¹⁵⁸

147. *See id.* at 2538.

148. *See id.* at 2538-40.

149. *See id.*

150. *See id.* at 2540.

151. *See id.*

152. *See id.*

153. *See id.*

154. *See id.*

155. *See id.*

156. *See id.* at 2550 (Kennedy, J., dissenting).

157. *See id.* at 2540-41.

158. *See id.* at 2540. Assuming the majority's statistics are correct, it is possible that in the ninety-five percent of cases in which defendants plead guilty, they do so because the prosecution submitted damning evidence contained in the laboratory report. Perhaps, if these reports were not admitted at trial, fewer defendants would plead guilty because the prosecution would lack vital evidence against them.

While no such statute was at issue in Massachusetts, the majority specifically noted that, in their simplest form, notice-and-demand state statutes are constitutional.¹⁵⁹ These statutes require the prosecution to give notice to the defendant before trial if they plan to introduce a laboratory report into evidence, allowing the defendant time to object to the use of the report without the analyst's live appearance.¹⁶⁰ Upon objection, the analyst must testify or the prosecution will forego the use of the report.¹⁶¹ The majority casts aside the dissent's argument that these are burden-shifting statutes because defendants have always borne the burden of objecting to Confrontation Clause violations.¹⁶² Moreover, the Court recognized that these statutes merely set a procedural framework by regulating the time in which a defendant makes her objection.¹⁶³ In comparison, the majority noted that states already require defendants to exercise their Sixth Amendment right to compulsory process prior to trial; thus, defendants may also be required to exercise their confrontation rights prior to trial.¹⁶⁴

After *Melendez-Diaz*, lower courts have a clear answer to their wide-ranging treatment of laboratory reports. Under *Melendez-Diaz*, laboratory reports cannot be admitted at trial without the testimony of the analyst, unless the analyst is unavailable and there was a prior opportunity for cross-examination.¹⁶⁵ This holding will cause many states to adjust their current practices to require the analyst to testify at trial. Additionally, states may opt to implement the simplest of notice-and-demand schemes to meet the command of the Sixth Amendment.¹⁶⁶

IV. Analysis of *Melendez-Diaz* Application to Oklahoma

While *Melendez-Diaz* was a straightforward application of *Crawford v. Washington*, its effect on the criminal justice system could be tremendous. Within a few weeks of the Court's decision, the initial effect of *Melendez-Diaz* was on full display when Virginia's Governor called a special session for the legislature to address Virginia's compliance with *Melendez-Diaz*.¹⁶⁷

159. *See id.* at 2541.

160. *See id.*

161. *See id.*

162. *See id.*

163. *See id.*

164. *See id.*

165. *See id.* at 2532.

166. *See id.* at 2541.

167. *See* Alan Cooper, *Virginia Governor Kaine Calls Special Session on Lab Techs*, ALLBUSINESS.COM (July 27, 2009), <http://www.allbusiness.com/government/government-bodies-offices-public/12600180-1.html> (reprinted from *Virginia Lawyers Weekly*).

Additionally, North Carolina's legislature amended several of its statutes to adjust to the Court's holding.¹⁶⁸

Applying the Confrontation Clause to laboratory reports will affect all the parties involved in a criminal case. Prosecutors must now strategically determine whether they want to use a laboratory report at trial; they may decide to call the analyst to testify about the contents of the report or choose to forfeit its use if they can prove the elements of their case without it. Foregoing use of the report may be appealing if the prosecution does not want the analyst to testify. Most analysts perform hundreds of laboratory tests each year and the prosecution may not want the defense to have an opportunity to raise doubt in the mind of the jury by highlighting inconsistencies or the analyst's lack of memory regarding the particular test at issue.¹⁶⁹ Furthermore, the prosecution may not wish to call an analyst that is confusing, longwinded, or bad mannered.¹⁷⁰

The Court's decision in *Melendez-Diaz* will also affect the laboratory analyst and the defendant. The analyst is now required to appear at trial when she is the maker of a laboratory report. This will undoubtedly place a burden on her schedule by requiring her to prepare for each trial, travel to the courthouse, and eventually testify. Defense attorneys stand to benefit by receiving increased access to the analyst, effectively providing a better opportunity to represent their clients' rights. The defendant will not be subject to prosecution through the use of documentary evidence alone, but can now cross-examine her accuser, which is "beyond any doubt the greatest legal engine ever invented for the discovery of truth."¹⁷¹

A. Oklahoma's Procedures for Admitting Laboratory Reports at a Preliminary Hearing

The effect of *Melendez-Diaz* in Oklahoma will not be as strong as in other states because Oklahoma's statutes only provide for the introduction of laboratory reports prior to trial at a preliminary hearing.¹⁷² Title 22, section

168. See 2009 N.C. Sess. Laws 2009-473 (codified as amended at N.C. GEN. STAT. ANN. §§ 8-58.20, 20-139.1, 90-95 (West 2000)).

169. See *Melendez-Diaz*, 129 S. Ct. at 2548 (Kennedy, J., dissenting). In Oklahoma, for example, on average, each of the sixty-seven analysts at the Oklahoma State Bureau of Investigation analyzed approximately 651 items from July 2008 to June 2009. See OSBI FY 2009 ANNUAL REPORT, *supra* note 103, at 11.

170. Cf. *Delaware v. Van Arsdall*, 475 U.S. 673, 687 (1986) (Brennan, J., dissenting) ("Jurors evaluating the witnesses' demeanor may choose to give great weight to the testimony of one witness while ignoring the similar testimony of another.").

171. 5 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1367 (Chadbourn rev. 1974).

172. A few different statutes in Oklahoma cover the admissibility of different types of

751 requires the following types of reports to be made available to the accused at least five days before any pre-trial hearing: laboratory reports from the Oklahoma State Bureau of Investigation or a forensic laboratory operated by this state; any laboratory that a forensic laboratory operated in Oklahoma requests to conduct the analysis; autopsy reports from the medical examiner; reports from the Oklahoma State Bureau of Narcotics and Dangerous Drugs Control; and reports from the Department of Public Safety.¹⁷³ This statute provides a notice-and-demand scheme at a preliminary hearing by requiring the prosecution to make a laboratory report available to the defendant five days prior to any pre-trial hearing in which it is to be used.¹⁷⁴ The report will be admitted at the hearing without the live testimony of the analyst unless the defendant makes a motion ordering the appearance of the analyst.¹⁷⁵ The statute greatly restricts confrontation because the court will only grant the motion and order the appearance of the analyst if “it appears there is a substantial likelihood that material evidence not contained in such report may be produced by the testimony of the person having prepared the report.”¹⁷⁶

The procedures of section 751 apply only at pre-trial hearings.¹⁷⁷ The Oklahoma Constitution requires a preliminary hearing when an individual is prosecuted for a felony.¹⁷⁸ A preliminary hearing differs from a trial because its purpose is not to determine the guilt of the accused;¹⁷⁹ rather, it is the magistrate’s duty to determine if a crime has been committed and “whether there is probable cause to believe that the defendant is the person that committed the crime.”¹⁸⁰ If the magistrate finds that probable cause exists, the case will be bound over for trial.¹⁸¹ Thus, the preliminary hearing acts as a screening device, protecting the accused from unjust prosecution.¹⁸² The right to cross-examination at a preliminary hearing is also granted by statute,¹⁸³ but

laboratory reports. *See, e.g.*, 22 OKLA. STAT. § 751.1(B)(2) (2001) (DNA reports); 47 OKLA. STAT. §§ 751-56 (2001) (blood and breath DUI reports); 63 OKLA. STAT. §§ 944-45 (2001) (autopsy reports by the Chief Medical Examiner). This note will focus on title 22, section 751 of the Oklahoma Statutes. 22 OKLA. STAT. § 751 (2001), *amended by* Act of May 22, 2009, ch. 274, § 2, 2009 Okla. Sess. Laws 541.

173. 22 OKLA. STAT. § 751(A)(1)-(5).

174. *See id.* § 751(A)(5).

175. *See id.* § 751(A)(5), (C)(1).

176. *See id.* § 751(C)(1).

177. *See id.* § 751(A).

178. OKLA. CONST. art. II, § 17.

179. *See Holloway v. State*, 1979 OK CR 113, ¶ 3, 602 P.2d 218, 219.

180. *State v. Berry*, 1990 OK CR 73, ¶ 2, 799 P.2d 1131, 1132; *see* 22 OKLA. STAT. § 258 (Eighth).

181. *See* 22 OKLA. STAT. § 258 (Sixth).

182. *See Beaird v. Ramey*, 1969 OK CR 195, ¶ 7, 456 P.2d 587, 589.

183. *See* 22 OKLA. STAT. § 258 (First).

the magistrate may limit the evidence to the issues of whether the crime was committed and whether there was probable cause.¹⁸⁴

1. The Right to Confrontation Does Not Apply to Preliminary Hearings

Because the purpose of a preliminary hearing is to determine probable cause,¹⁸⁵ not all the rights and protections afforded to the accused at trial are extended at a preliminary hearing.¹⁸⁶ Thus, the important question is whether the right to confrontation applies at a preliminary hearing. Oklahoma is free to limit confrontation rights in section 751 if the Confrontation Clause does not apply at the preliminary hearing stage. The right to confrontation arises under both the Oklahoma and United States Constitutions.¹⁸⁷

The right to have a preliminary hearing is not granted in the United States Constitution,¹⁸⁸ but it is required in the Oklahoma Constitution for all felony prosecutions.¹⁸⁹ In 1913, the United States Supreme Court unanimously held that there was not a due process violation when Oregon's state law did not provide for a preliminary hearing.¹⁹⁰ Thirteen years later, the Court explicitly recognized that "[t]he Constitution does not require [a] preliminary hearing."¹⁹¹ Furthermore, the Court has held that the Fourth Amendment only requires a probable cause determination after the arrest of the accused; a formal preliminary hearing is not required.¹⁹²

The Supreme Court has only discussed the right to confrontation at the preliminary hearing stage in dicta.¹⁹³ In *California v. Green*,¹⁹⁴ the Court was determining the admissibility of the defendant's preliminary hearing testimony when it stated that the "right to 'confront' the witness at the time of *trial*"

184. *See id.* § 258 (Sixth).

185. *See* 22 OKLA. STAT. § 258 (Eighth).

186. *See* *Barber v. Page*, 390 U.S. 719, 725 (1968).

187. U.S. CONST. amend VI; OKLA. CONST. art. II, § 20.

188. *See* *Gerstein v. Pugh*, 420 U.S. 103, 120 (1975); *Barber*, 390 U.S. at 725; *Goldsby v. United States*, 160 U.S. 70, 73 (1895); *United States v. Hart*, 526 F.2d 344, 344 (5th Cir. 1976); *United States v. Harris*, 458 F.2d 670, 677 (5th Cir. 1972); LAFAYETTE ET AL., *supra* note 15, § 14.2(a).

189. OKLA. CONST. art. II, § 17.

190. *See* *Lem Woon v. Oregon*, 229 U.S. 586, 590 (1913).

191. *United States ex rel. Hughes v. Gault*, 271 U.S. 142, 149 (1926).

192. *See* *Gerstein*, 420 U.S. at 120.

193. *See, e.g., Goldsby*, 160 U.S. at 73 (stating "the contention at bar, that, because there had been no preliminary examination of the accused, he was thereby deprived of his constitutional guaranty to be confronted by the witnesses, by mere statement, demonstrates its error."); *Hart*, 526 F.2d at 344 (holding there is no Sixth Amendment right to confrontation at a preliminary hearing); *Harris*, 458 F.2d at 677 (finding "no Sixth Amendment requirement that [the defendant] also be allowed to confront . . . [the witness] at a preliminary hearing prior to trial.").

194. 399 U.S. 149 (1970).

protects the core values of the clause.¹⁹⁵ The most notable case discussing the issue is *Barber v. Page*,¹⁹⁶ a case out of Oklahoma. In *Barber*, the United States Supreme Court addressed whether the defendant's right to confrontation was violated when the state introduced unopposed preliminary hearing testimony of a witness incarcerated in federal prison at the time of trial.¹⁹⁷ The issue of whether the Sixth Amendment applied to preliminary hearings was not directly before the Court. Nonetheless, it recognized that "[t]he right to confrontation is basically a trial right" because "[a] preliminary hearing is ordinarily a much less searching exploration into the merits of a case than a trial," and "its function is the more limited one of determining whether probable cause exists to hold the accused for trial."¹⁹⁸ A few years later, a plurality of the Court went even further to state "[t]he opinions of this Court show that the right to confrontation is a *trial* right . . ."¹⁹⁹

In *Gerstein v. Pugh*, the Supreme Court acknowledged that the right to confrontation is a safeguard that is not necessary to protect the defendant in a probable cause determination.²⁰⁰ Here, the Court distinguished between a full-blown preliminary hearing and a probable cause determination.²⁰¹ The Court explained that a probable cause determination focuses only on whether there is probable cause to detain the accused for trial; therefore, protections such as confrontation are not required.²⁰² The Court went on to emphasize that a full preliminary hearing may be a "critical stage" wherein adversarial protections such as the right to counsel or confrontation may be imposed.²⁰³ The Court noted *Coleman v. Alabama*,²⁰⁴ which held that Alabama's preliminary hearing was a critical stage requiring the appointment of counsel because the purpose of the hearing was to determine: (1) whether the accused could be charged with an offense and (2) whether the accused was allowed to confront and cross-examine witnesses at the hearing.²⁰⁵ In *Gerstein*, the Court fell short of requiring confrontation at a critical stage proceeding, limiting its holding to the analysis of the Confrontation Clause at a probable cause determination.²⁰⁶

195. *Id.* at 157 (emphasis added).

196. 390 U.S. 719 (1968).

197. *See id.* at 720.

198. *Id.* at 725.

199. *Pennsylvania v. Ritchie*, 480 U.S. 39, 52 (1987) (citing *Green*, 399 U.S. at 157; *Barber*, 390 U.S. at 725).

200. *See* 420 U.S. 103, 120 (1975).

201. *See id.* at 119-22.

202. *See id.*

203. *See id.* at 122-23.

204. 399 U.S. 1 (1970).

205. *See Gerstein*, 420 U.S. at 122-23 (citing *Coleman*, 399 U.S. 1 (1970)).

206. *See id.* at 123. Although unlikely, the Oklahoma Court of Criminal Appeals could rely

Until 2010, the only case to directly face the question of whether confrontation applies at a preliminary hearing in Oklahoma was *State v. Tinkler*.²⁰⁷ In 1991, the Oklahoma Court of Criminal Appeals examined a defendant's claim that his right to confrontation was violated under the Oklahoma and United States Constitutions when a laboratory report was introduced into evidence at his preliminary hearing without the testimony of the analyst.²⁰⁸ Relying on *Barber*, the court recognized that because a preliminary hearing is distinct from trial, the accused is not afforded the same constitutional rights at a preliminary hearing as at trial.²⁰⁹ The court found that the legislature's enactment of title 22, section 751 of the Oklahoma Statutes created an exception to the hearsay rule that eliminated the defendant's right to confront the analyst.²¹⁰ The court unequivocally held that section 751--which did not provide any procedures for confrontation--did not violate the defendant's rights under either the Oklahoma or United States Constitution.²¹¹ The Supreme Court's description of the right to confrontation as a trial right and *Tinkler's* explicit application of this analysis to laboratory reports in Oklahoma requires the conclusion that the Sixth Amendment Confrontation Clause does not apply to preliminary hearings.²¹²

A defendant may also choose to object to the use of a laboratory report at a preliminary hearing under the Oklahoma Constitution. The right to confrontation is extended in article II, section 20 of the Oklahoma

on *Gerstein's* recognition that confrontation may be employed at a critical stage proceeding. Oklahoma has acknowledged that its preliminary hearing is a critical stage, however this determination has only extended the right to counsel under the Sixth Amendment and not the right to confrontation. See *Norton v. State*, 2002 OK CR 10, ¶ 9, 43 P.3d 404, 407. Reliance on *Gerstein* would be difficult because Oklahoma courts have consistently cited *Barber* for the proposition that confrontation is a trial right because of its limited nature. See *Howell v. State*, 1994 OK CR 62, ¶ 18, 882 P.2d 1086, 1091; *State v. Tinkler*, 1991 OK CR 73, ¶ 9, 815 P.2d 190, 192 (citing *Barber v. Page*, 390 U.S. 719, 725 (1968)), *overruled on other grounds by State v. Johnson*, 1992 OK CR 72, 877 P.2d 1136; *Bennett v. State*, 1982 OK CR 161, ¶ 18, 652 P.2d 1237, 1241 (citing *Barber*, 390 U.S. at 725).

207. 1991 OK CR 73, 815 P.2d 190; see also *Randolph v. State*, 2010 OK CR 2, 231 P.3d 672 (Oklahoma's recent application of *Melendez-Diaz*).

208. See *Tinkler*, ¶¶ 2-6, 815 P.2d at 192-93.

209. See *id.*, ¶¶ 9-10, 815 P.2d at 192 (citing *Barber*, 390 U.S. at 721).

210. See 22 OKLA. STAT. § 751 (2001), amended by Act of May 22, 2009, ch. 274, 2009 Okla. Sess. Laws 541; *Tinkler*, ¶ 11, 815 P.2d at 192.

211. See *Tinkler*, ¶ 12, 815 P.2d at 193. The statute at issue in *Tinkler* has since been amended several times; for the purposes of this discussion, it is relevant that both the 1981 and current statute similarly require laboratory reports to be submitted prior to trial if they are to be used as evidence at a preliminary hearing. 22 OKLA. STAT. § 751 (1981) (current version at 22 OKLA. STAT. § 751 (2001)). The statute at issue in *Tinkler* did not contain the procedures which now allow confrontation to take place. See *id.*

212. See *Barber*, 390 U.S. at 725; *Tinkler*, ¶ 12, 815 P.2d at 193.

Constitution, providing “[i]n all criminal prosecutions the accused . . . shall be confronted with the witnesses against him”²¹³ Although *Tinkler* remains good law, it has been criticized as “overreaching”²¹⁴ and for nineteen years after issuance, it was not cited for any proposition. Furthermore, other Oklahoma cases have implied contrary treatment of the right to confrontation at a preliminary hearing under the Oklahoma Constitution.²¹⁵ These cases were not directly faced with the issue and the dictum is anything but explicit.

Specifically, in *Beaird v. Ramey* the defendant appealed after he was prohibited from calling his own witnesses at the preliminary hearing.²¹⁶ In discussing the defendant’s right to produce evidence at a preliminary hearing, the court recognized that the defendant has a “Constitutional right to be confronted with his accusers [sic].”²¹⁷ The court failed to provide any authority for this proposition; because of this, it is not entirely clear whether the court was referring to the “Constitutional right” under the state or federal constitution.²¹⁸

Almost twenty years later in *LaFortune v. District Court of Tulsa County*, the Oklahoma Court of Criminal Appeals analyzed the 1994 Amendments to the preliminary hearing code to determine when law enforcement reports were required to be provided to the defendant.²¹⁹ Here, the magistrate did not allow the defendant to call witnesses because the defense could not prove the relevancy of the testimony without access to the state’s law enforcement reports.²²⁰ Citing *Beaird*, the court recognized that the defendant’s “Constitutional right” to confrontation at a preliminary hearing must not be denied.²²¹

213. OKLA. CONST. art. II, § 20. This right is codified in title 22, section 13 of the Oklahoma Statutes. 22 OKLA. STAT. § 13(3).

214. See 3 LEO H. WHINERY, OKLAHOMA EVIDENCE: COMMENTARY ON THE LAW OF EVIDENCE § 33.03 (2d ed. 2000).

215. See, e.g., *LaFortune v. Dist. Court of Tulsa County*, 1998 OK CR 65, ¶ 11, 972 P.2d 868, 872; *Beaird v. Ramey*, 1969 OK CR 195, ¶¶ 2-3, 7, 456 P.2d 587, 587-89.

216. See *Beaird*, ¶ 1, 456 P.2d at 588.

217. See *id.* ¶ 7, 456 P.2d at 589.

218. Because the surrounding analysis is in light of Oklahoma state law, the cited right likely arises from the Oklahoma Constitution. There are no citations to the United States Constitution or Sixth Amendment. See generally *Beaird*, 1969 OK CR 195, 456 P.2d 587.

219. See *LaFortune*, ¶ 7, 972 P.2d at 870.

220. See *id.* ¶ 3, 972 P.2d at 869-70.

221. See *id.* ¶ 11, 972 P.2d at 872. The court’s analysis is in light of Oklahoma’s constitution. The court cited to *Beaird*, which is seemingly discussing the Oklahoma Constitution, and the immediately prior sentence was a direct quotation to the Oklahoma Constitution. See *id.* Without any reference to federal law, the only reasonable inference is that the “Constitution” the court was discussing is Oklahoma’s constitution. See *id.*

2. *The Oklahoma Court of Criminal Appeals' Convoluting Answer to Melendez-Diaz*

Just seven months after the Supreme Court decided *Melendez-Diaz*, Oklahoma broke its silence and addressed the right to confrontation at its own preliminary hearings. In *Randolph v. State*, the Oklahoma Court of Criminal Appeals examined whether admitting a laboratory report at a preliminary hearing pursuant to section 751 violated the defendant's right to confrontation.²²² The defendant was charged with drug trafficking.²²³ Under the procedures provided in section 751, the state submitted a laboratory report at the preliminary hearing which identified the substance seized from the defendant as cocaine.²²⁴ The maker of the report did not testify at the preliminary hearing.²²⁵ On appeal from trial, the defendant argued that his right to confrontation was violated when the laboratory report was admitted without the testimony of the analyst.²²⁶ The court held that the defendant waived his limited right to confrontation because he failed to employ section 751(c), which provided procedures to object to the introduction of the report without the analyst's testimony.²²⁷

While the court rested its decision on the defendant's waiver of his right to confrontation, it took the opportunity to address the new rule in *Melendez-Diaz*.²²⁸ The court began by looking at *Beaird*, *LaFortune*, and *Tinkler* and recognized that "the law confers a limited right to confront[ation]" at a preliminary hearing.²²⁹ Relying on a case wherein the defendant waived the right to confrontation *at trial*, the court went further and stated that the right to confrontation *at a preliminary hearing* can also be waived by the defendant.²³⁰ The court concluded that there is a limited "Constitutional right"

222. 2010 OK CR 2, ¶ 24, 231 P.3d 672, 680.

223. *See id.* ¶ 1, 231 P.3d at 674.

224. *See id.* ¶¶ 24-26, 231 P.3d at 680-81.

225. *See id.*

226. *See id.* ¶ 24.

227. *See id.* ¶ 28, 231 P.3d at 681-82; 22 OKLA. STAT. § 751 (2001), amended by Act of May 22, 2009, ch. 274, § 2, 2009 Okla. Sess. Laws 541. To add fuel to the court's fire, not only did the defendant fail to invoke section 751, but he also objected to the use of the report at the preliminary hearing after cross-examining the analyst at trial. *See Randolph*, ¶¶ 31-32, 231 P.3d at 682-83.

228. *See Randolph*, ¶ 25, 231 P.3d at 680-81 (stating that the defendant's "argument is fraught with conceptual problems, but relief is unnecessary for the more basic reason that he waived the right to confront at preliminary examination the witness who prepared the report").

229. *See id.* ¶¶ 27-28, 231 P.3d at 681.

230. *See id.* ¶ 27, 231 P.3d at 681; *Miles v. State*, 1954 OK CR 33, ¶ 15, 268 P.2d 290, 298 (finding that the defendant waived his right to confrontation when he admitted the very same uncontroverted deposition testimony at trial as did the plaintiff).

to confrontation at a preliminary hearing, and section 751 creates the opportunity for this right to be invoked.²³¹

Despite its conclusion that there is a “Constitutional right” for a defendant to confront his accusers at a preliminary hearing, the court rejected the application of *Melendez-Diaz* to preliminary hearings based solely on the fact that the case applied to the admission of laboratory reports *at trial*.²³² Finding support in *Tinkler* and *Barber*, the court quoted language highlighting the long-standing acknowledgment that a preliminary hearing is not a trial.²³³ Moreover, the court recognized “the right to confrontation is basically a trial right.”²³⁴ Thus, the court’s analysis contained three opposing views: first, there is a Constitutional right to confrontation at a preliminary hearing; second, this right is basically a trial right; and third, because the application of *Melendez-Diaz* is limited to laboratory reports at trial, the defendant has no right to confront the maker of the laboratory report at a preliminary hearing.

Further complicating its analysis, the court approved reasonable conditions on confrontation at a preliminary hearing.²³⁵ In defense of the dissent’s attack on the constitutionality of section 751, the court unnecessarily noted that the statute is a “reasonable enactment” that implements “reasonable conditions” on the defendant seeking to confront the maker of the report.²³⁶ Reiterating *Tinkler*, the court stated “the rights and privileges afforded participants may not be the same for both trial and preliminary examination.”²³⁷ In other words, the court believes that while there is some Constitutional right to confrontation at a preliminary hearing, the limited nature of the proceeding may not afford the right or may allow it to be limited by reasonable conditions.

While reaching the correct result—that *Melendez-Diaz* does not invalidate section 751—the Court of Criminal Appeals failed to adequately analyze and address the conflicts within its own precedent. The majority skirted the issue of whether there is a Sixth Amendment right to confrontation at preliminary hearings by resting its holding on the fact that *Melendez-Diaz* applied only to

231. *See Randolph*, ¶¶ 27-28, 231 P.3d at 681.

232. *See id.* ¶¶ 29-30, 231 P.3d at 682.

233. *See id.* ¶¶ 30-32, 231 P.3d at 682-83 (“Quite simply, a preliminary examination is not a trial.” (quoting *State v. Tinkler*, 1991 OK CR 73, ¶ 10, 815 P.2d 190, 192, *overruled on other grounds by State v. Johnson*, 1992 OK CR 72, 877 P.2d 1136)), (“A preliminary hearing is ordinarily a much less searching exploration into the merits of a case than a trial, simply because its function is the more limited one of determining . . . probable cause.” (quoting *Barber v. Page*, 390 U.S. 719, 724 (1969)) (emphasis omitted)).

234. *See id.* ¶ 30, 231 P.3d at 682 (quoting *Barber*, 390 U.S. at 725).

235. *See id.* ¶ 31, 231 P.3d at 682.

236. *See id.*

237. *See id.* ¶ 32, 231 P.3d at 682 (quoting *Tinkler*, ¶ 6, 815 P.2d at 192) (emphasis omitted).

the right to confrontation at trial.²³⁸ Despite the dissent's assertion that "the majority concludes that there is no right to confrontation at a preliminary hearing,"²³⁹ the court never explicitly stated this.²⁴⁰ In fact, the majority merely cited past dictum suggesting that confrontation is a trial right.²⁴¹

A better approach would have been to rely only on *Tinkler* and *Barber*.²⁴² The heart of the holding in *Tinkler* rests on the Supreme Court's assertion in *Barber* that the right to confrontation is a trial right.²⁴³ There is no shortage of Oklahoma Court of Criminal Appeals cases citing to *Barber* for this proposition.²⁴⁴ *Barber*'s longstanding recognition of confrontation as a right that is limited to trial should have been the court's foundational reason for finding that the protections of the Confrontation Clause, as discussed in *Melendez-Diaz*, do not apply to laboratory reports admitted at preliminary hearings in Oklahoma.

The court missed an excellent opportunity to provide clarity to Oklahoma's murky precedent. Instead of squaring the *Beird* and *LaFortune* language stating that there is a "Constitutional right" to confrontation at a preliminary hearing, with the holding in *Tinkler*, which unequivocally declares that there is not a confrontation right at this stage under either the United States or Oklahoma Constitution, the court relied on all three cases to reach its convoluted holding.²⁴⁵ The court's reliance on these cases presents several flaws.

238. *See id.* ¶ 32, 231 P.3d at 682-83.

239. *See id.* ¶ 8, 231 P.3d at 687 (Chapel, J., dissenting).

240. *See id.* ¶¶ 24-32, 231 P.3d at 680-83 (majority opinion).

241. *See id.* ¶¶ 30, 32, 231 P.3d at 681-82.

242. Reliance on *Tinkler* is not without its own problems. There is a major point of weakness in the court's far-reaching conclusion that every legislatively created hearsay exception eliminates the ability to confront the witness. *See Tinkler*, ¶ 11, 972 P.2d at 192. Under *Crawford*, this is no longer true. *See Crawford v. Washington*, 541 U.S. 36, 68 (2004). The Supreme Court has stated that the right to confrontation applies to all testimonial statements, including those admitted pursuant to a legislatively created hearsay exception. *See id.*; *Miller v. State*, 2004 OK CR 29, ¶ 25, 98 P.3d 738, 743. Despite this, *Tinkler*'s support of *Barber* is difficult to defeat.

243. *See Tinkler*, ¶ 9, 815 P.2d at 192.

244. *See, e.g.,* *Thompson v. State*, 2007 OK CR 38, ¶ 23, 169 P.3d 1198, 1206 n.38; *Howell v. State*, 1994 OK CR 62, ¶ 18, 882 P.2d 1086, 1091; *Tinkler*, ¶ 9, 815 P.2d at 192; *Bennett v. State*, 1982 OK CR 161, ¶ 19, 652 P.2d 1237, 1241; *In re Bishop*, 1968 OK CR 115, ¶ 13, 443 P.2d 768, 772.

245. *See Randolph*, ¶¶ 27-28, 231 P.3d at 681; *LaFortune v. Dist. Court of Tulsa Cnty.*, 1998 OK CR 65, ¶ 11, 972 P.2d 868, 872; *State v. Tinkler*, 1991 OK CR 73, ¶ 12, 815 P.2d 190, 193 (holding there is no "denial of any right protected by either the State or Federal Constitutions"), *overruled on other grounds by State v. Johnson*, 1992 OK CR 72, 877 P.2d 1136; *Beird v. Ramey*, 1969 OK CR 195, ¶ 7, 456 P.2d 587, 589.

First, in both *Beaird* and *LaFortune* the Oklahoma Court of Criminal Appeals failed to cite any authority supporting its propositions.²⁴⁶ Second, even if the court was declaring a “Constitutional right” to confrontation under the Oklahoma Constitution, there is no evidence that the Oklahoma Constitution provides Confrontation Clause protections that the Sixth Amendment does not. This would mean that despite the nearly identical Confrontation Clause provisions, the Oklahoma court was disregarding the Supreme Court’s own language confirming that the Constitutional right to confrontation is a trial right. Finally, as a policy consideration, the criminal justice system would not benefit from treating a preliminary hearing like a mini-trial. The purposes for and rights associated with a preliminary hearing and a trial remain separate and distinct.

While there are similarities, a preliminary hearing is a much more limited proceeding than a trial. The principal distinction is that, unlike a trial, a preliminary hearing does not determine the guilt or innocence of the accused. Accordingly, the state’s burden of proof is lowered from proving its case beyond a reasonable doubt at trial,²⁴⁷ to mere probable cause at the preliminary hearing.²⁴⁸ Furthermore, at trial the jury is the trier of fact, while the magistrate determines whether the burden of proof has been met at the preliminary hearing.²⁴⁹ There are also significant differences in the discovery that is available. Under the Oklahoma Discovery Code, discovery commences after the preliminary hearing, further limiting the scope, evidence, and nature of the hearing.²⁵⁰ Blurring the lines between these two proceedings by incorporating all of the safeguards of trial at a preliminary hearing strips each of its purpose.

In spite of its perplexing analysis, the court seemed to reach the correct approach: Oklahoma’s preliminary hearing procedures survive the falling sky of *Melendez-Diaz*. The Sixth Amendment right to confrontation does not provide the opportunity for a defendant to cross-examine witnesses at a preliminary hearing. Therefore, in Oklahoma, the right to cross-examine a laboratory analyst at a preliminary hearing is limited by the procedures provided in section 751.

246. See generally *LaFortune*, ¶ 11, 972 P.2d at 872; *Beaird*, ¶ 7, 456 P.2d at 589.

247. See *Johnson v. Bd. of Governors of Registered Dentists*, 1996 OK 41, ¶ 17, 913 P.2d 1339, 1345 (“[B]eyond a reasonable doubt is generally the measurement used in criminal proceedings.”).

248. See 22 OKLA. STAT. § 258 (Sixth) (2001); *Primeaux v. State*, 2004 OK CR 16, ¶ 20, 88 P.3d 893, 900.

249. 22 OKLA. STAT. § 258 (Sixth).

250. See *id.* § 2002(D).

3. *The Effect of Oklahoma's Preliminary Hearing Procedures on Trial*

Although *Melendez-Diaz* does not directly apply to the preliminary hearing procedures of section 751, its holding may have implications at trial. Title 22, section 258 of the Oklahoma Statutes provides that witnesses “may be cross-examined” by the defendant at a preliminary hearing.²⁵¹ If a laboratory analyst testifies at a preliminary hearing and later becomes unavailable for trial, the report may be admitted pursuant to the former testimony hearsay exception.²⁵² This exception must be read in conjunction with the defendant’s constitutionally protected right to confrontation at trial. In *California v. Green*, the Supreme Court held that the Sixth Amendment is not violated when preliminary hearing testimony is admitted at trial, so long as the witness was “subject to full and effective cross-examination.”²⁵³

The Oklahoma Court of Criminal Appeals has previously allowed testimony from a preliminary hearing because it was given in circumstances sufficiently similar to trial, thereby protecting the defendant’s right to confrontation.²⁵⁴ Specifically, the court explained that the testimony “was made under oath in a truth-inducing courtroom atmosphere,” the “defendant was represented by counsel,” and there was “ample opportunity to cross-examine” the witness.²⁵⁵ The court recognized that while the magistrate can restrict a witness’s testimony at a preliminary hearing to the issue of probable cause,²⁵⁶ limiting cross-examination might make the testimony inadequate for later use at trial because it would not be a “full and effective cross-examination.”²⁵⁷ To protect against this possibility, courts should recognize that preliminary hearings are conducted for the benefit of the accused, and defendants should be allowed to conduct liberal cross-examination of the analyst.²⁵⁸ In doing so, the courts

251. *Id.* § 258 (First).

252. 12 OKLA. STAT. § 2804 (2001).

253. *See* 399 U.S. 149, 158 (1970).

254. *See* *Thompson v. State*, 2007 OK CR 38, ¶ 23, 169 P.3d 1198, 1206 (citing *Howell v. State*, 1994 OK CR 62, ¶ 18, 882 P.2d 1086, 1091).

255. *See id.*

256. *See id.* ¶ 25, 169 P.3d at 1206-07 (acknowledging the possibility that “limiting defense counsel’s cross examination of a witness at preliminary hearing could make admission of that witness’s transcribed testimony at trial . . . a violation of the defendant’s constitutional right to confront the witnesses against him”).

257. *See Green*, 399 U.S. at 158.

258. *See Harris v. State*, 1992 OK CR 74, ¶ 8, 841 P.2d 597, 599. Despite the notion that courts should allow broad cross-examination, it is unlikely that a defendant would take advantage of this opportunity. A defendant would want to limit the analysts’ testimony so that it *is* inadequate for later use at trial. Furthermore, a defendant has little incentive to give away the details of his case and strategy through the cross-examination of the analyst.

may lose speed and economy at the preliminary hearing stage, but gain valuable evidence at trial if the analyst becomes unavailable.

B. Oklahoma's Procedures for Admitting Laboratory Reports at Trial

While title 22, section 751 of the Oklahoma Statutes specifically addresses procedures for admitting laboratory reports before trial,²⁵⁹ the reports can still be used at trial with the testimony of the analyst. In Oklahoma, a laboratory report is hearsay because it is an out-of-court statement by an analyst offered to prove the findings therein.²⁶⁰ Because Oklahoma lacks a hearsay exception or rule allowing for the introduction of laboratory reports into evidence at trial, they are only admitted in conjunction with the testimony of the analyst.

There are two hearsay exceptions commonly employed in most jurisdictions to admit these reports: business records and public records.²⁶¹ Oklahoma's narrow interpretation of these hearsay exceptions has barred the entry of laboratory reports into evidence.²⁶² Title 12, section 2803(6) of the Oklahoma Statutes allows admission of a business record if a qualified witness's testimony can show that the record is made at or near the time of the event, by a person or with information transmitted by a person with knowledge, in the regular course of business as the regular practice of that business to make the record.²⁶³ Laboratory reports are not kept in the regular course of business as required under section 2803(6) because they are submitted to the laboratory for the purpose of testing evidence to be used in a future criminal prosecution.²⁶⁴

259. See 22 OKLA. STAT. § 751 (2001), amended by Act of May 22, 2009, ch. 274, § 2, 2009 Okla. Sess. Laws 541.

260. See 12 OKLA. STAT. § 2801(A)(3) (2001); State *ex rel.* Dep't of Pub. Safety v. 1985 Chevrolet Blazer, 1999 OK CIV APP 134, ¶ 5, 994 P.2d 1183, 1185 (recognizing a laboratory report was inadmissible as hearsay when the state did not call the author of the report to testify about the results of the controlled substance testing).

261. See, e.g., United States v. Feliz, 467 F.3d 227, 233-37 (2d Cir. 2006) (holding an autopsy report prepared by the Office of the Chief Medical Examiner was a business record and public record not subject to the Confrontation Clause).

262. The Oklahoma Court of Civil Appeals has also rejected the admission of a laboratory report under Oklahoma title 12, section 2902(4). See State v. \$2,200.00 in U.S. Currency, 1993 OK CIV APP 22, ¶ 6 n.1, 851 P.2d 1081, 1083 n.1. The court found a report to be inadmissible as an official certified record, reasoning that laboratory reports should be governed by Oklahoma title 22, section 751 because that is the specific statute regulating their use; thus, without a hearsay exception the report is inadmissible at trial. See *\$2,200.00 in U.S. Currency*, ¶ 6 n.1, 851 P.2d at 1083 n.1.

263. See 12 OKLA. STAT. § 2803(6).

264. See 1985 Chevrolet Blazer, ¶ 5, 994 P.2d at 1185 (holding a laboratory report analyzing a controlled substance did not meet any of the hearsay exceptions in sections 2803 or 2804 and was thus inadmissible).

Additionally, the reports are not admissible as public records under section 2803(8).²⁶⁵ Public records are records “setting forth . . . regularly conducted and regularly recorded activities,” records “observed pursuant to duty imposed by law” when there is a duty to report, and “factual finding[s] resulting from an investigation made pursuant to authority granted by law.”²⁶⁶ While this broad definition could embrace laboratory reports, the following items are excluded from admission:

- (a) [I]nvestigative reports by police and other law enforcement personnel,
- (b) investigative reports prepared by or for a government, a public office or agency when offered by it in a case in which it is a party,
- (c) factual findings offered by the government in criminal cases,
- (d) factual findings resulting from special investigation of a particular complaint, case or incident, or
- (e) any matter as to which the sources of information or other circumstances indicate lack of trustworthiness.²⁶⁷

Investigative reports are excluded from hearsay exceptions in part because their self-serving nature lacks reliability.²⁶⁸ Laboratory reports are self-serving because they are prepared for the state to be offered as proof in their criminal case.²⁶⁹ Without a statute authorizing their admission into evidence, laboratory reports have been and will continue to be inadmissible at trial in Oklahoma.

1. Room for Improvement: Oklahoma’s Current Trial Procedures

Although Oklahoma’s system can remain unchanged under *Melendez-Diaz*, it should not. Encouraging the introduction of laboratory reports and analyst testimony through a notice-and-demand statute would provide better protection for the defendant. Oklahoma’s current approach to laboratory reports at trial forces prosecutors to use other means to prove the factual findings that would otherwise be evidenced through a report.²⁷⁰ In *Swain v. State*, the defendant was convicted of possession of marijuana after offering to sell the substance

265. See 12 OKLA. STAT. § 2803(8).

266. See *id.*

267. *Id.*

268. See 1 LEO H. WHINERY, OKLAHOMA PRACTICE, COURTROOM GUIDE: OKLAHOMA EVIDENCE CODE ch. 5 § 2803 (2009 ed.).

269. Section 2803(6) provides that public records that are inadmissible under section 2803(8) are also inadmissible under 2803(6) as a business record. See 12 OKLA. STAT. § 2803(6), (8). Conversely, section 2803(8) does not provide the same provision. See *id.* It has not been determined whether an inadmissible business record could still be admissible as a public record. See WHINERY, *supra* note 268, § 2803.

270. See *Swain v. State*, 1991 OK CR 15, ¶ 5, 805 P.2d 684, 685-86.

to an undercover Drug TASC Force agent.²⁷¹ The Oklahoma State Bureau of Investigation tested the substance, but the laboratory report was not submitted at trial.²⁷² The court held that the prosecution sufficiently identified the substance as marijuana by using non-expert testimony and circumstantial evidence.²⁷³ The non-expert testimony consisted of three TASC Force investigators who testified that the substance they saw appeared to be marijuana.²⁷⁴ The court also considered circumstantial evidence, such as the defendant calling the substance marijuana, discussing the price of the substance, and stating that it was “very good stuff.”²⁷⁵ Additionally, the court examined the secretive nature of the exchange because the buy occurred late at night in a parking lot.²⁷⁶ Based on this evidence, the court held that there was sufficient proof for the jury to have found the substance’s identity to be marijuana.²⁷⁷

The Tenth Circuit has also advanced the use of circumstantial evidence in lieu of chemical analysis.²⁷⁸ In *United States v. Sanchez DeFundora*, the defendant was convicted of eight counts of distribution of cocaine and one count of possession with intent to distribute.²⁷⁹ On appeal, the Tenth Circuit reviewed the trial court’s reliance on the lay testimony of Sarah Phillip, a former cocaine addict, as the sole evidence identifying the distributed substance as cocaine.²⁸⁰ The prosecution did not provide any scientific evidence proving the chemical composition of the substance.²⁸¹ Instead, Phillip testified that on several occasions she purchased cocaine from the defendant, each time personally testing the substance and finding its effects to be consistent with her past experiences of cocaine use.²⁸² The court considered that Phillip was able to resell the substances she purchased from the defendant and that the defendant discussed having a “cocaine business.”²⁸³

Evaluating the evidence, the court acknowledged that scientific evidence is not required to determine the identity of a substance when there is sufficient

271. *See id.*

272. *See id.* ¶ 3, 805 P.2d at 685.

273. *See id.* ¶ 2, 805 P.2d at 685.

274. *See id.* ¶ 6, 805 P.2d at 686.

275. *See id.*

276. *See id.*

277. *See id.* ¶ 7, 805 P.2d at 686.

278. *See United States v. Sanchez DeFundora*, 893 F.2d 1173, 1175 (10th Cir. 1990); *United States v. Baggett*, 890 F.2d 1095, 1096 (10th Cir. 1989).

279. *See* 893 F.2d at 1174.

280. *See id.*

281. *See id.* at 1175.

282. *See id.* at 1174.

283. *See id.* at 1176.

lay testimony and circumstantial evidence.²⁸⁴ Specifically, the court recognized that acceptable circumstantial evidence includes:

evidence of the physical appearance of the substance involved in the transaction, evidence that the substance produced the expected effects [of the illicit drug]. . . , evidence that the substance was used in the same manner as the illicit drug, testimony that a high price was paid in cash for the substance, evidence that transactions involving the substance were carried on with secrecy or deviousness, and evidence that the substance was called by the name of the illegal narcotic by the defendant or others in [her] presence.²⁸⁵

Based on this standard, the court found sufficient evidence for the jury to conclude the substance the defendant sold was cocaine.²⁸⁶

Increased reliance on laboratory reports works to benefit the defendant by providing an alternative to the unreliability of circumstantial evidence. Although lay testimony regarding the appearance, price, or circumstances surrounding the controlled substance is accepted,²⁸⁷ it is less accurate than providing evidence of a chemical analysis of that substance. For example, the accurate visual identification of certain narcotics, like cocaine and heroin, is nearly impossible due to the millions of chemicals that can be made into white powder.²⁸⁸ Furthermore, imitation drugs complicate sole reliance on lay testimony and circumstantial evidence because the circumstances surrounding a sale of real drugs are strikingly similar to a sale of imitation drugs.²⁸⁹ To defraud the buyer, the seller must convincingly represent the circumstances of a genuine sale.²⁹⁰

Consequently, under the Tenth Circuit's analysis, evidence of an imitation drug's physical appearance, price, name, and the secrecy of its sale may be indistinguishable from the circumstances surrounding a legitimate sale.²⁹¹

284. *See id.* at 1175.

285. *See id.* (quoting *United States v. Baggett*, 890 F.2d 1095, 1096 (10th Cir. 1989) (internal quotation omitted)).

286. *See id.* at 1176.

287. *See Swain v. State*, 1991 OK CR 15, ¶¶ 6-7, 805 P.2d 684, 686; *Cory v. State*, 1975 OK CR 227, ¶ 13, 543 P.2d 565, 568-69; *Davenport v. State*, 1973 OK CR 271, ¶ 12, 510 P.2d 988, 991; *see also* Michael D. Blanchard & Gabriel J. Chin, *Identifying the Enemy in the War on Drugs: A Critique of the Developing Rule Permitting Visual Identification of Indescript White Powder in Narcotics Prosecutions*, 47 AM. U. L. REV. 557, 588-89 (1998).

288. Blanchard & Chin, *supra* note 287, at 565.

289. *See id.* at 588.

290. *See id.*

291. *See Sanchez DeFundora*, 893 F.2d at 1175; Blanchard & Chin, *supra* note 287, at 588.

Given that the Sixth Amendment seeks “to advance the accuracy of the truth determining process in criminal trials,”²⁹² submitting the report and cross-examining the analyst would provide better protection for the defendant than the use of lay testimony and circumstantial evidence.

Not only would the report protect defendants, the report may aid prosecutors as well. In today’s technology and science driven world, jurors may reasonably expect the prosecution to present all available scientific evidence.²⁹³ Attorneys claim that the national popularity of shows such as *CSI: Crime Scene Investigation*, *Cold Case*, and *Law & Order* have created a “CSI effect” in the courtroom.²⁹⁴ Prosecutors assert that programs like *CSI* have “caused jurors to wrongfully acquit guilty defendants when the prosecution presents no scientific evidence in support of the case.”²⁹⁵ A 2006 study on the alleged “CSI effect” revealed that 46% of jurors expect some type of scientific evidence in every criminal case.²⁹⁶ Interestingly, the study also found that this expectation does not impact juror propensity to make a finding of guilt or innocence.²⁹⁷ Providing clear statutory procedures for the introduction of laboratory reports and analyst testimony advances a prosecutor’s use of scientific evidence while giving defendants the full protections guaranteed by the Confrontation Clause.

2. A Proposed Rule Change for Laboratory Reports at Trial In Oklahoma

The Supreme Court has provided the states with a roadmap for complying with *Melendez-Diaz*, and Oklahoma should capitalize on the Court’s suggestion by enacting a notice-and-demand statute.²⁹⁸ Oklahoma is one of the few states lacking a statute specifically addressing the use of laboratory reports at trial.²⁹⁹ Although its current practices are in compliance with *Melendez-*

292. United States v. Inadi, 475 U.S. 387, 396 (1986) (internal quotations omitted).

293. See Donald E. Shelton et al., *A Study of Juror Expectations and Demands Concerning Scientific Evidence: Does the “CSI Effect” Exist?* 9 VAND. J. ENT. L. & PRAC. 331, 365 (2006).

294. See *id.* at 332.

295. See *id.*

296. See *id.* at 357.

297. See *id.* at 359.

298. See *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2541 (2009).

299. The following states’ statutes provide for laboratory reports at trial: ALA. CODE § 12-21-302 (2005); ALASKA STAT. § 12.45.084 (2008); ARIZ. REV. STAT. ANN. § 36-254 (2009); ARK. CODE ANN. § 5-64-707 (2003); COLO. REV. STAT. § 16-3-309(5) (2009); CONN. GEN. STAT. § 21a-283(b) (2006); DEL. CODE ANN. tit. 10, § 4332 (1999); D.C. CODE § 48-905.06 (2007); FLA. STAT. § 316.1934 (2006); GA. CODE ANN. § 35-3-154.1 (2006); IDAHO CODE ANN. § 37-2745 (2004); 725 ILL. COMP. STAT. 5/115-15 (2008), *invalidated by* People v. McClanahan, 729 N.E.2d 470, 478 (Ill. 2000); IOWA CODE § 691.2 (2003); KAN. STAT. ANN.

Diaz—laboratory reports are inadmissible absent the live testimony of the analyst—they do not promote judicial efficiency. Notice-and-demand statutes increase efficiency by requiring the analyst to testify only when the defendant asserts his right to confrontation.³⁰⁰ These procedures allow the defendant to choose whether she wants to confront the analyst, potentially providing an opportunity to counteract an inaccurate report, a fraudulent analyst, or misleading circumstantial evidence. There are many reasons why a defendant may still choose not to call the analyst to testify. For example, the defense may not want to call the analyst because they cannot impeach her testimony and they believe doing so would be a waste of questioning. Alternatively, the defense may not deny the report's findings because they intend to challenge the case on other grounds.³⁰¹

Although the Supreme Court declined to spell out the exact elements of a constitutionally compliant notice-and-demand statute, it did approve the notice-and-demand statutes in Georgia, Ohio, and Texas.³⁰² Each of these state statutes requires simple notice by the prosecution of their intent to use the

§ 22-3437 (2007), *invalidated by* State v. Laturner, 218 P.3d 23 (Kan. 2009); KY. REV. STAT. ANN. § 189A.010 (West 2006); LA. REV. STAT. ANN. § 15:499 (2005); ME. REV. STAT. ANN. tit. 17-A, § 1112 (2006); MD. CODE ANN., CTS. & JUD. PROC. § 10-1001 (West 2002); MASS. ANN. LAWS ch. 22C, §§ 39, 41 (LexisNexis 1996); MASS. ANN. LAWS ch. 94C, § 47A (LexisNexis 1995); MASS. ANN. LAWS ch. 111, § 13 (LexisNexis 2004); MICH. COMP. LAWS § 257.625a (2006); MINN. STAT. § 634.15 (2009), *invalidated by* State v. Caulfield, 722 N.W.2d 304 (Minn. 2006); MO. ANN. STAT. § 577.037 (West 2003); NEV. REV. STAT. §§ 50.315, 50.320, 50.325 (2004); N.J. STAT. ANN. § 2C:35-19 (West 2005); N.M. STAT. ANN. § 66-8-110 (2003); N.Y. VEH. & TRAF. LAW § 1195 (McKinney 1996); N.Y. C.P.L.R. §§ 4518, 4520 (McKinney 2007); N.C. GEN. STAT. § 90-95(g) (2008); N.C. GEN. STAT. § 20-139.1 (2006); N.D. CENT. CODE § 19-03.1-37(4) (2004); N.D. CENT. CODE § 39-20-07 (2008); OHIO REV. CODE ANN. § 2925.51 (West 2006); OR. REV. STAT. §§ 40.460(25)(a), 475.235(4) (2007); 75 PA. CONS. STAT. ANN. § 1547(c) (West 2006), *invalidated by* Commonwealth v. Kohl, 615 A.2d 308 (Pa. 1992); R.I. GEN. LAWS § 9-19-43 (1998); S.D. CODIFIED LAWS § 1-49-6 (2004); TENN. CODE ANN. § 55-10-407 (2008); TEX. CODE CRIM. PROC. ANN. art. 38.41 § 4 (Vernon 2005); UTAH CODE ANN. § 41-6a-515 (West 2004); VA. CODE ANN. § 19.2-187.1 (2008); WASH. REV. CODE § 46.20.308 (2008); W. VA. CODE § 17C-5A-1 (2009).

300. Ohio, employing a notice-and-demand statute, is an example of efficiency. In 2008, the Ohio Bureau of Criminal Identification and Investigation handled 12,585 drug cases. *See* Reply Brief of Petitioner at 26, *Briscoe v. Virginia*, 130 S. Ct. 1316 (2010) (No. 07-11191), 2009 WL 4709535, at *26. Of these cases, the laboratory's fourteen forensic scientists made 123 court appearances, which is less than one percent of the cases. *See id.*

301. *See, e.g., State v. Simbara*, 811 A.2d 448, 455 (N.J. 2002) (“[I]n the majority of cases a defendant will not challenge the certificate ‘either because the focus of the defense is otherwise or because he or she may not wish to suffer the piling-on effect of a live witness when there is no true contest over the nature of the tested substance.’”) (quoting *State v. Miller*, 790 A.2d 144, 153 (N.J. 2002)).

302. *See Melendez-Diaz*, 129 S. Ct. at 2541.

laboratory report as evidence,³⁰³ and the defendant must only voice his objection to require the analyst to testify at trial.³⁰⁴ Additionally, the Ohio and Georgia provisions both require the notice to include a statement informing a defendant of her right to demand the testimony of the analyst.³⁰⁵

To comply with the demands of the Sixth Amendment and the holding of *Melendez-Diaz*, any proposed statute in Oklahoma must require only notice-and-demand. That is, the defendant need *only* make an objection to assert his right to confrontation. Some notice-and-demand schemes burden the defendant by requiring her to do more than simply object to the use of the report.³⁰⁶ For example, in Alaska's Code of Criminal Procedure the defendant must make a written demand showing cause as to why the analyst should testify.³⁰⁷ This type of statute does not reflect the guaranteed right to confrontation because the defendant must improperly justify his demand by providing a substantive reason why the analyst should testify.³⁰⁸ Furthermore, a statute requiring more than a naked objection violates the defendant's Sixth Amendment right because "the Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court."³⁰⁹ Therefore, any legislative changes in Oklahoma should make it a point to implement a "no strings attached" objection to the use of the laboratory report.

Any proposed Oklahoma statute should also include a reasonable time frame for the prosecution to give notice, and for the defendant to make his demand. The state statutes that *Melendez-Diaz* approved require a range of notice requirements from twenty days before trial to anytime before the proceeding in which the report is to be used.³¹⁰ The timing requirement of the proposed notice-and-demand statute should be consistent with the Oklahoma

303. See GA. CODE ANN. § 35-3-154.1(a); OHIO REV. CODE ANN. § 2925.51(A); TEX. CODE CRIM. PROC. ANN. 38.41 § 1.

304. See GA. CODE ANN. § 35-3-154.1(c); OHIO REV. CODE ANN. § 2925.51(B); TEX. CODE CRIM. PROC. ANN. 38.41 § 4.

305. See GA. CODE ANN. § 35-3-154.1(d); OHIO REV. CODE ANN. § 2925.51(D).

306. See ALASKA STAT. § 12.45.084 (2008); see also Pamela R. Metzger, *Cheating the Constitution*, 59 VAND. L. REV. 475, 478 (2006).

307. See ALASKA STAT. § 12.45.084.

308. As a practical consideration, it may be a nearly impossible task for a defendant to show cause as to why she needs to cross-examine an analyst before even knowing what the analyst's future testimony will reveal.

309. *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2540 (2009).

310. See GA. CODE ANN. § 35-3-154.1; OHIO REV. CODE ANN. § 2925.51; TEX. CODE CRIM. PROC. ANN. 38.41 § 4 (Vernon 2005).

Criminal Discovery Code's requirement for discovery to be completed at least ten days prior to trial.³¹¹

The hypothetical Oklahoma statute should instruct the prosecution to give written notice of its intent to use the report at least fifteen days prior to trial by serving the defendant with a copy of the report. At this point—five days before discovery is to be completed and fifteen days prior to trial—the prosecution should have adequate time to research, prepare, and plan for whether they will be relying on the laboratory report and analyst's testimony for evidence. Under this proposed scheme, after the defendant receives notice from the prosecution, he must object to the use of the report at least seven days prior to trial. The objection could be filed with the court clerk, served on the prosecution, or both. The legislature may desire to make any such statute similar to the current preliminary hearing procedures, which require the defendant to file a motion ordering the appearance of the analyst.³¹² This will provide the defendant with at least one-week notice of the prosecutor's intent to use the laboratory report. Finally, under this scheme if the defendant objects to the use of the report without the analyst's testimony, the prosecution will have seven days to subpoena the analyst for trial.

This statute should also require the prosecution's initial notice to the defendant to include a statement informing the defendant of his right to demand the testimony of the analyst.³¹³ This additional element is not necessary to bring the statute into compliance with *Melendez-Diaz* and the Sixth Amendment, but it gives further protection to the defendant at no cost to a fair prosecution. If the prosecution must already send notice to the defendant, the inclusion of such a statement would act as an informative and inexpensive reminder to a pro se defendant or defense attorney.

V. Conclusion

As many states scramble to adjust to the changes required by *Melendez-Diaz*, Oklahoma's current approach to laboratory reports should avoid mandatory change. Its procedures governing the admissibility of laboratory reports apply only at a preliminary hearing, and the protections of the Confrontation Clause have been recognized as a trial right. Nevertheless, *Melendez-Diaz* has shed light on Oklahoma's lack of procedures for using laboratory reports at trial. Oklahoma should work to utilize the full limits of

311. See 22 OKLA. STAT. § 2002(D) (2001).

312. See *id.* § 751(C). The proposed statute must not shadow the preliminary hearing procedures that require the defendant to make a substantive motion showing that there are material facts the analyst may provide that are not contained in the laboratory report. See *id.*

313. See GA. CODE ANN. § 35-3-154.1(e); OHIO REV. CODE ANN. § 2925.51(D).

Constitutional protections by implementing a notice-and-demand statute. This will provide a means for encouraging the introduction of laboratory reports at trial, thus satisfying jury expectations and protecting the defendant from prosecution based entirely on circumstance. The implementation of notice-and-demand also promotes judicial economy while efficiently protecting a defendant's right to confrontation. As other states work to fix their failures, Oklahoma should take this opportunity to stay ahead of the curve as a defender of the Sixth Amendment.

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