

Melendez-Diaz v. Massachusetts:

Raising the Confrontation Requirements
for Forensic Evidence in California

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INTRODUCTION

Under the Sixth Amendment, a criminal defendant has the right to confront the “witnesses against him.”¹ However, when considering the admissibility of crime lab reports, the Second and Third Districts of the California Courts of Appeal are interpreting the right to confrontation differently. The disagreement between these courts echoes a larger debate between jurists all over the country, a debate that the U.S. Supreme Court sought to settle with its decision in *Melendez-Diaz v. Massachusetts*.² To clarify the application of *Melendez-Diaz* to California state courts, the California Supreme Court has granted review on *People v. Rutterschmidt*, a Second District homicide case that raises an issue with crime lab report admissibility.³ This article seeks to predict the outcome of *Rutterschmidt* by analyzing the language of *Melendez-Diaz* in relation to the divergent California appellate opinions.

In *Melendez-Diaz*, the U.S. Supreme Court held that a crime lab report identifying a substance as cocaine was a “witness against” the defendant and triggered the defendant’s right to confrontation under the Sixth Amendment.⁴ The decision was the latest in a string of Supreme Court decisions since *Crawford v. Washington* in 2004 that held that the Confrontation Clause requires the declarants of all “testimonial” statements be cross-examined in

1. U.S. CONST. amend. VI.

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

3. *People v. Rutterschmidt*, 98 Cal. Rptr. 3d 390 (Ct. App. 2009), *review granted*, 220 P.3d 239 (Cal. 2009).

4. *Melendez-Diaz*, 129 S. Ct. at 2532 (“In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.” (citing U.S. CONST. amend. VI)).

court.⁵ *Melendez-Diaz* found that crime lab result affidavits fell under this class of “testimonial” statements, and that prosecutors could only introduce them in conjunction with the testimony of the crime lab analysts who performed the tests.⁶

The decision was not without significant controversy. The dissent predicted that it would wreak havoc on the nation’s trial courts, forcing crime lab analysts to spend much of their already sparse resources testifying to pro forma reports or waiting outside of courtrooms.⁷ The majority responded with evidence that jurisdictions that were already applying this rule had not been brought to a standstill, and emphasized that confrontation was a constitutional mandate that the Supreme Court did not have the power to limit.⁸

Given this disagreement, it is not surprising that California appellate courts have implemented the U.S. Supreme Court’s opinion inconsistently. Prior to *Melendez-Diaz*, the California appellate courts cited the 2007 California Supreme Court case *People v. Geier*⁹ whenever a lab report confrontation issue was raised.¹⁰ *People v. Geier* found that DNA blood test results were non-testimonial and permitted the lab technician’s supervisor to testify on behalf of the technician.¹¹

After the *Melendez-Diaz* decision in June, the Third District California Court of Appeal (Third District) immediately recognized that *Melendez-Diaz* undermined the reasoning of *Geier* and has denied the admission of lab results without the testimony of the actual technician who performed the tests.¹² The Second District California Court of Appeal (Second District), however, has held that *Geier* is still good law.¹³ The court distinguished *Melendez-Diaz* on the grounds that there was no live testimony in *Melendez-Diaz* and the case was about “near-contemporaneous observations” rather than “contemporaneous” observations.¹⁴ This article will analyze the Second District’s approach and show that *Geier* and *Melendez-Diaz* are not reconcilable.

Because *Melendez-Diaz* is an application of the *Crawford* decision, Section I will begin with a brief discussion of *Crawford*. Section II expands on

5. See *Melendez-Diaz*, 129 S. Ct. 2527; *Davis v. Washington*, 547 U.S. 813, 821-22 (2006); *Crawford v. Washington*, 541 U.S. 36, 61-62 (2004).

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

7. *Id.* at 2549 (Kennedy, J., dissenting).

8. See *id.* at 2540-42.

9. *People v. Geier*, 161 P.3d 104 (Cal. 2007).

10. See, e.g., *People v. Cardenas*, No. B206558, 2009 WL 1464395, at *3-4 (Cal. Ct. App. May 27, 2009); *People v. Briones*, No. B206482, 2008 WL 5394926, at *3 (Cal. Ct. App. Dec. 22, 2008); *In re D.H.*, No. A116095, 2007 WL 2955950, at *4 (Cal. Ct. App. Oct. 11, 2007).

11. *Id.* at 140.

12. *People v. Dungo*, 98 Cal. Rptr. 3d 702, 711 n.11 (Ct. App. 2009).

13. *People v. Rutterschmidt*, 98 Cal. Rptr. 3d 390, 412-13 (Ct. App. 2009), *review granted*, 220 P.3d 239 (Cal. 2009).

14. See, e.g., *People v. Graham*, No. B204863, 2009 WL 2623331, at *15-16 (Cal. Ct. App. Aug. 27, 2009). This case and others like it are discussed extensively below.

that discussion with an explanation of the *Crawford* doctrine's progeny, *Davis v. Washington*. Section III is a more thorough analysis of the *Melendez-Diaz* decision. Section IV will introduce *People v. Geier*, the most recent California Supreme Court case relevant to this issue. Section V will go on to describe the Second and Third Districts' contrasting implementation of *Melendez-Diaz* and *Geier*. The final section, Section VI, will explain why *Melendez-Diaz* invalidates the Second District's theory and why the California Supreme Court should overturn the Second District's decision in *Rutterschmidt*. The reasoning in *Melendez-Diaz* shows that California's trial courts should no longer permit prosecutors to introduce lab evidence without giving the defendant the opportunity to confront the actual analyst who produced it.

I. THE EXPANSION OF THE SIXTH AMENDMENT: *CRAWFORD V. WASHINGTON*

Before *Crawford v. Washington* in 2004, confrontation issues were decided under the Supreme Court's standard in *Ohio v. Roberts*.¹⁵ Under *Roberts*, the prosecution could satisfy the defendant's Sixth Amendment right to "confront witnesses against him" by showing that the evidence fell within a firmly rooted hearsay exception or bore particularized guarantees of trustworthiness.¹⁶ To reach this decision, the Court rejected a literal reading of the Confrontation Clause¹⁷ and used an abstract formulation: the defendant did not have the right to physically confront each and every witness against him in the courtroom, but instead had the right to test the "reliability" of any out-of-court statements before they were admitted.¹⁸ That right was satisfied if the prosecution showed that the statement fell under a "firmly rooted hearsay exception" or possessed other indicia of reliability.¹⁹ Because the *Roberts* standard sought to guarantee the reliability of the contents of the declaration rather than the right to bring the declarant into court, the *Roberts* standard could be described as a substantive, rather than procedural, guarantee.²⁰

In 2004, the Supreme Court decided *Crawford v. Washington*, abrogating the *Roberts* standard.²¹ The defendant Crawford and his wife had gone in search of a Kenneth Lee, angry that Lee had allegedly tried to rape Ms. Crawford.²² When they arrived at Lee's apartment, Crawford and Lee had a physical altercation, and Crawford stabbed Lee in the torso.²³ When the police

15. See *Ohio v. Roberts*, 448 U.S. 56, 66 (1980).

16. *Id.*; see also U.S. CONST. amend. VI.

17. *Roberts*, 448 U.S. at 64.

18. *Id.* at 66.

19. *Id.*

20. See Ariana J. Torchin, *A Multidimensional Framework for the Analysis of Testimonial Hearsay under Crawford v. Washington*, 94 GEO. L.J. 581, 583 (2006) (drawing distinctions between substantive and procedural guarantees).

21. See *Crawford v. Washington*, 541 U.S. 36, 67-69 (2004).

22. *Id.* at 38.

23. *Id.*

arrived, they took tape-recorded statements from both Crawford and his wife.²⁴

In the resulting trial, a critical issue for Crawford's self-defense claim was whether Lee had pulled out a weapon before or after he was stabbed.²⁵ Crawford's wife's statements indicated that Lee pulled out the weapon *after* he was stabbed, but the prosecution was unable to introduce her live testimony because the defendant invoked the state's marital privilege, which barred her testimony without his consent.²⁶ The trial court found that the statements given to the police had "particularized guarantees of trustworthiness" because Crawford's wife was 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.²⁷ Thus, the prosecution successfully introduced a transcript of the post-altercation police interview and the jury subsequently convicted.²⁸ The Washington Court of Appeals reversed, but the Washington Supreme Court reinstated the conviction. Both of the reviewing courts based their decisions on the reliability of the statements, the dispositive factor under the *Roberts* standard.²⁹

The U.S. Supreme Court reversed the Washington Supreme Court's ruling. Instead of applying the *Roberts* rule, the Court introduced a new rule that hinged not on the statement's reliability, but on whether the statement was "testimonial."³⁰ The Court arrived at its decision through an analysis of the historical underpinnings of the Confrontation Clause,³¹ which suggested that the Clause was intended to be a procedural rather than substantive guarantee.³² "[The Confrontation Clause] commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination."³³

The Court explained these historical roots in considerable depth. Despite having a common-law system, which required the live, adversarial examination of witnesses, some English courts still bore vestiges of civil-law practice around the time the Sixth Amendment was written.³⁴ These courts permitted private examination by judicial officers, which was prohibited under common law.³⁵ The trial of Sir Walter Raleigh was the most infamous example of this civil-law practice. Charged with treason, Raleigh's supposed accomplice Lord

24. *Id.*

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

26. *Id.* at 39-40.

27. *Id.* at 40.

28. *Id.* at 40-41.

29. *See id.* at 41-42.

30. *Id.* at 61.

31. *Id.* at 43-50.

32. *Id.* at 61.

33. *Id.*

34. *Id.* at 43-44.

35. *Id.* at 43-46.

Cobham had accused him before the Privy Council.³⁶ At the trial itself, Raleigh argued that Lord Cobham had lied to the authorities in hopes of receiving leniency in his own trial.³⁷ Suspecting that he would recant in open court, Sir Walter Raleigh asked to confront him face-to-face.³⁸ The judges refused, and Sir Walter Raleigh was sentenced to death without ever having the opportunity to confront Lord Cobham.³⁹

Because the Framers would have been aware of the type of evil Raleigh faced, the Court came to the conclusion that the Confrontation Clause was written to prohibit the civil-law mode of criminal procedure.⁴⁰ The Court further concluded, based on this historical review, that “the Framers would not have allowed admission of ‘testimonial’ statements of a witness who did not appear at trial unless he was unavailable to testify and the defendant had had a prior opportunity for cross-examination.”⁴¹ Under the Court’s interpretation, the Framers meant to endorse cross-examination as the best and only constitutionally guaranteed process for determining the truth.⁴²

Thus, the Court replaced the *Roberts* standard with a rule that all “testimonial” statements must be subject to live cross-examination.⁴³ Out-of-court testimonial statements can only be introduced if the declarant is unavailable and there was a prior opportunity for cross-examination.⁴⁴ Although the Supreme Court chose not to articulate the exact definition of “testimonial,” they did include the following in the core class of testimonial statements:

[E]x parte in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially; extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions; statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial⁴⁵

Charged with implementing this new rule, criminal courts around the nation were left to interpret what “testimonial” meant with only a this paradigmatic case and a “core class” of testimonial statements for guidance.

36. *Id.* at 44.

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.* at 50.

41. *Id.* at 53-54.

42. *See id.* at 61-62.

43. *Id.* at 62 (rejecting the *Roberts* test on the grounds that it “replaces the constitutionally prescribed method of assessing reliability with a wholly foreign one”).

44. *Id.*

45. *Id.* at 51-52 (citations omitted) (internal quotation marks omitted).

II. CLARIFYING “TESTIMONIAL”: *DAVIS V. WASHINGTON*

In 2006, two years after the decision in *Crawford*, the U.S. Supreme Court granted certiorari for a pair of Confrontation Clause cases and issued a combined opinion. In the first case, *Davis v. Washington*, the Court held that a statement was non-testimonial for the purposes of the Confrontation Clause.⁴⁶ The statement in question was the transcript of a 911 call.⁴⁷ During a domestic violence dispute, the complaining witness called 911.⁴⁸ Before she could speak, the connection was terminated.⁴⁹ The operator then reversed the call, and the victim told the operator that her former boyfriend was beating her with his fists and that his name was Adrian Davis.⁵⁰ Seconds after she identified him, she said, “He’s runnin’ now.”⁵¹ The operator then proceeded to obtain a few more identifying pieces of information from the victim.⁵² The police arrived four minutes later, observing “fresh injuries on her forearm and her face.”⁵³

In the subsequent trial, the State’s only two witnesses were the two police officers who arrived on the scene.⁵⁴ The officers testified to observing the bruises, but because they did not witness any beating, they could not testify to what caused the injuries.⁵⁵ The victim could have testified but did not appear.⁵⁶ Without the benefit of the victim’s testimony, the State introduced the recording of the 911 call to show the cause of the bruises. The trial court admitted the recording over the defendant’s confrontation objection and the jury subsequently convicted.⁵⁷

In contrast, the Court found that the statements in the second of the combined cases, *Hammon v. Indiana*, were testimonial.⁵⁸ Responding to a “reported domestic disturbance,” the police arrived to find Ms. Hammon alone on the front porch, appearing “somewhat frightened.”⁵⁹ Going inside, they found the defendant, Mr. Hammon, who told them that he and his wife had been in an argument but that there was no physical altercation.⁶⁰ However, once separated from her husband, Ms. Hammon agreed to fill out and sign a battery affidavit that read: “Broke our Furnace & shoved me down on the floor

46. *Davis v. Washington*, 547 U.S. 813, 829 (2006).

47. *See id.* at 817-19.

48. *Id.* at 817-18.

49. *Id.* at 818.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.* at 818-19.

55. *Id.*

56. *Id.*

57. *See id.*

58. *Id.* at 830.

59. *Id.* at 819 (quoting *Hammon v. State*, 829 N.E.2d 444, 446 (Ind. 2005)).

60. *Id.*

into the broken glass. Hit me in the chest and threw me down.”⁶¹

In the resulting bench trial, the court subpoenaed Ms. Hammon, but she did not testify.⁶² The State called one of the officers present at the incident and asked him to recount Ms. Hammon’s statements and authenticate the affidavit while the defense counsel objected repeatedly.⁶³ The trial court admitted the evidence over the defense’s objections on the theory that the affidavit was a “present sense impression” and that Ms. Hammon’s statements were excited utterances that were “expressly permitted in these kinds of cases even if the declarant is not available to testify.”⁶⁴ The judge, sitting as the fact finder, convicted the defendant.⁶⁵ The Indiana Court of Appeals and Indiana Supreme Court both affirmed.⁶⁶

The U.S. Supreme Court examined these two cases and arrived at different conclusions. The Court held that the statements made to the 911 operator in *Davis* were non-testimonial and therefore admissible despite the defendant’s objections, but that the statements made in response to police questioning in *Hammon* were testimonial and thus subject to confrontation.⁶⁷ The touchstone of the Court’s analysis was the objective expectation of the defendant. Looking at the facts of the two cases, the Court analyzed four distinguishing factors to determine the objective expectation of the defendant.

First, the statements made in *Davis* referenced events “*as they were actually happening*, rather than ‘describ[ing] past events.’”⁶⁸ The statements given to the police in *Hammon* described events that took place hours earlier.⁶⁹ Second, any “reasonable listener” would have recognized that the alleged victim in *Davis* was facing an “ongoing emergency.”⁷⁰ The call was “plainly a call for help against bona fide physical threat.”⁷¹ Third, the “nature of what was asked and answered in *Davis*, again viewed objectively, was such that the elicited statements were necessary to be able to *resolve* the present emergency.”⁷² The Court included the questions the operator asked after the defendant had fled in this category because their answers were helpful to the responding police to know whether they were dealing with a potentially dangerous felon.⁷³ Finally, the Court contrasted the formality of the two

61. *Id.* at 820.

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.* at 821.

66. *Id.*

67. *Id.* at 829, 830.

68. *Id.* at 827 (citations omitted) (citing *Lilly v. Virginia*, 527 U.S. 116, 137 (1999) (plurality opinion)).

69. *Id.* at 829.

70. *Id.* at 827.

71. *Id.*

72. *Id.*

73. *Id.*

statements: in *Davis*, the statements were made frantically over a 911 call, while in *Hammon*, the police asked the witness to recount the events and sign an affidavit.⁷⁴

Thus, the Court found that these four factors made it clear that the objective primary purpose of the statements was to meet an ongoing emergency in *Davis*.⁷⁵ The analysis also suggested the types of facts courts should consider in determining the purpose of such statements: the contemporaneousness of the statements (describing ongoing, rather than past events), the urgency (declarant facing a dangerous physical emergency), the utility (aiding law enforcement in dealing with an ongoing situation), and the formality (911 call versus controlled police questioning).

III. CRIME-LAB AFFIDAVITS AS TESTIMONIAL: *MELLENDEZ-DIAZ V. MASSACHUSETTS*

On June 25th, 2009, the Supreme Court decided *Melendez-Diaz v. Massachusetts*, holding that Massachusetts crime-lab affidavits fell within the “core class of testimonial statements” implicated in *Crawford*.⁷⁶ The Court held that because the affidavits were testimonial, the trial court erred in admitting them without live testimony.⁷⁷

In *Melendez-Diaz*, the Massachusetts police arrested a Kmart employee on suspicion of drug dealing.⁷⁸ They sent the bags of a white powder seized from the defendant during the arrest to the state laboratory, which performed chemical analysis on the powdery white substance to determine its composition.⁷⁹ A week later, the analysts recounted the results of their tests in “certificates of analysis,” which were sworn before a notary public.⁸⁰ During the trial, the prosecution submitted the bags seized from the defendant into evidence along with these certificates, which read: “The substance was found to contain: Cocaine.”⁸¹ Under Massachusetts law, these certificates of analysis were admissible as prima facie evidence of the composition of the substance in the bags.⁸²

The trial court admitted the evidence and certificates over the defense’s *Crawford* objection, citing the Massachusetts statute, and the jury convicted the defendant.⁸³ The Massachusetts appellate court upheld the conviction, citing the Massachusetts Supreme Judicial Court’s decision in *Commonwealth v.*

74. *Id.*

75. *Id.* at 828.

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

77. *Id.*

78. *Id.* at 2530.

79. *Id.* at 2530-31.

80. *Id.* at 2531.

81. *See id.* at 2530-31.

82. *Id.* at 2531 (citing MASS. GEN. LAWS ch. 111, § 13 (2006)).

83. *See id.* at 2530-31.

Verde, which categorized the affidavits as public records and showed that such records were exempt from the Confrontation Clause at the time of its authorship.⁸⁴ The appellate court also reviewed the opinion in *Crawford* and pointed out the differences between the affidavits and the *ex parte* civil law inquisitions that the Confrontation Clause was written to protect.⁸⁵ The court found that “certificates of chemical analysis are neither discretionary nor based on opinion; rather, they merely state the results of a well-recognized scientific test determining the composition and quantity of the substance.”⁸⁶ The Massachusetts Supreme Judicial Court denied review.⁸⁷

The U.S. Supreme Court granted certiorari on the *Crawford* question and rejected the holding of the Massachusetts appellate court.⁸⁸ In its opinion, the majority stated flatly that the case “involve[d] little more than the application of our holding in *Crawford v. Washington*.”⁸⁹ Acknowledging that *Crawford* failed to define precisely the term “testimonial,” the Court nonetheless found that the affidavits clearly fell within the core class of testimonial statements identified in that case.⁹⁰ That list of core testimonial statements mentioned affidavits twice.⁹¹

Under Massachusetts law, the certificates were “quite plainly affidavits: ‘declaration[s] of facts written down and sworn to by the declarant before an officer authorized to administer oaths.’”⁹² The Court found that the certificates were used to replace live testimony, as they delivered the exact same information that the analyst herself would have delivered on the stand.⁹³ Not only were the circumstances surrounding the certificates such that “would lead an objective witness reasonably to believe that the statement would be available for use at a later trial,” the affidavits had no other purpose than to prove a fact at trial.⁹⁴ In fact, the certificates themselves contained the language of the statute that made them *prima facie* evidence of their contents.⁹⁵

However, despite the majority’s assertion that there was “little doubt” that the affidavits fell into the core class of testimonial statements, the Court split 5-4 on the outcome. In response to the dissent and the respondent’s contentions,

84. *Commonwealth v. Verde*, 827 N.E.2d 701, 705-06 (Mass. 2005). The *Crawford* Court noted that exceptions to the Confrontation Clause that existed at the time of the clause’s authorship, such as business records, would remain exceptions under the new rule. *See Crawford v. Washington*, 541 U.S. 36, 68 (2004).

85. *See Verde*, 827 N.E.2d at 706 (citing *Crawford*, 541 U.S. at 50).

86. *Id.* at 705-06.

87. *Melendez-Diaz*, 129 S. Ct. at 2531.

88. *Id.* at 2532.

89. *Id.* at 2542.

90. *Id.* at 2532.

91. *Id.* at 2531.

92. *Id.* at 2532 (quoting BLACK’S LAW DICTIONARY 62 (8th ed. 2004)).

93. *Id.* (citing *Davis v. Washington*, 547 U.S. 813, 830 (2006)).

94. *Id.* at 2531.

95. *Id.* at 2532 (citing *Crawford v. Washington*, 541 U.S. 36, 52 (2004); MASS. GEN. LAWS ch. 111, § 13 (2006)).

the majority first rejected the argument that the analysts themselves did not “accuse” the defendant, and that the testimony the analysts give is only accusatory when taken “together with other evidence.”⁹⁶ The Court responded that there are only two kinds of witnesses: witnesses the prosecution calls, who are helpful for the prosecution, and witnesses the defense calls to help defend the accused.⁹⁷ The Court found that “there is not a third category of witnesses, helpful to the prosecution, but somehow immune from confrontation.”⁹⁸

The Court then faced the argument that “the analysts should not be subject to confrontation because they are not ‘conventional’ (or ‘typical’ or ‘ordinary’) witnesses of the sort whose *ex parte* testimony was most notoriously used at the trial of Sir Walter Raleigh.”⁹⁹ The dissent pointed out that the testimony in Sir Walter Raleigh’s case described past events, while the testimony in *Melendez-Diaz* described “near-contemporaneous” events.¹⁰⁰ The dissent also noted that conventional witnesses have to rely on memory, which could be faulty, while analysts performing tests simply record the results contemporaneously.¹⁰¹ They contended that contemporaneousness had “substantial weight” in *Davis*.¹⁰² The Court rejected these arguments on two grounds. First, because the record showed that the affidavits were sworn “almost a week” after the tests were performed, too much time had elapsed to describe the observations as “near-contemporaneous.”¹⁰³ Second, the majority found that the dissent misunderstood the role that near-contemporaneousness played in the *Davis* case.¹⁰⁴ The majority responded by pointing out that the *Davis* Court held that confrontation was required despite the finding that Ms. Hammon’s statements were near-contemporaneous “present-sense impressions.”¹⁰⁵ Presumably, by invoking the statements in *Hammon* that were both near-contemporaneous and testimonial, the Court was showing that near-contemporaneousness was less significant to a determination of whether a statement is testimonial than the dissent purported to show.¹⁰⁶ However, because the Court offered little clarifying analysis, its reasoning here is unclear.¹⁰⁷

The majority then went on to reject the defendant’s argument that the

96. *Id.* at 2533.

97. *Id.*

98. *Id.*

99. *Id.* at 2534.

100. *Id.* at 2535.

101. *Id.* at 2551-52 (Kennedy, J., dissenting) (citing *Davis v. Washington*, 547 U.S. 813, 822 (2006); *People v. Geier*, 161 P.3d 104, 139-41 (Cal. 2007)).

102. *Id.*

103. *Id.* at 2535.

104. *Id.*

105. *Id.* at 2535.

106. *See infra* V.B.

107. As explained below, the Second District California appellate court exploits the majority’s inadequate and haphazard analysis of the role of contemporaneity to uphold the pre-*Melendez-Diaz* rule.

affidavits were like business records, which were admissible absent confrontation in the common law.¹⁰⁸ The majority stated that regardless of the circumstantial factors that may make business records more reliable, if the purpose for writing the records was “specifically for use at petitioner’s trial,” then they are testimony against the defendant and are subject to confrontation.¹⁰⁹ Again, the Court was emphasizing the importance of discerning the objective primary purpose of a statement when determining whether the statement is testimonial.

In addition to arguing that the laboratory tests do not “accuse” the defendant, and pointing out the myriad of reasons why the lab reports are not “conventional witnesses” (including the distinction based on near-contemporaneousness), the state of Massachusetts and the dissent also argued that there is a difference between the scientific nature of the lab tests and the recounting of historical events by “conventional witnesses.”¹¹⁰ According to the dissent, the scientific nature of the tests performed mitigated the need for confrontation because “one would not reasonably expect a laboratory professional . . . to feel quite differently about the results of his scientific test by having to look at the defendant.”¹¹¹

The majority characterized this argument as “little more than an invitation to return to our overruled decision in *Roberts*.”¹¹² According to the Court, although the scientific nature of the evidence may increase its reliability, the *Crawford* decision shifted the focus away from substantive reliability and towards the Constitution’s historically-based procedural guarantees.¹¹³ The Court stated, “[T]here are other ways—and in some cases better ways—to challenge or verify the results of a forensic test. But the Constitution guarantees one way: confrontation. We do not have license to suspend the Confrontation Clause”¹¹⁴ In other words, since the Framers of the Sixth Amendment intended that defendants in criminal prosecutions be guaranteed in-court confrontation of the witnesses against them, the judiciary does not have the power to suspend that procedural guarantee and replace it with a finding of reliability, even if the intent is the same.

Going beyond the distinction between substance and procedure, the Court pointed out various reasons why forensic testing might not be any more reliable than “conventional” testimony.¹¹⁵ Law enforcement agencies may pressure lab analysts to change their procedures or results, may err in the gathering of the

108. *Melendez-Diaz*, 129 S. Ct at 2538.

109. *Id.* at 2539-40.

110. *Id.* at 2536, 2543.

111. *Id.* at 2536 (citation omitted) (internal quotation marks omitted); *see also id.* at 2548-49 (Kennedy, J., dissenting).

112. *Id.* at 2536 (citation omitted) (internal quotation marks omitted).

113. *Id.*

114. *Id.*

115. *See id.* at 2536-38.

data, or in some cases, might not even perform the tests at all.¹¹⁶ The bare-bones nature of the Massachusetts affidavits illustrated the dangers of not requiring live testimony; the affidavits contained no information about “what tests the analysts performed, whether those tests were routine, and whether interpreting their results required the exercise of judgment or use of skills that the analysts may not have possessed.”¹¹⁷ It was not enough, the Court stated, that the defense could have subpoenaed the analysts who wrote the certificates.¹¹⁸ Asking that defendants subpoena the analysts improperly shifted the burden to the defendant to fulfill the prosecution’s confrontation requirement.¹¹⁹

Turning to the practical repercussions of requiring confrontation in all cases involving lab evidence, the majority rejected the dissent’s concern that “the Court threatens to disrupt forensic investigations across the country . . . based on erratic, all-too frequent instances when a particular laboratory technician, now invested by the Court’s new constitutional designation as the analyst, simply does not or cannot appear.”¹²⁰ In the face of unpredictable court schedules, limited crime lab staff, and large volumes of drug related cases, the dissent feared that the decision would gridlock already heavily burdened state and federal court systems.¹²¹

As a preliminary matter, the majority stated that it lacked the authority to abbreviate constitutional protections for practicality’s sake.¹²² Nevertheless, the Court found that the dissent was overstating the crippling effect of the decision. First, the Court noted that ten states held that crime lab reports were testimonial after the *Crawford* decision, and none of those states experienced catastrophic repercussions after implementing that decision.¹²³ The Court also pointed out that before the *Melendez-Diaz* decision, defendants in Massachusetts had the right to subpoena analysts for cross-examination, but there was no indication that “obstructionist” defendants were abusing the privilege.¹²⁴ The majority speculated that most defendants preferred to stipulate to the nature of the substance in ordinary drug cases.¹²⁵ Vigorously cross-examining lab analysts without any specific reasons for doing so would only direct more attention towards the drugs.¹²⁶ The Court speculated that this

116. *Id.* at 2536-37.

117. *Id.* at 2537.

118. *Id.* at 2540.

119. *Id.*

120. *Id.* at 2549 (Kennedy, J., dissenting).

121. *Id.* at 2549-50.

122. *Id.* at 2540.

123. *Id.* at 2541 n.11; *id.* at 2542 (“[G]iven the large number of drug prosecutions at the state level, one would have expected immediate and dramatic results. The absence of such evidence is telling.”).

124. *Id.* at 2541.

125. *Id.* at 2542.

126. *Id.*

move would irritate judges and juries to the detriment of the defendants.¹²⁷

Ultimately, the majority claimed to anchor its holding in a simple application of *Crawford*.¹²⁸ Not only were affidavits mentioned twice in *Crawford*'s formulation of "core class of testimonial statements," but they were clearly made "under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial."¹²⁹ However, as the arguments of the four dissenting justices suggest, the holding was not as "simple" as the majority tried to convey. These complications have resulted in the inconsistent application of *Melendez-Diaz* in California courts.

IV. HOW WAS CALIFORNIA APPLYING *CRAWFORD* BEFORE *MELENDEZ-DIAZ*: *PEOPLE V. GEIER*

Unlike Massachusetts, California does not have a statute permitting the admission of crime lab affidavits as prima facie evidence of drug composition. Instead, California courts analyzed crime lab evidence confrontation under *People v. Geier*, a 2007 California Supreme Court case which held that DNA reports were non-testimonial under their reading of *Crawford* and *Davis*.¹³⁰

In *People v. Geier*, one of the key pieces of evidence was a DNA report that implicated the defendant as the perpetrator of a sexual assault.¹³¹ The DNA analyst's supervisor, Dr.

Robin Cotton, testified on behalf of the analyst, and the defendant objected on the grounds that Dr. Cotton did not perform the tests herself.¹³² The trial court stated that the test results were business records and that even if they were not, Dr. Cotton could rely on the records for the purpose of formulating her opinion as a DNA expert.¹³³ The defendant renewed his *Crawford* objection on appeal.¹³⁴

The California Supreme Court held that the DNA report was non-testimonial.¹³⁵ In formulating the rule, it considered the contrasting opinions of various state courts and the language in *Crawford* and *Davis*.¹³⁶ Although the *Geier* court did not find any analysis of the applicability of *Crawford* and *Davis* to be "entirely persuasive," they were more persuaded by the court opinions

127. *See id.*

128. *Id.*

129. *Id.* at 2532 (citing *Crawford v. Washington*, 541 U.S. 36, 51-52 (2004)).

130. *See, e.g.,* *People v. Geier*, 161 P.3d 104 (Cal. 2007).

131. *See id.* at 131.

132. *Id.* at 131-32.

133. *Id.* at 133.

134. *Id.*

135. *Id.* at 140.

136. *See generally id.* at 134-40 (State courts that held that lab reports were testimonial after *Crawford* included Minnesota, Washington D.C., Michigan, and New York. Courts that held the contrary included California, Massachusetts, and Ohio.).

that held the reports to be non-testimonial.¹³⁷ Notably, the California Supreme Court cited *Commonwealth v. Verde*, the same Massachusetts case that the Massachusetts Supreme Judicial Court cited in upholding Melendez-Diaz's conviction.

Using the language of *Crawford* and *Davis*, the *Geier* court created a three-part test for determining whether a statement is testimonial.¹³⁸ "[A] statement is testimonial if (1) it is made by a law enforcement officer or by or to a law enforcement agent and (2) describes a past fact related to criminal activity for (3) possible use at a later trial."¹³⁹ All three factors must be present; a statement that does not meet all three criteria is non-testimonial and is therefore not subject to the Confrontation Clause.¹⁴⁰

The *Geier* rule begins by restricting testimonial statements to statements made to law enforcement because police officers are the modern version of the justices of the peace that the Sixth Amendment sought to address.¹⁴¹ In this case, although neither the lab analyst nor the analyst's supervisor was a police officer, they were acting in an "agency relationship with law enforcement."¹⁴² Thus, there was "no question" that the DNA report was requested by a police agency, satisfying the first prong of the test.¹⁴³

It was similarly obvious to the Court (as it is likely to be in most lab-report cases) that the DNA reports were being prepared for a criminal trial, fulfilling the third prong of the test.¹⁴⁴ Even though the analysts performing the tests were employees of a private company and not direct employees of the state, they were being contracted to work specifically on a criminal investigation, and could reasonably anticipate that their reports would be used at later criminal trials.¹⁴⁵

The second prong of the three-part *Geier* test goes beyond possible use of the statements and requires that the statement describe a "past fact related to criminal activity."¹⁴⁶ Basing this prong of the rule on the U.S. Supreme Court's decision in *Davis*, the Court noted that although "possible use of such statements at a later trial remains an important consideration," it is no longer the sole consideration.¹⁴⁷ The *Geier* court found that the DNA report was

137. *Id.* at 138.

138. *Id.* at 138-40.

139. *Id.* at 138.

140. *Id.* at 138-39.

141. *See id.* (citing *Crawford v. Washington*, 541 U.S. 36, 53 (2004)).

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.* at 139 (citing *People v. Cage*, 155 P.3d 205, 216 n.14 (Cal. 2007); *United States v. Ellis*, 460 F.3d 920, 926-27 (7th Cir. 2006) ("A reasonable person reporting a domestic disturbance, which is what [Michelle McCottry] in *Davis* was doing, will be aware that the result is the arrest and possible prosecution of the perpetrator. So it cannot be that the statement is

contemporaneous because the analyst was preparing the reports as she was performing the tests on the samples.¹⁴⁸ Therefore, the reports were more similar to the 911 call in which the declarant was relaying present events than to the police report taken after the incident.¹⁴⁹

The Court went on to state that its contemporaneousness prong was consistent with cases holding that the reports are non-testimonial on the basis that they are business records,¹⁵⁰ because the business records exception applies only to statements “made at or near the time by, or from information transmitted by, a person with knowledge.”¹⁵¹ In a footnote, the court noted that business records are not necessarily non-testimonial since “conceivably some such document could contain historical facts.”¹⁵²

Going beyond the three factor test, the Court explained that its holding was congruous with pre-*Davis* cases that held that there were “circumstances under which statements were made in laboratory reports . . . that [gave reasons] to find those statements non-testimonial under *Crawford*, notwithstanding their possible use at trial.”¹⁵³ *Davis*, the Court explained, confirmed this line of cases, since the *Davis* court looked to circumstances beyond whether the speaker reasonably could have anticipated that the statements would end up in court.¹⁵⁴

Geier appealed to the U.S. Supreme Court, but the Court denied certiorari four days after the Court’s decision in *Melendez-Diaz*.

V. A HOUSE DIVIDED: CALIFORNIA APPELLATE COURTS DISAGREE ON THE IMPLEMENTATION OF *MELENDEZ-DIAZ*

A. *The Third District: People v. Dungo*

The California appellate courts are split on the question of whether or not *Melendez-Diaz* overrules *People v. Geier*.¹⁵⁵

testimonial in every case where a declarant reasonably expects that it might be used prosecutorially.”) (citation omitted)).

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.* at 139-40 (citing *United States v. Feliz*, 467 F.3d 227, 234 (2d Cir. 2006) (“A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation.”) (quoting FED. R. EVID. 803(6))).

152. *Id.* at 140 n.12.

153. *Id.* at 140.

154. *Id.*

155. Although this article discusses only the Second and Third Districts’ application of *Melendez-Diaz*, it should be noted that like the Third District, the Fourth District has held that *Melendez-Diaz* overturns *Geier*. The Fourth District held in *People v. Lopez* that blood alcohol

On August 24, 2009, the Third District decided *People v. Dungo*, holding that autopsy testimony given by the coroner's supervisor in lieu of the coroner's own testimony was admitted in error.¹⁵⁶ In the homicide trial, the defendant admitted to choking his girlfriend to death but argued that he had done it in the heat of passion, and at most was guilty only of voluntary manslaughter.¹⁵⁷ Given the defense's theory, one of the key elements of sentencing was the time that it took for the victim to choke to death.¹⁵⁸ Dr. George Bolduc, the doctor who performed the autopsy, was not called to testify on this issue; instead, Dr. Robert Lawrence, his supervisor, was called to testify.¹⁵⁹ Notably, the prosecution called upon Dr. Lawrence because Dr. Bolduc's competence and credibility were questionable: he had been fired from Kern County, "allowed to resign" from Orange County, and other counties refused to use him to testify in homicide cases.¹⁶⁰ Dr. Lawrence told the trial court that he believed the "baggage" associated with Dr. Bolduc's career was "95% fluff."¹⁶¹ He told the trial judge that he was testifying because Dr. Bolduc's poor reputation made it "too awkward" for district attorneys to try their cases.¹⁶²

The Supreme Court decided *Melendez-Diaz* during the *Dungo* trial, so the trial court solicited and reviewed supplemental briefs on the significance of *Melendez-Diaz* to the defendant's Confrontation Clause claim.¹⁶³ The court held that "[g]iven the [Supreme Court's] holding in *Melendez-Diaz*, there can be little doubt that Dr. Bolduc's autopsy report is testimonial."¹⁶⁴ The court pointed to two main factors that identified the statement's primary purpose. First, it found that the statutory role of a coroner was to determine the "circumstances, manner, and cause of death."¹⁶⁵ Second, the court found that the autopsy report in question was clearly generated for the homicide investigation.¹⁶⁶ The coroner himself was clearly aware of his role in the investigation, as the homicide detective was present during the autopsy.¹⁶⁷

reports were "indistinguishable" from the certificates described in *Melendez*. See *People v. Lopez*, 98 Cal. Rptr. 3d 825 (Ct. App. 2009).

156. *People v. Dungo*, 98 Cal. Rptr. 3d 702 (Ct. App. 2009).

157. *Id.*

158. *See id.* at 704.

159. *Id.* at 708.

160. *Id.* at 707.

161. *Id.*

162. *Id.*

163. *Id.* at 709 n.6 ("*Melendez-Diaz* was decided while the instant matter was pending here on review. The parties had already submitted their briefs on the merits. We therefore solicited, and received, supplemental letter briefs addressing the significance of *Melendez-Diaz* on the defendant's Confrontation Clause claim.>").

164. *Id.* at 710.

165. *Id.* (citing CAL. GOV'T CODE § 27491 (West 1966)).

166. *Id.*

167. *Id.*; see also CAL. GOV'T CODE § 27491.4 (West 1966) ("No person may be present during the performance of a coroner's autopsy without the express consent of the coroner.").

The prosecution relied on *People v. Geier* in its opening brief, arguing that the autopsy report was non-testimonial because it constituted a “contemporaneous recordation of observable events.”¹⁶⁸ However, according to the court, the prosecution “correctly acknowledge[d] that ‘the reasoning in *Melendez-Diaz* undermines some of the rationale of *People v. Geier* and [withdrew] their argument that the autopsy report is not testimonial because it constitutes a ‘contemporaneous recordation of observable events.’”¹⁶⁹

The Third District not only held that the autopsy report was clearly testimonial, but also held that “the fact that [the coroner’s supervisor] was available for cross-examination did not satisfy the defendant’s right of confrontation.”¹⁷⁰ Rather than holding that *Melendez-Diaz* did not apply to the case because there was no live testimony in *Melendez-Diaz*, the court rejected the prosecution’s argument that the original report simply acted as a basis for the supervisor’s expert testimony under California Evidence Code section 801, which allows experts to base their opinions on otherwise inadmissible evidence.¹⁷¹ Quoting a law review article, they held that “pretend[ing] that expert basis statements are introduced for a purpose other than the truth of their contents is not simply splitting hairs too finely or engaging in an extreme form of formalism. It is, rather, an effort to make an end run around a constitutional prohibition by sleight of hand.”¹⁷²

Because Dr. Bolduc’s report was testimonial, the Third District reversed and remanded.

B. The Second District: People v. Rutterschmidt, People v. Ellis, People v. Graham, and People v. Gutierrez

Unlike the Third District, which held that the rationale in *Melendez-Diaz* at least “partially undermined” *Geier*, the Second District has held that *Geier* is still good law after the U.S. Supreme Court’s recent decision.

In *Rutterschmidt*, the Second District held that the admission of laboratory blood-test results though the testimony of the supervising laboratory director did not violate the two defendants’ confrontation rights.¹⁷³ The facts of this double homicide case can be summarized as follows: the defendants Olga Rutterschmidt and Helen Golay conspired to, and were successful in, murdering victims Paul Vados and Kenneth McDavid to collect a large number

168. *Id.* at 711 n.11.

169. *Id.*

170. *Id.* at 710, 713.

171. *Id.* at 713 n.14.

172. *Id.* at 713 (citing Jennifer L. Mnookin, *Expert Evidence and the Confrontation Clause after Crawford v. Washington*, 15 J. TECH. L. & POL’Y 791, 822-23 (2007)); *see also id.* at 713 n.14 (“Where testimonial hearsay is involved, the Confrontation Clause trumps the rules of evidence.” (citing *Crawford v. Washington*, 541 U.S. 36, 51 (2004))).

173. *People v. Rutterschmidt*, 98 Cal. Rptr. 3d 390, 408 (Ct. App. 2009), *review granted*, 220 P.3d 239 (Cal. 2009).

of life insurance policies that they had taken out on the two men about two years prior.¹⁷⁴ In 1999 (Vados) and 2005 (McDavid), the police found each of the two victims in the street with injuries consistent with having been run over slowly by automobiles.¹⁷⁵ Notably, the toxicology report on McDavid's blood showed the presence of .08 grams percent of alcohol, a high level of Ambien, a sleep-aid, a significant level of Vicodin, a painkiller, and some amount of Topamax, an anti-anxiety medication that can cause drowsiness.¹⁷⁶ The police arrested the defendants in May of 2006.¹⁷⁷ In the subsequent trial, the jury found the defendants guilty of the first degree murders of Vados and McDavid, finding that both murders were committed for financial gain.¹⁷⁸ The jury also found that they were guilty of conspiring to commit the murders.¹⁷⁹

During the trial, the prosecution called Joseph Muto, the chief laboratory director of the Department of the Coroner, to testify to the presence and quantity of the various drugs and alcohol found in McDavid's blood and help establish that the murder of McDavid was not accidental.¹⁸⁰ The defendant Golay objected "on the ground that the Sixth Amendment's Confrontation Clause required that the analysts who personally tested the samples testify."¹⁸¹ The prosecution responded by arguing that Muto's review of the other analysts' testing procedures and results gave him "personal knowledge" of the results, and that the reports fell under the business records exception to the hearsay rule.¹⁸² The trial court overruled the defense's objection.¹⁸³

The prosecution offered Muto as an expert witness, and he testified on the basis of the lab reports, but the reports themselves were never introduced or entered into evidence.¹⁸⁴ Although other criminologists in Muto's lab performed the actual tests, the record showed that Muto was closely involved in the process: he reviewed every toxicology report issued from his laboratory with either an administrative review or a peer review.¹⁸⁵ The administrative review involved reviewing the entire case to "verify compliance with proper procedures and scientific standards, including quality control."¹⁸⁶ The peer review involved acting as a second chemical analyst to "ensure a sufficient informational foundation for the original analyst's conclusions."¹⁸⁷ He signed

174. *See generally id.* at 394-408.

175. *Id.* at 395-96, 401-02.

176. *Id.* at 402.

177. *Id.* at 406.

178. *Id.* at 393.

179. *Id.* at 394.

180. *See id.* at 408.

181. *Id.* at 409.

182. *Id.* (citing CAL. EVID. CODE. § 1271 (West 1963)).

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

all reports before they left his lab, indicating that he had examined them.¹⁸⁸

On appeal, the Second District found that Muto's testimony did not violate the defendants' Sixth Amendment right, relying on *People v. Geier*.¹⁸⁹ The court focused its interpretation of *Geier* on the distinction the California Supreme Court drew between the data in the report (which is not entered into evidence) and the expert's in-court testimony based on that data.¹⁹⁰ Under this interpretation, the lab reports only "supported" Muto's expert testimony that McDavid's blood contained alcohol and prescription drugs.¹⁹¹ According to the Second District, it is well established in California that expert testimony may "be premised on material that is not admitted into evidence so long as it is material of a type that is reasonably relied upon by experts in the particular field in forming their opinions."¹⁹²

The Second District considered the impact of the *Melendez-Diaz* decision on the *Crawford* objection, but unlike the Third District, the Second District read *Melendez-Diaz* narrowly. According to the *Rutterschmidt* court, *Melendez-Diaz* did not reach the question of whether this type of expert testimony was a violation of the Sixth Amendment, but held only that prosecutors could not prove an element of the offense solely with a sworn statement (that is, without any live testimony at all).¹⁹³ The court supported this narrow reading with language from Justice Thomas' concurring opinion in which he expressed his view that the decision should be limited to formalized testimonial materials such as "affidavits, depositions, prior testimony, or confessions."¹⁹⁴ The California Supreme Court granted review in *Rutterschmidt* on December 2, 2009.¹⁹⁵

In *People v. Ellis*, the Second District also distinguished *Geier* from *Melendez-Diaz*, but for different reasons.¹⁹⁶ The facts in *Ellis* were very similar to *Melendez-Diaz*. The police arrested the defendant Ellis in a drug bust and sent the suspected narcotics found in his possession to the crime lab.¹⁹⁷

188. *Id.*

189. *Id.* at 411 (citing *People v. Geier*, 161 P.3d 104, 133 (Cal. 2007)).

190. *Id.* (citing *Geier*, 161 P.3d at 140) ("Finally, the accusatory opinions in this case . . . were reached and conveyed not through the nontestifying technician's laboratory notes and report, but by the testifying witness . . .").

191. *Id.*

192. *Id.* at 412-13 (citing *People v. Gardeley*, 927 P.2d 713, 721 (Cal. 1996)); *see also id.* (citing *In re Fields*, 800 P.2d 862, 866 (Cal. 1990); *People v. Campos*, 38 Cal. Rptr. 2d 113, 114 (Ct. App. 1995)).

193. *Id.* at 412.

194. *Id.* (citing *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2543 (2009) (Thomas, J., concurring)).

195. *People v. Rutterschmidt*, 220 P.3d 239 (Cal. 2009) (confining their review of *Rutterschmidt* to the introduction of Muto's testimony and the impact of *Melendez-Diaz* on *Geier*).

196. *People v. Ellis*, Nos. B204576, B200018, 2009 WL 2974117 (Cal. Ct. App. Sept. 18, 2009).

197. *Id.* at *1.

The crime lab then generated reports that identified the substance as cocaine.¹⁹⁸

On the third day of the trial, the prosecutor informed the court that the chemist who performed the tests on the suspected cocaine recovered from Ellis was “on vacation, not available.”¹⁹⁹ In lieu of the actual chemist who performed the tests, the prosecution intended to “put on the chemist’s supervisor to testify about what the chemist did.”²⁰⁰ The defense objected to the testimony on Confrontation Clause grounds.²⁰¹ The trial court then conducted an evidentiary hearing and determined that the chemist’s supervisor could be called to the stand, stating that “[the prosecution] may be able to establish the admissibility of the lab reports as business records. I don’t believe that under . . . existing caselaw [the] admission of those business records is going to violate the confrontation rights of the defendants in this case.”²⁰²

The supervisor testified to his own background in chemistry, as well as the scientific acceptability of the tests performed by the analyst. He further testified that the substances were indeed cocaine, and the trial court admitted the reports into evidence.²⁰³

Ellis appealed to the Second District, claiming in part that the trial court violated his right to confrontation by not requiring the prosecution to call the actual analyst who performed the tests.²⁰⁴ The court held that the reports were properly admitted into evidence.²⁰⁵ Citing *People v. Gutierrez*, another recently decided and unpublished Second District case, the court held that *Geier* was still good law, even after *Melendez-Diaz*.²⁰⁶ In both *Ellis* and *Gutierrez*, the Second District distinguished *Melendez-Diaz* on the grounds that *Melendez-Diaz* involved near-contemporaneous, rather than contemporaneous recordation of observable events, and lacked live testimony, whereas *Geier* had the testimony of a supervisor.²⁰⁷

Once the court decided that *Geier* was still good law, the Second District held that *Ellis* and *Gutierrez* were both “*Geier* cases,” not *Melendez-Diaz* cases.²⁰⁸ They based their holdings largely on the presence of live testimony and the contemporaneous preparation of the reports.²⁰⁹

While the Second District in *Ellis* claimed that *Melendez-Diaz* only applies to cases where there is no live testimony, it reached the same holding in

198. *Id.*

199. *Id.* at *10.

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.* at *10-11.

204. *Id.* at *11.

205. *Id.*

206. *Id.* (citing *People v. Gutierrez*, 99 Cal. Rptr. 3d 369 (Ct. App. 2009) (Like *Ellis*, *Gutierrez* involves lab reports. The reasoning in *Gutierrez* is mirrored in *Ellis* and *Graham*)).

207. *Id.* (citing *Gutierrez*, 99 Cal. Rptr. 3d at 376).

208. *Id.*

209. *Id.* (citing *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2535 (2009)).

People v. Graham, but went one step further in its reasoning.²¹⁰ *Graham* held not only that the live testimony found lacking in *Melendez-Diaz* was in fact present, but also that the testimonial or non-testimonial character of the tests was not even at issue in *Melendez-Diaz*.²¹¹ Because there was “little doubt that the certificates or affidavits fell squarely within the class of testimonial statements covered by the Confrontation Clause,” the court said that the only issue truly decided in *Melendez-Diaz* was whether the certificate could substitute for live testimony.²¹²

Thus, the Second District continues to cite *People v. Geier* for the admission of lab report testimony, carrying on as if *Melendez-Diaz* had no impact on the application of the Sixth Amendment in California.

VI. WHO IS RIGHT?

The reasoning articulated by the Second District justifying the introduction of crime-lab evidence without permitting the defendant to confront the actual analyst is unsound in light of *Melendez-Diaz*. Contrary to the Third District, which held that *Melendez-Diaz* at least calls *Geier* into question, the Second District decisions cite directly to *People v. Geier* to justify their outcomes, which are based on live testimony by supervisors and contemporaneity.²¹³ However, a more thorough comparison of *Geier* and *Melendez-Diaz* reveals that the reasoning in *Melendez-Diaz* undercuts the constitutionality of surrogate testimony and undermines *Geier*'s exclusion of all contemporaneous statements.

A. Live Testimony vs. No Live Testimony

In all of the Second District cases, the Second District held that *Geier* remains good law because *Melendez-Diaz* only applied to cases where there is no live testimony at all.²¹⁴ This distinction, however, fails to recognize the implications of *Melendez-Diaz* to situations beyond its immediate facts. Furthermore, the Second District opinions seem to suggest that *Geier* would have accepted the live testimony of a supervisor even if the reports were testimonial. In fact, the *Geier* court never reached the question of whether the surrogate witness would have sufficed for confrontation if the reports were found to be testimonial, because they held that the reports were non-testimonial.²¹⁵ Thus, even if the California Supreme Court holds that lab reports are testimonial after *Melendez-Diaz*, it would still have to answer the question of whether surrogate testimony is permissible. Based on the language

210. See *People v. Graham*, No. B204863, 2009 WL 2623331 (Cal. Ct. App. Aug. 27, 2009).

211. *Id.* at *16.

212. *Id.* (citing *Melendez-Diaz*, 129 S. Ct. at 2531-32).

213. *Ellis*, 2009 WL 2974117, at *11; *Graham*, 2009 WL 2623331, at *16.

214. *Ellis*, 2009 WL 2974117, at *11; *Graham*, 2009 WL 2623331, at *16.

215. See *People v. Geier*, 161 P.3d 104, 140 (Cal. 2007).

of the *Melendez-Diaz* opinion, it appears that it is not.

In *Rutterschmidt* and *Graham*, the Second District held that the defendant's confrontation rights were satisfied because the "accusatory" opinions came in through the testifying expert and not through the non-testifying analyst's laboratory notes and report.²¹⁶ Similarly, in the Third District case, *Dungo*, the prosecution introduced the reports through California Evidence Code section 801(b), which allows expert witnesses to rely on otherwise inadmissible evidence if that evidence is reasonably relied upon by experts in that field.²¹⁷

The language of *Melendez-Diaz* casts doubt on the constitutionality of introducing the substance of the reports through state evidentiary rules. In *Melendez-Diaz*, the respondent argued that the affidavits "do not directly accuse petitioner of wrongdoing; rather, their testimony is inculpatory only when taken together with other evidence linking petitioner to the contraband."²¹⁸ In response, the majority stated that "[the lab reports] certainly provided testimony *against* petitioner, proving one fact necessary for his conviction—that the substance he possessed was cocaine."²¹⁹

The theory that the accusatory opinions are coming into the court through expert testimony and not through the reports is similar to the respondent's argument in *Melendez-Diaz* that the affidavits only become accusatory when linked with other evidence. They both evoke the picture of a lonely report sitting on the table of a laboratory, impotent until linked to another fact or actor. However, this image fails to acknowledge the simple truth: the lab reports do not exist in such a vacuum. Far from it; they are prepared for a specific trial, in connection with a specific defendant or set of defendants. Often, these reports are the critical piece of evidence used to prove an element of the crime or a similarly pivotal part of the case. Without the actual test results—the drug analysis reports, the DNA readouts, etc.—a prosecutor could call an infinite number of experts and be no closer to proving his or her case.

California Evidence Code section 801(b), which the prosecution cited in *Dungo*, does not rescue this flawed line of reasoning. As the *Dungo* court points out, a rule of evidence cannot be used to circumvent a constitutional right.²²⁰ An expert "may not base his opinion upon any matter that is declared by the constitutional, statutory, or decisional law of this State to be an improper

216. *People v. Rutterschmidt*, 98 Cal. Rptr. 3d 390, 411-12 (Ct. App. 2009), *review granted*, 220 P.3d 239 (Cal. 2009); *Graham*, 2009 WL 2623331, at *16.

217. *People v. Dungo*, 98 Cal. Rptr. 3d 702, 713 n.14 (Ct. App. 2009).

218. *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2533 (2009).

219. *Id.* The majority supports this argument by characterizing all testimony as a dichotomy, stating "The text of the Amendment contemplates two classes of witnesses—those against the defendant and those in his favor. . . . [T]here is not a third category of witnesses, helpful to the prosecution, but somehow immune from confrontation." *Id.* at 2534.

220. *See Dungo*, 98 Cal. Rptr. 3d at 713 n.14.

basis for an opinion.”²²¹

The jury instructions in *Dungo* show that it is practically impossible to separate the accusatory report from the expert’s live testimony. The jury was asked to decide the meaning and importance of the expert testimony based on “the reasons the expert gave for any opinion and the facts or information on which the expert relied in reaching that opinion. *You must decide whether information on which the expert relied was true and accurate.*”²²² Clearly, the weight that the jury gives the expert is dependent on the substance of the underlying information. Even if the reports were introduced through an expert opinion, they would still come before the jury, and the defendant’s constitutional rights would still be infringed.

The dissent in *Melendez-Diaz* provided an even clearer indicator that the Supreme Court intended to foreclose surrogate testimony. Highlighting the impracticality of the majority’s decision, the dissent stated that:

[A] laboratory could have one employee sign certificates and appear in court, which would spare all the other analysts this burden . . . [but] [t]he Court made it clear in *Davis* that it will not permit the testimonial statement of one witness to enter into evidence through the in-court testimony of a second *If the signatory is restating the testimonial statements of the true analysts—whatever they might be—then those analysts, too, must testify in person.*²²³

Permitting the introduction of the lab reports through another analyst would be the equivalent of allowing a policeman to read the declarant’s testimonial statement in court.²²⁴

Even as a practical matter, introducing laboratory reports through a testifying expert like a supervisor is not identical to the cross-examination of the analyst himself. The *Melendez-Diaz* majority was concerned that the lack of live testimony left the defendant without the opportunity to explore, on cross-examination, the possibility that the analysts lacked “proper training or had poor judgment.”²²⁵ Without cross examination, defendants would have one less tool to test analysts’ “honesty, proficiency, and methodology.”²²⁶ Not that it is completely fruitless for a supervisor to testify in an analyst’s stead. Questions regarding poor training can be directed towards the analysts’ supervisors, as it is reasonable to assume that the supervisors would have personal knowledge of their analysts’ training. This seemed to be the case in *Rutterschmidt*, where the record showed that the chief laboratory director was closely supervising the analysts.²²⁷ And as the Second District pointed out in

221. CAL. EVID. CODE § 801 cmt. ¶ 7 (West 1967).

222. *Dungo*, 98 Cal. Rptr. 3d at 713.

223. *Melendez-Diaz*, 129 S. Ct. at 2545-46 (Kennedy, J., dissenting) (emphasis added).

224. *Id.* (Kennedy, J., dissenting) (citing *Davis v. Washington*, 547 U.S. 813, 826 (2006)).

225. *Dungo*, 98 Cal. Rptr. 3d 702, 714 (citing *Melendez-Diaz*, 129 S. Ct. at 2538).

226. *Id.*

227. *People v. Rutterschmidt*, 98 Cal. Rptr. 3d 390, 409 (Ct. App. 2009), *review granted*, 220

Dungo, speaking to the methodology of the lab tests was a primary reason for calling the supervisors to the stand.²²⁸

However, there are still concerns about honesty and proficiency. Although it may appear that the tests themselves have been performed according to protocol, there are still many ways that error could be introduced. Pressure from law enforcement agencies may create incentives to modify the results,²²⁹ or analysts may sacrifice methodology for expediency.²³⁰ In *Melendez-Diaz*, the Court even pointed out documented cases where the tests were never even actually performed.²³¹ Analysts who chose to fabricate or modify results in these ways might reconsider giving false testimony if required to confront the defendant in person and testify under oath.

Cross-examination of a surrogate expert would not fully mitigate these concerns. Any employer who has ever hired a consultant to aid in downsizing understands that having an intermediate “messenger” helps insulate one from responsibility. Although such insulation might not always be the incentive for introducing evidence through a surrogate witness, it is far from an imaginary threat. In *Dungo*, the prosecutor called the coroner’s supervisor to the stand because the coroner who performed the autopsy had been fired and banned from employment in other California counties, and his poor track record made it “too awkward” to try cases with him.²³² Although the supervisor assured the court that the baggage associated with the Coroner’s career was “95% fluff,” the court noted that the supervisor was unable to respond to specific questions concerning the coroner’s alleged incompetence in past cases.²³³ This thinly-veiled effort to insulate the jury from the declarant’s possible incompetence illustrates both the need for confrontation and the inadequacy of surrogate testimony.

Thus, because language in *Davis* and *Melendez-Diaz* forecloses the introduction of testimonial statements through substitute declarants and substitute testimony fails to meet the practical concerns underlying the Confrontation Clause, surrogate testimony cannot satisfy the defendant’s right to confrontation.

P.3d 239 (Cal. 2009).

228. See *People v. Ellis*, Nos. B204576, B200018, 2009 WL 2974117, at *10 (Cal. Ct. App. Sept. 18, 2009); *People v. Graham*, No. B204863, 2009 WL 2623331, at *16 (Cal. Ct. App. Aug. 27, 2009).

229. *Melendez-Diaz*, 129 S. Ct. at 2536.

230. *Id.* (quoting NATIONAL RESEARCH COUNCIL, STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD S-17 (Prepublication Copy Feb. 2009)).

231. *Id.* at 2537 (citing Brief for National Innocence Network as Amicus Curiae Supporting Petitioner 15-17, *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527 (2009)).

232. *People v. Dungo*, 98 Cal. Rptr. 3d 702, 704 (Ct. App. 2009).

233. *Id.* at 708.

B. Why Geier is in trouble after Melendez-Diaz: Contemporaneousness

The above analysis concludes that the opinion in *Melendez-Diaz* cannot be distinguished for its lack of live testimony if the statements are testimonial, but *Geier* has its own test for testimonial statements which must be evaluated in light of *Melendez-Diaz*. Under *Geier*, “a statement is testimonial if (1) it is made by a law enforcement officer or by or to a law enforcement agent and (2) describes a past fact related to criminal activity for (3) possible use at a later trial.”²³⁴ Because all three of these factors must be satisfied for a statement to be testimonial, the contemporaneousness prong of this test acts as a gatekeeper; it effectively excludes all “contemporaneous” observations from confrontation regardless of whether the statements were made to a law enforcement agent or prepared specifically for trial.²³⁵

In *Graham*, the Second District distinguished *Melendez-Diaz* from *Geier* on the basis that *Melendez-Diaz* held only that *near*-contemporaneous lab reports are testimonial.²³⁶ The Second District held, in effect, that because the lab reports were prepared at the time the tests were conducted and not almost a week later, *Melendez-Diaz* did not invalidate their admissibility.

Although the Second District accurately invokes the language of *Melendez-Diaz*, it mischaracterizes the role of contemporaneousness in the decision. The *Melendez-Diaz* majority did observe that the week that elapsed between the performance of the tests and the swearing of the affidavits was too long for the observations to be considered “near-contemporaneous.”²³⁷ And at first blush, this contrast between the simultaneous recordings in *Geier* and the week that elapsed in *Melendez-Diaz* could be dispositive.²³⁸

However, the Second District made an apples to oranges comparison. In *Melendez-Diaz*, the Court observed that the affidavits were very sparse, containing little to no information. They contained only the “bare-bones statement that ‘[t]he substance was found to contain: Cocaine.’”²³⁹ Given that the affidavit contained almost no information and the swearing of the affidavit happened a week after the performance of the tests, it seems likely that there was an intermediate document; notes taken by the analyst during the tests, or a printout by the computer used to analyze the substance. In other words, it seems very unlikely that the analyst performed tests on the suspected substance, observed and memorized the results, and then swore them in an affidavit a week later, from memory.

Similarly, because the reports in *Geier* were not sworn before a notary

234. *People v. Geier*, 161 P.3d 104, 138 (Cal. 2007) (emphasis added).

235. *See id.* at 139.

236. *See, e.g.*, *People v. Graham*, No. B204863, 2009 WL 2623331, at *16 (Cal. Ct. App. Aug. 27, 2009).

237. *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2535 (2009).

238. *See Geier*, 161 P.3d at 139.

239. *Melendez*, 129 S. Ct. at 2537.

public, the California Supreme Court only considered the time that elapsed between when the analyst observed the results and when she recorded them.²⁴⁰ A more comparable time to the week in *Melendez-Diaz* would have been the time that elapsed between when the *Geier* analyst conducted the tests and when the supervisor testified in open court. Although the *Geier* record does not indicate how much time elapsed between running the test and the supervisor's testimony in open court, it is doubtful that the time could be characterized as contemporaneous.²⁴¹ In other words, because *Geier* and *Melendez-Diaz* are never properly compared on the issue of contemporaneousness, the Second District cannot distinguish *Geier* without a fuller analysis.

The Second District's identification of the pivotal "time" in *Melendez-Diaz* may be misguided, but because *Melendez-Diaz* does not explicitly hold that contemporaneousness cannot be a factor in whether a statement is testimonial, *Geier* and *Melendez-Diaz* could still coexist. However, one hypothetical question highlights why contemporaneousness was not dispositive in the Supreme Court's decision: if the affidavits were sworn a mere ten minutes after the analyst observed the test results, would the *Melendez-Diaz* majority have changed their holding and deemed them non-testimonial? What about one minute, or thirty seconds?

The low emphasis that the majority placed on contemporaneousness in the opinion suggests that the amount of time elapsed was not the dispositive factor for finding the crime lab reports testimonial. The majority held that the crime lab affidavits were clearly testimonial because they are affidavits, they were functionally equivalent to live testimony, and they were prepared for trial.²⁴² The Court discussed near-contemporaneousness only in the context of the dissent's argument that the analysts are not "conventional witnesses."²⁴³

Furthermore, the Court rejected the dissent's emphasis on contemporaneousness on two grounds. First, the affidavits were sworn "almost a week" after the tests were performed (which, as discussed, was the wrong measure of contemporaneousness).²⁴⁴ Second, the dissent "misunderstood" the role that near-contemporaneity played in the *Davis* case: the statements in *Hammon* were near-contemporaneous statements deemed "present sense impressions," and were still subject to confrontation.²⁴⁵ Presumably, this earlier decision refuted the dissent's argument that contemporaneousness had been given substantial weight, although the majority gives little analysis to support its finding.²⁴⁶

240. *Geier*, 161 P.3d at 139.

241. *See generally id.* at 131-33.

242. *Melendez-Diaz*, 129 S. Ct. at 2531-32.

243. *Id.* at 2535.

244. *Id.*

245. *Id.*

246. *See id.*

On the page that the Court cites for the dissent's contemporaneousness argument, the dissent was actually comparing the crime lab affidavits to the 911 call in *Davis*, not the statements taken after the domestic violence incident in *Hammon*.²⁴⁷ The dissent was pointing out that recording the results of lab tests as they are being performed is more similar to calling 911 during an ongoing emergency than it is to going into court and testifying to past events.²⁴⁸ The dissent even cited *People v. Geier* to support their argument.²⁴⁹

Given the inadequate way that the *Melendez-Diaz* majority responded to the dissent's contemporaneousness argument, the Second District's misinterpretation is not unexpected. In its narrowest form, the majority's invocation of *Hammon* could be interpreted as a ruling that near-contemporaneousness does not render a statement non-testimonial. Because the *Melendez-Diaz* court identifies the statements as "present sense impressions," which are usually contemporaneous, it is also reasonable to conclude that the contemporaneous statements could be testimonial as well.²⁵⁰ This interpretation alone would invalidate *Geier*'s gatekeeping contemporaneousness rule.

A more convincing interpretation of *Davis* in favor of the majority's holding would have characterized contemporaneity as but one factor in determining the objective primary purpose of the statements.²⁵¹ Ms. Davis' statements were made during an ongoing emergency, which required that the call be contemporaneous; since she wanted to stop the assault, she called as the assault was occurring.²⁵² Ms. Hammon's statements were made soon enough after the assault had passed that the trial court ruled them "present sense impression[s]," but the fact that they were made *after* the assault had ended meant that they could not have been made for the purpose of meeting an ongoing emergency; their usefulness was limited to the subsequent prosecution.²⁵³

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

248. *See id.* (Kennedy, J., dissenting) ("We gave this consideration substantial weight in *Davis*. There, the 'primary purpose' of the victim's 911 call was 'to enable police assistance to meet an ongoing emergency,' rather than 'to establish or prove past events potentially relevant to later criminal prosecution.'").

249. *Id.* (Kennedy, J., dissenting) (citing *People v. Geier*, 161 P.3d 104, 139-41 (Cal. 2007)); Notably, *Geier* was denied certiorari four days after the Court's decision in *Melendez-Diaz*.

250. Indiana derives its Rules of Evidence from the Federal Rules of Evidence (Adopted Jan. 1, 1994). The present sense impression exception, which was adopted along with the rest of Rule 803 of the Federal Rules, reads "A statement describing or explaining a material event, condition or transaction, made *while* the declarant was perceiving the event, condition or transaction, or immediately thereafter." IND. R. EVID. 803(1) (emphasis added).

251. *See Davis v. Washington*, 547 U.S. 813, 822 (2006) ("Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency.").

252. *See id.* at 818.

253. *Id.* at 820, 822.

Lab reports involve no such ongoing emergency. Nor is there any indication in *Davis* that time was a dispositive factor in determining anything other than the objective “primary purpose” of the statements.²⁵⁴ As the *Melendez-Diaz* majority pointed out, the *only* purpose of the affidavits was for use in trial.²⁵⁵ Given that clear and undisputed purpose, contemporaneity had no bearing on whether the statements are testimonial, and thus the *Melendez-Diaz* majority spent little time analyzing it and gave it little weight.²⁵⁶

Surprisingly, the majority in *Melendez-Diaz* does not use this line of reasoning to negate the “near-contemporaneity” claim, as they applied a similar reasoning to reject the prosecutor’s argument that the affidavits are like business records.²⁵⁷ The Court held that regardless of the circumstantial factors which may have made business records more reliable, if the purpose for writing the records was “specifically for use at petitioner’s trial,” then they were testimony against the defendant and subject to confrontation.²⁵⁸

Even though the *Melendez-Diaz* decision did not directly review *Geier*’s contemporaneousness test, the Third District properly points out that the reasoning in *Melendez-Diaz* undercuts the *Geier* rule.²⁵⁹ The *Melendez-Diaz* language suggests that the touchstone of the testimonial analysis is the objective purpose of the statements.²⁶⁰ Contemporaneousness may factor into that purpose, as it did in *Davis*, but the *Geier* contemporaneousness rule effectively denies California defendants the right to confront *any* laboratory results as long as the analyst took notes as he or she was observing the tests. This misreading was understandable under *Davis*, but has been rendered unacceptable by the reasoning of the *Melendez-Diaz* opinion.

CONCLUSION

The California Supreme Court should reverse the Second District’s decision in *Rutterschmidt* and replace *Geier* with a new set of rules that more closely incorporate the *Melendez-Diaz* decision. First, the Court should hold that lab reports are testimonial, since they are prepared exclusively for use in criminal trials.²⁶¹ Second, the Court should dispel the legal fiction that the

254. *See id.* at 822, 828.

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

256. *See id.*

257. *See id.* at 2538.

258. *Id.* at 2539-40.

259. *People v. Dungo*, 98 Cal. Rptr. 3d 702, 711 n.11 (Ct. App. 2009).

260. *See Melendez-Diaz*, 129 S. Ct. at 2531-32 (citing *Crawford v. Washington*, 541 U.S. 36, 52 (2004); MASS. GEN. LAWS ch. 111, § 13 (2006)); *see also id.* at 2539-40.

261. *C.f. id.* at 2532 (“[N]ot only were the affidavits ‘made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial,’ but under Massachusetts law the *sole purpose* of the affidavits was to provide ‘prima facie evidence of the composition, quality, and the net weight’ of the analyzed substance.” (internal quotation marks omitted) (citing *Crawford*, 541 U.S. at 52; MASS. GEN. LAWS ch. 111, § 13 (2006))).

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reports are just one source of data used to form an expert opinion and hold that prosecutors cannot circumvent defendants' confrontation rights by calling expert witnesses to testify on the basis of testimonial reports.²⁶²

Given that the *Melendez-Diaz* decision is fairly recent and California is grappling with unprecedented budget problems, it is not surprising that the Second District is attempting to hold onto its pre-*Melendez-Diaz* precedent. Although the California court system may not grind to a complete halt under the Third District's interpretation of *Melendez-Diaz*, any changes to the way that courts deal with lab testimony are likely to impose some costs; costs that may be difficult for crime labs to bear at present. Perhaps the Second District has a fiscal incentive for continuing their course until the California Supreme Court decides the fate of *Geier* after *Melendez-Diaz*. However, because the reasoning in *Geier* seems to stand on shaky ground after the *Melendez-Diaz* decision, it seems unlikely that the California Supreme Court will uphold this practice. Thus, criminal defendants in California should continue to make *Crawford/Melendez-Diaz* objections when prosecutors attempt to introduce lab reports without the testimony of the original analysts.

262. See *People v. Rutterschmidt*, 98 Cal. Rptr. 3d 390, 411-13 (Ct. App. 2009), review granted, 220 P.3d 239 (Cal. 2009).