

# MITIGATING THE PROSECUTORS’ DILEMMA IN LIGHT OF *MELLENDEZ- DIAZ*: LIVE TWO-WAY VIDEOCONFERENCING FOR ANALYST TESTIMONY REGARDING CHEMICAL ANALYSIS

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## I. INTRODUCTION

Criminal prosecutors often present laboratory reports as crucial pieces of evidence.<sup>1</sup> Overturning ninety years of precedent, the Supreme Court’s decision in *Melendez-Diaz v. Massachusetts* mandates that prosecutors may no longer introduce scientific analysis as evidence without live testimony from the producing laboratory analyst.<sup>2</sup> Prior to this decision, prosecutors were able to introduce scientific evidence into evidence against a defendant without furnishing the analyst who conducted the laboratory analysis as a “witness” because scientific affidavits were not categorically deemed to be testimonial.<sup>3</sup> Regardless of whether one agrees with the outcome of *Melendez-Diaz*, the Court has made its ruling and prosecutors must now amend the process by which they bring laboratory evidence to trial.<sup>4</sup> The Confrontation Clause of the Sixth Amendment protects the right of a criminal defendant to confront adverse witnesses, and the Court’s holding in *Melendez-Diaz v. Massachusetts* further defines the scope of the Confrontation Clause.<sup>5</sup> Specifically, the Supreme Court held that certificates of analysis are affidavits, and analysts themselves are not beyond the coverage of the Confrontation Clause.<sup>6</sup> The decision swept

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<sup>1</sup> See Brief of Amici Curiae The National District Attorneys Ass’n, & District, Prosecuting, & County Attorneys in Support of Respondent at 10-11, *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009) (No. 07-591) [hereinafter Attorneys Ass’n Amici Brief].

<sup>2</sup> *Melendez-Diaz*, 129 S. Ct. at 2543 (Kennedy, J., dissenting).

<sup>3</sup> *Id.* at 2542 (majority opinion) (citing *Crawford v. Washington*, 541 U.S. 36 (2004)) (explaining that scientific affidavits are in fact testimonial under the application of *Crawford v. Washington*, a case that addressed whether evidence is testimonial in nature).

<sup>4</sup> See *id.* at 2543 (Kennedy, J., dissenting) (“Until today, scientific analysis could be introduced into evidence without testimony from the ‘analyst’ who produced it.”).

<sup>5</sup> *Id.* at 2531 (majority opinion).

<sup>6</sup> *Id.* at 2532-34.

away an evidentiary practice that extended across thirty-five states and six federal appellate courts.<sup>7</sup> In turn, many prosecutors now face the dilemma of obtaining the resources required to comply with this ruling without sacrificing justice.<sup>8</sup> As the four dissenting Justices cautioned, requiring live analyst testimony for the admission of laboratory reports might pose a crushing burden for the prosecution that “[g]uilty defendants will go free, on the most technical grounds.”<sup>9</sup>

Under *Melendez-Diaz*, the restrictions on using laboratory reports have a wide and all-encompassing reach that have created new obstacles for prosecutors when presenting evidence in cases involving scientific analysis.<sup>10</sup> An analyst must present live testimony to confirm a report involving scientific analysis, regardless of the type of laboratory report offered as evidence.<sup>11</sup> Although the Court justifiably adheres to protecting a defendant’s Sixth Amendment right to confront witnesses against him,<sup>12</sup> the decision nonetheless presents prosecutors with logistical and financial hurdles.<sup>13</sup> It increases the need for more analysts because instead of solely performing testing and analysis in laboratories, analysts must now spend time traveling to court to testify regarding their analysis.<sup>14</sup> Prosecutors must find a way to meet the requirements of *Melendez-Diaz* using the resources available to them without impairing the success of the criminal justice system. Notably, *Melendez-Diaz* does not offer any guidance for implementation of its ruling, but merely asserts that live analyst testimony is required for the admission of laboratory reports.<sup>15</sup>

This Note seeks a solution to the prosecutors’ dilemma so that they may continue to perform their jobs efficiently, while not overstepping the boundaries of the Confrontation Clause. Specifically, this Note proposes the use of videoconferencing technology for analysts’ testimony when offering evidence based on a particular type of forensic science known as “chemical analysis” for controlled substances. Affidavits prepared by analysts for chemical analysis on substances reflect “objective or neutral facts” that do not directly accuse a defendant of any wrongdoing, but merely confirm or deny the presence of a given substance being submitted into evidence.<sup>16</sup> For example, an analyst may confirm that a white powdery substance is an illegal substance such as cocaine, or a legal substance such as talcum powder. However, an analyst does not testify that a defendant was found to be carrying or transporting the substance,

<sup>7</sup> *Id.* at 2543 (Kennedy, J., dissenting).

<sup>8</sup> See Rebecca Waters, *Supreme Court Requires Lab Analysts to Testify: Now What?*, FORENSIC MAG. (July 24, 2009), <http://www.forensicmag.com/news/supreme-court-requires-lab-analysts-testify-now-what-0>.

<sup>9</sup> *Melendez-Diaz*, 129 S. Ct. at 2550 (Kennedy, J., dissenting).

<sup>10</sup> See Waters, *supra* note 8.

<sup>11</sup> See *Melendez-Diaz*, 129 S. Ct. at 2537-38.

<sup>12</sup> *Id.* at 2531.

<sup>13</sup> See Waters, *supra* note 8.

<sup>14</sup> See *infra* notes 113-21.

<sup>15</sup> *Melendez-Diaz*, 129 S. Ct. at 2545 (Kennedy, J., dissenting).

<sup>16</sup> Brief for Respondent at 16-17, 23, *Melendez-Diaz*, 129 S. Ct. 2527 (No. 07-591). Although the Court rejected the assertion that “neutral scientific testing” is truly neutral and concluded that affidavits must be subject to analysts’ testimony, this Note asserts that live two-way videoconferencing is sufficient for providing the testimony that the Court requires for this type of scientific analysis. *Melendez-Diaz*, 129 S. Ct. at 2536.

and thus, the analyst presents a “neutral” analysis in his or her testimony. Although usage of two-way live video testimony will not allow prosecutors to return to the practice they have used for the last century and will not encompass *all* laboratory reports, it will provide a more viable method for prosecutors to utilize a large amount of laboratory reports without draining resources.<sup>17</sup>

Part II explores the background and purpose of the Confrontation Clause, including the Supreme Court’s stance on the use of one-way live video testimony and further examines the holding in *Melendez-Diaz*. Part III analyzes the propriety of using two-way live video testimony for analyst testimony to corroborate reports involving chemical analysis. Finally, Part IV concludes that the usage of two-way live video testimony for scientifically neutral laboratory reports will reconcile *Melendez-Diaz* with the prosecutors’ dilemma.

## II. THE LEGAL FRAMEWORK

### A. *The Confrontation Clause*

The Sixth Amendment guarantees that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.”<sup>18</sup> When the framers of the United States Constitution ratified the Bill of Rights in 1791, they included the Sixth Amendment in order to give an accused the right to confront his accuser at trial.<sup>19</sup> However, while the Sixth Amendment requires access to confrontation, it does not expressly call for physical confrontation.<sup>20</sup> In turn, the legal system has continuously called for the Supreme Court to delineate the requirements and limitations of the Confrontation Clause.<sup>21</sup>

The Court has often construed the Confrontation Clause to require physical, face-to-face confrontation,<sup>22</sup> but has also found that the right to confrontation is not absolute.<sup>23</sup> In an early interpretation of the Confrontation Clause, the Supreme Court assessed whether a trial court had violated a defendant’s right to confront his accusers by admitting the prior testimony of two deceased witnesses.<sup>24</sup> Because the deceased witnesses gave their respective testimony at a prior trial, the Court found that the admissions of the testimonies to the second trial did not violate the Confrontation Clause.<sup>25</sup> The Court emphasized

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<sup>17</sup> This Note proposes that live two-way videoconferencing should be used for analysts’ testimony regarding chemical analysis in federal courts, as well as in states that have yet to adopt legislation that would allow for videoconferencing.

<sup>18</sup> U.S. CONST. amend. VI.

<sup>19</sup> See *Crawford v. Washington*, 541 U.S. 36, 50 (2004) (stating that the text of the Confrontation Clause reflects a purpose to eliminate use of *ex parte* examinations); Cathleen J. Cinella, Note, *Compromising the Sixth Amendment Right to Confrontation—United States v. Gigante*, 32 SUFFOLK U. L. REV. 135, 138 (1998).

<sup>20</sup> Cinella, *supra* note 19, at 141.

<sup>21</sup> See *infra* text accompanying notes 19-69.

<sup>22</sup> See, e.g., *Coy v. Iowa*, 487 U.S. 1012, 1016 (1988) (stating that the Confrontation Clause grants a right to meet face-to-face); *Pennsylvania v. Ritchie*, 480 U.S. 39, 51 (1987) (stating that a defendant has “the right physically to face those who testify against him”).

<sup>23</sup> See *Mattox v. United States*, 156 U.S. 237, 243 (1895).

<sup>24</sup> *Id.* at 237-38.

<sup>25</sup> *Id.* at 240-43.

that “general rules of law . . . must occasionally give way to considerations of public policy and the necessities of the case.”<sup>26</sup>

Under this decree, the Court has considered several circumstances in which face-to-face confrontation might not be required at a criminal trial.<sup>27</sup> Over time, the Court has created guidelines to determine whether the Confrontation Clause has been violated, including the *Crawford* test for testimonial statements, and the *Craig* test for one-way live videoconferencing testimony.<sup>28</sup>

### 1. *The Crawford Test for the Admissibility of Out-of-Court Statements*

In *Crawford v. Washington*, the Supreme Court created a test to determine whether out-of-court testimony may be admissible in court.<sup>29</sup> There, the defendant was charged with assault and attempted murder for stabbing a man who allegedly tried to rape the defendant’s wife.<sup>30</sup> The defendant argued that he acted in self-defense, but his wife’s recorded police statement contradicted his story.<sup>31</sup> A state marital privilege statute provided that spouses could not be compelled to testify against each other, and, thus, the defendant’s wife did not testify at trial.<sup>32</sup> Nevertheless, the trial court allowed the prosecution to introduce the wife’s recorded statement as evidence.<sup>33</sup> The defendant was convicted and, on appeal, the defendant argued that the admission of the statement violated his Sixth Amendment rights.<sup>34</sup> The Court agreed and reversed the conviction.<sup>35</sup>

*Crawford* overturned *Ohio v. Roberts*,<sup>36</sup> which had been the controlling law for twenty-four years. The *Roberts* test for the admissibility of out-of-court statements was based on reliability, rather than the testimonial nature of the statement.<sup>37</sup> Turning away from the reliability test, the Court set forth a category of “testimonial” hearsay.<sup>38</sup> However, the Court declined to establish an overarching definition of “testimonial,” and reserved that task for another time.<sup>39</sup>

Instead, the Court created a two-prong test to determine whether an out-of-court statement is considered “testimonial”: (1) a witness must be unavailable because he or she refuses or is unable to testify, and the court cannot compel

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<sup>26</sup> *Id.* at 243.

<sup>27</sup> See Christine L. Olson, Comment, *Accusation from Abroad: Testimony of Unavailable Witnesses Via Live Two-Way Videoconferencing Does Not Violate the Confrontation Clause of the Sixth Amendment*, 41 U.C. DAVIS L. REV. 1671, 1676-77 (2008).

<sup>28</sup> *Id.* at 1679-85.

<sup>29</sup> *Crawford v. Washington*, 541 U.S. 36, 51, 71 (2004).

<sup>30</sup> *Id.* at 38-40.

<sup>31</sup> *Id.* The wife stated to police that the victim did not have anything in his hands when the defendant stabbed him, indicating that the defendant did not act in self-defense.

<sup>32</sup> *Id.* at 40-42.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 68-69.

<sup>36</sup> *Id.*; *Ohio v. Roberts*, 448 U.S. 56 (1980), *overruled by Crawford*, 541 U.S. 36.

<sup>37</sup> *Crawford*, 541 U.S. at 62.

<sup>38</sup> *Id.* at 68.

<sup>39</sup> *Id.*

that witness to testify at trial;<sup>40</sup> and (2) the unavailable witness's testimony is only admissible if the defendant had a prior opportunity to cross-examine the witness.<sup>41</sup> In *Crawford*, the wife's statement satisfied the first prong, but did not pass the second prong for admissibility.<sup>42</sup> The Court placed great emphasis on a defendant's right to cross-examine his accusers and indicated that a defendant's right to cross-examine a witness is essential for upholding the Confrontation Clause.<sup>43</sup>

## 2. *The Craig Test for the Admissibility of One-Way Live Video Testimony*

The Supreme Court has also addressed whether an alternative form of testimony, one-way live videoconferencing, may be admissible as an exception to face-to-face confrontation, but only with regard to child sexual abuse cases.<sup>44</sup> In *Coy v. Iowa*, the trial court allowed prosecutors to place a screen between child victims and the defendant who was charged with molesting them.<sup>45</sup> The screen prevented the children from seeing the defendant as they testified, and the defendant could only faintly see the children through the screen.<sup>46</sup> The defendant was convicted of sexual assault, and he argued on appeal that the use of the screen deprived him of his right to face adverse witnesses.<sup>47</sup>

Writing for the majority, Justice Scalia pointed out the importance of physical confrontation because "[i]t is always more difficult to tell a lie about a person 'to his face' than 'behind his back.'"<sup>48</sup> Moreover, the pressure of testifying in the defendant's presence reduces the likelihood that a witness will lie while testifying,<sup>49</sup> and the trier of fact can better observe the witness's demeanor.<sup>50</sup> Accordingly, the Court held that the use of the screen violated the Confrontation Clause.<sup>51</sup>

In a concurring opinion, Justice O'Connor laid the groundwork for using one-way live videoconferencing as an alternative form of testimony.<sup>52</sup> While

<sup>40</sup> *Id.* at 68. A witness is also unavailable if the witness invokes a privilege not to testify. FED. R. EVID. 804(a)(1).

<sup>41</sup> *Crawford*, 541 U.S. at 68.

<sup>42</sup> *See id.* at 40.

<sup>43</sup> *Id.* at 43-51.

<sup>44</sup> *See infra* text accompanying notes 56-69.

<sup>45</sup> *Coy v. Iowa*, 487 U.S. 1012, 1014-15 (1988).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 1015.

<sup>48</sup> *Id.* at 1019.

<sup>49</sup> *See id.* ("A witness 'may feel quite differently when he has to repeat his story looking at the man whom he will harm greatly by distorting or mistaking the facts. He can now understand what sort of human being that man is.'") (quoting Z. CHAFEE, *THE BLESSINGS OF LIBERTY* 35 (1956)).

<sup>50</sup> *See id.* ("The Confrontation Clause does not, of course, compel the witness to fix his eyes upon the defendant; he may studiously look elsewhere, but the trier of fact will draw its own conclusions.")

<sup>51</sup> *Id.* at 1022.

<sup>52</sup> *Id.* at 1025 (O'Connor, J., concurring); *see also* *Maryland v. Craig*, 497 U.S. 836, 858 (1990) (quoting *Coy*, 487 U.S. at 1025 (O'Connor, J., concurring)) (addressing the use of live video testimony for child sexual abuse cases, stating that a "case-specific finding of necessity" may create an exception in the Confrontation Clause to protect child witnesses.

Justice O'Connor agreed that the use of a screen violated the Confrontation Clause in *Coy*'s case, she suggested that in a different case, it might be appropriate to use "certain procedural devices designed to shield a child witness from the trauma of courtroom testimony."<sup>53</sup> Justice O'Connor specifically mentioned that child abuse cases might warrant the use of one-way or two-way closed-circuit television because the child witness' testimony would be presented live, in the defendant's presence.<sup>54</sup>

Two years after *Coy*, Justice O'Connor wrote the majority opinion in *Maryland v. Craig*, a case that recognized the use of closed-circuit television to admit a child victim's testimony in sexual abuse cases.<sup>55</sup> There, the defendant was charged with sexually abusing a child, and the Court permitted the child victim to testify via one-way closed-circuit television.<sup>56</sup> The defendant was convicted and, on appeal, the defendant claimed she was not afforded her right to confrontation.<sup>57</sup>

Unlike *Coy*, the *Craig* Court found the state's interest in protecting a child victim warranted the use of the one-way closed-circuit television.<sup>58</sup> The Court emphasized that the four crucial requirements of the Confrontation Clause are: (1) the personal examination of the witness; (2) the witness's submission to giving statements under oath; (3) the opportunity to cross-examine the witness; and (4) the ability of the jury to observe the witness in order to determine credibility.<sup>59</sup>

The Court created another two-prong test for determining whether actual in-person confrontation is required under the Confrontation Clause:<sup>60</sup> (1) the denial of physical confrontation must be necessary to further an important public policy,<sup>61</sup> and (2) the testimony admitted must be sufficiently reliable.<sup>62</sup> Accordingly, the Court found that the use of one-way video testimony passed both prongs of the test because protecting a child witness in a sexual abuse case supported public policy, and the child's testimony was reliable because the defendant's counsel was able to cross-examine the child before an observing jury.<sup>63</sup>

In a strong dissent, Justice Scalia argued that the waiver of face-to-face confrontation only applied to hearsay evidence for "unavailable" declarants, and child witnesses did not qualify.<sup>64</sup> Justice Scalia further criticized the majority's decision because it allowed an "available" witness to appear at trial

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<sup>53</sup> *Coy*, 487 U.S. at 1022 (O'Connor, J., concurring).

<sup>54</sup> *Id.* at 1023-25.

<sup>55</sup> *Craig*, 497 U.S. at 840.

<sup>56</sup> *See id.* at 840-41 (citing MD. CODE ANN., CTS. & JUD. PROC. § 9-102(a)(1)(ii) (West 1989)). Before allowing the procedure, the trial judge must determine that the child witness will suffer from severe emotional distress if required to testify in front of the defendant.

<sup>57</sup> *See Craig*, 497 U.S. at 843.

<sup>58</sup> *Id.* at 853.

<sup>59</sup> *Id.* at 845-46.

<sup>60</sup> *Id.* at 850.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 851-52. Notably, *Craig* was decided prior to *Crawford*, and, thus, it is unclear how the *Craig* test applies post-*Crawford* because *Craig* was decided using the reliability test.

<sup>64</sup> *Id.* at 863 (Scalia, J., dissenting).

without facing confrontation.<sup>65</sup> Although Justice Scalia acknowledged that the right to confront a witness at trial is not absolute, he argued that the Court should impart greater deference to the plain language of the Confrontation Clause, which guarantees face-to-face confrontation.<sup>66</sup> Additionally, Justice Scalia maintained that although protecting a child victim is an important state interest, it bears no more weight than what the state's interest would be in obtaining a guilty conviction in any other criminal proceeding.<sup>67</sup>

### B. *The Supreme Court's Decision in Melendez-Diaz*

In June 2009, the Supreme Court's ruling in *Melendez-Diaz v. Massachusetts* caused great alarm for many prosecutors.<sup>68</sup> In that decision, the Court held that the Confrontation Clause mandates live testimony from lab analysts in order to admit laboratory reports into evidence.<sup>69</sup> The Court maintained that mandating analysts' testimony in court would allow for the discovery of defects in laboratory reports, and the Court supported its decision by citing to a study conducted by the National Academy of Sciences that placed doubt on the accuracy of forensic science.<sup>70</sup>

In *Melendez-Diaz*, the state trial court convicted the defendant on charges of distributing and trafficking cocaine.<sup>71</sup> The Massachusetts Court of Appeals affirmed the ruling, holding that the trial court did not err by admitting certificates of analysis from a state laboratory, even in the absence of in-court testimony by analysts.<sup>72</sup> On appeal to the United States Supreme Court, the defendant contended that admission of the certificates of analysis violated his Sixth Amendment right to confront witnesses against him.<sup>73</sup> The State presented four defenses for its use of analyst reports.<sup>74</sup> First, the State argued that analysts were not subject to confrontation because they were not "accusatory" witnesses who directly accuse the defendant of any wrongdoing.<sup>75</sup> Second, the State asserted that it did not request laboratory analysts to testify regarding an event that occurred in the past, but, rather, to report "near-contemporaneous observations."<sup>76</sup> Third, the State claimed that analysts did not observe any crime, and did not provide statements in response to interrogation.<sup>77</sup> Determining whether a statement is testimonial must be based on the

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 863-64 (arguing that the majority misconstrued precedent to create this exception to the Confrontation Clause).

<sup>67</sup> *Id.* at 867.

<sup>68</sup> See Tom Jackman, *Va. Rushes to Address Ruling on Analysts; Drug-Case Demands Have Strained State Lab*, WASH. POST, Aug. 18, 2009, at B1, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/08/17/AR2009081702302.html>.

<sup>69</sup> *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2543 (2009) (Kennedy, J., dissenting).

<sup>70</sup> *Id.* at 2536-37.

<sup>71</sup> *Id.* at 2530-31.

<sup>72</sup> *Id.* at 2531. The Supreme Judicial Court of Massachusetts denied review of the case. *Commonwealth v. Melendez-Diaz*, 874 N.E.2d 407 (2007).

<sup>73</sup> *Melendez-Diaz*, 129 S. Ct. at 2530.

<sup>74</sup> See *infra* notes 75-79.

<sup>75</sup> *Id.* at 2533.

<sup>76</sup> *Id.* at 2535.

<sup>77</sup> *Id.*

context in which the statement was made, and an affidavit that “merely attest[s] to the chemical composition and weight of physical evidence . . . do[es] not directly accuse anyone of any criminal conduct.”<sup>78</sup> Finally, the State argued that the analysts’ affidavits were “akin to the types of official and business records admissible at common law.”<sup>79</sup>

Tightening the requirements of the Confrontation Clause, the Supreme Court rejected the State’s arguments and found that laboratory analysts did not constitute a category of witnesses that would be “immune from confrontation.”<sup>80</sup> The Court maintained that laboratory reports completed almost a week before the analysts’ affidavits were not near contemporaneous,<sup>81</sup> and that forensic evidence was nonetheless subject to manipulation.<sup>82</sup> Citing the National Academy of Sciences study, the Court asserted that “neutral scientific testing” is not entirely neutral or reliable.<sup>83</sup> Specifically, the Court explained that because forensic scientists are often given a specific question to answer in relation to a case, the scientist might feel pressured to “sacrifice appropriate methodology for the sake of expediency.”<sup>84</sup> Furthermore, the Court established that the analysts’ affidavits were unlike admissible business records because the affidavits were not kept as a regular course of business, but, rather, were produced as evidence to be submitted at trial.<sup>85</sup> Finally, the Court noted that requiring laboratory analysts to confront a defendant face-to-face would curtail the submission of fraudulent and incompetent analysis.<sup>86</sup> The Court did acknowledge that its decision will further burden the prosecution,<sup>87</sup> but stressed that the “sky will not fall,” as proven by the states that have already adopted rules that bar admission of a forensic analyst’s report without live testimony.<sup>88</sup>

Four justices, however, maintained that the Court misconstrued the requirements of the Confrontation Clause with regard to scientific evidence.<sup>89</sup> Writing for the dissent, Justice Kennedy accused the majority of basing its decision on two cases that do not address forensic analysts.<sup>90</sup> The dissent argued that current procedures already preclude the admission of faulty evidence, and predicted that the Court’s holding would be greatly disruptive to criminal procedure.<sup>91</sup>

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<sup>78</sup> Brief for Respondent, *supra* note 16, at 16-17.

<sup>79</sup> *Melendez-Diaz*, 129 S. Ct. at 2538 (internal quotation marks omitted).

<sup>80</sup> *Id.* at 2534.

<sup>81</sup> *Id.* at 2535.

<sup>82</sup> *Id.* at 2536.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* (citing NAT’L RESEARCH COUNCIL OF THE NAT’L ACADEMIES, STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD 183 (2009) [hereinafter NATIONAL ACADEMY REPORT]).

<sup>85</sup> *Id.* at 2538.

<sup>86</sup> *Id.* at 2537 (referencing the Brief for National Innocence Network as Amicus Curiae at 15-17, *Melendez-Diaz*, 129 S. Ct. 2527, in which “drylabbing”—where analysts falsely report test results when no actual tests were performed—is discussed).

<sup>87</sup> *Id.* at 2540.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 2543.

<sup>90</sup> *Id.* at 2543 (Kennedy, J., dissenting) (stating that the majority relies on *Crawford v. Washington*, 541 U.S. 36 (2004), and *Davis v. Washington*, 547 U.S. 813 (2006)).

<sup>91</sup> *Id.* at 2544.

One of the primary problems with the Court's decision, according to the dissent, is that although the Court demands the live testimony of the "analyst," it is difficult to determine which person this rule applies to because many people are involved in producing a laboratory report.<sup>92</sup> In considering the process, the dissent listed four people that may play a role in producing a report and may contribute to the final test result: (1) an analyst who prepares a sample of the drug, places it in a testing machine, and retrieves the results; (2) an analyst who interprets the results; (3) an analyst who calibrates the testing machine and certifies the machine is in good working order; and (4) an analyst who is likely a director that certifies that the others followed proper procedures.<sup>93</sup> Even if it were assumed that the "analyst" required to testify in court is the person who interprets the results, the dissent noted that the Confrontation Clause was not designed to detect errors in forensic reports.<sup>94</sup> The dissent further reasoned that it is unlikely a laboratory analyst would retract a prior conclusion of the test results from simply catching sight of a defendant.<sup>95</sup> Moreover, if a defendant truly believes a report to be flawed, the defendant can either call in an expert witness or subpoena the original analyst to appear in court.<sup>96</sup>

The dissent also considered the logistical and financial burden imposed on the prosecution.<sup>97</sup> It maintained that because busy trial courts must accommodate the schedules of attorneys, witnesses, and juries, a laboratory analyst will likely not be a priority and may wait for days before testifying in court.<sup>98</sup> Furthermore, the dissent indicated that the number of cases that will require laboratory analysts to testify will reach astounding numbers, which will ultimately abate taxpayer dollars by exhausting financial resources, or result in the wrongful exoneration of guilty defendants.<sup>99</sup> In particular, if for some reason an analyst is unable to testify in court, the defense will catch a "windfall" because courts can no longer admit the laboratory report as evidence.<sup>100</sup>

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<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 2544-45.

<sup>94</sup> *Id.* at 2547.

<sup>95</sup> *Id.* at 2548.

<sup>96</sup> *Id.* at 2547.

<sup>97</sup> *Id.* at 2549.

<sup>98</sup> *Id.* The dissent points out,

Trial courts have huge caseloads to be processed within strict time limits. Some cases may unexpectedly plead out at the last minute; others, just as unexpectedly, may not. Some juries stay out longer than predicted; others must be reconstituted. An analyst cannot hope to be the trial court's top priority in scheduling. The analyst must instead face the prospect of waiting for days in a hallway outside the courtroom before being called to offer testimony that will consist of little more than a rote recital of the written report.

*Id.*

<sup>99</sup> *See id.* at 2549-50. The dissent surmises that if the district attorney in Philadelphia prosecutes 25,000 drug crimes in a year, and 95 percent of the cases end in plea bargain, then each of the city's eighteen drug analysts will testify in at least sixty-nine trials in a year. *Id.* at 2550. Also, if the district attorney in Cleveland prosecutes 14,000 drug crimes in a year, and 95 percent of the cases end in plea bargain, then each of the city's six drug analysts will testify in 117 cases in a year. *Id.*

<sup>100</sup> *Id.* at 2556-57.

Finally, the dissent argued that the Court's holding contradicted the authority of thirty-five states and six federal appellate courts.<sup>101</sup> It is the role of state legislatures, and not the Court, to establish rules of evidence. The dissent also noted that the Court should not rely on the National Academy of Sciences' report because the objective of the research council was to inform Congress of their findings, and not to advise the Supreme Court.<sup>102</sup> In Justice Kennedy's eyes, the majority's interpretation of the Confrontation Clause "transforms . . . a sensible procedural protection into a distortion of the criminal justice system."<sup>103</sup>

*Melendez-Diaz* divided the Court, resulting in a 5-4 split decision favoring the petitioner. In the wake of the Court's decision, prosecutors around the country braced themselves in anticipation of the possible ramifications.<sup>104</sup>

### III. THE PROPRIETY OF USING TWO-WAY LIVE VIDEO TESTIMONY TO AMELIORATE THE PROSECUTOR'S DILEMMA

Although *Craig* addresses the use of one-way video testimony, the Supreme Court has never addressed the use of two-way video testimony.<sup>105</sup> Two-way video testimony enables parties at both ends of the circuits to hear and see each other instantaneously.<sup>106</sup> Federal courts diverge on whether to allow the use of two-way video testimony and under what circumstances such testimony should be admissible.<sup>107</sup> Proponents of using two-way video testimony argue that the procedure is akin to physical testimony in that it allows for face-to-face confrontation, cross-examination, and observation by the jury, court, defense counsel, and the defendant.<sup>108</sup> Opponents of the use of two-way video testimony find that the procedure does not furnish physical face-to-face confrontation, and that courts should only apply the *Crawford* test for statements made prior to trial, as opposed to statements presented *at* trial.<sup>109</sup> Oppo-

<sup>101</sup> *Id.* at 2554.

<sup>102</sup> *Id.* The dissent believes the Court should not act in the place of Congress, and it is Congress that must determine "whether scientific tests are unreliable and, if so, whether testimony is the proper solution to the problem." *Id.*

<sup>103</sup> *Id.* at 2548.

<sup>104</sup> See Waters, *supra* note 8.

<sup>105</sup> See *United States v. Yates*, 438 F.3d 1307, 1313 (11th Cir. 2006). The 11th circuit cites its own precedent, along with four other circuits, for using the *Craig* test to analyze two-way video testimony even though *Craig* addresses one-way video testimony.

<sup>106</sup> See Aaron Harmon, Recent Development, *Child Testimony Via Two-Way Closed Circuit Television: A New Perspective on Maryland v. Craig in United States v. Turning Bear and United States v. Bordeaux*, 7 N.C. J.L. & TECH. 157, 161 (2005).

<sup>107</sup> See *Yates*, 438 F.3d at 1315 (finding that usage of two-way video for testimony of unavailable international witness violates Confrontation Clause); *United States v. Bordeaux*, 400 F.3d 548, 554-55 (8th Cir. 2005) (declining to follow *Gigante*, stating that confrontation over two-way videoconferencing is not the constitutional equivalent of face-to-face confrontation); *Harrell v. Butterworth*, 251 F.3d 926, 931 (11th Cir. 2001) (upholding the use of the *Craig* test in finding that that use of video testimony was constitutional); *United States v. Gigante*, 166 F.3d 75, 80 (2d Cir. 1999) (holding that admission of testimony from a bedridden, unavailable witness via two-way videoconferencing does not violate Confrontation Clause);

<sup>108</sup> See *Gigante*, 166 F.3d at 80.

<sup>109</sup> See *Yates*, 438 F.3d at 1314 n.4.

nents believe that confrontation through electronic means is simply not the same as physical testimony as required by the Constitution, and thus, compromises the Sixth Amendment.<sup>110</sup>

However, the text of the Confrontation Clause does not specify “face-to-face” or “physical” testimony.<sup>111</sup> Rather, it merely assures a defendant the “right . . . to be *confronted* with the witnesses against him.”<sup>112</sup> Live two-way videoconferencing fulfills the demands on the Confrontation Clause because the defendant is, in fact, afforded an opportunity to confront an accusatory witness who is adverse to his case, and the defense is able to cross-examine the witness in pursuit of the truth.

Part A of this section describes the difficulties prosecutors have encountered since the Court issued its requirement for analysts’ testimony in *Melendez-Diaz*. Part B analyzes the propriety of using live two-way videoconferencing for analysts’ testimony from a scientific frame of reference, and Part C discusses current usage of live two-way videoconferencing and the issues involved with its use. Part D explains why the use of two-way live video for analysts’ testimony regarding chemical analysis meets the requirements of the Confrontation Clause.

#### A. *The Prosecutors’ Dilemma*

With mounting budgetary restrictions and limitations on resources, prosecutors have become frustrated in attempting to comply with *Melendez-Diaz*.<sup>113</sup> The increased demand for analyst testimony has been staggering and will likely continue to burden prosecutors.<sup>114</sup> Following the *Melendez-Diaz* decision, Scott Burns, executive director of the National District Attorneys Association, stated, “It’s a train wreck. To now require that criminalists in offices and labs that are already burdened and in states where budgets are already being cut back, to travel to courtrooms and wait to say that cocaine is cocaine—we’re still kind of reeling from this decision.”<sup>115</sup>

Prosecutors find themselves in a difficult position when attempting to comply with the requirements of *Melendez-Diaz* because many forensic laboratories that perform chemical analysis are substantially understaffed.<sup>116</sup> In a brief to the Court regarding the *Melendez-Diaz* case, the amici National District Attorneys Association maintained that in consideration of the significant number of chemical analysis tests performed each year, a court appearance from each lab analyst who has performed chemical analysis for a case would be “physically impossible.”<sup>117</sup> Specifically, the brief cites staffing levels and budgetary restrictions as reasons that it would be unlikely for analysts to be able to testify in all cases involving chemical analysis.<sup>118</sup>

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<sup>110</sup> *Id.* at 1315.

<sup>111</sup> See U.S. CONST. amend. VI.

<sup>112</sup> *Id.* (emphasis added).

<sup>113</sup> See Waters, *supra* note 8.

<sup>114</sup> See Jackman, *supra* note 68.

<sup>115</sup> Waters, *supra* note 8 (internal quotation marks omitted).

<sup>116</sup> Attorneys Ass’n Amici Brief, *supra* note 1, at 12-14.

<sup>117</sup> *Id.* at 10.

<sup>118</sup> *Id.* at 19.

For example, in Clark County, Nevada, analysts perform testing on all recovered illegal substances at the Las Vegas Metropolitan Police Department Forensic Laboratory.<sup>119</sup> In 2007, the laboratory received 2,205 requests for chemical analysis, and employed four full-time lab analysts who performed analyses on 2,251 cases, where many cases required analysis for more than one item.<sup>120</sup> However, with a sharp rise of methamphetamine use in the southwestern region of the United States, the laboratory received 2,973 requests in the first eight months of 2008 alone.<sup>121</sup> Despite the rising number of cases involving illegal narcotics, and, consequently, requests for chemical analysis, the lab was still only able to employ 4.5 full-time analysts in 2008.<sup>122</sup> The *Melendez-Diaz* ruling has only exacerbated the budgetary dilemmas that prosecutors were coping with prior to the Court's decision.

In Las Vegas, Nevada, prosecutors are concerned with the increasing number of cases where a person is driving under the influence of sleep medications.<sup>123</sup> The laboratory in Las Vegas tests for six primary chemical substances, but does not test for the substance used in sleep medications, and neither do any laboratories in nearby cities or states.<sup>124</sup> To perform chemical analysis in order to test for sleep medication, the prosecutors' office must use a laboratory in Pennsylvania, one of the few laboratories in the country that will test for the substance.<sup>125</sup> Under *Melendez-Diaz*, if the prosecutor's office in Las Vegas chooses to prosecute a suspect for driving under the influence of sleep medications, the City of Las Vegas must spend the time and money to transport a laboratory analyst from the other side of the country to testify in a case.<sup>126</sup> Consequently, the financial and logistical issues surrounding live analyst testimony are unduly burdensome for the prosecution.

The amici National District Attorneys Association also maintained that requiring live testimony from analysts for every drug-related case would create delays in the criminal justice system of most jurisdictions.<sup>127</sup> The amici noted that courts often have such lengthy dockets that cases might not proceed on the scheduled date and could be rescheduled as many as four times.<sup>128</sup> By demanding that an analyst must testify in court at these cases, courts would require the analyst to wait for many hours only to see if a case actually proceeds to trial.<sup>129</sup> If the case is rescheduled, the analyst would have to appear again and again until it is time for the case to proceed.<sup>130</sup> While these analysts are waiting to testify at court, the delay creates a backlog for substances waiting

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<sup>119</sup> *Id.* at 14.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> Interview with Benard Little, Assistant City Attorney, Las Vegas, in Las Vegas, Nev. (Sept. 10, 2009) (on file with author).

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> Attorneys Ass'n Amici Brief, *supra* note 1, at 15.

<sup>128</sup> *Id.* at 15-16.

<sup>129</sup> *Id.* at 16.

<sup>130</sup> *Id.*

to be tested for cases.<sup>131</sup> Additionally, analysts who have performed many chemical tests for different cases may be required to testify in multiple courts on the same day.<sup>132</sup> If the analyst is unable to provide law enforcement with test results in a timely fashion, or is unable to appear in certain courts due to scheduling in other courts, then the prosecution bears the risk of violating the defendant's right to a speedy trial.<sup>133</sup>

At the federal level, as the dissent noted in *Melendez-Diaz*, the Court's decision poses even greater obstacles for federal prosecutors due to the federal government's widespread operations.<sup>134</sup> The Federal Bureau of Investigation laboratory in Quantico, Virginia, performs more than one million chemical analyses per year, and under *Melendez-Diaz*, an analyst must travel to various locations to testify in every case for which he performed a chemical analysis.<sup>135</sup>

Finally, prosecutors assert that the cost to society will be grave if analysts are required to testify at all trials to corroborate laboratory reports.<sup>136</sup> Illegal narcotics usage is a prevalent problem in American society,<sup>137</sup> and the economic expenditure for illegal substance abuse in 2002 totaled \$180.9 billion.<sup>138</sup> Substance abuse is also one of the most expensive health-related ailments in the United States, with the healthcare-related cost for illegal substance abuse totaling approximately \$16 billion in 2002.<sup>139</sup> The community holds a great interest in curbing the availability and distribution of illegal narcotics,<sup>140</sup> as it affects various facets of society, from educational to economic functions.<sup>141</sup> However, prosecutors believe that if analysts are required to testify for every narcotics case that the government brings forth, the already-difficult process of battling illegal substance usage will force illegal narcotics prosecution to "face an insurmountable hurdle and come to a halt."<sup>142</sup>

The post-*Melendez-Diaz* experience in at least one state suggests that prosecutors' concerns might be justified. Although supporters of *Melendez-Diaz* believed that the encumbrance on prosecutors would be minimal due to the availability of other options, such as stipulations<sup>143</sup> and notice-and-demand statutes,<sup>144</sup> the numbers have revealed a negative resulting effect on prosecutors.<sup>145</sup> For example, in July 2009, just one month after the *Melendez-Diaz*

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<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2550 (2009) (Kennedy, J., dissenting).

<sup>135</sup> *Id.* (citations omitted).

<sup>136</sup> See Attorneys Ass'n Amici Brief, *supra* note 1, at 27.

<sup>137</sup> *Id.* at 20.

<sup>138</sup> *Id.* at 21.

<sup>139</sup> *Id.* at 22.

<sup>140</sup> *Id.* at 20.

<sup>141</sup> See *id.* at 24-25.

<sup>142</sup> *Id.* at 27.

<sup>143</sup> Brief of Law Professors as Amici Curiae in Support of Petitioner at 9-10, *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009) (No. 07-591).

<sup>144</sup> Statutes that allow prosecutors to service defendants' notices of intent to offer forensic testimony without cross-examination, and give defendants the right to demand cross-examination. *Id.* at 13.

<sup>145</sup> See *supra* text accompanying notes 119-22.

ruling, defense attorneys in the state of Virginia subpoenaed drug analysts in 925 instances; in July 2008, the defense only called for analysts forty-three times.<sup>146</sup> Additionally, in July 2009, analysts in Virginia spent 369 hours traveling to courthouses and testifying in court; in the previous eleven months, analysts spent a cumulative total of 230 hours for traveling and testifying.<sup>147</sup> A DUI case was even reduced to a mere reckless driving conviction because an analyst was unable to testify at trial to allow laboratory reports into evidence.<sup>148</sup> Legislators in Virginia admitted that the ultimate problem was simply a lack of resources—namely, the need for more analysts who are able to conduct lab work and spend time testifying in court.<sup>149</sup>

### B. A Scientific Perspective

Understanding the scientific basis for requiring analyst testimony is crucial in assessing the use of live two-way videoconferencing. This section reveals how the usage of live two-way videoconferencing is commensurate with scientific concerns regarding analyst testimony for chemical analysis. In particular, this section introduces findings in the field of forensic science with regard to chemical analysis, and then delves into issues that must be resolved by the forensic science field, rather than imputed upon the legal community.

*Strengthening Forensic Science in the United States: A Path Forward*, is a 200-page report about the challenges of forensic science, produced by the National Academy of Sciences (NAS) and commissioned by Congress.<sup>150</sup> In *Melendez-Diaz*, the Court drew on several of the NAS research council's findings in making the decision to require analysts' testimony in court for the admission of laboratory reports.<sup>151</sup> In the NAS report, the research council assessed the admission of forensic science evidence in litigation.<sup>152</sup> It detailed the methodology of different fields of forensic science,<sup>153</sup> and described the limitations of utilizing such evidence at trial.<sup>154</sup> Specifically, the report maintains that the admission of forensic evidence in criminal trials should rely on:

- (1) the extent to which a particular forensic discipline is founded on a reliable scientific methodology that gives it the capacity to accurately analyze evidence and report findings and
- (2) the extent to which practitioners in a particular forensic discipline rely on human interpretation that could be tainted by error, the threat of bias, or the absence of sound operational procedures and robust performance standards.<sup>155</sup>

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<sup>146</sup> See Jackman, *supra* note 68.

<sup>147</sup> *Id.*

<sup>148</sup> See Waters, *supra* note 8.

<sup>149</sup> See Jackman, *supra* note 68.

<sup>150</sup> NATIONAL ACADEMY REPORT, *supra* note 84, at 1.

<sup>151</sup> *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2536 (2009).

<sup>152</sup> NATIONAL ACADEMY REPORT, *supra* note 84, at 85-86.

<sup>153</sup> See *id.* at 127-28.

<sup>154</sup> See *id.* at 52-53. The NAS report explores various disciplines in forensic science, such as biological evidence (DNA analysis), friction ridge analysis (fingerprints, palm prints, and sole prints), and impression evidence (shoeprints and tire tracks). See *id.* at 127-50. However, this Note does not endeavor to explain the validity of using live two-way video testimony for any discipline other than chemical analysis.

<sup>155</sup> *Id.* at 87.

Analysts commonly conduct chemical analysis to determine substances in the form of powders, smokeable or injectable material, tablets, capsules, and plant materials.<sup>156</sup> Although other forms of forensic science are more sensitive, and likely require complex analyst testimony (or even expert testimony) in order to explain the findings, forensic scientists analyze chemical substances using widely recognized, standard protocols.<sup>157</sup> Thus, this Note only addresses the reliability of two-way video testimony for analysts' testimony involving chemical analysis.

The NAS report does not specifically address the necessity of live testimony from analysts in court to corroborate laboratory reports for chemical analysis. Instead, the NAS report was primarily concerned with the validity and accuracy of forensic science laboratory reports, and called for higher standards for the use of forensic science reports.<sup>158</sup> The NAS report aimed to limit the risks involved with depending on certain forensic science methodologies that have not been proven to be completely accurate, and to eliminate wrongful convictions that were made in reliance on forensic science.<sup>159</sup> In particular, one of the research council's recommendations was to develop model laboratory reports that delineate the minimum information a report should include.<sup>160</sup>

In explaining the various downfalls of admitting forensic science in litigation, the NAS report states "the legal system is ill-equipped to correct the problems of the forensic science community."<sup>161</sup> Some forensic science disciplines have not been able to validate their approaches or establish the accuracy of their findings, and court are limited in addressing these issues due to "the rules governing the admissibility of forensic evidence, the applicable standards governing appellate review of trial court decisions, the limitations of the adversary process, and the common lack of scientific expertise among judges and lawyers who must try to comprehend and evaluate forensic evidence."<sup>162</sup>

The NAS report further admits that superior resources must be used in order to improve the reliability of forensic science.<sup>163</sup> However, it is not the responsibility of the legal system to correct the errors of forensic science. The NAS report acknowledges that the source of problems in forensic science is contained within the scientific community itself.<sup>164</sup> Therefore, the resolution of such issues should not be imposed on the legal system, but resolved separately within the field of forensic science.

The Confrontation Clause is a procedural guarantee that requires courts to properly evaluate evidence for reliability through a particular process.<sup>165</sup> The *Melendez-Diaz* Court maintained that requiring analyst testimony ensures that

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<sup>156</sup> *Id.* at 134.

<sup>157</sup> *Id.*

<sup>158</sup> *See id.* at 53.

<sup>159</sup> *See id.* at 45, 85-86.

<sup>160</sup> *See id.* at 189-90.

<sup>161</sup> *Id.* at 53.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *See id.*

<sup>165</sup> *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2536 (2009) (quoting *Crawford v. Washington*, 541 U.S. 36, 61-62 (2004)).

courts have sufficiently assessed evidence through cross-examination.<sup>166</sup> However, as the dissent points out, “The Confrontation Clause is not designed, and does not serve, to detect errors in scientific tests.”<sup>167</sup> The scientific community must resolve errors in lab reports before submitting the reports as evidence. Thus, allowing an analyst to testify via two-way videoconferencing sufficiently ensures that a lab report was produced accurately to the best of an analyst’s knowledge, which is the most that the Confrontation Clause can ask of an analyst. Physical, in-person testimony is not necessary for an analyst to confirm that she conducted chemical analysis under proper protocol. In fact, the NAS report states that chemical analysis is fundamentally dependable, and there is “adequate understanding of the uncertainties and potential errors.”<sup>168</sup> Because a lab analyst did not witness any acts, and is far removed from a defendant, cross-examination via two-way video testimony provides adequate confrontation between an analyst and a defendant.

The NAS report also notes that fraudulent lab reporting is uncommon, but the risk of bias is prevalent.<sup>169</sup> However, chemical analysis does not depend on the cognitive predisposition of a lab analyst.<sup>170</sup> Human bias is not a character flaw, but a characteristic of decision-making.<sup>171</sup> When an analyst is asked to compare possibly subjective data, such as hair, shoeprints, or fingerprints, the risk of cognitive bias is magnified.<sup>172</sup> Chemical analysis relies on standard protocols and procedures to determine the composition of a substance, and only requires objective analysis.<sup>173</sup> Thus, most inconsistencies can be discovered through comprehensive cross-examination using two-way videoconferencing. Indeed, any inconsistencies in laboratory findings that cannot be discovered through cross-examination via two-way videoconferencing likely cannot be discovered through physical, in-court testimony.

Finally, the NAS report advocates enhanced standards for reporting results.<sup>174</sup> With regard to courtroom testimony based on forensic science reporting, however, the NAS report only calls for the usage of “lay terms” so that the judge or jury may properly weigh and interpret the testimony.<sup>175</sup> Because analysts can adequately explain lab reports in lay terms via two-way videoconferencing, and such explanations would not be any different if the analyst physically appears in court, two-way video testimony is acceptable.

### C. *Current Usage of Two-Way Video Testimony*

Many states already employ, or are considering, the usage of two-way videoconferencing in courts.<sup>176</sup> Videoconferencing technology decreases the

<sup>166</sup> *Id.*

<sup>167</sup> *Id.* at 2547 (Kennedy, J., dissenting).

<sup>168</sup> NATIONAL ACADEMY REPORT, *supra* note 84, at 135.

<sup>169</sup> *Id.* at 45.

<sup>170</sup> *See id.* at 122.

<sup>171</sup> *Id.*

<sup>172</sup> *See id.* at 123.

<sup>173</sup> *See id.* at 121-23.

<sup>174</sup> *Id.* at 185-86.

<sup>175</sup> *Id.*

<sup>176</sup> *See* Justin Lazenby, *Video-Testimony Equipment Helping Forensic Scientists in Court and the Lab*, OR. ST. POLICE (Feb. 14, 2009), <http://www.oregon.gov/OSP/NEWSRLL/news/>

backlog of cases requiring chemical analysis,<sup>177</sup> and forensic laboratories that utilize two-way videoconferencing have noticed improvements in their ability to provide valuable scientific analysis to the criminal justice system.<sup>178</sup> These forensic laboratories operate under greater efficiency, asserting, "Time not spent on the road means time spent in the lab doing crucial analytical work needed for other investigations."<sup>179</sup>

For example, in one drunk-driving trial, a forensic science office was able to save approximately forty-six hours of analyst bench time, in addition to avoiding the costs associated with travel.<sup>180</sup> Analysts are able to walk down the hall from their laboratory, spend some time testifying over videoconferencing, and then promptly return to their work in the laboratory without spending hours on transportation.<sup>181</sup> In fact, using videoconferencing systems, analysts are able to efficiently schedule several testimonies with different courts all on the same day,<sup>182</sup> illustrating that videoconferencing facilitates a vast improvement in efficiency and greatly increases work production.

One prosecutor noted that with the usage of adequate audio and visual technology, testimony given over a videoconferencing system seems virtually equivalent to a person being physically present at trial.<sup>183</sup> Even a judge stated that videoconferencing does not adversely affect witness testimony, encouraging both prosecutors and defense attorneys alike to agree to its implementation.<sup>184</sup>

Although implementing the videoconferencing system poses technological issues, these matters can be addressed by carefully scrutinizing the video quality and reliability of the equipment being used. Courtrooms have taken advantage of technological advancements to improve court proceedings, and are increasingly considered "high-tech."<sup>185</sup> Courts must strive to resolve disputes as quickly as possible, and, for the sake of efficiency, they must do so using minimal human and financial resources.<sup>186</sup> The legal community has generally accepted and approved of the use of technology for the purpose of trial efficiency,<sup>187</sup> but courts must consider the quality of the videoconferencing tech-

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02\_14\_2008\_lab\_video\_testimony.shtml; *In Michigan, Forensics Experts Testify Using Polycom Telepresence*, POLYCOM (Mar. 16, 2009), [http://www.polycom.com/global/documents/company/customer\\_success\\_stories/government/cs\\_michigan\\_state\\_police.pdf](http://www.polycom.com/global/documents/company/customer_success_stories/government/cs_michigan_state_police.pdf) [hereinafter POLYCOM]; Ron Wood, *Washington County Circuit Court: Crime Lab Link Used More*, NWA ONLINE (Nov. 9, 2009), <http://www.nwaonline.com/news/2009/nov/09/washington-county-circuit-court-crime-lab-link-use/>.

<sup>177</sup> Waters, *supra* note 8.

<sup>178</sup> See Lazenby, *supra* note 176.

<sup>179</sup> *Id.*

<sup>180</sup> See POLYCOM, *supra* note 176.

<sup>181</sup> See Wood, *supra* note 176.

<sup>182</sup> Waters, *supra* note 8.

<sup>183</sup> See POLYCOM, *supra* note 176.

<sup>184</sup> Wood, *supra* note 176.

<sup>185</sup> Fredric I. Lederer, *Technology-Augmented Courtrooms: Progress Amid a Few Complications, or the Problematic Interrelationship Between Court and Counsel*, 60 N.Y.U. ANN. SURV. AM. L. 675, 675 (2005).

<sup>186</sup> *Id.* at 681.

<sup>187</sup> *Id.* at 676.

nology and set standards for its use.<sup>188</sup> The judge, jury, defense, and prosecution must be able to clearly observe the live cross-examination of the analyst for both audio and visual purposes. As the gatekeepers to evidence, judges should determine whether the videoconferencing technology utilized in a courtroom is adequate, because inadequate equipment might violate the defendant's right to confrontation. If the analysts' testimony is not observable in a clear manner, the court should render the testimony inadmissible, and the use of live two-way videoconferencing would be nullified.

Implementing new technology also poses financial issues due to the costs of the technology. The use of two-way videoconferencing technology requires the purchase of cameras, computers, monitors, carts, installation, training, and shipping.<sup>189</sup> In 2008, the cost for a technologically adequate unit cost approximately \$11,000 per unit.<sup>190</sup> However, the money saved from not requiring analysts to testify in court when they could be working in laboratories offsets the costs of implementing the technology.<sup>191</sup> Using videoconferencing technology has resulted in overall savings of about \$1,100 per testimony,<sup>192</sup> and some states have funded the purchase of the technology through specific grants.<sup>193</sup> Given the time saved and the increased efficiency of analysts' work product, the results of implementing two-way conferencing outweigh the costs of implementing the technology.

*D. The Use of Two-Way Live Video for Analysts' Testimony Satisfies the Confrontation Clause*

The use of two-way live video for analyst testimony pertaining to chemical analysis upholds the Confrontation Clause under both the *Crawford* and the *Craig* tests.<sup>194</sup> It also provides a more thorough treatment for non-physical testimony than hearsay exceptions, and either the *Crawford* or *Craig* tests.<sup>195</sup> In fact, the brief of amici law professors in *Melendez-Diaz* endorses the use of video technology for analyst testimony.<sup>196</sup> Furthermore, many states already have had great success with the usage of two-way videoconferencing for testifying in court.<sup>197</sup> The use of two-way video for analysts' testimony regarding chemical analysis is appropriate and reliable for confirming laboratory reports on chemical analysis.

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<sup>188</sup> Cf. *United States v. Yates*, 438 F.3d 1307, 1323 (11th Cir. 2006) (Tjoflat, J., dissenting) (pointing out that courts must consider the adequacy of the technology).

<sup>189</sup> See Lazenby, *supra* note 176.

<sup>190</sup> *Id.*

<sup>191</sup> See *infra* notes 224-26.

<sup>192</sup> Waters, *supra* note 8.

<sup>193</sup> See Lazenby, *supra* note 176; Wood, *supra* note 176.

<sup>194</sup> See Olson, *supra* note 27, at 1689.

<sup>195</sup> See *id.*

<sup>196</sup> See Brief of Law Professors as Amici Curiae in Support of Petitioner, *supra* note 143, at 16-17.

<sup>197</sup> See Lazenby, *supra* note 176; POLYCOM, *supra* note 176; Wood, *supra* note 176.

*1. Two-Way Live Video Testimony Not Only Satisfies the Crawford Test, but Is More Comprehensive*

The *Crawford* test for testimonial statements does not allow a defendant to cross-examine an adverse witness in the presence of a judge or jury contemporaneously at trial because *Crawford* only requires: (1) that a witness is unavailable, and (2) the defendant had a prior opportunity to cross-examine the witness.<sup>198</sup> The keyword is “prior”—whereas *Crawford* allows for *prior* testimony to be introduced in court, two-way videoconferencing enables live testimony. By utilizing two-way videoconferencing, a defendant can cross-examine a lab analyst while being observed by a jury during the defendant’s actual trial. Two-way videoconferencing allows full observation from the judge and jury, and ensures the defense can cross-examine an analyst before a trier of fact.<sup>199</sup> The Supreme Court maintains that an accused “should never lose the benefit of any of these safeguards,”<sup>200</sup> and two-way videoconferencing protects the Sixth Amendment rights of defendants at trial.

Moreover, two-way videoconferencing fulfills the standards set forth by *Crawford*. The *Crawford* test evaluates the use of former testimony from an unavailable witness given prior to trial by inquiring whether the defense had a prior opportunity to cross-examine the witness.<sup>201</sup> In *Crawford*, the Court was fundamentally concerned with the defendant’s right to cross-examine the witness, stating, “Nothing can be more essential than the cross examining [of] witnesses, and generally before the triers of fact in question . . . . [w]ritten evidence . . . [is] almost useless . . . .”<sup>202</sup> The Court held that any evidence that is “testimonial” in nature must survive the scrutiny of the Confrontation Clause.<sup>203</sup> In light of the *Crawford* holding, the *Melendez-Diaz* court decided that the problem with forensic lab reports is that when an analyst signs the report as an affidavit, the report is clearly testimonial in nature.<sup>204</sup> Justice Scalia explained that by stating a tested substance is cocaine and setting forth its weight, the analysts’ affidavits are “the precise testimony the analysts would be expected to provide if called at trial.”<sup>205</sup> In turn, the lab certificates are functionally identical to live, in-court testimony doing “precisely what a witness does on direct examination.”<sup>206</sup>

Two-way videoconferencing upholds the safeguards that the Supreme Court has established because it allows both contemporaneous testimony and cross-examination, where the defendant can immediately confront the lab analyst. Furthermore, using two-way video conferencing, the analyst’s statements are heard in court instantaneously.<sup>207</sup> Although the analyst is not physically in

<sup>198</sup> *Crawford v. Washington*, 541 U.S. 36, 68 (2004).

<sup>199</sup> See Harmon, *supra* note 106, at 161.

<sup>200</sup> *Mattox v. United States*, 156 U.S. 237, 243 (1895).

<sup>201</sup> See *Crawford*, 541 U.S. at 39-40. The wife’s testimony given prior to trial was not permitted for use at trial because the wife was unavailable for cross-examination.

<sup>202</sup> *Id.* at 49 (citation omitted).

<sup>203</sup> *Id.* at 68.

<sup>204</sup> *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2427, 2532 (2009).

<sup>205</sup> *Id.*

<sup>206</sup> *Id.* (quoting *Davis v. Washington*, 547 U.S. 813, 830 (2006)).

<sup>207</sup> See *United States v. Yates*, 438 F.3d 1307, 1310 (11th Cir. 2006).

court, those in the courtroom can observe the live cross-examination to consider the analyst's credibility.<sup>208</sup>

In *Crawford*, the Court essentially contemplated that some out-of-court statements become admissible *if* the witness is unavailable.<sup>209</sup> It is arguable that due to the high demand and low supply of analysts in laboratories, in many instances, these analysts are in fact *unavailable*. There are simply not enough analysts to testify in numerous hearings while continuing to perform analysis in laboratories. Two-way video testimony enables analysts to spend more time in a laboratory performing analysis, rather than commuting to court. Also, analysts would be able to continue performing their duties in a laboratory until they are actually called to give live testimony, rather than waiting at a courthouse to be called into court. Under the *Crawford* test, if former testimony that has undergone cross-examination satisfies the Confrontation Clause, then two-way video testimony that allows a defendant to actually cross-examine a lab analyst "in court" via live videoconferencing should be permitted.

## 2. *The Relevancy of the Craig Test*

Although *Craig* was decided prior to *Crawford* and the confrontation issues were addressed under the now defunct "reliability" test,<sup>210</sup> the reasoning in *Craig* is still pertinent because, in *Craig*, the child witnesses were effectively unavailable to testify in court. Laboratory analysts are similarly unavailable to testify in court, and two-way video testimony is much more comprehensive than the one-way video testimony permitted by *Craig*. Even when both *Craig* and *Crawford* are considered, two-way video testimony satisfies Confrontation Clause requirements.

The *Craig* test addresses one-way video testimony, requiring its usage to be necessary to further an important policy, and for the testimony to be sufficiently reliable.<sup>211</sup> Allowing two-way video testimony is necessary to further several important policies. Two-way video testimony ensures a speedy trial,<sup>212</sup> while allowing prosecutors to build their cases adequately. Requiring analysts to testify at every trial that utilizes a laboratory report causes significant delays,<sup>213</sup> and if a defendant is not afforded his right to a speedy trial, charges against the defendant might be dismissed without prejudice.<sup>214</sup> Two-way video testimony also enables prosecutors to uphold the success of the criminal justice system without encountering great budgetary restrictions and time constraints. Finally, two-way video testimony is reliable because unlike one-way video testimony, where the defendant can see and hear the witness but the witness can-

<sup>208</sup> *Id.*

<sup>209</sup> *Crawford v. Washington*, 541 U.S. 36, 59 (2004).

<sup>210</sup> *Maryland v. Craig*, 497 U.S. 836, 845 (1990).

<sup>211</sup> *See id.* at 850.

<sup>212</sup> *See Jackman, supra* note 68. The right to a speedy trial is addressed as a problem for the prosecution when lab analysts are not immediately available to testify.

<sup>213</sup> *See Attorneys Ass'n Amici Brief, supra* note 1, at 15-16 (describing three ways in which the right to a speedy trial may be delayed: (1) delays due to court scheduling, which may result in hours and days of wait time for analysts to testify; (2) delays due to the laboratory analysts' workload within the laboratories to issue certificates, and (3) delays due to the volume of drug cases that would require analysts to appear in multiple courts in many cities).

<sup>214</sup> *Id.* at 17.

not see or hear the defendant,<sup>215</sup> two-way video testimony allows full confrontational access between the witness and the defendant.<sup>216</sup>

The Court in *Melendez-Diaz* stressed the importance of confrontation to “weed out not only the fraudulent analyst, but the incompetent one as well,”<sup>217</sup> but two-way video conferencing allows for “in-court” testimony that still provides face-to-face adversarial questioning, albeit in two-dimensional form.<sup>218</sup> As the Court suggested in *Craig*, witnesses are less likely to lie when confronted in the courtroom.<sup>219</sup> Yet, because the Court found that one-way videoconferencing provided adequate testimony even in the absence of actual in-person confrontation,<sup>220</sup> two-way videoconferencing is even more thorough because it allows for cross-examination and two-way interaction. In *Melendez-Diaz*, the Court asserted its expectation for an analyst who has produced false results to reconsider his testimony when in view of the defendant.<sup>221</sup> While two-way video testimony is a remote interaction, the method nevertheless allows an analyst to view a defendant and to succumb to the pressure of testifying truthfully under oath.

### 3. *The Brief of Law Professors as Amici Curiae In Support of Petitioner Establishes that Video Technology Satisfies the Confrontation Clause*

In *Melendez-Diaz*, the Court considered the opinions of a group of amici law professors who provided input on the confrontation issues involved in the case.<sup>222</sup> In their brief to the Court, the professors supported requiring analyst testimony under the Confrontation Clause.<sup>223</sup> However, they also suggested that prosecutors may use video technology as a means for providing analyst testimony, in order to lessen the prosecutors’ burden.<sup>224</sup> The brief noted that the use of one-way closed circuit television “[s]howcas[es] a witness’s tone of voice, facial expressions, and general demeanor. . . . [and u]nlike transcripts, the video image captures body language, eye contact, and affect—factors that juries evaluate when considering the reliability of testimony.”<sup>225</sup> In turn, the amici law professors believe that the use of video technology would provide all the crucial information the framers of the Constitution valued when they created the Confrontation Clause, and that its usage is a suitable replacement for in-court testimony.<sup>226</sup>

<sup>215</sup> *Craig*, 497 U.S. at 841-42.

<sup>216</sup> See Harmon, *supra* note 106, at 161.

<sup>217</sup> *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2537 (2009).

<sup>218</sup> See Harmon, *supra* note 106, at 157-58.

<sup>219</sup> *Craig*, 497 U.S. at 845-46 (“It is always more difficult to tell a lie about a person ‘to his face’ than ‘behind his back.’”) (citations omitted).

<sup>220</sup> *Id.* at 856-57.

<sup>221</sup> *Melendez-Diaz*, 129 S. Ct. at 2537.

<sup>222</sup> See Brief of Law Professors as Amici Curiae in Support of Petitioner, *supra* note 143, at 1.

<sup>223</sup> *Id.* at 5.

<sup>224</sup> *Id.* at 16-17.

<sup>225</sup> *Id.* at 17.

<sup>226</sup> *Id.*

## IV. CONCLUSION

The Court's decision in *Melendez-Diaz* has further defined a defendant's right to confrontation at trial. Regardless whether prosecutors agree with the Court's ruling, they must move forward in a manner that best sustains their endeavors while complying with the Court's decision. Although physical confrontation before a trier of fact is ideal, courts have consistently made exceptions to this requirement, and another exception should be made for analysts' testimony. Doing so would alleviate the overwhelming burden on the prosecution of logistically and financially providing analyst testimony in court. Applying the Confrontation Clause in an overly restrictive manner strongly inhibits, if not destroys, the state's ability to pursue many cases involving chemical analysis. Although prosecutorial efficiency is not above the constitutional rights of our criminal justice system, courts should consider the legitimate goals and realistic capabilities of law enforcement and not allow guilty defendants to circumvent the law due to the prosecution's restricted resources.

The use of live two-way videoconferencing allows prosecutors to fulfill the goal of maintaining effective prosecutions of criminal cases without violating rights afforded to defendants by the Constitution. The Court's requirement of live analyst testimony imposes a greater burden upon the prosecution and its available resources, but technological advancements serve to mitigate the problem. In turn, prosecutors should be permitted to take advantage of such technologies in order to maintain an effective criminal justice system.

Employing two-way live videoconferencing for analyst testimony regarding chemical analysis meets the demands of the Confrontation Clause, as set forth by the Court in *Melendez-Diaz*. Indeed, the use of two-way live videoconferencing better fulfills the Confrontation Clause than the *Crawford* and *Craig* tests. Moreover, using videoconferencing technology, laboratory analysts are able to appear in court to testify without spending many hours—hours that could be spent working in laboratories on cases—traveling to court. Finally, the use of live two-way videoconferencing is interactive and effective; analysts are still able to provide testimony under oath and the defense counsel can cross-examine an analyst in the presence of a jury. Live two-way videoconferencing fulfills all the elements the Supreme Court has established for meeting the requirements of the Confrontation Clause. Allowing analysts to impart testimony via live two-way videoconferencing will effectively reconcile the ruling in *Melendez-Diaz* with the prosecutors' dilemma.