TOURO LAW
Touro College Jacob D. Fuchsberg Law Center

Touro Law Review

Volume 26
Number 3 *Annual New York State Constitutional Issue*

Article 25

July 2012

# Court of Appeals of New York - People v. Brown

Madeline Zuckerman

# COURT OF APPEALS OF NEW YORK

People v. Brown[1]
(decided November 19, 2009)

Michael Brown was convicted in the Queens County Supreme Court of two counts of first-degree sodomy,[2] two counts of second-degree assault,[3] and endangering the welfare of a child.[4] On appeal, the Appellate Division, Second Department, affirmed the conviction.[5] Defendant Brown appealed to the New York Court of Appeals, claiming that the introduction of a DNA report without testimony from the analyst who initiated the test violated his right to confrontation as guaranteed by the United States Constitution[6] and the New York Constitution.[7] The New York Court of Appeals affirmed, holding that the forensic biologist alone, who conducted the DNA analy-

---

[1] 918 N.E.2d 927 (N.Y. 2009).

[2] N.Y. PENAL LAW § 130.50 (McKinney 2009) states, in pertinent part:

> A person is guilty of criminal sexual act in the first degree when he or she engages in oral sexual conduct or anal sexual conduct with another person: (1) By forcible compulsion; or (2) Who is incapable of consent by reason of being physically helpless; or (3) Who is less than eleven years old; or (4) Who is less than thirteen years old and the actor is eighteen years old or more.

[3] N.Y. PENAL LAW § 120.05 (McKinney 2009) states, in pertinent part: "A person is guilty of assault in the second degree when: (1) With intent to cause serious physical injury to another person, he causes such injury to such person or to a third person."

[4] N.Y. PENAL LAW § 260.10 (McKinney 2008) states, in pertinent part:

> A person is guilty of endangering the welfare of a child when (1) He knowingly acts in a manner likely to be injurious to the physical, mental or moral welfare of a child less than seventeen years old or directs or authorizes such child to engage in an occupation involving a substantial risk of danger to his life or health.

*Brown*, 918 N.E.2d at 930.

[5] People v. Brown, 856 N.Y.S.2d 672, 673 (App. Div. 2d Dep't 2008).

[6] U.S. CONST. amend. VI states, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witness against him."

[7] N.Y. CONST. art. I, § 6 states, in pertinent part: "In any trial in any court whatever the party accused shall be allowed to . . . be confronted with the witnesses against him or her."; *Brown*, 918 N.E.2d at 930.

sis, was sufficient to satisfy the defendant's right to confront.[8]

On August 6, 1993, defendant Michael J. Brown followed a nine-year-old female into an apartment building in Queens, New York.[9] With her mouth covered, the nine-year-old was led to the roof of the building, where Brown began threatening her.[10] In an attempt to sexually assault the adolescent, Brown burned a hair clip into the victim's arm and then struck her alongside the head due to her resistance to his advances.[11] Consequently, the nine-year-old was knocked unconscious and later woke up naked, except for a t-shirt covered in blood.[12] She also appeared to have been kicked in the face.[13]

After running to her friend's apartment, the victim was transported to a local hospital, where she was interviewed by the police.[14] She was unable to give a detailed description of her attacker, except that "he was an African-American male in his mid-thirties."[15] A rape kit was prepared by the hospital, which was subsequently delivered to the Office of the Chief Medical Examiner ("OCME").[16] However, the OCME was suffering from a substantial backlog and thus could not immediately process the rape kit.[17]

On August 2, 2002, approximately nine years following the attack, the victim's rape kit was sent to Bode Technology ("Bode"), a subcontracting laboratory of the OCME, for testing.[18] Six months later, the DNA found in the victim's rape kit was matched with the characteristics of Brown's DNA.[19] After the link was made between the defendant and the victim's attacker, an OCME forensic biologist

---

[8] *Brown*, 918 N.E.2d at 931-33.

[9] *Id.* at 928.

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *Brown*, 918 N.E.2d at 928. The nine-year-old had a "footprint on her face." *Id.*

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *Brown*, 918 N.E.2d at 928.

[18] *Id.* at 928-29. OCME was able to send the victim's rape kit, as well as hundreds of others, to its subcontractors after it received additional financial support to remedy the backlog. *Id.*

[19] *Id.* at 929. "[The] defendant's DNA specimen had been recorded in . . . [a] national database" for an incident that took place in Maryland, which was unrelated to the sexual assault at issue. *Id.*

conducted a more precise examination of the two DNA specimens.[20] The OCME forensic biologist confirmed the initial finding, concluding that "the profiles [of defendant Brown and the rape kit specimen] were a match occurring in one out of one trillion males."[21]

Brown was charged with two counts of sodomy in the first degree, kidnapping in the second degree, three counts of assault in the second degree, and endangering the welfare of a child.[22] At trial, the prosecution called the OCME forensic biologist as a witness, who testified about her analysis of defendant Brown's DNA.[23] The witness also described her position at OCME, the process by which she analyzed the defendant's DNA, the procedures and standards implemented by both OCME and Bode, and her extensive background in performing this type of test.[24]

The prosecution tried to introduce into evidence a DNA report generated by Bode, claiming that it was admissible as a business record.[25] The defense counsel objected to its admissibility on grounds that it would violate the defendant's Sixth Amendment right to confrontation, given that "any documents generated by Bode were 'testimonial evidence.' "[26] Furthermore, the OCME forensic biologist was "not familiar with Bode's quality assurance and how this particular test was performed."[27]

In response, the prosecution claimed that the report contained "merely raw data and was not testimonial, and that the witness herself had performed the analysis in comparing the defendant's profile with the profile of the DNA found in the rape kit."[28] After the OCME forensic biologist testified in support of the prosecution's contention that the report did not contain any of Bode's conclusions, and only "her own scientific conclusions from analyzing the data and defen-

---

[20] *Brown*, 918 N.E.2d at 929.

[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] *Brown*, 918 N.E.2d at 929.

[26] *Id.*

[27] *Id.*

[28] *Id.* at 929-30. The prosecution relied on People v. Cratsley, 653 N.E.2d 1162 (N.Y. 1995) and People v. Kennedy, 503 N.E.2d 501 (N.Y. 1986), which indicated that "a business record can be introduced by a person who is not a custodian of records, provided that the other criteria for the business record exception are established." *Id.* at 930.

dant's DNA profile," the report was admitted into evidence.[29]

Defendant Brown was later convicted of two counts of first-degree sodomy, two counts of second-degree assault, and endangering the welfare of a child.[30] The conviction was affirmed by the appellate division.[31] On appeal, Brown claimed that (1) his "Sixth Amendment right to confrontation was violated by the introduction of a DNA report processed by a subcontractor laboratory to the [OCME]," (2) "the results of the Bode procedures could have been tainted by a pro-law-enforcement bias to inculpate [the] defendant," (3) "the OCME witness's testimony [did not] provide a sufficient foundation for introducing the Bode documents under . . . [the] business records rule," and (4) "his right to effective assistance of counsel was violated when his attorney did not raise the statute of limitations claim again, after the victim provided a more ample description of her attacker during her trial testimony."[32] The New York Court of Appeals affirmed both the trial court's and appellate division's decisions.[33]

In making its determination, the New York Court of Appeals relied on *Crawford v. Washington*[34] and *Melendez-Diaz v. Massachusetts*.[35] In *Crawford*, the United States Supreme Court made a pivotal distinction between testimonial and non-testimonial statements under the Confrontation Clause.[36] Defendant Crawford had stabbed a man by the name of Kenneth Lee, who allegedly attempted to rape his wife.[37] At trial, the prosecution tried to introduce the recording of the wife's account[38] of the incident to the police "as evidence that the

---

[29] *Brown*, 918 N.E.2d at 930.

[30] *Id.*

[31] *Id.* The appellate division concluded that the "introduction of the DNA report did not violate defendant's Sixth Amendment confrontation right." *Id.* The appellate division heard Defendant Brown's case before Melendez-Diaz was decided by the Supreme Court. *Id.* at 930 n.3.

[32] *Brown*, 918 N.E.2d at 928, 932.

[33] *Id.* at 930.

[34] 541 U.S. 36 (2004).

[35] 129 S. Ct. 2527 (2009).

[36] *Crawford*, 541 U.S. at 68.

[37] *Id.* at 38.

[38] In the State of Washington, the marital privilege "does not extend to a spouse's out-of-court statements admissible under a hearsay exception." *Id.* at 40.

stabbing was not in self-defense."[39] The trial court admitted the recording, deeming it sufficiently trustworthy, and the Washington Supreme Court agreed.[40] The United States Supreme Court reversed, finding that the introduction of the recording violated the defendant's Sixth Amendment right to confrontation.[41]

The Court maintained that when non-testimonial statements are at issue, the states are given flexibility to develop their hearsay laws as they chose.[42] However, when testimonial statements are at issue, the Sixth Amendment demands that such evidence be admissible "only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine."[43] In its decision, the Court noted that the term " 'testimonial' . . . . at a minimum [encompasses] prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations,"[44] but failed to indicate whether laboratory reports constituted "testimonial" evidence.[45]

Five years later, the Supreme Court bridged the gap by answering that question in *Melendez-Diaz*.[46] Defendant "Melendez-Diaz was charged with distributing and . . . trafficking . . . cocaine."[47] At trial, the prosecution sought to introduce "three 'certificates of analysis' showing the results of the forensic analysis performed" on the bags containing the cocaine-like substance, which were seized when the defendant was arrested.[48] The certificates indicated the weight of the bags and the analyst's conclusion that the substance was in fact cocaine.[49] The trial court admitted the certificates, pursuant to state law, reasoning that they were " 'prima facie evidence of the composition, quality, and the net weight of the narcotic . . . analyzed.' "[50] The

---

[39] *Id.*

[40] *Id.* at 40, 41.

[41] *Crawford*, 541 U.S. at 68.

[42] *Id.*

[43] *Id.* at 59.

[44] *Id.* at 68.

[45] In fact, Justice Scalia acknowledged in his opinion that it was to be left "for another day any effort to spell out a comprehensive definition of 'testimonial.' " *Id.* at 68.

[46] *See Melendez-Diaz*, 129 S. Ct. 2527.

[47] *Id.* at 2530.

[48] *Id.* at 2531.

[49] *Id.*

[50] *Id.* (quoting MASS. GEN. LAWS ANN. ch. 111, § 13 (2010)).

defendant appealed his conviction, but the Appeals Court of Massachusetts agreed with the lower court's admission of the certificates.[51] On certiorari, the United States Supreme Court reversed, reasoning that the admission of the certificates, without witness testimony of the analyst, violated the defendant's Sixth Amendment right to confrontation.[52]

Although *Crawford* had not explicitly included the documents at issue as part of the " 'core class of testimonial statements,' " the Court in *Melendez-Diaz* had "little doubt" that laboratory reports would fall within such category.[53] The Court stated that "[t]he 'certificates' [were] functionally identical to live, in-court testimony, doing 'precisely what a witness does on direct examination.' "[54] Furthermore, the certificates were " 'made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.' "[55] Thus, the Court held that laboratory reports are considered "testimonial statements," and as such, "[a]bsent a showing that the analysts were unavailable to testify at trial *and* that petitioner had a prior opportunity to cross-examine them, petitioner was entitled to 'be confronted with' the analysts at trial."[56]

After its analysis of the federal law, the Court of Appeals of New York in *Brown* then turned to *People v. Meekins* and its companion case, *People v. Rawlins*.[57] In *Meekins*, the defendant was con-

---

[51] *Melendez-Diaz*, 129 S. Ct. at 2531.

[52] *Id.* at 2542 (reasoning that affidavits were mentioned twice by *Crawford* as being testimonial and "law 'certificates' are quite plainly affidavits: 'declaration[s] of facts written down and sworn to by the declarant before an officer authorized to administer oaths' " (quoting BLACK'S LAW DICTIONARY 62 (8th ed. 2004))).

[53] *Id.* at 2532. *Melendez-Diaz* was recently challenged in Briscoe v. Virginia. *See Briscoe*, No. 07-11191, 2010 WL 246152 (U.S. Jan. 25, 2010). Pursuant to statute, defendant waived his right to cross-examination of a laboratory expert during the prosecution's case-in-chief due to his failure to notify the State of his desire to conduct such cross examination. Magruder v. Commonwealth, 657 S.E.2d 113, 115 (V.A. 2008). The Supreme Court remanded the case, which directions to render a decision not inconsistent with *Melendez-Diaz*. *Briscoe*, 2010 WL 246152, at *1.

[54] *Melendez-Diaz*, 129 S. Ct. at 2532 (quoting Davis v. Washington, 547 U.S. 813, 830 (2006)).

[55] *Id.* (quoting *Crawford*, 541 U.S. at 52). The Court explained that the analysts must have been aware that the certificates would be used at a later trial since their evidentiary purpose was clearly printed on the certificates themselves. *Id.*

[56] *Id.* at 2532 (citing *Crawford*, 541 U.S. at 53-54).

[57] 884 N.E.2d 1019 (N.Y. 2008). It is important to note that both of these cases were de-

victed of first-degree sodomy, first-degree sexual abuse, and third-degree robbery.[58] At trial, the prosecution introduced a DNA report, prepared by a private laboratory from the alleged victim's rape kit.[59] In that case, two experts testified, neither of whom performed the actual analysis.[60] Each testified to the general procedures used to test the DNA sample and their opinions based on the results.[61] The New York Court of Appeals held that the report was not "testimonial" since "[t]he graphical DNA test results, standing alone, shed no light on the guilt of the accused in the absence of an expert's opinion that the results genetically match[ed] a known sample," and the experts that testified played such role.[62]

In *Rawlins*, however, a fingerprint comparison report prepared by police was considered "testimonial."[63] In that case, fingerprints were lifted from the scene of six burglarized Manhattan commercial establishments and reports comparing those fingerprints with those of the defendant were introduced at trial.[64] The reports were prepared by two officers, but only one testified at trial.[65] The defendant was convicted of six counts of third-degree burglary, and the appellate division affirmed the conviction.[66] The New York Court of Appeals held that the fingerprint reports "were clearly testimonial because . . . [the officers] prepared [the] reports for prosecutorial purposes and, most importantly, because they were accusatory and offered to establish [the] defendant's identity."[67]

Since then, New York has provided further clarification as to what constitutes a "testimonial statement" under *Crawford*. The court in *Brown* relied upon *People v. Freycinet*, in which the defendant was "indicted for murder, manslaughter, and other crimes"

---

cided before *Melendez-Diaz*.

[58] *Id.* at 1024.

[59] *Id.*

[60] *Id.*

[61] *Id.* at 1024-25.

[62] *Rawlins*, 884 N.E.2d at 1035.

[63] *Id.* at 1033.

[64] *Id.* at 1022-23.

[65] *Id.* at 1023.

[66] *Id.* at 1022, 1024.

[67] *Rawlins*, 884 N.E.2d at 1033. However, the Court concluded that the admission of the reports, without testimony from one of the officers, "was harmless beyond a reasonable doubt," and thus affirmed the appellate division's decision. *Id.*

against his girlfriend.[68] At trial, a report regarding the autopsy conducted on the victim was introduced, with the "opinions as to the cause and manner of the victim's death" removed from it.[69] A different doctor from the same office testified as an expert a trial, "giving opinions based on the facts in . . . [the] report," and made the conclusion that the victim died of bleeding from the wound where she was stabbed and that the stabber was likely right-handed.[70] The defendant was convicted of manslaughter in the second-degree.[71] The appellate division affirmed, and on appeal, the New York Court of Appeals affirmed as well.[72]

At the time of this decision, *Melendez-Diaz* had not yet been decided by the United States Supreme Court, thus the New York Court of Appeals sought to shed some light on the definition of "testimonial statements" in the context of laboratory reports.[73] The court set forth some factors to determine the

> "indicia of testimonially" [which include] .... [(1)] the extent to which the entity conducting the procedure is "an 'arm' of law enforcement" . . . [(2)] whether the contents of the report are contemporaneous record of objective facts, or reflect the exercise of "fallible human judgment" . . . [(3)] whether a pro-law-enforcement bias is likely to influence the contents of the report . . . and [(4)] whether the report's contents are "directly accusatory" in the sense that they explicitly link the defendant to the crime.[74]

The current state of the federal law with respect to the Confrontation Clause is similar to that of New York. The United States Constitution guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witness

---

[68] *Freycinet*, 892 N.E.2d 843, 844 (N.Y. 2008).

[69] *Id.*

[70] *Id.* at 845.

[71] *Id.*

[72] *Id.*

[73] *See Freycinet*, 892 N.E.2d at 845 ("The Supreme Court has not defined 'testimony' in this context.").

[74] *Id.* at 845-46 (internal citations omitted).

against him."[75] As established in *Crawford*, when non-testimonial statements are at issue, the states are given flexibility to establish their hearsay laws as they chose.[76] However, when testimonial statements are at issue, the Sixth Amendment demands that such evidence be admissible "only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine."[77] Testimonial statements include "*ex parte* in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially."[78] Additionally, laboratory reports fall under the category of "testimonial statements" because they are " 'made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.' "[79]

The New York Constitution, states, in pertinent part, that "[i]n any trial in any court whatever the party accused shall be allowed to . . . be confronted with the witnesses against him or her."[80] In addition to the *Crawford* and *Melendez-Diaz* decisions, New York has further refined the law with respect to the Confrontation Clause with the addition of *Brown*. Under *Brown*, only one analyst must be called by the prosecution in order to satisfy the Constitution.[81] As long as the analyst who "conducted the actual analysis at issue" testifies at trial, the obligations of the Confrontation Clause will be met.[82]

Although New York jurisprudence has provided greater clarity as to how the Confrontation Clause must be satisfied, it is also very biased. By requiring the prosecution to call only one analyst to the stand, New York has set out a standard that greatly favors the prosecution. The New York Court of Appeals has made the burden on the prosecution to satisfy the Confrontation Clause much easier than the federal standard by requiring only the "analysis making" analyst be

---

[75] U.S. CONST. amend VI.
[76] *Crawford*, 541 U.S. at 68.
[77] *Id.* at 59.
[78] *Id.* at 51.
[79] *Melendez-Diaz*, 129 S. Ct. at 2532 (quoting *Crawford*, 541 U.S. at 52).
[80] N.Y. CONST. art. I, § 6.
[81] *Brown*, 918 N.E.2d at 932.
[82] *Id.* at 931.

called to the stand, rather than multiple analysts in the chain of custody of the report.

Granted, *Melendez-Diaz* does not require the burdensome task of calling *every* analyst in the chain of custody to testify about a particular report.[83] As stated by the Supreme Court, "it is not the case . . . that anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device, must appear in person as part of the prosecution's case."[84] Nor does *Melendez-Diaz* give any greater clarification than New York.

The New York Court of Appeals does not give any rationale as to why the analyst who draws inferences about the report is best suited to satisfy the Confrontation Clause. This easier burden for the prosecution unfairly disadvantages the defendant. Incorrectly analyzing, mishandling and contamination of evidence are common problems in the criminal justice field.

For instance, a problem that dates back to 1978 is the "wide range of proficiency levels among the nation's laboratories."[85] In a report sponsored by the Law Enforcement Assistance Administration ("LEAA report"), two hundred crime laboratories were examined regarding various analyses they conduct on a regular basis.[86] Unacceptable proficiency was found most often attributed to: "a) [m]isinterpretation of the test results by the examiner resulting from carelessness or lack of experience; b) [f]ailure to employ adequate methodology, or failure to employ appropriate methodology; c) [m]islabelled or contaminated primary standards; [and] d) [i]nadequate data bases or standard spectra."[87]

Although greater regulations have been passed since the LEAA report,[88] problems remain amongst laboratories nationwide.

---

[83] *See Melendez-Diaz*, 129 S. Ct. at 2532 n.1.

[84] *Id.* at 2532 n.1.

[85] JOSEPH L. PETERSON, ET AL., CRIME LABORATORY PROFICIENCY TESTING RESEARCH PROGRAM 3 (1978).

[86] *Id.* at 1-2. The samples that were distributed included "controlled substances, blood, plaint, glass, hair, fibers, firearms, physiological fluids (semen, saliva), questioned documents, wood, arson accelerants, soils and metals." *Id.*

[87] *Id.* at 258 (emphasis removed from original).

[88] *See, e.g.*, 43 U.S.C.A. § 14131(a), (c) (2000) (establishing a federal proficiency testing program for DNA analysis); N.Y. EXEC. LAW § 995-b (McKinney 2009) (requiring "accreditation for all forensic laboratories in New York state").

In 2009, the National Academy of Sciences authored a report on forensic science entitled *Strengthening Forensic Science in the United States: A Path Forward* ("NAS Report").[89] The NAS Report detailed the strengths and weaknesses of forensic science and how to improve upon such weaknesses.[90] It attributed many of the problems that exist among forensic laboratories to being "underresourced and understaffed."[91] Forensic analysts are limited in their ability to produce the most accurate results because of debilitating backlogs, inadequate research funding, and large disparities in formal training and education of forensic scientists.[92] Acknowledging the importance of accurate and uniform proficiency in forensic analysis for the purpose of justice, the NAS Report warns that "the fragmented nature of the forensic science community raises worrisome prospect that the quality of evidence presented in court, and its interpretation, can vary unpredictably according to jurisdiction."[93]

Justice Scalia, in the majority opinion in *Melendez-Diaz*, elaborated on the existing problems amongst forensic laboratories and inconsistencies in test results. He noted that "[a] forensic analyst responding to a request from a law enforcement official may feel pressure—or have incentive—to alter the evidence in a manner favorable to the prosecution."[94]

These problems will only compound at trial when certain ana-

---

[89] NAT'L RESEARCH COUNCIL OF THE NAT'L ACADS., STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD (2009).

[90] *See id.*

[91] *Id.* at 77 ("Existing data suggest that forensic laboratories are under resourced and understaffed, which contributes to a backlog in cases and likely makes it difficult for laboratories to do as much as they could to inform investigations, provide strong evidence for prosecutions, and avoid errors that could lead to imperfect justice.").

[92] *Id.* at 77-78. The report particularly emphasizes that

> [t]he forensic science community . . . is hindered by its extreme disaggregation—marked by multiple types of practitioners with different levels of education and training and different professional cultures and standards for performance. Many forensic scientists are given scant opportunity for professional activities such as attending conferences or publishing their research, which could help strengthen the professional community.

*Id.* at 78.

[93] NAT'L RESEARCH COUNCIL OF THE NAT'L ACADS., *supra* note 89, at 78.

[94] *Melendez-Diaz*, 129 S. Ct. at 2536. Justice Scalia also extensively discussed the NAS Report in his opinion. *See id.* at 2536-38.

lysts will not be required to account for their part in analyzing an evidentiary sample. According to the *Brown* decision, it is constitutional that only the "conclusion making" analyst testify about the report and the analysts who handled and conducted examinations of the substances would be passed over for testimony. How is that fair to the defendant? An analyst who removes a powdery white substance from a bag and fails to properly clean the tools that were previously used to test cocaine is not required to testify under this theory. If two laboratory technicians conduct two separate analyses of two separate substances in the same room at the same time, both analysts are not required to testify that they kept their workspaces independent of the other's and free from contamination. In a chain of analysts who handle evidence, "[e]ach one has contributed to the test's result and has, at least in some respects, made a representation about the test. . . . [but] each [one also] has the power to introduce error."[95]

Furthermore, *Brown* may raise potential hearsay issues. When the analyst who makes the conclusions regarding the laboratory report testifies in court, does this mean that she is allowed to testify to out-of-court statements made by other analysts? Does this not fall under the definition of hearsay?[96] Additionally, if a junior laboratory technician makes a statement to his or her superior who compiles the final report, is that statement testimonial as well? By allowing one laboratory technician to testify for the entire testing department, that technician may be in a situation in which he or she is testifying to multiple out-of-court statements, made by many different laboratory technicians, which may be protected by the Confrontation Clause.

Arguably, *Brown* adequately addresses many social and economic costs that *Melendez-Diaz* left open. If courts required all ana-

---

[95] *Id.* at 2545 (Kennedy, J., dissenting). Justice Kennedy similarly stated that

> [a] laboratory technician might adulterate the sample. The independent contractor might botch the machine's calibration. And so forth. The reasons for these errors may range from animus against the particular suspect or all criminal suspects to unintentional oversight; from gross negligence to good-faith mistake.

*Id.* at 2545.

[96] " 'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." FED. R. EVID. 801(c).

lysts that ever touched laboratory analyzed evidence to testify, it would impose a tremendous fiscal burden on the criminal justice system. Trials are already very costly on the individual and society, with fees associated with attorneys, government employees, witnesses, jurors, laboratories, etc. To require the prosecution to call every analyst that ever handled a piece of evidence, whether he or she played a minor or major role in the analysis, could result in astronomical fees incurred by the State. As a result of our extremely litigious society, the judicial process already carries a heavy burden. Calling even more witnesses at trial could impose weeks, possibly months, worth of delays. The burden of trying to accommodate attorneys', judges', clients', clerks', witnesses', and stenographers' schedules is already difficult. Imagine trying to incorporate five more witnesses' schedules into a trial. The amount of time and money that may result could be astronomical and possibly harmful to the judicial system.

Fittingly, *Brown* seeks to answer the precise problem that the dissent in *Melendez-Diaz* foreshadowed. In *Melendez-Diaz*, Justice Kennedy addressed the potential money and time issues that could arise from the majority's decision when he gave the following example:

> Consider how many people play a role in a routine test for the presence of illegal drugs. One person prepares a sample of the drug, places it in a testing machine, and retrieves the machine's printout—often a graph showing the frequencies of radiation absorbed by the sample or the masses of the sample's molecular fragments. . . . A second person interprets the graph the machine prints out—perhaps by comparing that printout with published, standardized graphs of known drugs. . . . Meanwhile, a third person—perhaps an independent contractor—has calibrated the machine and, having done so, has certified that the machine is in good working order. Finally, a fourth person—perhaps the laboratory's director—certifies that his subordinates followed established procedures.[97]

[97] *Melendez-Diaz*, 129 S. Ct. at 2544 (Kennedy, J., dissenting).

The Federal Rules of Evidence expressly states that "evidence may be excluded . . . by considerations of undue delay [and] waste of time."[98] Arguably, if the prosecution is required to call every analyst that has handled or tested a single piece of evidence, it would directly contradict one of the reasons for which relevant evidence may be excluded, as set forth by the Federal Rules of Evidence.

Ultimately, the decision comes down to a cost-benefit analysis of how much time and money we are willing to spend versus how thorough we must be to ensure the defendant has sufficiently had the opportunity to confront the witness(es) against him or her. Nevertheless, New York has chosen the former by requiring the prosecution to call only one analyst, so long as it is the analyst who makes the actual inferences in a laboratory report.[99] While some may champion this decision as a fair and cost-effective way to administer a criminal defendant's Sixth Amendment right, in reality, this may be a quite costly decision. By conducting less thorough cross-examinations, more wrongful convictions may result. Moreover, the cost to imprison those wrongly convicted will be great and will fall squarely on the shoulders of the taxpayers of the State of New York. The New York Court of Appeals decision in *Brown* was logical, however, in the end it will prove to be a tremendous disservice to the criminal justice system and the "fair" trial we seek to provide the accused.

*Madeline Zuckerman*

[98] FED. R. EVID. R. 403.

[99] *Brown*, at 918 N.E.2d at 932.