Massachusetts Firearms Prosecutions in the Wake of Melendez-Diaz

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In *Melendez-Diaz v. Massachusetts*, the United States Supreme Court held that state prosecutors could not introduce certified certificates of chemical analysis to prove the weight and chemical makeup of a seized substance without live testimony from the analyst who performed the testing. While *Melendez-Diaz* addressed only the admissibility of chemical certificates in related drug prosecutions, the Supreme Court later extended the principle that the Confrontation Clause barred “trial by affidavit” could be extended to other contexts including prosecutions related to firearms. This article begins by examining the practice of trying firearms-related cases prior to *Melendez-Diaz*; it then discusses the drastic changes brought about by *Melendez-Diaz*; and it concludes by identifying five new issues that are likely to arise in prosecuting and defending firearms-related cases.

**I. Firearms Prosecutions in Massachusetts**

Massachusetts law proscribes a variety of firearms-related offenses, including: the unlawful possession of a firearm, unlawful possession of a loaded firearm, the improper storage of a firearm, and leaving a firearm in a vehicle. The term “firearm” is a term-of-art that is defined by statute as:

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2. *Id.* at 2532; *see also Commonwealth v. Melendez-Diaz*, 460 Mass. 238, 238-39 (2011).
4. G.L. c. 269, § 10(a).
5. G.L. c. 269, § 10(n).
6. G.L. c. 140, § 131L. The violations contained in Chapter 140 apply to persons who possess a valid license to carry firearms granted under the provisions of G.L. c. 140, § 131.
7. G.L. c. 140, § 131C.
a pistol, revolver or other weapon of any description, loaded or unloaded, from which a shot or bullet can be discharged and of which the length of the barrel or barrels is less than 16 inches or 18 inches in the case of a shotgun as originally manufactured...  

Therefore, in prosecutions involving firearm possession or storage, the government has to prove that the weapon was (a) within the specified dimensions, and (b) that it was operable at the time of the offense.  

A. The Ballistics Certificate

In order to establish the ‘operability’ element of firearms prosecutions, Massachusetts law provided for a shortcut in the form of a ballistics certificate (or ballisticsian’s certificate). Specifically, Section 121A of Chapter 140 provided that:

A certificate by a ballistics expert of the department of state police or of the city of Boston of the result of an examination made by him of an item furnished him by any police officer, signed and sworn to by such an expert, shall be prima facie evidence of his findings as to whether or not the item furnished is a firearm, rifle, shotgun, machine gun, sawed off shotgun or ammunition, as defined by section one hundred and twenty-one provided that in order to qualify as an expert under this section he shall have previously qualified as an expert in a court proceeding.

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8 G.L. c. 140, § 121. The entire text of Section 121 includes “provided, however, that the term firearm shall not include any weapon that is: (i) constructed in a shape that does not resemble a handgun, short-barreled rifle or short-barreled shotgun including, but not limited to, covert weapons that resemble key-chains, pens, cigarette-lighters or cigarette-packages; or (ii) not detectable as a weapon or potential weapon by x-ray machines commonly used at airports or walk-though metal detectors.”


11 Case law did allow for the jury to infer operability if the firearm was admitted into evidence. See Commonwealth v. Fancy, 349 Mass. 196, 204 (1965); But see Commonwealth v. Chery, 75 Mass. App. Ct. 909, 910-11 (2009) (“[A]lthough the gun itself was introduced in evidence, as this court has observed, ‘the mechanisms of guns are not so universally familiar that jurors, simply by looking at one, can tell whether it works.’” [citation omitted]).

12 G.L. c. 140, § 121A.
Against this backdrop, the United States Supreme Court decided in *Crawford v. Washington*, that the Confrontation Clause prevented prosecutors from introducing accusatory statements unless the accusing witness was available to testify and was subject to cross-examination. The Supreme Court’s decision in *Crawford* called into question the Massachusetts practice of admitting both chemical and ballistics certifications. On the issue of chemical certifications, the Massachusetts Supreme Judicial Court (SJC) held in *Commonwealth v. Verde*, that chemical certificates remained admissible under *Crawford* as common law public records because the certificates were “neither discretionary nor based on opinion; rather, they merely state the results of a well-recognized scientific test determining the composition and quantity of the substance.” Similarly, in *Commonwealth v. Morales*, the Massachusetts Appeals Court held that ballistics certificates were admissible under *Crawford* because they did not contain “prohibited expressions of opinion, judgment, or discretion” but rather “a summary

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14 The Confrontation Clause is found in U.S. Const. Amd. VI, and it provides that: "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."
15 *Crawford*, supra. at 68-69.
16 The chemical certificates were made admissible by statute. See G.L. c. 111, § 13 (“The analyst … shall upon request furnish a signed certificate, on oath, of the result of the analysis provided … to any police officer … and the presentation of such certificate to the court by any police officer … shall be prima facie evidence that all the requirements and provisions … have been complied with. This certificate shall be sworn to before a justice of the peace or notary public, and the jurat shall contain a statement that the subscriber is the analyst or an assistant analyst of the department. When properly executed, it shall be prima facie evidence of the composition, quality, and the net weight of the narcotic or other drug, poison, medicine, or chemical analyzed or the net weight of any mixture containing the narcotic or other drug, poison, medicine, or chemical analyzed, and the court shall take judicial notice of the signature of the analyst or assistant analyst, and of the fact that he is such.”).
18 *Id.* at 283.
of the established and admissible primary facts that bear on the question whether the weapon [is] a firearm … within the meaning of the statute.”

II. Melendez-Diaz

In Commonwealth v. Melendez-Diaz, the Massachusetts Appeals Court reaffirmed the holding in Verde that certificates of the chemical composition were admissible under Crawford as a business or official record. The SJC declined to review the case, and the Supreme Court granted certiorari. The issue before the Court was whether the chemical certificates were “testimonial” under Crawford thereby making the certificates improper “witnesses” under the Confrontation Clause. The Supreme Court concluded that the chemical certificates fell within the “core class of testimonial statements” that Crawford squarely prohibited, and that such certificates were not admissible absent live testimony by the chemist who is subjected to cross-examination.

Four days after deciding Melendez-Diaz, the Supreme Court summarily reversed the decision in Morales v. Massachusetts, and ordered the Appeals Court to reconsider its decision in light of Melendez-Diaz. The decision implicitly held that the admission of ballistics certifications – the “shortcut” provided by G.L. c. 140, § 121A – to prove the dimensions and

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20 Id. at 589. The Appeals Court also likened the ballistics certificates at issue with the chemical certificates allowed in Verde. See id. (“The recitation here was no more a statement of opinion than the recitation of drug weight and composition on a drug certificate.”).
22 The decision was issued as a summary disposition under the Appeals Court Rule 1:28. It is available electronically at: http://federalevidence.com/pdf/2008/06-June/Commonwealth_v._Melendez-Diaz.pdf.
25 Melendez-Diaz, supra. at 2530.
26 Id. at 2532.
27 Morales, supra note 3.
operability of the gun in question violated the Confrontation Clause embodied in the Sixth Amendment.

A. Retroactivity and the Standard of Review

The Supreme Court decision in Morales opened the veritable floodgates to appeals challenging the erroneous admission of the ballistics certificates in cases charging firearms-related offenses. Given this influx of appeals, it became necessary for the reviewing courts to establish the legal ground rules for these appeals. Accordingly, the courts had to decide: (a) whether a defendant whose convictions were final at the time of the Morales decision could seek a new trial based on the Melendez-Diaz rule, and (b) what standard of review should apply in reviewing firearms convictions.28

1. Retroactivity

Whenever a supreme court announces a new rule of criminal procedure, the issue of retroactivity will surface. In other words, does the newly announced rule apply only to defendants whose appeals were pending at the time of the new rule’s announcement (“direct appeal”), or does it apply to every convicted defendant – including those whose appeals were decided before the new rule was announced (“collateral appeal”)?29

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28 Because Morales simply applied the Melendez-Diaz rule to firearm prosecutions, the two cases are interchangeable so that any discussion of the drug certificates in Melendez-Diaz necessarily includes the ballistics certificates in Morales. See Commonwealth v. Brown, 75 Mass. App. Ct. 361, 363 (2009).

29 A “direct” appeal refers to the initial challenge to a defendant’s conviction. See G.L. c. 211A, § 10. A “collateral” appeal arises in two venues: in federal court pursuant to a habeas petition filed under 28 U.S.C. § 2254, or in a state proceeding seeking a new trial under Mass. R. Crim. P. 30(b).
The Supreme Court set forth the framework for determining retroactivity in *Teague v. Lane.* Under *Teague,* an old rule applies to both types of review, whereas a new rule is generally applicable only to cases that are still on direct review. A new rule will only apply to appeals on collateral review if: “(1) the rule is substantive or (2) the rule is a watershed rule of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding.”

Ironically, the SJC decided the retroactivity of *Melendez-Diaz* in cases on collateral appeal in another appeal filed by the same defendant on a different drug-related conviction. In *Melendez-Diaz II,* the defendant argued that the decision in *Melendez-Diaz* was not “new,” but rather a straight-forward application of the Supreme Court’s prior decision in *Crawford.* After noting that other courts have differed on the retroactivity question, the SJC held that *Melendez-Diaz* “broke new ground” by extending *Crawford* to apply to certain business and official records which were previously beyond the purview of *Crawford.* This decision bars any attempt by a defendant whose conviction was final before *Melendez-Diaz* was decided from filing a motion for a new trial. In other words, the Supreme Court’s decision in *Melendez-Diaz*

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32 *Id.* (citations omitted). The SJC has adopted the *Teague* framework for determining whether a rule was “new.” See *Commonwealth v. Bray,* 407 Mass. 296, 300-01 (1990).
33 See *Commonwealth v. Melendez-Diaz,* 460 Mass. 238, 239 n.2 (2011). (Melendez-Diaz II). The SJC had previously and unsurprisingly held that the *Melendez-Diaz* rule applied to cases on direct review. See *Commonwealth v. Vasquez,* 456 Mass. 350 (2010).
34 See *Id.* at 239 n.1.
35 *Id.* at 246. The SJC did carefully limit its holding to chemical certificates offered under G.L. c. 111, §§ 12, 13, and it noted that “[a]s to the retroactive effect of *Melendez-Diaz* in relation to other categories of records or reports, we reach no conclusions.” *Id.* at 246 n.9. However, the similar treatment of the chemical certificates in *Melendez-Diaz* and the ballistics certificates in *Morales* by the Supreme Court, there is little doubt that the analysis would be the same. See *Commonwealth v. Depina,* 456 Mass. 238, 248 (2010) (holding that *Melendez-Diaz* applies to ballistics certificates).
applies only to defendants whose convictions were still on direct appeal when *Melendez-Diaz* was decided.\(^{36}\)

2. Standard of Review

Another related issue for appellate practitioners is the standard that a reviewing court will apply when considering appeals based on the erroneous admission of ballistics certificates. In general, defense counsel must preserve an evidentiary ruling by timely objecting to its admission.\(^{37}\) A timely objection to a ruling that infringes on a Constitutional right triggers a heightened standard of review which asks "whether the record establishes 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.' "\(^{38}\) A failure to object triggers a lower standard which asks "whether the error created a substantial risk of a miscarriage of justice"\(^{39}\) such that the reviewing court "can say that the wrongly admitted evidence did not cause or materially influence the verdict of guilt."\(^{40}\) In most appeals, the determination of the standard of review dictates the outcome.\(^{41}\)

\(^{36}\) *Commonwealth v. Gentile*, 80 Mass. App. Ct. 243 (2011), presents an interesting case applying these principles. In *Gentile*, the defendant was convicted in absentia for unlawful possession of a firearm and other charges after he fled during his 2004 trial. *Id.* at 244. The defendant was caught and returned to Massachusetts in 2008, and he faced sentencing in 2009. *Id.* The government argued that the defendant’s conviction should have been final before *Melendez-Diaz* was decided, and therefore he should not be allowed to benefit from his wrongdoing. *Id.* at 245 & n.3. The Appeals Court rejected this argument and held as “implausible” the idea that a defendant would flee during a trial “on the possibility that the case law might eventually develop in his favor.” *Id.* at 245.


\(^{41}\) When a claimed constitutional error has been preserved by timely objection, the hurdle is extremely difficult to overcome. In Massachusetts, a reviewing court “presumes that the constitutional violation requires reversal, but an affirmative showing of harmlessness beyond a reasonable doubt by the Commonwealth will preserve the convictions.” *Commonwealth v. Fluellen*, 456 Mass. 517, 526 (2010).
Determination of the standard of review to apply to firearms prosecutions was complicated by the SJC’s decisions in Verde and Morales that chemical and ballistics certificates did not implicate the Confrontation Clause. Ordinarily, if trial counsel failed to object to the ballistics certificate, the lower standard of review likely would result in the conviction being affirmed. Conversely, if a trial counsel did timely object, the heightened standard would almost always result in the conviction being overturned. It remained an open question whether trial counsel were required to make an essentially futile objection in order to preserve the issue for review under the heightened standard.

In Commonwealth v. Vasquez, the SJC settled the issue of whether defense counsel was required to make an objection to the admission of chemical certificates in order to preserve the issue under the favorable Chapman standard. In concluding that trial counsel was not required to object in order to preserve the issue for appeal, the SJC noted that because the Verde rule was settled law that had to be followed, counsel was not required to make a futile objection. Though the Vasquez rule was followed by the Appeals Court in subsequent appeals from firearms convictions, the SJC officially extended Vasquez to firearms cases in Commonwealth v. Depina.

III. Appeals Challenging Admission of Ballistics Certificates

The upshot of the Vasquez opinion is that a conviction for a firearms offense will not stand unless the reviewing court is convinced that the erroneous admission of the ballistics certificate was “harmless beyond a reasonable doubt.” This section chronicles the application of

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43 Id. at 352, 356.
44 See, e.g., Morales, supra. at 665 n.1.
45 Depina, supra. at 248.
that heightened standard of review, and it demonstrates the difficulty that prosecutors have faced in seeking to preserve convictions.

Given this extremely stringent standard of review, it should not be surprising that convictions based solely on the admission of the ballistics certificate were some of the first to be overturned. In Commonwealth v. Brown, the Appeals Court had its first opportunity to apply the new Melendez-Diaz rule. In reversing the defendant’s conviction for unlawful possession of a firearm, the Appeals Court noted that the only evidence presented was the certificate. The court held that the other independent evidence – that the pistol was possessed by the defendant and that it was unloaded – was not sufficient to conclude that the erroneously admitted certificate did not influence the jury. In opinions that followed, the Appeals Court overturned convictions where prosecutors stressed the certificate in their closing arguments and where the defendant possessed a loaded weapon. The Appeals Court also extended the rule to include convictions for improper storage of a firearm, and it held that even if a defendant did not contest operability, only a stipulation would relieve the burden on the prosecution to produce evidence to

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48 Id. at 362. The court carefully distinguished this case from older cases in which juries were permitted to infer operability where weapon was loaded, see, e.g., Fancy, supra. at 204; Commonwealth v. Stallions, 9 Mass. App. Ct. 23, 26 (1980), and where evidence was presented that the weapon had been recently fired, see, e.g., Commonwealth v. Sperrazza, 372 Mass. 667, 670 (1977); Commonwealth v. Sylvester, 35 Mass. App. Ct. 906, 907 (1993).
49 Chery, supra. at 910-11 (only evidence was the certificate and the prosecutor’s closing argument); see also Morales, supra. at 669 (same).
51 Hollister, supra. at 732.
satisfy the operability prong. \(^{52}\) Not surprisingly, prosecutors eventually began to concede the need to reverse firearm convictions that were principally based on the ballistics certification. \(^{53}\)

Though most were overturned, a few convictions managed to survive on appeal. For example, in *Commonwealth v. Mendes*, \(^{54}\) the Appeals Court affirmed convictions for a variety of firearms offenses by concluding that the strength of independent evidence was sufficient to overcome the prejudice produced by the erroneously admitted ballistics certificate. \(^{55}\) Among the evidence presented was testimony that three shots had been heard, three spent casings had been recovered, and officers noted the distinct smell of burnt gunpowder at the scene of the crime. \(^{56}\) Thus, where there is independent evidence that the gun had been fired, a conviction could still stand. \(^{57}\) Later decisions of the Appeals Court, however, were careful to note that simple testimony alone about the ability of a gun to fire would not be sufficient. \(^{58}\)

The SJC threw prosecutors a proverbial lifeline in *Commonwealth v. Depina*. \(^{59}\) In *Depina*, prosecutors introduced the state police ballisticsian’s certificate through live testimony by the commander of the local police department’s firearms division. \(^{60}\) The commander testified that the revolver in question was loaded with five live rounds and one shell casing from a round


\(^{55}\) Id. at 397.

\(^{56}\) Id.


\(^{58}\) See, e.g., *Ware*, supra. at 57 (reversing conviction where officer testified that gun had been test fired but not by that officer); *Commonwealth v. Muniz*, 456 Mass. 166, 171 (2010) (testimony that the gun appeared to be “in good condition” was not sufficient).

\(^{59}\) 456 Mass. 238 (2010).

\(^{60}\) Id. at 247-48.
already fired. The commander testified that he sent the revolver, live rounds and empty casing to the state police laboratory for testing. He then testified that the revolver was returned with only two live rounds and four spent casings. He was permitted to testify that the three extra shell casings led him to conclude that the revolver had been successfully test fired. The SJC affirmed the defendant’s conviction by holding that the jury “could reasonably infer that the State police had test fired the revolver using the live rounds.”

Though Depina appeared to offer a path to save convictions based on unlawfully admitted ballistics certificates, the SJC carefully limited that holding in the most recent case of Commonwealth v. Barbosa. Barbosa appeared to present the same facts as Depina: a state trooper testified that he found a loaded revolver; removed six live rounds from the cylinder; and delivered them to the state police laboratory for analysis. The trooper then testified that the revolver was returned from the laboratory with five live rounds and one spent shell casing. This testimony – coupled with the fact that the prosecution did not stress the ballistics certificate in its closing and the court did not instruct the jury that the ballistics certificate was prima facie evidence – lead the Appeals Court to affirm Barbosa’s conviction.

The SJC reversed the Appeals Court on further appellate review. The Court distinguished its holding in Depina by focusing on the fact that the revolver in Depina had a

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61 Id. at 250.
62 Id.
63 Id.
64 Id.
65 Id.; see also Commonwealth v. Pitman, 76 Mass. App. Ct. 905, 907 (2010) (affirming conviction where officer testified that he submitted the weapon and two round of ammunition to the state police lab which then “fire[s] off one of those rounds and sends us the empty casing back.”).
68 Id. at 345-46.
69 Id. at 347.
spent casing in the cylinder whereas the revolver in this case did not.\textsuperscript{70} The SJC reasoned that “the fact that the weapon was loaded when discovered has been found to establish harmlessness beyond a reasonable doubt, absent the presence of a spent casing in the weapon's chamber.”\textsuperscript{71}

The SJC had a more difficult time distinguishing this case from \textit{Pitman}. In \textit{Pitman}, a loaded, semi-automatic pistol was found without any spent casings.\textsuperscript{72} An officer testified that he sent two live rounds of ammunition to the state lab, and that the state lab “fire[d] off one of those rounds and sen[t] us the empty casing back.”\textsuperscript{73} In affirming Pitman’s conviction, the Appeals Court held that the jury could reasonably infer that the gun was operable because the live round was sent to the state lab and it was returned empty.\textsuperscript{74}

In \textit{Barbosa}, the SJC essentially gutted the Appeals Court’s holding in \textit{Pitman} while purporting to keep it intact. The SJC concluded that even though the state trooper testified that six live rounds were sent to the lab and the lab returned five live rounds of the same ammunition with a sixth, fired round marked “test,” the officer’s testimony that the round marked “test” had indeed been test fired by the lab was mere “speculation” and “not based on personal knowledge.”\textsuperscript{75} The SJC attempted to distinguish \textit{Pitman} by noting that the officer in \textit{Barbosa} was not an expert, and he did not specifically testify that the ammunition returned to the lab was the same as the ammunition that was sent out to the lab.\textsuperscript{76} The weakness of this reasoning is highlighted by the fact that the Appeals Court never considered the officer in \textit{Pitman} to be an

\begin{itemize}
\item \textsuperscript{70} \textit{Depina}, supra. at 436.
\item \textsuperscript{71} \textit{Id.} (citing \textit{Ware}, supra. for the proposition that the fact that the gun was loaded is not sufficient to meet the harmless beyond a reasonable doubt standard).
\item \textsuperscript{72} \textit{Pitman}, supra. at 907.
\item \textsuperscript{73} \textit{Id.}
\item \textsuperscript{74} \textit{Id.}
\item \textsuperscript{75} \textit{Barbosa}, supra. at 437.
\item \textsuperscript{76} \textit{Id.} at 436-37.
\end{itemize}
‘expert’ on the procedure used by state police technicians to test operability of handguns.\textsuperscript{77}

Moreover the supposed ‘expert’ testimony consisted of the officer testifying merely that the state lab “fire[s] off one of those rounds and send[s] us the empty casing back.”\textsuperscript{78}

IV. The Future of Firearms Prosecution After \textit{Melendez-Diaz}

\textit{Melendez-Diaz} created as many problems as it solved. This section presents and analyzes the five issues that are most likely to arise as this new area of law is developed.

\textit{Issue 1 – What Quantum of Proof is Needed to Uphold a Conviction?}

As the preceding analysis makes clear, it has been and will continue to be very difficult to uphold a conviction in a firearms case. However, the recent SJC decision in \textit{Barbosa} appears to clarify the issue. The lesson of \textit{Barbosa} is that there is no bright-line rule for reviewing convictions based on erroneously admitted certificates – each case must be determined based on its particular facts. Prosecutors seeking to uphold convictions must be able to demonstrate that there was “overwhelming evidence” that the gun was operable. To accomplish this, prosecutors must be able to show that there existed independent, extrinsic evidence from which a reasonable juror could infer that the weapon would fire. This can be accomplished by referencing evidence that witnesses heard or saw shots fired or smelled gunpowder, that the gun was found with spent shell casings in the weapon itself, or expert testimony about the procedure employed by the state police to test the weapon and return it along with a spent casing. Defense attorneys should focus on the amount of weight the prosecution gave the certificate in their closing arguments and

\textsuperscript{77} The Appeals Court noted only that the officer had “considerable experience with firearms” \textit{Pitman, supra}. at 907, which is not the same as being an expert on state police practice and procedure.

\textsuperscript{78} \textit{See supra.} note 73. This answer probably does not even qualify as an expert opinion under Massachusetts law because it does not require “scientific, technical, or other specialized knowledge.” \textit{See Mass. G. Evid.} § 702; see also \textit{Commonwealth v. Tanner}, 45 Mass. App. Ct. 576, 581 (1998) (“The role of an expert witness is to help jurors interpret evidence that lies outside of common experience.”). Presumably all trained peace officers are generally aware that recovered firearms are sent out for testing and are returned back to the police department.
whether the trial judge instructed the jury that the ballistics certificate was prima facie evidence of operability.

**Issue 2 – Does Melendez-Diaz Apply Retroactively?**

The retroactivity of *Melendez-Diaz* is far from settled law. Though it held that the decision does not apply retroactively, the SJC noted that no other state supreme court or federal circuit court of appeals has decided the question. After reviewing the practice in other circuits, the SJC concluded that only one federal district court has held that *Melendez-Diaz* applies retroactively. Though it is hornbook law that neither sister-state court opinions nor First Circuit Court of Appeals decisions bind the SJC, the fact that courts have disagreed over the import of *Melendez-Diaz* makes it likely that the Supreme Court may ultimately decide the issue. If the Supreme Court decides that *Melendez-Diaz* applies retroactively – or if a federal court grants a habeas petition based on *Melendez-Diaz* – then there will be a spike in both state and federal appeals.

Reading the tea leaves of constitutional jurisprudence is especially difficult because of the ever-changing composition of the federal judiciary. Therefore, it is unclear what direction the Supreme Court will take if and when it is presented with the question. On the one hand, the Supreme Court has unanimously held that the *Crawford* decision did not apply retroactively

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79 *See Melendez-Diaz II, supra.* at 239 n.1.

80 *Id.*

81 The state appeals will take the form of a motion for new trial provided for in Mass.R.Crim.P. R. 30(b) which permits a trial judge to order a new trial “at any time if it appears that justice may not have been done.” The federal appeals will take the form of a writ of habeas corpus filed in the district court pursuant to 28 U.S.C. § 2254(d)(1) (2011) which allows convicts to seek a new trial where the state court decision “was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.” Thus far, the First Circuit has denied habeas relief to a Massachusetts convict in *Likely v. Ruane*, 642 F.3d 99, 102 (1st Cir. 2011).
because it established a “new” rule that was not “dictated by precedent.”\textsuperscript{82} Thus, the government could argue that if the \textit{Crawford} rule was new, then \textit{Melendez-Diaz} also announced a new rule because it extended \textit{Crawford} to apply another, previously admissible class of documents. On the other hand, the lead opinion in \textit{Melendez-Diaz} stated that the case “involve[d] little more than the application of our holding in \textit{Crawford}.”\textsuperscript{83} Thus, defense attorneys will seize on that language and argue that the \textit{Melendez-Diaz} rule was “dictated” by the \textit{Crawford} decision and therefore applicable to all appeals – both direct and collateral – for those convicted after \textit{Crawford} was decided in 2004.

\textit{Issue 3} – Are Ballistics Certificates Necessary and Useful Anymore?

Because the ballistics certificate is a testimonial document, it is admissible only if the technician who issued the certificate testifies to contents of the certificate. Given that the certificates were a statutorily approved short-cut to prove operability, completion of a certificate has almost been rendered meaningless because it no longer saves time and resources if the ballistics has to testify anyways. Thus, there are two viable alternatives for prosecutors to show operability without having to rely on a ballistics certificate or other direct evidence.

The first method would be to present testimony of any officer who test-fired the handgun. Proving that a handgun will fire is as simple as loading and firing the gun by a person who is familiar with the operation of handguns. This can be accomplished by having a member of the local police department who is trained in gun operation and safety successfully fire the weapon at the department’s firing range. The relative ease of determining the operability of a firearm distinguishes it from the need to have chemical certificates in drug cases because the

\textsuperscript{82} \textit{Whorton v. Bockting}, 549 U.S. 406, 416 (2007) (internal citation omitted).

\textsuperscript{83} \textit{Melendez-Diaz}, supra. at 2542.
composition of a particular substance needs to be scientifically determined and very few police
departments have the sophisticated equipment necessary to make that determination.

The second method would be to present expert testimony in the manner approved by
*Commonwealth v. Nardi*. In *Nardi*, the SJC held that experts who do not perform an autopsy
could still testify to their own opinions regarding cause of death so long as their opinion is their
own and it is based on (1) facts personally observed; (2) facts assumed in the questions put to the
expert and supported either by admitted facts or by the testimony of other witnesses already
given or to be given at the trial; or (3) facts or data not in evidence if the facts or data are
independently admissible and are a permissible basis for an expert to consider in formulating an
opinion.

It would likely be permissible to extend the *Nardi* rule to cover expert testimony
regarding the ability of a gun to fire. In this formulation, an expert in the practice and procedure
of the test-firing process could be asked to assume, for instance, that a weapon was recovered;
was sent along with ammunition to the state laboratory; and was returned to the local police
department with a spent casing included. That witness could then offer expert opinion that the
weapon had been successfully test-fired. The SJC appeared to accept this procedure in
*Barbosa*.

**Issue 4 – Is Expert Testimony Necessary to Prove Operability?**

Amid the discussion about expert testimony and ballistics certificates lies the SJC’s
holding in *Commonwealth v. Fancy*, that “*t*he jury could have found, **without the aid of expert

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85 *Id.* at 388.
86 *See Barbosa, supra.* note 76. (citing with approval the expert testimony offered in *Pitman*).
testimony, that the gun was capable of discharging a bullet.”

The holding in Fancy was not an aberration: Massachusetts law has long recognized that expert testimony is not necessary to prove that a weapon is a “firearm” as defined by the statute. In Fancy, the only evidence presented to establish that the revolver was a firearm was (a) testimony that it was loaded when discovered, and (b) that it was introduced into evidence.

The applicability and viability of Fancy and its progeny has been called into question in several reported decisions. In Commonwealth v. Nieves, the Appeals Court flatly refused to follow Fancy and held that “the mechanisms of guns are not so universally familiar that jurors, simply by looking at one, can tell whether it works.” The court reasoned that if operability could be demonstrated by simply introducing the weapon into evidence, there would be no reason for the legislature to insert the Section 121A shortcut. The SJC passed up an opportunity to settle the issue in Commonwealth v. Muniz when it acknowledged the Nieves/Fancy split, but it chose instead to distinguish Fancy on the basis of a different standard of review. In a later decision in Commonwealth v. Loadholt, the SJC signaled in dicta that the Fancy rule might only apply to revolvers and not to semi-automatic pistols.

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87 Fancy, supra. at 204 (emphasis added).
88 See, e.g., Commonwealth v. Tuit, 393 Mass. 801, 810 (1985) (“There is no need for the Commonwealth to present expert testimony to the effect that the definitional prerequisites for a ‘firearm’ have been met.”); Stallions, supra. at 25-26 (same).
89 Fancy, supra. note 86.
91 Id. at 4.
92 Muniz, supra. at 171 & n.5. The SJC held that Fancy was reviewed on the lower, ‘sufficiency of evidence’ standard whereas Muniz was reviewed on the heightened, ‘harmless beyond a reasonable doubt’ standard.
94 Id. at 433 n.15. (“It is not clear whether the inferences that could be drawn by a jury with respect to the firing capability of a revolver [based primarily on observation and examination] could similarly be drawn with respect to a semiautomatic pistol.”).
It is obvious that *Fancy* is on thin ice. At least one Appeals Court decision has refused to follow it, and the SJC has left that decision in place while indicating that the rule might be limited only to revolvers. Given this history, prosecutors should continue not to rely on the weapon itself, but rather to offer expert testimony regarding the operability of the firearm. On the other hand, defense attorneys should rely on *Nieves* and demand that in the absence of properly admitted certificates, expert testimony be presented because the mechanism of firearms are not so universally understood by jurors that expert testimony must be taken.

**Issue 5 – Should the Legislature Redefine “Firearm”?**

The state legislature always retains the power to change the law. Recall that the source of the debate lies in the statute’s definition of the term firearm as a weapon “from which a shot or bullet can be discharged.” The courts have interpreted that provision as requiring proof that the weapon was “operable” at the time of the offense. If it so desired, the legislature could simply end all of the confusion by amending the definition of ‘firearm’ as contained in Chapter 121. For example, the legislature could change the term “can be discharged” to “is designed to be discharged.” This would mirror the federal definition of firearm which defines the term as “any weapon … which will or is designed to or may readily be converted to expel a projectile by the action of an explosive.” Many states have chosen to define the term ‘firearm’ in accordance with the broader federal rule. Or the legislature could take a more direct route and simply

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95 Id.
96 **See supra.** note 10.
97 **See supra.** note 8.
99 Among the jurisdictions that have adopted the broader federal definition are: Arizona (ARIZ. REV. STAT. § 13-3101(A)(4)); Arkansas (ARK. CODE § 5-73-120(b)(2)); District of Columbia (D.C. CODE § 7-2501.01(9)); Florida (FLA. STAT. § 790.001(6)); Georgia (GA. CODE §16-11-131(a)(2)); Illinois (I.LL. COMP. STAT. 65/1.1)); Indiana (IND. CODE § 35-47-1-5)); Maine (ME. REV. STAT. tit. 17-A, § 2(12-A)); Maryland (MD. CODE ANN., PUB. SAFETY § 5-101(h)(1)(i));
remove the requirement that the weapon be “operable.” This approach has been followed in several other states.\textsuperscript{100}

V. Conclusion

The Supreme Court ruling in \textit{Melendez-Diaz} fundamentally changed the way that firearms offenses are prosecuted in Massachusetts. While subsequent decisions have helped to define the contours and nuances of future prosecutions, new issues have bloomed. This article has presented the history of firearms prosecutions, the current state of the law, and it has also raised several unanswered questions that could further change the nature of future firearms prosecutions in Massachusetts.

\textsuperscript{100} Among the states whose statutes expressly provide that a weapon need not be operable to constitute a firearm are: Alaska (\textsc{alaskastat} § 11.81.900(b)(26)); Delaware (\textsc{delcode} tit. 11, § 222(12)); Idaho (\textsc{idahocode} § 18-3316(3)); and Ohio (\textsc{ohiorevcode} § 2923.11(B)(1)).