

BRISCOE v. VIRGINIA: REEXAMINING THE SCOPE OF *MELLENDEZ-DIAZ*

CAROLINE MIX*

I. INTRODUCTION

On June 25, 2009, the Supreme Court announced its decision in *Melendez-Diaz v. Massachusetts*.¹ The case presented an important Confrontation Clause question: are laboratory certificates of analysis, such as those used by prosecutors in drug cases to prove the identity of a seized substance, testimonial evidence that must be subjected to cross-examination?² Writing for the majority, Justice Scalia held that these laboratory certificates were indeed testimonial evidence.³ The ruling's impact was substantial; for the first time, states would be required to provide criminal defendants with the opportunity to cross-examine the laboratory analysts responsible for the certificates.⁴

Confrontation Clause scholar and University of Michigan law professor Richard D. Friedman had conflicting thoughts as he reacted to the decision.⁵ On the one hand, the University of Michigan law professor thought the Court's ruling was "the right result, for the right reasons."⁶ On the other hand, Friedman had recently filed his own petition for certiorari in the case of *Briscoe v. Virginia*, asking the Supreme Court to decide whether a Virginia statute violated the Confrontation Clause by not requiring the prosecution to subpoena

*2011 J.D. Candidate, Duke University School of Law.

1. *Melendez-Diaz v. Massachusetts*, No. 07-591, slip op. at 1 (U.S. June 25, 2009).

2. *Id.*

3. *Id.* at 5.

4. *See id.* The majority acknowledged that precedent grants an exception to this requirement, but only when (1) there has been a showing that the analyst(s) will not be available at trial, and (2) the criminal defendant has had a prior opportunity for cross-examination of the analyst(s). *Id.*

5. *See* The Confrontation Blog, <http://confrontationright.blogspot.com> (June 25, 2009, 20:05 EST).

6. *Id.*

laboratory analysts in cases where it wishes to introduce certificates of analysis into evidence.⁷ The Supreme Court's opinion in *Melendez-Diaz* seemed to directly address this question, explicitly denouncing so-called "burden-shifting" statutes that pass the responsibility of calling an analyst to testify from the prosecution to the defense.⁸ "I confess I was a little sorry to see this part of the opinion . . . ," Friedman wrote on his blog that evening. "I would have loved to argue it. Instead, we get handed a victory without argument. Darn."⁹

Four days later, in a move that even petitioners' attorney Friedman did not anticipate, the Supreme Court granted certiorari in *Briscoe*.¹⁰ This unexpected announcement generated speculation about the Court's next step with regard to Sixth Amendment jurisprudence.¹¹ Some commentators believe that the grant of certiorari is an indication that the Court's decision in *Melendez-Diaz* is in danger of being substantially limited or even overturned.¹² The arguments in *Briscoe* will set the stage for an important ruling on the limits of the Confrontation Clause in criminal cases involving the testimony of laboratory analysts.

II. FACTS

Briscoe is a consolidation of two cases which arose in different Virginia circuit courts.¹³ The petitioners, criminal defendants Mark Briscoe and Sheldon Cypress, were both charged with crimes relating to the possession of cocaine.¹⁴ In February 2005, police officers executed a search warrant at Mark Briscoe's apartment in Alexandria, Virginia.¹⁵ Upon entering the kitchen, officers found a wide variety of drug paraphernalia, including scales, a weight, plastic sandwich bags, a

7. See Petition for Writ of Certiorari, *Briscoe v. Virginia*, No. 07-11191 (U.S. Mar. 29, 2008).

8. See *Melendez-Diaz*, No. 07-591 at 19 (saying that a Massachusetts law granting criminal defendants the right to subpoena the analyst was "no substitute for the right of confrontation").

9. The Confrontation Blog, *supra* note 5.

10. *Briscoe v. Virginia*, 129 S. Ct. 2858 (U.S. June 29, 2009) (granting petition for certiorari).

11. See, e.g., Steven N. Yermish, *Melendez-Diaz and the Application of Crawford in the Lab*, THE CHAMPION, Aug. 2009, at 28 (noting that legal commentators have suggested various reasons for the grant of certiorari in *Briscoe*).

12. See, e.g., Posting of Lyle Denniston to SCOTUSblog, <http://www.scotusblog.com/wp/new-lab-report-case-granted> (June 29, 2009, 13:51EST) (suggesting that the dissenting justices in *Melendez-Diaz* are looking to use *Briscoe* to make *Melendez-Diaz* easier to subvert, and possibly obsolete).

13. Brief of Petitioners at 5, *Briscoe v. Virginia*, No. 07-11191 (U.S. Sept. 1, 2009).

14. *Id.* at 4.

15. Joint Appendix at 21, *Briscoe*, No. 07-11191 (U.S. Sept. 1, 2009).

razor blade, and what appeared to be cocaine residue.¹⁶ A search of Briscoe's person also yielded a "white rocklike substance" that police officers believed was crack cocaine.¹⁷

Sheldon Cypress was arrested in June of 2005 when police pulled over a car in which he was a passenger.¹⁸ The officer saw a marijuana cigarette in plain view and subsequently searched the vehicle.¹⁹ He found white chunks that appeared to be crack cocaine, as well as scales, plastic baggies, and what appeared to be marijuana.²⁰ The officer seized the evidence and arrested Cypress.²¹

Following their arrests, the petitioners' cases followed substantially similar paths.²² In each case the police submitted the confiscated substances for forensic analysis.²³ In Briscoe's case, the laboratory analyst concluded that the confiscated substances amounted to 36.578 grams of "solid material cocaine."²⁴ In Cypress's case, tests revealed that the police had seized 60.5 grams of cocaine.²⁵ In both cases the analysts reported their findings in signed certificates of analysis.²⁶ Each certificate contained an attestation that the information printed therein was accurate.²⁷

Briscoe and Cypress were charged with multiple drug-related crimes, including possession of cocaine with intent to distribute.²⁸ At both trials, the prosecution sought to introduce the certificates of analysis into evidence, despite petitioners' objections on Sixth Amendment grounds.²⁹ Petitioners argued that because the certificates were testimonial evidence, the prosecution could not present them without also calling the analyst responsible for the certificates to be present for cross-examination.³⁰ Both defendants' objections were overruled.³¹ In each case, the circuit court judge held that the petitioner had the right under Virginia Code § 19.2197.1 to

16. *Id.* at 24.

17. *Id.* at 18.

18. *Id.* at 94–95.

19. *Id.* at 96.

20. *Id.* at 97.

21. *Id.*

22. Brief of Petitioners, *supra* note 13, at 4.

23. *Magruder v. Commonwealth*, 657 S.E.2d 113, 116–17 (Va. 2008).

24. *Id.* at 117.

25. *Id.* at 116.

26. *Id.* at 116–17.

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. Brief of Petitioners, *supra* note 13, at 4.

call the analyst to appear at trial as a hostile witness, and that this was sufficient to satisfy the demands of the Confrontation Clause.³² Neither defendant elected to subpoena the analyst.³³

Petitioners were found guilty of possession-related crimes and were sentenced to terms in prison.³⁴ The Court of Appeals denied their separate appeals, holding that a criminal defendant waives his right to confront a laboratory analyst in court if he refuses to call the analyst as a defense witness under the procedure mandated by Code § 19.2187.1.³⁵ The two cases were consolidated on appeal to the Supreme Court of Virginia.³⁶

III. LEGAL BACKGROUND

The Confrontation Clause is found in the Sixth Amendment to the United States Constitution.³⁷ The Amendment provides, in part, that in criminal cases, “the accused shall enjoy the right . . . to be confronted with the witnesses against him”³⁸ This Clause traditionally has been viewed as a protection of the criminal defendant’s right to an in-person cross-examination of the witnesses testifying against him.³⁹ Though the Clause’s language itself does not contain any qualifications, the Supreme Court has consistently held that a defendant’s right to confrontation is not without limits.⁴⁰

The Court attempted to clarify one such limit in the 1980 case *Ohio v. Roberts*.⁴¹ In *Roberts*, the Court held that testimony could be admitted without an accompanying opportunity for live cross-examination by the defense if it contained certain “indicia of reliability.”⁴² The Court said that the general purpose of the Confrontation Clause was to ensure the opportunity for cross-examination, which was necessary to provide the trier-of-fact with a reliable method of determining the truth of an accusing witness’s

32. Joint Appendix, *supra* note 15, at 49.

33. Brief of Petitioners, *supra* note 13, at 4.

34. *Id.*

35. *Magruder*, 657 S.E.2d at 116–17.

36. Brief of Petitioners, *supra* note 13, at 5.

37. U.S. CONST. amend. VI.

38. *Id.*

39. *Mattox v. United States*, 156 U.S. 237, 244 (1895).

40. *See e.g.*, *Ohio v. Roberts*, 448 U.S. 56, 62–63 (1980) (remarking that the Confrontation Clause’s rule against the admissibility of hearsay evidence is not absolute because such an interpretation would be “too extreme”).

41. *Id.*

42. *Id.* at 66.

statement.⁴³ If, however, a witness's testimony met a high threshold of reliability, the Court reasoned that there would be no need for face-to-face confrontation.⁴⁴ Testimony met this threshold if it either (1) fell under traditional evidentiary hearsay exceptions, or (2) bore "particularized guarantees of trustworthiness."⁴⁵

The "indicia of reliability" test caused significant confusion in lower courts during the decade that followed the *Roberts* decision.⁴⁶ In response, the Supreme Court in 2004 overruled the *Roberts* decision in *Washington v. Crawford*.⁴⁷ In that case, Defendant Crawford was charged with stabbing a man who was allegedly attempting to rape Crawford's wife, Sylvia.⁴⁸ The prosecution sought to admit into evidence Sylvia's tape-recorded description of the stabbing, as Sylvia herself was unable to be present at trial due to spousal privilege.⁴⁹ Although the recording did not fall under a traditional hearsay exception, the lower court held that it was admissible because Sylvia's statement was almost identical to Crawford's own testimony, and therefore had "particularized guarantees of trustworthiness" that assured its reliability under the *Roberts* standard.⁵⁰ The Washington Supreme Court affirmed the decision on the same grounds.⁵¹

The Supreme Court reversed the lower court. The Court held that the Sixth Amendment granted criminal defendants the right to be confronted with the evidence proffered by the witnesses against them, including their "testimony."⁵² The Court concluded that the framers of the Sixth Amendment intended the reliability of this "testimonial" evidence to be tested not by judges, but rather by the criminal defendant using the tool of cross-examination.⁵³ In order to satisfy the demands of the Confrontation Clause, then, the Court held that testimonial evidence created out-of-court, such as tape recordings or affidavits, may not be admitted unless the witness is unavailable and

43. *Id.* at 65–66.

44. *Id.*

45. *Id.* at 66.

46. *Washington v. Crawford*, 541 U.S. 36, 62–63 (2004) (calling the *Roberts* test "so unpredictable that it fails to provide meaningful protection from even core confrontation violations").

47. *See id.* at 67.

48. *Id.* at 40.

49. *Id.*

50. *Id.*

51. *Id.* at 41.

52. *Id.* at 51.

53. *Id.* at 61.

there has been a prior opportunity for cross-examination.⁵⁴

During its 2008 term, the Court attempted to define this standard of “testimonial” evidence.⁵⁵ In *Melendez-Diaz v. Massachusetts*, the State sought to introduce into evidence a laboratory analysis certificate containing the results of tests run on substances found on the defendant during a search.⁵⁶ The defendant argued that the certificates should be barred from evidence because the analyst responsible for preparing the certificate was not present at trial for cross-examination.⁵⁷ The central question in *Melendez-Diaz* was whether such a certificate constituted “testimonial” evidence and, therefore, could not be admitted without the live, in-court testimony of an analyst.⁵⁸

In a 5-4 decision, the Court held that laboratory analysis certificates are essentially affidavits, and that they therefore fall into the “core class of testimonial statements” established by the *Crawford* decision.⁵⁹ *Melendez-Diaz* held that in cases where the prosecution seeks to admit a laboratory analysis certificate into evidence, the prosecution must produce the analyst responsible for the certificate at trial.⁶⁰ Responding to the State’s argument that the defendant had refused to exercise the right granted to him by Massachusetts statute to subpoena the witness himself, the Court explained that “the Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court.”⁶¹ The value of the Sixth Amendment to criminal defendants, according to *Melendez-Diaz*, is that it forces the prosecution to bring forth adverse witnesses at trial.⁶² To this end, the Court held that provisions requiring the defense to produce a laboratory analyst were ineffective guarantees of confrontation in situations where the witness failed to appear.⁶³

In his dissent, Justice Kennedy argued that the confrontation

54. *Id.* at 68.

55. *See* *Melendez-Diaz v. Massachusetts*, No. 07-591, slip op. at 1 (U.S. June 25, 2009) (presenting the issue of whether a laboratory analyst’s testimony in a certificate of analysis is “testimonial” evidence under the standard set forth in *Crawford*).

56. *Id.* at 2.

57. *Id.*

58. *Id.* at 1 (unless there is an exception under rules set forth in *Crawford*).

59. *Id.* at 4.

60. *Id.* at 8.

61. *Id.* at 19.

62. *Id.*

63. *Id.*

requirement established in *Crawford* did not apply to all testimonial witnesses.⁶⁴ Rather, the only testimonial statements encompassed by the Confrontation Clause were those made by “conventional witnesses” with some personal knowledge of the defendant’s guilt.⁶⁵ The dissent argued that a laboratory analyst is not the kind of ordinary witness that the Framers of the Sixth Amendment had in mind when they thought of cross-examination.⁶⁶ Furthermore, the dissent predicted that the Court’s decision would have a substantial negative impact on the current operation of the criminal justice system.⁶⁷ The dissent expressed concern about the increased cost to the state that the Court’s “new rule” would cause, as more analysts would need to be hired and more effort would be required on the part of the prosecution to ensure these analysts’ presence in court.⁶⁸ The dissent also foresaw a situation in which defendants would escape judgment because analysts would inevitably be unable to appear in person at every single trial involving a laboratory certificate.⁶⁹

The *Melendez-Diaz* decision informed states that in order for the prosecution to introduce into evidence laboratory certificates of analysis, the defendant must have the opportunity to confront the analyst who prepared the certificate at trial.⁷⁰ However, the question of what constitutes an acceptable procedure for guaranteeing this right to cross-examination remains unanswered.⁷¹ Virginia’s procedure is found in Virginia Code § 19.2–187.1, which guarantees criminal defendants the right to call a laboratory analyst for cross-examination as a hostile witness.⁷² The statute reads, in part:

The accused in any hearing or trial in which a certificate of analysis is offered into evidence shall have the right to call the person performing such analysis or examination or involved in the chain of custody as a witness therein, and examine him in the same manner as if he had been called as an adverse witness. Such

64. *Id.* at 2 (Kennedy, J., dissenting).

65. *Id.* at 2 (Kennedy, J., dissenting).

66. *Id.* at 29 (Kennedy, J., dissenting).

67. *Id.* at 14 (Kennedy, J., dissenting).

68. *Id.* (Kennedy, J., dissenting).

69. *Id.* at 14–15 (Kennedy, J., dissenting).

70. *Id.* at 5 (Kennedy, J., dissenting).

71. *Melendez-Diaz* indicates that a state law requiring a defendant to subpoena a laboratory analyst for cross-examination would not pass constitutional muster, *see Melendez-Diaz v. Massachusetts*, No. 07-591, slip op. at 19 (U.S. June 25, 2009); however, the fact that the Supreme Court granted certiorari in *Briscoe* suggests that this portion of *Melendez-Diaz* is the subject of some dispute.

72. VA. CODE ANN. § 19.2-187.1 (2009)

witness shall be summoned and appear at the cost of the Commonwealth.⁷³

Virginia is not the only state that requires the defendant, rather than the prosecution, to call a laboratory analyst as a hostile witness.⁷⁴ Similar statutes have been held constitutional by the highest state courts in North Dakota, Tennessee, and North Carolina.⁷⁵ The North Carolina Supreme Court, for instance, held that a state law requiring a criminal defendant to subpoena a laboratory analyst was valid and that “[f]ailure to summon the analyst results in a waiver of any right to examine the analyst and contest the findings.”⁷⁶ However, high courts in Florida, the District of Columbia, and Oregon have expressly rejected analogous statutes in their own states, deeming them to be unconstitutional.⁷⁷ According to the District of Columbia Court of Appeals, a law requiring a defendant to call an analyst to testify violated the Sixth Amendment because the Confrontation Clause imposes a “burden of production on the prosecution, not on the defense.”⁷⁸

IV. HOLDING

The Supreme Court of Virginia held that § 19.2–187.1 was constitutional because it sufficiently protected the defendant’s Sixth Amendment confrontation rights.⁷⁹ The court analyzed the statute under the assumption that certificates of analysis were “testimonial” evidence, although because the case was being analyzed pre-*Melendez-Diaz*, the court questioned the validity of this argument.⁸⁰

The court first found that the statute satisfied the essential facets of confrontation: “physical presence, oath, cross-examination, and observation of demeanor by the trier of fact.”⁸¹ That confrontation would not occur until after the prosecution introduced the certificates into evidence was irrelevant, according to the court, because the Sixth Amendment required only that criminal defendants be afforded the

73. *Id.*

74. Petition for Writ of Certiorari, *supra* note 7, at 5–10.

75. *Id.* at 5–6.

76. *State v. Smith*, 323 S.E.2d 316, 328 (N.C. 1984).

77. Petition for Writ of Certiorari, *supra* note 7, at 6–8.

78. *Thomas v. United States*, 914 A.2d 1, 16 (D.C. 2006).

79. *Magruder v. Commonwealth*, 657 S.E.2d 113, 115 (Va. 2008).

80. *Id.* at 118 (deciding that it would be unnecessary to decide if a certificate of analysis is “testimonial” evidence).

81. *Id.* at 120–21.

opportunity for cross-examination at some point during the trial.⁸² Second, the court held, contrary to the defendants' arguments, that § 19.2–187.1 did not unconstitutionally shift the burden of production from the prosecution to the defense.⁸³ The court relied on precedent granting state legislatures latitude to reasonably regulate procedures by which criminal defendants exercise their constitutional guarantees.⁸⁴

Finally, the court concluded that Briscoe's and Cypress's failure to call the laboratory analysts as witnesses pursuant to § 19.2–187.1 equated a waiver of their confrontation rights.⁸⁵ The court said that the defendants should have exercised their right to cross-examine the analysts by either:

issuing summons for their appearance at the Commonwealth's cost, or asking the trial court or Commonwealth to do so. At trial, the defendants could have called the forensic analysts as witnesses, placed them under oath, and questioned them as adverse witnesses, meaning the defendants could have cross-examined them.⁸⁶

The court said that it was not necessary for defendants to make an affirmative showing of their "knowing, voluntary, and affirmative agreement" to this waiver.⁸⁷

V. ANALYSIS

The Supreme Court of Virginia anticipated the trajectory of Sixth Amendment case law by basing its decision on the assumption that certificates of analysis were testimonial evidence.⁸⁸ As the Supreme Court had not yet decided *Melendez-Diaz*, it was not yet settled that the certificates were indeed testimonial evidence as described in *Crawford*.⁸⁹ By assuming this evidentiary status, the court made *Briscoe* the perfect vehicle for further exploration of the limits of

82. *Id.*

83. *Id.*

84. *Id.* at 122.

85. *Id.* at 124.

86. *Id.* at 121.

87. *Id.* at 124.

88. See Petition for Writ of Certiorari, *supra* note 7, at 4 (saying that state court decisions, like that of the Supreme Court of Virginia in *Magruder*, "operate on the assumption that the reports are testimonial").

89. See *Magruder v. Commonwealth*, 657 S.E.2d 113, 118 (Va. 2008) (refusing to consider the unanswered question of the testimonial nature of laboratory certificates of analysis).

Melendez-Diaz.⁹⁰ As several states currently have laws requiring the defendant to call a lab analyst as a hostile witness, it is important for the Supreme Court to decide the constitutionality of this procedure in light of the *Melendez-Diaz* ruling.⁹¹

At least one aspect of the lower court's decision, however, could cause some difficulty on appeal. The respondents argue that the Virginia court did not interpret § 19.2-187.1 as requiring a defendant to call the laboratory analyst.⁹² The plain language of the statute lends itself to such an interpretation, and although the court concluded that the Sixth Amendment does not *require* the prosecution to call the analyst,⁹³ there is an ambiguous phrase in the opinion that may support the respondents' argument. The problematic language lies in the state court's assertion that Briscoe and Cypress waived their rights to confrontation by not "issuing summons for [the analysts'] appearance at the Commonwealth's cost, or asking the trial courts or Commonwealth to do so."⁹⁴ If this sentence is a valid interpretation of § 19.2-187.1, the Supreme Court might determine that the Virginia statute does not require a burden-shift because this sentence appears to say that the defendant could ask the prosecution to subpoena the analyst.⁹⁵ Regardless of whether this ambiguity proves to be important, it is nonetheless troubling that one poorly-worded phrase can be used as fodder to support arguments seeking to prevent the Supreme Court from using *Briscoe* to provide necessary answers about the limits of *Melendez-Diaz*.

VI. ARGUMENTS

A. *Briscoe and Cypress's Arguments*

Briscoe and Cypress's primary argument against the constitutionality of § 19.2-187.1 is rooted in explicit language from

90. Petition for Writ of Certiorari, *supra* note 7, at 21-22.

91. See Brief of the States of Indiana et al. as Amici Curiae Supporting Respondents at 12-17, *Briscoe v. Virginia*, No. 07-11191 (U.S. Nov. 2, 2009) (describing the laws of several states that do not automatically require the prosecution to produce a laboratory analyst for live testimony, but provide either for the defendant to demand the laboratory analyst's presence or for the laboratory analyst to testify via telecommunication equipment).

92. Brief of Respondents at 15-16, *Briscoe*, No. 07-11191 (U.S. Oct. 26, 2009).

93. See *Magruder*, 657 S.E.2d at 122 (holding that only the opportunity for cross-examination is protected by the Confrontation Clause (citing *United States v. Owens*, 484 U.S. 554, 559 (1988))).

94. *Id.* at 120-21.

95. Brief of Respondents, *supra* note 92, at 16.

the *Melendez-Diaz* majority opinion.⁹⁶ In *Melendez-Diaz*, Justice Scalia clearly stated that statutes requiring a defendant to call a laboratory analyst did not meet the confrontation demands of the Sixth Amendment.⁹⁷ Briscoe and Cypress argue that § 19.2–187.1, which they characterize as imposing a subpoena requirement on criminal defendants who wish to cross-examine laboratory analysts,⁹⁸ clearly falls into this category of proscribed statutes.⁹⁹

Briscoe and Cypress further contend that the syntax of the Confrontation Clause was structured specifically to prevent laws like § 19.2–187.1.¹⁰⁰ They point to the fact that the passive voice is used when granting criminal defendants the right “to be confronted with the witnesses against him.”¹⁰¹ According to Briscoe and Cypress, this wording was intentionally chosen to ensure that the state would bear the burden of producing witnesses against criminal defendants so that they might be subjected to cross-examination.¹⁰² To bolster this textual argument, they contrast the passive voice of the Confrontation Clause with the active voice of the Compulsory Process Clause which grants defendants the right to call witnesses in their own favor.¹⁰³ If the Amendment’s authors had intended criminal defendants to take affirmative action to ensure the availability of adverse witnesses for confrontation, petitioners reason, the verb tense in the two clauses would be similar.¹⁰⁴

Briscoe and Cypress also argue that upholding § 19.2–187.1 as a subpoena statute would cause negative effects incompatible with the purpose of the Confrontation Clause.¹⁰⁵ For example, they claim that requiring the defendant to call an analyst to testify during the defense portion of the trial would create a substantial time gap between the introduction of the certificate of analysis and the actual cross-examination.¹⁰⁶ Briscoe and Cypress claim this gap would deprive the

96. Brief of Petitioners, *supra* note 13 at 5.

97. *Melendez-Diaz v. Massachusetts*, No. 07-591, slip op. at 19 (U.S. June 25, 2009) (saying that “state law” granting a defendant the power to call a prosecution witness to testify is “no substitute for confrontation”).

98. Brief of Petitioners, *supra* note 13, at 16 (characterizing the Virginia statute as allowing defendants to subpoena laboratory analysts if they wish to conduct a cross-examination).

99. *Id.* at 7.

100. *Id.* at 14.

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.* at 14–15.

105. *Id.* at 18.

106. *Id.*

defendant of an essential element of cross-examination: the immediate dissection of adverse testimony.¹⁰⁷ Calling the analyst long after the prosecution introduces the certificate of analysis could annoy the jury, they argue, and might even cause jury members to see the defense as harassing the witness.¹⁰⁸ It might also interrupt the flow of the defense's presentation of its case, whereas cross-examination of the analyst during the prosecution's case would follow traditional cross-examination procedure.¹⁰⁹ Furthermore, in cases where the defendant does not wish to present a defense, Briscoe and Cypress claim that the Virginia statute forces the defendant to make the choice to either not cross-examine the lab analyst or abandon his plan and present a defense.¹¹⁰

Finally, Briscoe and Cypress assert that they did not waive their confrontation rights by failing to call the analysts as witnesses.¹¹¹ The risks and costs of calling laboratory analysts as a defense witnesses, they argue, make the Virginia procedure an "inferior alternative" to a system in which the prosecution is required to produce analysts and introduce the certificate of analysis at the same time.¹¹²

B. The Commonwealth of Virginia's Arguments

Virginia first argues that Briscoe and Cypress did waive their Sixth Amendment confrontation rights by refusing to either call the lab analysts or asking the prosecution to subpoena them.¹¹³ The Commonwealth contests the petitioners' characterization of § 19.2–187.1 as imposing a subpoena requirement on criminal defendants who wish to cross-examine analysts.¹¹⁴ Instead, it claims that the Virginia statute does not specify who must summon the analyst to testify, and that by failing to demand that the prosecution produce the analysts as witnesses, Briscoe and Cypress effectively waived their Confrontation Clause rights.¹¹⁵ This interpretation of the statute, Virginia contends, is confirmed by the opinion of the Supreme Court of Virginia.¹¹⁶ The Commonwealth argues that the Supreme Court

107. *Id.* at 18 (citing *State v. Saporen*, 285 N.W. 898, 901 (Minn. 1939)).

108. *Id.* at 20.

109. *Id.*

110. *Id.* at 23–24.

111. *Id.* at 8.

112. *Id.*

113. Brief of Respondents, *supra* note 92, at 13.

114. *Id.* at 15.

115. *Id.* at 15, 18.

116. *Id.* at 15–16.

should wait to decide the constitutionality of § 19.2–187.1 on an as-applied basis in a case where the defendant actually sought to call a laboratory analyst for cross-examination, rather than deem it unconstitutional on its face.¹¹⁷

Second, Virginia is opposed to the Court deciding an issue based on “purely hypothetical scenarios.”¹¹⁸ In its view, Briscoe and Cypress cannot positively say that they would have been required to cross-examine the analysts during the defense portion of the trial.¹¹⁹ The Commonwealth also argues that it is speculative to assume that the prosecution would be able to introduce the certificate of analysis before the analyst was called upon to testify.¹²⁰ As neither Briscoe nor Cypress made any attempt to ensure that a laboratory analyst would appear at trial, Virginia says that petitioners’ claims are not supported by any factual experience.¹²¹

Virginia argues that even if petitioners did not waive their confrontation rights, § 19.2–187.1 is nonetheless a sufficient and constitutional protection of confrontation rights because it provides a criminal defendant with the opportunity to cross-examine a laboratory analyst that has prepared a certificate of analysis used by the prosecution.¹²² The Commonwealth points out that the language of the Confrontation Clause does not specify or even suggest an order in which witness testimony and cross-examination must be presented in court.¹²³ The phrase “to be confronted with,” it claims, means only that the prosecution may be required to bear the burden of ensuring the testimonial witness’s presence in the courtroom; it does not require a witness to be examined by the prosecution before being cross-examined by the defense.¹²⁴ Virginia says that the authors of the clause wished only to ensure that criminal defendants had access to the tool of cross-examination which had been historically denied them—not to dictate a specific order of witness examination during the trial.¹²⁵

117. *Id.* at 23–24.

118. *Id.* at 19.

119. *Id.* at 19.

120. *Id.* at 22.

121. *Id.* at 24.

122. *Id.* at 25.

123. *Id.* at 28.

124. *Id.* at 29.

125. *Id.* at 31–32 (claiming that the Confrontation Clause was included in the Sixth Amendment in order to allow for cross-examination opportunities that were not available in the royal vice-admiralty courts of seventeenth century England).

Finally, Virginia cautions that interpreting the Confrontation Clause too broadly would cause problems in the daily operation of criminal trials.¹²⁶ For example, it points out that concern about time gaps in relation to the Confrontation Clause could ultimately lead to allegations of a Sixth Amendment violation in the case of a routine recess between the direct examination and cross-examination of a witness.¹²⁷ Virginia also foresees potential challenges in situations where a defense witness is called before a prosecution witness who is running late because of a delayed flight or a traffic jam.¹²⁸ Accepting the petitioners' arguments, the Commonwealth contends, could mean that "routine trial decisions would be swept into the orbit of the Confrontation Clause."¹²⁹

VII. DISPOSITION

Because *Briscoe* follows so closely on the heels of *Melendez-Diaz*, the four dissenters could be seeking to limit that decision's impact.¹³⁰ It is even possible that the dissenters would vote to overturn the majority's holding in *Melendez-Diaz* altogether. Their success would almost certainly depend on whether the dissenters could convince newly-appointed Justice Sonia Sotomayor to join them.¹³¹ Since Sotomayor replaced Justice David Souter, who voted with the five-member majority in *Melendez-Diaz*, her vote in *Briscoe* could ultimately decide the case.

Sotomayor, a former prosecutor, could prove amenable to prosecution-friendly arguments.¹³² The opinion that she wrote in *United States v. Saget* while sitting on the Second Circuit, however, indicates that she may be willing to stand firmly behind the *Melendez-Diaz* holding that laboratory certificates of analysis are testimonial

126. *Id.* at 40.

127. *Id.*

128. *Id.*

129. *Id.*

130. See *Melendez-Diaz v. Massachusetts*, No. 07-591, slip op. at 13 (U.S. June 25, 2009) (Kennedy, J., dissenting). The dissent predicts that the *Melendez-Diaz* decision will strain the judicial system, thereby harming the efficient administration of justice in criminal cases. *Id.*

131. See Denniston, *supra* note 12 (theorizing that Justice Souter's departure from the Court leaves his deciding vote for the majority available to be shifted to the dissent by his replacement).

132. David R. Yannetti, *Melendez-Diaz May Be Short-Lived Victory for Criminal Defendants*, <http://knowledgebase.findlaw.com/kb/2009/Oct/63981.html> (last visited Dec. 9, 2009) (claiming that Sotomayor's background as a prosecutor could make her more sensitive to the high cost of administering justice problem alleged by the dissenters in *Melendez-Diaz*).

evidence.¹³³ In *Saget*, which was written before *Melendez-Diaz*, Sotomayor suggested that the Supreme Court would eventually consider a statement to be “testimonial” evidence if the witness reasonably expected that the statement would be used in court.¹³⁴ This prediction seems to fit the *Melendez-Diaz* standard, as a laboratory analyst preparing a certificate for the prosecution would likely anticipate the statement of the test results to be used in court.¹³⁵

Even if Sotomayor does not vote to overrule *Melendez-Diaz*, however, it is likely that, as a former prosecutor, she will support limiting the further expansion of confrontation rights in the realm of laboratory certificates. In the end, *Briscoe* will probably be decided in favor of the respondents upholding state laws that guarantee criminal defendants the opportunity to cross-examine a laboratory analyst, including procedures that require a criminal defendant to subpoena the analyst. Justice Sotomayor will likely provide the swing vote in favor of balancing Sixth Amendment confrontation rights with the burden placed on the prosecutorial system when laboratory analysts must be brought into the courtroom.¹³⁶

Regardless of which party prevails, a desirable outcome would be one in which the Supreme Court provides a clear answer to the key question of whether or not the prosecution is always responsible under the Sixth Amendment for calling laboratory analysts to testify in cases involving certificates of analysis. If the Court does not reach the issue, either because it finds that petitioners waived their confrontation rights or because it does not wish to uphold a facial challenge to the Virginia statute, this area of criminal procedure will continue to be rife with confusion. If the Supreme Court uses *Briscoe* as an opportunity to clarify *Melendez-Diaz* and provide a solid answer about the nature and limits of the Confrontation Clause, the entire criminal justice system will ultimately benefit.

133. Mark Chenoweth, *Using Its Sixth Sense: The Roberts Court Revamps the Rights of the Accused*, 2009 CATO SUPREME COURT REVIEW 223, 261–62 (2009).

134. *Id.* at 261.

135. *Id.* at 262.

136. *Id.* at 261.