May the State Require the Defense to Produce a Prosecution Witness for Cross-Examination?

CASE AT A GLANCE

Petitioners Mark Briscoe and Sheldon Cypress were convicted of drug offenses in Virginia state court. In each trial, the state introduced a certificate of drug analysis detailing the nature and amount of the alleged drugs. The state did not call the analyst as a witness in either case. Instead, the state invoked a statute that permitted petitioners to call the analysts as an adverse witness. Petitioners argue that this procedure violated the Confrontation Clause of the Sixth Amendment to the U.S. Constitution.

Briscoe et al. v. Virginia
Docket No. 07-11191

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From: Supreme Court of Virginia

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ISSUE

Did the state violate petitioners' confrontation rights when it introduced certificates of drug analysis at trial without calling the analysts who prepared the certificates, when state law allowed petitioners to call the analysts as an adverse witness?

FACTS

Petitioners Mark A. Briscoe and Sheldon Cypress both were prosecuted for drug offenses in Virginia state court. In Briscoe's case, police officers executed a search warrant at Briscoe's apartment, where the police found suspected drugs and drug paraphernalia. The police also found suspected drugs on Briscoe. Following Briscoe's arrest, the police submitted the suspected drugs for analysis to the Virginia Division of Forensic Science (DFS). A DFS analyst reported in two separate certificates of analysis that the seized substance was cocaine totaling 36.578 grams. The certificates included the analyst's signature and attestation that she analyzed the drugs herself and that the certificates accurately reflected her test results.

Cypress was a passenger in an automobile driven by his cousin when a Virginia state trooper stopped the vehicle for improperly tinted windows. The driver consented to a search of the vehicle, during which the trooper found suspected drugs. Cypress was arrested. Subsequent DFS analysis revealed that the seized substance was cocaine totaling 60.5 grams. The DFS analyst produced a certificate of analysis reporting these results and bearing her signature and attestation that she analyzed the drugs herself.

Briscoe and Cypress both were indicted on drug charges. Prior to trial, the state filed the DFS analysts' certificates of analysis. At trial, the state introduced the certificates without calling the analysts as a witness. A Virginia statute, Code § 19.2-187, authorized the admission of a "duly attested" certificate of analysis "as evidence of the facts therein stated and the results of the analysis or examination referred to therein." Briscoe and Cypress both objected, arguing that the certificates were "testimonial" evidence and therefore precluded by the Confrontation Clause unless the state called the analysts who prepared them.

The trial court in each case disagreed. The judge in Cypress's case found the certificate nontestimonial. In Briscoe's case, the judge relied on another Virginia statute, Code § 19.2-187.1, which provided:

> The accused in any hearing or trial in which a certificate of analysis is admitted into evidence pursuant to § 19.2-187 … shall have the right to call the person performing such analysis or examination … as a witness therein, and examine him in the same manner as if he had been called as an adverse witness. Such witness shall be summoned and appear at the cost of the Commonwealth.

The trial court concluded that this law adequately protected Briscoe's confrontation rights. Neither Briscoe nor Cypress called the forensic analyst. Briscoe and Cypress both were convicted and sentenced to prison.

In a consolidated appeal, the Virginia Supreme Court upheld admission of the certificates. The court ruled that even if the certificates did constitute testimonial evidence, Code § 19.2-187.1 satisfied the Confrontation Clause, because "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." The Confrontation Clause does not prevent states from requiring affirmative action by a defendant to assert the right, so long as the accused has an opportunity to cross-examine

the witness. The court further held that to any extent this statute imposed an evidentiary burden on Briscoe and Cypress, this argument "raises due process concerns that are not properly before us in these appeals." Therefore, the court concluded, by failing to call the analysts as permitted under Code § 19.2-187.1, Briscoe and Cypress waived any confrontation objection to the certificates.

Briscoe and Cypress petitioned for a writ of certiorari to the U.S. Supreme Court. The Court granted the petition on January 29, 2009.

CASE ANALYSIS

This case affords the Supreme Court another opportunity to clarify its seminal Confrontation Clause decision in *Crawford v. Washington,* 541 U.S. 36 (2004). The Confrontation Clause provides "In all criminal prosecutions, the accused shall enjoy the right … to be confronted with the witnesses against him." In *Crawford,* the Court held that the Confrontation Clause precludes "testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had a prior opportunity for cross-examination." The Court made clear, however, that "when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his [or her] testimonial statements."

Crawford altered about 25 years of preexisting confrontation jurisprudence and spawned a new family of issues. The Supreme Court resolved one of these issues last term in *Melendez-Diaz v. Massachusetts,* 129 S.Ct. 2527 (2009), when it held that a certificate of forensic drug analysis is a testimonial affidavit subject to *Crawford*. The Court's decision in *Melendez-Diaz* thus put Virginia's law squarely in the spotlight: how far may states go to economize the presentation of often routine and unchallenged forensic evidence consistent with the Confrontation Clause?

The state of Virginia argues that by making the analysts who prepared the certificates available to the defense as witnesses, the Virginia law provided exactly what the Confrontation Clause requires: an opportunity to cross-examine the state's witnesses at trial. In the state's view, it did not deny Briscoe and Cypress the right to confront the analysts; Briscoe and Cypress simply elected not to exercise that right and thus waived it.

Briscoe and Cypress argue that the Supreme Court "definitively resolved" this issue in *Melendez-Diaz* when the Court concluded:

> Respondent asserts that we should find no Confrontation Clause violation because petitioner had the ability to subpoena the analyst. But that power—whether pursuant to state law or the Compulsory Process Clause—is no substitute for the right of confrontation … the Confrontation Clause imposes a burden of the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court. Its value to the defendant is not replaced by a system in which the prosecution presents its evidence via ex parte affidavits and waits for the defendant to subpoena the affiants if he so chooses.

Briscoe and Cypress contend that the Virginia law functions the same as the subpoena practice rejected in *Melendez-Diaz.* Briscoe and Cypress stress that the Virginia law divorces the admissibility of the certificate of analysis from the defendant's cross-examination of the analyst: the state may present its evidence by ex parte affidavit and wait for the defendant to summon the affiant. Briscoe and Cypress thus argue that "[t]his case is very simple: *Melendez-Diaz* clearly demands that the decision of the Supreme Court of Virginia be reversed."

This result also is required by constitutional text and principle, according to Briscoe and Cypress. Unlike the Compulsory Process Clause, which protects a defendant's right affirmatively to produce evidence, the Confrontation Clause's text is phrased in the passive voice. Briscoe and Cypress thus contend that an opportunity for confrontation should not depend on the defendant's initiation. Indeed, Briscoe and Cypress argue, by burdening the defendant with producing the state's witness for cross-examination, the Virginia law blurs the presumption of innocence and the prosecution's burden of proof.

Briscoe and Cypress identify practical implications of the Virginia law that they assert confirm this view of the confrontation right. For example, under Briscoe and Cypress's reading of the Virginia law, the state can require that the defendant present a prosecution witness during the defense case as a condition to the defendant's right of cross-examination. This condition may deter some defendants from exercising that right rather than risk that the jury believe the state's evidence carries the defendant's imprimatur. Briscoe and Cypress further observe that if a defendant does choose to call the state's witness, the defendant bears the risk of an adverse witness no-show: if the witness fails or refuses to appear, "the accused is out of luck; the certificate is admitted and the accused has no opportunity at all to examine the witness." Briscoe and Cypress emphasize that nothing would cabin the Virginia law's procedure to drug cases and certificates of drug analysis. On the contrary, "States would be free to present the testimony of any witness by affidavit … and leave it to the accused, if he was able and if he dared, to call the witness to trial himself."

The state counters that the Virginia Supreme Court construed this law to avoid the problems identified in *Melendez-Diaz:* "the defendants could have insured the physical presence of the forensic analysts at trial by issuing summons for their appearance at the Commonwealth's cost, or asking the trial court or Commonwealth to do so." *Magruder v. Commonwealth,* 657 S.E.2d 113, 120-21 (Va. 2008). The state thus characterizes the law instead as a "notice and demand" statute, where the state notifies the defendant of its intent to introduce a witness's affidavit, and the defendant demands production of the witness by the state or waives any objection to admission of the affidavit. The state accepts that a defendant has the right under the Virginia law to exclude the certificate of analysis if, on a timely request, the state fails to produce the witness. The Supreme Court approved of some notice and demand statutes in *Melendez-Diaz.*

The state accordingly reframes Briscoe and Cypress's main argument as an order-of-proof complaint: that the state cannot sequence the evidence at trial in a manner that tactically disfavors the defendant. The state observes, however, that states historically have been given latitude to set their own rules governing the order of evidence, so long as those rules do not impair basic rights—such as the opportunity to cross-examine a witness at trial. Confrontation, the state argues, does not entitle a defendant to dictate *when* that cross-examination

happens. To any extent a burden of witness production may prejudice a defendant, that rule would violate due process, not the Confrontation Clause. Briscoe and Cypress never raised a due process claim.

The state adds that Briscoe and Cypress's core confrontation concerns remain speculative, because Briscoe and Cypress never demanded that the state call the analysts. Accordingly, the Court only can hypothesize whether the state could have admitted the certificates without calling the analysts, or whether Briscoe and Cypress would have been forced to call the analysts to cross-examine them. The state identifies tactical and practical reasons why, if Briscoe and Cypress had demanded that the analysts testify, the state likely would have called them during its case. The state counsels against an "advisory opinion."

Finally, the state, along with the United States and several other states as supporting amicus, details how Briscoe and Cypress's rule would harm the criminal justice system by taxing limited trial and investigative resources and encouraging defense "gamesmanship," without substantially enhancing the reliability of the trial process. Indeed, going beyond the state of Virginia, the amicus brief filed by several states challenges *Melendez-Diaz* itself, arguing that the Supreme Court should overrule *Melendez-Diaz* just one term after issuing the decision.

Briscoe and Cypress respond that in other states the prosecution calls analysts before admitting certificates of analysis without the "sky falling." Commonly, the defense stipulates to admission of the certificate. States alternatively can permit pretrial depositions or hire more analysts. States also can adopt a true notice-and-demand statute. Several states have such laws, including now Virginia—Briscoe and Cypress note that Virginia has amended the law that governed their trials to resemble the type of notice-and-demand statute of which the Supreme Court approved in *Melendez-Diaz.*

SIGNIFICANCE

Briscoe has generated some interesting speculation because the Supreme Court does appear to have resolved this issue in *Melendez-Diaz.* Professor James Duane, for example, has characterized this case as "The Extraordinary Mystery of *Briscoe v. Virginia.*" See CrimProf Blog (Aug. 18, 2009). Professor Duane observed that if a majority of the Court believed Briscoe is controlled by the holding in *Melendez-Diaz,* the Court could order "a summary disposition … that would vacate and remand the decision of the lower court for reconsideration in light of *Melendez-Diaz.*" Yet, the Court has not.

At the same time, the Supreme Court has declined an alternative opportunity to rule by summary disposition, in a manner suggested by the state. The state contends that the Virginia Supreme Court construed the Virginia law to function as a notice-and-demand statute, of which the U.S. Supreme Court approved in *Melendez-Diaz*. Since the U.S. Supreme Court is bound by the Virginia Supreme Court's construction of a Virginia statute, the state argues that the U.S. Supreme Court has no substantial federal question to review. The state thus argues that "the Court may wish to dismiss the case as improvidently granted." Yet, the Court has not.

Because the Supreme Court has declined these opportunities for a narrow disposition in *Briscoe,* Court watchers have questioned whether the Supreme Court may have something significant in mind. The "mystery" becomes exactly what it might be. The Supreme Court may view *Briscoe* merely as an opportunity to clarify precisely what kinds of notice and demand statutes will pass constitutional muster. Briscoe and Cypress in their original petition presented evidence that "the federal and state courts are sharply divided on the question." The Court also noted in *Melendez-Diaz,* "We have no occasion today to pass on the constitutionality of every variety of statute commonly given the notice-and-demand label. It suffices to say that what we have referred to as the 'simplest form [of] notice-and-demand statutes' … is constitutional." If the Court restricts its ruling in *Briscoe* to this issue, the Court could place responsibility for presenting a prosecution witness with the state, although this duty may be limited constitutionally by procedural rules requiring pretrial demand of the witness by the defense.

But some have wondered whether the Supreme Court instead may do something rather unusual: overrule the one-year-old holding of *Melendez-Diaz* itself and declare that certificates of analysis no longer constitute testimonial evidence. Justice Kennedy wrote a vigorous dissent in *Melendez-Diaz* for himself, Chief Justice Roberts, and Justices Breyer and Alito. Calling the decision a "windfall" for defendants that "transforms the Confrontation Clause from a sensible procedural protection into a distortion of the criminal justice system," Justice Kennedy opined:

> The Court purchases its meddling with the Confrontation Clause at a dear price, a price not measured in taxpayer dollars alone. Guilty defendants will go free, on the most technical grounds, as a direct result of today's decision, adding nothing to the truth-finding process.

The states of Massachusetts and Indiana, in an amicus brief joined by 24 other states and the District of Colombia, attempt to prove these dissenters correct by arguing that "*Melendez-Diaz* is already proving unworkable."

A one-term about-face from the Supreme Court might seem like wishful thinking. Virginia itself does not invite the Court to overrule *Melendez-Diaz*—perhaps the Virginia legislature's decision to amend Virginia's law to conform to *Melendez-Diaz* handcuffed the state's litigation strategies. But the *Melendez-Diaz* majority included Justice Souter, who retired after *Melendez-Diaz* was decided. Justice Souter's replacement, Justice Sotomayor, is an ex-prosecutor. Some therefore have questioned whether she will prove more receptive to the state's law enforcement concerns. Cf. L. Denniston, *Is Melendez-Diaz Already Endangered?,* SCOTUSBlog (June 29, 2009); Duane, *supra.*

If Justice Sotomayor does agree with the dissent in *Melendez-Diaz,* and if she also agrees with the states as amicus that principles of stare decisis would not be upended by an outright reversal, perhaps *Briscoe* will produce a dramatic decision. A more modest "overruling," however, might leave *Melendez-Diaz*'s core holding intact, but target that part of the decision condemning "subpoena" rules. States as a result would have much greater flexibility to admit a certificate of analysis without having to call the analyst, while giving defendants the right to subpoena and cross-examine the analyst during the defense case.

Briscoe does present a bit of a mystery, because on one level it could result in a very narrow ruling—too narrow perhaps even for full argument and a merits decision. But at the same time, *Briscoe* offers the prospect of something big that could uncover important signs about the Supreme Court's direction in the area of criminal law following Justice Sotomayor's installation on the Court. Oral argument, scheduled for January 11, 2010, may reveal a lot about the potential for this decision.

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PREVIEW of United States Supreme Court Cases, pages 165–168.

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