

No. 07-11191

In The
Supreme Court of the United States

MARK A. BRISCOE and SHELDON A. CYPRESS,
Petitioners,

v.

COMMONWEALTH OF VIRGINIA,
Respondent.

**On Writ Of Certiorari
To The Supreme Court Of Virginia**

REPLY BRIEF OF PETITIONERS

JOSEPH D. KING
KING & CAMPBELL, PLLC
*Counsel for
Petitioner Briscoe*
526 King Street, Suite 213
Alexandria, Virginia 22314
(703) 683-7070
(703) 836-0445 (fax)

RICHARD D. FRIEDMAN
Counsel of Record
625 South State Street
Ann Arbor, Michigan 48109
(734) 647-1078
(734) 647-4188 (fax)
rdfrdman@umich.edu

THOMAS B. SHUTTLEWORTH
CHARLES B. LUSTIG
SHUTTLEWORTH, RULOFF,
SWAIN, HADDAD & MORECOCK
*Counsel for
Petitioner Cypress*
4525 South Boulevard,
Suite 300
Virginia Beach, Virginia 23452
(757) 671-6000
(757) 671-6004 (fax)

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
ARGUMENT	1
I. THE FORMER VIRGINIA SCHEME SHARES BOTH OF THE FATAL DEFECTS OF A SUBPOENA SYSTEM....	2
A. The former Virginia statutory scheme is fatally defective in that it allows prosecutors to present affidavits rather than live testimony of witnesses.....	3
B. The former Virginia statutory scheme is fatally defective in that it requires the defendant who wishes to examine a prosecution witness, rather than the prosecution, to bear the risk that the witness will not appear at trial....	16
II. THE DEFENDANTS DID NOT WAIVE THEIR CONSTITUTIONAL RIGHTS BY DECLINING TO INVOKE VIRGINIA'S INVALID STATUTORY PROCEDURE	20
III. PROTECTING DEFENDANTS' CONFRON- TATION RIGHTS DOES NOT IMPOSE AN UNDUE BURDEN ON THE STATES	24
IV. THE COURT SHOULD DECIDE THIS CASE ON THE MERITS – BUT IF IT DECIDES NOT TO, IT SHOULD VACATE AND REMAND FOR RECONSIDERATION IN LIGHT OF <i>MELENDEZ-DIAZ</i>	28
CONCLUSION.....	31

TABLE OF AUTHORITIES

Page

CASES

<i>Barba v. California</i> , 129 S.Ct. 2857 (2009)	29
<i>Bordenkircher v. Hayes</i> , 434 U.S. 357 (1978)	15
<i>Bouie v. City of Columbia</i> , 378 U.S. 347 (1964).....	22
<i>Brooks v. Tennessee</i> , 406 U.S. 605 (1972)	7
<i>Bruton v. United States</i> , 391 U.S. 123 (1968).....	12, 24
<i>California v. Green</i> , 399 U.S. 149 (1970)	10
<i>Commissioner v. Estate of Bosch</i> , 387 U.S. 456 (1967).....	19
<i>Crawford v. Washington</i> , 541 U.S. 36 (2004)	9, 12, 13
<i>Grant v. Commonwealth</i> , 682 S.E.2d 84 (Va. Ct. App. 2009)	17, 18, 19, 23
<i>Griffin v. California</i> , 380 U.S. 609 (1965)	13
<i>Hoover v. Beto</i> , 439 F.2d 913 (5th Cir. 1971).....	9
<i>Johnson v. Zerbst</i> , 304 U.S. 458 (1938)	21
<i>Knox v. Lee</i> , 79 U.S. 457 (1871).....	6
<i>Lawrence v. Chater</i> , 516 U.S. 163 (1996)	29
<i>Long v. State</i> , 742 S.W.2d 302 (Tex. 1987), <i>cert.</i> <i>denied</i> , 485 U.S. 993 (1998).....	9
<i>Lowery v. Collins</i> , 988 F.2d 1364 (5th Cir. 1993).....	12
<i>Lowery v. Collins</i> , 996 F.2d 770 (5th Cir. 1993).....	11
<i>Maldonado v. Commonwealth</i> , 2006 WL 3798583 (Va. Ct. App. 2006)	17

TABLE OF AUTHORITIES – Continued

	Page
<i>Melendez-Diaz v. Massachusetts</i> , 129 S.Ct. 2527 (2009).....	<i>passim</i>
<i>N.A.A.C.P. v. Alabama</i> , 357 U.S. 449 (1958)	22
<i>Norwood v. United States</i> , 2009 WL 2134356 (U.S. Nov. 2, 2009).....	29
<i>Pointer v. Texas</i> , 380 U.S. 400 (1965).....	13
<i>Reich v. Collins</i> , 513 U.S. 106 (1994).....	22
<i>Schaal v. Gammon</i> , 233 F.3d 1103 (8th Cir. 2000)	11
<i>State v. Apilando</i> , 900 P.2d 135 (Haw. 1995).....	11, 13
<i>State v. Belvin</i> , 986 So.2d 516 (Fl. 2008)	12
<i>State v. Birchfield</i> , 157 P.3d 216 (Or. 2007).....	13
<i>State v. Fisher</i> , 563 P.2d 1012 (Kan. 1977)	9
<i>State v. Rohrich</i> , 939 P.2d 697 (Wash. 1997)	9
<i>State v. Snowden</i> , 867 A.2d 314 (Md. 2005)	11, 12
<i>Taylor v. Kentucky</i> , 436 U.S. 478 (1978).....	12
<i>Thomas v. United States</i> , 914 A.2d 1 (D.C. 2006), <i>cert. denied</i> , 552 U.S. 895 (2007).....	25, 26
<i>Virginia v. Black</i> , 538 U.S. 343 (2003).....	12
<i>Wright v. Georgia</i> , 373 U.S. 284 (1963).....	22

CONSTITUTIONAL PROVISION

U.S. Constitution, VI Amendment.....	<i>passim</i>
--------------------------------------	---------------

TABLE OF AUTHORITIES – Continued

Page

STATUTES

Ala. Code 1975 § 12-21-32(b).....	14
Alaska Stat. § 12.45.084.....	14
Cal. Evid. Code §§ 1370, 1380.....	12
Del. Code § 3516	12
German Code of Criminal Procedure §§ 243, 244	7
Idaho Code § 37-2745	30
725 Ill. Comp. Stat. § 5/115-10.3.....	12
La. Rev. Stat. Ann. § 15:501(B)(2).....	14
Mich. Comp. L. Ann. § 768.27c	12
N.D. Cent. Code § 19-03.1-37.....	30
Or. Rev. Stat. § 40.460(18)(b)	12
Va. Code § 19.2-187 <i>et seq.</i>	<i>passim</i>

BOOKS AND ARTICLES

WILLIAM BLACKSTONE, COMMENTARIES 373 (1768).....	8
Aaron-Andrew P. Bruhl, <i>The Supreme Court's Controversial GVRs – And an Alternative</i> , 107 MICH. L. REV. 711 (2009).....	29
GEOFFREY GILBERT, EVIDENCE (1754)	8
EUGENE GRESSMAN, et al., SUPREME COURT PRACTICE (9th ed. 2007).....	29

TABLE OF AUTHORITIES – Continued

	Page
CHARLES EVANS HUGHES, <i>THE SUPREME COURT OF THE UNITED STATES</i> (1928)	6
John H. Langbein, <i>Shaping the Eighteenth Century Criminal Trial: A View from the Ryder Sources</i> , 50 U. CHI. L. REV. 1 (1983)	7
ANTHONY LEWIS, <i>GIDEON’S TRUMPET</i> (1964)	24
JOHN HENRY WIGMORE, <i>EVIDENCE</i> (Chadbourn rev. 1976)	8

OTHER AUTHORITIES

Brief for the Commonwealth, October 17, 2008, <i>Grant v. Commonwealth</i> , available at < http://www-personal.umich.edu/~rdfrdman/GrantVa.pdf >	18
Brief in Opposition to Petition for Appeal, July 17, 2008, <i>Grant v. Commonwealth</i> , available at < http://www-personal.umich.edu/~rdfrdman/GrantBIO.pdf >	18
<i>Confronting Forensic Evidence: Implications of Melendez-Diaz v. Massachusetts and Briscoe v. Virginia Cite</i> , Symposium at New England School of Law, Nov. 13, 2009, available at < http://www.nesl.edu/students/ne_journal_symposia_audio_2009.cfm >	27
Oral Argument, May 7, 2009, <i>Grant v. Commonwealth</i> , available at < http://www-personal.umich.edu/~rdfrdman/GrantvCW.MPG >	18

ARGUMENT

In *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527 (2009), this Court held that forensic laboratory reports are testimonial for purposes of the Confrontation Clause. The Court also held that the defendant's ability to subpoena the author of such a report does not satisfy the Clause: A subpoena procedure requires the defendant, rather than the prosecution, to present the live testimony of the witness, and it imposes the burden of witness no-shows on the defense.

The Virginia statutory scheme involved in this case, however one may label it, shares both these fatal defects. Approving it would not only severely undercut the confrontation right but fundamentally transform trial procedure as it has stood since before the time of the Founding. To their credit, the Governor and General Assembly of Virginia recognized the problem, and very promptly replaced the principal portion of the scheme by a statute that, *Melendez-Diaz* indicated, clearly satisfies the Constitution – a simple notice-and-demand procedure under which, if the defendant makes a timely demand, the prosecution must present the live testimony of the witness or forgo use of the certificate.

But in this case, Virginia, after trying to avoid the merits, tries to transform the defunct statutory scheme into what it transparently is not, a simple notice-and-demand statute. Its attempt to accomplish this feat relies in part on its attempt to cast aside a key aspect of *Melendez-Diaz*, the requirement that

the prosecution call prosecution witnesses to the stand. And in part it relies on a mischaracterization of dictum from an uncontested lower court case – a case in which, until *Melendez-Diaz* was decided, it insisted the scheme required a subpoena by the defendant.

The Court should not be taken in by this attempted alchemy. Nor should the Court be frightened into abandoning a precedent less than six months old. There is no evidence whatsoever that the holdings of *Melendez-Diaz* – that lab certificates are testimonial and that the prosecution rather than the accused bears the burden of producing prosecution witnesses at trial – are casting an undue burden on the states. On the contrary, the evidence shows clearly that the burden is modest. Some states – including some of the *amici* – already bore it, without prompting by this Court, before *Melendez-Diaz*. Any state wishing to minimize it can follow the lead of Virginia and adopt a simple notice-and-demand statute.

I. THE FORMER VIRGINIA SCHEME SHARES BOTH OF THE FATAL DEFECTS OF A SUBPOENA SYSTEM.

Two grounds led the *Melendez-Diaz* Court to reject the contention that the accused’s ability to subpoena the witness is an adequate substitute for the confrontation right.

The “[m]ore fundamental” of the two grounds is that “the Confrontation Clause imposes a burden on

the prosecution to present its witnesses,” live at trial, rather than “via *ex parte* affidavits.” 129 S.Ct. at 2540. Virginia and the United States do not seriously deny that the former Virginia scheme imposed this burden on the accused. In effect, they ask the Court to turn its back on this aspect of *Melendez-Diaz*.

The other ground is that the ability to subpoena a witness is “of no use to the defendant when the witness is unavailable or simply refuses to appear”; such a procedure therefore “shifts the consequences of adverse-witness no-shows from the State to the accused.” *Id.* Virginia no longer denies that such a burden shift is unconstitutional. But it contends – contrary to the clear statutory language and contrary to the position it asserted until after the decision in *Melendez-Diaz* and the grant of *certiorari* in this case – that its defunct scheme does not cause such a shift.

A. The former Virginia statutory scheme is fatally defective in that it allows prosecutors to present affidavits rather than live testimony of witnesses.

Under former § 19.2-187 of the Virginia Code, a “duly attested” certificate of a forensic laboratory analysis fitting within a prescribed category was admissible at trial to prove the results of the test it reported, provided that (1) the certificate was filed with the clerk seven days before trial, and (2) *if* defense counsel (a) anticipated that such a

certificate would be filed, and (b) made a request at least *ten* days before trial, a copy was mailed or delivered to counsel at least seven days before trial. A companion statute, § 19.2-187.01, still in force, provides that such a certificate is admissible to prove the chain of custody of the material described in it; this statute does not contain the proviso regarding filing and transmittal. A third provision, former § 19.2-187.1, provided that in any trial “in which a certificate of analysis is admitted into evidence” pursuant to the first two provisions, the accused “shall have the right to call the person performing the analysis or examination involved in the chain of custody as a witness therein, and examine him in the same manner as if he has been called as an adverse witness.”

The plain meaning of the statutory language is that the certificate is admissible as part of the prosecution’s case and that the accused may, if he wishes (and is able) present the analyst as his own witness as part of his case. And the Virginia Supreme Court explicitly declared that the statute should be read in accordance with its terms. (“At trial, the defendants could have called the forensic analysts as witnesses, placed them under oath, and questioned them . . . ,” JA 200). While offering speculation that perhaps the prosecutor would present the analyst as its witness if

the defense so demanded, Brief at 20, that is not the procedure provided by the statute.¹

Virginia makes no real effort to reconcile this aspect of the statutory scheme with *Melendez-Diaz*. Nor could it plausibly do so, because the conflict is so clear. *Melendez-Diaz* holds explicitly that the author of a forensic lab report is a witness against the accused, 129 S.Ct. at 2533, and the consequence follows inevitably:

While the Confrontation Clause guarantees a defendant the right to be confronted with the witnesses “against him,” the Compulsory Process Clause guarantees a defendant the right to call witnesses “in his favor.” U.S. Const., Amdt. 6. The text of the Amendment contemplates two classes of witnesses – those against the defendant and those in his favor. The prosecution *must* produce the former; the defendant *may* call the latter.

Id. at 2534 (footnote omitted). Thus, a system that relieves the prosecution of its obligation to present the live testimony of its witnesses is “fundamentally” flawed. “[T]he Confrontation Clause imposes a burden on the prosecution to present its witnesses,” and “[i]ts value to the defendant is not replaced by a system in

¹ And in fact when petitioners, in their bench trials, objected to presentation of the certificates absent the live testimony of the witness, Virginia made no attempt to present the witnesses or even to demonstrate that it could not feasibly be done.

which the prosecution presents its evidence via *ex parte* affidavits.” *Id.* at 2540.

Virginia and the United States therefore ask the Court – albeit without saying so – to overrule this aspect of *Melendez-Diaz*.² They offer no plausible basis that would warrant this result.

Virginia and the United States attempt to trivialize the constitutional deficiency of the former Virginia statute by characterizing the issue as one over order of proof. That misses the essential point:

² The other *amici* supporting Virginia, Indiana and twenty-five other states plus the District of Columbia, do explicitly ask the Court to overrule *Melendez-Diaz* in its entirety. Because Virginia does not ask for this result, which goes far beyond the question presented, we will not address the matter here. But the fact that *Knox v. Lee*, 79 U.S. 457 (1871), is the states’ prize example of an overruling of a recent decision is notable, and casts an important light on Virginia’s implicit request for a partial overruling. Charles Evans Hughes famously identified *Knox* as a decision that “brought the Court into disesteem,” one of “three notable instances” in which “the Court has suffered severely from self-inflicted wounds”:

The action of the Court, taken soon after [the confirmation of two new justices], . . . the two new judges joining with the three judges, who had dissented in the *Hepburn* case, to make a majority, caused widespread criticism. From the standpoint of the effect on public opinion, there can be no doubt that the reopening of the case was a serious mistake and the overruling in such a short time, and by one vote, of the previous decision shook popular respect for the Court.

CHARLES EVANS HUGHES, *THE SUPREME COURT OF THE UNITED STATES* 50-52 (1928).

The principal failing of the procedure is that it allows the prosecution to present the testimony of its witnesses through affidavits rather than by calling them to the stand as its own live trial witnesses.

Much of the argument in the briefs of Virginia and the United States is devoted to demonstrating, largely on historical grounds, an undisputed point – that the trial court has discretion to manage the proceedings, including considerable control over the order of proof. Thus, for example, there would be no constitutional difficulty if the court interrupted the testimony of another witness to allow a lab analyst to testify at a convenient time. Nor does a brief delay in cross-examination pose a constitutional problem.

But this housekeeping power does not mean that a trial court has discretion to impose any order whatever in a particular case. Nor does a state have the constitutional leeway to choose whatever procedure it chooses as a general matter. A state could not provide that a defendant must testify at the outset of the defense case,³ or that all defense witnesses must testify first.⁴ Nor could a state provide a general rule

³ *Brooks v. Tennessee*, 406 U.S. 605 (1972).

⁴ See, e.g., John H. Langbein, *Shaping the Eighteenth Century Criminal Trial: A View from the Ryder Sources*, 50 U. CHI. L. REV. 1, 130-31 (1983) (By the 1750s, “[o]ur sources show a consistently crisp division of testimony along partisan lines, inculcating evidence before exculpating,” because to “test[] the prosecution case,” counsel “had to know what the prosecution case was.”); compare German Code of Criminal Procedure
(Continued on following page)

that there should be a three-week delay between direct and cross examinations, to allow the trier of fact to absorb and reflect on the direct testimony.⁵

And neither can a state provide that a prosecutor may present the testimony of its witnesses through affidavit, leaving it to the defendant, if he wishes to examine them, to call them to the witness stand. That proposition has been the rule for centuries,⁶ it was the

§§ 243, 244 (defendant examined before evidence taken from others).

⁵ 6 JOHN HENRY WIGMORE, EVIDENCE 697 (Chadbourn rev. 1976) (“The cross-examination . . . *follows immediately* the direct examination, in the customary order prescribed by the common law”; though a postponement may be granted in the court’s discretion “where fairness seems to require it,” “the *opponent is entitled* to this *immediate sequence*, in order to expose without delay the weak points of the testimony against him”), *see also id.*, vol. 6, at 38.

⁶ *E.g.*, GEOFFREY GILBERT, EVIDENCE 105 (1754) (“The Witness produced must first be examined on the part of the Producer, and then the other Side may examine him; and this is a Regulation that naturally follows the true Order of Things, for it is proper first to enquire what a Witness can prove before you are to examine what hath not fallen under his Knowledge.”); 3 WILLIAM BLACKSTONE, COMMENTARIES 373 (1768) (“open examination of witnesses *viva voce* . . . is much more conducive” to truth determination than are “private and secret examinations taken down in writing”). That defendants were occasionally allowed to ask questions during the direct testimony, as occurred during the Aaron Burr trial, Brief of Respondent at 38, is of no significance; the essential point is that the prosecution presented its witnesses live as part of its case rather than by affidavit.

central focus of the Confrontation Clause,⁷ and it remains the rule now.⁸

Thus, two major points stand out from the arguments made by Virginia and the United States. First, for all their trawling of historical sources, they have found no historical precedent – that is, none other than relatively recent statutory schemes resembling the one here – for a procedure like that involved in this case: They provide *not a single instance* in which a court allowed a prosecution witness to present evidence through an affidavit and held that the defendant’s ability to call the witness to the stand sufficed. Petitioners have searched for cases

⁷ *Crawford v. Washington*, 541 U.S. 36, 50 (2004) (“the principal evil at which the Confrontation Clause was directed was . . . [the] use of *ex parte* examinations as evidence against the accused”).

⁸ *E.g.*, *State v. Rohrich*, 939 P.2d 697, 700-01 (Wash. 1997) (“The opportunity to cross examine means more than affording the defendant the opportunity to hail the witness to court for examination. It requires the State to elicit the damaging testimony from the witness so the defendant may cross examine if he so chooses.”); *Long v. State*, 742 S.W.2d 302, 320 (Tex. 1987), *cert. denied*, 485 U.S. 993 (1998) (noting lack of precedent for “a trial procedure that requires the defendant to call as a witness his accuser if he wants to question the witness.”); *State v. Fisher*, 563 P.2d 1012, 1017 (Kan. 1977) (“calling a declarant as a defense witness is no substitute for cross-examining that declarant as a state’s witness”); *Hoover v. Beto*, 439 F.2d 913, 924 (5th Cir. 1971) (noting that state might fear live testimony because of possible retraction or refusal to testify; to treat availability of witness as “the equivalent of putting him on the stand and subjecting him to cross-examination would severely alter the presumption of innocence and the burdens of proof”).

in which the issue was even raised, but without success. The reason is not hard to discern: The idea that the prosecution could present its testimony by affidavit, so long as the defense had the ability to call the witnesses to testify live, was as unacceptable then as it is now.

Second, neither the United States nor Virginia provides any basis for resisting the conclusion that approving the burden-shifting procedure involved here would result in a fundamental transformation of the criminal trial. Neither one provides any basis for distinguishing, with respect to that procedure, forensic lab technicians from any other type of prosecution witness.⁹ Approval of the procedure, therefore, would allow a state to present as its case nothing more than a pile of affidavits, audiotapes, and videotapes, so long as the prosecution could assure the presence of the witnesses at some later point during trial if the defendant decided to put them on the stand. The prosecution could choose which medium to use, and it

⁹ The United States suggests that the prosecution could call a witness to the stand, ask nothing, read the statement, and turn the witness over for cross. Petitioners believe the prosecutor would have to ask *something*, if only to determine that the witness had no recollection. In any event, the key is that the prosecution would still call the witness to the stand, and would suffer adverse consequences if the direct testimony were empty. See *California v. Green*, 399 U.S. 149, 159 (1970) (emphasizing benefit to defendant of inconsistency between prior statement and direct testimony).

could craft and rehearse the witness's testimony behind closed doors.

What possible reason is there to believe this would not happen? "Well-established hearsay rules" would prevent this result, assures the United States. Brief at 28. Or, put another way, trust the foxes to guard the chicken coop: Though states allowed Sylvia Crawford to testify without confrontation by talking to a police officer in the station-house, and Amy Hammon to do the same in her living room, states apparently would not take advantage of the leeway accorded them by approval of the defunct Virginia system. But in fact several states already have adopted similar procedures for certain child witnesses. The courts have usually held that these statutes violate the Confrontation Clause, on grounds similar to those argued here by petitioners.¹⁰ A green light from this Court would revive such statutes and

¹⁰ *State v. Snowden*, 867 A.2d 314 (Md. 2005); *Schaal v. Gammon*, 233 F.3d 1103, 1106-07 (8th Cir. 2000) (Missouri statute; videotaped statements of child victims of statutorily defined offenses; "the State never called the child to testify on direct examination and [defendant] . . . cannot be expected to bear the burden of taking affirmative action to make the State's use of the videotape constitutional"); *Lowery v. Collins*, 996 F.2d 770, 771-72 (5th Cir. 1993) (Texas statute, child witness testifying to certain crimes: "the Sixth Amendment is complied with when the *prosecution* calls the witness first. . ."); *State v. Apilando*, 900 P.2d 135 (Haw. 1995) (videotaped statements of a child victim of sexual assault: "Simply producing the declarant, without having him or her testify on *direct* examination," violated confrontation right).

allow the states to adopt the same procedure for any category of witness they choose – or, if they prefer, for all witnesses. Statutes passed before and even after *Crawford*, designed to facilitate admission of broad prescribed categories of testimonial accusations, indicate that the states would not be reticent.¹¹

As shown in petitioners’ principal brief, pp. 18-24, and in the PDS-NACDL *amicus* brief, pp. 14-19, the former Virginia procedure severely impairs the right of the accused to examine a prosecution witness – among other ways by forcing the accused to choose between that right and the “constitutional right not to put on a defense,” *Virginia v. Black*, 538 U.S. 343, 365 (2003), an integral aspect of the presumption of innocence, *Taylor v. Kentucky*, 436 U.S. 478, 484 n.12 (1978). *See, e.g., State v. Belvin*, 986 So.2d 516 (Fl. 2008); *State v. Snowden*, 867 A.2d 314 (Md. 2005); *Lowery v. Collins*, 988 F.2d 1364, 1369-70 (5th Cir. 1993) (“Catch-22”).¹² Indeed, petitioners believe it is not accurate to describe the opportunity as being one

¹¹ *See* Cal. Evid. Code §§ 1370 (statements describing injury to declarant), 1380 (elder or disabled witness); Or. Rev. Stat. § 40.460(18)(b) (witness who was “chronologically or mentally under 12 years of age when the statement was made or was 65 years of age or older when the statement was made”); 725 Ill. Comp. Stat. § 5/115-10.3 (elder witness); Del. Code § 3516 (infirm adults and residents or patients of state facilities); Mich. Comp. L. Ann. § 768.27c (statements alleging domestic violence).

¹² No jury instruction could solve the problem, because it could not alter the reality of the situation. *See Bruton v. United States*, 391 U.S. 123, 137 (1968) (instruction inadequate to relieve “substantial threat” to confrontation right).

for cross-examination.¹³ But, however the procedure may be characterized, clearly defendants have a right to an *adequate* opportunity for cross-examination, *e.g.*, *Crawford*, 541 U.S. at 57; *Pointer v. Texas*, 380 U.S. 400, 407 (1965), not one that has been designed to “cut down” the right “by making its assertion costly,” *e.g.*, *Griffin v. California*, 380 U.S. 609, 614 (1965).

And the prospect of impairing that opportunity – so that it will be exercised less frequently or less effectively or both – is the only reason to choose a scheme like the one involved here. As we have also shown in our principal brief, a state’s legitimate interests are fully satisfied by a simple notice-and-demand statute, which is clearly constitutional.¹⁴ Indeed, the *only* difference between such a statute and the system for which Virginia and the United States advocate lies in who puts the witness on the stand;¹⁵ in both systems, if the defense demands

¹³ And the statute does not so describe it. *See* former Code § 192-187.1 (“right to call the person . . . and examine him in the same manner as if he had been called as an adverse witness”). *See also State v. Apilando*, 900 P.2d 135, 145 (Haw. 1995) (describing opportunity under similar procedure as “not cross-examination at all”).

¹⁴ *State v. Birchfield*, 157 P.3d 216, 220 (Or. 2007) (“The legislature may require the defendant to assert that right or to design a procedure to determine whether the defendant agrees that a written report will suffice. But, to require that a defendant do more changes the right to insist that the state present evidence the ‘old-fashioned way’ into an obligation to procure a witness for the state.”).

¹⁵ They concede that a system placing the burden of witness no-shows on the defense is invalid.

the presence of the technician, the prosecution must secure it or forgo use of the certificate. Then what possible legitimate goal does a state have in insisting that the defendant call the witness to the stand?

The United States, recognizing the problem, asserts that this procedure reduces the risk of gamesmanship, in which the defendant will insist on the presence of the technician even if he has no interest in cross-examining him, simply to impose a burden on the prosecution. Brief at 31. But the argument collapses on mere examination.

First, *if* this were a problem, insisting that it be the defendant who presents the testimony of the witness would not solve it; the defendant could say that, although he had anticipated putting the technician on the stand he no longer believes it advantageous to do so.

Second, *if* it were a problem, there would be less restrictive alternatives, such as requiring that the defense assert that it “intends in good faith” to cross-examine.¹⁶ Petitioners take no position on the constitutionality of such a requirement, a question not presented here; they only assert that such a requirement, tacked on to a genuine notice-and-demand statute, would impair the confrontation right far less

¹⁶ Such a requirement has been incorporated in some statutes. *E.g.*, Ala. Code 1975 § 12-21-32(b); La. Rev. Stat. Ann. § 15:501(B)(2); Alaska Stat. § 12.45.084 (“written demand showing cause”).

than does the procedure involved here, and provide a genuine solution to the purported problem.

Third, the Government offers no data at all suggesting that this practice is pervasive, and data we have offered, indicating that defendants almost always cross-examine even when the witness testifies at the prosecutor's initiative, Brief at 33-34 n.13, suggest that it is not.

Finally, even if the problem were pervasive, it would not be serious. The leverage accorded the defendant would be far less than, say, that resulting from the defendant's right to impose the costs of a jury trial on the state; and the state, as the classic repeat player, has ample incentives and ample resources to ensure that the defense gains no significant advantage from such a tactic, or that it backfires. *See, e.g., Bordenkircher v. Hayes*, 434 U.S. 357 (1978).¹⁷

In short, not only does the backwards procedure here violate *Melendez-Diaz*, but it runs contrary to hundreds of years of practice deeply engrained in the fabric of common law trials; it impairs the right of an accused to examine a prosecution witness; and it serves no valid purpose that could not be better achieved by less restrictive means.

¹⁷ Note that petitioner Cypress feared prosecutorial reprisal if he asserted his confrontation rights before trial. JA 110.

B. The former Virginia statutory scheme is fatally defective in that it requires the defendant who wishes to examine a prosecution witness, rather than the prosecution, to bear the risk that the witness will not appear at trial.

As explained above in Section A, the statutory language provides clearly that, so long as the prosecution complies with the statute's requirements, the certificate is unconditionally admitted, and *then* the accused may call the analyst as a witness. There is no suggestion whatsoever that if the analyst is unavailable or refuses to appear the certificate must be struck.¹⁸ Accordingly, the defense bears the risk that the witness will be unavailable. And the Virginia courts have never indicated otherwise.

In the decision under review, *Magruder v. Commonwealth*, the Supreme Court of Virginia asserted that rather than subpoenaing the analyst himself the accused may ask the Commonwealth or the court to do so. But the difference between a subpoena and such a request is inconsequential; in either event, the accused must file a demand and in either case state agents rather than the defendant himself would

¹⁸ If the scheme placed on the prosecution the risk that the witness would be unavailable, one would expect that it would include a time by which the defendant must make the demand or lose his rights. Virginia, recognizing the problem, now tries to read into the scheme an unstated standard of reasonableness, and asserts that petitioners' objection failed to meet it. Brief at 16 n.5.

attempt to secure the presence of a witness who is recalcitrant or difficult to find. Indeed, at the time these cases were tried, defendants did not have the power to issue subpoenas directly to *any* witness; they gained that power by a 2007 amendment to Code § 19.2-267. Before then, though lawyers and courts sometimes referred informally to defense subpoenas, the rule was that “a defendant’s witnesses . . . generally must be subpoenaed on request through the clerk’s office.” *Maldonado v. Commonwealth*, 2006 WL 3798583 (Va. Ct. App. 2006). In other words, the procedure to which *Magruder* refers is essentially the same procedure that was applicable to *any* defense witness; this is Virginia’s means of complying with the Compulsory Process Clause. And of course it is the defense, not the prosecution, that bears the risk that defense witnesses do not appear to testify. *Magruder* did not alter this underlying rule. It contained no hint that if, notwithstanding good faith efforts by the Commonwealth, the technician does not appear, then the certificate, having already been admitted, must be struck.

Thus, Virginia relies heavily on *Grant v. Commonwealth*, 682 S.E.2d 84 (Va. Ct. App. 2009). For several reasons, the reliance is completely unavailing.

1. *Grant* simply did not present the issue of who bears the risk of the witness being unavailable or unwilling to testify, and nothing in it suggests an answer to that question. *Grant* filed a notice demanding that the technician testify – but Virginia did

absolutely nothing to try to procure the attendance of the witness.

2. *The history of Grant itself indicates that Virginia law treated the risk of the witness being unavailable as on the defendant.* The trial court held that Grant's notice was ineffective; Grant had to subpoena the witness himself. On appeal, Virginia insisted vigorously that this ruling was correct, Brief in Opposition to Petition for Appeal, July 17, 2008, at 2 ("*The Plain Meaning of the Language Used in Virginia Code § 19.2-187.1 Clearly Places on the Defendant the Duty to Subpoena Those Who Perform Any Analyses or Whose Attestations Appear on a Certificate of Analysis Offered Into Evidence by the Commonwealth.*"); Brief for the Commonwealth, October 17, 2008, at 23 ("Grant failed to vindicate his right to confront the breath test operator through his failure to subpoena her for trial."); it characterized as dictum the *Magruder* court's assertion that the accused could satisfy the statute by asking the Commonwealth to produce the declarant. Oral Argument, May 7, 2009, at 19:05-20:23, available at <<http://www-personal.umich.edu/~rdfrdman/GrantvCW.MPG>>.

3. *Grant was uncontested on the merits.* After this Court decided *Melendez-Diaz* and granted *certiorari* in this case, Virginia promptly reversed position. Nothing further had happened to change the meaning of the statutory scheme – but that scheme was obviously invalid, soon to be replaced, and so Virginia's only interest was in preserving the convictions in this case and any others in the pipeline. Hence, it

now took a view of the statute diametrically opposed to the one on which it had insisted just weeks before. Therefore, it no longer denied Grant's contention that it had violated the statute by failing to attempt to produce the technician.

4. *Even if it had decided the issue, and in a contested case, Grant, as a lower court decision, would not be binding on this Court. Commissioner v. Estate of Bosch*, 387 U.S. 456, 465 (1967).

Grant, in short, provides no support at all for the Commonwealth's newly discovered reading of the statute. The most one could draw from *Grant* is confirmation of the Virginia Supreme Court's suggestion in *Magruder* that if the defendant asks the prosecution to ensure the technician's availability as a trial witness then the prosecution must attempt to do so; it cannot simply ignore the request. Nothing in *Grant* suggests that the statute provides that the prosecution bears the risk that, notwithstanding reasonable efforts, the technician will prove to be unavailable to testify. The Court should construe the statute in accordance with its plain meaning. In no event can it take as established the proposition that the former Virginia statute placed on the prosecution the burden of witness-no shows.

II. THE DEFENDANTS DID NOT WAIVE THEIR CONSTITUTIONAL RIGHTS BY DECLINING TO INVOKE VIRGINIA'S INVALID STATUTORY PROCEDURE.

Virginia relies heavily on its argument that petitioners waived their confrontation claim. The argument is basically a repeat of one Virginia made in its failed attempt to oppose a grant of *certiorari*. The argument has no more merit now than it did then. Several points warrant emphasis.

1. Petitioners objected at trial on Confrontation Clause grounds to introduction of the lab certificates. JA 32 (Briscoe), 106 (Cypress). Virginia offers no reason to conclude that, had it chosen to, it could not have presented the lab technicians as live witnesses; these were bench trials, and so far as appears, the inconvenience would have been minimal. Instead, it chose to fight. It did not then claim waiver, but rather contended, and the respective trial courts held, that it had no obligation to present the technicians as live witnesses because the reports were not testimonial. JA 32-51 (Briscoe), 107-14 (Cypress).

2. The Virginia Supreme Court ultimately held in this case that the then-prevailing procedure did not violate the Confrontation Clause. JA 204, 211. Given that the Virginia Court reached the issue, there is no reason why this Court should not.

3. The only possible basis for a waiver claim is the contention that petitioners did not comply with the provisions of former § 19.2-187.1. Unlike the new

statute, this one provided notice to defendant only if he had thought ahead to ask for it. Moreover, it provided no deadline for the defendant to cause the witness to be summoned, and petitioners stated their objection before the certificates were introduced. Virginia's attempt to interpolate a vague "reasonableness" standard into the statute cannot vest it with the clarity necessary for a statute providing for waiver of a constitutional right. *See, e.g., Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

4. In any event, the contention adds nothing to the arguments already made by Virginia. An accused cannot be held to have waived a constitutional right by declining to invoke a procedure that fails to protect that right. The majority, as well as the dissent, in the Virginia Supreme Court recognized this point. *See* JA 192 (majority: "The dispositive issue . . . is whether the [former statutory] procedure . . . adequately protects a criminal defendant's rights under the Confrontation Clause . . . , *and if so*, whether [defendants] . . . waived their Confrontation Clause challenges . . ." (emphasis added)), 231-32 (three dissenters: A defendant's choice "not to exercise this statutory right is insufficient to establish a waiver of his separate constitutional confrontation right. . . . The extent of a defendant's waiver of a right under Code § 19.2-187.1 necessarily is limited to rights he possesses under the statute.") And of course the essence of the petitioners' contention in this Court is precisely that the statutory scheme fails to protect the confrontation right.

5. Failure to follow a procedure that clearly preserves a defendant's confrontation rights *can* result in waiving those rights. Prospectively, a state may create such a procedure, as Virginia now has done. But a state cannot by retroactive alterations, or by unpredictable reconstructions of the law, ordain that its procedure complied with the confrontation right, so that the accused should have invoked it. *See, e.g., Reich v. Collins*, 513 U.S. 106, 110-11 (1994); *Bowie v. City of Columbia*, 378 U.S. 347, 354 (1964); *Wright v. Georgia*, 373 U.S. 284, 291 (1963) ("Novelty in procedural requirements cannot be permitted to thwart review in this Court * * *," quoting *N.A.A.C.P. v. Alabama*, 357 U.S. 449, 457 (1958)).

(a) *In this case*, the Virginia Supreme Court declared clearly that the statutory scheme provided for the defendant to call the technician as witnesses. *See* JA 200 ("At trial, the defendants could have called the forensic analysts as witnesses, placed them under oath, and questioned them . . ."). Petitioners should not be expected to have anticipated that perhaps the statute would be applied in any other way in their cases.

(b) Nor should petitioners be expected to have anticipated that the defunct statutory scheme would be construed to impose on the prosecution the risk that the technician would be unavailable despite good faith efforts to procure her testimony. No court has ever held that the statute has that effect. Indeed, as explained above, until after this Court granted *certiorari* in this case, Virginia contended that if the

defendant wished to examine the witness he had to subpoena the technician (or more precisely, request the court to do so), and this is how the statute was understood at the time of petitioners' trials.

Petitioners believe that the statute is clear, and that its requirements violate the Confrontation Clause in these two respects. At best – in Virginia's own view – it is ambiguous. Brief at 15. Failure to invoke it cannot provide a basis for waiver.

6. Virginia speculates that *perhaps*, if petitioners had ensured the presence of the technicians (assuming, implicitly, that their presence could be secured), the respective prosecutors would have put the technicians on the witness stand. But Virginia offers no reason at all to suppose that, had the petitioners done what the defendant did in *Grant*, filed a notice demanding that the prosecution produce the witness, the prosecutors would have done anything different from what the prosecution did in *Grant* – which was precisely nothing, apart from arguing that the defendant had to subpoena the witness.¹⁹ Virginia vigorously argued in these cases that it had no obligation at all to produce the technicians as live witnesses, whose statements it incorrectly believed

¹⁹ Petitioners' understanding is that in the jurisdictions where Briscoe and Grant were tried, this was the Commonwealth's standard practice before *Melendez-Diaz*, and at the time and place of Cypress's trial, defendants rarely if ever issued such notices.

were non-testimonial; it would not have produced them had it been asked earlier.

Faced with a statutory system that does not protect his rights, the accused should not bear the burden of anticipating or devising a procedural system that does. It was always in the power of Virginia to create such a system – and it has since done so. That system removes any need for speculation: If the accused makes a demand for confrontation by a designated time, his rights are fully honored, and if he fails to do so then he waives those rights.

III. PROTECTING DEFENDANTS' CONFRONTATION RIGHTS DOES NOT IMPOSE AN UNDUE BURDEN ON THE STATES.

In states that, like Virginia, previously did not accord defendants the right recognized by *Melendez-Diaz*, the necessity to do so inevitably creates *some* additional cost. The state *amici* continue to complain about the burden. But see Brief of United States at 31 (“simple notice-and-demand statutes can mitigate some of the burden on the States”). There is, of course nothing new in this type of argument, *see* ANTHONY LEWIS, GIDEON’S TRUMPET 161, 167 (1964) (states complaining of “unbearably onerous financial burden,” “enormous burden on members of the bar,” and “unnecessary expense to taxpayers” that would follow from rule requiring appointment of counsel), and it is constitutionally irrelevant. *See, e.g., Melendez-Diaz*, 129 S.Ct. at 2540; *Bruton v. United States*, 391 U.S.

123, 135 (1968). In any event, the states provide no significant supporting data – and in fact sufficient data and experience are already available to demonstrate that the burden is a modest one, easily borne. Consider the following, in addition to the data on Michigan provided in petitioners’ principal brief:

District of Columbia – As the United States suggests, Brief at 31-32, the District provides a particularly useful example, because the decision in *Thomas v. United States*, 914 A.2d 1 (D.C. 2006), *cert. denied*, 552 U.S. 895 (2007), effectively anticipated *Melendez-Diaz* and *prospectively* transformed the District’s system from one like Virginia’s former one to a simple notice-and-demand statute. The Government cites a letter (solicited by the Government) by the director of the relevant laboratory to the effect that, since *Thomas*, subpoenas have risen substantially and the lab has had to pay overtime expenses. The Government fails to mention, however, that the letter indicates that, as compared to the pre-*Thomas* period, the lab now spends a little more than 1,000 additional hours per year – or about one-half a person-year – responding to subpoenas in the District’s local courts. And, though the letter asserts that the number of lab analysts has fluctuated between 18 and 23 since 2006, it fails to explain the true significance of this fact: The director has since reported (in response to an inquiry by petitioners) that the lab

had 23 analysts in 2006 and 18 now.²⁰ In other words, the District is now being served with considerably *fewer* analysts than before *Thomas*.

Ohio – For three decades, Ohio has had, for drug analyses, a simple notice-and-demand statute that complies with *Melendez-Diaz*; if the state wishes to prove the results of other types of lab tests, it must, absent a stipulation, put an analyst on the witness stand. According to the state,²¹ its Bureau of Criminal Identification and Investigation has 14 assigned forensic scientists. In 2008, they made 123 appearances in drug cases, resulting in 626.25 hours away from the lab – in other words, on average *each forensic scientist made less than one appearance per month in court*, for an average of about five hours away from the lab per appearance. Through mid-November 2009, the forensic scientists have made 87 appearances in drug cases and spent 393.75 hours away from the lab, both *pro rata* reductions from the 2008 figures. In 2008, BCI&I worked 12,585 drug cases, meaning that a forensic scientist testified at trial in *fewer than 1%* – and this includes cases (presumably most of the total) in which the prosecution rather than the defense sought the live testimony.

²⁰ Letter from James V. Malone to Kathleen A. Felton, Nov. 18, 2009, available at <<http://www-personal.umich.edu/~rdfrdman/Maloneltr.pdf>>.

²¹ E-mail from Benjamin Mizer, Solicitor General of Ohio, to Richard D. Friedman, December 4, 2009, available at <<http://www-personal.umich.edu/~rdfrdman/Mizer.pdf>>.

Massachusetts – The states report that the average turnaround for drug analysis in Massachusetts, the state of *Melendez-Diaz* itself, more than doubled to 169 days between July 2008 and July 2009. Brief at 7-8. It would not be productive to dwell on the mystery of how *Melendez-Diaz*, decided on June 25, 2009, could possibly have accounted for any substantial part of that change. Consider instead this public statement by a leading Massachusetts prosecutor at a recent conference considering the impact of the decision:

Many of you may expect me to get up here today and say, “The sky is falling, this is horrible, this is horrible, we cannot do justice.” Well, I’m here to say quite the opposite. . . . [B]ased upon the efforts that have been made since the *Melendez-Diaz* decision, I can say that I think it’s going to work out, and I think especially . . . when it comes to drug cases, I’m quite confident that our state and hopefully all states in the country are going to be able to deal with *Melendez-Diaz* in an efficient, appropriate and just way, to hold those accountable but also to afford the constitutional rights to all defendants.²²

²² Remarks of Patrick M. Haggan, Chief Trial Counsel, Suffolk County District Attorney’s Office, *Confronting Forensic Evidence: Implications of Melendez-Diaz v. Massachusetts and Briscoe v. Virginia* Cite, Symposium at New England School of Law, Nov. 13, 2009, available at <http://www.nesl.edu/students/ne_

(Continued on following page)

Virginia – The figures cited in the States’ *amicus* brief are in error. Updated figures supplied by the Commonwealth show that in the 18 months before *Melendez-Diaz*, the number of subpoenas received by the Department of Forensic Services ranged as high as 261. Immediately after the decision, apparently as a result of prosecutorial over-reaction, the number spiked to 1,164, but it has fallen every month since; the number for October was 788. Virginia Department of Forensic Service, *Drug Subpoena Data*, available at <<http://www-personal.umich.edu/~rdfrdman/Subpoenas.pdf>>. Again, many of these are at the initiation of prosecutors, and of course the number of subpoenas is vastly greater than the number of court appearances. It is likely that (as occurred in the District of Columbia) further adjustments to the new system will occur, and that ultimately the results will be similar to those of Ohio.

IV. THE COURT SHOULD DECIDE THIS CASE ON THE MERITS – BUT IF IT DECIDES NOT TO, IT SHOULD VACATE AND REMAND FOR RECONSIDERATION IN LIGHT OF *MELENDEZ-DIAZ*.

The Commonwealth’s suggestion that the Court dismiss the writ of certiorari as improvidently granted falls well wide of the mark. The petition in this case,

journal_symposia_audio_2009.cfm> (Speaker 6). Suffolk County includes the city of Boston.

seeking direct review of the Virginia decision, was pending when *Melendez-Diaz* was decided. That decision, at the very least, dramatically altered the landscape against which the Virginia Supreme Court made its decision. It would have been “extraordinarily inequitable” to let that court’s decision stand, without any court ever having heard petitioners’ cases under the proper legal standard. Aaron-Andrew P. Bruhl, *The Supreme Court’s Controversial GVRs – And an Alternative*, 107 MICH. L. REV. 711, 737-38 (2009). The proper course then, if the Court did not wish to review this case, would therefore have been to grant the petition, vacate the decision below, and remand for reconsideration (GVR) in light of *Melendez-Diaz*, see *Lawrence v. Chater*, 516 U.S. 163, 167 (1996) (“reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation,”), *id.* at 191-92 (Scalia, J., dissenting) (“where an intervening factor has arisen that has a legal bearing upon the decision”); EUGENE GRESSMAN, et al., SUPREME COURT PRACTICE 345-49 (9th ed. 2007) – as it has done in several cases both on the very day the Court granted the petition in this case and since then. *E.g.*, *Barba v. California*, 129 S.Ct. 2857 (2009); *Norwood v. United States*, 2009 WL 2134356 (U.S. Nov. 2, 2009). Denial of the petition would have been inappropriate after *Melendez-Diaz*; dismissal of the petition, meaning that no court would ever have the opportunity to determine the impact of that case on

this one, would be no more appropriate now. If the Court now decides in light of subsequent developments that it does not wish to give plenary review to this case, the proper course remains to vacate the decision of the Virginia Supreme Court and remand the case to that court with no instruction other than to reconsider in light of *Melendez-Diaz*.

Nevertheless, the far preferable course is to decide the case on the merits and rule that admission of the laboratory certificates was error. Virginia and its supporting *amici* contend that the former Virginia statute and statutes like it, *see, e.g.*, Idaho Code § 37-2745; N.D. Cent. Code § 19-03.1-37, are constitutional though they do not require the prosecution to provide live witnesses; it would be far better for the Court to make clear that this is not so, and it can do so without resolving any disputes over the meaning of state law. It would also be highly beneficial for the Court to remove any lingering doubt that genuine, simple notice-and-demand statutes *are* constitutional. And, for several reasons, the best course is not to remand in search of a definitive resolution of the meaning of the former Virginia law: (1) No remand is necessary to determine that the statutory scheme at issue here did not require the prosecution to call live witnesses, and that in itself renders the scheme unconstitutional. (2) The scheme is now defunct, covering no cases other than the present ones and any similar ones in the pipeline. It is cost-free for the Commonwealth and its courts to ascribe a generous interpretation to the statute now – because the only

consequence of doing so is to cast doubt on defendants' constitutional claims. (3) Any attempt to construe the former scheme as a simple notice-and-demand statute would, for the reasons stated above in Part II, so distort the statutory language that it could not constitutionally be applied to petitioners.

CONCLUSION

The judgment of the Supreme Court of Virginia should be reversed.

Respectfully submitted,

JOSEPH D. KING
KING & CAMPBELL, PLLC
Counsel for
Petitioner Briscoe
526 King Street, Suite 213
Alexandria, Virginia 22314
(703) 683-7070
(703) 836-0445 (fax)

RICHARD D. FRIEDMAN
Counsel of Record
625 South State Street
Ann Arbor, Michigan 48109
(734) 647-1078
(734) 647-4188 (fax)
rdfrdman@umich.edu

THOMAS B. SHUTTLEWORTH
CHARLES B. LUSTIG
SHUTTLEWORTH, RULOFF,
SWAIN, HADDAD & MORECOCK
Counsel for
Petitioner Cypress
4525 South Boulevard,
Suite 300
Virginia Beach, Virginia 23452
(757) 671-6000
(757) 671-6004 (fax)