Briscoe v. Virginia: the Confrontation Clause and Forensic Analysis

In Briscoe v. Virginia, the Supreme Court of the United States will determine whether a state law allowing a prosecutor to introduce a certificate of a forensic laboratory analysis, without presenting the testimony of the analyst who prepared the certificate, violates the Confrontation Clause of the Sixth Amendment if the accused has a right to call the analyst as his own witness.

In Crawford v. Washington, the Supreme Court of the United States held that “where testimonial evidence is at issue…the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination.” The Court further stated that the class of testimonial statements covered by the Confrontation Clause included, “…ex parte in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declants would reasonably expect to be used prosecutorially.”

In June, the Supreme Court of the United States issued its long-awaited decision in Melendez-Diaz v. Massachusetts, holding that certificates of analysis showing the results of forensic analysis performed on seized narcotics were testimonial affidavits and their admission at trial, without supporting testimony, violated the Confrontation Clause of the Sixth Amendment. Writing for the majority, Justice Scalia concluded that using the Court’s analysis in Crawford, the affidavits were testimonial statements and that absent a showing that the analysts who authored the affidavits were unavailable to testify at trial and the defendant had a prior opportunity to cross-examine them, the defendant “was entitled to be confronted with the analysts at trial.”

On June 29, 2009, four days after it issued its decision in Melendez-Diaz, the Supreme Court granted certiorari to review the Supreme Court of Virginia’s decision in Magruder v. Commonwealth. In Magruder, the Supreme Court of Virginia reviewed the unrelated cases of three defendants, Michael Magruder, Sheldon Cypress, and Mark Briscoe, each of whom were convicted after bench trials of cocaine possession offenses. At issue in all three cases was the admission of certificates of analysis from a forensic laboratory indicating the weight and nature of the substance tested (cocaine). Each certificate was authored by the forensic analyst, employed by the Department of Criminal Justice Services, Division of Forensic Science, who performed the analysis and attested that the certificate was “an accurate record of the results of analysis.” The certificates were admitted without the testimony of the analysts who authored the documents.

Virginia State law allows for the admission of certificates of analysis without requiring the prosecutor to call the analyst who authored the document, to testify. Virginia Code § 19.2-187 permits the admission of certificates of analysis when attested to by the person who performed the analysis, “[i]n any hearing or trial of any criminal offense…as evidence of the facts therein stated and the results of the analysis or examination referred to therein.” The law requires that the certificate of analysis be “filed with the clerk of the court hearing the case at least seven days prior to the hearing or the trial.”
Code § 19.2-187.1 allows the defendant the opportunity to cross-examine the person who performed the analysis and authored the certificate, as an adverse witness, stating, “[t]he accused in any hearing or trial in which a certificate of analysis is admitted 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…[s]uch witness shall be summoned and appear at the cost of the commonwealth.”

The defendants’ consolidated appeal argued that the procedures set forth in Virginia Code §§ 19.2-187 and 19.2-187.1 violated the defendants’ right to cross-examine adverse witnesses under the Confrontation Clause of the Sixth Amendment. The defendants argued that the provisions of the Virginia code do not adequately protect their right of confrontation for three reasons: the statute requires an accused to take affirmative steps to confront the forensic analyst; the accused is required to present evidence to preserve confrontation rights; and the accused is only allowed to cross-examine the forensic analyst only after a certificate of analysis has already been admitted into evidence.

The Supreme Court of Virginia affirmed the appellate court’s decision and held that the Virginia Code adequately protects a criminal defendant’s right to confront the forensic analyst because “the statute supplies the ‘elements of confrontation—physical presence, oath, cross-examination, and observation of demeanor by the trier of fact.’” The court determined that the state code afforded all three of the defendants the opportunity to call the forensic analysts as witnesses and cross-examine them, thus satisfying the Sixth Amendment right to confrontation. Furthermore, the court found that the statutory procedures did not impermissibly burden the defendants’ exercising their rights under the Confrontation Clause, noting that “the right to confront and to cross-examine is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process.” The court concluded that the statute established reasonable procedures for a defendant to confront scientific witnesses at trial. Finally, the court rejected the defendants’ claim that the statutory procedures shifted the burden of producing evidence by requiring the defendant to call the forensic analyst because the Confrontation Clause only guarantees an opportunity for effective cross examination.

The Chief Justice of the Supreme Court of Virginia joined two other justices in dissenting from the majority’s opinion, arguing the admission of the certificates of analysis without the testimony from the authors, violated the defendants’ Confrontation Clause rights. The dissent, relying heavily on Crawford, stated that because the procedures under Virginia Code §§ 19.2-187 and 19.2-187.1 permitted the admission of the certificates of analysis without the testimony of the authors, the defendants’ right to confrontation were violated because the defendants were unable to “subject the contents of the certificates of analysis to adversarial scrutiny before the prosecution concluded its case in chief.”

During this term, the United States Supreme Court will review the decision of the Supreme Court of Virginia. Arguments have not yet been scheduled.

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2 Id. at 51.
4 Id. at 2532 citing Crawford at 54.
6 Id.
7 Id. at 115, 116, 117.
8 Id. at 115.
9 Id. at 119 citing VA. CODE ANN. § 19.2-187 (2006).
10 Id.
12 Id. at 120.
13 Id. citing Maryland v. Craig, 497 U.S. 836, 846 (1990)
14 Id. at 121.
16 Id.
17 Id. at 122 citing U.S. v. Owens, 484 U.S. 554, 559 (1988).
18 Id. at 127.
19 Id. at 131.