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

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)

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)

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

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

If a state allows a prosecutor to introduce a certificate of a forensic laboratory analysis, without presenting the testimony of the analyst who prepared the certificate, does the state avoid violating the Confrontation Clause of the Sixth Amendment by providing that the accused has a right to call the analyst as his own witness?

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The opinion and dissent of the Supreme Court of Virginia (Joint Appendix ("JA") 182-233) are published at 275 Va. 283, 657 S.E.2d 113 (Va. 2008). The opinions of the Virginia Court of Appeals (JA 75-83 (Briscoe), JA 176-81 (Cypress)) are unpublished, as are the relevant rulings of the Circuit Court of the City of Alexandria (JA 68-74 (Briscoe)) and the Circuit Court of the City of Chesapeake (JA 169-75 (Cypress)).

JURISDICTION

The Supreme Court of Virginia issued its decision in this case on February 29, 2008. This Court has jurisdiction under 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him [and] to have compulsory process for obtaining witnesses in his favor."

This case concerns a system of Virginia statutes as it stood until August 21, 2009. Virginia Code § 19.2-187 provided that in a criminal trial, in

prescribed circumstances, certain certificates of analysis reporting the results of laboratory analysis "shall be admissible in evidence as evidence of the facts therein stated and the results of the analysis or examination referred to therein."

Virginia Code § 19.2-187.01, which has not been amended, provided that certain reports of laboratory analysis "shall be prima facie evidence in a criminal or civil proceeding as to the custody of the material described therein from the time such material is received by an authorized agent of such laboratory until such material is released subsequent to such analysis or examination."

Virginia Code § 19.2-187.1 provided in relevant part:

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

Relevant portions of these statutes, and of the new forms of §§ 19.2-187 and 19.2-187.1, enacted August 21, 2009, are set forth in Section A of the Appendix to this brief.

STATEMENT OF THE CASE

Under the statutory scheme involved in this case, a prosecutor could introduce a certificate of the results of a forensic laboratory test, without producing the live testimony of the analyst who performed the test, or indeed of any other witness who could testify about the conduct of the test or the chain of custody of the materials tested. The Supreme Court of Virginia did not deny a point since established by *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527 (2009), that such certificates are testimonial in nature within the meaning of *Crawford v. Washington*, 541 U.S. 36 (2004). Nevertheless, it held that admission of the certificates in prosecuting the petitioners was acceptable because of another portion of the statutory scheme, which explicitly gave the accused the right to call the analyst, or a person "involved in the chain of custody," as his own witness at trial, at the expense of the Commonwealth.[1] The question presented is whether such a burden-shifting scheme violates the Confrontation Clause of the Sixth Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment.

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[1] Although this statutory scheme has since been amended, in response to *Melendez-Diaz*, it will, for the most part, be simpler to discuss the case without reference to the fact of amendment; in particular, § 197.2-187.01, which allowed the prosecutors in these cases to prove chain of custody without the need for live testimony, remains unchanged.

Each of these cases fits the same pattern: The petitioner was tried on charges related to the distribution of cocaine. At trial, the key question was whether substances seized by the police (from Briscoe's apartment and from a car in which Cypress was a passenger) contained cocaine, and if so how much. The principal evidence against the petitioner was a certificate of analysis (two in Briscoe's case) prepared by a forensic analyst of the Commonwealth's Department of Criminal Justice Services, Division of Forensic Science. The certificate reported test results purporting to show that the seized substances contained large quantities of cocaine (a total of 36.578 grams in Briscoe's case, JA 4-7, and 60.5 grams of cocaine hydrochloride, JA 84-87 – a "very pure" form of cocaine, indicative of possession for distribution rather than personal use, JA 132 – in Cypress's case). The petitioner objected to introduction of the certificate, contending that it would violate the Confrontation Clause. JA 31-43, 50 (Briscoe), JA 105-11, 113-14, 145-50 (Cypress). The trial court overruled the objection and admitted the certificate. JA 46-49, 51 (Briscoe), JA 112-13, 114, 151-52 (Cypress). The petitioner declined to call the analyst as his own witness, nor did he present any other evidence. The petitioner was convicted, and was sentenced to a lengthy term of imprisonment (20 years, with 14 years, 4 months suspended for Briscoe; 15 years, with 10 years suspended, plus a fine of $1,000, for Cypress). The Court of Appeals affirmed, JA 75-83 (Briscoe), JA 176-81 (Cypress), and the petitioner then appealed to the Supreme Court of Virginia.

The appeals of these two petitioners were consolidated in that court with one other similar appeal. By a 4-3 vote, the court affirmed all three convictions. *Magruder v. Commonwealth*, 657 S.E.2d 113, 275 Va. 283 (2008), JA 182-233. The majority put aside the question whether the certificates are testimonial in nature. JA 194. Nevertheless, it squarely held that Virginia's statutory scheme does not violate the Confrontation Clause:

> Because the procedure provided in Code § 19.2-187.1 adequately protects a criminal defendant's rights under the Confrontation Clause and because the defendants in these appeals failed to utilize that procedure, we conclude that they waived the challenges under the Confrontation Clause to the admissibility of the certificates of analysis.

JA 183. In the course of its discussion, the majority addressed directly and bluntly rejected the contention

> that the statutory procedure, by its terms, shifts the burden of producing evidence and requires a criminal defendant to call the forensic analyst in order to exercise his right to confront that witness.

"This argument," the majority said, "is not cognizable under the Confrontation Clause." JA 204.[2]

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[2] The majority also said that the defense contention raised due process concerns that were not properly before the court because no defendant subpoenaed the analyst and then said that

(Continued on following page)

On May 29, 2008, petitioners filed their petition for *certiorari* in this Court. They suggested that the case be held pending the decision in *Melendez-Diaz, supra*, which presented the underlying issue of whether forensic laboratory reports are testimonial; if the Court had decided that question in the negative, there would have been no basis for granting the petition in this case. The Court did hold the petition.

In litigating the *Melendez-Diaz* case in this Court, Massachusetts contended, among other points, that introduction of a forensic laboratory report against a criminal defendant did not violate the Confrontation Clause because the defendant had a right, under the Compulsory Process Clause of the Sixth Amendment and under state-law procedures, to produce the author as his own witness.

On June 25, 2009, this Court issued its decision in *Melendez-Diaz*. The Court's principal holding was that the laboratory reports were testimonial for purposes of the Confrontation Clause. In the course of its analysis, the Court also explicitly held that the

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the analyst could not testify unless the Commonwealth called him. JA 205. Whatever the merits of this avoidance argument, *see* JA 231 (Keenan, J., dissenting) ("the majority confuses the issue whether a defendant may be required to produce evidence in a criminal trial with the issue whether the statutory mechanism at issue in this case, which requires a defendant to produce evidence, is capable of preserving his Confrontation Clause rights"), it is irrelevant to petitioners' Confrontation Clause contention, which the court indisputably considered and rejected.

accused's "ability to subpoena the analysts . . . – whether pursuant to state law or the Compulsory Process Clause – is no substitute for the right of confrontation." 129 S.Ct. at 2540.

On June 29, 2009, the Court granted the petition for *certiorari* in this case.

SUMMARY OF ARGUMENT

In one sense, this case is very simple: *Melendez-Diaz* clearly demands that the decision of the Supreme Court of Virginia be reversed, because Virginia's subpoena procedure is blatantly unconstitutional. On the other hand, affirming the decision of the Virginia court would pose a fundamental threat to the confrontation right – immediately, within the context of forensic laboratory reports, and ultimately in general.

Melendez-Diaz held that a forensic laboratory report is testimonial for purposes of the Confrontation Clause. In response to a contention made by Massachusetts, it also held that the ability of the accused to subpoena the author of the report does not satisfy the confrontation right: If the state wishes to prove the contents of the report, then, unless the defendant waives the right, *the state* must produce a live witness who is able to testify to those contents from first-hand knowledge.

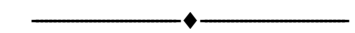
Compelling reasons support this holding. As *Melendez-Diaz* pointed out, a subpoena system like Virginia's shifts to the accused the risk that a competent witness will not appear to testify at trial; it thus provides no guarantee that the accused will have any opportunity for confrontation at all.

But even assuming the accused were able to secure the presence of the author of the report, or another competent witness, Virginia's former subpoena procedure is constitutionally inadequate. As *Melendez-Diaz* held, the burden imposed by the Confrontation Clause is on the prosecution, to present its witnesses – not on the defense to present adverse witnesses. The Clause is worded in passive terms, which reflects the stark difference between the confrontation right and the active right granted by the Compulsory Process Clause. And the difference has immense practical significance. As compared to the right to cross-examine a witness called by the prosecution, the opportunity to call that person to the witness stand is, for several reasons, of little value. It entails significantly greater risks and costs, and as a result is rarely invoked. Petitioners did not waive the confrontation right by failing to invoke this inferior alternative.

Ensuring the accused his right to be confronted with this particular type of adverse witness does not entail intolerable costs. Empirical evidence indicates that if the prosecution seeks a stipulation allowing admissibility of a lab report the defense will most often comply. A state eager to take all opportunities to

reduce expense can adopt other procedures, including statutes that treat the confrontation right as waived unless the accused makes an affirmative pre-trial demand that the prosecution produce the analyst. Some forms of such statutes are plainly constitutional, and indeed *Melendez-Diaz* explicitly endorses their validity. The Commonwealth has, since the grant of *certiorari* in this case, adopted such a statute.

If, however, this Court affirms the decision of the Supreme Court of Virginia, it would severely vitiate the confrontation right, and not only in the context of certificates of forensic laboratory reports. There would be no principled basis – short of re-estabishing a regime like the rejected one of *Ohio v. Roberts*, 448 U.S. 56 (1980) – of limiting the constitutionality of Virginia's subpoena procedure to one particular species of statement. Given that, as *Melendez-Diaz* holds, the certificates here are testimonial, the same procedure could be applied to any other type of testimonial statement. The door would be open to a fundamental alteration of the centuries-old procedure of the criminal trial: Prosecutors could introduce affidavits or video-taped statements of witnesses and leave it to the defense to bring to the trial such of the prosecution witnesses as they dared to.



ARGUMENT

I. *MELENDEZ-DIAZ* CLEARLY RESOLVES THE QUESTION PRESENTED IN THIS CASE, RENDERING VIRGINIA'S SUBPOENA PROCEDURE UNCONSTITUTIONAL.

In *Melendez-Diaz*, as here, the prosecution had, pursuant to state procedure, introduced certificates of forensic laboratory reports without producing the analysts who performed the tests and prepared the reports. The question presented was "[w]hether a state forensic analyst's laboratory report prepared for use in a criminal prosecution is 'testimonial' evidence" for purposes of the Confrontation Clause. Brief of Petitioner, at i. In resisting the conclusion that it had violated the Confrontation Clause, Massachusetts contended that, even if the report was testimonial, Melendez-Diaz had adequate opportunity to challenge the certificates and confront the analysts who prepared them. "Above all," the Commonwealth argued,

> Petitioner had the opportunity to compel the analysts' presence at trial and subject them to cross-examination. He could have obtained a subpoena pursuant to Mass. R. Crim. P. 17 or used his right to compulsory process, under both the state and federal constitutions, to compel the analysts to testify at trial. See art. 12 of the Massachusetts Declaration of Rights. Had Petitioner pursued these options for securing the analysts' presence at trial, he would have been able to cross-examine them in the same manner as

> if they had been called as part of the prosecution's case.

Brief of Respondent at 57. Melendez-Diaz answered this argument extensively in his reply brief, pp. 20-23, and it was discussed at some length at oral argument, Transcript at 7-10, 20 (questioning of petitioner's counsel), 48 (argument of respondent).

This Court squarely rejected the Commonwealth's contention. The Court decided that the analysts' reports were testimonial for Confrontation Clause purposes, and therefore that Melendez-Diaz had a right to be confronted with the analysts unless they were unavailable to testify at trial and he had a prior opportunity to cross-examine them. It then responded to what it aptly called, 129 S.Ct. at 2532-33, a "potpourri of analytic arguments" advanced against this "rather straightforward application" of *Crawford v. Washington*, 541 U.S. 36 (2004):

> Respondent asserts that we should find no Confrontation Clause violation in this case because petitioner had the ability to subpoena the analysts. But that power – whether pursuant to state law or the Compulsory Process Clause – is no substitute for the right of confrontation. Unlike the Confrontation Clause, those provisions are of no use to the defendant when the witness is unavailable or simply refuses to appear. See, *e.g., Davis* [v. *Washington*], 547 U.S. [813 (2006)], at 820, ("[The witness] was subpoenaed, but she did not appear at . . . trial"). Converting the prosecution's duty

> under the Confrontation Clause into the defendant's privilege under state law or the Compulsory Process Clause shifts the consequences of adverse-witness no-shows from the State to the accused. More fundamentally, the Confrontation Clause imposes a burden on 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 chooses.

Id. at 2540.

The question presented by this case, therefore, has been definitively resolved by this Court, just last Term. There can be no doubt that the Court's statement on this issue was holding rather than dictum: The matter was briefed on both sides and argued, and the Court's conclusion was essential to the result in the case – had the Court accepted the contention by Massachusetts that the ability to subpoena the analysts was a full substitute for the right to be confronted with them, presumably the Court would have affirmed rather than reversed the decision of the Appeals Court of Massachusetts affirming the conviction.

Nor is there any plausible ground for distinguishing the procedure involved here from that of Massachusetts for purposes of the Confrontation

Clause. Under Virginia's statutory scheme, if the accused does present the analyst as a witness, he can examine her as a hostile witness, using leading questions – but, as Massachusetts emphasized to the Court in litigating *Melendez-Diaz*, the same is true under Massachusetts law. Brief of Respondent at 57 & n.21. Under Virginia's subpoena scheme, if the accused does decide to produce the analyst it is the Commonwealth that bears the expense. But that is not in itself significant; there is no suggestion in *Melendez-Diaz* that the result would have been different if the Commonwealth generally paid the costs of producing the witness – and the rule is universal that if the defendant is indigent (as these petitioners are), the state bears the cost of producing the witness. 6 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE (3d ed. 2007) § 24.3(f); *see also, e.g.,* Mass. R. Crim. P. 17(b) (providing that if the defendant is indigent the expenses of producing defense witnesses shall be borne by the Commonwealth).

II. VIRGINIA'S SUBPOENA PROCEDURE POSES A FUNDAMENTAL THREAT TO THE CONFRONTATION RIGHT.

Melendez-Diaz resolves the question presented in this case as a matter of doctrine, but the point is also clear as a matter of principle: Virginia's subpoena procedure poses a fundamental threat to the confrontation right – immediately, within the context of forensic laboratory reports, and ultimately in general.

The Sixth Amendment gives the accused "the right . . . to *be confronted with* the witnesses against him." (Emphasis added.) The use of the passive voice in the Confrontation Clause is not adventitious. *Melendez-Diaz* emphasized the fundamental principle 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." 129 S.Ct. at 2540.[3] If the accused were forced to call adverse witnesses, "[u]ltimately the effect could be to blur the presumption of innocence and the principle that the burden of proof on the prosecution 'never shifts throughout the trial.'" *Thomas v. United States*, 914 A.2d 1, 17 (D.C. 2006), *quoting in part* CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT OF COLUMBIA, Instruction No. 2.08 ("Burden of Proof-Presumption of Innocence") (4th ed. rev. 2004).

As this Court has made clear, the Confrontation Clause, governing the process for witnesses *against* the accused, stands in sharp contrast to the Compulsory Process Clause, which allows the accused to bring to trial witnesses "in his favor." The right

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[3] *See also Thomas v. United States*, 914 A.2d 1, 16 (D.C. 2006) ("This language, employing the passive voice, imposes a burden of production on the prosecution, not on the defense. *State v. Snowden*, 867 A.2d 314, 332 n.22 (Md. 2005) (rejecting the theory that the defendant could call his accusers to the stand because 'the burden of production . . . is placed on the State [by the Confrontation Clause] to produce affirmatively the witnesses needed for its prima facie showing of the defendant's guilt')."); *Magruder*, JA 227-28 (Keenan, J., dissenting).

accorded by the latter Clause "is dependent entirely on the defendant's initiative"; the confrontation right, however, like most of the others granted by the Sixth Amendment, "arise[s] automatically on the initiation of the adversary process and no action by the defendant is necessary to make [it] active in his or her case." *Taylor v. Illinois*, 484 U.S. 400, 410 (1988); *see also id.* at n.14; *accord, e.g., State v. Birchfield,* 157 P.3d 220 (Or. 2007) ("It is the state that seeks to adduce the evidence as to which the criminalist will testify. . . . The legislature may require the defendant to assert [the confrontation] 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.").

The difference is not a mere theoretical nicety. It has immense practical significance, going to the essence of the criminal trial process – and that is true even if, as under Virginia's statutory scheme, the expense of bringing the witness to court is imposed on the prosecution and the accused may then ask leading questions. Even given those accommodations, it remains as true now as it did more than six decades ago that "[o]nly a lawyer without trial experience would suggest that the limited right to impeach one's own witness is the equivalent of that right to immediate cross-examination which has always been regarded as the greatest safeguard of American trial procedure." *New York Life Ins. Co. v. Taylor*, 147 F.2d

297, 305 (D.C. Cir. 1944) (Thurman Arnold, A.J.); *accord, e.g., Magruder*, JA 229 (Keenan, J., dissenting) ("The opportunity for effective cross-examination of prosecution witnesses . . . presupposes that a defendant has an opportunity to cross-examine those witnesses during the prosecution's case."). It is fanciful to suggest that the two opportunities are equivalent. It is therefore clear that petitioners did not waive the confrontation right; on the contrary, they vigorously demanded that they be accorded the right, and at most they waived the inferior opportunity Virginia offered them in lieu of the right.[4]

To see the difference between the constitutional right and the alternative offered by Virginia, compare the two basic scenarios at issue here. The first scenario is the one that, petitioners contend, is required by the Confrontation Clause, and so will here be labeled the Confrontation Scenario: The prosecution presents the live testimony of the lab technician, and defense counsel may then cross-examine. The second is the one provided by Virginia's statutory scheme, and will be labeled the Subpoena Scenario: The prosecution presents a certificate of the lab results and the accused may subpoena the technician to be a

[4] *See Magruder*, JA 231 (Keenan, J., dissenting) ("While a defendant's failure to act under Code § 19.2-187.1 may constitute a waiver of his statutory right under that Code section to call the forensic scientist in the defendant's case, the fact that he chooses not to exercise this statutory right is insufficient to establish a waiver of his separate constitutional confrontation right that is guaranteed to him throughout his criminal trial.").

live witness as part of his case. The differences are numerous and critical.

One crucial difference, emphasized by *Melendez-Diaz*, is that Virginia's statutory scheme "shifts the consequences of adverse-witness no-shows from the State to the accused." 129 S.Ct. at 2540; *cf. id.* at 2550 (Kennedy, J., dissenting) (noting the possibilities that the analyst "may be ill; may be out of the country; may be unable to travel because of inclement weather; or may at that very moment be waiting outside some other courtroom . . . "). In the Confrontation Scenario, the accused is guaranteed the ability to cross-examine. The prosecution cannot present the witness's testimonial statement without producing the witness at trial (or another formal proceeding such as a deposition). Once the witness is on the stand, cross-examination follows immediately; if the witness should suddenly become unavailable before the accused has had an adequate opportunity for cross, the testimony would have to be stricken. *See Crawford, supra*, 541 U.S. at 68 (opportunity for cross held essential for admissibility of testimonial statement, even given unavailability of witness). In the Subpoena Scenario, by contrast, if the witness becomes unavailable after preparing the certificate and before trial, the accused is completely out of luck; the

certificate is admitted and the accused has no opportunity at all to examine the witness.[5]

Moreover, the tactical decisions facing defense counsel in the two scenarios are dramatically different, making a decision to examine the technician far riskier and less attractive in the Subpoena Scenario than in the Confrontation Scenario.

1. In the Confrontation Scenario, when defense counsel decides whether, and how, to examine the witness, the witness has just testified on direct.

In the Subpoena Scenario, by contrast, some time, perhaps substantial, has passed since the witness's (written) testimonial statement has been presented to the trier of fact, and presumably a much greater time since the witness made that statement. The time gap may be critical, as explained in the oft-quoted language of *State v. Saporen*, 285 N.W. 898, 901 (Minn. 1939):

> The chief merit of cross examination is not that at some future time it gives the party opponent the right to dissect adverse testimony. Its principal virtue is in its immediate

[5] *See Gray v. Commonwealth*, 265 S.E.2d 705 (Va. 1980) (preparer of certificate being unavailable as a witness at trial, the failure of the Commonwealth to comply with the filing provisions of § 19.2-187 held fatal to admissibility – the implication being that had the Commonwealth filed in a timely manner the certificate would have been admissible notwithstanding the preparer's unavailability).

> application of the testing process. Its strokes fall while the iron is hot.

Accord, Peter Westen, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases*, 91 HARV. L. REV. 567, 578-79 (1978) ("Were the hearsay introduced as part of the prosecution's presentation, the jury might form an initial impression which the defense could not later counteract by examining the declarant in person once the state rested. . . . If such witnesses are to be examined at all about the truth of their statements, it should be the prosecution's duty to examine them in the first instance.").

2. In the Confrontation Scenario, immediately before cross-examination begins, the attention of the trier of fact is already focused on the testimony of the witness.

In the Subpoena Scenario, by contrast, to conduct examination of the technician the defense must in effect first remind the trier of fact of the adverse statement made by the witness. Note, *Right of Confrontation: Admission of Declaration by Co-Conspirator*, 85 HARV. L. REV. 188, 195 (1971) ("[E]ven a direct examination successful from the defendant's perspective is less effective than cross-examination because . . . the damaging hearsay will have to be repeated during the examination, thereby increasing its impact.").

3. In the Confrontation Scenario, given that the witness is already on the stand, the trier of fact will

not take it amiss that, at the conclusion of the prosecution's direct examination, defense counsel will in turn ask some questions.

In the Subpoena Scenario, by contrast, calling to the stand a witness whose statement has already been admitted may be annoying to the trier of fact and may appear to be harassment of the witness. *E.g.*, *Lowery v. Collins*, 988 F.2d 1364, 1369 (5th Cir. 1993) ("The State would . . . impermissibly impose on the defendant the Catch-22 . . . of either calling the child-complainant to the stand at the 'risk [of] inflaming the jury against [himself]' or avoiding the risk of thus inflaming the jury at the cost of waiving his constitutional right to confront and cross-examine the key witness against him.") (alteration in original) (footnote omitted) (*quoting Lowrey v. State*, 757 S.W.2d 358, 359 (Tex.Crim.App. 1988)).

4. In the Confrontation Scenario, defense examination of the technician will come in the middle of the prosecution's case.

In the Subpoena Scenario, by contrast, assuming the defense presents other evidence, it must disrupt its own case if it wishes to examine the technician, and give the prosecution an opportunity to examine a witness friendly to it in the middle of the defense case. Janeen Kerper, *The Art and Ethics of Direct Examination*, 22 AM. J. TRIAL ADVOC. 377, 411 (1998). To avoid giving too prominent a position to an adverse witness, the defense will probably find it best to adhere to the advice that, if one must present such a

witness, it is best to do so in the middle of one's case, rather than at the beginning or end. *Id.* And if the defense does *not* present other evidence, then the adverse witness will necessarily be *both* at the beginning and at the end of the defense case.

5. In the Confrontation Scenario, before the defendant begins to examine the witness, the prosecution has presumably already drawn from the witness all the information favorable to its case that it can, effectively setting up a target for cross-examination.

In the Subpoena Scenario, by contrast, the defense is shooting blind; it may know nothing about what the technician is likely to say other than what is contained in the report.

6. In the Confrontation Scenario, if the direct testimony has been harmful to the defense – as it almost certainly has been in the case of a lab technician – counsel will nearly always find it advantageous to ask at least a few questions on cross-examination, in an attempt to chip away where possible at the testimony and to introduce some element of doubt. *See* Irving Younger, *The Art of Cross-Examination*, AMERICAN BAR ASSOCIATION, SECTION OF LITIGATION, MONOGRAPH SERIES, No. 1 (1975), at 1 (before discussing "destructive cross-examination," noting that even in facing strong testimony counsel may find it

advantageous to conduct a brief cross-examination).[6] By taking small, careful steps, counsel can ensure that even disappointing answers do not create significant damage. *See* EDGAR LUSTGARTEN, VERDICT IN DISPUTE (1950), at 251 (describing a careful cross-examination, in which counsel "cannot foresee the terms of [the witness's] reply: "he needs to approach the question circumspectly, advancing only one step at a time, and at every stage leaving channels of escape which he can use without grave loss of face"). Accordingly, even the hope of modest gains will make the decision to cross-examine a sound one.

In the Subpoena Scenario, by contrast, by calling to the stand an adverse witness – and one whose written testimonial statement has already been admitted against the defendant – counsel inevitably raises expectations: Why would she do this unless she expects to make a major gain? Absent such a gain, she will look foolish, having wasted time and effort, her own and that of others, and done little but secured a re-affirmation of harmful testimony. Almost inevitably, the risk of failure will be so great that counsel will not dare take it. *See Reardon v. Manson*, 806 F.2d 39, 43 (2d Cir. 1986).[7]

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[6] *See infra* note 13 (presenting empirical evidence indicating that defense lawyers will almost always cross-examine a lab technician produced as a live witness by the prosecution).

[7] Petitioners examined all cases indicated by Westlaw's KeyCite tool that cited §§ 19.2-187 or 19.2-187.1. There were 59 cases – in some instances more than one involved in the same

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Petitioner Cypress's case provides a vivid illustration of the difference. The critical evidence against him was the certificate purporting to report a significant quantity of cocaine, in form suitable for use by a dealer, in the substances seized from the car. Given Virginia's statutory scheme, the Commonwealth had no need to present the live testimony of the author of the report, and the petitioner did not call the author to the stand. But the prosecution also presented another certificate, one indicating that no fingerprints had been found on the seized materials. Despite the Commonwealth's purported resistance on grounds of practicality to bringing in lab technicians, it did just that in that instance, so that the technician could explain that failure to recover fingerprints was not surprising. JA 122; Trial Transcript 52-55. Peripheral though this witness was to the case, defense counsel cross-examined him rather extensively, largely with respect to chain-of-custody issues that applied as well to the certificate reporting the presence of cocaine. JA 122-25.

7. In the Confrontation Scenario, defense counsel may cross-examine the technician and still decide not to present an affirmative case, relying instead on

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appeal – fitting this description. In each of these, the prosecutor had invoked § 19.2-187. In only two of the cases did the defense subpoena the person performing the chemical analysis to testify at trial. *Waller v. Commonwealth*, 1997 WL 457476 (Va.App. 1997); *Ellis v. Commonwealth*, 414 S.E.2d 615 (Va.App. 1992).

a clean, uncluttered argument that the prosecution has failed to satisfy its burden of persuasion.

In the Subpoena Scenario, by contrast, the defense is forced to elect – either decline to examine the technician, or abandon (or at least severely undercut) the burden-of-proof argument. *See, e.g., Thomas, supra*, 914 A.2d at 16 ("the 'available to the accused' theory of the Confrontation Clause is flawed because it 'unfairly requires the defendant to choose between his right to cross-examine a complaining [or other prosecution] witness and his right to rely on the State's burden of proof in a criminal case.' [*State v.*] *Snowden*, 867 A.2d [314 (Md. 2005),] at 332-33 (quoting *Lowery v. Collins*, 988 F.2d 1364, 1369-70 (5th Cir. 1993)).").

For all these reasons, subpoena schemes like Virginia's work a fundamental transformation in traditional criminal procedure within their scope of application. The effect is to turn the heart of the trial into a presentation of affidavits. To recognize fully the significance of the threat to criminal procedure that this poses, several considerations must be taken into account.

First, because forensic laboratory reports are such an essential part of the routine of modern criminal procedure, the question presented here arises many times every day.

Second, the Virginia statutory scheme is not limited to proving the *results* of a laboratory test. Section 19.2-187.01, which has not been amended,

applies to proof of the chain of custody of the tested materials – and it was used for that purpose here. JA 57-58 (Briscoe), JA 145-52 (Cypress). The chain of custody is not a triviality or technicality. On the contrary, it is a crucial aspect of the prosecution's case: Absent satisfactory proof that the materials that were the subject of the test reported in the testimony, and that they were not altered in any material respect, evidence of the test has no significant probative value.

Third, statutory authorization is not essential for a court to implement a subpoena system. If Virginia's system is valid, a prosecutor and a court could replicate it even absent a burden-shifting statute – as Massachusetts contended in *Melendez-Diaz* that its law did. The hearsay rule would not pose a serious obstacle; if the jurisdiction does not have a special-purpose hearsay exception to cover the certificate, then its exceptions for business and public records could easily do so, and if necessary the residual exception could be invoked. *Cf.* Fed. R. Evid. 803(6) (business records), 803(8) (public records), 807 (residual exception). The Compulsory Process Clause would in itself give the accused the right to subpoena the author of the certificate. If the defendant is indigent, state law would, as noted above, provide for payment by the state of the expenses of producing the witness. And, assuming no such law provided for payment of expenses in the circumstances of the case, the prosecutor could commit to pay those expenses if the accused decides to subpoena the witness, or the court

could make such a contingent commitment a condition of admissibility. Finally, given that the author would be a hostile witness, the court would presumably allow the accused to ask leading questions. *See supra* p. 13 (Massachusetts rule); *cf.* Fed. R. Evid. 611(c) (providing that "interrogation may be by leading questions" when a party calls a hostile witness). Thus, the resolution achieved by the pre-amendment form of Va. Code § 19.2-187.1 could be reached without need for a comparable statute – which means that the problem posed by the decision below in this case can arise in *any* state that does not affirmatively preclude it (as the new Virginia statutes appear to do, except perhaps to prove chain of custody), not just those that have provided by legislation for burden-shifting.

Fourth, and most importantly, if the principle accepted by the Supreme Court of Virginia – that the ability of the accused to call a witness as his own may substitute for the opportunity to cross-examine – is accepted in the context of laboratory reports, there is no sound basis on which to stop it from spreading to other contexts as well. That court explicitly declined to consider the problem, JA 211 n.5, perhaps because to do so would reveal the danger of the course on which it has started.

The contention that a subpoena procedure like the one involved in this case satisfies the confrontation right has not been limited to the context of laboratory reports. States have often made it in the context of hearsay exceptions for statements by

children alleged to be victims of abuse. *See, e.g., Snowden v. State*, 867 A.2d 314, 332 (Md. 2005) (Maryland; contention rejected); *Schaal v. Gammon*, 233 F.3d 1103, 1106-07 (8th Cir. 2000) (similar; Missouri); *State v. Rohrich*, 939 P.2d 697, 700-01 (Wash. 1997) (similar; Washington); *Lowery v. Collins*, 996 F.2d 770, 771-72 (5th Cir. 1993) (on rehearing) (similar; Texas). But there is no limit at all on the type of statement to which the procedure might be applied, if the ability to call a witness were considered the equivalent of the right to be confronted with a prosecution witness. *See Hoover v. Beto*, 439 F.2d 913, 924 (5th Cir. 1971) (rejecting contention in the context of accomplice confession).[8] Thus, approving Virginia's subpoena procedure in the context of lab reports ultimately threatens a fundamental alteration in the procedure governing criminal trials. States would be free to present the testimony of *any* witness by affidavit – or, when they

[8] The *Hoover* court put the matter succinctly:

> That Sellars was available to be called as a witness does not mitigate the prosecution's misconduct here. The State sought to shift to the defendant the risk of calling Sellars to the stand. To accept the State's argument that the availability of Sellars is the equivalent of putting him on the stand and subjecting him to cross-examination would severely alter the presumptions of innocence and the burdens of proof which protect the accused. Hoover's undoubted right to call Sellars as a witness in his behalf cannot be substituted for his Sixth Amendment right to confront Sellars as a witness against him.

thought it was more advantageous, by video-taped statement, *see, e.g., Schaal, supra* – and leave it to the accused, if he was able and if he dared, to call the witness to trial himself.

What possible limitations could be imposed on the subpoena procedure if this Court sanctions it here? The Virginia Supreme Court appears to have suggested that lab reports are a particularly appropriate setting for the procedure, because the opportunity to cross-examine would not usually be worth the inconvenience created by calling the lab technician to testify.[9] The factual premise of the suggestion is unsupportable; as the Court noted in *Melendez-Diaz*, lab reports cannot be deemed so inherently trustworthy that cross-examination is of minuscule value. 129 S.Ct. at 2536-37.[10] More fundamentally,

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[9] Immediately after declining to "engage in . . . speculation" as to the bounds of its decision, the court declared:

> Furthermore, the provisions of Code § 19.2-187 obviate the need for the Commonwealth to call one of the limited number of forensic analysts to testify in every case in which a certificate of analysis is being offered into evidence if the defendant chooses not to exercise his confrontation rights by utilizing the procedure provided in Code § 19.2-187.1.

[10] For a very recent example of this basic point, see *People v. Dungo*, 2009 WL 2596892 (Cal. App. 3rd App. Dist. Aug. 24, 2009) (prior to *Melendez-Diaz*, trial court allows a pathologist not present at autopsy to testify on basis of, and disclose portions of, a report prepared by another pathologist since discredited; held, based in large part on the basis of *Melendez-Diaz*, that admission was error).

the doctrine at which the Virginia court hints – allowing the Confrontation Clause to be overcome on the basis of a judicial determination of the value of cross-examination in a particular case or class of cases – is nothing more than a resuscitation of the rejected regime of *Ohio v. Roberts*, 448 U.S. 56 (1980).

Petitioners have no wish to be overly dramatic. But it is necessary to recognize a wolf for what it is, no matter how bland or benign its appearance may be. It is clear that the transformation begun by *Crawford* – restoring the Confrontation Clause to its rightful place as one of the central protections of our criminal justice system – would be nullified if Virginia's subpoena procedure were approved by this Court. *Cf. Crawford, supra,* 541 U.S. at 50 ("Leaving the regulation of out-of-court statements to the law of evidence would render the Confrontation Clause powerless to prevent even the most flagrant inquisitorial practices.").

III. VIRGINIA'S SUBPOENA SYSTEM IS NOT NECESSARY TO PREVENT GRATUITOUS EXPENSE.

The efficiency-oriented language of the Virginia Supreme Court is constitutionally misguided. As *Melendez-Diaz* made clear, 129 S.Ct. at 2540:

> The Confrontation Clause may make the prosecution of criminals more burdensome, but that is equally true of the right to trial by jury and the privilege against

> self-incrimination. The Confrontation Clause – like those other constitutional provisions – is binding, and we may not disregard it at our convenience.

The language of the Virginia court is also highly revealing. It suggests that Virginia's subpoena scheme saved money because defendants *do not often invoke the right* to call lab technicians as their own witnesses. Petitioners agree that under that scheme defendants rarely invoked the statutory right to call the technician. Why not? The explanation, petitioners believe, is that, because of the considerations discussed in Part II, the opportunity offered by that scheme is so far inferior to the right to cross-examine that defendants rarely found it worth the risks and negative tactical consequences to invoke it; put another way, the subpoena system provided a wholly inadequate substitute for the confrontation right.

Logically, the only other possible explanation is that the opportunity provided by the subpoena system is essentially equivalent to the right to be confronted with and cross-examine a prosecution witness, but that this right is of such minuscule value that the accused would not ordinarily invoke it. If this possibility were plausible, a state would not need a subpoena system to achieve the cost-saving benefit anticipated by the Supreme Court of Virginia. It could achieve the same benefit by a simple notice-and-demand statute of the type approved by *Melendez-Diaz*, 129 S.Ct. at 2541 (citing three examples), and adopted by Virginia in the wake of that decision.

Virginia Act of Assembly, 2009 Special Session I, Ch. 1, Aug. 21, 2009. "In their simplest form," as *Melendez-Diaz* explained, 129 S.Ct. at 2541, such statutes

> require the prosecution to provide notice to the defendant of its intent to use an analyst's report at trial, after which the defendant is given a period of time in which he may object to the admission of the evidence absent the analyst's appearance live at trial.

A subpoena system and a simple notice-and-demand system are crucially different. The key is that under the latter if the defendant makes the demand the *prosecution* must call the author of the report (or another person qualified to testify as to its contents) as a trial witness or forgo use of the report at trial. As compared to the traditional practice – in which the lab report could not be admitted, absent the live testimony of a qualified witness, over the objection of the accused – a simple notice-and-demand system alters only the *time* at which the accused must object, *Melendez-Diaz*, 129 S.Ct. at 2541, and the *form* in which the objection must be made. *Id.* at 2557 (Kennedy, J., dissenting) ("defendant must make a formal demand, with proper service, well before trial"). It does not alter the dynamics of the decision *whether* to object, nor does it diminish the value of confrontation.

Such a system fully preserves the accused's confrontation right. And at the same time, it operates efficiently.[11] It ensures that the lab technician will be required to testify subject to confrontation only when the accused has a strong enough interest in cross-examining her to be worth the cost to him of causing the technician's testimony to be presented live, far more vividly than in a paper report.[12]

Plainly, a simple notice-and-demand statute satisfies the state's legitimate interest in preventing gratuitous expense. Any *incremental* savings generated by a subpoena scheme such as Virginia's must be the result of impairing the right of the accused to examine the lab technician.

Reaffirmation by this Court that a simple notice-and-demand statute is constitutional may help quell

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[11] In Texas, a notice-and-demand state, fifty-five forensic chemists in Department of Public Safety crime laboratories examined evidence in a total of over 50,000 drug cases in 2004 (accounting for the majority of cases examined in the Department's crime labs). Texas Department of Public Safety, Criminal Law Enforcement Division, Crime Laboratory Service, Forensic Testing Services, *Drug Analysis Section*, <http://www.txdps.state.tx.us/criminal_law_enforcement/crime_laboratory/clabforensictesting/clabdruganalysis.htm>, last examined August 26, 2009. This is an average of over 900 cases per analyst each year.

[12] *See, e.g., State v. Simbara*, 811 A.2d 448 (N.J. 2002) ("in the majority of cases a defendant will not challenge the certificate either because the focus of the defense is otherwise or because he or she may not wish to suffer the piling-on effect of a live witness when there is no true contest over the nature of the tested substance") (citation, internal quotation marks omitted).

concerns that protecting the accused's confrontation right with respect to lab reports will cast an undue burden on the states.

Petitioners do not mean to suggest that a notice-and-demand statute is necessary to prevent such a burden. Numerous states manage under the traditional rule, in full compliance with the confrontation right and without any special provision for lab reports, so that if the prosecution wishes to present lab results it must either produce a live witness or – as most often happens – secure an affirmative waiver from the defense.[13]

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[13] Michigan, the home of petitioners' lead counsel, is one of the states adhering to traditional practice: A prosecutor wishing to prove the results of a forensic laboratory test must, absent an affirmative agreement by the defense, produce the laboratory analyst as a live witness. The State Appellate Defenders' Office ("SADO"), which is appointed in a random selection of approximately 25% of indigent trial appeals from every county in the state, maintains electronic copies of trial transcripts from its cases. Petitioners examined the transcripts of the 125 most recent trials in which SADO clients were convicted of drug-related offenses; the results are presented in Section B of the Appendix to this brief. In 122 of these cases, or approximately 97.6%, the prosecution presented evidence of laboratory results. In 50 of the 122 cases, a laboratory analyst testified at trial. In one other, by agreement of the parties, the deposition of an analyst was admitted; in another, also by agreement of the parties, the analyst was allowed to testify by telephone from his office; and in the remaining 70 cases, by agreement of the parties, the laboratory report was admitted without a live sponsoring witness. Thus, in only 50 out of a total of 125 drug cases, or 40%, was it necessary for a laboratory analyst to testify at trial. Petitioners do not know in how many of the cases it was

(Continued on following page)

States are also free to make depositions for the preservation of testimony a more regular feature of their criminal procedure. Depositions can be scheduled more easily than trial testimony, *see Melendez-Diaz*, 129 S.Ct. at 2550 (Kennedy, J., dissenting) (discussing difficulties of presenting live trial testimony of technicians), and if the analyst is then deemed unavailable (by distance or other reason) to testify at trial, the deposition could be introduced instead.

And, of course, if they believe that the system is bottle-necked, states are free to hire more lab technicians. They are a very small part of the criminal justice system, and would remain so even if their numbers were massively increased.[14] Virginia could

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the prosecution's decision to present the analyst as a live witness; for all petitioners know, it may be that in most of the 50 cases the prosecutor did not seek a stipulation.

Of the 52 cases in which an analyst gave live testimony in one form or another, the defendant cross-examined in 45 of them (48 analysts of a total 55), for an average of 3.93 page per analyst. Thus, in 36.9% of the cases in which the prosecution presented evidence of laboratory results, the defense actually cross-examined a witness competent to testify to about the tests and the results. In only 7 cases did an analyst testify live without cross-examination. Again, petitioners do not know in how many of these cases it was the prosecution's decision to present the live witness, but in any event it appears that rarely, if ever, did the defense insist on the analyst testifying at trial without intending to examine him or her.

[14] For example, Philadelphia employs 18 drug analysts. *Melendez-Diaz*, 129 S.Ct. at 2550 (Kennedy, J., dissenting). Its police department employs over 6,600 officers. Philadelphia Police Department, *Department History*, <http://www.ppdonline.

(Continued on following page)

not successfully contend that it may decline to furnish counsel to indigent defendants because there are too few willing defense lawyers in the Commonwealth; nor should it prevail in contending that its subpoena system, designed to limit the extent to which lab technicians testify subject to confrontation, is constitutional because the Commonwealth has hired too few trained lab technicians.

In short, protecting the confrontation with respect to laboratory reports need not impose any undue burden on the states. Concerns about expense should not deflect the Court from declaring Virginia's subpoena scheme to be unconstitutional, the result demanded both by *stare decisis* and by principle.

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org/hq_history.php>, last examined August 26, 2009. The Philadelphia District Attorney's Office employs 600 lawyers, detectives and support staff. City of Philadelphia District Attorney's Office, *About Us*, <http://www.phila.gov/district attorney/AboutUs/about.html>, last examined August 26, 2009.

CONCLUSION

The decision 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)

September 1, 2009

APPENDIX

A. RELEVANT PORTIONS OF VIRGINIA CODE

§ 19.2-187

Former version; in force until August 21, 2009

Admission into evidence of certain certificates of analysis

In any hearing or trial of any criminal offense or in any proceeding brought pursuant to Chapter 22.1 (§ 19.2-386.1 et seq.) of this title, a certificate of analysis of a person performing an analysis or examination, performed in any laboratory operated by the Division of Consolidated Laboratory Services or the Department of Forensic Science or authorized by such Department to conduct such analysis or examination, or performed by the Federal Bureau of Investigation, the federal Postal Inspection Service, the federal Bureau of Alcohol, Tobacco and Firearms, the Naval Criminal Investigative Service, the National Fish and Wildlife Forensics Laboratory, the federal Drug Enforcement Administration, or the United States Secret Service Laboratory when such certificate is duly attested by such person, shall be admissible in evidence as evidence of the facts therein stated and the results of the analysis or examination referred to therein, provided the certificate of analysis is filed with the clerk of the court hearing the case at least seven days prior to the hearing or trial. . . .

Any such certificate of analysis purporting to be signed by any such person shall be admissible as evidence in such hearing or trial without any proof of the seal or signature or of the official character of the person whose name is signed to it.

Current version; in force from August 21, 2009

Admission into evidence of certain certificates of analysis

In any hearing or trial of any criminal offense or in any proceeding brought pursuant to Chapter 22.1 (§ 19.2-386.1 et seq.) of this title, a certificate of analysis of a person performing an analysis or examination, duly attested by such person, shall be admissible in evidence as evidence of the facts therein stated and the results of the analysis or examination referred to therein, provided (i) the certificate of analysis is filed with the clerk of the court hearing the case at least seven days prior to the proceeding if the attorney for the Commonwealth intends to offer it into evidence in a preliminary hearing or the accused intends to offer it into evidence in any hearing or trial, or (ii) the requirements of subsection A of § 19.2-187.1 have been satisfied and the accused has not objected to the admission of the certificate pursuant to subsection B of § 19.2-187.1, when any such analysis or examination is performed in any laboratory operated by the Division of Consolidated Laboratory Services or the Department of Forensic Science or authorized by such Department to conduct such analysis or examination, or performed by a person

licensed by the Department of Forensic Science pursuant to § 18.2-268.9 or 46.2-341.26:9 to conduct such analysis or examination, or performed by the Federal Bureau of Investigation, the federal Postal Inspection Service, the federal Bureau of Alcohol, Tobacco and Firearms, the Naval Criminal Investigative Service, the National Fish and Wildlife Forensics Laboratory, the federal Drug Enforcement Administration, or the United States Secret Service Laboratory.

. . .

Any such certificate of analysis purporting to be signed by any such person shall be admissible as evidence in such hearing or trial without any proof of the seal or signature or of the official character of the person whose name is signed to it.

§ 19.2-187.01

Certificate of analysis as evidence of chain of custody of material described therein

A report of analysis duly attested by the person performing such analysis or examination in any laboratory operated by (i) the Division of Consolidated Laboratory Services, the Department of Forensic Science or any of its regional laboratories, or by any laboratory authorized by such Division or Department to conduct such analysis or examination; (ii) the Federal Bureau of Investigation; (iii) the federal Bureau of Alcohol, Tobacco and Firearms; (iv)

the Naval Criminal Investigative Service; (v) the federal Drug Enforcement Administration; (vi) the Postal Inspection Service; or (vii) the United States Secret Service shall be prima facie evidence in a criminal or civil proceeding as to the custody of the material described therein from the time such material is received by an authorized agent of such laboratory until such material is released subsequent to such analysis or examination. Any such certificate of analysis purporting to be signed by any such person shall be admissible as evidence in such hearing or trial without any proof of the seal or signature or of the official character of the person whose name is signed to it. The signature of the person who received the material for the laboratory on the request for laboratory examination form shall be deemed prima facie evidence that the person receiving the material was an authorized agent and that such receipt constitutes proper receipt by the laboratory for purposes of this section.

§ 19.2-187.1

Former version; in force until August 21, 2009

Right to examine person performing analysis or involved in chain of custody

The accused in any hearing or trial in which a certificate of analysis is admitted into evidence pursuant to § 19.2-187 or § 19.2-187.01 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 witness shall be summoned and appear at the cost of the Commonwealth.

Current version; in force from August 21, 2009

Procedures for notifying accused of certificate of analysis; waiver; continuances.

A. In any trial and in any hearing other than a preliminary hearing, in which the attorney for the Commonwealth intends to offer a certificate of analysis into evidence pursuant to § 19.2-187, the attorney for the Commonwealth shall:

1. Provide by mail, delivery, or otherwise, a copy of the certificate to counsel of record for the accused, or to the accused if he is proceeding pro se, at no charge, no later than 28 days prior to the hearing or trial;

2. Attach to the copy of the certificate so provided under subdivision 1 a notice to the accused of his right to object to having the certificate admitted without the person who performed the analysis or examination being present and testifying; and

3. File a copy of the certificate and notice with the clerk of the court hearing the matter on the day that the certificate and notice are provided to the accused.

B. The accused may object in writing to admission of the certificate of analysis, in lieu of testimony, as evidence of the facts stated therein and of the results of the analysis or examination. Such objection shall be filed with the court hearing the matter, with a copy to the attorney for the Commonwealth, no more than 14 days after the certificate and notice were filed with the clerk by the attorney for the Commonwealth or the objection shall be deemed waived. If timely objection is made, the certificate shall not be admissible into evidence unless (i) the testimony of the person who performed the analysis or examination is admitted into evidence describing the facts and results of the analysis or examination during the Commonwealth's case-in-chief at the hearing or trial and that person is present and subject to cross-examination by the accused, (ii) the objection is waived by the accused or his counsel in writing or before the court, or (iii) the parties stipulate before the court to the admissibility of the certificate.

C. Where the person who performed the analysis and examination is not available for hearing or trial and the attorney for the Commonwealth has used due diligence to secure the presence of the person, the court shall order a continuance. Any continuances ordered pursuant to this subsection shall total not more than 90 days if the accused has been held continuously in custody and not more than 180 days if the accused has not been held continuously in custody.

D. Any objection by counsel for the accused, or the accused if he is proceeding pro se, to timeliness of the receipt of notice required by subsection A shall be made before hearing or trial upon his receipt of actual notice unless the accused did not receive actual notice prior to hearing or trial. A showing by the Commonwealth that the notice was mailed, delivered, or otherwise provided in compliance with the time requirements of this section shall constitute prima facie evidence that the notice was timely received by the accused. If the court finds upon the accused's objection made pursuant to this subsection, that he did not receive timely notice pursuant to subsection A, the accused's objection shall not be deemed waived and if the objection is made prior to hearing or trial, a continuance shall be ordered if requested by either party. Any continuance ordered pursuant to this subsection shall be subject to the time limitations set forth in subsection C.

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

B. MICHIGAN DRUG PROSECUTIONS: PRESENTATION OF LAB ANALYSES

This table presents the results of the examination of trial transcripts from Michigan drug prosecutions described in footnote 10 of the brief.

Defendant's Last Name	Court[1]	Docket Number	Trial Start Date	Lab Results Presented?	Live Witness?	# Pages Cross[2]
DeMann	Allegan	05-14225-FH	11/7/2005	Yes	Yes	0.5
Whitehorn	Allegan	06-15025-FH	4/4/2007	Yes	Yes	3.5
Rosenberg	Barry	02-200-FH	9/16/2002	Yes	No	
Newson	Bay	04-10314 FC	10/5/2004	Yes	Yes	4.5
Snow	Bay	07-10666-FH 07-10667-FH	3/4/2008	Yes	Yes	3.5, 1[3]
Miller, O.	Berrien (Drug)	200441063	6/23/2004	Yes	No	
Futrell	Berrien (Drug)	2004406061FH	12/16/2004	Yes	No	
Hall, A.	Berrien (Drug)	2005401850	5/26/2005	Yes	Yes	7[4]
Underwood	Berrien (Drug)	2005412135FH	12/1/2005	Yes	Yes	3
McKinney	Berrien (Drug)	2006404059FH	9/8/2006	Yes	No	
Cole	Berrien (Drug)	2007403353fh	10/9/2007	No		
Williams, P.	Berrien (Drug)	07-405372-FH	1/17/2008	Yes	Yes	0
Mosley	Calhoun	04-2798 FH	3/15/2005	Yes	Yes	0
Moore	Cass	05-10083	8/2/2005	Yes	Yes	2.5
Reeves	Cass	05-10149 05-10361	1/18/2006	Yes	Yes	3
Ryans	Cass	07-10080	7/31/2007	Yes	No	
Blackamore	Cass	07-10290	1/8/2008	Yes	No	
Biggs	Cass	08-10096	7/8/2008	No		

Passino	Cheboygan	08-3788-FH	5/13/2008	Yes	No	
Poe	Chippewa	07-8336-FH	7/9/2007	Yes	No	
Peltola	Dickinson	08-4032-FH	9/30/2008	Yes	No	
Pate	Eaton	04-483-FC	3/1/2005	Yes	Yes	1
Huver	Eaton	06-118-FH	6/12/2006	Yes	No	
Robins	Eaton	07-305-FH 07-313-FH	11/19/2008	Yes	No	
Orr	Emmet	06-2614-FH	12/11/2006	Yes	No	
Engle	Emmet	05-2533-FH	12/14/2006	Yes	Yes	1
Burks	Emmet	2007-2770-FH	9/25/2007	Yes	No	
Savage	Emmet	07-2888-FH	2/19/2008	Yes	Yes	1, 2[3]
Hollingsworth	Genesee	05-16364-FH	7/14/2005	Yes	Yes	0.5
Jones, S.	Genesee	05-016528-FH	9/20/2005	Yes	Yes	2
DeWalt	Genesee	08-22022-FH	2/26/2008	Yes	Yes	2
Eggers	Gogebic	G 03-270 FH	4/20/2004	Yes	Yes	0
Fetterolf	Grand Traverse	03-9151-FH	11/10/2003	Yes	Yes	3
Lessard	Grand Traverse	05-9704-FH	5/4/2005	No		
Hayes	Grand Traverse	07-10313-FC	8/21/2007	Yes	No	
Walker, D.	Ingham	04-72=FH	5/31/2005	Yes	Yes	26
Cantu	Ingham	01-076660-FH	7/18/2005	Yes	Yes	1
Myles	Ingham	07-905-FH	1/31/2008	Yes	No	
Caniff	Ionia	12640	7/8/2004	Yes	No	

Sanders	Jackson	04-000915-FH	3/30/2005	Yes	Yes	4
Brown	Jackson	2006-003491-FH	7/26/2006	Yes	No	
Skidmore	Jackson	2006-3318-FH	9/25/2006	Yes	Yes	13
Weaver	Jackson	2007-3711-FH	6/11/2007	Yes	No	
Phason	Kalamazoo	D02-1698 FH	10/28/2003	Yes	No	
Gilliam	Kalamazoo	05-002430 FH	4/4/2006	Yes	No	
Johnson	Kalamazoo	06002077 FH	3/1/2007	Yes	Yes	4.5
Ferguson	Kalamazoo	C2008-0897FH	11/4/2008	Yes	No	
Abramczyk	Kalkaska	03-2323-FH(D)	11/24/2003	Yes	Yes	3.5
Minix	Kalkaska	07-2836-FH	10/29/2007	Yes	Yes	2
Legree	Kent	02-09102-FH	6/13/2005	Yes	No	
Hilaski	Kent	05-03837-FH	11/6/2006	Yes	Yes	6
Runyon	Kent	07-04681-FH	8/15/2007	Yes	No	
Jorah	Kent	06-09052-FH	9/4/2007	Yes	Yes	1.5
Uphaus	Livingston	05-014970-FH	6/27/2005	Yes	Yes	3.5
Miclea	Livingston	07-016334-FH	6/26/2007	Yes	No	
Palacios	Macomb	03-1281-FH	12/2/2003	Yes	No	
Williams, E.	Macomb	05-1564-FH	10/26/2005	Yes	Yes	2
Peoples	Macomb	06-1902-FH	1/30/2007	Yes	Yes	0
Daoud	Macomb	07-5300-FH	3/5/2008	Yes	Yes	6
Quinn	Mason	06-00-1580-FH	5/17/2006	Yes	Yes	6
Kacienda	Mecosta	03-005124-FR	12/3/2003	Yes	Yes	15.5
Kregear	Missaukee	04-101905-FH	11/2/2004	Yes	Yes	0.5
Black	Monroe	02-320450FH	12/9/2002	Yes	No	
Montague	Monroe	03-33173-FH	5/6/2004	Yes	Yes	1.5
Evans	Monroe	05-34552-FH	7/5/2006	Yes	No	

McCoy	Monroe	06-35638-FH	2/5/2007	Yes	No	
Johnican	Monroe	07-36095-FH	12/5/2007	Yes	Yes	2
Salinas	Muskegon	02-47140-FC	1/17/2003	Yes	No	
Bailey	Muskegon	02-47931-FH	12/9/2003	Yes	No	
Vangeison	Muskegon	03-48408-FH	1/21/2004	Yes	Yes	1.5
Morehead	Muskegon	06-53546-FC	12/5/2006	Yes	No	
Harris	Oakland	2003-192102-FC	4/26/2004	Yes	No	
Capeles	Oakland	04-194666-FH	7/29/2004	Yes	No	
Washington	Oakland	04-196772-FH	7/12/2005	Yes	No	
Jacques	Oakland	2004-197790-FH	10/13/2005	Yes	No	
Hardiman	Oakland	04 196749-FH	10/31/2005	Yes	No	
Murray	Oakland	03-189072-FH 03-189082-FH	11/2/2005	Yes	No	
Jacobson	Oakland	05-204549-FH	12/6/2005	Yes	Yes	2
Jackson	Oakland	05-205408-FC 05-205409-FC	4/17/2006	Yes	No	
Greene	Oakland	06-206966-FC 06-206970-FC	5/11/2006	Yes	No	
Watson	Oakland	05-204038-FC	5/25/2006	Yes	No	
Mallory	Oakland	06-207596-FC	6/1/2006	Yes	No	
Thomas	Oakland	06-206294-FH	6/15/2006	Yes	No	
Giles	Oakland	05-205314	9/28/2006	Yes	Yes	3
Mathis	Oakland	06-211580-FH	5/18/2007	Yes	No	
Dye	Oakland	06-210088-FH	6/5/2007	Yes	No	
Hall, S.	Oakland	07-214930-FH	9/11/2007	Yes	Yes	0.5
Bell	Oakland	07-215014-FH	9/27/2007	Yes	No	
Jones, F.	Oakland	08-219309-FH	6/23/2008	Yes	No	
Sims	Oakland	08-220585-FH	7/10/2008	Yes	No	

Dent	Oakland	2007-216132-FH	9/25/2008	Yes	No	
Williams, J.	Otsego	03-2920-FH	3/25/2004	Yes	No	
Markey	Presque Isle	04-092208-FC 04-092209-FC	6/8/2005	Yes	No	
Green	Roscommon	05-4996-FH	2/9/2006	Yes	Yes	2.5
Bridges	Saginaw	06-027887-FH-1	3/13/2007	Yes	Yes	1
Armstrong	St. Clair	K 03-001208 FH	9/23/2003	Yes	Yes	3
Burries	St. Clair	K 04-002071	1/4/2005	Yes	Yes	0
Essenmacher	St. Clair	D-06-631-FH	6/27/2006	Yes	Yes	3
Miller, V.	St. Clair	D-07-821-FC	9/18/2007	Yes	Deposition	17[5]
Williams	St. Clair	K 07-002286 FH	12/11/2007	Yes	Yes	3.5
Carnicom	St. Joseph	04-12272 FH	9/22/2004	Yes	Yes	2, 4.5[3]
Fuller	Tuscola	03-8864-FH	1/21/2004	Yes	Yes	0
Yocic	Tuscola	03-8855-FH	2/3/2004	Yes	Yes	0
Fisher	Tuscola	03-8955-FH	2/8/2005	Yes	Yes	4.5
Peters	Tuscola	07-010552-FH	7/15/2008	Yes	Yes	1
Taylor	Washtenaw	05-1797-FH 03-603-FH	6/19/2006	Yes	No	
Rashad	Wayne (Detroit Recorder's Court)	88-12274	10/18/1989	Yes	No	
Marin	Wayne	02-8432 01	9/18/2002	Yes	No	
Newby	Wayne	02-3910	12/16/2002	Yes	No	
Snedacar	Wayne	04-1682	4/20/2004	Yes	No	

Maddox	Wayne	04-005427	8/10/2004	Yes	No
Poston	Wayne	04-9948	12/6/2004	Yes	No
Moon	Wayne	05-4078	10/13/2005	Yes	No
Campbell, K.	Wayne	05-7721 05-5277	11/7/2005	Yes	No
Cotton	Wayne	05-9454	1/10/2006	Yes	No
Richardson	Wayne	06-0902-364	6/14/2006	Yes	No
Holden	Wayne	06-4729	6/22/2006	Yes	No
Davis	Wayne	03-12827	9/12/2006	Yes	No
Rogers	Wayne	06-010620 06-010994	12/18/2006	Yes	No
Walker, E.	Wayne	06-14092	3/14/2007	Yes	No
McClammy	Wayne	07-03871	4/5/2007	Yes	No
Staley	Wayne	07-7962-01	7/12/2007	Yes	No
Reber	Wayne	07-9642	8/15/2007	Yes	No
Lively	Wayne	04-11339	1/16/2008	Yes	No
Campbell, L.	Wayne	07-15213-00 07-15213-01	1/30/2008	Yes	No

[1] Circuit Court of identified county, except where otherwise stated.
[2] Rounded to nearest half page; minimum of 0.5 pages indicated for any substantive quesitoning.
[3] Two separate analysts.
[4] Examination done by telephone.
[5] Deposition.