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 Petition for a Writ of Certiorari
to the United States Court of Appeals
For the Fourth Circuit

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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August 1, 2008

QUESTION PRESENTED

If a State allows a prosecutor to introduce a certificate of 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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COURT RULES

BRIEF IN OPPOSITION TO
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Virginia Attorney General Robert F. McDonnell, on behalf of the Commonwealth of Virginia, submits this Brief in Opposition.[1]

INTRODUCTION

In the wake of *Crawford v. Washington*, 541 U.S. 36 (2004), lower courts have struggled with the admissibility of certificates of analysis in the absence of live testimony by the forensic analyst. Some courts have concluded that such certificates are not "testimonial" while others have reached the opposite conclusion.[2] This Court granted certiorari in *Melendez-Diaz v. Massachusetts*, No. 07-591, to resolve that issue.

However, even if such certificates are "testimonial," the States have a second line of defense. Various statutes authorize the introduction of certain forensic certificates of analysis without the in-court testimony of the analyst. These statutes further provide that the defendant may ensure the presence of the analyst for

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[1] On June 10, 2008, this Court extended the time for such filing to and including August 4, 2008.

[2] *See, e.g.*, *Massachusetts v. Verde*, 827 N.E.2d 701, 705-06 (Mass. 2005) (certificate of analysis is not testimonial); *Minnesota v. Caulfield*, 722 N.W.2d 304, 313 (Minn. 2006) (certificate of analysis constitutes testimonial evidence).

cross-examination. This second line of defense will become relevant if the Court decides in *Melendez-Diaz* that certificates of analysis are "testimonial."[3]

Granting certiorari would be premature until *Melendez-Diaz* is decided. Furthermore, the petitioners rest their entire argument on a reading of Virginia state law that Virginia's highest court expressly did not address. Addressing the question presented would require this Court to hypothesize about how the Virginia statutes might operate and, thus, to hand down an advisory opinion on an abstract question of state law. Finally, the holding below, that the defendants had waived their rights by failing to ask for the presence of the analyst at trial, was correct as a matter of federal constitutional law.

STATEMENT OF THE CASE

This Petition involves two separate criminal defendants who committed separate crimes. The Supreme Court of Virginia consolidated their appeals because of the commonality of the central issue.[4]

a. Sheldon A. Cypress was a passenger in a car stopped by police in the City of Chesapeake, Virginia, for having improperly tinted windows. Pet. App. A-4. The

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[3] In addition to the present case, *Hinojos-Mendoza v. Colorado*, No. 07-9369, asks this Court to decide whether the right to confront witnesses is personal to an accused or whether counsel can waive the right.

[4] The third defendant, Michael Ricardo Magruder, whose case was consolidated with Briscoe's and Cypress's, did not seek this Court's review of the judgment of the Supreme Court of Virginia.

driver, Cypress's cousin, consented to a search of the car. Pet. App. A-4. The search yielded two bags containing a "chunky white substance." Pet. App. A-4. One of the baggies was under the passenger seat and the other was under the driver's seat. Pet. App. A-4. A test by the Department of Forensic Science concluded that the substance was cocaine. Pet. App. A-4. These test results were reflected in a certificate of analysis, which was signed by the analyst who performed the test. Pet. App. A-4, A-124. The analyst also attested that she had performed the analysis. Pet. App. A-4.

Cypress was charged with possession of cocaine with the intent to distribute, having previously committed the offense of distribution or possession with the intent to distribute. Pet. App. A-4. At trial, he objected to the admission of the certificate of analysis, contending that it was "testimonial" evidence that could not be admitted without the testimony from the forensic analyst who conducted the test. Pet. App. A-4. The trial court overruled the objections, ruling that the evidence was not testimonial. Pet. App. A-4. Cypress did not present any evidence and did not request the presence of the analyst, nor did he subpoena her. Following a bench trial, Cypress was convicted of possession of cocaine with the intent to distribute, second or subsequent offense, and he was sentenced to serve 15 years, with 10 years suspended, and a fine was imposed. Pet. App. A-4.

b. The other petitioner in this appeal is Mark A. Briscoe. During the execution of a search warrant for Briscoe's apartment in Alexandria, Virginia, police recovered two scales, a razor blade, a 100-gram weight, and a box of plastic sandwich bags. Pet. App. A-5. When they searched Briscoe, police retrieved from the front pocket of his shorts a white, rock-like substance wrapped in plastic. Pet. App. A-5. Police recovered additional suspected cocaine from the kitchen area of the apartment. Police submitted this item for testing to the Department of Criminal Justice Services, Division of Forensic Science. A forensic analyst prepared two certificates of analysis, which stated that the substances were cocaine in an amount totaling 36.578 grams. Pet. App. A-5. The analyst signed the certificates, stated that she had performed the analyses and that the certificates accurately reflected the results of the analyses. Pet. App. A-5. Briscoe was charged with possession of cocaine with the intent to distribute, conspiracy to distribute cocaine, and unlawful transportation of cocaine into the Commonwealth. Pet. App. A-5.

At his bench trial, the prosecution adduced into evidence two certificates of analysis. Pet. App. A-5. Briscoe argued that the certificates were "testimonial" evidence under the holding in *Crawford*, and therefore, admitting the certificates of analysis without the testimony of the forensic analyst constituted a violation of his right to confront witnesses. Pet. App. A-5. The trial court overruled this objection, concluding that the statutory procedure available under *Virginia Code Ann.* § 19.2-187.1 adequately protected his right to confront the analyst. Briscoe did not call the analyst to testify and did not present any evidence. The trial court

convicted him, and he was sentenced to serve a total of 20 years in prison, with all but five years and eight months suspended. Pet. App. A-5.

2. On appeal, both convictions were affirmed by Virginia's intermediate appellate court.

a. The Court of Appeals of Virginia denied Cypress's appeal in an unpublished order. *Cypress v. Virginia*, Record No. 1547-06-1 (Jan. 3, 2007). The Court assumed that a certificate of analysis was testimonial evidence, but reasoned that "a defendant's confrontation rights are nonetheless protected by the procedures provided by Code §§ 19.2-187 and 19.2-187.1." Pet. App. A-4. Because the defendant had not invoked these procedures, the court held, he had waived his right to confront the analyst. Cypress appealed to the Supreme Court of Virginia, and that Court agreed to hear his appeal.

The Court of Appeals of Virginia affirmed Briscoe's convictions by an unpublished *per curiam* order. *Briscoe v. Virginia*, Record No. 1478-06-4 (January 18, 2007). Pet. App. A-5. The Court of Appeals assumed, without deciding, that the certificate of analysis was testimonial. The Court of Appeals concluded, however, that the defendant's right to ensure the presence of the forensic analyst was protected by *Virginia Code* § 19.2-187.1. The Court of Appeals further held that by failing to avail himself of the procedure provided by this statute, Briscoe had waived his right to confront the analyst. Pet. App. A-5. Briscoe's attempt to obtain further review in that court was unsuccessful and he petitioned

for appeal in the Supreme Court of Virginia. That Court granted his petition, and consolidated his case with two other cases, including *Cypress v. Virginia*, detailed above.

3. After their appeals were consolidated with another appeal, the Supreme Court of Virginia, by a vote of 4-3, affirmed the decisions of the Court of Appeals of Virginia. *Magruder v. Virginia*, 657 S.E.2d 113 (Va. 2008). Pet. App. A-1. The Court first reasoned that it was not necessary to reach the issue of whether a certificate of analysis is testimonial evidence. Pet. App. A-6. Instead, the Court upheld the admission of the certificates of analysis under Virginia's statutory scheme. That scheme is as follows.

Under Virginia Code § 19.2-187, a "duly attested" certificate of analysis by the "person performing analysis or examination" in certain laboratories may be admitted into evidence "[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." A prerequisite to admitting such a certificate of analysis is that the certificate must be "filed with the clerk of the court hearing the case at least seven days prior to the hearing or trial." *Id.* Failure to follow the seven-day filing requirement precludes the admission of the certificate of analysis at trial. *Bell v. Virginia*, 622 S.E.2d 751, 754 (Va. Ct. App. 2005).

A second statute, *Virginia Code* § 19.2-187.1, sets forth a procedure for the accused to question the person performing the analysis or examination. That statute provides:

> 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.

Under this procedure, the Court observed,

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

Pet. App. A-8—A-9. "In short," the Court held, "if the defendants had utilized the procedure provided in Code § 19.2-187.1, they would have had the opportunity to cross-examine the forensic analysts." Pet. App. A-9.

The Court rejected the defendants' arguments that they could not be required to take affirmative steps to assert a right to confront witnesses. The Court reasoned that States can and, with some frequency do, regulate the exercise of constitutional rights. Pet. App. A-9. For example, States require defendants to provide notice when they intend to raise an alibi defense. States also impose restrictions concerning when a defendant must file a motion to suppress. Pet. App. A-9-A-10.

The Court found unpersuasive the defendants' contention that Virginia's statutory scheme forces a defendant to produce evidence. Such concerns are "due process concerns that are not before us in these appeals." Pet. App. A-10. The Court observed that none of the defendants had taken any steps to ensure the presence of the analyst at trial. Therefore, none of them were forced to call the witness to the stand. If they had, the Court noted, the trial court could have addressed "the proper order of proof." Pet. App. A-10.

Finally, the Court held that the defendants could, and did, waive their confrontation rights by failing to seek the presence of the analyst at trial. Pet. App. A-10.

REASONS FOR DENYING THE PETITION

The petition should be denied for three reasons. First, although the question presented in this case has divided the lower courts, granting certiorari would be premature. The Court has granted certiorari in *Melendez-Diaz*, No. 07-591, to address the issue of whether certificates of analysis are testimonial. Should this Court conclude that certificates of analysis are non-testimonial, this case would become moot. Until *Melendez-Diaz* is decided, there is no reason to address the issue presented by the case at bar.

Second, the question presented is hypothetical rather than concrete. The petitioners assume that under the Virginia statutory scheme at issue, they will be forced to call the analyst as his own witness. The petitioners then identify

purported constitutional flaws with this approach. However, the court below expressly declined to reach the state law issue of whether a defendant must present the testimony of the analyst or whether the prosecution must first adduce this testimony. The petitioners thus seek an advisory opinion on an hypothetical question of state law.

Finally, the decision below was correct. Virginia's statutory scheme is another example of long-validated and constitutionally permissible regulations that govern the exercise of a defendant's constitutional rights. Virginia law does not impermissibly infringe on the exercise of a defendant's right to confront witnesses.

I. GRANTING CERTIORARI IN THIS CASE WOULD BE PREMATURE BECAUSE A FAVORABLE RESOLUTION OF THE ISSUE IN *MELENDEZ-DIAZ V. MASSACHUSETTS* WOULD RENDER THIS CASE MOOT.

On March 17, 2008, this Court granted the petition for a writ of certiorari in *Melendez-Diaz v. Massachusetts*, 128 S. Ct. 1647 (2008). The question presented in that case is "[w]hether a state forensic analyst's laboratory report prepared for use in a criminal prosecution is 'testimonial' evidence subject to the demands of the Confrontation Clause as set forth in *Crawford v. Washington*, 541 U.S. 36 (2004)." *Melendez-Diaz*, No. 07-591, Brief for Petitioners at i. (June 16, 2008). If *Melendez-Diaz* is decided in favor of the government, this petition would become moot. Therefore, granting certiorari in the case at bar would be premature.

Following the decision in *Crawford*, the critical inquiry under the Confrontation Clause is whether a particular statement is "testimonial." *Davis v.*

Washington, 547 U.S. 813, 821 (2006). If a statement is not testimonial, it "is not subject to the Confrontation Clause." *Id.* As Massachusetts and certain amici will argue, certificates of analysis such as the ones at issue here are not testimonial in nature. The petitioners' entire argument in the case at bar is predicated upon the "testimonial" nature of such certificates of analysis. *See* Pet. at 23. It would serve little purpose to grant certiorari, only to dismiss the case at a later juncture on mootness grounds.

Oral argument in *Melendez-Diaz* is scheduled for November 10, 2008. The issue presented in this case has received considerable attention from the lower courts, so there will be no shortage of opportunities for the Court to address the issue in the future – should the issue not become mooted by the outcome in *Melendez-Diaz*. Rather than hold the petition in abeyance for a lengthy period of time, the Court should deny certiorari.

II. THE QUESTION PRESENTED WOULD REQUIRE A RULING ON A HYPOTHETICAL STATE LAW QUESTION THAT THE COURT BELOW REFUSED TO ADDRESS.

The petitioners frame the question presented in the following terms: when "a state allows a prosecutor to introduce a certificate of forensic laboratory analysis, 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?" Pet. i. This question assumes at its foundation that Virginia law forces a defendant to call the analyst as a part of the defense case. The petitioners then construct an

elaborate argument on this foundation, seeking to establish that this procedure is constitutionally infirm. Pet. 11-22.

However, the Supreme Court of Virginia expressly declined to reach the state law question of whether the defendant, rather than the prosecutor, must call the analyst. Pet. App. A-10. The Court below began by pointing out that under Virginia's statutory scheme, a defendant can ensure that the analyst is present for cross-examination at trial in three ways: "by issuing a summons for their appearance at the Commonwealth's cost, or asking the trial court or the Commonwealth to do so." Pet. App. A-9. The Court observed that the petitioners did not avail themselves of any of these options. Pet. App. A-9. Turning to the argument that the petitioners were impermissibly forced "to call the forensic analyst in order to exercise [the] right to confront that witness," the Court observed that this argument "raises due process concerns that are not before us in these appeals." Pet. App. A-10.[5] The Court held that

> [b]ecause the defendants did not avail themselves of the opportunity to require the presence of a particular forensic analyst at trial, they were never in the position of being forced, over their objection, to call a forensic analyst as a witness. In other words, no defendant said to the respective circuit court, "the forensic analyst is here to testify but the Commonwealth must first call the witness."

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[5] At least one other court has reached the same conclusion, *i.e.* that forcing a defendant to adduce evidence from the analyst constitutes a due process problem. *See Wigglesworth v. Oregon*, 49 F.3d 578, 581 (9th Cir. 1995). The petitioners do not raise any due process issue in this Court. Assuming for purposes of argument that the Court below was incorrect in concluding that the petitioners' arguments sounded in due process rather than under the Confrontation Clause, the petitioners do not ask this Court to rectify that conclusion. Therefore, that aspect of the lower court's holding is final.

Pet. App. A-10. In other words, the Court never reached the issue of how matters should proceed under Virginia law once a defendant takes the initial step of ensuring the presence of the analyst.

The petitioners' argument thus rests on an unsupported assumption regarding state law. In practice, a trial court can easily obviate the purported problems the petitioners identify. A Virginia trial court can simply require the prosecution to present the analyst's testimony – provided that a defendant has taken the *de minimis* step of ensuring the presence of the analyst. Indeed, Virginia took the view in the Court below that, to avoid any constitutional ambiguity in the statute, once the defendant has requested the presence of the analyst, the *prosecution* "should subpoena the witness and present the testimony of the witness during its case in chief." Brief for the Commonwealth, *Magruder v. Virginia*, at 17. The issue simply did not arise in the cases at bar, because none of the petitioners took the preliminary step of ensuring that the analyst was present.[6]

To illustrate, suppose that a defendant seeks mid-trial to exclude evidence that he claims was seized impermissibly in a warrantless search. He further asserts that Virginia impermissibly places on a defendant the burden of proving that a warrantless search of his home was lawful and that, instead, the State should bear that burden. *See, e.g., Coolidge v. New Hampshire*, 403 U.S. 443,

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[6] Of course, if the defendant wishes to or does not object, he can call or cross-examine the analyst as a part of the defense case rather than during the prosecution's case in chief. There may be sound tactical reasons for doing so.

453-55 (1971) (burden of establishing constitutionality of warrantless search rests with the prosecution). In that circumstance, the defendant's failure to file a timely suppression motion would preclude the court from reaching the issue. The court would not reach the issue of the propriety of the allocation of the burden of proof because the defendant did not take a necessary first step of filing a suppression motion. That is comparable to what occurred here. The petitioners never took any steps to ensure the presence of the analyst. Therefore, the lower courts never addressed the argument that the petitioners are forced to place the analyst on the stand was never addressed by the trial court or the court on appeal.

If, in a *future case*, a Virginia defendant – one who ensures the presence of the analyst – is forced, over his objection, to call the analyst, the issue the petitioners' attempt to raise in this Court will be squarely presented. That, however, is a purely hypothetical scenario and one that did not arise here. The petitioners are asking this Court to invalidate a conviction based on a hypothetical scenario. In the context of facial challenges, the Court has held that "the delicate power of pronouncing [a statute] unconstitutional is not to be exercised with reference to hypothetical cases" imagined by a litigant. *United States v. Raines*, 362 U.S. 17, 22 (1960). Had the petitioners taken the simple step of ensuring the presence of the analyst, they could have urged the court to require the prosecution to place the analyst on the stand. The trial court was simply never in a position to address the issue, however, because the analyst was not there. As a result, on appeal, the Supreme Court of Virginia properly declined to reach the issue.

Because the petitioners seek "nothing more than a hypothetical judgment – which comes to the same thing as an advisory opinion, disapproved by this Court from the very beginning," *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101 (1998), certiorari should be denied.

III. VIRGINIA'S NOTICE-WAIVER STATUTE REPRESENTS A PERMISSIBLE AND LONG-VALIDATED REGULATION OF A DEFENDANT'S EXERCISE OF HIS CONSTITUTIONAL RIGHTS.

A. States may enact reasonable rules to regulate the exercise of constitutional rights.

The States have long imposed rules governing all aspects of a criminal trial, including the exercise of constitutional rights. For example, a requirement that a defendant file a notice that he intends to pursue an alibi defense does not violate the Sixth Amendment. *Williams v. Florida*, 399 U.S. 78, 82-83 (1970). States can also require defendants who wish to impeach the victim of a sexual crime with her past sexual conduct to file a notice of their intent to do so without infringing on a defendant's constitutional rights. *Michigan v. Lucas*, 500 U.S. 145, 152-53 (1991). In *Lucas*, the Court noted that "[t]he notice-and-hearing requirement serves legitimate state interests in protecting against surprise, harassment, and undue

delay." *Id.*[7] Similarly, the States can impose reasonable rules of procedure to govern the exercise of rights under the Confrontation Clause.[8]

With respect to certificates of analysis of drugs, the identity of the substance is seldom at issue. The substance is identified pursuant to routine, simple and well-established scientific testing. The test is performed by an analyst with no connection to the investigation and who has no reason to falsify the result. In the overwhelming majority of cases, defendants have nothing to gain by cross-examining the analyst. It is hardly surprising that nearly every State has a statutory framework in place that authorizes as a default the introduction of certain certificates of analysis and asks a criminal defendant to take some step to ensure the presence of a forensic analyst.[9]

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[7] *See also Poulos v. New Hampshire*, 345 U.S. 395, 405 (1953) (State may establish reasonable procedures that must be followed to exercise First Amendment rights).

[8] "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. CONST. amend. VI. This guarantee applies to the States as well as to the United States government. *Pointer v. Texas*, 380 U.S. 400, 406 (1965).

[9] Alabama: ALABAMA CODE § 12-21-300 (2006); Alaska: ALASKA STAT. § 12.45.084 (2006); Arizona: ARIZONA REV. STAT. ANN. § 36-254 (2006); Arkansas: ARKANSAS CODE ANN. §§ 5-64-707, 12-12-313 (2006); Colorado: COLORADO REV. STAT. § 16-3-309(5) (2006); Connecticut: CONNECTICUT GEN. STAT. § 21a-283(b) (2006); Delaware: DELAWARE CODE ANN. tit. § 10, 4330-32 (2006); District of Columbia: DISTRICT OF COLUMBIA CODE ANN. § 48-905.06 (LexisNexis 2006); Florida: FLORIDA STAT. ANN. §§ 316.1934, 327.354 (West 2006); Idaho: IDAHO CODE ANN. § 37-2745 (2006); Illinois: 725 ILLINOIS COMP. STAT. ANN. 5/115-15 (West 2000) (*but see Illinois v. McClanahan*, 729 N.E.2d 470, 478 (Ill. 2000), holding the statute unconstitutional); Iowa: IOWA CODE § 691.2 (2006); Kansas: KANSAS STAT. ANN. §§ 22-2902a, 22-3437 (2006); Kentucky: KENTUCKY REV. STAT. ANN. § 189A.010 (West 2006); Louisiana: LOUISIANA REV. STAT. ANN. §§ 15:499-15:501, 32:662-32:663 (2006); Maine: MAINE REV. STAT. ANN. tit. 5, § 9057; tit. 6, § 205; tit. 17-A, § 1112;

Requiring a defendant to provide notice that he wishes to have the analyst present for cross-examination, like the statutes requiring notice of an alibi or notice of the intent to explore the sexual history of the victim, is a constitutionally permissible measure. The right of an accused to confront and cross-examine is "not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process." *Chambers v. Mississippi*, 410 U.S. 284, 295

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tit. 29-A, § 2431 (2006); Maryland: MARYLAND CODE ANN., CTS. & JUD. PROC. §§ 10-914, -1001 to -1003 (West 2006);) Massachusetts: MASSACHUSETTS GEN. LAWS ch. 22C, §§ 39, 41; ch. 90, § 24; ch. 90B, § 8; ch. 94C; ch. 111, § 13 (2006)); Michigan: MICHIGAN COMP. LAWS §§ 257.625a, 600.2167 (2006); Minnesota: MINNESOTA STAT. §§ 634.15-16 (2006); Missouri: MISSOURI REV. STAT. §§ 577.020, 577.037 (2006); Nebraska: NEBRASKA REV. STAT. § 28-1439 (2006); Nevada: NEVADA REV. STAT. §§ 50.315, 50.320, 50.325 (2006); New Hampshire: NEW HAMPSHIRE REV. STAT. ANN. §§ 215-A:11-i, 265:92-a, 270:57 (2006); New Jersey: NEW JERSEY STAT. ANN. § 2C:35-19 (West 2006); New Mexico: NEW MEXICO STAT. ANN. §§ 66-8-110, 66-13-11 (LexisNexis 2006); New York: NEW YORK VEH. & TRAF. LAW § 1195 (McKinney 2006), NEW YORK C.P.L.R. 4518, 4520 (McKinney 2006), NEW YORK CRIM. PROC. LAW § 190.30 (McKinney 2006); North Carolina: NORTH CAROLINA GEN. STAT. §§ 20-139.1, 90-95(g) (2006); North Dakota: NORTH DAKOTA CENT. CODE §§ 19-03.1-37, 39-20-07 (2006); Ohio: OHIO REV. CODE ANN. § 2925.51 (West 2006); Oklahoma: OKLAHOMA STAT. ANN. tit. 22 §§ 751, 751.1; tit. 47, § 754 (West 2006); Oregon: OREGON REV. STAT. §§ 40.460, 40.510, 475.235 (2006); Pennsylvania: 75 PENNSYLVANIA CONS. STAT. ANN. § 1547 (West 2006); Rhode Island: RHODE ISLAND GEN. LAWS § 9-19-43 (2006); South Dakota: SOUTH DAKOTA CODIFIED LAWS § 1-49-6 (2006); Tennessee: TENNESSEE CODE ANN. §§ 40-28-122, 40-35-311, 55-10-407 (2006);); Texas: TEXAS CODE CRIM. PROC. ANN. art. 38.41 (Vernon 2006); Utah: UTAH CODE ANN. §§ 41-6a-515, 72-10-503 (2006); VERMONT STAT. ANN. tit. 13, § 4816; tit. 23, §§ 1202, 1203, (2006); Virginia: VIRGINIA CODE ANN. §§ 18.2-268.7, 18.2-268.9, 19.2-187, 19.2-187.01, 19.2-187.02, 19.2-187.2 (2006); Washington: WASHINGTON REV. CODE § 46.20.308 (2006); West Virginia: WEST VIRGINIA CODE § 17C-5A-1 (2006); Wisconsin: WISCONSIN STAT. § 970.03 (2006); Montana: MONTANA R. EVID. 803(8) (2006); South Carolina: SOUTH CAROLINA R. CRIM. PRO. 6 (2006); Washington: WASHINGTON ST. SUPER. CT. CRIM. R. 6.13 (2006).

(1973).[10] As noted above, the Supreme Court of Virginia has not settled the question of how matters must proceed once the defendant provides the required notice that he wishes to have the forensic analyst present. However, the requirement that the defendant provide notice to ensure the presence of the analyst is a constitutionally permissible regulation of the exercise of the right to confront witnesses.[11]

B. The petitioners waived their right to confront the analyst.

The court below correctly concluded that a defendant who fails to ensure the presence of the analyst has waived his right to confront the analyst. It is settled law that, like other constitutional rights, the right to confront witnesses can be waived. *Brookhart v. Janis*, 384 U.S. 1, 4 (1966); *Singer v. United States*, 380 U.S. 24, 35 (1965). Although the petitioners contend that they "vigorously demanded" their right to confront the analyst, Pet. at 12, they did not avail themselves of the mechanism to ensure that confrontation took place, either by notifying the prosecution or the court that they wished to have the analyst present, or by issuing a subpoena for the analyst. Pet. App. A-9. The court below correctly concluded that this failure constituted a waiver. Certiorari should be denied.

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[10] *See also Mattox v. United States*, 156 U.S. 237, 243 (1895) (noting that confrontation of witnesses "must occasionally give way to considerations of public policy and the necessities of the case.").

[11] Indeed, the petitioners agree that some notice waiver statutes are constitutionally valid. Pet. at 21.

CONCLUSION

For reasons stated above, the Petition for a Writ of Certiorari should be DENIED.

Respectfully submitted,

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August 1, 2008

CERTIFICATE OF SERVICE

On August 1, 2008, I served one copy of THE COMMONWEALTH OF VIRGINIA'S BRIEF IN OPPOSITION upon all parties required to be served, by United States Postal Service in accordance with Rule 29(3), as follows:

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