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 Writ of Certiorari to the
Supreme Court of Virginia

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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The Commonwealth's Brief in Opposition ("BIO") acknowledges that the Question Presented by the Petition is an important one on which the lower courts are divided. It acknowledges as well that, assuming this Court holds in *Melendez-Diaz v. Massachusetts*, No. 07-591, that certificates of laboratory reports are testimonial, the Question Presented will be ripe for decision by this Court. The Commonwealth's principal basis for opposition to the Petition is its contention that this case is a poor vehicle for decision of the Question Presented. But it can make that argument only by describing the proceedings below in a potentially misleading manner, by misstating the holding of the Supreme Court of Virginia, and by suggesting an implausible reading of the relevant statute.

ARGUMENT

The Commonwealth frankly acknowledges the critical facts supporting a grant of certiorari in this case: This Court granted certiorari in *Melendez-Diaz v. Massachusetts*, No. 07-591, to resolve the question whether certificates of forensic analysis are testimonial for purposes of the Confrontation Clause. BIO at 1. Statutes of the sort involved in this case are "a second line of defense" raised by some states to a claim that the admission of such a certificate absent live testimony by the author violates the Confrontation Clause. *Id.* The question whether such statutes are valid – the Question Presented in this case – is a frequently recurring one, *id.* at 10, and it "has divided the lower courts." *Id.* at 8. If this Court determines in *Melendez-Diaz* that the certificates are testimonial – a proposition assumed by the Supreme Court of Virginia, App. A6, for purposes of its decision in this case – then the Question Presented will also be ripe for resolution. BIO at 2 ("Granting certiorari would be premature until *Melendez-Diaz* is decided.").

Given these undisputed, and indisputable, facts, the Commonwealth is able to offer only specious arguments against granting the writ.

I. This Petition Offers an Ideal Opportunity for Prompt Resolution of the Question Presented.

The Commonwealth first argues that the Court should not "hold the petition in abeyance for a lengthy period of time" until the decision in *Melendez-Diaz*, before which a grant of certiorari would be premature. *Id.* at 10. Petitioners agree that the Petition should not be granted before the Court decides *Melendez-Diaz*, and that if the Court holds in that case that certificates of forensic analysis are not testimonial there would be no basis for granting the Petition. But if (as Petitioners believe is probable) the Court holds that such certificates are testimonial, then it would be appropriate for the Court to consider whether burden-shifting statutes like Virginia's nevertheless satisfy the Confrontation Clause. Given the importance of the issue, it would be important for the matter to be resolved promptly. Huge numbers of cases, of course, depend on that resolution in states having burden-shifting statutes. Moreover, it is inevitable that legislatures in states that do not now have such statutes, facing the newly determined doctrine that the certificates are testimonial, would consider adopting what the Commonwealth has here called "a second line of defense." This Petition would present an ideal opportunity for the necessary prompt resolution. There would be no need to remand to the Supreme Court of Virginia; that court has already decided the case on the assumption that the certificates are testimonial.

Holding the Petition pending the decision in *Melendez-Diaz* and then granting certiorari promptly, without a remand, would be entirely consistent with the Court's prior practice.[1] Nor

[1] For example, the Court decided Almendarez-Torres v. United States, 523 U.S. 224 (1998), on March 24, 1998. Six days later, it granted certiorari in Jones v. United States, 523

would it problematic to postpone consideration of this Petition by a few months until *Melendez-Diaz* is decided. Suppose the Court decides *Melendez-Diaz* in mid-February, more than three months after the argument date. That would be less than one year after the decision of the court below, less than nine months after the filing of the Petition, and less than five months after the date the Court first considers the Petition. None of these time periods would be at all unusual.[2]

II. The Supreme Court of Virginia Construed the Statute in Accordance With Its Plain Terms, and Explicitly Provided That the Procedures It Provides Comply With the Confrontation Clause.

The Commonwealth's second, and principal, argument is that the Question Presented is raised only in the hypothetical by this Petition. There is no merit to this argument. To make it, the Commonwealth must misstate the holding below, suggest (without actually advocating) an implausible reading of the applicable statute, and make a potentially misleading statement about the proceedings below.

Petitioners contend that the applicable statute, Virginia Code § 19.2-187.1, violates the Confrontation Clause by forcing the accused, if he wishes to examine the author of the certificate,

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U.S. 1045 (1998), and later explained that it did so "[b]ecause of features arguably distinguishing this case from *Almendarez-Torres*." Jones v. United States, 526 U.S. 227, 232 (1999).

[2] Though citations are hardly necessary to demonstrate the point to this Court, it may be highlighted by the following illustration. On January 7 of this year, the Court granted, vacated, and remanded in 28 cases that had been decided by the respective courts below more than one year previously. In 26 of those cases, the petition had been filed more than nine months previously, and in 24 of them the first conference had been held more than five months previously.

The 28 cases are listed below by docket number; those in which the petition had been filed more than nine months previously are in bold, and those in which the first conference was held more than five months previously are in italics. Nos. 05-***11144***, ***11308***, ***11659***; 06-***378***, **1311**, ***6079***, ***6222***, ***6445***, ***6637***, ***7290***, ***7591***, ***7600***, ***7774***, ***7779***, ***7784***, ***7975***, ***8086***, ***8168***, ***8498***, ***8679***, ***9210***, ***9749***, ***9864***, ***9998***, ***10045***, **10277**, 11525, 11903.

to call her as a witness himself; the Petition summarizes reasons why this procedure does not provide the equivalent of cross-examination.

In an attempt to characterize the Petition as not properly presenting this issue, the Commonwealth contends that (1) perhaps the statute can be read as requiring the Commonwealth to call the author to the witness stand if the accused makes a timely demand of his presence;(2) that court left unresolved whether the statute so provides; (3) it contended in the Supreme Court of Virginia that the statute so provides; (4) because of a procedural default by the defendants, that court also left unresolved whether, if the statute does not so provide, it would violate the Confrontation Clause. BIO at 10-14. But the statute plainly precludes the implausible reading that the Commonwealth suggests – a reading that is inconsistent with the positions taken by the Commonwealth itself in litigating the cases against the Petitioners. The Supreme Court of Virginia read the statute in accordance with its plain terms. And it squarely held that the problems raised by Petitioners do not constitute a violation of the Confrontation Clause.

1. As stated in the Petition, Virginia Code § 19.2-187.1 provides 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.

(emphasis added)

The procedure provided by the statutory scheme is clear. Section 19.2-187 provides for admission of the certificate as part of the prosecution's case-in-chief. If the accused wishes to examine the analyst, he has "the right to call [the analyst] . . . as a witness," and the accused may then examine the analyst "as if" the analyst "had been called as an adverse witness." There is no suggestion in the

statute that instead what it means is that if the accused requests the presence of the analyst, the Commonwealth must present the analyst as a witness or forgo use of the certificate.

2. The Supreme Court of Virginia did not introduce such a suggestion. On the contrary, it construed the statute expressly in accordance with its plain terms, saying: "At trial, the defendants could have called the forensic analysts as witnesses, placed them under oath, and questioned them as adverse witnesses . . . ." App. A9. The meaning of the statute cannot plausibly be regarded as in doubt.

3. The Commonwealth says, "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." BIO at 12 (emphasis in original). Given the clear statement, quoted above, by the Supreme Court of Virginia, the contentions previously raised by attorneys for the Commonwealth are of no significance. But in any event, the assertion now made by the Commonwealth is potentially misleading. *Magruder* consolidated three cases – those of the two Petitioners and that of Michael Magruder, who is not petitioning this Court for certiorari. Each case was briefed and argued by a different Assistant Attorney General. In the Petitioners' cases, the Commonwealth's attorneys construed the statute in accordance with its plain terms. Brief for the Commonwealth, *Cypress v. Virginia*, at 7 (arguing that under § 19.2-187.1 the accused has the right to summon the analyst and to treat her as an adverse witness, which "is synonymous with cross-examination"); Brief for the Commonwealth, *Briscoe v. Virginia*, at 21 (arguing that § 19.2-187.1 "affords the defendant the absolute right to call the preparer . . . as an averse witness"). And before this Court, the Commonwealth, while citing the

historical fact of the argument made by its attorney in *Magruder*, notably fails to endorse that argument. This Court should not be misled: The statute means what it says, the highest court of the Commonwealth has affirmed that meaning, and the Commonwealth cannot introduce any plausible doubt on that score.

4. The Commonwealth also contends that the Supreme Court of Virginia did not resolve the Confrontation Clause question presented by the Petitioners. That is simply not so. As the Petition itself recites, at 4, the Supreme Court of Virginia 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." App. A10. That, in clear and simple terms, is a rejection of the Confrontation Clause argument presented here by the Petitioners. The majority reached that conclusion because of its perception that "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." App. A9. But of course the Petitioners' contention is precisely that the statutory procedure does *not* offer an adequate opportunity for cross-examination or its equivalent, for the reasons summarized in the Petition.

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 the analyst could not testify unless the Commonwealth called him. App. A10. It is highly dubious that a defendant should be precluded from raising a contention under the Due Process Clause by failing to go through the motion of subpoenaing the analyst. But the Petitioners do not raise a Due Process

challenge. They only raise a Confrontation Clause challenge. *That* challenge was indisputably considered and sharply rejected by the Supreme Court of Virginia. And whether that challenge is sound is the issue on which the state high courts are irreconcilably divided.

III. Petitioners Did Not Waive Their Confrontation Rights By Declining to Invoke a Procedure That Fails to Protect Those Rights.

Finally, the Commonwealth contends that the holding of the Supreme Court of Virginia was correct as a matter of constitutional law. Its arguments add nothing to those already considered.

The Commonwealth contends that a state may validly require that an accused make a timely demand for confrontation. Petitioners have already acknowledged this point. Petition at 21. If that is all the statute did, then the cases would stand in a far different footing. But, especially in light of the explicit construction given by the Supreme Court of Virginia, the Commonwealth has no plausible basis for contending that the statute might be read as a simple notice-and-demand statute.

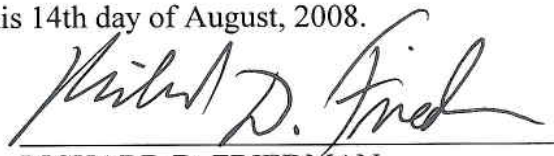
The Commonwealth also contends that each Petitioner waived the confrontation right by "fail[ing] to ensure the presence of the analyst" in accordance with the statutory scheme. But an accused cannot be held to have waived a constitutional right by declining to invoke a procedure that fails to protect that right. And of course the essence of the Petitioners' contention in this Court is precisely that the statutory scheme fails to protect the confrontation right. In each case, the Petitioner had no realistic basis on which to believe that, if he subpoenaed the analyst, his confrontation right would be protected – a result that could have followed only if the Virginia courts rewrote the statutory scheme (which they have declined to do) to require that the Commonwealth either put the analyst on the witness stand as part of its case-in-chief or forgo use of the certificate. Petitioners did not prevent this Court from vindicating their constitutional rights by declining to invoke the

procedure that they contend is constitutionally invalid. Put another way, the Commonwealth's "waiver" argument is nothing more than a merits argument defending the decision below; it does not suggest any impediment to reaching the Question Presented.

CONCLUSION

For the reasons stated above and in the Petition for a Writ of Certiorari, the Petition should be granted.

RESPECTFULLY SUBMITTED this 14th day of August, 2008.



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