IN THE SUPREME COURT OF THE UNITED STATES

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MARK A. BRISCOE AND SHELDON A. :

CYPRESS, :

Petitioners : No. 07-11191

v. :

VIRGINIA :

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Washington, D.C.

Monday, January 11, 2010

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:40 a.m.

APPEARANCES:

RICHARD D. FRIEDMAN, ESQ., Washington, D.C.; on behalf of Petitioners.

STEPHEN R. McCULLOUGH, ESQ., Solicitor General, Richmond, Virginia; on behalf of the Respondent.

LEONDRA R. KRUGER, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States, as amicus curiae, supporting Respondent.

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P R O C E E D I N G S

(11:40 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 07-11191, Briscoe v. Virginia.

Mr. Friedman.

ORAL ARGUMENT OF RICHARD D. FRIEDMAN

ON BEHALF OF THE PETITIONERS

MR. FRIEDMAN: Mr. Chief Justice, and may it please the Court:

We ask the Court in this case to take no new ground beyond that established just last term in the Melendez-Diaz case, but the stakes of this case are high. If the Court were to reverse Melendez-Diaz and hold that a State may impose on the defendant the burden of calling a prosecution witness to the stand, it would severely impair the confrontation right and threaten a fundamental transformation in the way Anglo-American trials have been conducted for hundreds of years.

JUSTICE SOTOMAYOR: The State court has interpreted their provision to give the defendant the choice of subpoenaing the witness or asking the State to bring in the witness. Why is that overruling Melendez-Diaz?

MR. FRIEDMAN: Your Honor, the -- the State

courts, since the time of this case -- since the time that these cases were tried, raised the possibility of asking the -- that the defendant could ask the witness to bring -- that the defendant could ask the prosecution to bring in the witness. It doesn't really change anything from a straight subpoena statute in any -- in either event.

JUSTICE SOTOMAYOR: Well, how is that different from a notice statute? If --

MR. FRIEDMAN: Okay.

JUSTICE SOTOMAYOR: If we take the statute as the State supreme court has read it --

MR. FRIEDMAN: Right.

JUSTICE SOTOMAYOR: -- they say: In my mind, it's a notice statute; tell the prosecutor you either want them to call the witness or you subpoena the witness. That's what the State court has told us. Whether or not you had notice of that interpretation is a separate question.

MR. FRIEDMAN: That --

JUSTICE SOTOMAYOR: Let's separate out the two questions.

MR. FRIEDMAN: Okay, fine, fine. The -- the two aspects that Melendez-Diaz said were wrong with the subpoena statute are both present in this statute

even as interpreted by the -- by the State supreme court. That is, nothing in Melendez-Diaz -- I'm sorry, nothing in the Magruder case -- the opinion here suggests that the prosecution would bear the burden of calling the witness to the stand. I think the Magruder case, the decision of the State supreme court is very explicit and goes in accordance --

JUSTICE SOTOMAYOR: So that's our first question --

MR. FRIEDMAN: That’s --

JUSTICE SOTOMAYOR: Does the Confrontation Clause require, not just the ability to cross-examine --

MR. FRIEDMAN: That's right.

JUSTICE SOTOMAYOR: -- but an affirmative obligation to place the witness on the stand?

MR. FRIEDMAN: That's correct. That's correct.

JUSTICE SOTOMAYOR: Could I just ask you one --

MR. FRIEDMAN: Yes. Sure.

JUSTICE SOTOMAYOR: Would swearing the witness in and saying to the witness "Is this your report?" and the witness saying "Yes" -- what would be unconstitutional about that, given our case law that

says that any prior statements by a witness are admissible once the witness is on the stand or constitutionally admissible once they are on the stand?

MR. FRIEDMAN: Right. Right. The cases involve that were California v. Green and United States v. Owens. In both cases, there were questions asked of the witness about what happened. So I do believe -- though it hasn't been resolved in this Court, I do believe that the prosecution should go beyond simply saying "Is this your" --

JUSTICE SOTOMAYOR: No, no, no. "Should" is a different question than the one I asked.

MR. FRIEDMAN: No. I mean, I think the Constitution -- I think constitutionally, the -- the prosecution would be compelled at least to ask: What is your recollection? Do you endorse this statement? But even if that's not true --

JUSTICE SOTOMAYOR: Do you have anything historically or in any case that would suggest that that is a constitutional requirement? I mean, I do accept that there is plenty that says you have a right to be --

MR. FRIEDMAN: Right.

JUSTICE SOTOMAYOR: -- to confront the

witness.

MR. FRIEDMAN: Right.

JUSTICE SOTOMAYOR: But what would require the prosecutor to actually do more than I just suggested? "Is this your statement? Is this your lab report?"

MR. FRIEDMAN: Your Honor, so far as I can tell, it's hardly ever been tried, for the obvious reason that if all the prosecution does is say, "Is this it," and not ask a further question of the witness --

JUSTICE SOTOMAYOR: It's not terribly persuasive. I don't disagree with you.

MR. FRIEDMAN: Right. It -- well, that’s --

JUSTICE SOTOMAYOR: It’s a matter of trial tactic, but I'm not talking about trial tactic.

MR. FRIEDMAN: Yes. Right. But I -- but it's something that prosecutors don't try because they would have to bear the -- the risk. So part of my response is: Well, let them go ahead and try it if they want to.

JUSTICE SCALIA: Bear what risk?

MR. FRIEDMAN: I'm sorry.

JUSTICE SCALIA: Bear what risk? What risk? Bear what risk?

MR. FRIEDMAN: Bear -- bear the risk that the -- that the witness has gotten on the stand and is not even asked to recall. Bear the cost of putting a witness on with no recollection.

JUSTICE SCALIA: Well, he says, "Is this your lab report and do you stand by it?"

MR. FRIEDMAN: “And do you stand by it?" -- that's the critical point. That's going beyond the hypothetical, as I understood it from Justice Sotomayor.

JUSTICE SCALIA: Oh, I see. So -- okay.

MR. FRIEDMAN: But -- but --

JUSTICE SCALIA: Yes. I understood the hypothetical to be -- to be otherwise, then.

MR. FRIEDMAN: But -- no, no. If it's "And do you stand by it" --

JUSTICE SCALIA: Right.

MR. FRIEDMAN: -- then that's fine.

But I do know of a couple of cases involving child witnesses where they don't ask -- they put the witness on the stand, and they don't ask anything about the events at issue. And in those cases there’s -- courts have held that that's -- that’s not acceptable. So --

JUSTICE SOTOMAYOR: Well, but -- so

what difference? That's because there's nothing in evidence about the incident, correct?

MR. FRIEDMAN: Well, no. No, then they presented a former statement by the child. So -- so I do think that there is some justification --

JUSTICE SOTOMAYOR: And that was a --

MR. FRIEDMAN: Yes.

JUSTICE SOTOMAYOR: Those were found -- I don't -- were those found as violations of the Confrontation Clause?

MR. FRIEDMAN: Those are found to be violations of the Confrontation Clause. The --

JUSTICE SOTOMAYOR: Or due process?

MR. FRIEDMAN: Confrontation Clause. State v. Rohrich, which is cited in my brief on another point, and Warren, an Illinois appellate case from, I think, just last term.

JUSTICE ALITO: It's not clear to me what your answer to these questions is. If all the prosecution does is call the analyst on the stand and admit -- have the analyst provide a foundation for the admission of the report, let's say, pursuant to the hearsay exception for recorded recollection, and does nothing more, would there be a Confrontation Clause problem?

MR. FRIEDMAN: And there's -- there's the question, "Is this your report? Do you stand by it?" Then -- then I don't think there is a Confrontation Clause problem, because -- because the prosecution has put the witness on the stand, has asked those questions, and then the witness -- and --

JUSTICE ALITO: What's the difference between that situation and the situation in which the report is -- is admitted, subject to -- and the analyst is available, and the defense can question the analyst if the defense wishes to?

MR. FRIEDMAN: Well, I think -- I think the difference is that once you ask the question -- "Do you stand by it?" -- then the witness has testified one way or another. And the prosecution, as I say, bears the risk that the witness will not testify in accordance with the prior statement. California --

JUSTICE SOTOMAYOR: On the past recollection recorded, the witness doesn't stand by the statement. The witness says: I made the statement, have no current knowledge; I can't stand by it or not stand by it.

MR. FRIEDMAN: That's right. I take California v. Green at its word. California v. Green says and Owen follows up and says that if the witness

does not testify in accordance with the prior statement, then the defendant has had some of the -- has had considerable benefit of cross-examination already. So -- so the prosecution has to -- has to put the witness through that pace to make sure that that happens. Beyond that --

JUSTICE SCALIA: I don't understand what you just said. Want to say it again?

MR. FRIEDMAN: Yes. California v. Green says that if the witness testifies inconsistently with the prior statement, that the defendant has had the benefit of cross-examination in showing the inconsistency. So -- so Justice Alito asked me what's the difference, and I'm saying a difference, one difference is, that if the witness does not testify in accordance with the prior statement, that's apparent to -- that's apparent to the jury. There are also all the practical differences that we emphasize.

JUSTICE SOTOMAYOR: You are asking us now to state something that you admit is in really no constitutional case or historical case, that says the right to confrontation means that the witness has to tell the story, and the form of telling that story has to be a verbal recitation; it can't be past recorded recollection because you just said they have to tell

the story. It can't be based on official documents or anything else, because it has to be their story. Am I hearing you wrong?

MR. FRIEDMAN: No, I don't believe so. I'm saying that the -- that the witness has to take the stand, has to -- has to testify live, viva voce, face to face, in the time-honored phrases which have always governed testimony in an Anglo-American trial. Then the -- I think the witness has to at least be asked what happened. If the witness says, I don't recall, then the prior statement may be introduced. I'm not --

JUSTICE BREYER: What is the --

MR. FRIEDMAN: I'm not asking the Court to go beyond anything that has previously been said.

JUSTICE BREYER: What is the theory of this? I understand in hearsay, which as we have just seen demonstrated, is very complicated, filled with all kinds of rules --

MR. FRIEDMAN: Right.

JUSTICE BREYER: -- some of which I may recall and others of which I certainly don't.

(Laughter.)

MR. FRIEDMAN: Right.

JUSTICE BREYER: But the -- the

Confrontation Clause, I would have thought, would have picked out the heart of that. So we have Sir Walter Raleigh and Sir Walter Raleigh says, "Bring in witnesses," which they wouldn't. So why shouldn't we say what this clause is about is Sir Walter Raleigh?

MR. FRIEDMAN: Well, if --

JUSTICE BREYER: Bring in the witnesses. Now, once you bring them in, the defendant can do what he wants. He has had his chance to cross-examine them. End of the matter, and leave the rest up to the hearsay law.

MR. FRIEDMAN: I want to emphasize that the Confrontation Clause is about a lot more -- there were nearly 200 years of history between Walter Raleigh and the Confrontation Clause, and what was established is that in an Anglo-American trial witnesses give their testimony live, face to face, and Melendez-Diaz emphasized last term you can't prove the case via an affidavit.

So -- so it's -- it's the fundamental question that -- that Crawford establishes -- fundamental principle that Crawford establishes is this is the way witnesses testify in our trials: live, in front of the jury, subject to oath and then cross-exam.

JUSTICE SOTOMAYOR: Why -- and -- I trust the trial process, and much of your brief was talking about that process --

MR. FRIEDMAN: Right.

JUSTICE SOTOMAYOR: -- and the fact that it's much more effective when the witness tells their story and you get a chance to cross-examine than if you have to start from the platform of cross-examination. Once a defendant makes it known that a -- he's going to cross-examine a lab technician, don't you think that in the vast majority of cases the prosecutor is going to put that witness on?

MR. FRIEDMAN: I --

JUSTICE SOTOMAYOR: And if he does or doesn't, why shouldn't we leave it to the normal trial strategy and practice to leave to that prosecutor the burden of non-persuasion, which is what confrontation was about?

MR. FRIEDMAN: Right. Yes.

JUSTICE SOTOMAYOR: Which is --

MR. FRIEDMAN: If -- if the prosecutor is certain that the defendant is going to put the witness on the stand, then -- then the prosecutor has some reason to -- to put the witness on first. The problem

is that the -- the defunct Virginia statute puts the burden on the defendant of bringing the witness in, and the defense --

JUSTICE SOTOMAYOR: Well -- well, I was starting from a different proposition than you did --

MR. FRIEDMAN: Right. I'm sorry -- but --

JUSTICE SOTOMAYOR: -- because I think that's a question for your adversaries: How could you have known --

MR. FRIEDMAN: Right.

JUSTICE SOTOMAYOR: -- that you should have asked the State to bring that witness in?

But putting that aside --

MR. FRIEDMAN: But --

JUSTICE SOTOMAYOR: -- assume we are reading it the way the Court has now.

MR. FRIEDMAN: Right. The -- the fact is that under the Virginia statute, given -- and as interpreted by the Commonwealth, too -- given that the defendant has the burden of putting the witness on the stand, defendants rarely exercise that right, because it's a corrupted right, because it isn't nearly as valuable, as I think Your Honor understands, as the right to stand up and cross-examine a witness who has actually just testified.

I don't think that the right given by the Virginia statute is -- the former Virginia statute is actually the right to cross-examine. It's not in form cross-examination, and it's not in substance cross-examination. It's a right to make the witness the defendant's own, and that's the way -- that's the way the statute is -- is worded.

JUSTICE GINSBURG: Mr. Friedman, one of the problems that has been brought up is that this is an inordinate expense, and you're wasting the time of the analyst. Do you recognize any economy -- for example, that the analyst could testify from the lab, have video conferencing, and so the analyst, while the prosecutor must call her, can testify from the lab instead of coming down to the courthouse?

MR. FRIEDMAN: That -- that is a -- certainly a possibility, at least on consent of the defendant, and some States, including my own State of Michigan, has been experimenting with that. And I think that's a plausible possibility.

Now, if the defendant were to insist on -- on live testimony, that is an open -- that's an open question as to whether video testimony would be acceptable. This Court some years ago refused to transmit to Congress a proposed amendment to Federal

Rules of Criminal Procedure, and the majority in a statement by Justice Scalia said there is a virtual satisfaction of the confrontation right, not a real satisfaction.

So the matter as to whether it could be done without consent hasn't been satisfied -- hasn't been determined. But certainly on consent it could, and in many cases I believe the defendants -- that those defendants who do want confrontation would be perfectly willing to accept video.

But I do -- I do want to respond also to the -- the premise. I -- I believe that sufficient data is now available to show rather clearly that the expense is not inordinate.

JUSTICE ALITO: How can you say that? We have an amicus brief from 26 States plus the District of Columbia arguing exactly the contrary.

MR. FRIEDMAN: Yes, I --

JUSTICE ALITO: They say that there is a very substantial category of cases in which defendants really have no interest whatsoever in contesting either the nature or the quantity of drugs involved, but they will refuse to stipulate to those things simply for the purpose of putting a financial burden on the prosecution, because they know, if they do

that, it may be helpful for them in getting a better plea bargain, plus there is a certain risk that the analyst will not show up, and they will get the benefit of that.

MR. FRIEDMAN: So, Your Honor, I think that what the -- the States' amicus brief shows is that there are -- there are a lot of drug prosecutions, and there are a lot of drug analyses, and then there is this speculation about the type of gamesmanship that you have mentioned. But if we look for hard data, there is nothing supporting that.

So let's look at a couple of jurisdictions that have perfectly valid notice-and-demand rules. Ohio -- it's less than one appearance per lab analyst per month. That is in the State lab. Less than one appearance per month.

JUSTICE ALITO: If this is not a burden on these 26 States plus the District of Columbia, why are they bothering to make this argument? Just for amusement?

MR. FRIEDMAN: I'm sure not for amusement. I think there's a certain amount of solidarity. I'm sure that they would rather not have whatever expense there is. But, frankly, I think a large part is that they recognize that the defunct Virginia statute is an

impairment to the confrontation right and makes it harder for defendants. It makes -- it makes it less likely that the confrontation right is going to -- is going to be invoked.

Let's look at the District of Columbia. The District of Columbia, it's about -- it's about a half a person a year in extra expense caused by lab techs having to come and testify.

That's -- that is not a large burden for the District of Columbia, and in fact, the District of Columbia -- the lab that services the District of Columbia has gotten by with five fewer technicians than it did before the change.

CHIEF JUSTICE ROBERTS: But I assume you've picked the best example for you. D.C. is a small place. You go to a big State, and the lab is not always right next door.

MR. FRIEDMAN: Your Honor, I -- I'm just little old me, and I just picked what I could get. And, frankly, the example I picked was because the Solicitor General's brief had data on the District of Columbia, so I asked some more questions. That's why I got -- that's why I got the District of Columbia. Ohio -- I asked because they are a neighboring State, and I was able to get some information.

JUSTICE BREYER: You could have -- you could have hearsay that is not prepared for testimony. There are all kinds of categories. And suppose, in your case, this hearsay of business record or --

MR. FRIEDMAN: Right.

JUSTICE BREYER: And how often will you say: I understand it's admissible, but I would like as well to call the witness who prepared it. Will you do that very often?

Suppose you learn that that witness is -- is 4,000 miles away, so you say, I'd like to call this witness, and you know perfectly well that it's going to be virtually impossible for that witness to be produced. What happens?

MR. FRIEDMAN: We are talking about non-testimonial hearsay?

JUSTICE BREYER: I'm trying to think of something that's hearsay, and --

MR. FRIEDMAN: But --

JUSTICE BREYER: -- and what I'm trying to figure out --

MR. FRIEDMAN: Yes.

JUSTICE BREYER: -- is will defense attorneys, if they have the right under the Constitution to insist that a lab technician be

present, in cases where they happen to know that lab technician has left the job and is married and is reliving in a distant State, say okay, let's call her. And that way the prosecution really cannot present the case except at inordinate expense.

And I'm concerned about that --

MR. FRIEDMAN: Right.

JUSTICE BREYER: -- but I don't see quite how to deal with it, how much of a problem it is, and the impact on this particular situation.

MR. FRIEDMAN: I -- I don't think it's a significant problem, and I do want to say -- I didn't -- I didn't select data. I just got -- presented the data on the States that I had, and my own State of Michigan --

JUSTICE SCALIA: Mr. Friedman, aren't there States that have been proceeding this way even before we came down with our opinion?

MR. FRIEDMAN: Absolutely, absolutely, including my own State.

JUSTICE SCALIA: And which States are they?

MR. FRIEDMAN: They -- well, they include my own State of Michigan; they include the State of New York --

JUSTICE SCALIA: And they are not under

water, are they?

MR. FRIEDMAN: The problems of the State of Michigan are not attributable to the use of this procedure, no.

(Laughter.)

CHIEF JUSTICE ROBERTS: Your answer to Justice Breyer has to be, of course, you would insist that the person be called. It would be malpractice for you not to.

MR. FRIEDMAN: It -- it is -- yes, but it's not a significant problem, and one reason it’s not a significant problem is that the possibility of a deposition is always --

JUSTICE BREYER: I don't know except anecdotally, but Massachusetts seems to be having huge problems, reported anecdotally, with the --

MR. FRIEDMAN: Not -- not according to -- not according to the chief of the -- chief trial counsel, Suffolk -- the Suffolk district attorney's office --

JUSTICE BREYER: Rouse -- is that --

MR. FRIEDMAN: Excuse me.

JUSTICE BREYER: The woman, Barbara -- Barbara Rouse?

MR. FRIEDMAN: In my reply brief on page 27,

I quote Patrick Hagan, who says -- who says: "The sky has not fallen; we can do this very well."

JUSTICE BREYER: And then there are conflicting reports in the newspapers, but I don't know.

MR. FRIEDMAN: It's -- and, of course, there can be an adjustment period, but -- but States can adjust. I think the -- the simplest answer to your question, Justice Breyer, is the use of depositions, and I think prosecutors probably have been underusing depositions. But -- but if a lab tech is about to retire and that lab tech has done a test that is about to be used, then take the deposition.

JUSTICE BREYER: What happens if the lab is -- is divided into four or five parts and there is several different machines and we have different people at different times using these different machines and performing different operations and each, at the end, certifies that the red light was on or it was this or it was that? Now, do we have to call all those people?

MR. FRIEDMAN: No, I don't believe you have to call all those people.

JUSTICE BREYER: Why not? Each of them --

MR. FRIEDMAN: I do believe that there has

to be --

JUSTICE BREYER: Each of them looked at a special part. Each of them said --

MR. FRIEDMAN: Right.

JUSTICE BREYER: -- that it was this or that, and in respect to each of those statements, it's this or that. That is hearsay.

MR. FRIEDMAN: Right. The problem, of course, isn't hearsay. The problem is -- the only question is --

JUSTICE BREYER: No, no, it's no confrontation because in this instance the hearsay prevents the confrontation.

MR. FRIEDMAN: Right. The -- the prosecution has to present the testimony of witnesses. It has to present the testimony live. Depending on how the lab is organized -- usually, labs can organize so that only one person needs to -- needs to present.

In any event, of course, the State is acknowledging that, if the defendant brings -- demands they have to bring in the witnesses, that's not at issue.

JUSTICE BREYER: Your answer to my question is, if a laboratory is so organized so that six or seven people perform different steps of the operation,

if it is organized in that way, all of them must be brought?

MR. FRIEDMAN: I -- I don't believe so. I believe --

JUSTICE BREYER: You don't believe so, but you gave me an answer saying they did have to, so -- because you said they could organize differently. So now explain to me why they don't.

MR. FRIEDMAN: But even if -- even if they are organized in that way, for instance, if one person observes all the -- all the procedures, that's sufficient. Apart from that, as Melendez-Diaz indicates, it's up to the -- it's up to the State to decide what the evidence they are going to present is, whether --

JUSTICE KENNEDY: Suppose one person doesn't observe all the procedures. One person prepares the sample, another person puts it on the paper, another person reads the machine, another person calibrates the machine.

MR. FRIEDMAN: Yes. Right. Well, I think Melendez-Diaz indicates that it's up to the State to determine what the -- the evidence that's going to be presented, and there may be gaps. I do want to emphasize that this is an issue that --

JUSTICE KENNEDY: No, no, no. The evidence is presented, and the test comes out so -- positive, so that the gun fires or that it's a drug or that it's a DNA sample. Can the conclusion be presented by one witness from the lab, when that witness did not observe all of the procedures?

MR. FRIEDMAN: I think -- I think that there probably has to be a witness who has observed the procedures. If I am -- and that's an issue that will be presented to the Court, we can be pretty certain. I think that issue is entirely orthogonal to the issue here because the Commonwealth is acknowledging --

CHIEF JUSTICE ROBERTS: I'm sorry. Entirely what?

MR. FRIEDMAN: Orthogonal. Right angle. Unrelated. Irrelevant.

CHIEF JUSTICE ROBERTS: Oh.

JUSTICE SCALIA: What was that adjective? I like that.

MR. FRIEDMAN: Orthogonal.

JUSTICE SCALIA: Orthogonal?

MR. FRIEDMAN: Right, right.

JUSTICE SCALIA: Ooh.

(Laughter.)

JUSTICE KENNEDY: I knew this case presented

us a problem.

(Laughter.)

MR. FRIEDMAN: I should have -- I probably should have said --

JUSTICE SCALIA: I think we should use that in the opinion.

(Laughter.)

MR. FRIEDMAN: I thought -- I thought I had seen it before.

CHIEF JUSTICE ROBERTS: Or the dissent.

(Laughter.)

MR. FRIEDMAN: That's a bit of -- a bit of professorship creeping in, I suppose.

But the Commonwealth is acknowledging that they have to bring in witnesses if the -- if the defense demands, so this is another issue as to who are -- who are the witnesses. And it's --

JUSTICE GINSBURG: But, in your view, it wouldn't satisfy the Confrontation Clause if, say, the supervisor shows up and said that this is -- this is the way the analysts operate and describes the procedures.

MR. FRIEDMAN: In my view, it wouldn't, but if I'm wrong, it doesn't change this case whatsoever. It does not change this case whatsoever. It has

nothing to do with the issue here. The issue here is -- is the witnesses who are going to testify and how much they -- they testify, and I want to --

JUSTICE BREYER: Well, the reason that I ask is because floating in the back of my mind is -- is if -- (a) does the Confrontation Clause apply?

MR. FRIEDMAN: Right.

JUSTICE BREYER: And if the answer to (a) is yes, then are there different kinds of implementation rules in different areas where there are other signs of security, where there are other reasons for thinking it's not bad testimony? That line is not something that's necessarily workable, and -- but I brought it up to try to think about it.

MR. FRIEDMAN: Yes. I think -- I think it's an interesting question, and it's question 3 in the evidence exam that I am just grading, in fact. But I think that's an issue that the Court will have to resolve.

And, as I say, my views are what they -- what they are, but if you reject my views on that, it doesn't change this case whatsoever.

What I think is important to recognize is how fundamental a transformation in the Anglo-American trial is threatened if -- if the Court were to hold

that the prosecution can present an affidavit and leave it to the defendant, if he dares, to put the witness on the stand.

JUSTICE ALITO: Well, does that square with where we started out? We have situation A, where the prosecutor calls the lab analyst, and the lab analyst says, this is my report, and I stand by it, period. Now, it's up to the defense to cross-examine. That's situation A.

Situation B is the report is admitted without the analyst present, but the defense can then -- without the analyst on the stand --

MR. FRIEDMAN: Right.

JUSTICE ALITO: But the defense can then cross-examine the analyst.

MR. FRIEDMAN: I wouldn't call that cross-exam --

JUSTICE ALITO: There’s such a slight difference between those two situations. Now, how is that a fundamental transformation of the way Anglo-American trials are conducted?

MR. FRIEDMAN: It's fundamental transformation because the prosecution can present a stack of affidavits, and they wouldn't even have to be affidavits. They could just be signed -- they could

just be statements. It could present videotapes. It could present audiotapes. It could craft those and rehearse those behind the scene. It could present those to the trial --

JUSTICE ALITO: No. Let's just not get beyond the facts of this case, where all -- all that we are dealing with is a -- an analyst's report relating to the -- the nature of the substance that was tested and, if it's a controlled substance, the amount. That's it. It doesn't extend to anything else, videotapes or anything more. There's such a slight difference between those two situations.

MR. FRIEDMAN: I think there's an enormous difference in -- in impact. It's an enormous impact, as I've emphasized in my brief, because of the impairment of the ability to examine.

I don't believe it's cross-examination. In practice, it is -- if the defendant said, I don't want to cross-examine, but I still insist that the witness get up on the stand and let's see what the witness can do -- and the Commonwealth makes no attempt to distinguish between these witnesses and other witnesses for what is -- what is satisfactory confrontation. It says: This is good confrontation. He could do it with all witnesses.

If the Court pleases, I will reserve the balance of my time.

CHIEF JUSTICE ROBERTS: Thank you, Mr. Friedman.

MR. FRIEDMAN: Thank you.

CHIEF JUSTICE ROBERTS: Mr. McCullough.

ORAL ARGUMENT OF STEPHEN R. McCULLOUGH

ON BEHALF OF THE RESPONDENT

MR. McCULLOUGH: Mr. Chief Justice, and may it please the Court:

I think an appropriate place to start would be how the Supreme Court of Virginia construed the statute and get past that and into the confrontation issue.

The first thing I would note there is that the Petitioners simply have not challenged the decision of the -- the interpretation of the Supreme Court of Virginia that it placed on the statute. So I think, to the extent that they are now, for the first time in their reply brief, trying to raise a separate due process issue, that the construction of the court was so unreasonable that it violates due process, it's far too late in the day to do that. So I think the Court --

JUSTICE SOTOMAYOR: It goes -- that goes to

the waiver question.

MR. McCULLOUGH: Right.

JUSTICE SOTOMAYOR: How did they know at trial that they were supposed to say to you: I don't want a subpoena; you bring them in.

MR. McCULLOUGH: I think the -- the way the Supreme Court of Virginia construed the statute is perfectly sensible. What it says -- and the key phrase is on page 2 of our brief -- that "no" -- excuse me -- "such witnesses shall be summoned and appear at the cost of the Commonwealth." And unlike some statutes that say the defendant shall subpoena or shall summon -- for example, like the Idaho and the North Dakota statutes that the Petitioners cite -- they are express in saying it has to be the defendant who issues a summons. This just says "shall be summoned."

In a criminal trial at the time these Petitioners were being tried, there were two parties that have the authority to issue summons. One was the clerk of court; that is, a defendant would go to the court and say: These are my witnesses; have them produced for trial on this date. And the other was the Commonwealth. So the statute simply doesn't say it has to be the Commonwealth, it has to be the

defendant. It's silent. The Supreme Court of Virginia has a long history of construing statutes in a way that obviates a constitutional problem.

JUSTICE SOTOMAYOR: But you're -- you're still begging the question. How -- they did what any reasonable defendant would do and say: I object to the admission of this lab report; I have a right under the Confrontation Clause to have the -- the lab technician here.

And the Commonwealth court said, no, you don't.

MR. McCULLOUGH: Right.

JUSTICE SOTOMAYOR: And so did the court on appeal.

How did they know that this was a notice-and-demand statute as opposed to a subpoena statute?

MR. McCULLOUGH: I think it was incumbent on counsel to raise the issue exactly like counsel for the defendant did in the Grant case. And I think it's noteworthy that in the Grant case the -- the motion was filed well in advance of trial, on November 2nd, 2007, before the Supreme Court of Virginia ever construed the statute in this fashion. And so the fact that a statute may be susceptible to more than one interpretation doesn't obviate the need for

counsel to take the steps that are necessary to protect the right.

JUSTICE SOTOMAYOR: Could I ask you: If we were to -- how do we articulate a rule, or do we need to, that would take care of the fears of your adversary that trials would become trials by affidavit, that the -- that prosecutors will choose to put all witnesses on -- by videotape, by affidavit, by deposition, whatever mode they choose except bringing them into court -- and forcing defendants then to call the witnesses and do a what's -- what I call a cold-cross?

What rule would we announce in this case --

MR. McCULLOUGH: I think --

JUSTICE SOTOMAYOR: -- that would avoid -- what constitutional construction of the Confrontation Clause would we issue that would protect against that?

MR. McCULLOUGH: I think there are several constitutional, legal, and practical considerations that make this --

JUSTICE SOTOMAYOR: No, no. Forget the practical. Talk about the legal, constitutional.

MR. McCULLOUGH: Right. Constitutionally, there are two obstacles to a wholesale type of trial system where the prosecution would simply present a

stack of affidavits.

The first of those is the Due Process Clause, which -- for example, in these child witness cases, what a number of courts have held is that it's going to inflame the jury against the defendant if a videotape is introduced and then the defendant is called -- forced to call the witness to the stand. And that's simply not the case with these types of witness. So the Due Process Clause itself puts the brakes on the type of wholesale at-trial --

JUSTICE SCALIA: They're trial witnesses. Anything else?

MR. McCULLOUGH: Another is the fact that under the Confrontation Clause, the cross-examination has to be effective. And so if the prosecution on the day of trial dumps a series of affidavits on the defense, it's going to be pretty difficult for the defense to be in a position to effectively cross-examine.

JUSTICE SCALIA: No, just one or two. Just one or two affidavits. Or it -- the court has a rule you have to provide those affidavits several weeks before trial. That would be okay?

MR. McCULLOUGH: I think, under the --

JUSTICE SCALIA: We'd have a whole

European-type trial, right? It would be trial by affidavit.

MR. McCULLOUGH: Right. I don't think the Confrontation Clause, in terms of what it's historically intended to protect, blocks that scenario.

I think the key to the Confrontation Clause, what this Court has said for a long time, turning to the history of the clause, is that it's designed to protect the reliability of the government's evidence. And the way it does that is by subjecting that to the crucible of cross-examination, face to face, of live witnesses. And this statute protects exactly that; that is, the defendant says he wants the witness there --

JUSTICE SCALIA: It does more than that. It does more than that. It is the prosecution that has had to place the witness on the stand. It has not been up to the defense to say, oh, no, I object to this affidavit, I would like you to bring -- no. The prosecution has to bring in the witness. That has been what the Confrontation Clause has meant.

MR. McCULLOUGH: We agree that we have to produce the witness for court, but we see little constitutional --

JUSTICE SCALIA: No, you don't agree with that. You say you don't have to do it unless the defendant objects and issue -- gets a subpoena issued.

MR. McCULLOUGH: Well, we agree that if the defendant does provide the notice, as with the notice-and-demand statute, that it -- that it's our burden to make sure that witness is there. And if -- as the statute provides, the witness has to be summoned and appear.

So this statute has always been strictly construed against the prosecution. If it fails to do exactly what the statute requires, that cuts against the prosecution. So the witness does have to appear.

JUSTICE SCALIA: How is that clear from the statute?

MR. McCULLOUGH: I'm sorry.

JUSTICE SCALIA: How is that clear from the statute? It just says that a subpoena shall issue. What if a subpoena issues and nobody comes?

MR. McCULLOUGH: Right. And it -- the fact that the prosecution -- excuse me, that the statute is interpreted strictly against the prosecution comes from several decades of jurisprudence from the Supreme Court of Virginia, and we cite those cases on page 1 our brief.

JUSTICE SCALIA: A strict construction of statutes in general, or a strict construction of this provision?

MR. McCULLOUGH: This particular -- this particular statutory scheme. For example, if the -- 19.2-187, the statute that precedes this, says that it has to be filed 7 days before the trial. And if it's filed 6 days, forget it, you have to bring in a live witness.

JUSTICE SCALIA: I'm talking about the specific issue of the person subpoenaed not appearing. Do you have a case?

MR. McCULLOUGH: No, I don't have a case --

JUSTICE SCALIA: So we don't really know.

MR. McCULLOUGH: -- but I -- but I think the answer follows inexorably --

JUSTICE SCALIA: I don't know how -- how strict construction gets you to the -- to the result that when it is the defendant who has to take the initiative to get the person brought in, if the person doesn't show up, it's -- it doesn't fall on the defendant; it falls on the prosecution. I don't see how strict construction gets you there.

MR. McCULLOUGH: The -- the Grant case, for example, which our Court of Appeals of Virginia said

was simply was an application of the holding in the Magruder decision. There the defendant did -- well in advance of trial, sent notice to the Commonwealth and said, I want the witness there. The Commonwealth didn't get the subpoena out. So that was the first part of that, "shall be summoned." And the court of appeals said you should never have allowed this in, without the live witness being present.

And so what -- although Grant didn't address the appear part, the same answer is true; that is, the defendant says, I want the witness there; the Commonwealth issues a summons, but the witness doesn't appear. It's the same result.

JUSTICE BREYER: Well, I think that underlying this is a fairly simple problem, conceptually. Imagine we have Sir Walter Raleigh at trial, and there’s an affidavit for missing witness A and witness B and witness C, and they are over in a room somewhere, whether they were treated badly or not, and they have written these pieces of paper. In they come.

And Walter Raleigh says: "Bring me the witness." Now, suppose they had trotted him out, and he cross-examined him. Still, those pieces of paper came in, and they weren't cross-examined. And so what

do we do about that? They weren't cross-examined, and how did they get in here?

MR. McCULLOUGH: I think your question goes to the very heart of why we have the Confrontation Clause. It wasn't because of this formalistic order of proof that our modern trials have. And -- and one thing that makes this case conceptually difficult is we are so accustomed to this clean order of presentation -- that -- that that's how we have all tried our cases, that's how we are used to seeing them, but that's not the heart of the Confrontation Clause.

The Confrontation Clause is because, for example, the colonists were subject to anonymous --

JUSTICE BREYER: As I read this statute, it does let in that piece of paper.

MR. McCULLOUGH: It does. But --

JUSTICE BREYER: And so why then, by analogy, isn't the statute bad?

MR. McCULLOUGH: Well, because --

JUSTICE BREYER: If -- unless you -- unless you have some special kind -- I mean, you'd have to some special -- specially reliable evidence that sort of fell within the Confrontation Clause but not totally. And that's what I -- the more I think about

that, the harder that one is to do.

MR. McCULLOUGH: I think there are --

JUSTICE BREYERE: So -- so --

MR. McCULLOUGH: There are characteristics, of course, to this particular type of evidence that were debated in this Court's Melendez-Diaz opinion that make this procedure certainly more appropriate, and one of those is, these -- what -- functionally what you are doing when you have this witness on the stand is either past recollection recorded or past recollection refreshed, because they are doing approximately 900 of these certificates a year. They are largely fungible things like -- like crack cocaine or powder cocaine. And so we're miles from the type of scenario where --

JUSTICE BREYER: Well, to put my chips on the table, which you probably understand, I thought the reliability of this evidence in the mine run of cases was such, and the distance from Sir Walter Raleigh was sufficiently great, that it fell outside the scope of the Confrontation Clause for those two reasons, but mine was a dissenting opinion.

MR. McCULLOUGH: Right. I --

JUSTICE BREYER: So, therefore, what do I do?

(Laughter.)

MR. McCULLOUGH: Well, I think, though, even -- even going back to the very heart -- the historical heart of this clause, the problems for these colonists was anonymous accusers and absentee witnesses. That's -- that's why -- they were enraged because of this deeply unfair trial procedure. It wasn't because, for example, a harbor master might be called in and records of what ships came in for these colonists who were in the vice admiralty courts, and some paper is introduced about what ships came in, and then they get an opportunity to cross-examine them before the prosecution has asked any questions of the -- the harbor master.

That's not the problem, that the Confrontation -- Confrontation Clause --

JUSTICE SCALIA: Well, the problem you describe, the hearsay rule would have solved that alone, wouldn't it?

MR. McCULLOUGH: Well, that's one of the practical --

JUSTICE SCALIA: So -- so what's left for the Confrontation Clause to do?

MR. McCULLOUGH: Well, the Confrontation Clause is designed to ensure -- the core of it -- and

we agree with this -- is what this Court has said for a long time, a face-to-face encounter with a witness who is cross-examined face to face, under oath.

JUSTICE GINSBURG: But it doesn't have to happen in the prosecutor's case. In other words, the prosecutor puts in the reports and rests. And the defendant says, there wasn't sufficient evidence; I move to dismiss the case. It couldn't be dismissed at that point. The prosecutor would prove its case by the affidavit alone.

MR. McCULLOUGH: Right. But first -- a couple points in response.

First of all, the statute doesn't say at what point the defendant gets to treat this witness as an adverse witness. It just says the report comes in, and then the defendant can call the witness as an adverse witness. And the Supreme Court of Virginia deliberately left the question of the order of proof unresolved, because it viewed those things as a due process issue. So I don't think it's axiomatic under the statute, although it's possible, that the defendant would conduct a cross-examination during his case.

But -- but beyond that, the Confrontation Clause isn't designed to constitutionalize Federal

Rule of Criminal Procedure 29 or a motion to strike. The defendant could still -- in Virginia procedure, it's a motion to strike. The defendant could still make that motion at the close of all the evidence.

JUSTICE SCALIA: And it's still not clear -- not clear under the statute that if the witness doesn't show up, it's the prosecution that bears the burden.

MR. McCULLOUGH: No, I think that's very clear.

JUSTICE SCALIA: Why is that clear?

MR. McCULLOUGH: Under both the plain language of the statute and the way it's been construed adversely to the Commonwealth. The plain language of the statute is the witness shall be summoned and appear. So there's a requirement of appearance. And if the defendant asks the prosecutor to summon the witness, the witness then has to appear. And going -- and we cite some of these cases, again on page 1 of our brief.

JUSTICE SCALIA: It doesn't say what the consequence of his not appearing is. That the -- that the written testimony is -- stands and is admitted, without the opportunity to cross-examine the witness?

MR. McCULLOUGH: The consequence emerges

from this line of cases, Justice Scalia, that if the -- the statute requires the witness to appear, and if the Commonwealth doesn't do exactly what the statute requires, a live witness -- or excuse me, the certificate does not come in without the live witness. Just like, if you don't -- the statute says file 7 days before court.

JUSTICE SCALIA: No, the prosecutor issues the subpoena.

MR. McCULLOUGH: Right. And that would --

JUSTICE SCALIA: The witness does not show up.

MR. McCULLOUGH: Right.

JUSTICE SCALIA: I'm not talking about fault on the part of the prosecutor. I'm talking about the fact that the witness has died, has fled the State, is simply not available.

MR. McCULLOUGH: But I think the language answers that. The witness has to appear. The statute says shall be summoned, and the requirement is that the witness appear. If the witness does not appear --

JUSTICE SCALIA: Of course, he is required to appear. But what happens if he doesn't appear?

MR. McCULLOUGH: I'm sorry, but we seem to be going in -- in circles. And I want to answer your

question.

JUSTICE SCALIA: No, we're not going in circles at all. You -- you appeal to the language that the witness shall appear as resolving what happens when he doesn't, and it doesn't resolve that. It just says he must appear. And if he doesn't appear, what happens?

MR. McCULLOUGH: If he doesn't appear, the Commonwealth has failed to do what the statute requires, which is to make sure the witness appears. And if the Commonwealth fails to do exactly what the statute requires, it must -- it cannot rely on a piece of paper.

JUSTICE SCALIA: Well, I don't see the statute requiring that. It requires that of the witness, he shall appear.

MR. McCULLOUGH: And -- I mean, to the extent there's -- there's any question about that, I don't think it's a matter that this Court should resolve in the first instance. I think it would be a matter of remand to the Supreme Court of Virginia to determine what -- what the statute requires in that instance.

Let me just spend a moment since we've talked about the costs. Our experience in Virginia,

we -- of course, we've repealed this statute. This Court signaled in Melendez-Diaz what a safe harbor was, with notice and demand, and so we went there.

And what we have seen under our new statute is rampant demands for the witness to appear, followed by: Oh, well, he's here; I'll stipulate. Or no questions of the witness. So our experience under this old statute compared to our new one is that we had far more -- or far less under our old statute of this sort of tactical demands for confrontation.

JUSTICE SCALIA: How new is the new one?

MR. McCULLOUGH: It went into effect August 21, 2009.

JUSTICE SCALIA: Okay. The -- the reply brief of -- of the Petitioners mentions that -- that the same thing, a spike occurred in other jurisdictions after Melendez-Diaz, but then the spike went down, after -- after 6 months or a short period.

MR. McCULLOUGH: The spike has plateaued somewhat in Virginia, but we are still seeing extensive gamesmanship. And I think --

JUSTICE SCALIA: What is peculiar about Virginia that -- or what is peculiar about Michigan or the other States that have this system and somehow are able to live with it?

MR. McCULLOUGH: Well, I think --

JUSTICE SCALIA: Virginia criminals are nastier; is that it?

(Laughter.)

MR. McCULLOUGH: No, I -- I think -- I -- I don't know that -- that there's anything particularly different about Virginia criminals. I will say that this type of statute -- as this Court noted in Melendez-Diaz, defense attorneys don't want to necessarily antagonize the court and so on by making these kinds of gamesmanship demands.

JUSTICE SCALIA: Right.

MR. McCULLOUGH: Well, a cross-examination-focused statute like this one more blatantly exposes that type of gamesmanship and, therefore, may have a better deterrent value, as opposed to a garden variety statute.

I do want to just say, really briefly, that the practical concerns, even if they are not constitutional concerns, are very important because the prosecution always bears the burden of persuasion, and a live witness is always more compelling than a piece of paper.

And so the -- the practical realities of this -- a trial by affidavit simply are not likely to

be there.

I see my time's expired. I thank the Court.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Ms. Kruger.

ORAL ARGUMENT OF LEONDRA R. KRUGER

ON BEHALF OF THE UNITED STATES,

AS AMICUS CURIAE,

SUPPORTING RESPONDENT

MS. KRUGER: Mr. Chief Justice, and may it please the Court:

A State adequately safeguards the confrontation right recognized in Melendez-Diaz when it guarantees that it will, on the defendant's request, bring the analyst into court for face-to-face confrontation and cross-examination at trial.

JUSTICE SCALIA: That's not what we said in Melendez-Diaz, unfortunately.

MS. KRUGER: Well, Melendez-Diaz --

JUSTICE SCALIA: We said the following: "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."

So you are asking us to overrule that -- that statement?

MS. KRUGER: No, Justice Scalia, not at all. We believe that a State complies with that very rule from Melendez-Diaz when it ensures that the analyst is present in court to submit to cross-examination, which is the core of the confrontation right. This Court affirmed in its decision --

JUSTICE SCALIA: He's present only if the defendant asks for him, right?

MS. KRUGER: That's right, and that's -- that's because --

JUSTICE SCALIA: And that's exactly what this addressed. It's not -- it's not replaced by a system in which the prosecution presents its evidence by -- and waits for the defendant to subpoena the affiants if he chooses.

MS. KRUGER: This Court has recognized that the confrontation right is designed to achieve a particular purpose, and that is to ensure that the government's evidence is subject to adversarial testing at trial.

It is ultimately up to the defendant in every case to decide, no matter how the prosecution

presents its evidence on direct, whether or not it wants to confront the witness and submit that witness's testimony to adversarial testing --

JUSTICE SCALIA: That may be. It's a perfectly reasonable argument. I just object to your saying that it doesn't contradict Melendez-Diaz.

MS. KRUGER: I think it would be surprising to discover that Melendez-Diaz went quite so far. This Court has never before recognized a dimension of the Confrontation Clause that would govern the manner in which the prosecution presents its evidence, except for the rule that it affirmed it in Crawford, which is that so long as the government ensures that the witness is available for cross-examination at trial, the Confrontation Clause places no constraints on the government's use of prior testimony or statements.

JUSTICE BREYER: All right. So the statement, the sentence in this opinion, that, in your opinion, would have the effect of limiting Melendez-Diaz without overruling it, what is that statement?

MS. KRUGER: I think the statement is it requires only that the Court reaffirm what it already said in Crawford, in the context of the lab analyst testimony at issue in this case, which is, again, when

the analyst is available for cross-examination at trial, the government has complied with what the Confrontation Clause demands.

It has provided a constitutionally sufficient opportunity for the defendants to submit that analyst's findings to adversarial testing --

JUSTICE SCALIA: And it just doesn't -- doesn't apply just to analysts, right? I mean, is there anything peculiar about analysts? Would it not exist for any other witness?

MS. KRUGER: Well, our principal submission is that the Confrontation Clause provides, in every case, an opportunity for effective cross-examination.

JUSTICE SCALIA: Okay.

MS. KRUGER: And there may be independent constraints on the manner in which the prosecution presents its evidence under the laws of evidence in the jurisdiction because of the government's need to satisfy its burden of proof and ensure a fundamentally fair trial under the Due Process Clause.

To the extent that the Court --

JUSTICE SCALIA: I don't understand what -- is that a yes or a no?

MS. KRUGER: Well, it is to say that Confrontation Clause is not what prohibits that

practice. What prohibits that practice are other equally effective sources in the law --

JUSTICE SCALIA: Okay. So as far as the Confrontation Clause is concerned, this would apply to other witnesses as well?

MS. KRUGER: I think that that's right, but even if the Court were to disagree with that submission, this Court could rely on the kinds of distinctions that it has drawn in other cases, like Inadi or like White v. Illinois, which recognized that there is a class of hearsay evidence that's not simply a weaker substitute for live testimony at trial, that has independent, probative significance that makes it somewhat irrelevant whether or not the court --

JUSTICE SCALIA: Indicia of reliability -- you want us to go back to that? Is that --

(Laughter.)

MS. KRUGER: No, it's not a question of the reliability. What Crawford did was replace a system in which hearsay evidence and its admissibility was dependent on reliability with one in which the touchstone is an opportunity for cross-examination.

And it's precisely in response to that point that Crawford, again, reaffirmed the rule that it first announced in Green, that so long as the

out-of-court declarant is present at trial to explain or defend his out-of-court statements, the Confrontation Clause is satisfied.

JUSTICE BREYER: What if it doesn't quite work, that the Confrontation Clause seems to be expanding, just with the opportunity for cross-examination creating all kinds of incursions into areas where it's not necessary for fairness purposes?

Then does it make sense to say -- hey, unfortunately, to say that the only workable system is that you have a system which has exactly the confrontation point, but indicia of reliability do have an impact as to what the implications of the Confrontation Clause violation are, in terms of practical trial necessity.

MS. KRUGER: But --

JUSTICE BREYER: Now, there we are, accepting the warnings of the dissenters in Crawford.

(Laughter.)

MS. KRUGER: I don't think that the touchstone of this Court's analysis need return to the now discredited Ohio v. Roberts regime.

It's simply a practical point. To the extent the Petitioners are arguing that their

opportunity to confront and to cross-examine is constitutionally inadequate merely because the prosecution hasn't guaranteed that it would call the witness to the stand first, I think the court can take due account of the fact that that is not necessarily so.

JUSTICE BREYER: Well, what about Raleigh's witnesses -- you know, the hypothetical I gave you, for the heart of the matter, the heart of the matter, and they stick it in their affidavits, and you say, oh, don't worry, don't worry, you can cross-examine them later in the trial.

MS. KRUGER: I think, to the extent that the Court were otherwise inclined to invent a new body of Confrontation Clause jurisprudence to govern the manner in which the prosecution puts on its witnesses and questions them, this isn't the appropriate case to do it because, as we have seen from Petitioners' submission earlier this morning, there is no substantive difference from a defendant's perspective --

JUSTICE SOTOMAYOR: Could you -- are you suggesting or are you saying even a trial by affidavit is okay under the Confrontation Clause? Is that your position?

MS. KRUGER: Our principal submission is that the Confrontation Clause allows the government to rely on affidavits, so long as it bring the affiants into court, so that the defendant can ask whatever questions --

JUSTICE SOTOMAYOR: So you are absolutely saying that, under the Confrontation Clause, trial by affidavit of any witness would be okay.

MS. KRUGER: That is our principal --

JUSTICE SOTOMAYOR: So are you -- are you then saying that there is some other constitutional limit to that choice, outside of the Confrontation Clause? And if you are, what would be that other constitutional limit?

MS. KRUGER: We do think that there are constitutional limits in the Due Process Clause, and it's guaranteeing the right to --

JUSTICE SCALIA: Well, how many hundreds of cases will it take to identify those limits under that very clear Due Process Clause?

(Laughter.)

MS. KRUGER: Well, it's -- it’s somewhat of a difficult question to answer because this is not a question that arises particularly frequently. The laws of evidence, as a general matter, express a

strong preference for the prosecution to present its evidence through live testimony --

JUSTICE SCALIA: Don't we want clear rules for the presentation? Don't we want clear rules, not gambling on what the Supreme Court will say about due process?

MS. KRUGER: I think that it's difficult to imagine that a new-found constitutional rule that would require the prosecution to present its evidence in a certain way in every case would lead to that sort of clarity. It would, if anything, create --

JUSTICE STEVENS: Ms. Kruger, can I just ask this question? I just want to be sure. Supposing you have an eyewitness. Can you follow the same procedure that you recommend for the scientific witness here -- and for an eyewitness?

MS. KRUGER: We think that you could, so long as the defendant has an adequate opportunity to cross-examine that eye witness about the testimonial statement.

But even if you disagreed with that, we think that the Court can take due account of the fact that there is a significant difference between the kind of testimony that an eyewitness provides and the kind of testimony that a forensic analyst provides.

The forensic analyst's lab report is not merely a weaker substitute for live testimony. It is, in fact, I think, as we see by the relative infrequency with which analysts were called into court before Melendez-Diaz, something that has been seen to have equal value, regardless of the manner in which it's presented.

And, for that reason, we think that, in order to decide this case, all this Court needs to decide is that, in the context of forensic lab analysts, what the Court said in Crawford still stands, so long as the government presents the analyst at trial for face-to-face confrontation and cross-examination.

JUSTICE SCALIA: Why -- why do we have to say anything in this case? Why is this case here except as an opportunity to upset Melendez-Diaz?

MS. KRUGER: I think that --

JUSTICE SCALIA: This Virginia statute no longer exists, does it? So we are pronouncing on the validity of a Virginia statute that is now gone, right? They have adopted a statute that complies completely with Melendez-Diaz.

MS. KRUGER: That's true, and I think that that's because Virginia was unwilling to stake the

validity of however many convictions in the interim on the outcome of a case. But this --

JUSTICE SCALIA: I'm not criticizing Virginia; I'm criticizing us for taking the case.

(Laughter.)

MS. KRUGER: I think that this -- this case presents, I think, an important opportunity for the Court to provide guidance to States that are currently grappling with how to respond to the practical problems that have been presented in the wake of Melendez-Diaz.

JUSTICE SOTOMAYOR: So do we say to them, contrary to what Melendez-Diaz is, that subpoena statutes -- when you read the statute, it says the defendant has to subpoena the witness. On its -- on the face of this statute, without the Commonwealth court's gloss on it --

MS. KRUGER: I don't mean to quibble, Justice Sotomayor, but the statute does not in fact on its face say the defendant must subpoena. It says the witness shall be summoned. But I think to the extent that you had any questions about whether or not the Commonwealth's interpretation of that language were correct, the appropriate course would be to remand to the Virginia Supreme Court to allow them to address

that question of State law in the first instance.

JUSTICE SCALIA: That question of prior State law, right?

MS. KRUGER: Thank you, Your Honor.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Friedman, you have 4 minutes left.

REBUTTAL ARGUMENT OF RICHARD D. FRIEDMAN
ON BEHALF OF THE PETITIONERS

MR. FRIEDMAN: Thank you, Mr. Chief Justice.

This is not a notice-and-demand statute. It does not even provide notice to the defendant unless he asks for it ahead of time. It doesn't give any deadline as to when he should make a demand or take any other action. It just says that -- and I invite the Court's attention to the language of the statute -- it says that the defendant may cause the witness to be summoned.

There's no -- there's no deadline. It doesn't put the burden of no-shows on the prosecution. It's the defendant's witness, and it clearly doesn't call -- it doesn't provide that the prosecution should call the -- the witness. Virginia --

CHIEF JUSTICE ROBERTS: Well, the -- just the first one, the no-notice problem, that's kind of silly, isn't it? Because if you are being prosecuted

for 50 grams of crack cocaine, you can expect the government is going to try to prove that.

MR. FRIEDMAN: That's likely, of course. But the fact is Virginia knows how to write a good notice-and-demand statute and has done it, and contrast the -- the new statute, which gives 28 days notice. It's -- it's very glaring. If Virginia wanted to write a notice-and-demand statute before, it could have.

Now, I think I can explain what's different about Virginia. And what happened is after the -- after the defendants' -- after the defendants' trials -- let me say, after the defendants' trials, the -- the prosecution is saying, you could have subpoenaed. And they said this isn't testimony. Okay? They were wrong on both of those counts.

After the defendants' trials, in a case called Brooks, the -- the Virginia Court of Appeals suggested that the defendant could ask the prosecution to bring the witness in. Many defendants did that, including Grant, the defendant on whom -- in the case on whom the Commonwealth relies so heavily.

The prosecution ignored those requests. It was still taking the view that this is not -- this is not testimonial. Up until the moment that this Court

decided Melendez-Diaz, the Commonwealth in Virginia in -- in Grant said, we don't have to bring the witness in; the witness -- the defendant should subpoena the witness if he wants.

No court has ever held -- no court has ever held in Virginia that the prosecution bears the risk of -- of no-shows.

Now, the Commonwealth and the United States suggest: Oh, it's okay to -- to transform the way trials are conducted by allowing the prosecution to present affidavits because you can backfill with the Due Process Clause. I think that goes against decisions of this Court that say when there's a specific right addressed to a particular situation, we rely on that, not on the Due Process Clause.

JUSTICE ALITO: But I take it your position is it wouldn't matter. If the -- if Virginia said that the -- the Commonwealth bears the risk of a no-show, that wouldn't make any difference?

MR. FRIEDMAN: That would -- that would not be enough, no. It's enough -- it's enough --

JUSTICE ALITO: So we have to assume that that's the case.

MR. FRIEDMAN: Well, that's -- that's one problem. The no-show. But --

JUSTICE ALITO: Well, would you like us --
MR. FRIEDMAN: -- but there are two -- they are both problems.
JUSTICE ALITO: Would you like us to grant, vacate, and remand in this case and say because it's unclear who has the risk of a no-show?
MR. FRIEDMAN: No, no, no, Your --
JUSTICE ALITO: And then Supreme Court of Virginia on remand could decide whether in fact the -- the prosecution bore that risk?
MR. FRIEDMAN: No, Your Honor, because it's sufficient that the statute is very clear and the Commonwealth doesn't deny that it's the defendant's burden under the statute to call the witness to the stand. So whatever the no-show issue, however that might stand under State law, what Melendez-Diaz called the more fundamental problem, which is that the statute imposes on the defense the burden of calling a witness to the stand, is clearly provided for in this statute. So there's no reason --
JUSTICE ALITO: Do you think Melendez-Diaz addressed the question of the order of proof? Where did it address that?
MR. FRIEDMAN: I don't think this is a question of order of proof. This is a question of who

puts the witness on the stand. Melendez addressed that very explicitly in part III-E and said that an affidavit doesn't do, that the prosecution has to present prosecution witnesses.

JUSTICE GINSBURG: So is the proper solution to grant, vacate, and remand in light of Melendez-Diaz?

MR. FRIEDMAN: May -- may I respond to that?

CHIEF JUSTICE ROBERTS: Yes.

MR. FRIEDMAN: Thank you.

Your Honor, I think that the -- the proper response here is the Court has taken the case; there is enough without any -- resolving any ambiguities of the Virginia statute to say that the -- this procedure is unconstitutional, because it imposes -- even without worrying about the no-show point, it imposes upon the defendant the burden of putting the witness on the stand. Given that all these States and the United States are contesting that this procedure is acceptable, I think it’s proper for the Court to say right now that it -- that it is not.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

The case is submitted.

(Whereupon, at 12:41 p.m., the case in the above-entitled matter was submitted.)

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