IN THE

Supreme Court of Virginia

RECORD NO. 070817

MARK A. BRISCOE,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

CORRECTED OPENING BRIEF OF APPELLANT

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STATEMENT OF THE NATURE OF THE CASE

This is an appeal from two felony convictions in the Circuit Court of the City of Alexandria on the charges of possession with the intent to distribute cocaine, in violation of Virginia Code § 18.2-248(C), and transporting cocaine into the Commonwealth, in violation of Virginia Code § 18.2-248.01. The Virginia Court of Appeals affirmed the convictions on March 26, 2007. Upon appealing to the Virginia Supreme Court, in a 4-3 vote, this Court affirmed Briscoe's convictions in a joint opinion consolidating appeals of three defendants (Magruder, Cypress, and Briscoe) from different jurisdictions. Magruder v. Commonwealth, 275 Va. 283, 657 S.E.2d 122 (2008). On June 25, 2008, appellants Briscoe and Cypress petitioned for *certiorari* in the U.S. Supreme Court (U.S. Supreme Court No. 07-11191). The U.S. Supreme Court held their petition until deciding Melendez-Diaz v. Massachusetts, 557 U.S. ___, 129 S.Ct. 2527 (2009), on June 25, 2009. On June 29, 2009, the U.S. Supreme Court granted *certiorari* in this case. On January 25, 2010, the U.S. Supreme Court, after briefing and oral argument, in a *per curiam* decision, vacated the judgment of the Virginia Supreme Court

against petitioners Briscoe and Cypress and remanded the case for further proceedings not inconsistent with Melendez-Diaz. Briscoe v. Virginia, 559 U.S. ____ (2010).

On March 15, 2010, the Virginia Supreme Court requested briefs on whether Melendez-Diaz compels a different result than reached by the majority in Magruder.

STATEMENT OF MATERIAL PROCEEDINGS

On May 2, 2005, the Grand Jury charged Mark A. Briscoe with possession with the intent to distribute cocaine in violation of Virginia Code §18.2-248(C), transporting cocaine into the Commonwealth in violation of Virginia Code §18.2-248.01, and conspiracy to distribute cocaine in violation of Virginia Code §18.2-248 and §18.2-256. Mr. Briscoe waived his right to a jury trial and was tried in a bench trial in the Circuit Court of the City of Alexandria on June 16, 2005. The Honorable Lisa B. Kemler presided over the trial.

During the Commonwealth's case-in-chief, Mr. Briscoe, by counsel, objected to the admission into evidence of certificates of drug analysis on Confrontation Clause grounds. The trial court overruled the objection and entered the certificates into evidence.

(JA at 93-95) At the close of the Commonwealth's case, Mr. Briscoe, by counsel, moved to strike the Commonwealth's evidence as insufficient to support convictions for possession with intent to distribute cocaine, transport cocaine into the Commonwealth, and conspiracy to distribute cocaine. (JA at 138-142; 152-154) The trial court denied the motion to strike with regard to all three charges. (JA at 157) At the conclusion of Mr. Briscoe's case, the defense renewed its motion to strike and presented closing argument. (JA at 157-166; 173-176) After closing arguments by both sides, Judge Kemler found Mr. Briscoe guilty of possession with intent to distribute cocaine and transporting cocaine into the Commonwealth, and not guilty of conspiracy to distribute cocaine. (JA at 176-77)

On August 18, 2005, a hearing was held on Mr. Briscoe's motion to set aside the verdicts. The motion was denied. (JA at 186) Judge Kemler then sentenced Mr. Briscoe on the charge of possession with intent to distribute cocaine to 15 years incarceration with all but two years, eight months suspended for ten years on the condition that Mr. Briscoe be of uniform good behavior for 10 years and that he serve five years of supervised probation. (JA at 208-209)

On the charge of transporting cocaine into the Commonwealth, Judge Kemler sentenced Mr. Briscoe to five years incarceration with all but three years suspended for five years. (JA at 209) Final judgment was entered September 6, 2005. Mr. Briscoe noted his appeal to the Court of Appeals on September 30, 2005.

The Court of Appeals initially dismissed Mr. Briscoe's appeal on February 28, 2006. However, on May 25, 2006, the Court of Appeals granted Mr. Briscoe's motion for delayed appeal and granted him leave to file a replacement notice of appeal. Mr. Briscoe again noted his appeal on June 12, 2006. The Court of Appeals affirmed Mr. Briscoe's convictions on March 26, 2007. Mr. Briscoe subsequently appealed to this Court. By a 4-3 vote, his convictions were affirmed in Magruder. On January 25, 2010, the U.S. Supreme Court vacated and remanded the judgment of this Court for further proceedings not inconsistent with Melendez-Diaz.

ASSIGNMENTS OF ERROR

1. The Court of Appeals and Virginia Supreme Court erred, in light of Melendez-Diaz, in upholding the trial court's finding that Defendant's constitutional right to confront and cross-examine

adverse witnesses was not violated by the admission of the certificates of drug analysis into evidence. (Preserved at JA at 67-72, 79-82, 88-95)

QUESTION PRESENTED

1. Whether the Defendant's constitutional right to confront and cross-examine adverse witnesses, in light of Melendez-Diaz, was violated by the admission of the certificates of drug analysis into evidence? (Preserved at JA at 67-72, 79-82, 88-95)

STATEMENT OF THE FACTS

On the evening of February 10, 2005, Officer Greg Ladislaw and Officer Monica Lyle from the Alexandria Police Department went to the second-floor apartment home of appellant, Mark Briscoe, who resided there with his wife and stepdaughter. (JA at 39-41) Officer Ladislaw asked Mr. Briscoe to speak with him and Mr. Briscoe stepped outside to converse. (JA at 42) A few minutes later, while the police officers and Mr. Briscoe were still talking, a vice-narcotics search warrant team of nine or ten officers stormed into Mr. Briscoe's apartment to execute a search warrant. (JA at 42, 49-50) At the same time, Officers Ladislaw and Lyle detained Mr. Briscoe outside of

the apartment. (JA at 42)

During the search of Mr. Briscoe's apartment, the police recovered suspected cocaine, two scales that appeared to have suspected cocaine on them, a razor blade that appeared to have suspected cocaine on it, a 100 gram weight, a box with sandwich baggies, and a small plate that appeared to have suspected cocaine and suspected cocaine residue on it. (JA at 52) During a search of Mr. Briscoe's person, the police recovered a rocklike substance that was suspected to be crack cocaine. (JA at 43) The trial court sustained an objection by defense counsel to Detective Christopher Flood's referring to the suspected cocaine as cocaine as the prosecution had not laid a foundation the detective had the expertise to testify as to the nature of the substances; until a foundation were laid, the trial court instructed that the substances be described as "suspected cocaine." (JA at 52)

Detective Christopher Flood transported some of the recovered items to the Northern Virginia Forensic Laboratory. (JA at 64) The results of the lab analysis were purportedly reported in the Certificates of Analysis that were admitted into evidence, over defense counsel's

Confrontation clause objections, as Commonwealth's Exhibits 7A and 7B. (JA at 65) The certificates stated that the suspected cocaine seized from Mr. Briscoe's apartment and person was in fact cocaine and weighed a total of 36.578 grams. (Commonwealth's Exhibits 7A and 7B, JA at 222-223).

After the certificates of analysis were introduced as evidence, the Commonwealth adduced testimony that Mr. Briscoe was arrested, advised of his *Miranda* rights, and questioned by police. (JA at 123-131) The Commonwealth, through a detective, entered into evidence admissions made by Briscoe indicating he brought the cocaine that was found in his home from Washington, D.C. and that the cocaine in his home weighed "around 40 grams." (JA at 127-131)

ARGUMENTS

A. *Melendez-Diaz* Resolves The Issue In This Case By Rendering Former Virginia Code §19.2-187 et seq Unconstitutional

Melendez-Diaz v. Massachusetts clearly resolves the issue in this case of whether the state, if it allows a prosecutor to introduce a certificate of analysis without live testimony, may avoid violating the Confrontation Clause by providing the accused a right to the call the analyst as his own witness:

> Respondent asserts that we should find no Confrontation Clause violation in this case because petitioner had the ability to subpoena the analysts. But that power -- whether pursuant to state law or the Compulsory Process Clause -- is no substitute for the right of confrontation. Unlike the Confrontation Clause, those provisions are of no use to the defendant when the witness is unavailable or simply refuses to appear. Converting the prosecution's duty under the Confrontation Clause into the defendant's privilege under state law or the Compulsory Process Clause shifts the consequences of adverse-witness no-shows from the State to the accused. More fundamentally, the Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court. Its value to the defendant is not replaced by a system in which the prosecution presents its evidence via *ex parte* affidavits and waits for the defendant to subpoena the affiants if he chooses.

129 S.Ct. 2527, 2540 (2009) (internal citations omitted).

While the U.S. Supreme Court in Melendez-Diaz approved

simple notice and demand statutes that place no burden on the defendant to secure the presence of a forensic analyst or require the defendant to place the analyst on the stand, 129 S. Ct. at 2541, it clearly forbid burden shifting statutes, such a former Code §19.2-187.1: "the Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court." Id. at 2540. At this stage of the litigation, the Commonwealth cannot seriously contend the plain meaning of former §19.2-187.1 did not require Appellant to call the forensic analyst in his own case, in violation of the Confrontation of Clause, which requires reversal of Appellant's convictions. The plain language of the statute stated:

> "[t]he accused in any hearing or trial in which a certificate of analysis is admitted into evidence . . . shall have the right to call the person performing such analysis . . . 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."

Former Va. Code § 19.2-187.1

Clearly, the statute provides the accused with the "*right to call the person performing such analysis,*" meaning the defendant would

call the person in his own case. Id. (emphasis added). There can be no mistaking the statute's language allowing the accused to examine the person performing the analysis "*as an adverse witness*" as it applies to the order of proof. Va. Code § 19.2-187.1 (emphasis added). If the statute did not contemplate the accused calling the witness in his own case, the adverse witness language would be surplusage where witnesses called by an opponent may always be treated adversely. As importantly, the statute only provides the accused the right to call the analyst after the certificate of analysis is "*admitted into evidence*"– unconstitutionally shifting the burden to the defendant to test the truth of the certificate of analysis by calling the analyst to the stand.

When the trial judge heard the case in 2005, she also determined the statute meant what it says:

> In this case, our statute provides that the defense shall have a right to call the witness or the preparer of the certificate and call that person as an adverse witness at the expense of the Commonwealth and I think having the right to essentially cross examine the witness is what saves the Virginia statute. And for these reasons, I'll overrule the objection.

JA at 93.

In light of Melendez-Diaz, the trial court's ruling is clearly

erroneous. 129 S.Ct. 2527, 2540 (stating "[m]ore 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."). In further support that Appellant's convictions should be reversed, the U.S. Supreme Court in Briscoe v. Virginia, in vacating Magruder, had several options if it had agreed Virginia's defunct statutory scheme complied with the Confrontation Clause or Appellant waived his Confrontation rights under the old scheme—including dismissing Appellant's petition as improvidently granted. It did not, signaling the Commonwealth's arguments in this respect were to no avail and the majority's reasoning in Magruder was incorrect.[1]

I. Appellant Did Not Waive His Confrontation Rights.

A defendant's Sixth Amendment right to be confronted with adverse witness arises automatically at the beginning of the adversarial process. See Taylor v. Illinois, 484 U.S. 400, 410, 108 S.

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1 Farmer v. Commonwealth (Record No. 1694-08-3 (Va. App. 2/16/2010)) is also to no avail to the Commonwealth as the Court of Appeals, which relied on Magruder in Farmer, stayed its mandate pending "a decision of the Supreme Court of Virginia on the remand from the Supreme Court of the United States in Magruder v. Commonwealth, 275 Va. 283, 657 S.E.2d 113 (2008), vacated and remanded sub nom. Briscoe v. Virginia, 559 U.S. ____ (January 25,

Ct. 646, 653 (1988). Because this is a fundamental right, waivers of the right "not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." Hunter v. Commonwealth, 13 Va. App. 187, 191, 409 S.E.2d 483, 485 (1991) (quoting Brady v. United States, 397 U.S. 742, 748, 90 S.Ct. 1463, 1469 (1970)). Here, Appellant did not waive his confrontation right and expressly demanded confrontation at trial. (JA at 67-72, 79-82, 88-95)

The Commonwealth may persist that Appellant waived his right to confront the analyst by not requesting the analyst's presence. In Magruder, this Court, in reasoning Appellant waived his Confrontation rights, stated that Appellant could have "insured the physical presence of the forensic analysts at trial by issuing summons . . . at the Commonwealth's cost, or asking the trial court or Commonwealth to do so." Magruder, 657 S.E.2d at 122; see also Grant v. Commonwealth, 682 S.E.2d 84, 54 Va. App. 514 (2009). However, this waiver argument failed to persuade the U.S. Supreme Court[2] and

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2010) (per curiam)."

2 The Commonwealth relied heavily on its waiver argument before the U.S. Supreme Court. See Brief of Respondent, October

should not persuade this Court now.

From the history of the trial in this case, the purported right to ask under former §19.2-187.1 is insufficient, would not have been honored, and, and as discussed below, Appellant had no duty to invoke an invalid statutory procedure, which clearly required him to place the analyst on the stand if he wished to confront her.

The prosecutor, during the trial in this matter, argued the statute required the defendant to subpoena the analyst if he wished to cross-examine her. In her bench "[] Memorandum on the Applicability of Crawford v. Washington, 541 U.S. xx 029410 (2004)"[3] submitted at trial, she wrote that "[s]ince the statute authorizes the admission of documents whose reliability had not been independently proven, the requirement that the certificate be filed seven days in advance

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26, 2009, 13-19, found at http://www-personal.umich.edu/~rdfrdman/respondentsbrief.pdf; brief for Petitioners Briscoe and Cypress Brief is available at http://www-personal.umich.edu/~rdfrdman/07-11191.pdf; Petitioners' reply brief is available at http://www-personal.umich.edu/~rdfrdman/rbrev.pdf

3 This memorandum was not designated in the Joint Appendix, however, it was provided to the trial court by the prosecutor during trial and considered by the trial court. See JA at 88. It is appended here and Counsel for Appellant respectfully requests the Court to consider it in support of his brief.

provides some guarantee of trustworthiness in that it gives an accused the opportunity to verify the results **or to subpoena and challenge those who constructed the analysis."**[4] (Commonwealth's Memorandum at 7; emphasis in original) Later, she argued that:

> The defendant is given the express statutory right pursuant to Code 19.2-187.1 to subpoena the expert performing the analysis or the person involved in the chain of custody to testify at trial. A defendant's choice not to avail himself of that process does not constitute a denial of his confrontation right; it is simply a waiver of an opportunity to conduct cross examination. Virginia's statutory scheme provides a defendant with adequate notice that the prosecution intends to rely on the certificate and it affords a defendant the absolute right to call the preparer or

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4 The Commonwealth took the same position in Grant. In Grant, the trial court held Grant's notice demanding the presence of a breath technician for cross-examination, who did not appear, insufficient to bar admission of the certificate attested to by the technician—i.e. Grant needed to subpoena the witness himself under §19.2-187.1 in order to confront him. 682 S.E.2d at 87. At trial, the Commonwealth did nothing to secure the witness and maintained throughout the appeal that former §19.2-187.1 required the accused to subpoena the witness himself under former §19.2-187.1. Brief in Opposition to Petition for Appeal, July 17, 2008, at 2 ("*The Plain Meaning of the Language Used in Virginia Code §19.2-187.1 Clearly Places on the Defendant the Duty to Subpoena Those Who Perform Any Analyses or Whose Attestations Appear on a Certificate of Analysis Offered Into Evidence by the Commonwealth.*"); Brief for the Commonwealth, October 17, 2008, at 23 ("Grant failed to vindicate his right to confront the breath test operator through his failure to subpoena her for trial.").

> chain of custody witness as an adverse witness at the Commonwealth's expense should he so desire.

Commonwealth's Memorandum at 8.

In this case, the prosecutor read the statute by its plain terms and this Court should do the same. Clearly, if Appellant had requested the analyst, his request would not have been honored. He had to take the further step of subpoenaing the analyst himself; but he had no duty to do utilize a procedure that is clearly invalid. As indicated in Melendez-Diaz and noted in the dissent in Magruder, which now appears to have been correct, a defendant's statutory right to subpoena or call the preparer of a certificate of analysis as his own witness does not comply with the Constitution. Melendez-Diaz, 129 S.Ct. at 2540; Magruder, 657 S.E.2d at 132 (Keenan, dissenting, stating "the majority confuses the issue whether a defendant may be required to produce evidence in a criminal trial with the issue whether the statutory mechanism at issue in this case, which requires a defendant to produce evidence, is capable of preserving his Confrontation Clause rights.").

II. An Accused Cannot Be Held To Have Waived A Constitutional Right By Declining To Invoke A Procedure That Fails To Protect That Right.

As argued to the U.S. Supreme Court, Appellant cannot be deemed to have waived his confrontation rights for not invoking an invalid procedure. As stated by the three dissenters in Magruder, "[w]hile a defendant's failure to act under Code §19.2-187.1 may constitute a wavier of his statutory right under that Code section to call the forensic scientist in the defendant's case, the fact that he chooses not to exercise this statutory right is insufficient to establish a waiver of his separate constitutional confrontation right." 657 S.E.2d at 132. The majority also recognized "[t]he dispositive issue . . . is whether Code § 19.2-187.1 adequately protects a criminal defendant's rights under the Confrontation Clause of the Sixth Amendment, and if so whether [the defendants] waived their Confrontation Clause challenges . . . by failing to utilize that procedure." Id. at 119. And the heart of Appellant's contention, in light of Melendez-Diaz, is the majority erred in finding the now defunct procedure protected that right. As evidence that Appellant's contention is correct, the Virginia General Assembly, despite the existence of the Magruder decision, quickly moved to amend Code §

19.2-187 and 19.2-187.1 less than two months after the Melendez-Diaz decision.

a. The Virginia General Assembly's Amendments to Former Virginia Code §19.2-187 et seq. Indicate The Former Statutory Scheme Was Invalid And Failed To Comply With Melendez-Diaz.

On August 21, 2009, shortly after the June decision in Melendez-Diaz, the Virginia General Assembly amended Code §19.2-187 et seq; implicitly acknowledging that old statutory scheme failed to pass constitutional scrutiny. In briefly analyzing the differences between the past and present versions of Code §§19.2-187 and 19.2-187.1, the constitutional deficiencies of the past version are evident.

Former Code §19.2-187 stated that "a certificate of analysis . . .duly attested . . . shall be admissible in evidence as evidence of the facts therein stated." Former Virginia Code § 19.2-187. As a further condition of admissibility, the statute required certificates be filed with the clerk of court seven days prior to a hearing or trial, and, if requested by defense counsel at least ten days before trial, that a copy be delivered to defense counsel seven days before the hearing or trial. Id. While the aforementioned code section provided no means for confrontation of the analyst, former § 19.2-187.1, provided a

statutory mechanism to cross-examine analysts in the defendant's own case: "[t]he accused in any hearing or trial in which a certificate of analysis is admitted into evidence . . . shall have the right to call the person performing such analysis . . . and examine him in the same manner as if he had been called as an adverse witness." The statute provided that "[s]uch witness shall be summoned and appear at the cost of the Commonwealth." Former Virginia Code § 19.2-187.1.

There are three significant constitutional deficiencies in the defunct statutory scheme corrected by the new: first, the old statute impaired confrontation by making lab reports *prima facie* evidence whether the lab analyst testifies or not—i.e. even if the lab analyst testified and did not recall making the report, the report's contents are still *prima facie* evidence per the statute; second, the scheme places the burden on the defendant to call the lab analyst in the defendant's own case to challenge the analyst—forcing the defendant to sacrifice his right of not putting on a case to confront the analyst and adding all the hazards attendant to calling a hostile prosecution witness; and third, at best, it is unclear whether the defendant must subpoena the analyst to appear at court in order to confront the analyst, although

the Commonwealth in the instant case, as did the prosecutor in Grant, both contended that the statute places this burden on the defendant.

In addressing the first problem, making a lab report *prima facie* evidence, even if the analyst testifies, denies defendants their Confrontation rights in advance—an inadmissible or inaccurate lab report could be submitted into evidence, thus tainting the fact finder prior to defense counsel examining the analyst. Further, as mentioned above, if the analyst did not recall making the lab report, it is *still prima facie evidence* under the statutory scheme. If the analyst claimed memory loss, thereby preventing cross-examination, the defendant has already been incriminated per the statute.

Second, as stated above, former Virginia Code Section 19.2-187.1 provided an accused the "*right to call the person performing such analysis,"* which means that the defendant would call the person in his own case. While this Court indicated in Magruder that the "order of proof" is not known from the statute, there is no mistaking the statute's language allowing the accused to examine the person performing the analysis "*as an adverse witness*" as it applies to the

order of proof. See Former Virginia Code § 19.2-187.1 (emphasis added); 657 S.E.2d at 123. If the statute did not contemplate the accused as calling the analyst, the adverse witness language would be unnecessary. As importantly, a defendant's statutory right to call the witness apparently arises *after* the certificate of analysis is "*admitted into evidence*"–impairing confrontation as the certificate, which is *prima facie* evidence, has already been placed before the fact finder. (emphasis added).

Third, the statute's language that the witness "shall be summoned and appear at the cost of the Commonwealth," has been interpreted by prosecutors, no doubt colored in their view that the statute provided the defendant the right to call the witness in his own case, to require the defendant to also subpoena the analyst—which leaves unresolved as to who bears the risk of a witness no show. Apparently, under pre-Melendez-Diaz and Grant v. Commonwealth law, the defendant would be out of luck if the analyst were no longer available or failed to appear in court. In Gray v. Commonwealth, the Virginia Supreme Court reversed an appellant's drug conviction when the prosecutor failed to file the certificate of analysis at issue with the

court seven days prior to trial. The court stated: "We believe that, in the absence of the preparer of the certificate as a witness at trial, the failure of the Commonwealth to fully comply with the filing provisions of § 19.2-187 renders the certificate inadmissible." Gray, 265 S.E.2d 705, 707 (Va. 1980). The apparent implication is that had the prosecutor complied with Code §19.2-187, the certificate would have been admissible. This conclusion is bolstered by former Code §19.2-187, which made a "duly attested" and timely filed certificate of analysis admissible as *prima facie* evidence whether the analyst testified or not.

In contrast, the new scheme remedies the constitutional deficiencies of the old. Under revised § 19.2-187 et seq., the statutory scheme avoids the *prima facie* evidence problem by making a lab report, if the defendant demands the analyst, only admissible through the analyst's live testimony.[5] It further requires the

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5 Virginia Code §19.2-187.1 (B) states that in pertinent part that "[i]f timely objection is made, the certificate shall not be admissible into evidence unless (i) the testimony of the person who performed the analysis or examination is admitted into evidence describing the facts and results of the analysis or examination during the Commonwealth's case-in-chief at the hearing or trial and that person is present and subject to cross-examination by the accused."

prosecution to present the analyst in the prosecution case if the defendant so demands and sets out a time-table that requires the prosecutor to provide a defendant 28 days notice if the prosecution intends to introduce a certificate of analysis—within 14 days of receiving notice, the defendant must demand the analyst's presence if he wishes to challenge the content of the certificate of analysis.[6] On the whole, Virginia's new statute likely complies with the guidance set out in *Melendez-Diaz* that simple notice and demand statutes pass constitutional scrutiny, as state law may impose reasonable procedural rules governing constitutional objections.[7]

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6 Virginia Code §19.2-187.1(A)(1) requires that the prosecution "[p]rovide by mail, delivery, or otherwise, a copy of the certificate to counsel of record for the accused, or to the accused if he is proceeding pro se, at no charge, no later than 28 days prior to the hearing or trial." Upon the prosecution providing notice to defendant of his right to object under Virginia Code §19.2-187.1(A)(2), the "accused may object in writing to admission of the certificate of analysis, in lieu of testimony, as evidence of the facts stated therein and of the results of the analysis or examination' and "[s]uch objection shall be filed with the court hearing the matter, with a copy to the attorney for the Commonwealth, no more than 14 days after the certificate and notice were filed with the clerk by the attorney for the Commonwealth or the objection shall be deemed waived."

7 See, e.g., Melendez-Diaz, 129 S. Ct. 2527, 2541 (2009) (indicating "[s]tates are free to adopt procedural rules governing objections,") (internal citation omitted). In Virginia, state law requires

Based on the above, the Virginia General Assembly in amending former §19.2-187 et seq, implicitly recognized the old scheme was unconstitutional by remedying the aforementioned constitutional deficiencies. This Court should explicitly do the same.

B. The Trial Court's Admission of the Certificates of Analysis in This Case Was Not Harmless Error.

The Commonwealth may argue any error admitting the certificates is harmless. The standard in determining whether constitutional error is harmless is that the error must have been harmless beyond a reasonable doubt. Grant, 54 Va. App. At 725. In making this determination, "we must ask 'whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction.'" Id. (internal citations omitted). The Commonwealth has the burden of establishing the constitutional error was harmless beyond a reasonable doubt. Id. at 726.

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that defendants raise a number of objections "not later than seven days before trial," including motions to suppress evidence based on Fourth, Fifth, and Sixth Amendment violations of the United States Constitution and/or the Constitution of Virginia. VA. CODE ANN. §19.2-266.2.

It is clear the certificates of analysis were important and "might have contributed" to prove the two offenses of possession with intent to distribute cocaine and transportation of more than one ounce of cocaine into the Commonwealth where: 1) the trial court sustained counsel's objection to the police officer's testimony that the substances in question were cocaine and required that the substances be referred to as suspected cocaine until after the certificates of analysis were entered into evidence—the prosecution adduced Appellant's admissions after the certificates were already in evidence; and 2) as importantly, with regard to Appellant's conviction under Count 2 of the indictment for transporting cocaine into the Commonwealth under Virginia Code §18.2-248.01, the Commonwealth needed to prove beyond a reasonable doubt that he transported "one ounce of more of cocaine, cocoa leaves, or any salt, compound, derivative or preparation thereof" into the state.

I. The Trial Court Sustained Counsel's Objection To The Police Officer Testifying The Substances Found In Appellant's Possession And Apartment Were Cocaine.

At trial, Detective Christopher Flood of the Alexandria Police Department attempted to testify that "I seized crack cocaine that was

located…." This statement brought an immediate objection from defense counsel:

> Your honor, I object, there is no foundation that this witness has the expertise to actually testify as to the nature of the substances found. We would ask that the testimony be stricken at this point, where he actually testified that he found cocaine and we would ask that because of the lack of expertise and foundation at this point, that the substance referred to be referred to as suspected cocaine or suspected narcotics, Your Honor.

JA at 51-52.

The court sustained the objection and the substances were referred to as suspected cocaine until after the introduction of the certificates of analysis. It is probable, taking Appellant's admissions in this light, that trial court attached great weight to the incriminating information in the certificates of analysis. Therefore, it cannot be concluded that the certificates of analysis did not contribute to Appellant's convictions beyond a reasonable doubt.

II. Weight.

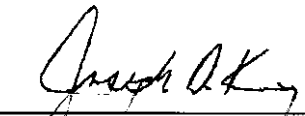
Under Virginia Code §18.2-248.01, the Commonwealth needed to prove that he transported "one ounce of more of cocaine, cocoa leaves, or any salt, compound, derivative or preparation thereof" into

the state. One ounce is equal to approximately 28.35 grams, and while Appellant estimated the substances in his apartment weighed "around 40 grams," clearly the best evidence of weight was recited in the certificates of analysis that indicated cocaine totaling 36.578 grams was recovered. Without the certificates, Appellant's statement was an estimate, which is insufficient to conclude that the certificates of analysis did not contribute to the trial court's analysis beyond a reasonable doubt.

CONCLUSION

For the above stated reasons, Mr. Briscoe respectfully requests that this Court reverse his convictions and remand the case to the trial court for a new trial if the Commonwealth be so advised.

Respectfully Submitted,
MARK A. BRISCOE
By Counsel



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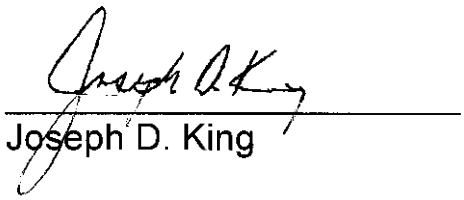
CERTIFICATE OF COMPLIANCE WITH RULE 5:26 OF THE SUPREME COURT

1. Mark A. Briscoe, Appellant, is incarcerated at the James River Correctional Facility, State Farm, VA 23160. Counsel for appellant is Joseph D. King, King & Campbell, Pllc., 526 King Street, Suite 213, Alexandria, VA 22314, (703) 683-7070. The Appellee is the Commonwealth of Virginia. Counsel for Appellee is Stephen McCullough, Solicitor General, Office of the Attorney General, 900

East Main Street, Richmond, VA 23219, (703) 786-2436.

2. Counsel filed 15 copies of this Brief on Remand with the Clerk of the Court, Supreme Court of Virginia, 100 North 9th Street, 5th Floor, Richmond, VA 23219, and mailed three copies to Stephen McCullough, Solicitor General, and Eugene Murphy, Special Assistant Attorney General, Office of the Attorney General, 900 East Main Street, Richmond, VA 23219, (703) 786-2436, on the 6th of May, 2010. An electronic copy was delivered to the Virginia Supreme Court via e-mail to scvbriefs@courts.state.va.us the same day.



Joseph D. King

VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF ALEXANDRIA

COMMONWEALTH OF VIRGINIA

v. Case # CF05000189

MARK A. BRISCOE

DEFENDANT.

COMMONWEALTH'S MEMORANDUM ON THE APPLICABILITY OF CRAWFORD V. WASHINGTON, 541 U.S. xx 029410 (2004)

I. INTRODUCTION

In Crawford v. Washington, the United States Supreme Court held that the Confrontation Clause of the Sixth Amendment requires exclusion of "testimonial" hearsay statements of an unavailable witness unless the accused is afforded an opportunity to cross-examine the witness.[1] See Crawford v. Washington, 541 U.S. ___ 029410, *33 (2004). A fair application of Crawford necessitates both an understanding of the factual basis of the case and the specific limitations of the decision. It is clear the case has no impact on most of Virginia's well established common law and statutory hearsay exceptions.[2]

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[1] In its ruling, the U.S. Supreme Court refuses to define testimonial. Crawford v. Washington, 541 U.S. ___ 029410, *33 (2004) ("We leave for another day any effort to spell out a comprehensive definition of 'testimonial'."). The Crawford Court does, however, indicate that confrontation concerns revolve around specific types of hearsay (formalized testimonial materials, affidavits, depositions, and pretrial statements reasonably expected to be used at trial). See discussion, infra.

* Page numbers preceded by an asterisk in citations to Crawford correspond to page numbers of the opinion as printed from Casefinder.

[2] "Where *non*-testimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law." Crawford v. Washington, 541 U.S. ___ 029410, *32-33 (2004) (emphasis added).

II. CRAWFORD IS FACTUALLY DISTINGUISHABLE FROM MOST CASES

The factual basis of Crawford sets important limitations on the Court's holding. In Crawford, the defendant was tried for assault and attempted murder. At trial, the State sought to introduce a recorded statement previously made by the defendant's wife Sylvia during police interrogation. Sylvia did not testify at trial because Crawford invoked protection under the State's marital privilege law; nonetheless, the State sought the introduction of her taped statement as evidence that the stabbing was not in self-defense. The defendant argued against the admission of the wife's taped statement on the grounds that such evidence violated his Sixth Amendment right to be "confronted with the witnesses against him."

Previously, the right of confrontation did not bar admission of an unavailable witness's statement against a criminal defendant if the statement had "adequate 'indicia of reliability'." Ohio v. Roberts, 448 U.S. 56 (1980). The balancing test created by Roberts and it's progeny allowed such hearsay evidence when it was demonstrated to be a "firmly rooted hearsay exception" or had "particularized guarantees of trustworthiness." Id. at 66. In Crawford the trial court admitted the statement on the ground that it had "particularized guarantees of trustworthiness."

The Washington State Supreme Court also upheld the conviction, deeming the wife's statement reliable because it was nearly identical to (i.e., interlocked with) the defendant's own statement to the police. Both statements were ambiguous as to whether the victim had drawn a weapon before the defendant assaulted him. In overturning Crawford's conviction, the United States Supreme Court ultimately overruled Ohio v. Roberts. The Crawford Court held that the State's use of the wife's statement violated the Confrontation Clause because, where testimonial

statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is confrontation. See generally Crawford, 541 U.S. at *5–33.

The extraordinary facts of Crawford isolate the concerns of the Supreme Court and are distinguishable from most hearsay issues confronting our courts. These facts must guide this court in determining which hearsay statements are "testimonial" and therefore implicate the Crawford constraints.

III. "TESTIMONIAL" EVIDENCE UNDER CRAWFORD v. WASHINGTON

Beyond the facts of Crawford, the applicability of the Supreme Court's holding depends upon the definition of "testimonial statements." Unfortunately, the Crawford Court did not provide any comprehensive definition of the term. (See n.1.)

Nonetheless, the Court did provide some clues as to hearsay statements that will be deemed "testimonial." The Court used the 1828 Webster's Dictionary definition of testimony as being a "solemn declaration or affirmation made for the purpose of establishing or proving some fact." The Court went on to explain that an "accuser who makes a **formal statement** to government officers bears testimony in a sense that a person who makes a **casual remark** to an acquaintance does not." 541 U.S. at *10 (emphasis added). The statement of Crawford's wife was the product of police interrogation and was made under circumstances that would lead an objective witness to reasonably believe his/her statement would be later used at trial. Crawford, 541 U.S. at *10.[3]

The Court gave some specific examples of statements that are testimonial. The Court

[3] The objective test stated in Crawford requires a trier of facts to analyze the particular facts and circumstances surrounding a out-of-court disclosure/statement and assess whether an objective witness—at the time of the disclosure—reasonably believed the statement would later be made available as evidence at trial. See Crawford, 541 U.S. at *10.

deemed "extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions" to be the core class of testimonial statements at odds with the confrontation clause. Crawford, 541 U.S. at *10 (emphasis added). As the Court noted:

> Various formulations of this core class of "testimonial" statements exist: ex parte in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially.

Crawford, 546 U.S. at *10.

In an important attempt to formulate a generic test to detect "testimonial" statements, the Court specifically indicated that such statements included those "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." Crawford, 541 U.S. at *10 [4] Application of this "test" and the other criteria used by the Supreme Court for determining a statement to be "testimonial" clearly limit the scope and impact of the Crawford decision.

Finally, the Crawford Court pointed out that the principal evil at which the Confrontation Clause was directed was the use of *ex parte* examinations as evidence against the accused. Crawford, 541 U.S. at *9. The Court also appears to be concerned with "inquisitorial practices" by government agents when investigating. Id. at *10. The Court specifically speaks of preliminary hearings, grand jury hearings, former trials, and police investigations as the type of

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[4] In applying those definitions, the Court said statements "taken by police officers in the course of interrogations are also testimonial under even a narrow standard. Police interrogations bear a striking resemblance to examinations by justices of the peace in England. The statements are not sworn testimony, but the absence of oath was not dispositive." Crawford, 541 U.S. at *10.

testimonial evidence banned absent cross examination. Because the Court fails to further define "testimonial," state tribunals must construe the definition of "testimonial" in light of the Court's overriding purpose and the historical evils that the Sixth Amendment sought to eliminate.

IV. CRAWFORD DOES NOT APPLY TO CERTIFICATES OF ANALYSIS

> "An accuser who makes a *formal* statement to government officers bears testimony in a sense that a person who makes a *casual* remark to an acquaintance does not. The constitutional text, like the history underlying the common-law right of confrontation, thus reflects an especially acute concern with a specific type of out-of-court statement." Crawford, 541 U.S. at *11.

Because the Crawford decision concerns itself with a specific type of hearsay (affidavits, depositions, formalized testimonial materials), its application does not extend to hearsay evidence which is not "testimonial." Further, in its decision, the Court acknowledged that "[m]ost of the hearsay exceptions covered statements that by their nature were ***not*** testimonial — for example, business records or statements in furtherance of a conspiracy." Crawford, 541 U.S. at *11 (emphasis added). In Virginia, the most commonly used hearsay exceptions allow for the admission non-testimonial evidence.

There are three reasons why Crawford does not impact the admissibility of a certificate of analysis filed in compliance with applicable provision of the Code of Virginia. See Va. Code Ann. §§19.2-187, 187.01, 187.02, 18.2-268.2. First, the defendant's right to confront and cross examine the preparer of such certificates is explicitly protected by statute. Second, the results contained in such certificates are not "testimonial" within the meaning of Crawford. Finally, public policy and principles of stare decisis strongly support the conclusion that Crawford should not apply to exclude such certificates.

IV. **The defendant's Sixth Amendment right to confrontation is adequately protected by statute in Virginia when a certificate of analysis is filed for use as evidence.**

It is notoworthy that in its loose ended attempt to define "testimonial," the Crawford Court uses as an example "prior testimony that the defendant was unable to cross-examine . . . ." Crawford, 541 U.S. at *10. In the final paragraph of his opinion, Justice Scalia notes that the State admitted a testimonial statement against Crawford "despite the fact that he had no opportunity to cross-examine . . . ." Crawford, 541 U.S. at *17. To the extent that the **opportunity for cross examination** appears to eliminate Crawford concerns, Virginia Code Section 19.2-187.1 provides a compelling argument that Crawford does not apply to exclude certificates of analysis. Section 19.2-187.1 provides the following:

> 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.

The Virginia Court of Appeals, albeit in an unpublished opinion, has opined that this statutory mechanism does not violate the defendant's Sixth Amendment rights to confrontation. See Wingfield v. Commonwealth, 97 Vap UNP 3000952 (1997). Although unpublished, the rationale of Wingfield is based on firmly established precedent. The rights granted to a defendant under the Confrontation Clause are not violated by admitting into evidence the certificate of analysis. The certificate falls within a "firmly rooted" hearsay exception. See Raia v. Commonwealth, 23 Va. App. 546, 551–52 (1996) (citing White v. Illinois, 502 U.S. 346, 356–57 (1992); see also Bourjaily v. United States, 483 U.S. 171 (1987). In the instant case, the

certificate of drug analysis was admitted under Code §§ 19.1-187 and 19.2-187.1[5].

In further construing this statute, in the case of Winston v. Commonwealth, the Court of Appeals notes that Code § 19.2-187 "imposes a condition for the exoneration of an otherwise hearsay document from the application of the hearsay rule, thus making the document admissible."

Since the statute authorizes the admission of documents whose reliability had not been independently proven, the requirement that the certificate be filed seven days in advance provides some guarantee of trustworthiness in that it gives an accused an opportunity to verify the results or to subpoena and challenge those who constructed the analysis. See Myrick v. Commonwealth, 13 Va. App. 333, 337 (1991) (emphasis added). See also Kay v. United States, 255 F.2d 476, 479–80 (4th Cir. 1958) (holding that then Code § 18.2-75.2 did not violate the Confrontation Clause); United States v. Farmer, 820 F. Supp. 259 (W.D. Va. 1993) (holding that certificate of blood alcohol analysis did not violate Confrontation Clause and was admissible under the business records exception to the hearsay rule).

The opportunity to challenge the analysis, afforded the defendant by statute, fully

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[5] Code § 19.2-187 provides, in part:

> In any hearing or trial of any criminal offense . . . a certificate of analysis of a person performing an analysis or examination, . . . when such certificate is duly attested by such person, shall be admissible in evidence as evidence of the facts therein stated and the results of the analysis or examination referred to therein, provided (i) the certificate of analysis is filed with the clerk of the court hearing the case at least seven days prior to the hearing or trial and (ii) a copy of such certificate is mailed or delivered by the clerk or attorney for the Commonwealth to counsel of record for the accused at least seven days prior to the hearing or trial upon request of such counsel.
>
> Any such certificate of analysis purporting to be signed by any such person shall be admissible as evidence in such hearing or trial without any proof of the seal or signature or of the official character of the person whose name is signed to it.

mitigates the concerns of the Crawford Court. No violation of the defendant's right of confrontation occurs. The defendant is given the express statutory right pursuant to Code § 19.2-187.1 to subpoena the expert performing the analysis or the person involved in the chain of custody to testify at trial. A defendant's choice not to avail himself of that process does not constitute a denial of his confrontation right; it is simply a waiver of an opportunity to conduct cross examination. Virginia's statutory scheme provides a defendant with adequate notice that the prosecution intends to rely on the certificate and it affords a defendant the absolute right to call the preparer or chain of custody witness as an adverse witness at the Commonwealth's expense should he so desire. Thus, no violation of either the United States or Virginia Constitution occurs by use of the statutory procedure authorized by §§ 19.2-187 and 19.2-187.1 of the Code.

V. The results contained in a certificate of analysis are non-testimonial.

The statements contained in a certificate of analysis are reports of results of scientific testing completed by a government employee pursuant to his or her official duties. This is not the type of hearsay evidence the Crawford Court sought to exclude.

In Crawford, the specific hearsay at issue was a statement made by the defendant's wife, who was a witness to the crime, given in response to police interrogation. While a certificate of analysis is a statement prepared with the expectation that it would be used "prosecutorially," it is not a statement that is the product of questioning by government agents. The results contained in a certificate of analysis bear no resemblance to the "inquisitorial practices" with which the Crawford Court was concerned in its opinion. Id. at *10.

Virginia Courts have long considered certificates of analysis to be documentary evidence

and therefore non-testimonial in nature. A certificate of analysis documents the results of scientific testing. Justice Scalia aptly noted the distinction between hearsay statements that are testimonial and those that are non-testimonial in nature. See Crawford, 541 U.S. at *11 ("Most of the hearsay exceptions covered statements that by their nature were *not* testimonial — for example, business records or statements in furtherance of a conspiracy.") Like business records, statements contained in official public records contain facts which are documentary rather than testimonial in nature. Laboratory analyses identifying controlled substances have long been admissible as a business record under Federal Rule of Evidence 803(6). See United States v. Roulette, 75 F.3d 418, 421-22 (8th Cir. 1996), *cert. denied*, ___ U.S. ___, 117 S. Ct. 147, 136 L.E.2d 93 (1996). In the instant case, the certificate of drug analysis was admitted under Code §§ 19.1-187 and 19.2-187.1, Virginia's statutory equivalent to FRE 803(6).

In Robertson v. Commonwealth, 211 Va. 62 (1970), the Supreme Court of Virginia addressed the confrontation issue in the context of the admission of laboratory reports. Robertson was tried and convicted of raping two young girls. On appeal, Robertson argued the trial court erred in allowing for the admission of copies of two laboratory reports showing the presence of seminal fluid in the vaginal specimens provided by the victims. Robertson claimed that the relevant statutory provision at that time (then Virginia Code § 19.1-45), which allowed for the admissibility of the lab reports, deprived him of his constitutional right of cross-examination. In denying Robertson's constitutional claim, the Court ruled that "[t]he admission of a laboratory report in evidence violates no constitutional right of a defendant. The right to be confronted with one's accusers and witnesses does not operate to exclude proper documentary evidence." Robertson v. Commonwealth, 211 Va. 62, 65 (1970) (emphasis added).

Similarly, in Bracy v. Commonwealth, 119 Va. 867 (1916), the Supreme Court held that the appellant was not deprived of his right of confrontation where the trial court admitted a chemical test showing a beverage to be alcoholic. The Court reasoned that the results of the chemical test were proper documentary evidence and admissible under the documentary evidence exception. See Bracy v. Commonwealth, 119 Va. 867 (1916); see also Kay v. United States, 255 F.2d 476 (4th Cir. 1958), cert. denied, 358 U.S. 825, 79 S. Ct. 42, 3L. Ed. 2d 65 (holding issue of the defendant's right to confront the chemist who conducted chemical test producing a certificate of analysis admitted into evidence without the chemist's testimony is a question that goes to the weight of the evidence, not to the initial admissibility of the certificate).

3. Public policy and principles of stare decisis strongly support the conclusion that Crawford should not apply to exclude certificates of analysis.

"Stare decisis is a doctrine implemented for the purpose of assuring consistent, predictable, and balanced application of legal principles. And when a court of last resort has established a precedent, after full deliberation upon the issue by the court, the precedent will not be treated lightly or ignored, in the absence of flagrant error or mistake." Selected Risks, Ins. Co. v. Dean, 233 Va. 260, 265 (1987). "[Importantly,] Under the doctrine of stare decisis, the principles of law as applicable to the state of facts in [an earlier case] will be adhered to, and will apply in later cases where the facts are substantially the same, even though the parties are different." Knewstep v. Jackson, 259 Va. 263, 267 (2000) (citing Commercial Business Systems, Inc. v. Halifax Corporation, 253 Va. 292, 297 (1997))(emphasis added).

Construing the Court's opinion in Crawford as binding precedent for excluding the certificate of analysis ignores the underlying principles of stare decisis. Even if this court rejects

the argument that certificates of analysis are non-testimonial in nature, it is nonetheless clear that the factual predicates underlying the content of a certificate and the content of the statement in Crawford are vastly different. The facts in Crawford are clearly not "substantially the same" as the facts in the present case. Knewstep, 259 Va. at 267. As a consequence, Crawford does not compel this Court to exclude the certificate of analysis by extending the case to apply far beyond substantially similar factual circumstances.

Assuming, arguendo, this Court finds the certificate of analysis to be testimonial, public policy considerations of expediency, efficiency and convenience coupled with the reliability safeguards required by § 19.2-187 outweigh any prejudicial effect to the defendant in the admission of the certificate.

"The right of a defendant in a criminal prosecution to confront his accusers is guaranteed by both the United States and Virginia Constitutions. This right, however, 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 (1973) (citation omitted). It must be assured in a fashion 'sensitive to the necessities of trial and the adversary process' and 'must occasionally give way to considerations of public policy and the necessities of the case.' (citations omitted). Nevertheless, it remains a constitutional right compromised "only where . . . necessary to further an important public policy and where the reliability of the testimony is otherwise assured." Baugh v. Commonwealth, 14 Va. App. 368, 371–372 (1992) (holding public policy concerns in admitting a certificate prepared by the general district court judge detailing the circumstances of a contempt of court charge pursuant to Virginia Code § 18.2-459 outweighed the defendant's constitutional right to confront witnesses) (citations omitted).

Public policy concerns of expediency, efficiency, and convenience are legitimate public policy concerns the Court must take into consideration. Such public policy concerns were addressed by the Supreme Court of Virginia in Robertson. "The purpose of the statute . . . is primarily to obviate the necessity of summoning as witnesses those physicians or technicians who, in their official capacity, are required to make pathological, bacteriological and toxicological investigations, as well as post-mortem examinations.[6] Such a provision is not only expedient and convenient — it prevents the delay that would result if the limited number of physicians, chemists and technicians were forced to testify whenever a report made by them was offered in evidence." Robertson, 211 Va. at 64-65.

Identical public policy considerations are implicated in the present case. Requiring multiple scientific experts to appear in criminal misdemeanor and felony trials to testify regarding the results of hundreds, if not thousands, of tests each year would unnecessarily burden the Commonwealth's resources and would not serve any practical purpose in establishing the reliability of the facts contained in the certificate itself. "[T]he principal rationale underlying the hearsay rule [is] that of reliability . . . ." King v. Commonwealth, 18 Va. App. 57, 59 (1994). "It is well settled that the legislature may exonerat[e] . . . otherwise hearsay [evidence] from the application of the hearsay rule, thus making that [evidence] admissible." Hills v. Commonwealth, 32 Va. App. 479, 490 (2000) (holding the admissibility of DNA testing pursuant to § 19.2-270.5 is based on a legislative determination that the database used to perform

[6] The idea that autopsy reports should be subject to stricter scrutiny under Crawford because they offer expert opinion should be of no concern. Expressions of opinion are not admissible merely because they are included in a medical examiner's report. Only statements of fact are admissible under the Code § 19.2-188 exception to the rule excluding hearsay evidence. See Hopkins v. Commonwealth, 230 Va. 280, 281 (1985).

the testing is presumptively reliable) (quoting Basfield v. Commonwealth, 11 Va. App. 122, 124 (1990)).

In conclusion, application of the balancing of interests analysis discussed in Baugh necessitates a finding that legitimate public policy interests, coupled with the strict compliance with the reliability safeguards required by §19.2-187, preclude application of Crawford to exclude certificates of analysis, especially when the defendant's right of confrontation is afforded adequate statutory protection in any event. Consequently, the certificate of analysis should be admitted.

V. CONCLUSION

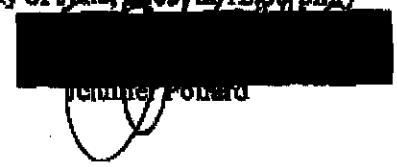
For the foregoing reasons, the Commonwealth respectfully submits the defendant's motion to exclude evidence made pursuant to Crawford v. Washington should be denied.

Respectfully submitted,

Jennifer Pollard
Assistant Commonwealth's Attorney

Certificate of Service

I certify that a true copy of the foregoing was sent by facsimile to Teresa McGarrity, Esq., Office of the Public Defender, this 16th day of June, 2005 at 12:35 pm.



Jennifer Pollard