IN THE

SUPREME COURT OF VIRGINIA

RECORD NO. 070817

MARK A. BRISCOE,

Appellant

v.

COMMONWEALTH OF VIRGINIA,

Appellee

BRIEF FOR THE COMMONWEALTH

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BRIEF FOR THE COMMONWEALTH

STATEMENT OF THE CASE

On June 16, 2005, a judge, sitting without a jury in the Circuit Court of the City of Alexandria, convicted Mark A. Briscoe of possession of cocaine with intent to distribute under Virginia Code § 18.2-248 and transportation of cocaine into the Commonwealth of Virginia under Code § 18.2-248.01. On August 18, 2005, the court sentenced Briscoe to 15 years for possession with intent to distribute and five years for transportation of cocaine and suspended all but two years and eight months on the

possession charge and all but three years of the sentence for transportation of cocaine. (App. 13-15).

On January 18, 2007, a single judge of the Court of Appeals denied the defendant's petition for appeal. (App. 19-23). On March 26, 2007, a three judge panel of that court again refused the appeal. (App. 24).

This Court granted a petition for appeal on July 30, 2007 and affirmed the convictions on February 29, 2008. Magruder v. Commonwealth, 275 Va. 283, 657 S.E.2d 122 (2008). On January 25, 2010 the United States Supreme Court after briefing and argument vacated the judgment of this Court and remanded the case "for further proceedings not inconsistent with the opinion in Melendez-Diaz v. Massachusetts, 557 U.S. ___ [, 129 S. Ct. 2527] (2009)."

ASSIGNMENT OF ERROR

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.

QUESTION PRESENTED

DOES MELENDEZ-DIAZ REQUIRE THAT THIS COURT RULE THAT THE DEFENDANT'S RIGHT TO CONFRONTATION WAS VIOLATED BY THE ADMISSION OF CERTIFICATES OF ANALYSIS WITHOUT THE LIVE TESTIMONY OF THE TECHNICIAN?

STATEMENT OF FACTS

On February 10, 2005, Alexandria City police officers executed a search warrant on the defendant's residence. (App. 39-40). When Briscoe opened the door, a search of his person disclosed crack cocaine. (App. 43). Cocaine was also recovered in the kitchen, scattered about in plain view. (App. 52). Paraphernalia, including two scales with cocaine residue, a razor blade with such residue and a 100 gram weight, was found on shelves in the kitchen cabinet. (App. 52, 56-57). The officers also recovered a box of sandwich baggies and a small plate with cocaine residue in the kitchen. (App. 52). Crack cocaine was found in the garbage disposal in the kitchen sink and a small rock of suspected crack cocaine was found on the kitchen counter. (App. 53-54). Suspected crack cocaine was also found in the ice cube tray. (App. 55). The officers found no items for use in ingesting crack cocaine for personal use. (App. 99).

An officer qualified as an expert in the use and distribution of crack cocaine testified to the manner in which cocaine was purchased, prepared

and sold by dealers. (App. 115-17). He pointed out that the scales are used to prepare cocaine for distribution. (App. 118). He also testified that the possession of the amount of cocaine present here would be inconsistent with personal use. (App. 119).

After his arrest the defendant spoke with detective Thomas Ritchie, who informed him of the charges. (App. 123-25). The defendant told the officer that all of the items found in the house, i.e., the cocaine, the crack and the baggies, were his, as was the crack found in his pocket. (App. 126). He said the cocaine that was found in the sink should weigh around 40 grams. (App. 126-27).

When asked where he had obtained the cocaine, the defendant said he "got it from 'my man in D.C. two weeks ago.'" (App. 127). He then said "I brought it over here. . . . Yeah, I got it in D.C., and I brought it down here." (App. 127). The defendant said the cocaine was hard when he obtained it. (App. 127-28).

The defendant explained that when he had moved down from the District of Columbia six months earlier and had observed how "green" the dealers were, he "saw how much money there was down here and [he] just had to step in." (App. 128).

The defendant said he obtained cocaine from three men in D.C. According to Briscoe, he usually purchased a quarter of a kilo from Japel and had bought 80 times from him in the past five years. (App. 128-29). The defendant gave Japel's telephone number to the police. (App. 128-29).

The defendant said his second supplier was Tony Marshall, from whom he obtained a quarter kilo of cocaine four or five times during October and December, 2004. (App. 129). The defendant identified his third source as Carl, from whom he obtained 62-gram packages of cocaine every day or almost every day. (App. 129). Briscoe admitted he had probably obtained such an amount 50-80 times and had last obtained drugs from Carl two weeks before his arrest. (App. 129-30). Briscoe said he would pay $1,800 for that amount and make a profit of $900, selling the cocaine in the form of eight balls. (App. 130).

Over the defendant's objections, the court admitted the certificates of analysis establishing that all of the suspected cocaine was in fact cocaine. (App. 222-23).

ARGUMENT

THE TRIAL COURT PROPERLY ADMITTED THE CERTIFICATES OF ANALYSIS.

The defendant contends that Melendez-Diaz requires that this Court reverse its decision in Magruder and hold that Briscoe's right to confrontation was violated. For the reasons stated below, Magruder was correctly decided and the defendant's convictions should be affirmed.

Standard of Review

"[T]he determination of the admissibility of relevant evidence is within the sound discretion of the trial court subject to the test of abuse of that discretion." Beck v. Commonwealth, 253 Va. 373, 384-85, 484 S.E.2d 898, 905, cert. denied, 522 U.S. 1013 (1997); Thomas v. Commonwealth, 263 Va. 216, 559 S.E.2d 652 (2002). The question of whether admission of evidence violates the Confrontation Clause is a matter of law reviewed by this Court *de novo*. Michels v. Commonwealth, 47 Va. App. 461, 465, 624 S.E.2d 675, 678 (2006).

Virginia's Previous Statutes Satisfied Melendez-Diaz

Under Virginia's notice and demand statutes, the defendant could have ensured the presence of the analyst by making a demand, within a reasonable time, that the prosecution produce the analyst. He did not do so and thus he waived any claim under the Confrontation Clause.

The defendant recognizes that 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." (Def. Br. 8-9, citing 129 S.Ct. at 2541). In Magruder, this Court found Virginia's former statutory scheme embodied such a notice and demand system.

The Court said:

> [T]he question whether the procedure provided in Code § 19.2-187.1 adequately protects a criminal defendant's right to confront the forensic analyst turns on whether the statute supplies the "elements of confrontation — physical presence, oath, cross-examination, and observation of demeanor by the trier of fact." [Maryland v.] Craig, 497 U.S. [836,] 846 [(1990)]. We conclude that it does. Pursuant to Code § 19.2-187.1, the defendants could have insured the physical presence of the forensic analysts at trial by issuing summons for their appearance at the Commonwealth's cost, or asking the trial court or Commonwealth to do so. At trial, the defendants could have called the forensic analysts as witnesses, placed them under oath, and questioned them as adverse witnesses, meaning the defendants could have cross-examined them. The trier of fact would then have had the opportunity to observe the demeanor of the witnesses. In short, if the defendants had utilized the procedure provided in Code § 19.2-187.1, they would have had the opportunity to cross-examine the forensic analysts. Contrary to the defendants' position, the Confrontation Clause does not insure that opportunity before a certificate of analysis is admitted into evidence. See Crawford [v. Washington], 541 U.S. [36,] 59 n.9 [(2004)] (the Confrontation Clause "does not bar admission of a statement so long as the declarant is present at trial to defend or explain it").

275 Va. at 299, 657 S.E.2d at 120-21 (other citations omitted).

The Confrontation Clause was designed to ensure that a witness testifies face-to-face, under oath, and subject to cross-examination. Virginia law, as interpreted by this Court, satisfied these requirements. Moreover, "[s]tates are free to adopt rules governing" a defendant's Confrontation Clause objection. Melendez-Diaz, 129 S. Ct. at 2541.

These notice and demand statutes serve important state interests. This discussion addresses the compelling state interest in having a defendant state his Confrontation Clause objection prior to trial. As many other states have done, Virginia sensibly streamlined trial practice to ensure the analysts are present when their testimony genuinely is in dispute, but not otherwise.

Notice

The first component of a "notice and demand" statute is notice. This Court concluded that the statutes at issue provided sufficient notice to a defendant.

> Based on the provisions of Code §§ 19.2-187 and 19.2-187.1, no criminal defendant can seriously contend that he is not on notice that a certificate of analysis will be admitted into evidence without testimony from the person who performed the analysis unless he utilizes the procedure provided in Code § 19.2-187.1. Failure to use the statutory procedure obviously waives the opportunity to confront the forensic analyst. . . . Thus, we reject not only the defendants' contention that the statutes need to contain an explicit notice outlining the consequences of failing to utilize the procedure set forth in

> Code § 19.2-187.1, but also the assertion that their waiver of confrontation rights was not voluntary, intelligent, and knowing. Confrontation Clause rights are waived every day in this Commonwealth when a criminal defendant's attorney chooses not to object to the admission of hearsay evidence or stipulates to the admission of evidence. We have never required, nor should we, that the record affirmatively reflect a defendant's knowing, voluntary, and intelligent agreement to such waivers.

275 Va. at 304-05, 657 S.E.2d at 124 (citations omitted).

Code § 19.2-187 makes it clear that a certificate of analysis is admissible without the testimony of the analyst. The prosecution must file the certificate with the trial court in advance of trial, and defense counsel can request a copy. Id. Virginia law satisfied the need for notice.

Demand

The defendant's principal contention is that the "demand" provisions of the former Virginia statute were inadequate because they required a defendant to issue a "subpoena" for the analyst. In their view, Code § 19.2-187.1 was a "subpoena statute" of the type that this Court invalidated in Melendez-Diaz,129 S. Ct. at 2540. (Pet. Br. 10). This premise is simply wrong. This Court construed Code § 19.2-187.1 in a way that obviated the constitutional difficulty associated with a pure "subpoena statute." The construction of a Virginia statute by this Court is final and binding on the federal courts. See Bradshaw v. Richey, 546 U.S. 74, 76 (2005) ("We have repeatedly held that a state court's interpretation of state law, including one

announced on direct appeal of the challenged conviction, binds a federal court sitting in habeas corpus."); Adderley v. Florida, 385 U.S. 39, 46 (1966) (State court interpretation of elements of state crime "binding on us.").

The statute simply states that the forensic "witness shall be summoned and appear at the cost of the Commonwealth." Code § 19.2-187.1. It did not specify who must subpoena the forensic analyst. Resolving this ambiguity, this Court construed the statute to provide that a defendant can "insure[ ] the physical presence of the forensic analysts at trial by issuing summons for their appearance at the Commonwealth's cost, ***or asking the trial court or Commonwealth to do so****."* 275 Va. at 298, 657 S.E.2d at 120-21*.* (emphasis added). So construed, the Virginia statute did not function as a pure "subpoena statute." A defendant had the option of making a demand for the prosecution to produce the analyst for trial.

The Court of Appeals confirmed this reading of the statute in Grant v. Virginia, 54 Va. App. 714, 682 S.E.2d 84 (2009). The defendant, before trial, made a written demand that the prosecution produce the forensic analyst who had performed the analysis of his blood alcohol. Id. at 718,

682 S.E.2d at 86. Despite this written demand, the prosecution did not produce the analyst. Id.

When the defendant objected at trial to the introduction of the certificate of analysis, the trial court concluded that he had not complied with Code § 19.2-187.1 "because he had not subpoenaed the breath test operator." Id. On appeal, the Court of Appeals unanimously reversed, holding that the defendant

> [c]omplied with the requirements of Code § 19.2-187.1 and did not waive his right to confront the person who prepared the certificate. In Magruder, our Supreme Court clarified that a criminal defendant could insur[e] the physical presence of the forensic analysts at trial" under Code § 19.2-187.1 "by issuing summons for their appearance at the Commonwealth's cost, ***or asking the trial court or Commonwealth to do so***." Magruder, 275 Va. at 298, 657 S.E.2d at 120-21 (emphasis added). Here, Grant notified the Commonwealth "that he desire[d] that the preparer of the certificate . . . *be summoned by the Commonwealth to appear at trial . . .*at the cost of the Commonwealth to be cross-examined in this matter." (Emphasis added). Grant did what our Supreme Court instructed in Magruder, and, accordingly preserved his right to confront the preparer of the certificate.

Id. at 724, 682 S.E.2d at 89. Accordingly, the Virginia case law refutes the defendant's claims that the scheme shifts the burden and permits only the right to subpoena the analyst. All a defendant needed to do was make a demand within a reasonable time that the prosecution produce the analyst.

If the prosecution failed to do so, Grant shows that the prosecution will bear the consequences of its failure to produce the analyst.

Here, however, the defendant waived his right to confront the analyst because, unlike the defendant in Grant, he took no steps prior to trial to demand the analyst's presence. Had he done so, it would have been incumbent on *the prosecution* to have the analyst present for trial. A failure by the prosecution to produce the analyst would have resulted in the exclusion of the certificate of analysis from the evidence.

Virginia's former statutory scheme did not specify when a defendant must make a demand for the analyst to be present. However, "[i]t is a general rule of wide acceptation that, when no particular time is specified for the exercise of a right or privilege, the law presumes that a reasonable time was intended." In re Edwards, 130 So. 615, 617 (Fla. 1930). See also Niles v. Boston Rent Control Adm'r, 374 N.E.2d 296, 305 (Mass. App. Ct. 1978) ("In the absence of a time period specified by statute, the time allowed . . . is a 'reasonable time,' which 'is to be determined from the facts and circumstances of each particular case.' ") (citation omitted). There is no issue in the case at bar concerning the timing of the demand for the analyst's presence. The defendant made no demand at all until the middle of trial, obviously too late to ensure the presence of the analyst.

Particular Order Of Proof Not Required

Adverse Witness

The defendant also argues that he would have had to examine the forensic analyst as an adverse witness during the defense case, rather than during the prosecution's case-in-chief. He further says that the prosecution would have been able to introduce the certificate of analysis into evidence before the defense could cross-examine the analyst. Because the defendant never took the first step of ensuring the presence of the analyst, the analyst was not present at trial. The defendant was not forced to cross-examine the analyst as part of the defense case, and the trial court did not have to make any ruling regarding the admissibility of the certificate of analysis prior to the live testimony of the forensic analyst. As this Court observed:

> Because the defendants did not avail themselves of the opportunity to require the presence of a particular forensic analyst at trial, they were never in the position of being forced, over their objection, to call a forensic analyst as a witness. In other words, no defendant said to the respective circuit court, "the forensic analyst is here to testify but the Commonwealth must first call the witness.". Like the situation in Brooks [v. Commonwealth, 49 Va. App. 155, 638 S.E. 2d 131 (2006)], "[T]he trial court never had occasion to address the proper order of proof."

275 Va. at 301, 657 S.E.2d at 122.

The defendant's argument on this point is abstract. In fact, it is likely that most prosecutors would have called the witness as part of their case-in-chief. This is so for a variety of obvious tactical reasons. It clearly benefits the prosecution to initially question the witness so as to shape the factfinder's first impression of the witness. The prosecution will want to establish the education and experience of the forensic analyst, the straightforward nature of the scientific analysis of the drug sample or the blood sample, and the extensive safeguards that ensure the accuracy of the analysis. Furthermore, prosecutors will want to avoid the impression that they have "something to hide" by failing to call the analyst and to diffuse any points the defense might wish to make. "[T]the failure to call an available, friendly witness creates a bad impression, no matter what the technical legal result may be." Hilton Spellman, DIRECT EXAMINATION OF WITNESSES 62 (1968). Indeed, there is no compelling reason for a prosecutor to give defense counsel the first chance to examine the analyst.

Just as a prosecutor has good reasons to ensure the analyst is called during the prosecution's case-in-chief, so does the trial court. When faced with an objection by defense counsel that the Constitution requires the prosecution to call the analyst as its witness, a trial judge likely would exercise his broad discretion and compel the prosecution to call the analyst

as part of the prosecution's case-in-chief. Certainly, nothing in the statute precludes the trial court from doing so.

Admission of Certificate

As for the defendant's complaint that the certificate of analysis would have been admitted into evidence before the testimony of the analyst, the contention is again pure speculation. Sound tactical reasons and widespread Virginia practice suggest that, once a defendant has made a demand for the prosecution to produce the analyst, the prosecution will present the testimony of the analyst, who will then authenticate the exhibit. It is possible, but not likely, that the court here would have allowed, over the defendant's objection, the admission of the certificate prior to the analyst's testimony. Most trial courts and prosecutors, however, will be reluctant to inject an appellate issue into the case, especially when the issue easily can be diffused by having the analyst testify before the certificate is introduced into evidence.

This Court is, of course, reluctant to render the sort of advisory opinion sought here.

> [T]he Commonwealth invites this Court to render an advisory opinion on a moot question based upon speculative facts. This is an exercise in which the Court traditionally declines to participate. "The reason . . . is that the courts are not constituted . . . to render advisory opinions, to decide moot questions or to answer inquiries which are merely speculative."

Commonwealth v. Harley, 256 Va. 216, 219-20, 504 S.E.2d 852, ___ (1998).(citing City of Fairfax v. Shanklin, 205 Va. 227, 229-30, 135 S.E.2d 773, 775-76 (1964)). Briscoe seeks to have this Court tell the trial court how it should have proceeded if he had made certain requests that he did not.

Had the defendant exercised his right to demand that the Commonwealth produce the analyst, and then called the analyst as an adverse witness, the analyst would have testified under oath, been cross-examined, and had his demeanor observed by the factfinder. Thus, the traditional protections of the Confrontation Clause, see United States v. Owens, 484 U.S. 554, 560 (1970), would have been provided.

Meaning of Confrontation Clause

Even if this Court were to reach the hypothetical issue of how the defendant's trial would have unfolded, the Confrontation Clause does not protect a particular order of proof. The issue then becomes whether the Confrontation Clause ***additionally*** requires the prosecution to present the witness's testimony during the prosecution's case-in-chief and before any exhibits associated with that witness's testimony have been introduced into evidence.

Melendez-Diaz did not resolve these questions. To be sure, the Supreme Court noted that "the Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court." Melendez-Diaz, 129 S. Ct. at 2540. The point of that section of the opinion, of course, was to make clear that a defendant's "ability to subpoena the analyst" under the Compulsory Process Clause "is no substitute for the right of confrontation." Id. Therefore, the prosecution had to "present" or "produce" its witnesses to provide the defendant with an opportunity to cross-examine them, rather than having to rely on his right to compulsory process. Melendez-Diaz did not purport to hold that permitting a defendant to cross-examine a witness before the prosecution examined the witness necessarily violated the Confrontation Clause.

In Crawford, the Court looked to a variety of historical sources to determine the meaning of the Confrontation Clause. Those sources— including the colonial experience with vice-admiralty courts, the notorious treason trials of Sir Walter Raleigh, state constitutions, and Constitution Framing-era treatises— reflect that the Clause "commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. The Clause thus reflects a

judgment, not only about the desirability of reliable evidence . . . but about how reliability can best be determined." 541 U.S. at 61. A review of those sources further reveals that the Clause is not concerned with the structure of criminal trials and the order by which witnesses are examined. The common law confrontation right was concerned with ensuring defendants the opportunity to cross-examine witnesses against them, a right fully protected by the Virginia statute.

Cases around the time of the founding of the United States typically proceeded with the prosecution's witnesses, to be followed by any defense witnesses. *See, e.g.*, 3 William Blackstone, *Commentaries* 367 (describing trials as beginning with one side presenting evidence, followed by the adverse case and then a reply). However, there is no evidence that the Framers attributed any particular importance to this sequence of events. Indeed, compared to modern trial practice, "[t]he colonial trial was far more informal and dynamic." Daniel D. Blinka, Trial by Jury on the Eve of Revolution: the Virginia Experience, 71 UMKC L.REV. 529, 568 (2003).

For the most part, witnesses testified in "narrative" form, that is, they related what they "knew" about an event unimpeded by the "Q and A" characteristic of contemporary trials. The party who called the witness might ask pertinent questions, following which the opponent had the

opportunity to cross-examine. Compared to their modern counterparts, judges interceded freely, often with pointed questions that revealed their predisposition about the case. It also appears that jurors occasionally asked questions, although the extent of this practice is impossible to determine. Id. at 568-69.

The "Boston Massacre" trials of British soldiers in 1770 illustrate this flexibility. "[W]itnesses were not sequestrated, but remained in open court during the taking of other testimony; . . . witnesses were called out of order (Crown witnesses were called in the middle of the defense's case); [and] rebuttal witnesses were called immediately, to refute specific segments of testimony." The Boston Massacre Trials, in 3 LEGAL PAPERS OF JOHN ADAMS 27 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965).

The treason trial of Aaron Burr, over which Chief Justice John Marshall presided, offers a further illustration of the flexibility of trial practice. 1 REPORTS OF THE TRIALS OF COLONEL AARON BURR FOR TREASON (1808). Occasionally, the first question for a prosecution witness would come from the defense. Burr's prosecutors at times would interrupt the defense's cross-examination with questions. Conversely, defense counsel, and the defendant himself, would interrupt the prosecution's direct examination with questions. Sometimes the jurors

would ask questions. See generally id. at 474-91 (examination of William Eaton) and 505-14 (examination of Thomas Morgan). This procedure would be highly unusual in a modern trial. However, there is no evidence that this flexibility was viewed as problematic or that the Confrontation Clause was designed to displace the flexibility that characterized trials around the time of the framing of the Constitution. .

Commonwealth Can Require Defendant to Take Some Steps

Virginia's statutory scheme provides a mechanism for governmental and judicial economy by obviating the need for the prosecution to call the preparer of the certificate and chain of custody witnesses. The statutes provide the defendant with adequate notice that the prosecution intends to rely on the certificate and affords the defendant the absolute right to call the preparer or chain of custody witnesses as an adverse witnesses, should he so desire. The statutes comport with the Confrontation Clause.

By failing to employ the procedure outlined in Code § 19.2-187.1, the defendant waived any right to confront the witnesses. By analogy, the Supreme Court in Davis v. Washington, 547 U.S. 813 (2006), found that "when defendants seek to undermine the judicial process by procuring or coercing silence from witnesses and victims, the Sixth Amendment does not require courts to acquiesce." Id. at 833.

Code § 19.2-187.1 does not deprive defendants of their rights to confrontation. It merely set forth a procedural framework a defendant must follow to address the issues. See John G. Douglass, Beyond Admissibility: Real Confrontation, Virtual Cross-Examination, and the Right to Confront Hearsay, 67 Geo. Wash. L. Rev. 191, 229 (1999) ("Properly applied, . . . a rule providing that defendants must request a subpoena to invoke the confrontation right should not work a serious hardship on defendants. In essence, the rule requires that a defendant mean what he says when he asks for confrontation."); see Brooks v. Commonwealth, 49 Va. App. 155, 638 S.E.2d 131 (2006) (petition for appeal refused by this Court on April 27, 2007).

In this case, there are many strategic reasons that would account for the defendant's choice not to have the analyst present. For example, this testimony could elevate the importance of the analysis to the fact finder. Moreover, cross-examination on a routine scientific matter would not likely result in any gain for the defense. At any rate, the defendant had the opportunity to cross-examine the analyst and waived it.

Remand Does Not Require Reversal

The defendant argues that the mere act of the United States Supreme Court in remanding this matter indicates that Virginia's scheme is

not acceptable under Melendez-Diaz. Under the principles of federal-state comity, however, it was fully appropriate to permit this Court to review its statutory scheme in light of Melendez-Diaz, decided well after Magruder. "[N]o principle has found more consistent or clear expression than that the federal courts should not adjudicate the constitutionality of state enactments fairly open to interpretation until the state courts have been afforded a reasonable opportunity to pass upon them." Harrison v. NAACP, 360 U.S. 167, 176 (1959).

Significantly, the Court also remanded an appeal from Ohio in which the judgment was vacated and remanded "for further consideration in light of Melendez-Diaz." Moore v. Ohio, 176 L.E. 2d 176, 2010 U.S. Lexis 2024 (decided March 1, 2010). In the Melendez-Diaz opinion the Court had cited the Ohio statute as exemplifying a simple notice and demand statute that involved no burden shifting. 129 S. Ct. at 2541. Nevertheless, the Court remanded the case so that the state court itself could determine the nature of the Ohio statute. And, indeed, on remand the Ohio court found that its statute satisfied Melendez-Diaz. State v. Moore, ___ N.E.2d ___, 2010 Ohio App. LEXIS 1298 (decided April 8, 2010).

If, as Briscoe argues, any remand indicates disapproval of the state court position, the United States Supreme Court would be deemed to have

disapproved the Ohio statute that it seemingly approved in its opinion. The action of that Court in remanding this case plainly is not determinative of its view of this Court's previous action.

When this Court decided Magruder, it did not have the benefit of the decision in Melendez-Diaz. The order of the Supreme Court contemplates nothing more than an assessment of Magruder in light of Melendez-Diaz. This is consistent with United States Supreme Court principle that state "courts 'have the final authority to interpret . . . that State's legislation.'" Brown v. Ohio, 432 U.S. 161, 167 (1977). (quoting Garner v. Louisiana, 368 U.S. 157, 169 (1961)). That Supreme Court, rather than itself applying Melendez-Diaz to the Virginia statutes, has simply remanded the case so that this Court can appropriately undertake that interpretation.

Commonwealth's Attorney's Interpretation Not Controlling

The defendant also contends that the memorandum filed by the Commonwealth's Attorney in the trial court somehow bears upon the determination of the issue here. That memorandum was written, of course, before the Magruder opinion and is not binding on the Court or on the Attorney General. "[T]he Commonwealth may not be estopped from repudiating the earlier position erroneously taken by the Commonwealth's Attorney, nor may the Department be estopped from changing its position."

In Re: Dept. of Corrections, 222 Va. 454, 465, 281 S.E.2d 857 (1981) (citing Segaloff v. City of Newport News, 209 Va. 259, 261, 163 S.E.2d 135, 137 (1968) and WANV v. Houff, 219 Va. 57, 62-63, 244 S.E.2d 760, 763-64 (1978)). Even in its original brief the Commonwealth argued to this Court that the statutes could be interpreted to place the burden on the Commonwealth to produce the analyst. (Comm. Br. 26-27). This Court, having so interpreted the statutes, has no reason to consider the prosecutor's earlier contrary view of the law.

Legislative Amendments Not Indicative Of Unconstitutionality

The defendant argues finally that the General Assembly action in amending the statutory scheme in 2009 means that the scheme was deficient before amended. There is no reason to accept this interpretation. The legislature's effort to render the system even less subject to constitutional attack does not mean it was deficient beforehand. After Melendez-Diaz there was, of course, grave concern about exactly what the decision meant. Together with the knowledge that certiorari had been granted in this case the legislature, understandably worried about the effect of an overturning of the system in this case, acted to protect the criminal justice system. Obviously, the General Assembly did not regard the prior system as, contrary to Magruder, a subpoena-only system.

As long ago as Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803), it has been the settled province that "[i]t is emphatically the province and duty of the judicial department to say what the law is." Just as clearly in Virginia, "[i]t is the function of the judiciary to interpret statutes." Owens v. Commonwealth, 211 Va. 633, 638, 179 S.E.2d 477 (1971) (quoting Caldwell v. Commonwealth, 198 Va. 454, 459, 94 S.E.2d 537, 540 (1956)). Moreover, this Court has said, "Our jurisprudence requires us to interpret a statute to avoid a constitutional infirmity." Jaynes v. Commonwealth, 276 Va. 443, 464, 666 S.E.2d 303, 314 (2008).

This Court has already ruled on this matter and should, under the principles of stare decisis, uphold its previous ruling.

> In Virginia, the doctrine of stare decisis is more than a mere cliché. That doctrine plays a significant role in the orderly administration of justice by 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, 355 S.E.2d 579, 581 (1987). There is no reason to overturn the prior decision merely because the United States Supreme Court has asked this Court to reexamine the issue in light of a later case. As shown above, this Court properly found

that the Virginia scheme satisfied the requirements of the Confrontation Clause.

Harmless Error

In any event, in light of the defendant's admissions, any error in admission of the certificate was harmless.

> In Lilly v. Commonwealth, 258 Va. 548, 551, 523 S.E.2d 208, 209 (1999), we quoted from Chapman v. California, 386 U.S. 18, 24 (1967), as follows: "'[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt.'" We further stated the following:
>
> > In making that determination, the reviewing court is to consider a host of factors, including the importance of the tainted evidence in the prosecution's case, whether that evidence was cumulative, the presence or absence of evidence corroborating or contradicting the tainted evidence on material points, and the overall strength of the prosecution's case.
>
> Lilly, 258 Va. at 551, 523 S.E.2d at 209.

Stevens v. Commonwealth, 272 Va. 481, 486, 634 S.E.2d 305, 308 (2006).

Here Briscoe, an experienced drug dealer, told the police that all of the cocaine found in the house and on his person was his. (App. 126). He said the cocaine that was found in the sink should weigh around 40 grams. (App. 126-27). He admitted he had gotten it from one of sources two weeks before its discovery. (App. 127). Briscoe then said, "I brought it over here. . . . Yeah, I got it in D.C., and I brought it down here." (App.

127). The defendant explained that when he had moved down from the District of Columbia six months earlier and had observed how "green" the dealers were, he "saw how much money there was down here and [he] just had to step in." (App. 128). The police found digital scales with possible cocaine residue on them in the house. (App. 56-57, 220-21).

From one of his sources the defendant obtained 62-gram packages of cocaine every day or almost every day. (App. 129). Briscoe admitted he had probably obtained such an amount 50-80 times and had last obtained drugs from that source two weeks before his arrest. (App. 129-30). Briscoe said he would pay $1,800 for that amount and make a profit of $900, selling the cocaine in the form of eight balls. (App. 130).

There was, therefore, no issue at all about the nature of the substance possessed or transported. Briscoe referred to the substance as "coke" or cocaine. (App. 126-29). The identity of alleged contraband can be established by the lay testimony of experienced dealers and users and the circumstances sounding its possession. Dunaway v. Commonwealth, 52 Va. App. 281, 301-04, 663 S.E.2d 117, 127-28 (2008).

The defendant himself said that part of the cocaine found weighed 40 grams, well over the one ounce or 28.35 grams required to convict on the transportation charge. Moreover, Briscoe admitted that he had brought 62

grams into Virginia, from which the 40 grams in his sink was the remainder. (App. 129-30). He also had, and apparently had used, scales to weigh the cocaine.

Briscoe fully admitted possessing cocaine for sale and transporting it into the Commonwealth. He confessed to transporting more than two ounces into the Commonwealth, the remainder of which was more than an ounce. The Commonwealth fully established the crimes without the certificates.

When the elements of the offenses are fully established by other admissible evidence, the erroneous admission of evidence probative of that same element is harmless. "[E]rror, if any, resulting front the trial court's rulings concerning the 1973 order of conviction was rendered harmless by the defendant's own account of the same facts disclosed by that order." Mu'Min v. Commonwealth, 239 Va. 433, 446-47, 389 S.E.2d 886, 895 (1990) *(*citing Schindel v. Commonwealth, 219 Va. 814, 817, 252 S.E.2d 302, 304 (1979) (hearsay error rendered harmless by defendant's "own testimony corroborating the factual details")).

Violations of the Confrontation Clause are subject to harmless error analysis. United States v. Caraballo, 595 F.3d 1214, 1229 n.1 (11th Cir. 2010). A Melendez-Diaz error is harmless when other evidence

establishes the element on which the statement was offered. United States v. Martinez, 595 F.3d 581, 587 (5th Cir. 2010). Here, the other evidence plainly proved the substance was the required amount of cocaine.

CONCLUSION

For the foregoing reasons the decision of the Court of Appeals of Virginia affirming the judgment of the Circuit Court of the City of Alexandria convicting the defendant of possession of cocaine with intent to distribute and transportation of cocaine into the Commonwealth should be affirmed.

Respectfully submitted,

COMMONWEALTH OF VIRGINIA
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CERTIFICATE OF TRANSMISSION AND SERVICE

On April 26, 2010, the required number of copies of this brief were hand-delivered to the Clerk of this Court and three copies were mailed to Joseph D. King, Esquire, King & Campbell, PLLC, 526 King Street, Suite 213, Alexandria, VA 22314, counsel for the defendant. Also, an electronic copy of this brief was submitted to the Supreme Court of Virginia at scvbriefs@courts.state.va.us.

_____

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