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THE *MELLENDEZ-DIAZ* DILEMMA: VIRGINIA'S RESPONSE, A MODEL TO FOLLOW

Anne Hampton Andrews*

INTRODUCTION

Striking a balance between protecting society from criminals and preserving the rights of defendants has always been a difficult and challenging responsibility. In June 2009 the United States Supreme Court tipped the balance in favor of criminal defendants by broadening their Sixth Amendment rights.¹ While defense attorneys believed the decision would provide them with a tactical advantage, prosecutors were concerned that chaos would erupt in the judicial system and many potentially guilty defendants would avoid conviction.

In Virginia, the legislature recognized an immediate need to address the potential ramifications of this decision. For more than a decade, the Virginia General Assembly has been deeply divided on fiscal and policy issues. Consequently, it is a difficult and lengthy process to reach a resolution when controversial legislation is proposed. Despite a tumultuous history and bitter divide between the House of Delegates and the Virginia Senate, democrats and republicans, legislators from both bodies and parties set partisan politics aside to fashion a remedy. Remarkably, the Virginia legislators accomplished this task in a one day session.²

A fundamental tenet of the American judicial system is the right to a fair and impartial trial, governed by the judicial constraints set forth in the United States Constitution.³ Among those constraints is a criminal defendant's Sixth Amendment right to confront his accuser at trial.⁴ The wording of this constitutional guarantee has prompted federal and state courts to consider the breadth and limitations of the

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¹ See *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009).

² See 2010-3 Va. Adv. Legis. Serv. 587 (LexisNexis). The Virginia General Assembly approved Senate Bill 106 during its 2010 session, which amended sections 18.2-472.1, 19.2-187, and 19.2-187.1 of the Code of Virginia. See *id.* These amendments, however, are not relevant to this Note.

³ See U.S. CONST. amend. VI.

⁴ *Id.* ("In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him . . .").

Confrontation Clause, specifically, whether the defendant's right to confront witnesses against him is unlimited or whether there are restrictions on this constitutional right.⁵

The United States Supreme Court, in an unprecedented interpretation of the Sixth Amendment, expanded the guarantee of the Sixth Amendment's Confrontation Clause in the case of *Melendez-Diaz v. Massachusetts*.⁶ In its decision, the Court abandoned the former interpretation of the scope of the Sixth Amendment's Confrontation Clause in order to obtain a particular result; whereas, the dissent adhered to the principles of stare decisis.⁷ In *Melendez-Diaz*, the Court vastly enhanced the scope of the Sixth Amendment by interpreting the Confrontation Clause to allow criminal defendants a greater right of cross-examination.⁸

This Note uses Virginia as a case study to show the profound impact that *Melendez-Diaz* had on the prosecutorial system, and how statutory construction may simplify these effects. By discussing the benefits of notice-and-demand statutes⁹ in light of *Melendez-Diaz*, this Note offers Virginia's notice-and-demand statute as the model, which will ensure criminal defendants' Sixth Amendment protections and will also provide both administrative and economic relief for the judicial system.

Part I of this Note will review the history of the Sixth Amendment's Confrontation Clause, including a general history of the purpose of this constitutional guarantee. Additionally, it will discuss both United States Supreme Court and state court cases that have interpreted the parameters of the Sixth Amendment. Part II will assess the 1979 version of Virginia's notice-and-demand statute, and its bearing on the Sixth Amendment as a result of *Melendez-Diaz*. Also, this Part will examine and explain the responses of Virginia legislators, attorneys, and citizens to *Melendez-Diaz*. Furthermore, this Part will include an analysis of notice-and-demand statutes enacted in

⁵ See, e.g., *Ohio v. Roberts*, 448 U.S. 56, 66 (1980) (determining that the Sixth Amendment does not bar admission of an unavailable witness's statements against the defendant at a criminal trial if his prior testimony bore adequate "indicia of reliability"). The reliability test can be met where "evidence falls within a firmly rooted hearsay exception" or where there is a "showing of particularized guarantees of trustworthiness." *Id.*; see also *Melendez-Diaz*, 129 S. Ct. at 2532 (determining that the core class of "testimonial" statements from *Crawford*, which included affidavits but not certificates of analysis as a subcategory of affidavits, now interprets certificates of analysis as affidavits, a category of testimonial evidence that subjects the drafters of these certificates to the Sixth Amendment's Confrontation Clause); *Crawford v. United States*, 541 U.S. 36, 53–54 (2004) (determining that the Sixth Amendment provides the defendant with the right to confront and cross-examine witnesses from whom the police have gathered written statements).

⁶ 129 S. Ct. 2527.

⁷ *Id.* at 2543 (Kennedy, J., dissenting).

⁸ *Id.* at 2532 (majority opinion).

⁹ Under a notice-and-demand statute, the government must give "notice" of its intent to use written materials at trial in lieu of live testimony. This type of statute further provides the defendant the opportunity to "demand" live testimony in lieu of the prepared written materials. See, e.g., GA. CODE ANN. § 35-3-154.1 (2006); OHIO REV. CODE ANN. § 2925.51 (West 2006); TEX. CODE CRIM. PROC. ANN. art. 38.41 (West 2005); VA. CODE ANN. § 19.2-187.1 (2009).

various states, as well as Virginia's legislative response to *Melendez-Diaz*. Part III will discuss and analyze the detrimental impact that *Melendez-Diaz* has had on the criminal justice system, with a particular focus on its implications in Virginia. This Part will discuss the required presence of the authors of certificates of analysis at both criminal hearings and trials, focusing on cases where the defendant has been charged with possession of narcotics and cases where the defendant has been charged with driving under the influence. Additionally, this Part will explain Virginia's reasons for recent amendments to its notice-and-demand statute¹⁰ in response to *Melendez-Diaz*. Finally, Part IV posits that Virginia's recently amended notice-and-demand statute complies with the Sixth Amendment's fundamental protection for a criminal defendant to confront witnesses against him. This Note hypothesizes that if the constitutionality of Virginia's notice-and-demand statute is challenged under the standard adopted in *Melendez-Diaz*, it should withstand such a constitutional challenge.

I. THE CONFRONTATION CLAUSE: A HISTORY OF THE DEFENDANT'S RIGHT TO CONFRONT HIS ACCUSER

A. Purpose of the Confrontation Clause

A paramount guarantee and protection under the United States Constitution is the right of a criminal defendant to a fair and impartial trial.¹¹ The Sixth Amendment's Confrontation Clause is one of several mechanisms to ensure this constitutional guarantee.¹² "[T]he Sixth Amendment's right of an accused to confront the witnesses against him is likewise a fundamental right and is made obligatory on the States by the Fourteenth Amendment."¹³ Should a state legislature pass a law that a defendant subsequently alleges infringes upon this constitutional right, as the defendants alleged in *Ohio v. Roberts*¹⁴ and in *Coy v. Iowa*,¹⁵ the constitutionality of the law will likely be challenged in the judicial arena.¹⁶

¹⁰ See VA. CODE ANN. § 19.2-187.1 (2009).

¹¹ See U.S. CONST. amends. V, VI.

¹² The Sixth Amendment of the United States Constitution also guarantees a criminal defendant the right to a speedy trial and the right to a public trial before an unbiased jury. U.S. CONST. amend. VI. This Amendment also guarantees a criminal defendant the right to have compulsory process to call witnesses in his support. *Id.* In addition, this Amendment guarantees a criminal defendant the right to counsel. *Id.* The United States Supreme Court first interpreted the Confrontation Clause in *Mattox v. United States*, 156 U.S. 237, 242 (1895).

¹³ *Pointer v. Texas*, 380 U.S. 400, 403–04 (1965) (“[T]he right of cross-examination is included in the right of an accused in a criminal case to confront the witnesses against him.”); accord *Melendez-Diaz*, 129 S. Ct. at 2531; *Crawford v. Washington*, 541 U.S. 36, 42 (2004); *Ohio v. Roberts*, 448 U.S. 56, 62–63 (1980).

¹⁴ 448 U.S. 56, *abrogated by Crawford*, 541 U.S. 36.

¹⁵ 487 U.S. 1012 (1988).

¹⁶ For example, section 2945.49 of the Ohio Code was challenged in *Ohio v. Roberts*, 448 U.S. 56, where the Supreme Court held that allowing certain recorded statements to be admitted

The Constitution provides, “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him”¹⁷ A formalist, who interprets the language of the Constitution literally, would construe the words of the Sixth Amendment to require “on objection, the exclusion of any statement made by a declarant not present at trial.”¹⁸ If the Sixth Amendment’s Confrontation Clause was applied literally, it would “abrogate virtually every hearsay exception, a result long rejected as unintended and too extreme.”¹⁹ *Melendez-Diaz* marks a shift in Sixth Amendment jurisprudence toward a “literal” standard. This literal interpretation places no definitive limit on how far in advance of the hearing or the trial a defendant must demand the presence of an expert.²⁰ Consequently, an enormous burden will rest on the prosecution to ensure that these witnesses appear at trial.²¹

into evidence without providing the defendant the opportunity to confront the individual putting forth those statements did not violate the defendant’s Sixth Amendment right. Section 910A.14 of the Iowa Code was challenged in *Coy v. Iowa*, 487 U.S. 1012 (1998), where the Supreme Court held that allowing witnesses who were victims of sexual abuse to have a large screen placed between them and the defendant during their testimony and denying the defendant the right to cross-examination did violate the defendant’s Sixth Amendment right.

¹⁷ U.S. CONST. amend. VI.

¹⁸ *Roberts*, 448 U.S. at 63; see also *Mattox v. United States*, 156 U.S. 237, 243 (1895) (“[T]here could be nothing more directly contrary to the letter of the provision in question than the admission of dying declarations.”).

¹⁹ *Roberts*, 448 U.S. at 63. While the Court in *Roberts* asserted that the Confrontation Clause should not be applied literally because it would eliminate all exceptions to the hearsay rule, the Court in recent years has taken a more formalistic view in determining the breadth of the Confrontation Clause. Consequently, a defendant’s right to confront his accuser has become more expansive and the state’s ability to use affidavits and other forms of documentation in lieu of having the witness present for trial has greatly diminished. This trend is apparent and is reflected in Supreme Court decisions over the past thirty years from *Roberts* to *Melendez-Diaz*. The elasticity of the Confrontation Clause is discussed throughout this Note. One may argue that the recent expansion of rights guaranteed by the Confrontation Clause is largely attributable to the more conservative composition of the Court.

²⁰ *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2536 (2009).

²¹ See generally *Cuccinelli Calls for Special Session: Drug Dealers and Drunk Drivers*, APPOMATTOX NEWS (July 10, 2009), <http://www.appomattoxnews.com/2009/cuccinelli-calls-for-special-session-drug-dealers-and-drunk-drivers.html> [hereinafter *Cuccinelli Calls for Special Session*] (“Until the ruling in *Melendez-Diaz*, the Virginia state forensic lab was able to submit a certificate of analysis of their findings for use in court in drug and D.U.I. cases. . . . ‘With the volume of cases analyzed, requiring court appearances by the scientist in every case has the potential to cripple the criminal justice system,’ noted Cuccinelli.”); Charlie Passut, *Prosecutors on Defense: Federal Decision may have Implication in Local Cases*, TIDEWATER NEWS (Aug. 5, 2009), <http://www.tidewaternews.com/2009/08/05/prosecutors-on-defense/> (“From a practical standpoint, it is going to be more difficult We have a limited number of analysts who perform the tests, and they’re performing the tests for a large number of courts and jurisdictions. It will make it more difficult to prosecute, particularly our drug cases, but I don’t think it will affect the way we prosecute them other than we will be subpoenaing witnesses that we have not had to subpoena in the past.” (quoting Wayne Farmer, Commonwealth’s Attorney for the Isle of Wight)).

Although a literal interpretation of the Sixth Amendment's Confrontation Clause may place an undue burden on the prosecution, the purpose of the Amendment is to guarantee the defendant, with certain limited exceptions, the opportunity to be confronted with the witnesses against him. "[T]he Confrontation Clause reflects a preference for face-to-face confrontation at trial, and that 'a primary interest secured by [the provision] is the right of cross-examination.'"²² In essence,

the [Confrontation] Clause envisions 'a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.'²³

B. Case Law Interpreting the Sixth Amendment's Confrontation Clause

As a result of judicial interpretation, the scope of the Confrontation Clause has become more expansive over the past thirty years. Consequently, the defendant has additional safeguards to ensure his right to confront his accuser. This concept of elasticity is evident by the Court's interpretation of the Sixth Amendment's Confrontation Clause in *Roberts*, *Crawford v. United States*,²⁴ and *Melendez-Diaz*. The Court in *Roberts*, was equally, if not more concerned, with providing certainty and efficiency for the judiciary than ensuring that the defendant had a right to cross-examine any unavailable witnesses who bore evidence against him.²⁵ Today, *Roberts* is no longer good law and all state and federal court decisions must comport with *Melendez-Diaz*.²⁶ According to *Melendez-Diaz*, a witness being unavailable, unless the defendant otherwise consents or had a prior chance for cross-examination, is no excuse to deny a criminal defendant the right to confront his accuser.²⁷

When *Roberts* was controlling, the State had the burden of showing that the witness was unavailable and unable to appear in court before a court could allow the unavailable declarant's statements.²⁸ "[W]hen a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable."²⁹ Upon making a determination that the witness is unavailable,

²² *Roberts*, 448 U.S. at 63 (quoting *Douglas v. Alabama*, 389 U.S. 415, 418 (1965)).

²³ *Id.* at 63–64 (quoting *Mattox*, 156 U.S. at 242–43).

²⁴ 541 U.S. 36 (2004).

²⁵ *Roberts*, 448 U.S. at 66.

²⁶ *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2533 (2009).

²⁷ *Id.* at 2531.

²⁸ *Roberts*, 448 U.S. at 65.

²⁹ *Id.* at 66.

the court's next step in considering whether his testimony is admissible is determining whether his statement "bears adequate indicia of reliability."³⁰ The statements made by a witness outside of court could be admitted at trial if the following were shown. First, the absent witness was unavailable to appear at the trial.³¹ Second, the testimony was reliable.³² The reliability requirement could be met by showing either the witness statement fell within a firmly rooted hearsay exception or there was a showing of trustworthiness.³³

The defendant in *Crawford* was tried before a Washington state court for assault and attempted murder.³⁴ The defendant objected to his wife testifying against him because Washington's marital privilege bars testimony by a spouse without the other spouse's consent.³⁵ His objection was sustained pursuant to section 5.60.060(1) of the Washington Code.³⁶ The trial court had allowed the prosecution to play a tape-recorded statement by the accused's wife describing the accused's stabbing of the victim.³⁷ Before the Washington Court of Appeals, the defendant objected and claimed that the playing of the tape-recorded statement violated his constitutional right to confront witnesses against him.³⁸ The appeals court reversed the trial court.³⁹ Subsequently, the Washington Supreme Court unanimously reversed the appellate court and affirmed the trial court's decision by reinstating the conviction.⁴⁰ The United States Supreme Court granted a writ of certiorari and ultimately reversed the court below.⁴¹

The Court in *Crawford* concluded that the Confrontation Clause

applies to "witnesses" against the accused—in other words, those who "bear testimony." . . . 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.

³⁰ *Id.* (internal quotation marks omitted).

³¹ *Id.*

³² *Id.*

³³ *Id.* ("Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.").

³⁴ *Crawford v. Washington*, 541 U.S. 36, 40 (2004).

³⁵ Brief for Petitioner at 5, *Crawford*, 541 U.S. 36 (No. 02-9410).

³⁶ WASH. REV. CODE § 5.60.060(1) (1994) ("A spouse or domestic partner shall not be examined for or against his or her spouse or domestic partner, without the consent of the spouse or domestic partner; nor can either during marriage or during the domestic partnership or afterward, be without the consent of the other, examined as to any communication made by one to the other during the marriage or the domestic partnership.").

³⁷ *Crawford*, 541 U.S. at 40.

³⁸ *Id.*

³⁹ *Id.* at 41.

⁴⁰ *Id.*

⁴¹ *Id.* at 36.

The constitutional text . . . thus reflects an especially acute concern with a specific type of out-of-court statement.⁴²

Crawford expressly applied to the admission of hearsay statements in criminal proceedings, and the Court concluded that the wife's statements implicating her husband at the crime scene were hearsay statements subject to the Sixth Amendment Confrontation Clause.⁴³

Crawford overruled the position set forth in *Roberts* that allowed testimonial statements such as, affidavits, custodial examinations, and prior testimony by witnesses that the defendant was unable to cross-examine, so long as there was a good faith showing that the witness was unavailable at trial and that the testimony of the witness was reliable.⁴⁴ The Court in *Crawford* held that its interpretation of the Sixth Amendment Confrontation Clause has "remained faithful to the Framers' understanding: Testimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine."⁴⁵

Under *Crawford*, "[w]here testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation."⁴⁶ After *Crawford*, the question that arose was whether the requirement that the defense has a right to confront witnesses against him applies to forensic scientists testifying to their certificates of analysis.⁴⁷ In decisions following *Crawford*, courts have been split in determining whether certificates of analysis are a type of affidavit. A majority of courts, including the Virginia state courts, have concluded that forensic certificates were not within the scope of *Crawford* and therefore, the certificates were not classified as a core class of testimonial statements subject to the Confrontation Clause.⁴⁸ The reasoning for the belief that certificates of analysis were not included under the umbrella of affidavits as established by *Crawford* was that statements of a witness at a crime scene do not fall within the same category as these certificates.⁴⁹

⁴² *Id.* at 51 ("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.'") (citations omitted).

⁴³ *Id.* at 68–69.

⁴⁴ *Id.* at 62–63.

⁴⁵ *Id.* at 59.

⁴⁶ *Id.* at 68–69.

⁴⁷ Certificates of analysis are laboratory results from testing narcotics and from testing blood samples to determine whether an individual was driving while intoxicated. For example, see the state law at issue in *Melendez-Diaz*, MASS. GEN. LAWS ch. III, § 13 (2010).

⁴⁸ See, e.g., *infra* notes 67–68.

⁴⁹ *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2529 (2009). Perhaps one reason why the Court in *Crawford* did not expressly include statements from expert analysts as a core

C. *Melendez-Diaz v. Massachusetts*

Melendez-Diaz held that certificates of analysis were a type of affidavit⁵⁰ and therefore, according to *Crawford*, part of the core class of testimonial statements covered by the Confrontation Clause.⁵¹ At trial, the prosecution introduced a certificate of analysis from a state laboratory as evidence that the substance seized from *Melendez-Diaz*, the defendant, was cocaine.⁵² The defense objected, arguing that under *Crawford*, analysts were required to testify in person, and that admitting evidence without testimony from the scientific analyst who tested the substance violated the Confrontation Clause.⁵³ The trial court overruled the objection, admitted the certificate of analysis, and subsequently, the jury found the defendant guilty of distributing and trafficking cocaine.⁵⁴ The Massachusetts Appeals Court affirmed the holding of the trial court,⁵⁵ and the Massachusetts Supreme Judicial Court denied defendant's request for appeal.⁵⁶ Subsequently, the United States Supreme Court granted certiorari and reversed the Massachusetts state courts, holding that the admission of a certificate of analysis violated petitioner's Sixth Amendment right to confront witnesses against him.⁵⁷

Justice Scalia wrote the opinion of the Court, which examined *Crawford*, and relied on the following statement from *Crawford* that defines "testimonial statements."⁵⁸ "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 . . . extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits . . ." ⁵⁹ Justice Scalia, along with a majority of the Court, interpreted certificates of analysis to be a type of affidavit, thus placing them in the category of testimonial evidence subject to the Confrontation Clause.⁶⁰ The Court, in *Melendez-Diaz*, looked to Black's Law Dictionary for the definition of "affidavits," which are "declaration[s] of facts written down and sworn to by the declarant before an officer authorized to

class of testimonial statements is because the evidence provided by these sworn certificates is extremely reliable.

⁵⁰ *Id.* at 2530.

⁵¹ *Crawford*, 541 U.S. at 51.

⁵² *Melendez-Diaz*, 129 S. Ct. at 2530.

⁵³ *Id.* at 2531.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* at 2527.

⁵⁸ *Id.* at 2531.

⁵⁹ *Id.* (quoting *Crawford v. Washington*, 541 U.S. 36, 51–52 (2004)).

⁶⁰ *Id.* at 2532 ("There is little doubt that the documents at issue in this case fall within the 'core class of testimonial statements' thus described. Our description of the category mentions affidavits twice. . . . The documents at issue here, while denominated by Massachusetts law 'certificates,' are quite plainly affidavits . . ." (citations omitted)).

administer oaths.”⁶¹ As a result of this interpretation, the authors of these certificates are subject to confrontation and cross-examination by the defendant at trial.⁶²

II. THE HISTORY OF VIRGINIA’S NOTICE-AND-DEMAND STATUTE

A. Section 19.2-187.1 of the Code of Virginia

Prior to the *Melendez-Diaz* decision, Virginia afforded criminal defendants a statutory right to examine individuals performing expert analysis.⁶³ Until the members of the Virginia General Assembly voted to amend section 19.2-187.1 of the Code of Virginia during the 2009 Special Session, which was held on August 19, 2009, this section did not directly impose any time limitation on the defendant in which he had to “demand” the analyst’s presence for either the hearing or the trial.⁶⁴ However, in order to admit a certificate of analysis into evidence, the burden was on the prosecution to file the certificate with the clerk of court at least seven days prior to trial.⁶⁵

In 2007 there were three cases originating in different circuit courts throughout the Commonwealth that interpreted section 19.2-187.1 and were subsequently appealed to the Virginia Court of Appeals. On appeal before the Virginia Court of Appeals, the three criminal defendants in *Briscoe v. Commonwealth*,⁶⁶ *Cypress v. Commonwealth*,⁶⁷ and *Magruder v. Commonwealth*⁶⁸ alleged that the admission into evidence

⁶¹ *Id.* (quoting BLACK’S LAW DICTIONARY 62 (8th ed. 2004)).

⁶² *Id.*

⁶³ VA. CODE ANN. § 19.2-187.1 (1979) (“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.”).

⁶⁴ *See id.*

⁶⁵ *See id.* § 19.2-187.

⁶⁶ No. 1478-06-4, 2007 Va. App. LEXIS 498 (Va. Ct. App. Jan. 18, 2007) (affirming the Circuit Court of the City of Alexandria’s finding the defendant guilty for the possession of cocaine with the intent to distribute and transporting cocaine into the Commonwealth with the intent to distribute), *vacated*, 130 S. Ct. 1316 (2010). At trial, defendant’s counsel objected to the Commonwealth introducing a certificate of analysis. *Id.* at *1. Not until the middle of the trial did the defendant first express his desire to confront the witness who prepared the certificate of analysis. *Id.* The trial judge overruled the defendant’s objection and admitted the certificate of analysis into evidence. *Id.*

⁶⁷ No. 1547-06-1, 2007 Va. App. LEXIS 497 (Va. Ct. App. Jan. 18, 2007) (affirming the Circuit Court of the City of Chesapeake’s finding the defendant guilty for possession of cocaine with the intent to distribute), *vacated sub nom. Briscoe v. Virginia*, 130 S. Ct. 1316 (2010). At trial, defendant’s counsel objected to the Commonwealth introducing a certificate of analysis. *Id.* at *1. The defendant first expressed his desire to confront the witness who prepared the certificate of analysis in the middle of the trial. *Id.* The trial judge overruled the defendant’s objection and admitted the certificate of analysis into evidence. *Id.*

⁶⁸ No. 1982-05-4, 2007 Va. App. LEXIS 95 (Va. Ct. App. Mar. 13, 2007), (affirming the Circuit Court of the City of Winchester’s finding the defendant guilty for possession of cocaine).

of a certificate of analysis, pursuant to section 19.2-187.1, “in the absence of testimony at trial from the person who performed the particular analysis and prepared the certificate violated his rights under the Confrontation Clause of the Sixth Amendment.”⁶⁹ The three criminal defendants were each charged and convicted with possession of cocaine in each respective Circuit Court.⁷⁰ The defendants in *Cypress*, *Briscoe*, and *Magruder* appealed their convictions from the Virginia Court of Appeals to the Supreme Court of Virginia. These three cases were consolidated and heard together before the Supreme Court of Virginia.⁷¹

In each case, the Virginia Court of Appeals and subsequently the Supreme Court of Virginia held that the procedure set forth in section 19.2-187.1 for a criminal defendant to “demand” the presence of an expert at trial sufficiently protected a criminal defendant’s rights under the Confrontation Clause.⁷² On appeal, both courts determined that because each of the criminal defendants failed to utilize the statutory procedure available to him, and “demand” the presence of the analyst prior to the commencement of his trial, each defendant automatically waived his right to challenge the admissibility of the certificate of analysis and therefore, each defendant’s Sixth Amendment right was not violated.⁷³

Melendez-Diaz was decided after *Magruder*.⁷⁴ Four days after the United States Supreme Court handed down its decision in *Melendez-Diaz*, the Supreme Court granted a writ of certiorari to hear the appeal of the Virginia case, now styled *Briscoe v. Virginia*.⁷⁵ While the defendant in *Briscoe* appealed to the United States Supreme

It was not until his case was on appeal that defendant objected to the trial court’s admittance of the certificate of analysis. *Id.* at *1-2.

⁶⁹ *Magruder v. Commonwealth*, 657 S.E.2d 113, 115 (Va. 2008) (discussing the arguments made before the Virginia Court of Appeals).

⁷⁰ *See supra* notes 67–68.

⁷¹ *See Magruder*, 657 S.E.2d 113.

⁷² *See id.* at 113; *Cypress*, 657 S.E.2d at 113; *Briscoe*, 657 S.E.2d at 113.

⁷³ *Id.* at 115.

⁷⁴ *Melendez-Diaz* was decided in 2009 and *Magruder* was decided in 2007. *See Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009); *Magruder v. Commonwealth*, No. 1982-05-4, 2007 Va. App. LEXIS 95 (Va. Ct. App. Mar. 13, 2007).

⁷⁵ 129 S. Ct. 2858 (2009). Many speculated that the dissenters in *Melendez-Diaz*, a 5-4 decision, were setting up a quick reversal of the case. Justice Souter, one of the five Justices comprising the majority in *Melendez-Diaz*, has since retired. There was speculation that newly appointed Justice Sotomayor would side with the Justices who dissented in *Melendez-Diaz*. *See Stephen Willis Murphy & Darryl K. Brown, The Confrontation Clause and the High Stakes of the Court’s Consideration of Briscoe v. Virginia*, VA. L. REV. IN BRIEF (Jan. 23, 2010), <http://www.virginialawreview.org/inbrief/2010/01/23/murphybrown.pdf>. However, others speculated the United States Supreme Court was quick to grant certiorari so the Court could begin to interpret which notice-and-demand statutes pass constitutional muster and which do not under *Melendez-Diaz*. *See Supreme Court Watch: Impact From Briscoe v. Virginia Remand*, FED. EVIDENCE REV. (Jan. 28, 2010), <http://federalevidence.com/blog/2010/january/briscoe-v-virginia-remand-leaves-unanswered-confrontation-clause-questions>.

Court,⁷⁶ the defendant in *Magruder* declined to appeal the Supreme Court of Virginia's decision.⁷⁷

When the three cases consolidated as *Magruder* came before the Supreme Court of Virginia, *Brooks v. Commonwealth*⁷⁸ set forth the current status of the law of Virginia interpreting section 19.2-187.1.⁷⁹ The relevant facts in *Brooks* for interpreting whether section 19.2-187.1 was followed by the courts and constitutional in light of *Crawford*, were similar to those in *Briscoe* and *Cypress*. The defendant was charged with possession of cocaine and heroin and it was not until the trial that the defendant sought to exclude the certificate of analysis claiming a violation of his right to confront witnesses against him.⁸⁰ In *Brooks*, the Virginia Court of Appeals held that section 19.2-187.1 provides a "reasonable procedure to be followed in order for a defendant to exercise his right to confront a particular limited class of scientific witnesses at trial and that a defendant's failure to follow this procedure amounts to a waiver of the constitutional right to confront such witnesses."⁸¹ The Virginia Court of Appeals concluded that the Court's holding in *Crawford* did not compel a result to the contrary and to support this premise, the court discussed *State v. Cunningham*,⁸² which was decided by the Louisiana Supreme Court and interpreted the constitutionality of Louisiana's notice-and-demand statute⁸³ in light of *Crawford*.⁸⁴ The court, in *Brooks*, examined Louisiana's statute to assess what constituted a reasonable amount of time prior to trial for the defendant to request the presence of the analyst.⁸⁵

Pursuant to section 15:501 of the Louisiana Revised Statutes, if the prosecutor provided the defendant with written notice and a copy of the certificate of analysis at least ten days prior to trial, "the court was required, subject to certain exceptions,

⁷⁶ After the Supreme Court granted certiorari, *Briscoe* was placed on the Supreme Court calendar for the 2009 October Term. Oral arguments were conducted on Monday, January 11, 2010. On January 25, 2010, the Supreme Court issued a per curiam opinion. The Court vacated the Supreme Court of Virginia's judgment and remanded the case for further proceedings consistent with *Melendez-Diaz*. See *Briscoe*, 129 S. Ct. at 2858.

⁷⁷ One possible reason why the defendant in *Magruder* did not appeal to the United States Supreme Court is his failure to assert that the admission of a certificate of analysis is a violation of his Sixth Amendment right until after the trial court reached its decision. *Magruder v. Commonwealth*, No. 1982-05-4, 2007 Va. App. LEXIS 95 (Va. Ct. App. Mar. 13, 2007), vacated *sub nom.* *Briscoe v. Virginia* 130 S. Ct. 1316 (2010). Since the Supreme Court of Virginia also heard cases and ruled against the defendants, where the defendants first raised at trial, the objection to the use of certificate analysis, the defendant in *Magruder* may have believed his claim was not likely to succeed before the United States Supreme Court.

⁷⁸ 638 S.E.2d 131 (Va. 2006).

⁷⁹ *Id.* at 135.

⁸⁰ *Id.* at 133.

⁸¹ *Id.* at 136.

⁸² 903 So. 2d 1110 (La. 2005).

⁸³ LA. REV. STAT. ANN. § 15:501 (1990).

⁸⁴ *Brooks*, 638 S.E.2d at 136.

⁸⁵ *Id.* at 136-37.

to admit the certificate as prima facie proof of the facts shown thereon, as prima facie proof of [the chain of] custody of the physical evidence.”⁸⁶ As long as the defendant requests a subpoena for the expert performing the analysis at least five days before the trial, the certificate of analysis does not serve as prima facie proof.⁸⁷

Under the Virginia statute, if the Commonwealth intends to use a certificate of analysis, the prosecution is required to file a copy of the certificate with the clerk’s office and to provide notice to and a copy of the certificate to the defendant at least seven days prior to the trial.⁸⁸ Unlike Louisiana’s notice-and-demand statute, Virginia’s statute did not provide a definitive period before the trial in which the defendant needed to demand the presence of the analyst.⁸⁹ Although Virginia’s statute does not expressly define how far in advance of the trial the defendant must demand the analyst’s presence, the court in *Brooks* looked at both the language and the interpretation of the notice-and-demand statutes of other states to determine what constitutes a reasonable period prior to trial in which the defendant must request the presence of the analyst.⁹⁰ In light of *Crawford*, the court in *Brooks* concluded that Virginia’s applicable statutes, sections 19.2-187 and 19.2-187.1

are merely a request to the defendant to stipulate to the admissibility of the contents of any properly filed certificates of analysis. Where a defendant waits until trial to assert his right to cross-examine the analyst who prepared a particular certificate, he accepts the request to stipulate and waives his right to confront that witness.⁹¹

The court determined it was unreasonable for the defendant to wait until his trial to request the presence of the analyst who prepared the certificate.⁹² *Brooks* was

⁸⁶ *Cunningham*, 903 So. 2d at 1115 (internal quotation marks omitted).

⁸⁷ See LA. REV. STAT. ANN. § 15:501 (1990).

⁸⁸ See VA. CODE ANN. § 19.2-187 (1979).

⁸⁹ Compare LA. REV. STAT. ANN. § 15:501 (1990), with VA. CODE ANN. § 19.2-187 (1979).

⁹⁰ *Brooks*, 638 S.E.2d at 136-37.

⁹¹ *Id.* at 137; see John G. Douglass, *Beyond Admissibility: Real Confrontation, Virtual Cross-Examination, and the Right to Confront Hearsay*, 67 GEO. WASH. L. REV. 191, 228–29 (1999) (“The Court’s approach still requires the government to produce an available declarant This approach roughly adheres to the ‘core’ historical purpose of the Confrontation Clause: preventing the inquisitorial practice of trial by affidavit or by ex parte examination. . . . [T]his approach avoids the considerable systemic burden of requiring the government to produce every available hearsay declarant as a predicate to the use of any hearsay. And by placing on the defendant the burden of initiating confrontation . . . it avoids the backwards set of tactical incentives that have created battles over admissibility Undoubtedly, it is less convenient for defendants than a rule that required them to do nothing but object to the admission of hearsay. Properly applied, however, a rule providing that defendants must request a subpoena to invoke the confrontation right should not work serious hardship on defendants.”).

⁹² *Brooks*, 638 S.E.2d at 136.

controlling when the Supreme Court of Virginia decided *Magruder*, *Cypress*, and *Briscoe*.⁹³ The United States Supreme Court handed down its decision in *Melendez-Diaz* after the Supreme Court of Virginia decided *Magruder*, *Cypress*, and *Briscoe*.⁹⁴ As previously discussed, *Briscoe* has been reviewed by the United States Supreme Court and remanded to the Supreme Court of Virginia to assess the constitutionality of section 19.2-187.1 of the Code of Virginia in light of *Melendez-Diaz*.⁹⁵

B. Public Opinion: Response to Melendez-Diaz and Possible Solutions

Immediately following the Supreme Court's decision in *Melendez-Diaz*, Virginia state officials concluded that a Special Session of the Virginia General Assembly was the most efficient and practical way of addressing the effects of the decision for two primary reasons. First, *Briscoe* and the constitutionality of Virginia's 1979 notice-and-demand statute were awaiting review by the United States Supreme Court and there was widespread belief that the legislature should change the statute rather than waiting for a potentially damaging decision by the Court.⁹⁶ According to former State Senator Kenneth Cuccinelli, now Virginia Attorney General, "[i]f we lose that case, there's going to be a lot of remands for new trials That's going to be a sudden workload hit."⁹⁷ On remand, should the Supreme Court of Virginia conclude that Virginia's notice-and-demand statute denied the defendant the opportunity to exercise his Sixth Amendment right, any case decided under that statute in favor of the Commonwealth after *Melendez-Diaz*, but prior to the Supreme Court of Virginia's reevaluation of *Briscoe*, would subsequently be remanded.⁹⁸ Second, even if the Virginia General Assembly decided not to draft a statutory "fix" and the United States Supreme

⁹³ *Brooks* was decided before the Virginia Court of Appeals on December 19, 2006. *Id.* at 131. After *Brooks* was decided and prior to the Supreme Court of Virginia deciding *Magruder*, *Cypress*, and *Briscoe*, there were no other cases interpreting section 19.2-197.1 of the Code of Virginia in which the criminal defendant claimed his Sixth Amendment right to confrontation had been violated.

⁹⁴ *Melendez-Diaz* was decided by the United States Supreme Court on June 25, 2009. *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009).

⁹⁵ *Briscoe v. Virginia*, 130 S. Ct. 1316 (2010). Although the 1979 version of Virginia's notice-and-demand statute has been amended, at this time there has been no ruling by the United States Supreme Court on its constitutionality.

⁹⁶ See GOVERNOR'S WORKING GRP., EXEC. OFFICE OF THE GOVERNOR, *MELLENDEZ-DIAZ V. MASSACHUSETTS: IT'S A BRAVE NEW WORLD* 8-10 (2009) [hereinafter BRAVE NEW WORLD]; see also Chris Dumond, *Update: AG Candidate Wants Special Session After Supreme Court Ruling*, NEWS & ADVANCE (July 10, 2009, 1:31 PM), http://www2.newsadvance.com/news/2009/jul/10/supreme_court_ruling_on_evidence_concerns_some_loc-ar-217088/ (quoting Senator Ken Cuccinelli).

⁹⁷ Dumond, *supra* note 96.

⁹⁸ This would have a profound effect on the Virginia judicial system and Virginia Commonwealth Attorneys. There would be a significant backlog in both the courts and the prosecutors' offices.

Court in reviewing *Briscoe*, subsequently found Virginia's notice-and-demand statute to be constitutional, the Commonwealth's Attorneys would be faced with the problem of selecting which cases to prosecute because of the shortage of lab analysts to both test the substances and to testify at trial.⁹⁹ Under *Melendez-Diaz*, the Commonwealth must bring the analyst to court unless the defendant decides otherwise. "Prosecutors here claim the ruling puts their cases in jeopardy. Many have asked for continuances to bide time to get a lab analyst onto the witness stand. 'The practical effects of this are too many cases, not enough scientists.'"¹⁰⁰ The result of the shortage of analysts from the Virginia Department of Forensic Science will become more apparent and more pronounced as time goes by.¹⁰¹ "'You're getting a ripple effect on the calendar that hasn't hit us yet,' said state Sen[ator] Ken Cuccinelli (R-Fairfax). 'I want to solve this problem before we have public safety problems because we're [releasing] legitimately guilty drunk drivers and drug offenders.'"¹⁰²

The Executive Office of the Governor and Governor Kaine's working group predicted that the immediate problem with the *Melendez-Diaz* decision is that every case in which the Commonwealth seeks to introduce certificates of analysis, there will be a significant increase in the amount of time analysts spend outside the laboratory to testify as to their findings.¹⁰³ In discussing possible solutions, the Governor's working group determined that while a favorable ruling by the United States Supreme Court on the constitutionality of section 19.2-187.1 of the Code of Virginia in *Briscoe* would be helpful, it would not solve the problem of the excessive workload placed upon the

⁹⁹ See *In Depth: Evidence Ruling Potentially "Horrible"*, RICH. REP. (July 10, 2009), <http://nbc29.wordpress.com/2009/07/10/in-depth-evidence-ruling-potentially-horrible/>.

¹⁰⁰ *Id.* (emphasis removed) (quoting Tom Garrett, Commonwealth's Attorney for Louisa County) ("Garrett said he's already had one drug case dismissed because of the ruling and has asked judges to delay many more. If Garrett delays too many cases for too long, he'll violate defendants' rights to speedy trials. If that happens, a judge will toss out the case.").

¹⁰¹ BRAVE NEW WORLD, *supra* note 96, at 3-4 ("[I]n its last Service Area Strategic Plan . . . DFS listed 74 positions [and] with 10 vacancies, this left 64 chemists. . . . By contrast, the 2008 Crime in Virginia report by the Virginia State Police listed 33,217 drug arrests in Virginia in 2008. If each of these arrests led to an analysis, each chemist would perform an average of 519 analyses in a year's time. . . . Now, add to this the *Melendez-Diaz* requirement [and] [w]e will need to hire three to four times the number of chemists we have now."). The Virginia Department of Forensic Science has four regional laboratories, Northern, Eastern, Central, and Western, located respectively in Manassas, Norfolk, Richmond, and Roanoke, which service the entire state. *Regional Labs*, VA. DEP'T OF FORENSIC SCI., <http://www.dfs.virginia.gov/labs/index.cfm> (last visited March 4, 2010).

¹⁰² *In Depth: Evidence Ruling Potentially "Horrible"*, *supra* note 99.

¹⁰³ BRAVE NEW WORLD, *supra* note 96, at 3. Part III of this Note will include specific statistical data on the number of analysts at the Department of Forensic Science and the frequency that criminal defendants "demanded" the presence of these analysts at trial both in cases pertaining to possession of controlled substances and driving under the influence. Statistical data will be provided for an average number of "demands" per month per category of cases both before and after the *Melendez-Diaz* decision.

analysts at the Virginia Department of Forensic Science.¹⁰⁴ Should the United States Supreme Court hold that Virginia's notice-and-demand statute is permissible, "defense attorneys know that all they will need to do is to push a button on their computer and print a written demand for the presence of the laboratory analyst *in every single case*. . . . [T]he criminal justice system will quickly grind to a halt."¹⁰⁵ The general consensus is regardless of whether the Supreme Court holds that *Briscoe* passes constitutional muster, the Commonwealth needs to consider alternative solutions so the Virginia judicial system is manageable and workable.¹⁰⁶

The Governor's working group¹⁰⁷ considered several "solutions" in the weeks following *Melendez-Diaz*.¹⁰⁸ Yet, the general consensus was that none of these

¹⁰⁴ *Id.* at 8.

¹⁰⁵ *Id.*

¹⁰⁶ *See id.*

¹⁰⁷ The Governor's working group consisted of (but was not limited to) representatives from the following offices and interest groups: the Office of the Governor, the Office of the Attorney General, the Department of Forensic Science, the Office of the Chief Medical Examiner, the Commonwealth's Attorneys' Services Council, the Virginia State Police, and the Department of Motor Vehicles. *See* GOVERNOR'S WORKING GRP., EXEC. OFFICE OF THE GOVERNOR, *MELLENDEZ-DIAZ V. MASSACHUSETTS: WORKING GROUP OVERVIEW 1* (2009).

¹⁰⁸ The following "solutions" were considered prior to calling the 2009 Special Session to amend Virginia's notice-and-demand statute. First, the Commonwealth could institute the de facto decriminalization of drugs. BRAVE NEW WORLD, *supra* note 96, at 9. The Commonwealth could decriminalize possession of certain simple drugs or decriminalize the quantities of certain drugs possessed. *Id.* As a result, there would be fewer possession cases before the courts and a reduced need to call analysts from the laboratory and into the court room. Second, the Commonwealth could engage in more plea negotiations. *Id.* Pursuant to *Melendez-Diaz*, cross-examination of the laboratory analysts is a constitutional right. *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2531–32 (2009). In light of *Melendez-Diaz*, if the Commonwealth fails to produce the requested analyst at trial, the certificate of analysis will be inadmissible. Consequently, the Commonwealth is in a weaker bargaining position when participating in plea negotiations and plea bargaining in drug and DUI cases will be unequivocally favorable to the defendant. BRAVE NEW WORLD, *supra* note 96, at 9. Third, the Commonwealth could subpoena the analyst in all drug and toxicology cases. *Id.* As a result, the criminal justice system would quickly become overburdened and because of Virginia's speedy trial statute, many cases would likely be dismissed with prejudice. *Id.*; *see also* VA. CODE ANN. § 19.2-243 (2007) ("Where a district court has found that there is probable cause to believe that an adult has committed a felony, the accused, if he is held continuously in custody thereafter, shall be forever discharged from prosecution for such offense if no trial is commenced in the circuit court within five months from the date such probable cause was found by the district court . . ."); *Cuccinelli Calls for Special Session*, *supra* note 21; *In Depth: Evidence Ruling Potentially "Horrific," supra* note 99. Fourth, the Commonwealth could hire additional laboratory analysts, thereby reducing the number of tests each analyst had to conduct and increasing their availability to testify to their results. *See* BRAVE NEW WORLD, *supra* note 96, at 9. Hiring additional analysts is not a viable solution in light of the recent economic climate. In order to maintain a balanced budget, the Commonwealth approved budget cuts over the past two years; the creation of a substantial number of new positions to compensate for the decision in *Melendez-Diaz* is not economically feasible. *Id.* at 4; *see* Jim Nolan & Tyler Whitley, *Kaine Seeks New Round of Virginia Budget Cuts*, RICH. TIMES-

proposed “solutions” were feasible.¹⁰⁹ As explained above, while each “solution” may temporarily alleviate the impact that *Melendez-Diaz* has had on Virginia’s judicial system, none is a long-term viable option. It is important to note that the defendant does not typically want to cross-examine the analyst because it is highly likely that his testimony will confirm the findings in the certificate of analysis.¹¹⁰ The goal of defense counsel “in the present *Melendez-Diaz* environment is to engage in a war of attrition where the only attrition is on the Commonwealth. Once we alleviate the need for laboratory personnel to travel throughout the state, the defense bar will move on to other, more conventional defenses.”¹¹¹ As a result, legislation appeared to be the best alternative to ensure that the entire judicial system did not collapse. According to Sharon Eimer, a member of the Lynchburg Public Defender’s Office, “once the law is fixed the question of delays and testimony will largely go away. ‘In reality, [the defense attorney is] going to talk to the analyst ahead of time and if there’s not an issue, you’re not going to want to call the analyst (as a witness).’”¹¹² Therefore, many politicians, state agencies, and interest groups garnered support for a Special Session of the Virginia General Assembly.¹¹³ The goal of the Special Session was to amend Virginia’s notice-and-demand statute to reduce the burden on Virginia’s judicial system as a result of *Melendez-Diaz*, and at the same time comply with constitutional mandates established by *Melendez-Diaz*.¹¹⁴

DISPATCH, (Aug. 20, 2009), http://www2.timesdispatch.com/news/2009/aug/20/budg20_20090819-215608-ar-33524/; Gail D. Jaspén, Chief Deputy Director, Department of Forensic Science, Address at the University of Richmond Law Review Annual Survey Symposium: *Melendez-Diaz* in Virginia (Nov. 12, 2009), <http://lawreview.richmond.edu/the-annual-survey-of-virginia-law-symposium-melendez-diaz-in-virginia/> [hereinafter Jaspén, University of Richmond Address] (presentation materials on file with author). Fifth, the Commonwealth could ask courts to be flexible in scheduling trial dates by placing numerous cases that a particular analyst tested and prepared the results on the docket on the same date. BRAVE NEW WORLD, *supra* note 96, at 9. This assumes the collaboration by numerous judicial jurisdictions, defense attorneys, and prosecutors and currently, there is no central operating system to assist in scheduling. *Id.* at 9–10. In addition, there is no incentive for defense attorneys to be flexible because if the Commonwealth fails to produce a requested analyst, the evidence will be inadmissible. See *Melendez-Diaz*, 129 S. Ct. at 2531–32; BRAVE NEW WORLD, *supra* note 96, at 10.

¹⁰⁹ BRAVE NEW WORLD, *supra* note 96, at 10.

¹¹⁰ *Id.* The cross-examination of an analyst who testifies to the results of the certificate of analysis is different than the cross-examination of a witness at a crime scene who provided a sworn affidavit to the police officer. The results of the tests performed by the analyst are highly accurate and the analyst’s testimony will likely confirm what was reported in the certificate. The statements provided by a witness to an officer at a crime (either a charge of possession or driving under the influence) may more easily be undermined by placing that individual on the stand at trial.

¹¹¹ *Id.*

¹¹² Dumond, *supra* note 96.

¹¹³ See, e.g., Cuccinelli Calls for Special Session, *supra* note 21; *In Depth: Evidence Ruling Potentially “Horrific”*, *supra* note 99; Dumond, *supra* note 96.

¹¹⁴ Cuccinelli Calls for Special Session, *supra* note 21.

C. Notice-and-Demand Statutes

1. Explanation of Notice-and-Demand Statutes

In *Melendez-Diaz*, the Court cited the notice-and-demand statutes of Georgia, Texas, and Ohio to support the position that,

[i]n their simplest form, notice-and-demand statutes require the prosecution to provide notice to the defendant of its intent to use an analyst's report as evidence at trial, after which the defendant is given a period of time in which he may object to the admission of the evidence absent the analyst's appearance live at trial.¹¹⁵

When referencing these statutes, the Court implied that these statutes would withstand any constitutional challenge pursuant to the ruling in *Melendez-Diaz*. The majority of the Court in *Melendez-Diaz* agrees that "[t]he defendant *always* has the burden of raising his Confrontation Clause objection; notice-and-demand statutes simply govern the *time* within which he must do so."¹¹⁶

Under a traditional notice-and-demand statute, the timing in which the prosecution must provide "notice" of its intent to use a certificate of analysis in lieu of the live testimony of the analyst and the defendant must "demand" the presence of the analyst in lieu of admittance of the certificate of analysis can vary in two primary regards.¹¹⁷ First, some statutes do not include a set number of days prior to the date of trial in which the prosecution must provide "notice," while other statutes link the time in which the prosecution must provide "notice" to the date of trial.¹¹⁸ Second, under some statutes, the time in which the defendant must "demand" the presence of the analyst is linked to the time in which the prosecution provided "notice," while other statutes tie the "demand" requirement to the date of trial.¹¹⁹ The notice-and-demand statutes cited in *Melendez-Diaz* are examples of these variations. The Court implied that each of the statutes discussed below, which govern the prosecution's obligation to provide "notice" and the defendant's responsibility to "demand," would protect the defendant's Sixth Amendment right to confront witnesses against him.¹²⁰

¹¹⁵ *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2541 (2009) (citing GA. CODE ANN. § 35-3-154.1 (2006); OHIO REV. CODE ANN. § 2925.51 (West 2006); TEX. CODE CRIM. PROC. ANN. art. 38.41, § 4 (West 2005)).

¹¹⁶ *Id.*

¹¹⁷ *See, e.g.*, GA. CODE ANN. § 35-3-154.1 (2006); OHIO REV. CODE ANN. § 2925.51 (West 2006); TEX. CODE CRIM. PROC. ANN. art. 38.41 (West 2005).

¹¹⁸ *Compare* GA. CODE ANN. § 35-3-154.1 (2006), *and* OHIO REV. CODE ANN. § 2925.51 (West 2006), *with* TEX. CODE CRIM. PROC. ANN. art. 38.41 (West 2005).

¹¹⁹ *Compare* OHIO REV. CODE ANN. § 2925.51 (West 2006), *with* GA. CODE ANN. § 35-3-154.1 (2006), *and* TEX. CODE CRIM. PROC. ANN. art. 38.41 (West 2005).

¹²⁰ *See* *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2541 (2009).

2. Georgia's Notice-and-Demand Statute

Georgia's notice-and-demand statute provides that the "prosecuting attorney shall serve a copy on the defendant's attorney of record, or on the defendant if pro se, prior to the first proceeding in which the report is to be used against the defendant."¹²¹ Any report provided by the prosecution to the defense under this section "shall contain notice of the right to demand the testimony of the person signing the report."¹²² Upon receiving the report, the defendant may object to the introduction of the report at trial so long as that objection is made at least ten days prior to the trial.¹²³ "If objection is made, the judge shall require the employee to be present to testify. The state shall diligently investigate the witness's availability and report to the court. If the witness is not available on a timely basis, the court shall grant a continuance."¹²⁴

In Georgia, the time in which the prosecution must provide notice is not expressly stated in the statute. For notice to be proper, it must be provided more than ten days prior to trial because demand must be made at least ten days prior to trial.¹²⁵ Virginia amended its notice-and-demand statute and tied the provision governing notice to the date of trial, while tying the provision governing demand to the date of notice.¹²⁶

3. Texas's Notice-and-Demand Statute

Texas's notice-and-demand statute provides that the prosecuting attorney must file the certificate of analysis "with the clerk of the court and a copy must be provided . . . to the opposing party."¹²⁷ The time in which the prosecution must provide notice is tied to the date of trial. The prosecution must provide notice "[n]ot later than the 20th day before the trial begins."¹²⁸ Demand by the defendant is deemed proper and physical presence of the analyst in lieu of the certificate of analysis will be required if, "not later than the 10th day before the trial begins, the [defendant] files a written objection to the use of the certificate with the clerk of the court and provides a copy . . . to the offering party."¹²⁹

In Texas, both the time in which the prosecution must give notice of its intent to use a certificate of analysis and the provision governing when the defendant must demand the presence of the analyst are tied to the date of trial.¹³⁰ In Virginia and Texas,

¹²¹ GA. CODE ANN. § 35-3-154.1 (2006).

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *See infra* Part II.D.

¹²⁷ TEX. CODE CRIM. PROC. ANN. art. 38.41 § 4 (West 2005).

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

provisions governing notice are similar because the notice-and-demand statutes in both states tie the time in which the prosecution must provide notice to the date of trial.¹³¹

4. Ohio's Notice-and-Demand Statute

Ohio's notice-and-demand statute provides that "[t]he prosecuting attorney shall serve a copy of the report on the attorney of record for the accused, or on the accused if the accused has no attorney, prior to any proceeding in which the report is to be used against the accused"¹³² After receiving notice, the defendant may object to the admittance of the certificate of analysis so long as demand is made within seven days of receiving notice.¹³³

In Ohio, the time in which the prosecution must provide notice is not expressly stated in the statute. For notice to be proper, it must be made more than seven days prior to trial because the defendant has seven days from the date of notice to demand the presence of the analyst.¹³⁴ Ohio's notice-and-demand statute is similar to Virginia's in that the provision governing the time in which the defendant must demand the presence of the analyst is tied to the date the prosecution provided notice of its intent to use a certificate of analysis.¹³⁵

D. Virginia's Amended Notice-and-Demand Statute, a Response to Melendez-Diaz

On August 19, 2009, members of the Virginia General Assembly convened in Richmond, Virginia, for a Special Session to address the impact of *Melendez-Diaz* on the Commonwealth.¹³⁶ Prior to convening, there were meetings amongst the leadership of the Virginia Senate and House of Delegates, as well as numerous meetings with representatives from the different stakeholders, such as the Governor's Office, the Attorney General's Office, the Virginia State Police, the Virginia Department of Motor Vehicles, the Commonwealth's Attorneys' Services Council, and the Association of Defense Attorneys.¹³⁷ A significant amount of planning preceded the 2009 Special Session, because the legislators agreed that the Special Session would only last for one day.¹³⁸ This was largely attributed to the fact that every day the General Assembly

¹³¹ Compare *id.*, with VA. CODE ANN. § 19.2-187.1 (2009).

¹³² OHIO REV. CODE ANN. § 2925.51 (West 2006).

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ Compare *id.*, with VA. CODE ANN. § 19.2-187.1 (2009).

¹³⁶ See William C. Flook, *Lawmakers Seek Fix for Tougher Forensic Rules*, WASH. EXAMINER (Aug. 19, 2009), <http://www.washingtonexaminer.com/local/Lawmakers-see-fix-for-tougher-forensics-rules-8124467-53617487.html>.

¹³⁷ See Tyler Whitley, *Court-ruling Solutions are Elusive*, RICH. TIMES-DISPATCH, Aug. 8, 2009, at B3; Alan Cooper, *Committees Meet on Melendez-Diaz*, VA. LAW. WKLY. BLOG (Aug. 7, 2009), <http://valawyersweekly.com/vlwblog/2009/08/07/committees-meet-on-melendez-diaz/>.

¹³⁸ Interview with Mark Rubin, Chief of Staff, Executive Office of the Governor of Virginia, in Richmond, Va. (Nov. 12, 2009) (on file with author).

convenes during a Special Session, it costs the Commonwealth between \$30,000 and \$50,000.¹³⁹ As a demonstration of the importance of crafting a legislative solution, the statute was amended in a one day session and Governor Kaine signed House Bill 5007 on August 21, 2009,¹⁴⁰ only two days later.¹⁴¹ The legislators, in drafting what they believed would be an appropriate legislative response, not only considered the views of the stakeholders, but also seem to have studied the statutes the majority in *Melendez-Diaz* implied would be constitutional.¹⁴²

The Court, in *Melendez-Diaz*, cites the Georgia, Texas, and Ohio statutes to support the position that notice-and-demand statutes, in their simplest form, are constitutional. The Virginia General Assembly amended section 19.2-187.1 of the Code of Virginia, and the amended version possesses some of the elements that appear in the notice-and-demand statutes of Georgia, Texas, and Ohio.¹⁴³ If the Commonwealth intends to offer a certificate of analysis at any trial or any hearing, other than the preliminary hearing, the Commonwealth shall “[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.”¹⁴⁴ In addition to providing the defendant with a copy of the certificate of analysis, the Commonwealth must provide “notice to the accused of his right to object to having the certificate admitted without the person who performed the analysis or examination being present and testifying.”¹⁴⁵ Also, on the same day the Commonwealth provides the certificate and notice to the defendant, both a copy of the certificate of analysis and notice must be filed in the office of the clerk of court.¹⁴⁶

The accused may object in writing to admission of the certificate of analysis, in lieu of testimony Such objection shall be filed . . . 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.¹⁴⁷

There are several noticeable differences between the 1979 and 2009 versions of section 19.2-187.1 of the Code of Virginia.¹⁴⁸ First, the amended version expressly

¹³⁹ *Id.*

¹⁴⁰ 2009 Va. Acts (Spec. Sess. I) 1. House Bill 5007 was the bill passed during the Special Session that now reflects the changes to section 19.2-187.1 of the Code of Virginia.

¹⁴¹ *Id.*

¹⁴² *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2541 (2009).

¹⁴³ *See supra* notes 19–20 and accompanying text. *Compare* GA. CODE ANN. § 35-3-154.1 (2006), *and* TEX. CODE CRIM. PROC. ANN. art. 38.41 § 4 (West 2005), *and* OHIO REV. CODE ANN. § 2925.51 (West 2006), *with* VA. CODE ANN. § 19.2-187.1 (2009).

¹⁴⁴ VA. CODE ANN. § 19.2-187.1 (2009).

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Compare* VA. CODE ANN. § 19.2-187.1 (1979), *with* VA. CODE ANN. § 19.2-187.1 (2009).

provides that the defendant has to object within fourteen days of receiving notice from the Commonwealth;¹⁴⁹ whereas, the 1979 version did not designate a time in which this objection had to be made.¹⁵⁰ This will assist the Commonwealth in coordinating with the Department of Forensic Science to ensure that the analyst who prepared the certificate will be present at trial. This framework will increase the chances that the Commonwealth can proceed and prosecute a particular case in a timely manner while the previous version would allow the defendant to object on the day of trial, and in light of *Melendez-Diaz*, that objection may be valid.¹⁵¹

Second, the Code explicitly states that if the defendant fails to object to the certificate being admitted into evidence within the permissible timeline provided for in the statute, then the demand is deemed waived;¹⁵² whereas the 1979 version did not expressly state the right was waived if not exercised.¹⁵³ If demand is waived, the defendant has forfeited his right to confront witnesses against him.¹⁵⁴ This will eliminate future claims by a defendant who fails to object to the certificate until the day of trial and later asserts that the timing of his objection did not result in waiver of his confrontation rights.

As a result of *Melendez-Diaz*, regardless of whether the Virginia General Assembly amended the Code, it is now a defendant's constitutional right and not just a statutory right to have the expert present at both the hearings and at trial for cross-examination.

III. THE IMPLICATIONS OF *MELLENDEZ-DIAZ* ON THE VIRGINIA JUDICIAL SYSTEM: EFFECTS ON CASES WHERE THE CRIMINAL DEFENDANT WAS CHARGED WITH POSSESSION OF NARCOTICS OR DRIVING UNDER THE INFLUENCE

A. Background on the Virginia Department of Forensic Science

According to Tom Garrett, the Louisa County Commonwealth's Attorney, the Virginia Department of Forensic Science (DFS) "simply doesn't have the manpower to have its examiners running all over the state to testify."¹⁵⁵ During the 2008 calendar year, with a staff of 160 employees, DFS handled nearly 60,000 cases and "[t]he number of tests [conducted was] even higher because many cases involve[d] multiple pieces of evidence."¹⁵⁶ In August 2008, DFS had 74 available positions within its

¹⁴⁹ VA. CODE ANN. § 19.2-187.1 (2009).

¹⁵⁰ VA. CODE ANN. § 19.2-187.1 (1979).

¹⁵¹ *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2531–32 (2009) ("Absent a showing that the analysts were unavailable to testify at trial *and* that [the defendant] had a prior opportunity to cross-examine them, [the defendant is] entitled to 'be confronted with' the analysts at trial." (citations omitted)).

¹⁵² VA. CODE ANN. § 19.2-187.1 (2009).

¹⁵³ VA. CODE ANN. § 19.2-187.1 (1979).

¹⁵⁴ *See Melendez-Diaz*, 129 S. Ct. at 2531–32, 2534.

¹⁵⁵ *Dumond*, *supra* note 96.

¹⁵⁶ *Id.*

Chemical Analysis Services division and at the time there were ten vacancies.¹⁵⁷ Prior to the decision in *Melendez-Diaz*, the number of cases in which an analyst was subpoenaed was relatively low. For example, in April and May of 2009, the total subpoenas for each month was 487 and 503, respectively,¹⁵⁸ and the number of hours the analysts spent out of the laboratory was 350 and 320, respectively.¹⁵⁹ With each analyst traveling around the state to testify in the cases in which he performed the laboratory tests, DFS anticipates that each analyst will spend approximately three to four days per week on the road testifying to his findings.¹⁶⁰ Hence, DFS anticipates this increasing demand on its analysts for court appearances will necessitate hiring three to four times the number of analysts currently employed by DFS in order to prevent a backlog requiring the Commonwealth to dismiss or nolle prosequere a substantial number of its cases.¹⁶¹ The Commonwealth has budgeted \$8,261,000 in FY 2010 for analysts; however, due to the increased demand for laboratory analysts as a result of *Melendez-Diaz*,¹⁶² Virginia is “facing an immediate budgetary increase of between \$24,783,000 and \$33,044,000.”¹⁶³ Furthermore, the Commonwealth will need to purchase approximately sixty to seventy state vehicles or reimburse each analyst for his mileage.¹⁶⁴

B. Statistics: Possession of Narcotics

In 2008, the Virginia State Police reported 33,217 drug arrests throughout the Commonwealth.¹⁶⁵ If each of these arrests led to an analysis, on average, each analyst would be required to perform 519 analyses a year.¹⁶⁶ As a result of *Melendez-Diaz*, these analysts must be available to be present at each of these 519 cases to allow the defendant to cross-examine them on their findings unless the defendant waives his rights. Since the Supreme Court handed down its decision in *Melendez-Diaz* in June,

¹⁵⁷ BRAVE NEW WORLD, *supra* note 96, at 4.

¹⁵⁸ Jaspen, University of Richmond Address, *supra* note 108.

¹⁵⁹ *Id.*

¹⁶⁰ BRAVE NEW WORLD, *supra* note 96, at 4.

¹⁶¹ *Id.* The Commonwealth must remember that because *Melendez-Diaz* was handed down by the United States Supreme Court, all fifty states will be looking to hire additional analysts to keep the prosecutors in each respective state from having to dismiss or nolle prosequere many pending cases.

¹⁶² *Id.*

¹⁶³ *Id.* This is a substantial increase in the state’s budget, especially since it is dedicated to one particular service. As a result of the current economic situation, it is highly unlikely that the General Assembly could come up with this money during the 2010 General Assembly Session.

¹⁶⁴ *Id.* The current state rate is 50.5 cents per mile. See *Virginia Workers’ Compensation Commission Chronological Compensation Benefits Chart*, VA. WORKERS’ COMPENSATION COMMISSION, <http://www.vwc.state.va.us/portal/vwc-website/helpfulresources/customerassistance/customerassistancebenefits> (last visited Oct. 28, 2010). This rate fluctuates, and if gasoline prices increase, this rate will increase and place additional costs on the Commonwealth.

¹⁶⁵ BRAVE NEW WORLD, *supra* note 96, at 4.

¹⁶⁶ *Id.*

DFS has seen a substantial increase in subpoenas for the appearance of drug analysts in court.¹⁶⁷

In July 2008, there were 43 subpoenas for drug section analysts¹⁶⁸ versus 1,242 in July 2009, a month after the Supreme Court's decision.¹⁶⁹ The analysts spent 324 hours away from the laboratory and in the courtroom during July 2009;¹⁷⁰ whereas they spent only 230 outside the laboratory and in the courtroom during the entire eleven preceding months.¹⁷¹ Commonwealth's Attorney Garrett said his "relatively small jurisdiction has 'dozens and dozens' of cases that could be affected by the ruling [in *Melendez-Diaz*]. . . . [and] one cocaine case in Louisa already has been dismissed because the forensic analyst was not present."¹⁷² During the days and weeks leading up to the Special Session, the general sentiment was that "[h]opes are dim . . . that a single day of legislating can fully undo the headaches caused by June's *Melendez-Diaz* decision The vastly increased demand for the experts already has caused some cases to be thrown out."¹⁷³

Since section 19.2-187.1 of the Code of Virginia was amended in August of 2009, there have been fewer controlled substance subpoenas and analysts have spent fewer hours outside of the laboratory compared to the time between the Court's decision on June 25, 2009, and when the Code of Virginia was amended on August 19, 2009.¹⁷⁴ Analysts spent more hours in the court room during the month following *Melendez-Diaz* than in the previous eleven months combined.¹⁷⁵ In September and October of 2009, the total number of controlled substance subpoenas was 1,034 and 822, respectively, and the hours out of the laboratory were 539 and 361, respectively.¹⁷⁶ While it is too early to gauge to what extent amending Virginia's Code will reduce the number of subpoenas received by DFS, the initial trend is that both fewer controlled substance subpoenas are being issued and analysts are spending fewer hours outside the laboratory.¹⁷⁷

¹⁶⁷ See BRAVE NEW WORLD, *supra* note 96; Editorial, *Taking a Bite Out of Crime Fighting: Virginia Labs are Hobbled by the Supreme Court*, WASH. TIMES, Aug. 28, 2009, at A22; Flook, *supra* note 136.

¹⁶⁸ Flook, *supra* note 136.

¹⁶⁹ Jaspen, University of Richmond Address, *supra* note 108, at 94.

¹⁷⁰ *Id.*

¹⁷¹ Flook, *supra* note 136.

¹⁷² Dumond, *supra* note 96. The dismissal occurred within two weeks of the decision and was one of many instances where the Commonwealth could not present its case.

¹⁷³ Flook, *supra* note 136 (italics added).

¹⁷⁴ See Jaspen, University of Richmond Address, *supra* note 108, at 94.

¹⁷⁵ See *supra* notes 168–71 and accompanying text. It is likely that the total number of hours spent outside a laboratory for a particular month is not representative of the total number of subpoenas received for that month. For example, the number of hours spent outside of the laboratory in July 2009 may reflect the total number of subpoenas received for the prior month.

¹⁷⁶ Gail Jaspen, Impact on Department of Forensic Science of *Melendez-Diaz v. Massachusetts*: Monthly Data from April 2009 Through July 2010 (2010) (presentation materials on file with author) [hereinafter Jaspen, Presentation].

¹⁷⁷ *Id.*

C. Statistics: Driving Under the Influence

The effects of *Melendez-Diaz* have also been profound on toxicology cases. In Virginia, there were 28,227 DUI arrests in 2008.¹⁷⁸ These arrests resulted in either a blood or breath test, unless the arrestee refused to provide a blood alcohol sample.¹⁷⁹ All blood tests are sent to DFS for analysis; whereas, the breath tests are analyzed by local law enforcement officers.¹⁸⁰ According to Pete Marone, the director of DFS, “Virginia has just three people who calibrate and certify the more than 200 breathalyzer machines in the state.”¹⁸¹

Since *Melendez-Diaz*, “defense lawyers began objecting to breath-test certificates in drunken driving cases in which the technician or the person who calibrated the machine wasn’t in court.”¹⁸² The law in Virginia “requires proof of breathalyzer calibration, meaning confirmation that the machines work Five cases in Fairfax County have been thrown out on such challenges.”¹⁸³ These five cases were dismissed less than a month after the Supreme Court’s decision in *Melendez-Diaz*.¹⁸⁴ The cases dismissed in Fairfax are an example from just one jurisdiction where the analysts have been unable to appear in court to testify to the findings of the blood-alcohol certificates.¹⁸⁵ This demonstrates the effects that *Melendez-Diaz* has had on the system in less than a month after the decision was handed down. If the Virginia General Assembly failed to adopt a statutory solution, the adverse consequences to the Virginia judicial system would be profound.

Although there has been a downward trend for subpoenas of analysts who prepared certificates concerning controlled substances, there has been an increase for subpoenas of analysts who prepared breath alcohol certificates.¹⁸⁶ Consequently, analysts have spent fewer hours in court testifying about controlled substance charges and more hours testifying about alcohol charges.¹⁸⁷ In July 2009, DFS received thirty-three breath alcohol subpoenas and analysts spent forty-three hours out of the laboratory.¹⁸⁸ In September and October of 2009, the total number of breath alcohol subpoenas was 64 and 114, respectively, and the hours out of the laboratory in September were 251.¹⁸⁹

¹⁷⁸ BRAVE NEW WORLD, *supra* note 96, at 4.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ Tom Jackman & Rosalind S. Helderman, *Kaine Calls Session to Amend Laws on Trial Testimony*, WASH. POST, July 23, 2009, at B2.

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *See id.*

¹⁸⁵ *See id.*; Dumond, *supra* note 96.

¹⁸⁶ Jaspen, University of Richmond Address, *supra* note 108, at 93–94.

¹⁸⁷ *See id.*

¹⁸⁸ *Id.* at 93.

¹⁸⁹ *Id.*; Jaspen, Presentation, *supra* note 176.

IV. WILL VIRGINIA'S NOTICE-AND-DEMAND STATUTE SUSTAIN A
CONSTITUTIONAL ATTACK UNDER *MELENDEZ-DIAZ*?

*A. Informational Background for Hypothetical Scenarios Assessing the
Constitutionality of Virginia's Amended Notice-and-Demand Statute*

As mentioned in Part II, Justice Scalia cited the notice-and-demand statutes of several states for the proposition that these statutes were constitutional in light of *Melendez-Diaz*.¹⁹⁰ In his opinion, Justice Scalia wrote that “[c]ontrary to the dissent’s perception, these statutes shift no burden whatever. The defendant *always* has the burden of raising his Confrontation Clause objection; notice-and-demand statutes simply govern the *time* within which he must do so. States are free to adopt procedural rules governing objections.”¹⁹¹ Defendants who wish to exercise their Sixth Amendment compulsory process rights¹⁹² are commonly required to announce their intent to call witnesses in advance of trial pursuant to the Federal Rules of Criminal Procedure.¹⁹³ In his opinion, Scalia wrote that “[t]here is no conceivable reason why [the criminal defendant] cannot similarly be compelled to exercise his Confrontation Clause rights before trial. . . . Today’s decision will not disrupt criminal prosecutions in the many large States whose practice is already in accord with the Confrontation Clause.”¹⁹⁴

This Part will provide several hypothetical scenarios in which the Commonwealth provided proper “notice” pursuant to section 19.2-187.1 of the Code of Virginia, but the defendant failed to “demand” the presence of the analyst within the permissive time period set forth in the statute. Although the defendant failed to make a timely demand in these hypothetical scenarios, the author will posit that, should Virginia’s notice-and-demand statute be challenged before the United States Supreme Court, it should withstand a constitutional attack under the criteria set forth in *Melendez-Diaz*.

In the hypothetical scenarios below, the defendant is charged with possession of cocaine. The white powdered substance is confiscated during an authorized search

¹⁹⁰ *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2541 (2009). *See generally* GA. CODE ANN. § 35-3-154.1 (2006); OHIO REV. CODE ANN. § 2925.51 (West 2006); TEX. CODE CRIM. PROC. ANN. art. 38.41 (West 2005).

¹⁹¹ *Melendez-Diaz*, 129 S. Ct. at 2541.

¹⁹² *See* U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor . . .”).

¹⁹³ *See* FED. R. CRIM. P. 12.1(a) & (e), 16(b)(1)(C).

¹⁹⁴ *Melendez-Diaz*, 129 S. Ct. at 2541. There is a long-standing tradition that a defendant must exercise his rights under the Sixth Amendment’s Compulsory Process Clause prior to trial. The Court concluded that it is not unreasonable to require a defendant to exercise his rights under the Sixth Amendment’s Confrontation Clause. It is noteworthy that the Court did not explicitly define “reasonable,” but rather cited several notice-and-demand statutes that the Court believed were constitutional under *Melendez-Diaz*.

of the defendant's car. The substance is submitted to DFS and tested by one of the analysts. The results confirm that the substance suspected by the officers to be cocaine is in fact cocaine.

B. Application One: Notice Provided Twenty-Nine Days Prior to Trial and Demand Occurred More than Fourteen Days Later

Under this hypothetical scenario, assume that on May 1st the Commonwealth provided a copy of the certificate to defendant's counsel and notice to the defendant of his constitutional right to object to the admittance of the certificate into evidence without the presence of the analyst at trial. After providing a copy of the certificate and the notice to defendant, the Commonwealth, on the same day, filed copies in clerk of court's office. In addition, the trial is scheduled for May 30th. Under Virginia's recently amended notice-and-demand statute, notice by the Commonwealth is deemed proper.¹⁹⁵ Assume that the defense attorney demanded the presence of the analyst sometime between May 16th and May 30th, the date of trial. Pursuant to Virginia's notice-and-demand statute, the defendant has failed to demand the analyst's presence within the time period required by the statute.¹⁹⁶

Because of the defendant's untimely request pursuant to section 19.2-187.1, the Commonwealth relies on the certificate of analysis at trial. At trial, on May 30th, the prosecution offers into evidence the certificate of analysis prepared by the analyst at DFS as proof that the white powdered substance in the defendant's car was cocaine. The defendant objects, claiming the use of the certificate violates his Sixth Amendment right to confront witnesses against him. Even in light of *Melendez-Diaz*, the trial judge concludes that the defendant did not demand the presence of the analyst in a "reasonable" amount of time prior to trial.¹⁹⁷ Ultimately, the case is appealed to the United States Supreme Court where the defendant asserts section 19.2-187.1 is unconstitutional in light of *Melendez-Diaz*.

¹⁹⁵ See *supra* notes 144–46 and accompanying text.

¹⁹⁶ See *supra* note 147 and accompanying text.

¹⁹⁷ In this application, the defendant did not comply with the statutory requirement prescribed in section 19.2-187.1 of the Code of Virginia. The failure of the criminal defendant to comply with the requirements set forth in a notice-and-demand statute will always trigger a statutory violation, but pursuant to *Melendez-Diaz* will not always result in a waiver of his constitutional right to confront witnesses against him. For example, if a criminal defendant fails to comply with the statute and the court subsequently finds the statute unconstitutional in light of *Melendez-Diaz*, the criminal defendant will have failed to comply with the statutory provision without having waived his constitutional right. In the aforementioned application, the trial judge would use his discretion when allowing the prosecution to enter into evidence the certificate of analysis in lieu of the analyst being physically present for trial. By admitting the certificate of analysis over the defendant's objection, the judge would hold that section 19.2-187.1 is constitutional pursuant to *Melendez-Diaz*. Therefore, due to the defendant's failure to "demand" the presence of the analyst in the statutorily proscribed time, the defendant waived his constitutional right to confront witnesses against him.

This Note posits that under this hypothetical scenario, section 19.2-187.1 of the Code of Virginia would survive the constitutional challenge under *Melendez-Diaz*. Justice Scalia, in his majority opinion, discussed Georgia's, Texas's, and Ohio's notice-and-demand statutes and implied that they would likely be declared constitutional.¹⁹⁸ Under Virginia's statute, the timeline in which the prosecution must provide notice is more stringent for the prosecution than under the Texas statute.¹⁹⁹ In addition, Virginia's statute is more lenient than that of Texas in that the defendant has a longer period of time to "demand" the presence of the analyst from the period in which "notice" was provided.²⁰⁰

C. Application Two: Notice Provided Forty-Five Days Prior to Trial and Demand Occurred Fifteen Days Later, Thirty Days Prior to Trial

Under this hypothetical scenario, assume on April 15, the Commonwealth provides the defendant with both a copy of the certificate of analysis and notice of his right to confront the analyst that prepared the certificate. Also, the Commonwealth filed with

¹⁹⁸ *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2541 (2009) (citing GA. CODE ANN. § 35-3-154.1 (2010); OHIO REV. CODE ANN. § 2929.51 (West 2006); TEX. CODE CRIM. PROC. ANN. art. 38.41 (West 2005)); *see also supra* Part II.C.1.

¹⁹⁹ *Compare* VA. CODE ANN. § 19.2-187.1 (2009), *with* TEX. CODE CRIM. PROC. ANN. art. 38.41 (West 2005). In Virginia, the prosecution must provide "notice" at least twenty-eight days prior to the date of trial; whereas in Texas, the prosecution is required to provide "notice" at least twenty days prior to the date of trial. A prosecutor in Virginia who intends to use a certificate of analysis must provide "notice" over a week in advance of a similarly situated prosecutor in Texas. Virginia's provision, requiring earlier notice, is more defendant-friendly because it provides the defense with notice a greater number of days prior to the date of trial. The Court in *Melendez-Diaz* said notice-and-demand statutes are proper because they are not burden-shifting. *Melendez-Diaz*, 129 S. Ct. at 2541. Additionally, the Court cited the Texas statute for the proposition that it would be deemed constitutional in light of its decision. *See id.* Since Virginia's "notice" provision is more defendant-friendly than Texas's "notice" provision, the author of this Note posits that Virginia's requirement of notice at least twenty-eight days prior to trial would be deemed constitutional in light of *Melendez-Diaz*.

²⁰⁰ *Compare* VA. CODE ANN. § 19.2-187.1 (2009), *with* TEX. CODE CRIM. PROC. ANN. art. 38.41 (West 2005). In Virginia, the defendant's "demand" is deemed proper if made within fourteen days of receiving notice, whereas in Texas, the defendant is required to "demand" the presence of the analyst within ten days of receiving notice. A defendant in Virginia who objects to the use of a certificate of analysis has four more days to make that objection known than a similarly situated defendant in Texas. Virginia's provision is more defendant-friendly because it grants the defendant a greater time period to "demand" the presence of the analyst. By allowing four additional days than provided in the Texas statute, Virginia's statute further reduces the burden of the "demand" requirement imposed on the defendant. Since Virginia's "demand" provision is more defendant-friendly than Texas's provision, the author of this Note posits that requiring defendant to "demand" within fourteen days in order to exercise his confrontation right would be deemed constitutional in light of *Melendez-Diaz*.

the clerk's office the materials submitted to the defendant. The trial is scheduled for May 30th. Because the Commonwealth provided notice more than twenty-eight days before trial, notice was deemed proper under section 19.2-187.1 of the Code of Virginia. The defendant demanded the presence of the analyst more than fourteen days later. At trial, on May 30th, the prosecution offers into evidence the certificate as proof that the white powdered substance in the defendant's car was cocaine. The defendant objects claiming the use of the certificate violates his Sixth Amendment right to confront witnesses against him. The trial court permitted the introduction of the certificate and subsequently found the defendant guilty of possession of cocaine. Ultimately, the case is appealed to the United States Supreme Court where the defendant claims section 19.2-187.1 is unconstitutional in light of *Melendez-Diaz*.

Under *Melendez-Diaz*, the author of this Note posits that should the constitutionality of section 19.2-187.1 be challenged in the aforementioned hypothetical scenario, the statute would pass constitutional muster. Under Virginia's statute, the timeline in which the prosecution must provide notice is defined; whereas in Ohio, the prosecution has no restrictions on the time in which notice must be provided.²⁰¹ In addition, Virginia's statute provides greater safeguards and is more lenient than Ohio's in that the defendant has a longer period of time to "demand" the presence of the analyst from the date on which "notice" was provided.²⁰²

CONCLUSION

Although the Supreme Court significantly expanded the scope of a defendant's Sixth Amendment right to confront witnesses against him in *Melendez-Diaz*, the majority downplayed this expansion and tried to indicate it had not departed from its holding in *Crawford*. Rather, the Court considerably changed the protections offered under this constitutional guarantee by affirming what defendants have claimed to be a constitutional right since its inception: the right to cross-examine testimonial statements, which includes the right to cross-examine the author of the certificate of analysis.

²⁰¹ Compare VA. CODE ANN. § 19.2-187.1 (2009), with OHIO REV. CODE ANN. § 2925.51 (West 2006). In Virginia, the prosecution must provide "notice" at least twenty-eight days prior to the date of trial; whereas, in Ohio, the prosecution may provide "notice" at any time. Under this application, the prosecution provided "notice" to the defendant forty-five days prior to the date of trial. Notice would be deemed proper under both the Virginia and Ohio Statute.

²⁰² Compare VA. CODE ANN. § 19.2-187.1 (2009), with OHIO REV. CODE ANN. § 2925.51 (West 2006). In Virginia, the defendant has fourteen days to "demand" the presence of the analyst from the date of receiving "notice." VA. CODE ANN. § 19.2-187.1 (2009). In Ohio, the defendant must exercise his right to "demand" the presence of the analyst within seven days of receiving "notice." OHIO REV. CODE ANN. § 2925.51 (West 2006). Under this application, the prosecution provided "notice" to the defendant forty-five days prior to the date of trial. In Virginia, demand would be proper up until thirty-one days prior to the date of trial; whereas, in Ohio, demand would only be proper if made at least thirty-eight days prior to the date of trial.

This Note first suggested that, as a result of the Court's decision in *Melendez-Diaz*, prosecutors around the country have been left in a vulnerable position because of the momentous influx of requests by defendants for the presence of the analyst at trial. Additionally, requiring the analysts' presence at trial will have a grave impact on the ability of each respective state's department of forensic science to remain current in testing for alcohol quantity and illegal narcotics. In effect, without some statutory provision to assist in administering the defendants' requests, *Melendez-Diaz* will paralyze prosecutors around the country and greatly inhibit their ability to prosecute their cases. To demonstrate the undue burden placed on the government, this Note explored the impact of *Melendez-Diaz* on Virginia, including the limitations placed on prosecutors, the Virginia Department of Forensic Science, and the Virginia judicial system.

Next, this Note proposed that the unfettered rights granted to a defendant as a result of *Melendez-Diaz* may be modified by statutory construction to provide administrative ease, which may still be deemed constitutional under the decision. Virginia's notice-and-demand statute adopted elements from those statutes cited by the majority in *Melendez-Diaz*. This Note posits that in light of the Court's discussion of the scope of a defendant's right to confront witnesses against him, coupled with its discussion of the notice-and-demand statutes of Georgia, Texas, and Ohio, if the constitutionality of Virginia's notice-and-demand statute is challenged, it will be deemed constitutional.