

**The Confrontation Clause and
the Ongoing Fight to Limit *Melendez-Diaz***

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On June 25, 2009, the Supreme Court handed down the 5-4 decision of *Melendez-Diaz v. Massachusetts*.¹ Justice Scalia's majority opinion held that a forensic report is "testimonial" under the Confrontation Clause, and therefore, a prosecutor can only introduce such a report into evidence if the analyst who prepared the report testifies in person.² Justice Kennedy's dissent not only disagreed with the constitutional analysis of the majority, but also decried the policy implications of the holding—particularly the "remarkable power" it gave to defense attorneys, who could use this requirement to their strategic advantage during plea negotiations even absent a legitimate dispute over the report's findings.³ Indeed, because of the burdens that the *Melendez-Diaz* holding potentially places on state crime labs, states have explored ways to limit that decision's reach. This essay explores the two such means that states have tried to date, which will constitute the next battle over the legal principles and policy implications of *Melendez-Diaz*.

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¹ *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (June 25, 2009).

² Under *Crawford v. Washington*, 541 U.S. 36, 51–52 (2004), the Court did not strictly set the boundaries of what statements are "testimonial," but it did hold generally that "testimonial" statements include formal statements made to police officers and other statements intended to be used prosecutorially. The cases after *Crawford*, including *Melendez-Diaz*, have attempted to determine which statements are "testimonial" and which are not. In *Davis v. Washington*, for example, the Court clarified that statements are non-testimonial when "the circumstances objectively indicate that the primary purpose is to enable police assistance to meet an ongoing emergency," while statements are testimonial "when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." 547 U.S. 813, 814 (2006).

³ *Id.* at 2556–57 (Kennedy, J., dissenting).

Opponents of *Melendez-Diaz* seemed to move quickly to limit that opinion. Just four days after *Melendez-Diaz* was handed down, the Court granted certiorari in the strikingly similar case of *Briscoe v. Virginia*.⁴ In *Melendez-Diaz*, Justice Souter had been in the five-justice majority; but by the time the Court considered *Briscoe*, his seat on the bench would be occupied by Justice Sotomayor, who had already been nominated to fill Souter's seat when the Court handed down *Melendez-Diaz*.⁵ Many commentators suspected that the four dissenting justices in *Melendez-Diaz* granted certiorari in *Briscoe* in the hope that Justice Sotomayor, a former prosecutor, would part from Justice Souter's position and vote to either overrule *Melendez-Diaz* or make it less burdensome on prosecutors.⁶ During oral argument in *Briscoe*, Scalia seemed to confirm this theory; he asked, "Why is this case here except as an opportunity to upset *Melendez-Diaz*?"⁷

But Sotomayor did not join the *Melendez-Diaz* dissenters. On January 25, 2010, after full briefing and oral argument, the Court vacated and remanded *Briscoe* to the Supreme Court of Virginia, without opinion, to reconsider that case in light of *Melendez-Diaz*.⁸ From oral argument, it was at least clear that Sotomayor had not been swayed by the dissenters' practical concerns; when Virginia Solicitor General Stephen McCullough suggested that "there are several constitutional, legal, and practical considerations" at play, Sotomayor interrupted him. "No, no. Forget the practical," she said. "Talk about the legal, constitutional."⁹

For the time being, then, *Melendez-Diaz* is safe, and the practical implications of that opinion continue to put pressure on states to limit its reach. Yet, as Professor Darryl K. Brown and I noted in a recent essay analyzing the possible outcomes in *Briscoe*, vacatur would leave unanswered several conspicuous questions about the scope of *Melendez-Diaz*.¹⁰ For example, Arkansas and Michigan already allow analysts

⁴ *Magruder v. Virginia*, 657 S.E.2d 113 (Va. 2008), *cert. granted sub nom. Briscoe v. Virginia*, 129 S. Ct. 2858 (June 29, 2009). In *Briscoe*, the Supreme Court of Virginia, writing one year before *Melendez-Diaz*, concluded that even if the analyst's report was "testimonial," the defendant's right to confront the witness was satisfied by a Virginia law that allowed the defendant to call the analyst as an adverse witness during the defense phase of trial. *Id.* At least according to Professor Richard D. Friedman, counsel for *Briscoe*, *Melendez-Diaz* already required the prosecution to call the witness; on brief, Friedman asserted that "[t]he question presented . . . has been definitively resolved by this Court" in *Melendez-Diaz*. Brief of Petitioners at 12, *Briscoe*, No. 07-11191 (U.S. Sept. 1, 2009).

⁵ Peter Baker & Jeff Zeleney, *Obama Hails Judge as "Inspiring,"* N.Y. TIMES, May 26, 2009, at A1.

⁶ See, e.g., Posting of Lyle Denniston to SCOTUSblog, *Analysis: Is Melendez-Diaz Already Endangered?*, <http://www.scotusblog.com/2009/06/new-lab-report-case-granted/> (June 29, 2009, 13:51 EST). On brief, twenty-six states and the District of Columbia, arguing as amici curiae, asked the Court to overturn *Melendez-Diaz* outright. Brief of the States of Indiana, Massachusetts et al. as Amici Curiae in Support of Respondent at 32-41, *Briscoe v. Virginia*, No. 07-11191 (U.S. Nov. 2, 2009).

⁷ Transcript of Oral Argument at 55, *Briscoe v. Virginia*, No. 07-11191 (U.S. Jan. 11, 2010).

⁸ Posting of Richard D. Friedman to The Confrontation Blog, *G . . . VR in Briscoe*, http://confrontationright.blogspot.com/2010_01_01_archive.html (Jan. 25, 2010, 16:51 EST).

⁹ Transcript of Oral Argument at 32, *Briscoe v. Virginia*, No. 07-11191 (U.S. Jan. 11, 2010).

to testify remotely under certain circumstances,¹¹ and the Virginia General Assembly recently passed similar legislation, which allows for remote testimony by the analyst if the defendant consents.¹² However, the constitutionality of this alternative to live, in-court testimony is at least questionable. In 2002, the Supreme Court refused to transmit to Congress a similar proposed amendment to the Federal Rules of Criminal Procedure. As Justice Scalia explained, “Virtual confrontation might be sufficient to protect virtual constitutional rights; I doubt whether it is sufficient to protect real ones.”¹³

But there exist other, more novel means of limiting *Melendez-Diaz*. Two possibilities are of particular note. First, can a state forensic lab substitute an analyst other than the report’s author to testify in court? Second, can a statute require an analyst’s appearance only upon a showing of “good cause” or upon the defendant expressing intent to cross-examine the analyst? Several states have adopted different positions on each of these issues, and the Court will no doubt be forced to resolve these questions. In fact, Professor Jeffrey L. Fisher and the Stanford Supreme Court Litigation Clinic have recently filed a petition for certiorari on the first question.¹⁴ This essay presents a brief overview of these two issues and frames the upcoming debate over the reach of *Melendez-Diaz*.

I. THE QUESTION OF WHICH ANALYST(S) MUST TESTIFY

While *Melendez-Diaz* stated that admission of a forensic report requires accompanying testimony by an analyst, the Court did not specify which analyst, or analysts, would be required to testify—although both the majority and the dissent noted the importance of this issue.¹⁵ *Melendez-Diaz* begs two related questions: (1) whether a

¹⁰ Stephen Wills Murphy & Darryl K. Brown, *The Confrontation Clause and the High Stakes of the Court’s Consideration of* *Briscoe v. Virginia*, 95 VA. L. REV. IN BRIEF 97 (2010), available at http://www.virginialawreview.org/inbrief.php?s=inbrief&p=2010/01/23/murphy_brown.

¹¹ See Ark. Code Ann. § 12-12-313(e) (West 2009) (allowing remote testimony by the analyst provided “sufficient safeguards to satisfy all state and federal Constitutional requirements,” and “[a]bsent a showing of prejudice by the defendant); see also Mich. C.L.A. § 600.2167(4) (West 2009) (providing for remote testimony at a preliminary hearing).

¹² S. 387, 2010 Gen. Assem., Reg. Sess. (Va. 2010), available at <http://leg1.state.va.us/cgi-bin/legp504.exe?101+ful+CHAP0800>. A summary of the bill’s progress is available at <http://leg1.state.va.us/cgi-bin/legp504.exe?101+sum+SB387>.

¹³ Order of the Supreme Court, 207 F.R.D. 89, 94 (2002) (statement of Scalia, J.), available at <http://www.uscourts.gov/rules/CR-26b.pdf>. See Frederic Lederer, *The Legality and Practicality of Remote Witness Testimony*, 20 No. 5 Prac. Litigator 19, 27–29 (2009) (discussing the legality of remote prosecution testimony).

¹⁴ See Petition for Writ of Certiorari, *Pendergrass v. State*, 913 N.E.2d 703 (Ind. 2009) (No. 09-___), available at http://confrontationright.blogspot.com/2010_01_01_archive.html [hereinafter “Fisher Petition”].

¹⁵ See *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2532 n.1 (2009) (“[W]e do not hold, and it is not the case, that anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device, must appear in person.”); *id.* at 2544–45, 2546 (Kennedy, J., dissenting).

“surrogate” analyst may testify in the place of another analyst; and (2) whether only the author of the forensic report must appear in court or whether all analysts who played a role in the test must appear.

The Court may soon take up the first of these questions. On January 19, 2010, Professor Fisher filed a petition for certiorari on the question of whether “surrogate” analysts may testify as to the conclusions of another analyst. In the underlying case, *Pendergrass v. State*, the prosecution introduced an analyst’s DNA report into evidence but called the lab supervisor—not the analyst who conducted the test—to testify about its contents.¹⁶ The Indiana Supreme Court allowed this substitution, reasoning that, where “the prosecution supplied a supervisor with direct involvement in the laboratory’s technical processes,” the witness “sufficed for Sixth Amendment purposes.”¹⁷ Similarly, the Georgia Supreme Court has held that a surrogate analyst can endorse another analyst’s conclusions before the jury. Notably, while the Indiana court seemed to require that the surrogate be familiar with the laboratory and the analyst, the Georgia court seemed to require only that the surrogate has “reviewed the data and testing procedures to determine the accuracy” of the report such that the surrogate was not testifying to the report of another analyst, but was rather testifying to his own conclusions.¹⁸

By contrast, the highest courts of Massachusetts and North Carolina have held that surrogate testimony does not satisfy the defendant’s right to confront the witness.¹⁹ The Seventh Circuit has clarified that a witness can testify based on raw data generated by another analyst, so long as he does not testify based on the conclusions of that analyst²⁰ and so long as the non-testifying analyst’s report is not admitted into evidence.²¹

At stake in this dispute is the control that labs have over their analysts’ time. Under a strict reading of *Melendez-Diaz*, each analyst would be regularly called out of the laboratory to testify at trial. By contrast, under the Indiana court’s rule, labs could coordinate and schedule analysts’ appearances to minimize the time each analyst spends away from the lab. And in fact, under the Georgia court’s rule, the prosecutor could hire an independent analyst to verify and testify to the conclusions of the analyst.

Ultimately, though, the question of *which* analyst must appear only speaks to whether a prosecutor can substitute one analyst for another. A much more significant

¹⁶ 913 N.E.2d 703 (Ind. 2009).

¹⁷ *Id.* at 708.

¹⁸ *Rector v. State*, 681 S.E.2d 157, 160 (Ga. 2009) (citation and quotation omitted); *see generally* Fisher Petition, *supra* note 14, at 15–17 (also discussing the similar position of the Illinois Supreme Court).

¹⁹ *Commonwealth v. Avila*, 912 N.E.2d 1014, 1029 (Mass. 2009); *State v. Locklear*, 681 S.E.2d 293, 304–05 (N.C. 2009).

²⁰ *United States v. Moon*, 512 F.3d 359, 362 (7th Cir. 2008), *cert. denied*, 129 S. Ct. 40 (2008).

²¹ *United States v. Turner*, 591 F.3d 928 (7th Cir. Jan. 12, 2010). Fisher concludes that the intermediate appellate courts of Texas, Michigan, and California have reached this same conclusion. *See* Fisher Petition, *supra* note 14, at 12–15 & n.3.

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issue for labs is the question of whether *every* analyst who participates in the test must also testify. If the Court answered this question in the affirmative, then the burden on state laboratories would multiply.

For the moment, the Court has put off this issue. In *Aguilar v. Virginia*, the analyst who prepared the forensic report testified, but the defendant nevertheless objected to the admission of his report, because other analysts who had prepared the samples did not also testify.²² Virginia's intermediate Court of Appeals upheld the admission of the report, and the Supreme Court of Virginia declined the defendant's appeal. The United States Supreme Court vacated the case and sent it back to the Supreme Court of Virginia, on the same day that the Court vacated *Briscoe*. Little can be read from the Court's vacatur; at the very least, it signaled the Court's desire that the Supreme Court of Virginia evaluate this issue more carefully.

Professor Brown and I have argued that the Court should resolve the issue of which analyst must testify by clarifying the line of what aspect of the forensic report is "testimonial." We proposed that the Court in *Briscoe* declare that only the results of a test are testimonial, because they are prepared as evidence of guilt in preparation for a trial against a particular defendant; this view is consistent with prior Supreme Court jurisprudence on "testimonial" evidence.²³ But given the complex nature of some forensic tests and the number of analysts who may be involved in the preparation of a particular forensic report, this is an issue that the Court should take up squarely. It is encouraging that the Court did not seek an easy fix by casting some broad rule or abstract principle in *Briscoe*.

Of course, it is beyond the scope of this essay whether the Court should ever act preemptively to set parties' expectations on issues that might later come before it. But the very nature of these issues should give the Court pause: a Court decision on which analysts, and how many, must later appear to testify would certainly affect how laboratories structure their laboratory tests. For example, the Court might lay out a rule that routine maintenance reports on a machine are non-testimonial, while specific maintenance reports—such as a maintenance report prepared immediately before the test, or the same day as the test—are testimonial. Such a ruling would certainly clarify the issue, but it would lead laboratories either to ensure that the same analysts conduct the maintenance or to forego specific maintenance altogether. Each option would have implications for the reliability of forensic tests. The Court should thus wait until such issues are squarely before it and parties and *amici* can weigh in on the policy implications of its resolution of the issue.

II. CONDITIONS ON THE RIGHT OF CONFRONTATION

The *Melendez-Diaz* majority declined to address the constitutionality of a second avenue that states have employed to limit *Melendez-Diaz*: statutes requiring the defendant to "show good cause for demanding the analyst's presence, or even to affirm

²² *Aguilar v. Virginia*, No. _____ (Va. Ct. App. ____), petition for appeal denied, 130 S. Ct. 1282 (Jan. 25 2010) (remanded for further consideration in light of *Melendez-Diaz*).

²³ See Murphy & Brown, *supra* note 10, at 104.

under oath an intent to cross-examine the analyst”²⁴ before the analyst must appear. These “demand-plus” statutes²⁵ require the defendant to make some showing in addition to the demand for an analyst’s appearance in court, and at least nine states have enacted one of these statutes or a combination of the two. These statutes were in place even before *Melendez-Diaz*, but that ruling puts pressure on other states to explore such a means of limiting the reach of that opinion.

This issue could be a far greater limit on *Melendez-Diaz* than the question of which analyst or analysts must appear. Whereas the above issue determines how many analysts must appear, demand-plus statutes could determine whether any analyst had to appear at all. The appeal of these statutes is obvious. They prevent a defendant from using a notice-and-demand rule for strategic purposes without any attempt or intent to challenge the report’s results.

A. The Requirement of “Good Cause”

Statutes that require a showing of “good cause” would particularly limit a defendant’s mischievous use of the Confrontation right. While the Nevada Supreme Court upheld such a statute, the highest courts of four other states have struck down “good cause” statutes as unconstitutional.²⁶ Ultimately, the permissibility of these statutes will depend not on the principles underlying the Confrontation Clause, but on the place of cross-examination in the fact-finding process.

Even before *Crawford v. Washington* expanded defendants’ rights under the Confrontation Clause,²⁷ the highest courts of New Hampshire, Georgia, and New Jersey struck down a “good cause” requirement on an analyst’s appearance, holding that such a statute presents a constitutional “Catch-22”: in order to determine specific grounds for objection, the defendant needs to cross-examine the analyst, but the defendant can only cross-examine the analyst if he states specific grounds.²⁸

Meanwhile, just last year and in light of *Crawford* and *Melendez-Diaz*, the Kansas Supreme Court struck down its similar statute.²⁹ Generally, the Kansas court

²⁴ *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2532 n.12 (2009).

²⁵ The term “demand-plus” was coined by Pamela Metzger. See Pamela Metzger, *Cheating the Constitution*, 59 VAND. L. REV. 475, 482 (2006).

²⁶ At least three other states have such statutes, but their highest courts have not considered their constitutionality: Alaska Stat. § 12.45.084(d) (West 2010) (defendant must “show[] cause.”); Ala. Code § 12-21-302(b) (2009) (defendant must “establish[] a legitimate basis for the challenge”); Tenn. Code Ann. § 40-35-311(2) (West 2010).

²⁷ *Crawford v. Washington*, 541 U.S. 36 (2004). *Crawford* held that all “testimonial” statements implicate the Confrontation Clause and can only be admitted if the speaker testifies in court. It overruled *Ohio v. Roberts*, 448 U.S. 56 (1980), which had held that out-of-court statements can be admitted without the speaker’s appearance if the statements indicate “indicia of reliability.”

²⁸ *State v. Christensen*, 607 A.2d 952, 953 (N.H. 1992) (considering N.H. Rev. Stat. Ann. § 318-B:26-a); *Miller v. Georgia*, 472 S.E.2d 74, 79 (Ga. 1996) (discussing Ga. Code Ann. § 35-3-16(c)); *State v. Miller*, 790 A.2d 144, 156 (N.J. 2002) (discussing N.J. Stat. Ann. § 2C:35-19).

²⁹ Kan. Stat. Ann. § 22-3437(3) (2009).

used the same “Catch-22” argument adopted by other state courts.³⁰ But the court also noted the importance of cross-examination under *Crawford*; in *Crawford*, the Court stated that the Confrontation Clause requires a document’s “reliability be assessed in a particular manner: by testing in the crucible of cross-examination.”³¹ Given the emphasis that *Crawford* placed on cross-examination, the Kansas court held that admissibility—and thus cross-examination—cannot be conditioned on a showing of “good cause” or some initial problem of reliability. Further, the Kansas court found that since the Court in *Melendez-Diaz* had expressly refused to allow practical concerns to inform its decision, states cannot use scarcity of resources to justify a restriction on the Confrontation right.³²

Despite these compelling arguments, in 2005 the Nevada Supreme Court upheld a statute that requires that the defendant establish a “substantial and bona fide dispute” of the facts of the report.³³ The Nevada court too relied on *Crawford* in allowing this condition. The court reasoned, “[t]he essence of *Crawford* is the need for cross-examination. If defense counsel has no bona fide dispute regarding the facts in an affidavit . . . then cross-examination is meaningless.”³⁴ Thus, the court found that the provision “adequately protect[s] the accused’s right to confront the witnesses against him while streamlining the trial process, serving both the interest of the accused and judicial economy.”³⁵

What separated the courts that struck down a “good cause” statute and the court that upheld it is not a disagreement about the principles underlying the Confrontation Clause: both camps reasoned that the Confrontation Clause at least guarantees cross-examination. Instead, their disagreement reflected a more nuanced view of the role of cross-examination in the judicial process. For the New Hampshire court, cross-examination serves as the moment when the defendant can uncover problems with the report; thus, requiring a showing of “good cause” before cross-examination represents a “Catch-22.” But for the Nevada court, cross-examination is more of a forum in which the defense brings to light issues and evidence discovered elsewhere; thus, cross-examination is “meaningless” without an existing dispute.

In any event, a requirement of “good cause” leaves intact *Melendez-Diaz*, but it nevertheless is an effective means to limit the number of defendants that could exercise that right. But even if the Court does allow such a requirement, then still the Court should clarify how much “good cause” can be required constitutionally: that is, whether a defendant must present particular criticisms of an analyst, or whether it is sufficient

³⁰ State v. Laturner, 218 P.3d 23, 37 (Kan. 2009).

³¹ *Id.* at 34–35 (quoting *Crawford v. Washington*, 541 U.S. 36, 61–62 (2004)).

³² *Id.* at 33 (quoting *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2540 (2009)).

³³ Las Vegas v. Walsh, 124 P.3d 203, 208 (Nev. 2005) (citing Nev. Rev. Stat. § 50.315(6)(a)–(b)).

³⁴ *Id.*

³⁵ *Id.* at 209.

for the defendant to present general criticisms of forensic labs.³⁶ The latter requirement seems a less restrictive burden on the Confrontation right.

But even a low threshold for “good cause” could have ramifications across the Confrontation Clause, and thus the Court should not adopt it lightly. If a state could permissibly require “good cause” before a defendant could confront an analyst, then there is no reason why a state could not permissibly require “good cause” before a defendant could object to the admission of the statement of other witnesses, such as eyewitnesses. Of course, for most witnesses, the defendant would presumably be able to point to such “good cause.” Yet it seems troubling that the state might, at least in theory, limit a defendant’s right to confrontation by requiring an affirmative showing of good cause to confront any witness. Indeed, the allowance of such statutes would seem to mark a return to the defunct regime of *Ohio v. Roberts* (overruled by *Crawford*), which held that an out-of-court statement is admissible if it bears certain “indicia of reliability.”³⁷ In fact, “good cause” statutes seem to go farther than *Roberts* did: under *Roberts*, the prosecution had the burden of proving that the statement was trustworthy, but a “good cause” statute places that burden on the defendant, who must argue that the statement is *not*. Then again, the fact that “good cause” statutes might apply to all witnesses does not necessarily lead to a rejection of “good cause” statutes; instead, the permissibility of such a restraint depends on the broader issue of the core of the Confrontation Clause, which is discussed in more detail below.

B. *The Requirement of Intent to Cross-examine*

Meanwhile, statutes that require intent to cross-examine the analyst have been more frequently upheld against constitutional challenges; only one state’s highest court, Georgia’s, has held that such a statute is unconstitutional.³⁸ Yet an “intent to cross-examine” requirement may not offer much protection for the prosecution. If the requirement turned on a substantive showing by the defendant, it would be just as impermissible as a “good cause” statute. Georgia’s court struck down such a clause for this very reason.³⁹ Nevertheless, any requirement of intent to cross-examine might still temper the difficulties posed by *Melendez-Diaz*.

There are two forms of these intent-based statutes. First, a handful of states require the defendant merely to give notice of intent to cross-examine the analyst or to otherwise contest the report. Arkansas requires the defendant to provide a “notice of

³⁶ For studies suggesting systematic problems with forensic labs, see Jeremy W. Peters, *Report Condemns Police Lab Oversight*, N.Y. TIMES, December 17, 2009, at A33 (poor oversight of New York crime labs allowed one analyst to go undetected for 15 years while unable to operate a microscope); Brandon L. Garrett & Peter J. Neufeld, *Invalid Forensic Science Testimony and Wrongful Convictions*, 95 VA. L. REV. 1, 14–16 (2009) (finding that in 60% of cases studied in which forensic analysts *did* testify, the analyst misused empirical data).

³⁷ *Ohio v. Roberts*, 448 U.S. 56, 65 (1980), *overruled by Crawford v. Washington*, 541 U.S. 36 (2004).

³⁸ *Miller v. State*, 472 S.E.2d 74 (Ga. 1996).

³⁹ *Id.* at 80.

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intention to cross-examine,”⁴⁰ while New Jersey requires that the defendant’s objection to the report reveal that the report “will be contested at trial.”⁴¹ While the New Jersey court struck down the requirement of showing specific good cause, the court did not disturb the requirement that the defendant show intent to contest the report’s contents.⁴² The court noted that this did not amount to any substantive burden—rather than merely a procedural burden—on the defendant.⁴³

Second, Louisiana and Alabama require that the defendant’s intent to cross-examine be in “good faith.”⁴⁴ But even this additional requirement seems to lack a real punch. Louisiana’s intermediate Court of Appeals found that the clause generally did not require the defendant to put on any proof and was hence not “an onerous burden” on his constitutional right.⁴⁵ The court’s language suggests that if the statute did require such proof, the court would have found it unconstitutional.

Alabama’s statute offers a potential means to enforce a “good faith” requirement without running afoul of the Constitution. Alabama’s statute requires a “good faith” intent to cross-examine, but it further provides that if the defendant “subsequently fails to conduct the cross-examination previously certified to,” the defendant must pay the costs of the analyst’s appearance.⁴⁶ This provision attempts to enforce the good faith requirement without creating a substantive burden on the defendant’s right: the test is tied to the defendant’s exercise of his right to cross-examination, rather than to any initial showing the defendant must make.

Above, this essay has already noted that these demand-plus statutes cannot be logically limited to the testimony of analysts. If the Court finds such a statute constitutionally permissible for an analyst’s testimony, then there is no reason why the Court would not permit a statute that puts such limits on a defendant’s right to confront the declarants of other types of hearsay statements—perhaps even eyewitness testimony. The ramifications of the Court’s consideration of demand-plus statutes thus raises the stakes of the debate, and in addressing the constitutionality of these statutes, the Court should also take up this broader issue of the core of the Confrontation right and what restrictions can be placed on it.

Overall, the permissibility of these “intent” and “good faith intent” statutes depends on the content of the Confrontation right. Professor Brown and I previously noted that the Confrontation Clause has been read as either an active right of “cross-examination,” or as a passive right that requires the prosecution to put its witnesses on

⁴⁰ Ark. Code Ann. § 12-12-313(b) (West 2009).

⁴¹ N.J. Stat. Ann. § 2C:35-19 (West 2009); see also Kan. Stat. Ann. § 22-3437(3) (2009); N.H. Stat. Ann. § 318-B:26-a (2009).

⁴² *State v. Miller*, 790 A.2d 144, 156 (N.J. 2002).

⁴³ *Id.*

⁴⁴ La. Rev. Stat. Ann. § 15:501(B)(2) (2009).

⁴⁵ *State v. Matthews*, 632 So.2d 294, 301 (La. Ct. App. 1993).

⁴⁶ Ala. Code § 12-21-302(b) (2009).

the stand—what we called a passive right to “presence.”⁴⁷ It is true that *Crawford* emphasized the place of cross-examination in the Confrontation right. But elsewhere, the Court has noted other purposes of the Confrontation right, such as bringing the witness face-to-face with the defendant,⁴⁸ and the Confrontation Clause itself states the right in the passive, guaranteeing the defendant the right “to be confronted with witnesses against him.”⁴⁹ On the one hand, those states that upheld “intent” statutes followed the “cross-examination” rationale, and they thus logically allowed a statute to condition the appearance of the analyst on the defendant’s affirmative act of cross-examination. On the other hand, if the right of Confrontation is about “presence” and requires that the prosecution put its witness on the stand, then the Constitution can tolerate no requirement of *any* intent to cross-examine the analyst—or even Alabama’s requirement of cross-examination in fact.

Then again, during oral argument in *Briscoe*, the parties brought to light some logical support for the “cross-examination” rationale. Even Professor Richard D. Friedman, as counsel for *Briscoe*, acknowledged that the Constitution required very little of the prosecution during *direct* examination, and that it required only that the prosecutor ask, “Is this your lab report and do you stand by it?”⁵⁰ This was not lost on the members of the Court; later, when he questioned the real significance of the requirement that the prosecutor put his witness on the stand, Justice Alito drew attention to how little was required of the testifying analyst.⁵¹ The fact that the prosecution could introduce the report through such minimal testimony suggests that it might be naïve to rely on a “presence” rationale for the Confrontation Clause, since being “confronted with” the analyst alone does not necessarily entail a detailed explanation of the report’s results, whereby the jury can evaluate them, but rather may merely involve endorsement of the report itself. A true analysis of the report may only take place upon active cross-examination. Still, however, the Confrontation right might serve broader, more symbolic goals in the adversarial process, and requires that the prosecution has the burden of proof and thus must bring its witnesses into court. Nevertheless, the minimal statement required of the analyst does beg the question of whether a requirement that the analyst appear is “empty formalism,” despite the Court’s assurance in *Melendez-Diaz* that it is not.⁵²

⁴⁷ See Murphy & Brown, *supra* note 10, at 102.

⁴⁸ *California v. Green*, 399 U.S. 149, 165–68 (1970); *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2548 (Kennedy, J., dissenting).

⁴⁹ U.S. CONST. amend. VI. See *Magruder v. Virginia*, 657 S.E.2d 113, 130 (Va. 2008) (Keenan, J., dissenting), *cert. granted sub nom. Briscoe v. Virginia*, 129 S. Ct. 2858 (2009) (making this argument).

⁵⁰ Transcript of Oral Argument at 5–7, *Briscoe v. Virginia*, No. 07-11191 (U.S. Jan. 11, 2010).

⁵¹ *Id.* at 27–28.

⁵² *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2537 n.6 (arguing that analyst reports are not necessarily credible, and thus requiring cross-examination is not an “empty formalism”).

ONGOING FIGHT

CONCLUSION

Ultimately, the Court will have to resolve each of these issues: which, and how many, analysts must testify, and whether a state can require a defendant to show “good cause” or to express intent to cross-examine before the state must present the analyst to testify. Of these avenues, a requirement of intent to cross-examine appears to be the most constitutionally permissible, but, interestingly, it also appears to be the most problematic to enforce with any real bite. In the end, the fate of these issues will depend on the Court’s evaluation of what testimony satisfies the Confrontation Clause and whether the clause is an active right of “cross-examination” or a passive right to the “presence” of the prosecution’s witnesses. These issues will force the Court to consider both the boundaries of “testimonial” evidence and the content of the Confrontation right, and thus not only will help further a coherent jurisprudence under the young *Crawford* regime, but will also provide guidance to state policymakers about the requirements of the Confrontation Clause and the extent to which they can permissibility limit its reach.