

## ***Melendez-Diaz* and *Briscoe*: Return of Constitutional Guarantees Worth the Cost to the System**

Joseph King, Chris Leibig, and Kristen D. Clardy\*

On July 22, 2009, Virginia Governor Tim Kaine called for emergency legislation to amend Virginia's laws governing the introduction of certificates of analysis into evidence in criminal cases.<sup>1</sup> Kaine requested revision of Virginia's laws as they appeared unconstitutional in light of U.S. Supreme Court decision *Melendez-Diaz v. Massachusetts*.<sup>2</sup> Decided in June 2009, *Melendez-Diaz* forbade trial by affidavit by holding that scientific reports, if demanded by the defendant, must be introduced into evidence through live testimony.<sup>3</sup> Justice Scalia, writing for the majority, stated "the Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court."<sup>4</sup> Virginia's laws, in opposition to Scalia's remarks, placed the burden on the defendant to call the analyst in the defendant's case in chief in order to challenge the analyst's conclusions.<sup>5</sup> Bringing increased

---

\* Joseph King, counsel for Briscoe, is a partner at King & Campbell, PLLC. Chris Leibig is a partner at Zwerling, Leibig & Mosely, PLLC. Kristen D. Clardy is a solo practitioner. All three practice criminal defense law and are based in Alexandria, Virginia.

1. Tom Jackman & Rosalind S. Helderman, *Kaine Calls Session to Amend Laws on Trial Testimony*, WASH. POST, July 23, 2009, at B1.

2. *Id.*

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

4. *Id.* at 2540.

5. VA. CODE ANN. § 19.2-187, *et seq.* (West 2008), *amended by* 2009 Va. Acts 1. Enacted in 1976, Former Virginia Code § 19.2-187 stated that "a certificate of analysis . . . duly attested . . . shall be admissible in evidence as evidence of the facts therein stated." As a further condition of admissibility, the statute required certificates be filed with the clerk of court seven days prior to a hearing or trial, and, if requested by defense counsel at least ten days before trial, that a copy be delivered to defense counsel seven days before the hearing or trial. Where the aforementioned code section provided no means for confrontation of the analyst, VA. CODE ANN. section 19.2-187.1 provided a method for confronting analysts in the defendant's own case: "The accused in any hearing or trial in which a certificate of analysis is admitted into evidence shall have the right to call the person performing such

immediacy to Virginia's predicament, four days after deciding *Melendez-Diaz*, the U.S. Supreme granted certiorari in *Briscoe v. Virginia*,<sup>6</sup> which challenged the constitutionality of Virginia's burden-shifting evidentiary laws governing certificates of analysis in drug cases.<sup>7</sup>

In July and August 2009, Virginia defense attorneys used the *Melendez-Diaz* decision to challenge prosecution by affidavit—i.e. using certificates of analysis in criminal trials without live testimony. Some judges, following *Melendez-Diaz*, dismissed drunk-driving cases upon determining breath-test certificates were inadmissible without the breath-test operators' live testimony, even when these certificates included affidavits signed by the operators certifying the accuracy of breath-test results, equipment and methods.<sup>8</sup> On July 18, 2009, *The Washington Post* reported on a Fairfax

---

analysis . . . and examine him in the same manner as if he had been called as an adverse witness.”

6. The petition for a Writ of Certiorari was granted on June 29, 2009. *Briscoe v. Virginia*, 129 S. Ct. 2858 (2009).

7. In 2008, the Virginia Supreme Court held in *Magruder v. Commonwealth* that former Virginia Code section 19.2-187.1 “sets out 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,” 657 S.E.2d 113, 122 (Va. 2008) (citation omitted). In response to the argument that Former Code section 19.2-187.1 shifts the burden to the defendant to call the analyst, the Virginia Supreme Court indicated that the defendants, including *Briscoe*, waived their Confrontation rights by not demanding the analysts until the day of trial, and therefore “the trial court never had occasion to address the proper order of proof.” *Id.* (citation omitted). *Magruder* was a joint opinion involving three defendants in drug cases appealing from three different Virginia circuit courts. *Briscoe* and *Cypress*, two of the appellants, sought review in the U.S. Supreme Court. Petition for a Writ of Certiorari, *Briscoe v. Commonwealth of Virginia*, 130 S.Ct. 1316 (US. May 29, 2008) (No.07-11191). *Magruder* did not apply for a writ of certiorari. *Id.* Professor Richard Friedman of the University of Michigan Law School argued *Briscoe v. Virginia* before the U.S. Supreme Court on January 11, 2010. Oral Arguments, *Briscoe v. Virginia*, 2010 WL 97434 (U.S. Jan. 11, 2010) (No. 07-11191). On January 25, 2010, the U.S. Supreme Court vacated the ruling of the Virginia Supreme Court in *Magruder* and remanded the case for further proceedings not inconsistent with *Melendez-Diaz*. *Briscoe v. Virginia*, 130 S.Ct. 1316 (2010).

8. VA CODE ANN. § 18.2-268.9 (2004) (current version at VA. CODE ANN. § 18.2-268.9 (2009)). Breath-test certificates were admissible into evidence as “evidence of the facts therein stated and of the results of such analysis” if “attested by the individual conducting the breath test.” Former Virginia Code section 18.2-268.9 further required the breath-test certificate to

indicate that the test was conducted in accordance with the Department [of Forensic Science]'s specifications, the equipment on which the breath test was conducted has been tested within the past six months and has been found to be accurate, the name of the accused, that prior to administration of the test the accused was advised of his right to observe the process and see the blood alcohol reading on the equipment used to perform the breath test, the date and time the sample was taken from the accused, the sample's alcohol content, and the name of

County, Virginia, DUI case in which the trial judge acquitted a drunk-driving defendant who “performed well on field sobriety tests” after excluding the certificate of breath analysis due to the prosecutor’s failure to present the live testimony of the operator.<sup>9</sup> Interestingly, the breath-test operator was present for trial and the prosecution did not call the operator—no doubt resisting the application of *Melendez-Diaz*.<sup>10</sup> Defense counsel successfully argued that *Melendez-Diaz* required the prosecution to call the operator and, accordingly, the judge excluded the breath test.<sup>11</sup> After the acquittal, Fairfax County’s chief prosecutor stated “[i]t’s Christmas in July for criminal lawyers who defend drunk drivers.”<sup>12</sup>

In response to *Melendez-Diaz*, prosecutors began continuing DUI and drug cases to arrange for breath-test operators, if different than the arresting officer, or analysts to appear in court in order to introduce certificates of analysis into evidence. However, some judges, including a judge presiding over a DUI matter litigated by one of the authors,<sup>13</sup> nonetheless excluded breath-test certificates because the Virginia code required the prosecution to demonstrate that the breath-test equipment had “been tested within the past six months and . . . [had] been found to be accurate”—although breath-test operators routinely signed an affidavit to this effect, it was apparent the operators themselves had no personal knowledge that the machine had been calibrated within the past six months.<sup>14</sup> The actual calibrators were three Virginia Department of Forensic Science technicians who calibrated the accuracy of the Department’s more than 200 breath-test devices.<sup>15</sup> Three

---

the person who examined the sample.

VA. CODE ANN. § 18.2-268.9. In practice, these requirements took the form of a substantial affidavit signed by the breath test operator.

9. Tom Jackman, *High Court Ruling Voids DWI Case in Fairfax County*, WASH. POST, July 18, 2009 at B1, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/07/17/AR2009071703478.html?nav=emailpage>.

10. *Id.*

11. Defense counsel David Bernhard is a prominent Virginia defense attorney at the firm of Bernhard, Gardner & Mickelson in Falls Church, Virginia.

12. Jackman & Helderman, *supra* note 1.

13. Joseph King litigated the case with fellow defense attorney Tom Carter. For purposes of client confidentiality, the case reference is omitted.

14. VA. CODE ANN. § 18.2-268.9 (2008) (current version at VA. CODE ANN § 18.2-268.9 (2010)). Under the former Virginia code, a certificate of analysis was admissible into evidence upon the breath test operator attesting, among other things, that “the equipment on which the breath test was conducted has been tested within the past six months and has been found to be accurate.” In the authors’ experience, the breath-test operators *routinely* certified, without personal knowledge, that the equipment had been found to be accurate in the past six months.

15. Jackman & Helderman, *supra* note 1 (quoting Peter Marone, Director of Virginia’s Department of Forensic Science).

technicians could not possibly meet appearance demands from prosecutors in Virginia's approximately 130 general district courts that handle the bulk of the state's annual DUI prosecutions, which amounts to more than 28,000.<sup>16</sup> Supporting the fears that the Department of Forensic Science could be overwhelmed, *The Washington Post* reported that subpoenas for lab personnel increased from forty-three in July 2008 to 925 in July 2009.<sup>17</sup> Virginia's criminal justice machine appeared to be stumbling under its own unconstitutional weight.

To address these challenges, the Virginia General Assembly met on August 19, 2009.<sup>18</sup> On August 22, Governor Kaine signed new legislation requiring the prosecution, rather than the defense, to present the live testimony of lab technicians in the prosecution's case-in-chief if demanded by the defendant within fourteen days of receiving notice of the state's intention to use a certificate of analysis in court.<sup>19</sup> To solve the problem of necessitating Virginia's three breath-test calibrators to testify in DUI prosecutions, the Virginia General Assembly removed the requirement from the code that prosecutor's prove a breath-test device's accuracy to admit a breath-test certificate.<sup>20</sup> In the months after the legislative fix, the

---

16. DEP'T OF STATE POLICE, VA. UNIF. CRIME REPORTING PROGRAM, CRIME IN VIRGINIA 68 (2008), available at [http://www.vsp.state.va.us/downloads/Crime\\_in\\_Virginia\\_2008.pdf](http://www.vsp.state.va.us/downloads/Crime_in_Virginia_2008.pdf).

17. Tom Jackman, *Lawmakers Intervene in DUI Issue*, WASH. POST, August 20, 2009, at B8.

18. *Id.*

19. See VA. CODE ANN. §§ 18.2-268.9, 19.2-187 -187.1 (2009).

20. See VA. CODE ANN. § 18.2-268.9 (2009). No doubt, the Virginia Assembly's removal of this requirement will be the subject of further Confrontation Clause litigation. Per Virginia Code section 9.1-1101 (B)(3), the Department of Forensic Science is still mandated to ensure breath-test equipment is calibrated every six months, however, it is no longer a prerequisite to the admission of a breath-test certificate. The key question to be addressed is whether the technician's act of calibrating the machine will be viewed as subject to confrontation—i.e. testimonial—mandating the government prove the machine's accuracy. It would appear *Melendez-Diaz* leaves this issue undecided in the majority opinion in which the U.S. Supreme Court states in footnote 1 that “we 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 as part of the prosecution's case.” *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2532 n.1 (2009). In Virginia, it would appear if the legislature requires the Commonwealth to prove a foundation for admissibility, it must do so through live testimony. *Grant v. Commonwealth*, 682 S.E.2d 84, 89 (Va. Ct. App. 2009) (reversing defendant's DUI conviction when breath certificate that included attestation clause by the breath-test operator introduced without live testimony and stating

while there is no constitutional requirement that the factual predicates in Code § 18.2-268.9 be established prior to the admission of the results of the test, once the General Assembly conditions the validity and admissibility of the breath-test

number of subpoenas to the Department of Forensic Science declined from the highs of the summer of 2009—although the subpoena numbers as of December 2009 and hours spent outside the laboratory by analysts are well-above pre-*Melendez-Diaz* levels.<sup>21</sup> Virginia's decision to amend its statutes paid off, not only in limiting the burden on its lab facilities and protecting DUI prosecutions, but by forestalling new appeals under the old statutory regime. On January 25, 2010, in *Briscoe v. Virginia*,<sup>22</sup> the U.S. Supreme Court vacated the Virginia Supreme Court decision *Magruder v. Commonwealth*<sup>23</sup> that had previously upheld Virginia's defunct statutory scheme governing the introduction of certificates of analysis.

While some defendants escaped prosecution during the summer of 2009, based on the experience of the authors who represent many defendants charged with DUI and drug offenses, the large majority of Virginia defendants charged with DUI or drug offenses did not escape prosecution—in Fairfax County, a major Virginia jurisdiction, judges routinely granted continuances,<sup>24</sup> at least one prosecutor threatened retaliation against defendants if they asserted their Confrontation rights, and defendants could still be convicted, by circumstantial evidence in DUI cases based on their conduct and direct evidence of admissions to consuming alcohol.<sup>25</sup>

---

results on the proof of those facts, the Commonwealth must prove those facts through live, in-court testimony and not by affidavit.

21. E-mail from Gail Jaspen, Virginia Department of Forensic Science, to Kristen D. Clardy, Attorney at Law (Feb. 25, 2010, 16:26 EST) (on file with author).

22. S. Ct. 1316, 175 L. Ed. 2d 966 (2010).

23. 657 S.E.2d 113, 124 (Va. 2008).

24. Based on the personal experiences of the authors, Fairfax County judges initially granted reasonable continuances to the prosecution after the *Melendez-Diaz* decision.

25. Under Virginia Code § 18.2-266, a prosecutor may prove an accused is driving under the influence without establishing a particular blood-alcohol content:

(i) while such person has a blood alcohol concentration of 0.08 percent or more by weight by volume or 0.08 grams or more per 210 liters of breath as indicated by a chemical test administered as provided in this article, (ii) while such person is under the influence of alcohol, (iii) while such person is under the influence of any narcotic drug or any other self-administered intoxicant or drug of whatsoever nature, or any combination of such drugs, to a degree which impairs his ability to drive or operate any motor vehicle, engine or train safely, (iv) while such person is under the combined influence of alcohol and any drug or drugs to a degree which impairs his ability to drive or operate any motor vehicle, engine or train safely, or (v) while such person has a blood concentration of any of the following substances at a level that is equal to or greater than: (a) 0.02 milligrams of cocaine per liter of blood, (b) 0.1 milligrams of methamphetamine per liter of blood, (c) 0.01 milligrams of phencyclidine per liter of blood, or (d) 0.1 milligrams of 3,4-methylenedioxymethamphetamine per liter of blood. A charge alleging a violation of this section shall support a conviction under

Nonetheless, the furor over an acquittal of a DUI defendant because of an unconstitutional prosecution made news in *The Washington Post*, feeding calls for emergency legislation to ensure defendants did not go free on “technicalities.”<sup>26</sup> Disappointingly, the fact that Virginia had apparently unconstitutional laws in place for thirty-three years, resulting in unknown numbers of wrongful convictions seemed, and still seems, to be little discussed as a motive for law reform in Virginia—as if having constitutional statutes and scrutinized forensic science is not in the people’s interest. As the majority recites in *Melendez-Diaz*, “[c]onfrontation is one means of assuring accurate forensic analysis,”<sup>27</sup> which has increased in importance since the National Academy of Sciences 2009 report on the problematic administration of forensic science.<sup>28</sup> As the U.S. Supreme Court stated in *Melendez-Diaz*:

Forensic evidence is not uniquely immune from the risk of manipulation. According to a recent study conducted under the auspices of the National Academy of Sciences, “[t]he majority of [laboratories producing forensic evidence] are administered by law enforcement agencies, such as police departments, where the laboratory administrator reports to the head of the agency.” (citation omitted) And “[b]ecause forensic scientists often are driven in their work by a need to answer a particular question related to the issues of a particular case, they sometimes face pressure to sacrifice appropriate methodology for the sake of expediency.” (citation omitted) A forensic analyst responding to a request from a law enforcement official may feel pressure—or have an incentive—to alter the evidence in a manner favorable to the prosecution.<sup>29</sup>

This article considers the implications in Virginia following *Melendez-Diaz*<sup>30</sup> and *Briscoe*.<sup>31</sup> The immediate effects of the decisions have increased, at least temporarily, the burden placed on Virginia’s forensic services. Nonetheless, as the authors have seen in everyday practice, by data provided by the Virginia Department of Forensic Science, and peculiarities in Virginia law discussed below, the overall effect of the

---

clauses (i), (ii), (iii), (iv), or (v).

VA. CODE ANN. § 18.2-266 (2009).

26. See Jackman & Helderman, *supra* note 1; Jackman, *supra* note 9; Jackman, *supra* note 17.

27. 129 S. Ct. 2527, 2536 (2009).

28. See COMM. ON IDENTIFYING THE NEEDS OF THE FORENSIC SCI. CMTY. ET AL., STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD (The National Academies Press 2009).

29. 129 S. Ct. at 2536.

30. *Id.* at 2527.

31. 130 S. Ct. 1316 (2010).

decisions has not derailed Virginia's criminal justice system—they have returned Constitutional guarantees to defendants that before were improperly taken from them. Further, as will be seen, the financial costs of the decisions appear to be a small fraction of the overall costs of the criminal justice system. These costs can be made good by decriminalizing marijuana or marginally reducing incarceration rates.

Part I discusses the now defunct Virginia statutes that governed the introduction of certificates of analysis in drug cases and compares them with the newly enacted statutes crafted to replace them. At first glance, the new statutes governing confrontation of analysts appear to withstand constitutional scrutiny as simple notice-and-demand statutes. However, the Virginia General Assembly, either intentionally or by error, initially appeared to have made the new statutory scheme the sole conduit for the admission of certificates of analysis, which in some cases impaired prosecutions. Additionally, it has inserted potentially unrealistic time requirements for when defendants must demand the appearance of the analyst, which may prejudice defendants who proceed *pro se* or who do not immediately employ counsel.<sup>32</sup> Legislative amendments to statutes are

---

32. As discussed in the article, Virginia's new scheme requires the prosecution to notify defendants at least twenty-eight days prior to trial that it will introduce a certificate of analysis into evidence. VA. CODE ANN. § 19.2-187.1(A)(1) (2009). Within fourteen days of receiving notice, the defendant may object to the use of the certificate without the analyst's presence. VA. CODE ANN. § 19.2-187.1(B) (2009). Until an additional amendment to the statutory scheme in July 2010, the statutory notice requirement, if not followed by the prosecution, as discussed in more detail in the article, suggested a certificate of analysis would be inadmissible even if the analyst appeared to testify. In July 2010, to obviate this concern, the legislature added language indicating nothing in the statutes "shall prohibit the admissibility of a certificate of analysis when the person who performed the analysis and examination testifies at trial or the hearing concerning the facts stated therein and of the results of the analysis or examination." VA. CODE ANN. § 19.2-187.1(E) (2010). While this amendment is an improvement to the new statutory scheme, a problem with the amendment is that the prosecution may now provide *no* notice at all of its intent to introduce a certificate of analysis. This may result in surprise to the defense, and due process concerns aside, it may create unnecessary brinkmanship situations where a prosecutor, having failed to provide timely notice, struggles at the last minute to attempt to obtain an analyst to testify and the defendant waits in court hoping the analyst does not appear. In the article, it is suggested, for the benefit of both defense and prosecution, a reasonable notice requirement (e.g. seven days) be included in the statute if the prosecutor intends to present live testimony to admit a certificate of analysis into evidence.

Regarding prejudicing unrepresented defendants, as discussed in the article, the statute should be amended. In Fairfax County, a major Virginia jurisdiction, DUI defendants are provided with a copy of the certificate of breath analysis a few days after arrest, usually prior to obtaining counsel. VA. CODE ANN. § 18.2-268.9(B) (2009). A *pro se* defendant likely will not understand the significance of confrontation and will unknowingly waive that right if counsel is not sought—often, the defendant's court date will be set out for two

suggested. Part II addresses the prosecution concerns of defendants “gaming the system,” in the wake of *Melendez-Diaz*, by demanding that analysts appear at trial in the hopes of obtaining a better result if an analyst does not show up. However, worries about defendant gamesmanship appear overblown in felony cases in which Virginia prosecutors have methods to retaliate against defendants who demand analysts without cause: by demanding jury and taking advantage of Virginia’s jury sentencing rules. However, it is acknowledged that defense counsel could demand analysts, in the hopes of gaining advantage, in misdemeanor cases, especially marijuana prosecutions, where the penalties for antagonizing the court, jury, or prosecutor are far less harsh.

Part III asks if providing confrontation in marijuana cases is the best solution in light of *Melendez-Diaz* and “gamey” defense attorneys. Perhaps the huge numbers of petty marijuana offenses, which comprise roughly 20,000 of the 34,000 annual narcotics arrests in Virginia, should be dealt with via civil fines rather than criminal prosecutions—potentially bringing money into the system in addition to preserving lab resources for the prosecution of more important crimes. Part IV, in building on Part III, briefly considers Virginia’s incarceration rates and costs: incarceration rates, significantly fueled by drug arrests, saw a decade-long climb until 2009—when the state’s prison population shrank for the first time in recent memory. The budget of Virginia’s Department of Forensic Science is slight when compared to the costs of incarceration, and the costs of complying with *Melendez-Diaz*, if additional employees were to be hired, could be made up by slightly reducing the number of felony drug possession offenders serving prison sentences and no doubt, dispensing with marijuana prosecutions.

Part V concludes that the sky has not fallen and will not fall in Virginia because of *Melendez-Diaz* and *Briscoe*. And these cases, standing for important rights, should cause us to critically reflect on a criminal justice system that has trended for decades toward the mass prosecution of defendants, in part by impairing their confrontation rights, rather than prioritizing the constitutional pursuit of justice.

---

months and by the time the defendant obtains counsel, the fourteen-day time period will have expired. As of press time, Fairfax County had announced a proposed change to the DUI procedures that create a “first appearance” date to prevent this problem, at which a defendant who intends to hire an attorney would notify the court of his or her intent. The court would wait until the attorney appeared in court on behalf of the client before providing the required notice of intent to introduce the certificate. *See* e-mail from Corrinne Magee, Esq., to VACL D Listserv (April 11, 2010, 04:20 EST) (on file with author). Such a procedure will be an additional burden where it will likely require additional court appearances by DUI defendants, which could be obviated by further amendment to the statutory scheme as discussed below.

I. COMPARING VIRGINIA'S DEFUNCT STATUTORY  
SCHEME WITH ITS NEW LEGISLATION

In 1976, Virginia passed code section 19.2-187 et seq. making certificates of analysis prima facie evidence of the facts therein stated without the need to present the live testimony of the analyst.<sup>33</sup> The purpose of the legislative enactment was to “reduce the time spent by key personnel for travel and court appearances” and to “improve services, since much [of the] time now spent in court appearances can be used in direct analysis and examinations.”<sup>34</sup>

In setting out the procedure for introducing certificates of analysis into evidence, Virginia Code section 19.2-187 stated that “a certificate of analysis . . . duly attested . . . shall be admissible in evidence as evidence of the facts therein stated.”<sup>35</sup> As a further condition of admissibility, the statute required certificates be filed with the clerk of court seven days prior to a hearing or trial, and, if requested by defense counsel at least ten days before trial, that a copy be delivered to defense counsel seven days before the hearing or trial.<sup>36</sup> While the aforementioned code section provided no means for confrontation of the analyst, Virginia Code § 19.2-187.1 provided a method to cross-examine analysts in the defendant's own case: “[t]he accused in any hearing or trial in which a certificate of analysis is admitted into evidence . . . shall have the right to call the person performing such analysis . . . and examine him in the same manner as if he had been called as an adverse witness.”<sup>37</sup> The defunct statute was unclear on who actually had responsibility for subpoenaing the analyst and merely stated that “[s]uch witness shall be summoned and appear at the cost of the Commonwealth.”<sup>38</sup>

The problems with the defunct statutory scheme are obvious: first, it impairs confrontation by making lab reports prima facie evidence whether the lab analyst testifies or not—i.e. even if the lab analyst testified and did not recall making the report, the report's contents are still prima facie evidence per the statute; second, the scheme places the burden on the defendant to call the lab analyst in the defendant's case to challenge the analyst—forcing the defendant to sacrifice his right of not putting on a case to confront the analyst and adding all the hazards attendant to calling a hostile prosecution witness; and third, it is unclear whether the defendant

---

33. VA. CODE ANN. § 19.2-187 (2009).

34. REPORT OF THE VIRGINIA STATE CRIME COMMISSION TO THE GOVERNOR AND THE GENERAL ASSEMBLY OF VIRGINIA ON FORENSIC SCIENCE, H.R. Doc. No. 36 (1975).

35. VA. CODE ANN. § 19.2-187 (1976).

36. *Id.*

37. *Id.*

38. VA. CODE ANN. § 19.2-187.1 (1976).

must ensure the analyst's appearance in court, leaving unresolved who bears the burden, the defense or the prosecution, in the event that an analyst fails to appear in court.

In addressing the first problem, making a lab report *prima facie* evidence, even if the analyst testifies, denies defendants their confrontation rights in advance—an inadmissible or inaccurate lab report could be submitted into evidence, thus tainting the fact finder prior to examining the analyst. Further, as mentioned above, if the analyst did not recall making the lab report, it is *still prima facie evidence* under the statutory scheme! In other words, if the analyst claimed memory loss, thereby preventing cross-examination, the defendant has already been incriminated per the statute. Louisiana has an on-point code provision recognizing the problem of making lab reports *prima facie* evidence.<sup>39</sup> The Louisiana code provision states the “certificate shall not be *prima facie* proof of its contents or of proper custody” where the person performing the analysis appears at trial or is properly subpoenaed.<sup>40</sup> The Louisiana scheme, unlike Virginia's defunct statute, ensures meaningful confrontation by requiring the analyst, upon the defendant's demand, to introduce the results of the analysis.

Second, former Virginia Code section 19.2-187.1 provided the accused the “right to call the person performing such analysis,” which means that the defendant would call the person in his own case.<sup>41</sup> While the Virginia Supreme Court argued in *Magruder v. Virginia* that the “order of proof” is not known from the statute,<sup>42</sup> there is no mistaking the statute's language allowing the accused to examine the person performing the analysis “*as an adverse witness*” as it applies to the order of proof.<sup>43</sup> If the statute did not contemplate the accused as calling the analyst, the adverse witness language would be unnecessary since witnesses called by an opponent may always be treated adversely.<sup>44</sup> As importantly, the accused's statutory right to call the witness apparently arises *after* the certificate of analysis is “*admitted into evidence*”—clearly indicative of placing the burden on the defendant to test the truth of the certificate, unconstitutionally shifting the burden to the defendant.

---

39. LA. REV. STAT. ANN. § 15:501 (2009).

40. State v. Cunningham, 903 So. 2d 1110, 1115 (La. 2005) (citing LA. REV. STAT. ANN. § 15:501(b)(1) (2009)).

41. VA. CODE ANN. § 19.2-187.1 (2008), *invalidated by* Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527 (2009).

42. 657 S.E. 2d 113, 122 (Va. 2008).

43. See VA. CODE ANN. § 19.2-187.1 (2009) (emphasis added).

44. Indeed, this is the theory behind cross-examination, the main method by which a defendant's right to confront witnesses against him is effected.

Third, the statute's language that the witness "shall be summoned and appear at the cost of the Commonwealth"<sup>45</sup> leaves unresolved the issue of witness no-shows—is the lab report inadmissible if the lab analyst does not show up to court? Apparently, under pre-*Melendez-Diaz* Virginia law, the defendant would be out of luck if the analyst were no longer available or failed to appear in court. In *Gray v. Commonwealth*, the Virginia Supreme Court reversed an appellant's drug conviction when the prosecutor failed to file the certificate of analysis at issue with the court seven days prior to trial. The court stated: "We believe that, in the absence of the preparer of the certificate as a witness at trial, the failure of the Commonwealth to fully comply with the filing provisions of section 19.2-187 renders the certificate inadmissible"<sup>46</sup>—apparently, the implication, at least in 1980, was that if the prosecutor had complied with code section 19.2-187, the certificate would have been admissible. This conclusion is bolstered: (1) under former code section 19.2-187, the certificate of analysis is admissible as evidence whether the analyst testifies or not due to the above-discussed *prima facie* evidence problem, and (2) a pre-*Crawford* Virginia court would likely have found the certificate admissible due to "particularized guarantees of trustworthiness" under the 1980 U.S. Supreme Court decision *Ohio v. Roberts*, which was overruled by *Crawford v. Washington*.<sup>47</sup>

In contrast, Virginia's replacement statutes resolve the major constitutional frailties of the former. Under revised section 19.2-187 *et seq.*, the statutory scheme avoids the *prima facie* evidence problem by making a lab report only admissible through the analyst's live testimony if the defendant demands the analyst.<sup>48</sup> It further requires the prosecution to present the analyst in the prosecution's case if the defendant so demands,<sup>49</sup>

---

45. VA. CODE ANN. § 19.2-187.1 (West 2010).

46. *Gray v. Commonwealth*, 265 S.E.2d 705, 706 (Va. 1980), *superseded by* *Mullins v. Commonwealth*, 404 S.E.2d 237 (Va. 1991).

47. Prior to *Crawford*, if evidence fell within a traditional hearsay exception or otherwise carried "particularized guarantees of trustworthiness," it was admissible under *Ohio v. Roberts*, 448 U.S. 56, 66 (1980). *Crawford v. Washington* bluntly overruled the *Roberts* reliability test with regard to testimonial statements: "Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes." *Crawford v. Washington*, 541 U.S. 36, 62 (2004).

48. VA. CODE ANN. § 19.2-187.1(B) (2009). The statute states in pertinent part that:

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

49. *Id.*

and sets out a time-table that requires the prosecutor to provide a defendant twenty-eight days notice if the prosecution intends to introduce a certificate of analysis—within fourteen days of receiving the notice, the defendant must demand the analyst’s presence if he wishes to challenge the content of the certificate of analysis.<sup>50</sup> On the whole, Virginia’s new statute likely complies with the guidance set out in *Melendez-Diaz* that simple notice and demand statutes pass constitutional scrutiny, as state law may impose reasonable requirements on when a defendant must exercise a constitutional right.<sup>51</sup>

The new statute is not without its faults and may still present potential problems to prosecutors. A significant statutory issue in the 2009 version of the statute, since corrected in July, 2010, was that failure to comply with the statute’s twenty-eight-day notice requirement arguably rendered certificates of analysis inadmissible *even if the analyst was present for trial* and called by the prosecution. To remedy this problem, the Virginia General Assembly added a new section to the statute in July 2010 to ensure “[n]othing in this section shall prohibit the admissibility of a certificate of analysis when the person who performed the analysis and examination testifies at trial or the hearing concerning the facts stated therein and of the results of the analysis or examination.”<sup>52</sup> To illustrate the need for the amendment, in a case discussed above, *Gray v. Commonwealth*, defense counsel objected to the admission of a certificate of analysis on grounds that the prosecutor did not timely file it.<sup>53</sup> The prosecutor, conceding it missed the filing deadline, nonetheless succeeded in admitting the certificate through live testimony from the lab supervisor rather than the

---

50. VA. CODE ANN. § 19.2-187.1(A)(1) (2009) requires that the prosecution “[p]rovide by mail, delivery, or otherwise, a copy of the certificate to counsel of record for the accused, or to the accused if he is proceeding pro se, at no charge, no later than twenty-eight days prior to the hearing or trial.” Upon the prosecution providing notice to defendant of his right to object under the Virginia statute “[t]he accused may object in writing to admission of the certificate of analysis, in lieu of testimony, as evidence of the facts stated therein and of the results of the analysis or examination” and “[s]uch objection shall be filed with the court hearing the matter, with a copy to the attorney for the Commonwealth, no more than fourteen days after the certificate and notice were filed with the clerk by the attorney for the Commonwealth or the objection shall be deemed waived.” VA. CODE ANN. § 19.2-187.1(B) (2009).

51. See *Melendez-Diaz*, 129 S. Ct. 2527, 2541 (2009) (internal citation omitted) (“States are free to adopt procedural rules governing objections.”). In Virginia, state law requires that defendants raise a number of objections “not later than seven days before trial,” including motions to suppress evidence based on Fourth, Fifth, and Sixth Amendment violations of the United States Constitution or the Constitution of Virginia. VA. CODE ANN. § 19.2-266.2(A)-(B) (LEXIS 2009).

52. VA. CODE ANN. § 19.2-187.1(E) (WEST 2010).

53. *Gray v. Commonwealth*, 265 S.E.2d 705, 706 (Va. 1980).

analyst who tested the drugs.<sup>54</sup> The Virginia Supreme Court reversed Gray's conviction, finding the prosecution's failure to timely file was fatal to the certificate's admissibility, despite the prosecutor's presentation of live testimony.<sup>55</sup> Similarly, the authors are aware of a DUI case, prior to the July 2010 amendment, in which a certificate of analysis was rendered inadmissible due to the prosecution's failure to comply with the statute's notice requirements, even where the breath-test operator was present to testify in court.<sup>56</sup> However, with the July 2010 amendment, the Virginia legislature has created a statute where if the prosecution intends to present the live testimony of an analyst, it need not provide *any* notice to a defendant of its intent to introduce a certificate of analysis. Due process concerns aside, the amendment may create unnecessary brinksmanship situations where a prosecutor, having failed to provide timely notice, struggles at the last minute to attempt to obtain an analyst to testify and the defendant waits in court hoping the analyst does not appear.

The statute also raises renewed Confrontation Clause concerns for cases involving *pro se* defendants or defendants who do not obtain defense counsel until more than fourteen days after receiving a certificate of analysis that the prosecution intends to introduce into evidence. The U.S. Supreme Court has stated that “[w]aivers of constitutional rights not only must be voluntary, but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences.”<sup>57</sup> It is doubtful an accused, without the aid of counsel, would understand “the relevant circumstances and likely consequences” of failing to demand an analyst's presence in court within the strict time constraints of Virginia Code section 19.2-187.1.<sup>58</sup> And there is no code provision allowing a defendant who hires or obtains counsel after letting the fourteen-day period run, to re-obtain or assert one's confrontation right—the defendant or defense counsel is left with the less desirable alternative of subpoenaing the analyst and putting the analyst on the stand in the defendant's case-in-chief.

In the authors' own criminal defense practices, the above mentioned problem is already arising. As an example, it is easy to imagine a defendant arrested for DUI and released on bond with an adjudication date set for two months in the future. A few days after his arrest, the defendant is mailed a copy of the certificate of breath analysis and a form indicating he has two

---

54. *Id.*

55. *Id.*

56. **Personal communication from Pierre Priale, esq., to Joseph King. Mr. Priale practices criminal defense law in Virginia.**

57. *Brady v. United States*, 397 U.S. 742, 748 (1970).

58. VA. CODE ANN. § 19.2-187.1(B) (WEST 2010).

weeks to request the presence of the breath-test operator, otherwise his right to confront the operator is waived. In other words, the defendant, not understanding the significance of waiving his confrontation right, waives it by inaction. Certainly, if a guilty plea is unconstitutional when a judge fails to inquire from a *counseled* defendant that he knowingly and voluntarily waived his jury, self-incrimination, and confrontation rights, a letter and a copy of a certificate of analysis mailed to a *pro se* defendant indicating that he waives his confrontation rights, if not otherwise demanded within two weeks, will be found to be an invalid waiver.<sup>59</sup>

While the Virginia General Assembly may have overlooked the aforementioned problem, or somehow envisioned defendants obtaining immediate counsel, selecting a lawyer to hire and obtaining the funds to do so can be a time consuming process. A cynic might interpret the time strictures in Virginia Code section 19.2-187.1 as a purposeful impairment of the confrontation right—i.e. while the Virginia General Assembly amended its laws to comply with *Melendez-Diaz*, given the practical difficulties inherent in obtaining defense counsel, it may be implied that the Commonwealth does not really want defendants to assert their Sixth Amendment rights.

Nonetheless, the above potential pitfalls are easily rectified through further amendments to the Virginia Code Section 19.2-187. First, while the Virginia General Assembly acted to prevent judges from excluding certificates of analysis if a prosecutor does not provide the defendant twenty-eight days notice by allowing that certificates may always be introduced through live testimony, the legislature created a statute where a defendant may receive no notice of a prosecutor's intent to introduce a certificate of analysis. It is suggested that reasonable notice be provided to defendants (e.g. seven days), if the prosecution intends to present live testimony to admit a certificate, to prevent trial by ambush and to help resolve cases—i.e. upon reasonable notice that an analyst will testify, many cases will likely be resolved by plea bargain and such an amendment may

---

59. See *Boykin v. Alabama*, 395 U.S. 238, 239-43 (1969) (reversing petitioner's robbery convictions where "the judge asked no questions of petitioner concerning his plea, and petitioner did not address the court"). *Id.* at 239. The U.S. Supreme Court in *Boykin* focused on three important Constitutional rights that must be waived knowingly and intelligently prior to a court accepting a guilty plea: (1) the privilege against compulsory incrimination (the right to remain silent), (2) the right to trial by jury, and (3) the "right to confront one's accusers." *Id.* at 243. While *Boykin* had counsel, nothing from the plea record demonstrated a knowing and intelligent waiver of key federal rights and the Court would not assume waiver based on a silent record. *Id.* at 242. Prior to the reversal of his case, *Boykin*, a twenty-seven-year-old black defendant, had been sentenced to death by electrocution for five counts of robbery by an Alabama jury presiding over the sentencing phase of the case. *Id.* at 239.

alleviate a prosecutor from scrambling to summon an analyst at the last hour to save a case because the prosecution failed to provide notice of intent to introduce a lab certificate twenty-eight days prior to trial.<sup>60</sup> Second, to shore up constitutional infirmities of the new statutes, if a defendant wishes to confront the analyst, the statute should be amended to allow the defendant to request confrontation fourteen days prior to trial rather than within fourteen days of receiving the certificate of analysis.<sup>61</sup> If the analyst is unavailable on the current trial date after demand, the statute should include a provision allowing prosecutors to obtain a reasonable continuance. This change should significantly reduce the number of *pro se* defendants unknowingly waiving an important federal right. Such a change would also be consistent with Virginia's statute governing other defense objections that must be raised prior to trial.<sup>62</sup> For example, under Virginia Code section 19.2-266.2, an accused seeking suppression of evidence on grounds that "such evidence was obtained in violation of the provisions of the Fourth, Fifth or Sixth Amendments" must raise the objection no less than seven days prior to trial.<sup>63</sup> And if a defendant proceeds *pro se* without demanding confrontation, a careful prosecutor may wish to seek an in-court waiver after judicial inquiry to ensure any resulting conviction is constitutionally firm.

## II. DEFENDANTS GAMING THE SYSTEM?

Prosecutors have expressed fears that defendants will "game the system" by making excessive demands for analysts in the hope of overburdening the system and obtaining dismissal of charges due to an analyst's failure to appear.<sup>64</sup> Certainly, the fear of abuse exists as the Virginia state police reported 33,000 narcotic arrests in 2008. A staggering 60.5% of those arrests involved marijuana (almost 20,000) when compared to the next

---

60. VA. CODE ANN. § 19.2-187 (2010).

61. *Id.*

62. VA. CODE ANN. § 19.2-266.2(a)-(b) (2008).

63. *Id.*

64. The United States made essentially this argument in its amicus brief on behalf of Virginia in *Briscoe v. Virginia*. See BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT, at 30 (Nov. 2, 2009), available at [http://www.abanet.org/publiced/previews/briefs/pdfs/09-10/07-11191\\_RespondentAmCuUSA.pdf](http://www.abanet.org/publiced/previews/briefs/pdfs/09-10/07-11191_RespondentAmCuUSA.pdf).

Attorney generals from twenty-six states and the District of Columbia also asserted this argument in *Briscoe v. Virginia*. BRIEF OF THE STATES OF INDIANA, MASSACHUSETTS, ALABAMA, ARIZONA, COLORADO, CONNECTICUT, DELAWARE, FLORIDA, IDAHO, IOWA, KANSAS, MARYLAND, MICHIGAN, MINNESOTA, NEW JERSEY, NEW MEXICO, NORTH DAKOTA, OHIO, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, UTAH, WASHINGTON, WISCONSIN, WYOMING AND THE DISTRICT OF COLUMBIA AS AMICI CURIAE IN SUPPORT OF RESPONDENT, at 3-5 (Nov. 2, 2009) available at <http://www-personal.umich.edu/~rdfrdman/bsacIndiana.pdf>.

largest category of narcotics offenses—cocaine, which consisted of 18% of drug arrests (approximately 6000).<sup>65</sup> Certainly, if Virginia's forty-three drug analysts needed to appear in such a vast number of cases due to defense demands, prosecutions would grind to a halt.<sup>66</sup>

Fears of such demands were realized during the summer of 2009, when subpoenas to the Department of Forensic Science for lab analyst testimony spiked from forty-three in July 2008 to 925 in July 2009.<sup>67</sup> However, since Virginia amended its statutes, the number of subpoenas to the Department of Forensic Science has leveled off. In January 2010, in a presentation before the Virginia Senate, the Department reported receiving 208 subpoenas for lab analysts in drug cases in June 2009 and its personnel spent nineteen hours outside the laboratory responding to them.<sup>68</sup> *Melendez-Diaz* was decided on June 25, 2009.<sup>69</sup> In July, the department received 1243 subpoenas and its analysts spent 324 hours outside the laboratory responding to them.<sup>70</sup> In August, as Virginia moved to amend its laws, the department received 1062 subpoenas and analysts spent 374 hours outside the lab in response.<sup>71</sup> In September, the department received 1034 subpoenas and analysts spent 539 hours outside the lab.<sup>72</sup> In October, 822

---

65. Annual statistics from 2008 indicate marijuana arrests consisted of nearly 6% of the 336,000 total arrests in Virginia and were only outpaced by arrests for driving under the influence (28,227), public drunkenness (30,831), and simple assault (37,145). Drug/narcotic arrests consisted of nearly 10% of total arrests. Other arrest categories involving large numbers of defendants include shoplifting (13,375) and trespass (10,803). UNIF. CRIME REPORTING SECTION DEP'T STATE POLICE, CRIME IN VIRGINIA 2008, at 62 (2008) available at [http://www.vsp.state.va.us/downloads/Crime\\_in\\_Virginia\\_2008.pdf](http://www.vsp.state.va.us/downloads/Crime_in_Virginia_2008.pdf).

66. Washington Post reporter Tom Jackman, who extensively covered the amendment to the Virginia statutory scheme and consequent prosecution problems, provided the figure of forty-three Virginia drug analysts in an article covering the Virginia statutory amendments. See Jackman, *supra* note 17. In February 2010, the Department of Forensic Science reported to one of the authors a staff of forty-one drug analysts. E-mail from Gail Jaspén, Virginia Department of Forensic Science, to Kristen D. Clardy, Attorney at Law. (Feb. 26, 2010, 17:01 EST) (on file with author); Tom Jackman, *Va. Rushes to Address Ruling on Analysts; Drug Case Demands Have Strained State Lab*, WASH. POST, Aug. 18, 2009 at B1.

67. Jackman, *supra* note 1, at 17.

68. *Impact on DFS of the Decision of the Supreme Court of the United States in Melendez-Diaz v. Massachusetts: Presentation of the Department of Forensic Science to the Senate Committee on Finance Public Safety Subcommittee* (Jan. 22, 2010) (presentation of Gail D. Jaspén, Chief Deputy Director of the Department of Forensic Science), available at <http://sfc.state.va.us/pdf/Public%20Safety/2010/January%2022%20mtg/012210%20Forensic%20Science%20Presentation.pdf>.

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

70. Jaspén, *supra* note 68.

71. *Id.*

72. *Id.*

2010]

BRISCOE V. VIRGINIA

305

subpoenas were received which cost 361 analyst hours as compared to 752 subpoenas resulting in 332 hours in November and 758 subpoenas resulting in 334 hours in December.<sup>73</sup>

The number of subpoenas and analysts hours responding to them appears to have decreased since the summer of 2009, demonstrating that the sky is not falling in Virginia, although there is certainly an increased burden on Virginia's forensic science services.<sup>74</sup> If the sky were falling, one would expect a continued increase in subpoenas if defense attorneys and defendants in fact were conspiring to overwhelm Virginia's forensic science services.<sup>75</sup> Also, as suggested by the U.S. Supreme Court in *Melendez-Diaz*, fears are overblown that defense attorneys will demand analysts in an attempt to game the system:

It is unlikely that defense counsel will insist on live testimony whose effect will be merely to highlight rather than cast doubt upon the forensic analysis. Nor will defense attorneys want to antagonize the judge or jury by wasting their time with the appearance of a witness whose testimony defense counsel does not intend to rebut in any fashion.<sup>76</sup>

In light of the above, defense attorneys are also unlikely to act collectively to overburden the system in which each attorney, ethically, must serve the best interests of each client competently and zealously.<sup>77</sup> And if lawyers conspired to demand analysts, for instance, in hundreds of cases to generate analyst no-shows, they might violate the Virginia Rules of Professional Conduct by risking the fate of individual clients, who could be successfully prosecuted, after incurring the ire of judges, juries, or prosecutors by making inappropriate demands for analysts.<sup>78</sup> Further, in felony cases Virginia prosecutors can retaliate against defendants by demanding trial by jury with the hopes of forcing a guilty plea where Virginia defendants are exposed to jury sentencing.<sup>79</sup> Nonetheless, for less serious offenses such as misdemeanor marijuana and DUI cases, addressed below, there is a more significant incentive to demand the maker of the certificate of analysis where the consequences of antagonizing prosecutors are far less—the maximum jail sentence is twelve months in most DUI

---

73. *Id.*

74. *Id.*

75. *Id.*

76. *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2542 (2009).

77. *See* VIRGINIA STATE R. OF PROF'L CONDUCT Rules 1.1 and 1.3 (2009).

78. *Id.*

79. VA. CODE ANN. § 19.2-295 (2009) (stating that “term of confinement . . . shall be ascertained by the jury, or by the court in cases tried without a jury”).

cases and thirty days for a first marijuana offense.<sup>80</sup> Prosecutors in misdemeanor cases also cannot use the threat of jury sentencing as misdemeanants are first tried before a judge in a district court—and can only obtain a trial by jury through defendant appeal to a Virginia Circuit Court if the defendants were aggrieved by the district court judgment.

#### A. Jury Trials in Virginia

Defense counsel has little incentive to antagonize Virginia prosecutors in felony drug cases where prosecutors can demand jury trials. Under Virginia law, juries determine not only guilt or innocence, but also the defendant's sentence without sentencing guidelines.<sup>81</sup> Further, juries are not empowered to suspend sentences nor place defendants on probation.<sup>82</sup> In drug cases, the fear of a runaway jury sentence is real—possession of most hard drugs such as cocaine and heroin are felonies in Virginia carrying a maximum punishment of ten years in prison.<sup>83</sup> And possession with intent to distribute hard drugs, or actual distribution, carries a statutory range of five to forty years in prison.<sup>84</sup> Thus, a defendant accused of a first cocaine distribution offense involving one gram of crack cocaine, if found guilty by a jury, will receive a minimum of five years in prison and a maximum of forty years. While judges may suspend all or part of a jury sentence,<sup>85</sup> they often refuse.<sup>86</sup>

---

80. VA. CODE ANN. § 18.2-270 (2009) (listing DUI penalties); VA. CODE ANN. § 18.2-250.1 (2009) (listing marijuana possession penalties).

81. VA. CODE ANN. § 19.2-295 (2008) (stating that “term of confinement . . . shall be ascertained by the jury, or by the court in cases tried without a jury”); VA. CODE ANN. § 19.2-298.01 (LEXIS 2008) (indicating that “[i]n cases tried by a jury, the jury shall not be presented any information regarding sentencing guidelines”).

82. VA. CODE ANN. § 19.2-295 (2009) (stating that “term of confinement . . . shall be ascertained by the jury, or by the court in cases tried without a jury”); VA. CODE ANN. § 19.2-298.01 (LEXIS 2009) (indicating that “[i]n cases tried by a jury, the jury shall not be presented any information regarding sentencing guidelines”).

83. VA. CODE ANN. § 18.2-250 (2009) (indicating that possession of Schedule I and II controlled substances under the Virginia Drug Control Act is a Class 5 felony); *see* VA. CODE ANN. § 18.2-10(e) (2009) (providing that a Class 5 felony in Virginia carries a maximum sentence of ten years). Schedule I and II controlled substances include cocaine, ecstasy, heroin, PCP, and other hard drugs. VA. CODE ANN. § 18.2-248(c)(1) (2009). Possession of marijuana is a misdemeanor offense. VA. CODE ANN. § 18.2-250.1(A) (2009).

84. VA. CODE ANN. § 18.2-248, § 19.2-295 (2009).

85. VA. CODE ANN. § 19.2-303 (2009) (providing court authority to suspend or modify a sentence).

86. Nancy J. King & Rosevelt L. Noble, *Felony Jury Sentencing in Practice: A Three-State Study*, 57 VAND. L. REV. 885, 918-19 (2004). King and Noble report that Virginia judges reduced jury sentences only one-fourth of the time and of those reduced, only one-half were reduced to the sentence suggested by Virginia's sentencing guidelines. *Id.*

In contrast, a defendant entering a guilty plea to the same offense in front of a judge, or being convicted after a bench trial, will receive the benefit of Virginia's sentencing guidelines and the judge's ability to suspend a portion of the minimum five-year sentence.<sup>87</sup> Routinely, Virginia sentencing guidelines call for lower sentences than the low end of the statutory range provided by the Virginia General Assembly.<sup>88</sup> For instance, at the midpoint, Virginia's sentencing guidelines call for a sentence of twelve months incarceration for a defendant convicted of a first cocaine distribution offense whereas a jury must sentence a similarly situated defendant to five years in prison. A Virginia judge, following the guidelines, would ideally sentence a defendant to five years in prison for a first distribution offense with all but four years of the sentence suspended (one year to serve) on conditions of good behavior and compliance with probation.<sup>89</sup> In other words, "Virginia's General Assembly has in effect encouraged higher minimum sentences for those who opt for jury trial than for those who opt for plea or bench trial."<sup>90</sup>

A qualitative study of jury sentencing conducted by Nancy King and Roosevelt Noble of Vanderbilt University reported that Virginia jury sentences are "generally tougher" than judge sentences.<sup>91</sup> Prior to *Melendez-Diaz*, Virginia prosecutors already used the threat of demanding a jury to force defendants in felony drug cases to plead guilty.<sup>92</sup> Thus if defendants attempt to "game the system" by demanding the presence of the

---

87. VA. CODE ANN. § 19.2-298.01 (2009) (providing for sentencing guidelines to be presented to the court). While sentencing guidelines are discretionary, the Virginia Criminal Sentencing Commission reports that judges comply with them in 79.9% of felony cases. *See* VA. CRIMINAL SENTENCING COMM'N, 2009 ANNUAL REPORT 18 (2009). There are no sentencing guidelines in misdemeanor cases. It would not appear that sentences determined by Virginia juries have been compared to those given by judges for like offenses.

88. VA. CODE ANN. §§ 18.2-248(c) (2009) (providing statutory range of punishment of a period of imprisonment "for not less than five years nor more than forty years" for a first offense). This tends to also be true in cases where defendants with minimal or no prior records are convicted of Class 3 or Class 4 felonies in Virginia that have statutory ranges of five to twenty years and two to ten years respectively. *See* VA. CODE ANN. §18.2-10 (c-d) (2009). Offenses that fall into this category include malicious wounding (a Class 3 felony) under Virginia Code §18.2-51 and forgery of a public document (a Class 4 felony) under Virginia Code §18.2-168.

89. *See* VA. CRIMINAL SENTENCING COMM'N, 2009 ANNUAL REPORT 18 (2009). Virginia Sentencing Guidelines are affected by many factors such as prior record, number of counts, whether the defendant was under a legal restraint at the time of the offense, and the quantity of drugs. *cite* The above sentence assumes the defendant has no record and the amount of cocaine is less than one ounce. *Id.*

90. King & Noble, *supra* note 86, at 911.

91. *Id.* at 910-11.

92. *Id.* at 910 n.81.

analyst in a felony drug case, no doubt more prosecutors will demand a jury. And it appears foolhardy to risk a minimum five-year sentence in a drug distribution case where a plea of guilty, for a defendant without a significant record, will yield an average sentence of one year to serve.<sup>93</sup> King and Noble in a review of jury sentences also found that juries sentenced drug defendants to significantly more time in prison than judges—drug defendants found guilty after a jury trial received a sentence “averaging anywhere from four and one-half to over fourteen years longer, depending on the offense.”<sup>94</sup>

#### B. Gamesmanship in Misdemeanor Cases

Defendants and defense attorneys have a greater incentive to demand analysts in hopes of their non-appearance in misdemeanor marijuana cases—the clear majority of all Virginia drug cases.<sup>95</sup> In Virginia, first-offense marijuana possession carries a maximum penalty of thirty days in jail and/or a \$500 fine.<sup>96</sup> Further, in misdemeanor cases, Virginia has a two-tiered court system where contested misdemeanors are first tried before a district court judge without a jury.<sup>97</sup> To afford a jury right, misdemeanants aggrieved by the district court outcome may appeal, and demand a jury, in a *de novo* trial in a Virginia circuit court—giving defendants two bites at the apple.<sup>98</sup>

While defense attorneys demanding analysts in such cases, hoping for an analyst no-show, may impair their reputation with prosecutors and judges, for defendants, there is certainly less to lose and much to be gained by using analyst brinkmanship in petty cases. As of now, the extent of this issue is unclear in Virginia as it has not been scrutinized,<sup>99</sup> but it does raise

---

93. *Id.* at 912 n.88.

94. *Id.* at 923-24.

95. *See* Jackman & Helderman, *supra*, note 1; UNIF. CRIME REPORTING SECTION DEP'T STATE POLICE, CRIME IN VIRGINIA 2008 at 62 (2008) available at [http://www.vsp.state.va.us/downloads/Crime\\_in\\_Virginia\\_2008.pdf](http://www.vsp.state.va.us/downloads/Crime_in_Virginia_2008.pdf).

96. VA. CODE ANN. § 18.2-250.1 (2009).

97. VA. CODE ANN. § 16.1-123.1 (2009) (indicating district courts have original jurisdiction over misdemeanor cases).

98. VA. CODE ANN. § 16.1-132 (2009) (providing defendants right to appeal non-felonious convictions to a circuit court within ten days of the conviction); VA. CODE ANN. § 16.1-136 (2009) (providing that misdemeanor appeals be heard *de novo* in the circuit court and providing the accused a right to trial by jury).

99. *See* Gail D. Jaspén, Chief Deputy Dir., Dep't of Forensic Sci., Presentation of the Dep't of Forensic Sci. to the Senate Committee on Finance Public Safety Committee (Jan. 22, 2010), available at <http://sfc.state.va.us/pdf/Public%20Safety/2010/January%2022%20mtg/012210%20Forensic%20Science%20Presentation.pdf> (containing statistic for all controlled substances, but not containing statistics specifically for marijuana).

the question, addressed in Part III, of whether Virginia's tax dollars are best spent on prosecuting the large number of petty marijuana offenses that may be better handled as a civil fine.<sup>100</sup>

Defense attorneys also have an incentive to demand the appearance of breath-test operators in DUI cases, if different from the arresting officer, for the chance of an operator no-show or to cross-examine the breath technician with the hope of discovering problems with the breath test. In 2008, Virginia law enforcement officers arrested 28,039 adults for driving under the influence.<sup>101</sup> First- and second-offense DUI cases are misdemeanors in Virginia and therefore, in Virginia's general district courts, prosecutors cannot bully defendants into guilty pleas by making jury demands.<sup>102</sup>

Nonetheless, considering the complexity of DUI cases and the possibility of operator error, defense attorneys should insist on the appearance of breath technicians.<sup>103</sup> The burden placed on prosecutions in DUI cases of producing breath technicians will sometimes be insignificant when the arresting officer and breath technician are the same person, obviating the need for multiple government officials appearing to prosecute a misdemeanor offense.

Further, if different, the breath technicians will be located in the same jurisdiction as the prosecuted DUI, reducing travel burden—whereas a Virginia lab technician, to testify in a misdemeanor marijuana case, may come from hours away. And to resolve *Melendez-Diaz* issues, for police departments with few breath technicians, more police officers can be trained to operate these machines without increasing the police force.<sup>104</sup>

---

100. See discussion *infra* Part III.

101. UNIF. CRIME REPORTING SECTION DEP'T STATE POLICE, CRIME IN VIRGINIA 2008, 68 (2009), available at [http://www.vsp.state.va.us/downloads/Crime\\_in\\_Virginia\\_2008.pdf](http://www.vsp.state.va.us/downloads/Crime_in_Virginia_2008.pdf). A small number of juveniles were also charged with driving under the influence—188 according to 2008 Virginia crime statistics. *Id.* at 65.

102. VA. CODE ANN. § 18.2-270 (2009) (setting forth penalties and offense levels for driving under the influence offenses).

103. Unlike perhaps in marijuana cases, there is potentially important information to be gained from cross examining a breath technician. For instance, the breath technician may also possess information on the overall demeanor and conduct of the defendant that could be beneficial or harmful to the defense. Further, the breath technician may or may not have detailed knowledge of the testing device, which could affect the weight or even admissibility of the certificate of analysis. The breath technician must also have followed the extensive strictures of administering the test accordingly with Virginia Department of Forensic standards. For breath-test regulations in Virginia, see 6 VA. ADMIN. CODE §§ 40-20-10 to -200 (2009).

104. Theoretically, every patrol officer could be trained to operate a breath-test machine thereby obviating the need for a separate breath technician to appear at trial. Certainly, police departments will bear increased training costs to instruct and maintain

## III. A DIFFERENT SOLUTION?

During oral argument in *Briscoe*, Stephen McCullough from the Virginia Office of the Solicitor General overtly sought to enlist the aid of the Court to “deter” the “extensive gamesmanship” used by Virginia defense attorneys who seek to invoke a client’s Confrontation Clause rights as set forth in *Melendez-Diaz*.<sup>105</sup> In this failed attempt McCullough ran up against Justice Scalia’s argument from *Melendez-Diaz* that convenience provides no authority to abridge a constitutional right:

Finally, respondent asks us to relax the requirements of the Confrontation Clause to accommodate the necessities of trial and the adversary process. It is not clear whence we would derive the authority to do so. The Confrontation Clause may make the prosecution of criminals more burdensome, but that is equally true of the right to trial by jury and the privilege against self-incrimination. The Confrontation Clause—like those other constitutional provisions—is binding, and we may not disregard it at our convenience.<sup>106</sup>

But McCullough’s argument did touch an important policy issue. Perhaps, rather than decry the tactics of attorneys who play every advantage in their misdemeanor cases, the Commonwealth should try to solve the problem of overburdened lab analysts by reshaping its veritable nanny-state approach to criminal law. As Virginia general district courts across the state are clogged daily with petty offenders and the police who wait around to testify against them, the Commonwealth somehow sees defense attorneys as the culprits. No doubt, good defense attorneys invoke rights without fear of, as McCullough put it, antagonizing the court.<sup>107</sup> As Chief Justice Roberts stated from the bench during the *Briscoe* argument, it would be malpractice to do anything else.<sup>108</sup> However, to avoid the hassles caused by the pesky defense attorneys, the *Melendez-Diaz* and *Briscoe* rulings provide an opportunity for Virginia to wonder whether its citizens wish to pay for state lab scientists to spend so much of their time analyzing marijuana taken from personal users, or, for that matter, to employ an army of drug counselors<sup>109</sup> to educate otherwise

---

certifications for additional breath-test operators.

105. Transcript of Oral Argument at 45, *Briscoe v. Virginia*, 130 S. Ct. 1316, 175 L. Ed. 2d 966 (2010).

106. 129 S. Ct. at 2540 (internal quotations omitted).

107. Transcript of Oral Argument, *supra* note 105, at 45.

108. *Id.* at 21.

109. VA. CODE ANN. § 46.2-390.1 (2005) (mandating a six-month driver’s license suspension for conviction of any drug offense, including possession of marijuana). Pursuant to VA. CODE ANN. §§ 18.2-259.1, 18.2-271.1 (2009), the only way marijuana offenders can drive to work, to important child-care obligations, or to medical appointments is by entering

law-abiding citizens about the dangers of marijuana.

In 2008, the Commonwealth of Virginia prosecuted approximately 33,000 drug offenses.<sup>110</sup> Under *Melendez-Diaz* and *Briscoe*, each case now carries the possibility that at least one person from the state lab will have to appear in court at least one time per case. These trips to court plainly interfere with the ability of the scientists to do their jobs. It is argued that these trips to court are worth it, as they result in incarceration of dangerous purveyors of poison, often to Virginia's school children. However, more than 60% of Virginia's drug arrests in 2008 were for marijuana.<sup>111</sup> Virginia Code section 18.2-250.1 criminalizes possession of marijuana for personal use, provides for a jail sentence of up to thirty days for a first offense, and twelve months for each subsequent offense. The Code also mandates a six-month driver's license suspension for all offenders, even those whose offense had nothing whatsoever to do with a car.<sup>112</sup> Apparently, Virginia's concern about *Melendez-Diaz* encouraging courtroom gamesmanship has some basis in fact, as requests for live lab witnesses did increase dramatically in the wake of the ruling.<sup>113</sup> Whether the increase will have any staying power notwithstanding, Virginia should address the *Melendez-Diaz* problem not, as McCullough suggested, by deterring defense attorneys from litigating cases, but by making possession of marijuana a civil offense without a license suspension. If possession of marijuana is not a crime, but a pre-payable ticket, the Confrontation Clause right does not apply and a civil fine can be imposed at hardly any expense to the Commonwealth.<sup>114</sup>

This would not be the first time Virginia has sought to reduce the number of offenses requiring court appearances to save money.<sup>115</sup> The

---

a drug education class.

110. DEP'T OF STATE POLICE UNIF. CRIME REPORTING PROGRAM, *supra* note 16.

111. *Id.*

112. VA. CODE ANN. § 42.6-390.01 (LEXIS 2005).

113. See Gail D. Jaspén, Chief Deputy Dir., Dep't of Forensic Sci., Presentation of the Department of Forensic Science to the Senate Committee on Finance Public Safety Committee (Jan. 22, 2010) available at <http://sfc.state.va.us/pdf/Public%20Safety/2010/January%2022%20mtg/012210%20Forensic%20Science%20Presentation.pdf>.

114. The Virginia Code provides for trial rights beyond those required by the Sixth Amendment, like the right to a jury trial for routine traffic tickets. VA. CODE ANN. 19.2-258.1 (LEXIS 2005). But the Sixth Amendment would not stand in the way of a civil fine for marijuana possession if the offense did not bear standard indicators of what renders an offense criminal. See generally *Baldwin v. New York*, 399 U.S. 66 (1970); *Cheff v. Schnackenberg*, 384 U.S. 373 (1966).

115. OFFICE OF THE EXECUTIVE SEC'Y OF THE SUPREME COURT OF VIRGINIA, A STUDY OF REQUIRED PERSONAL COURT APPEARANCES FOR MINOR NONTRAFFIC OFFENSES 2 (2000), available at [http://leg2.state.va.us/dls/h&sdocs.nsf/By+Year/HD342000/\\$file/HD34\\_2000.pdf](http://leg2.state.va.us/dls/h&sdocs.nsf/By+Year/HD342000/$file/HD34_2000.pdf).

Commonwealth asked the Virginia Supreme Court in 1999 for recommendations to reduce the number of offenses requiring a personal appearance in court.<sup>116</sup> As expressed in the subsequent 2000 report, the Virginia Supreme Court noted that “the entire philosophy of prepayable offenses is predicated upon maximizing efficiency and minimizing inconvenience.”<sup>117</sup>

According to the report, the characteristics of a pre-payable offense which can avoid Sixth Amendment scrutiny are: (1) pre-trial waiver of appearance; (2) a plea of guilty; and (3) a fine.<sup>118</sup> The offense cannot be designated as pre-payable if (1) subsequent offenses have greater penalties or (2) additional sanctions require judicial attention.<sup>119</sup> Thus, by eliminating the possibility of jail time, extra punishment for recidivists, and the driver’s license suspension, Virginia could save many thousands of court appearances per year—perhaps even turning marijuana enforcement into a lucrative endeavor instead of a system drain. Naturally, strict constitutional application of the Confrontation Clause and other rights make it more difficult for states to prosecute offenders, but when it comes to petty offenders and the plethora of new criminal statutes passed each year, perhaps this should be viewed as a positive development—a deterrent not for zealous defense attorneys, but for lawmakers.

The main argument against such a proposal, that adult marijuana use is an evil against which the resources of criminal justice are properly directed, has been losing ground throughout the United States.<sup>120</sup> Some states have decriminalized marijuana, and California presently seeks to legalize it outright.<sup>121</sup> There is little evidence that decriminalizing marijuana increases marijuana use across society and some evidence suggests the opposite is true.<sup>122</sup> The Connecticut Law Review Commission found that in states that

---

116. *See generally id.*

117. *Id.* at 6

118. *Id.* at 2.

119. *Id.* at 5-6.

120. Eric Blumenson & Eva Nilssen, *No Rational Basis: The Pragmatic Case for Marijuana Law Reform*, 17 VA. J. SOC. POL’Y & LAW 43, 75 (2009) (citing to several nationwide polls showing public opinion in support of decriminalization or reform).

121. *See, e.g.*, Steven Harmon, *Committee Passes Marijuana Legalization Bill*, CONTRA COSTA TIMES, Jan. 12, 2010, available at [http://www.mercurynews.com/breaking-news/ci\\_14173190?nclck\\_check=1](http://www.mercurynews.com/breaking-news/ci_14173190?nclck_check=1). Colorado, Maine, Massachusetts, Nebraska, New York, and Ohio have downgraded possession of marijuana from a criminal to a civil offense. Office of National Drug Control Policy, *Who’s Really in Prison for Marijuana?*, 14 (2005), available at [http://www.californiapolicechiefs.org/nav\\_files/marijuana\\_files/files/WhosInPrisonforMarijuana.pdf](http://www.californiapolicechiefs.org/nav_files/marijuana_files/files/WhosInPrisonforMarijuana.pdf).

122. “Thus, there is little evidence that decriminalization of marijuana use necessarily leads to a substantial increase in marijuana use.” JANET E. JOY ET AL., *MARIJUANA AND MEDICINE: ASSESSING THE SCIENCE BASE* 102, 104 (Institute of Medicine, 1999).

lowered marijuana penalties, marijuana use dropped on the whole, as compared to states which did not change their laws.<sup>123</sup>

While reasonable minds may differ about marijuana reform in the abstract, the Supreme Court's rulings in *Melendez-Diaz* and *Briscoe* render a change in marijuana laws. During Assistant Solicitor General McCullough's argument, Justice Scalia provoked laughter in the courtroom by inquiring as to whether Virginia's problems with *Melendez-Diaz* were the result of Virginia's criminals being nastier than those in other states.<sup>124</sup> McCullough again noted that it was the defense *attorneys* his interpretation sought to deter.<sup>125</sup> Virginia's persistent annoyance with lawyers who muck up the system by seeking to enforce Confrontation Clause rights is, perhaps, well placed but one step short. If Virginia would just decriminalize marijuana, many of these dreaded game-playing attorneys would never be involved at all.

#### IV. VIRGINIA INCARCERATION, COSTS, CRIME, AND FORENSIC SCIENCE

The Virginia Department of Corrections manages more than 90,000 offenders with a \$1 billion annual budget.<sup>126</sup> As of December 2009, approximately 31,000 state-responsible offenders were housed in state prisons and local jails and 60,000 were under community supervision.<sup>127</sup> These numbers do not include defendants awaiting trial, serving local jail sentences of less than twelve months, or defendants being supervised by local probation offices.<sup>128</sup> The Department of Corrections reports that over the past decade the "inmate population has increased by 24.7% and the community corrections supervision population has increased by 58.8%."<sup>129</sup>

---

123. CONN. LAW REVIEW COMM'N, DRUG POLICY IN CONNECTICUT AND STRATEGY OPTIONS: REPORT TO THE JUDICIARY COMMITTEE OF THE GENERAL ASSEMBLY, D.7. (1997), available at <http://www.cga.ct.gov/lrc/DrugPolicy/DrugPolicyRpt2.htm>.

124. Transcript of Oral Argument, *supra* note 105, at 45.

125. *Id.*

126. See VA. DEP'T OF PLANNING AND BUDGET, VIRGINIA'S 2009 BUDGET DOCUMENT (2008), available at <http://dpb.virginia.gov/budget/buddoc09/index.cfm>. The overall state budget, including fees and revenues generated by government agencies and entities, was about \$37 billion for 2009. *Id.*

127. VA. DEP'T OF CORR., POPULATION SUMMARY DECEMBER 2009, available at <http://www.vadoc.state.va.us/about/facts/research/new-popsum/2009/dec09popsummary.pdf>. The Virginia Department of Corrections is only responsible for defendants sentenced to serve more than one year of active incarceration and/or court ordered to a period of state supervised probation. The majority of Virginia misdemeanants, if a court orders supervision, are supervised by local probation offices, which tend to be, in the authors' experience, less intensive than state probation.

128. *Id.*

129. VA. DEP'T OF CORR., STRATEGIC PLANNING REPORT, 2010-2012, available at <http://www.vaperforms.virginia.gov/agencylevel/stratplan/spReport.cfm?AgencyCode=799>.

For incarcerated offenders, in 1999, the Department of Corrections reported that it cost \$18,666 to house an inmate for one year.<sup>130</sup> In 2008, the annual per capita cost per inmate had increased to \$24,322.<sup>131</sup>

Thousands of defendants languishing in Virginia prisons are serving sentences for felony drug possession—mostly cocaine possession.<sup>132</sup> In 1999, 7.8% of Virginia's nearly 30,000 confined offenders in Virginia prisons were serving time for nonviolent drug possession.<sup>133</sup> In 2008, 8.5% of Virginia prison inmates were serving sentences for possession offenses.<sup>134</sup> That is, in 2008, the Virginia Department of Corrections spent nearly \$81,000,000 to confine more than 3000 people convicted of nonviolent drug possession!<sup>135</sup>

In considering the costs of corrections to the overall state budget, it is important to note that the state paid its \$1 billion corrections bill from the state's \$16.5 billion general fund in 2009.<sup>136</sup> Further, the Department of

---

130. VA. DEP'T OF CORR., STATISTICAL SUMMARY FY99, FY00, AND FY01 (2000) available at <http://www.vadoc.state.va.us/about/facts/research/new-statsum/fy00statsummary.pdf>.

131. VA. DEP'T OF CORR., STATISTICAL SUMMARY FY08, at 5 (Sept. 15, 2009) available at <http://www.vadoc.state.va.us/about/facts/research/new-statsum/fy08statsummary.pdf> [hereinafter STATISTICAL SUMMARY FY08].

132. See VIRGINIA CRIMINAL SENTENCING COMMISSION, 2007 ANNUAL REPORT 97 (2007).

133. STATISTICAL SUMMARY FY99, FY00, AND FY01, *supra* note 130, at 4. In 1999, 6% of drug offenders were serving time for cocaine possession. *Id.* In sum, 25% of Virginia's prison population was serving sentences for drug crimes in 1999. *Id.*

134. STATISTICAL SUMMARY FY08, *supra* note 131, at 3. Including drug sales, the total number of inmates serving time for drug charges is approximately 16.1%. See *id.* In Virginia, 27.8% of inmates are serving sentences for other nonviolent crimes (e.g. larceny) and 55.9% for violent offenses. See *id.*

135. *Id.* at 3, 5. The Virginia Department of Corrections reports confining 3328 drug possession offenders in 2008. This number multiplied by \$24,322 is equal to \$80,943,616. *Id.* The significant costs of housing drug offenders cited above does not factor into account the costs of offenders serving local jail sentences and/or being supervised by local probation for insignificant possession charges. *Id.* at 7. Certainly, if costs increase due to the need of the government to provide confrontation, it may be time to reexamine policies that lead to the mass prosecution and incarceration of defendants.

136. In 2009, the Virginia Department of Corrections' projected budget was \$1,000,801,763 from the Virginia's general fund and \$58,224,963 from other sources, which would include institutional fees. Virginia Department of Planning & Budget: The 2009 Executive Budget Document 1-2, <http://dpb.virginia.gov/Budget/buddoc09/agency.cfm?agency=799>. Virginia's general fund is supported by individual and corporate income taxes, sales taxes, and other taxes. Virginia Department of Planning & Budget: Frequently Asked Questions, <http://dpb.virginia.gov/budget/faq.cfm>. The overall state budget, fees, and other revenues generated by government agencies and entities as well as federal monies, was \$35.7 billion for 2009. *Id.* at 1 The Department of Corrections generates a relatively

Corrections, from FY2004 until FY2009, saw sharp cost increases in its operating budget from \$763 million to \$1 billion.<sup>137</sup> Despite the rise in correction costs and incarceration rates over the past decade, criminal offenses per 100,000 persons have not appreciably increased and have even decreased in some categories—although drug crime, or at least arrests, did notably increase between 2002 and 2008.<sup>138</sup> In 2009, incarceration rates did dip in Virginia as its prisons lost population for the first time in memory, perhaps signaling an end to rapidly increasing incarceration rates.<sup>139</sup>

In comparison to the massive billion dollar Virginia corrections budget, the Virginia Department of Forensic Science has a slight \$34 million annual budget.<sup>140</sup> In its efforts to respond to subpoenas in drug and alcohol cases since *Melendez-Diaz*, the Virginia Department of Forensic Science has certainly expended a significant number of man-hours.<sup>141</sup> For instance, for the six months after the *Melendez-Diaz* decision, department statistics indicate that analysts spent on an average 376 hours per month to attend

---

small amount of non-general fund money. See STATISTICAL SUMMARY FY08, *supra* note 131.

137. BUDGET UNIT, OFFICE OF THE CONTROLLER, VA. DEP'T OF CORRECTIONS MANAGEMENT SUMMARY INFORMATION ANNUAL REPORT YEAR ENDING JUNE 30, 2004, 6 available at <http://www.vadoc.state.va.us/about/facts/managementInformationSummaries/2004.pdf>.

138. UNIFORM CRIME REPORTING SECTION, DEP'T OF STATE POLICE, CRIME IN VIRGINIA 2008, at 4 (2009) available at [http://www.vsp.state.va.us/downloads/Crime\\_in\\_Virginia\\_2008.pdf](http://www.vsp.state.va.us/downloads/Crime_in_Virginia_2008.pdf). For instance, while fraud crimes have risen, larceny offenses have fallen. *Id.* Between 2002 and 2008, fraud crime in Virginia trended upward to 314.58 fraud arrests per 100,000 in population in 2008 from 178.32 fraud arrests per 100,000 in population in 2002. *Id.* Larceny arrests decreased to 1976.38 per 100,000 in population in 2008 from 2413.07 per 100,000 in population in 2002. *Id.* Between 2002 and 2008, the Virginia State Police reported 593.57 narcotic/drug arrests per 100,000 in population in 2008 as compared to 619.66 in 2007, 587.93 in 2006, 558.12 in 2005, 528.81 in 2004, 495.82 in 2003, and 471.71 in 2002. *Id.*

139. VA. DEP'T OF CORR. POPULATION SUMMARY DECEMBER 2009, *supra* note 127, at 2. This summary of Virginia prison populations indicates the number of inmates dropped by 4.3% from December 2008 to December 2009—1380 fewer prisoners. *Id.* This figure does not include state responsible prisoners in local jails awaiting transport to a correctional facility. *Id.*

140. VA. DEP'T OF PLANNING AND BUDGET, DEPARTMENT OF FORENSIC SCIENCE OPERATING BUDGET SUMMARY (2010), available at <http://dpb.virginia.gov/budget/buddoc10/agency.cfm?agency=778>.

141. *Impact on DFS of the Decision of the Supreme Court of the United States in Melendez-Diaz v. Massachusetts: Presentation Before the Subcomm. on Public Safety of the Sen. Comm. on Finance*, Gen. Assem., Reg. Sess. (Va. 2010) (presentation of Gail D. Jaspén, Chief Deputy Director, Department of Forensic Science) available at <http://sfc.state.va.us/pdf/Public%20Safety/2010/January%2022%20mtg/012210%20Forensic%20Science%20Presentation.pdf>.

court; in the three months of April, May, and June 2009, leading up to the *Melendez-Diaz* decision, court obligations cost analysts on average twenty hours per month.<sup>142</sup> Further, on average, the numbers of subpoenas the department receives has increased significantly since *Melendez-Diaz*.

Date (Month/Year)	Subpoenas Received (All Sections)
April 2009	487
May 2009	503
June 2009	583
July 2009	1884
August 2009	1735
September 2009	1627
October 2009	1438
November 2009	1237
December 2009	1311
January 2010	1387

**Table I:** Provided by the Virginia Department of Forensic Science<sup>143</sup>

Nonetheless, if Virginia forensic scientists, post *Melendez-Diaz*, spend on average 375 hours in court each month (4500 hours per year), and an equivalent amount of additional time responding to subpoenas—the overall cost impact on Virginia’s criminal justice system is not terribly significant—i.e. 9000 man-hours is the equivalent of less than five full-time positions at 2000 hours per year, per position. And adding five positions to the Department of Forensic Science should cost something less than \$500,000 per year.<sup>144</sup> Certainly, there are other costs associated with *Melendez-Diaz*—e.g. travel expenses, the time of breath technicians appearing in DUI cases, etc. However, the costs of complying with the Confrontation Clause in drug cases are not high compared to the millions the state spends each year incarcerating defendants for possession offenses.<sup>145</sup> While the following logic may not be compelling to the Virginia General Assembly, the costs of *Melendez-Diaz* could apparently be paid for by fining Virginia’s nearly 20,000 annual marijuana defendants \$100 each and treating the bulk of those

142. E-mail from Gail Jaspen, Chief Deputy Dir., Va. Dep’t of Forensic Sci., to Kristen D. Clardy, Attorney at Law, (Feb. 26, 2010, 17:01 EST) (on file with author).

143. E-mail from Gail Jaspen, Chief Deputy Dir., Va. Dep’t of Forensic Sci., to Kristen D. Clardy, Attorney at Law, (Feb. 25, 2010, 16:26 EST) (on file with author).

144. See VA. DEP’T OF PLANNING AND BUDGET, *supra* note 126. According to the Department of Forensic Science’s 2009 budget, the department employed 313 people and had an annual budget of \$34 million. *Id.*

145. See *id.* at B-96 to B-97.

cases civilly (so as to reduce lab and prosecution costs), generating almost \$2 million in fines. Alternatively, since it costs \$24,000 to incarcerate a drug-possession felon for a year, releasing Virginia's more than 3000 drug-possession defendant's one month early would save \$6.75 million annually.<sup>146</sup> A simple statutory change granting an additional 10% good time to nonviolent drug offenders serving sentences should easily pay for the costs of *Melendez-Diaz*.

#### V. CONCLUSION

While the strains on Virginia's Department of Forensic Science are real, those strains appear to be lessening in the wake of Virginia's amendments to its laws governing the admissibility of certificates of analysis in response to *Melendez-Diaz* and *Briscoe*. Given Virginia's jury sentencing rules, there are not real concerns that defendant gamesmanship (i.e. analyst demands) will be a factor in felony drug cases.<sup>147</sup> And while the possibility and incentives exist for lawyers to play "analyst brinkmanship" in misdemeanor cases, especially marijuana possession, these concerns could be alleviated through policy changes.<sup>148</sup> As discussed in Part III, the troubles and costs of prosecuting marijuana offenses would be easily remedied if Virginia opted to punish marijuana possession as a civil fine where the accused would have no confrontation right. And as mentioned in Part IV, turning marijuana into a civil offense punished by a fine would potentially pay for the costs of complying with *Melendez-Diaz* in *all cases*. In the alternative, reducing prison sentences meted out to defendants for simple possession of drugs by one month per year served would also more than pay for the costs of complying with the Confrontation Clause.

As importantly, in the furor over the possibility of guilty defendants going free and the increased costs of complying with the Confrontation Clause after *Melendez-Diaz*, it should not be lost that Virginia, for thirty-three years, had an apparently unconstitutional system of prosecuting defendants. The now defunct Virginia statutes were designed to streamline prosecutions—and aided in the mass prosecution of defendants in Virginia courts. And while these laws made it cheaper to convict, the laws did not make it less expensive to incarcerate—in fact, the cost per inmate per year rose to \$24,000 in 2008 from less than \$19,000 in 1999. Cases such as *Melendez-Diaz* and *Briscoe*, standing for important rights, serve as a check on the government and should make us reflect on whether making it easier for the government to convict defendants is the right cause—especially when it is achieved by impairing constitutional rights.

---

146. See *supra* notes 65, 131.

147. See *supra* Part II.A-B (discussing Virginia jury trials and sentencing).

148. See *supra* Part III (suggesting decriminalization of marijuana).