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ESSAY

THE CONFRONTATION CLAUSE AND THE HIGH STAKES OF THE COURT'S CONSIDERATION OF *BRISCOE V. VIRGINIA*

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IN October Term 2008, the Supreme Court handed down *Melendez-Diaz v. Massachusetts*—the latest case in the *Crawford* line under the Confrontation Clause.¹ In *Melendez-Diaz*, the prosecution sought to introduce an affidavit by a forensic analyst that stated a given substance was cocaine. The defendant objected, arguing that the Confrontation Clause required that the analyst testify in person. Justice Scalia, writing for a five-Justice majority that included Justices Ginsburg, Souter, Stevens, and Thomas,² held that the reports of forensic analysts are “testimonial,” and thus a prosecutor can only introduce such a report if the analyst is subject to “confrontation,” or if the defendant waives that right.

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¹ *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (June 25, 2009); *Crawford v. Washington*, 541 U.S. 36 (2004). The Confrontation Clause of the Sixth Amendment provides, “In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.” U.S. Const. amend. VI.

² Thomas would have held that only “formalized . . . materials,” such as affidavits, are “testimonial.” *Melendez-Diaz*, 129 S. Ct. at 2543 (Thomas, J., concurring) (quotation and citation omitted).

Melendez-Diaz may have drastic consequences for the criminal justice system. Justice Kennedy, writing for a four-Justice dissent that included Chief Justice Roberts and Justices Alito and Breyer, worried about the “remarkable” and “formidable power” that *Melendez-Diaz* gives to defense attorneys.³ Despite Scalia’s assurances that defendants will be “unlikely” to regularly require the analyst’s presence,⁴ in Virginia defendants have liberally asserted that right. In the nine months before *Melendez-Diaz*, forensic analysts were subpoenaed an average of 528 times per month. In July, the month after the opinion was handed down, analysts were subpoenaed 1885 times. In the succeeding months, that spike abated, to 1737 in August, 1631 in September, and 1441 in October.⁵ The drop in the number of subpoenas, however, may only reflect defense attorneys’ ability to take advantage of this “formidable power” by gaining a more lenient sentence during plea negotiations.

The Court handed down *Melendez-Diaz* on a Thursday. The following Monday, the Court granted certiorari in *Briscoe v. Virginia*.⁶ In that case, the Supreme Court of Virginia—writing one year before *Melendez-Diaz*—had assumed that an analyst’s report was “testimonial,” but it held that the confrontation right was satisfied by a Virginia statute that allowed the defendant to call the analyst as an adverse witness during the defense phase of trial.⁷ The Court heard arguments in *Briscoe* on January 11, 2010.

Under the language of *Melendez-Diaz*, it seems a foregone conclusion that the Court in *Briscoe* will strike down this statute. The Massachusetts law at issue in *Melendez-Diaz* similarly empowered the defendant to call the analyst as his own, hostile witness.⁸ But in *Melendez-Diaz*,

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

⁴ Id. at 2541 (majority opinion).

⁵ The authors are grateful to Stephanie Merritt of the Department of Forensic Science for providing the data. E-mail from Stephanie Merritt (November 6, 2009) (on file with authors). These statistics were presented by Gail Jaspen, Chief Deputy Director, Virginia Department of Forensic Science, in *Melendez-Diaz* in Virginia, 44 U. Richmond L. Rev. Annual Survey of Virginia Law Symposium, November 12, 2009.

⁶ *Magruder v. Virginia*, 657 S.E.2d 113 (Va. 2008), cert. granted sub nom. *Briscoe v. Virginia*, 129 S. Ct. 2858 (June 29, 2009). The same day that it granted certiorari in *Briscoe*, the Court vacated and remanded other cases which had held that such evidence was not testimonial. See, e.g., *Ohio v. Crager*, 879 N.E.2d 745, 746 (Ohio 2007) (testimony of DNA analyst was nontestimonial), vacated by 129 S. Ct. 2856 (June 29, 2009).

⁷ Va. Code Ann. § 19.2-187.1 (2007).

⁸ Mass. R. Crim. P. 17(a)(1) (empowering the defendant to summon witnesses); Brief of Respondent at 57, *Melendez-Diaz*, 129 S. Ct. 2527 (No. 07-591) (arguing that the analyst could have been examined as a hostile witness).

Scalia explained that “fundamentally, the Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those *adverse witnesses* into court.”⁹ Further, Scalia reasoned, the Confrontation Clause is “not replaced by a system in which the prosecution presents its evidence via *ex parte* affidavits and waits for the defendant to subpoena the affiants if he chooses.”¹⁰ For this reason Petitioners in *Briscoe*, who are represented by Professor Richard D. Friedman of the University of Michigan Law School, conclude that “[t]he question presented . . . has been definitively resolved by this Court.”¹¹ Then again, the Court’s acceptance of certiorari in *Briscoe* suggests that the result will not be that simple; if the Court believed that *Melendez-Diaz* did resolve this issue so clearly—and if the Court had no plans to review *Melendez-Diaz*—then presumably it would have simply vacated and remanded *Briscoe*.

In its brief Respondent, the Commonwealth of Virginia argues that *Melendez-Diaz* requires only that the prosecution must subpoena the analyst and ensure his arrival at the trial, and the defendant cannot be required to bring the witness to the courtroom.¹² Yet this argument ultimately is difficult to square with the language of that opinion; Scalia seemed to require that the analyst appear in the prosecution’s case, since he rejected a system “in which the prosecution presents its evidence via *ex parte* affidavits” and a system that would view analysts as “adverse witnesses.” Indeed, even Virginia’s legislature found its prior statute insufficient under *Melendez-Diaz*: after *Melendez-Diaz*, the Virginia General Assembly amended its statute to require that, if the defendant so chooses, the prosecution must both subpoena the analyst and call him as a witness in the prosecution’s case-in-chief.¹³

The Commonwealth’s chances of success in *Briscoe* may depend less on its novel reading of *Melendez-Diaz* than on the new Justice on the Court. Justice Souter sided with the majority in *Melendez-Diaz*. But when the Court considered *Briscoe*, Souter had been replaced by Justice Sonia Sotomayor. Sotomayor’s experience as a prosecutor and a trial

⁹ *Melendez-Diaz*, 129 S. Ct. at 2540 (emphasis added).

¹⁰ *Id.*

¹¹ Brief of Petitioners at 12, *Briscoe*, No. 07-11191 (U.S. Sept. 1, 2009).

¹² Brief of Respondent at 27, *Briscoe*, No. 07-11191 (U.S. Oct. 26, 2009).

¹³ See Va. Code Ann. § 19.2-187.1 (signed into law Sept. 15, 2009); Alan Cooper, Virginia General Assembly: The Fix Is In: Legislature Passes Remedy for Melendez, *Virginia Lawyers Weekly*, Aug. 24, 2009. Despite the change in the statute, Respondent and its amici do not argue that the petition should be dismissed as moot.

judge suggests that she might take more seriously the concerns of the dissent in *Melendez-Diaz*—of the remaining Justices, only Alito also served as a prosecutor, and he dissented in *Melendez-Diaz*.¹⁴ In fact, some commentators suggest that certiorari was granted in *Briscoe* not to extend *Melendez-Diaz*, but to overrule or limit it.¹⁵

This essay will explore the options and compromises available to the Court in *Briscoe*. Moreover, it will explore how these various options can be used as a vehicle to shape future jurisprudence under the Confrontation Clause.

OPTION ONE: SOTOMAYOR JOINS THE *MELENDEZ-DIAZ* MAJORITY IN FULL

Scalia's language in *Melendez-Diaz* made clear in what direction he would head. If in *Briscoe* Sotomayor fully joins the Justices of the *Melendez-Diaz* majority, then the Court in *Briscoe* would invoke Scalia's language in *Melendez-Diaz* and confirm two holdings from that opinion. First, the Court would hold that an analyst's report is "testimonial," and thus inadmissible unless the defendant has an opportunity to confront the witness or waives the right to do so. Second, the Court would hold that the prosecution must introduce the analyst in its own case-in-chief—and that the Confrontation Clause is not satisfied by a statute that allows the defendant to call that witness in his own case.

OPTION TWO: SOTOMAYOR JOINS THE *MELENDEZ-DIAZ* MAJORITY, BUT
ALLOWS THE ANALYST TO BE CALLED BY THE DEFENDANT

The Court in *Briscoe*, however, could adopt the central holding of *Melendez-Diaz*—that lab reports are testimonial evidence—but limit the consequences of that decision by concluding that the Confrontation Clause is satisfied if the defendant calls the analyst as an adverse witness during the defense phase of trial.¹⁶ After all, it is one thing to agree with Scalia that logically the prosecution should present its own witnesses; it is quite another thing to say that the Constitution compels it.

¹⁴ See Jonathan Adler, Souter, Sotomayor, & *Melendez-Diaz v. Massachusetts*, Volokh Conspiracy (June 29, 2009), available at http://volokh.com/archives/archive_2009_06_28-2009_07_04.shtml#1246125087 (suggesting that Sotomayor may join the "pragmatist" position of the *Melendez-Diaz* dissent, instead of the "formalistic" position of the majority).

¹⁵ See, e.g., Lyle Denniston, Analysis: Is *Melendez-Diaz* Already Endangered? SCOTUS-Blog (June 29, 2009), available at <http://www.scotusblog.com/wp/new-lab-report-case-granted/>.

¹⁶ This particular solution was predicted by Lyle Denniston. See Denniston, *supra* note 15.

Nevertheless, this second option has two initial problems: the first is textual, and the second precedential. First, the Confrontation Clause states that a defendant has the right “to be confronted with” the witness. As noted by the dissenting justices of the Virginia Supreme Court, this right is stated in the passive, and it seems to require nothing of the defendant during trial.¹⁷ But on brief in *Briscoe*, the Commonwealth of Virginia has tried to overcome this by arguing that the “confrontation” that is contemplated by the Sixth Amendment is actually not a “confrontation” by the witness during direct examination, but is rather an opportunity for cross-examination by the defendant—whether during the prosecution’s or the defendant’s case. There are some nineteenth-century concurrences and dissents from the Court that support this view.¹⁸

But second, even if the text of the Sixth Amendment can be read to require only that the defendant can call the witness as an adverse witness, this option conflicts with the strong language in *Melendez-Diaz* that seemed to reject the adequacy of a system that enabled the defendant to call the analyst as his own witness. Sotomayor and the dissenting Justices in *Melendez-Diaz* may be reluctant to adopt the Commonwealth’s strained reading of Scalia’s statements in *Melendez-Diaz*, and they may be even more reluctant to openly restrict a prior decision less than a year old—especially during Sotomayor’s first year on the Court.

OPTION THREE: SOTOMAYOR JOINS THE *MELLENDEZ-DIAZ* MAJORITY, BUT LEAVES ROOM FOR, AND GIVES GUIDANCE FOR, STATUTORY RESTRICTIONS

There is another way that the Court in *Briscoe* can adopt the reasoning of *Melendez-Diaz* while limiting its consequences for the criminal justice system. The Court can follow the holding of *Melendez-Diaz* under option one, but in its holding it can leave room for restrictions on that right, such as a requirement that the defendant “intends in good faith to conduct the cross-examination” of the analyst, as he must under Alabama law, or that the defendant “establishes . . . a substantial and bona fide dispute” regarding the document and establishes that cross-examination is in the “best interests of justice,” as he must under Nevada

¹⁷ *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 (June 29, 2009).

¹⁸ Brief of Respondent, *supra* note 12, at 28–29 (citing cases).

law.¹⁹ Such a holding would not conflict with *Melendez-Diaz*; in that opinion, the Court expressly declined to evaluate such statutes.²⁰ Of course, the Court in *Briscoe* could not directly address such statutes. But by clarifying some principles, it could lay the groundwork for later consideration of these other statutes.

The Court's stance on these statutes has the potential to be even more important to Confrontation Clause jurisprudence than a holding on when the witness must appear. Such statutes would allow states to regulate away the practical problems of *Melendez-Diaz*, because they would require the analyst's presence only in those rare cases where the defendant has his own evidence of errors in the report. Yet allowing a "good cause" requirement would constitute a burden on the defendant's assertion of his right of confrontation; the Georgia Supreme Court rejected such a statute as a "Catch-22": the defendant needs cross-examination to identify the specific grounds that the statute requires prior to cross-examination.²¹

In reaching any conclusion in *Briscoe*, the Court can clarify the goals underlying the Confrontation Clause. At present, those goals are ambiguous. Before *Crawford*, the Court recognized three elements of the right of confrontation: the witness must give his statements under oath; the witness must submit to cross-examination; and the witness must give his statements before the jury, who can evaluate his statements.²² The dissent in *Melendez-Diaz* used this pre-*Crawford* language and identified two broad concerns of the Clause: to bring the witness face-to-face with the defendant and thereby "to impress upon witnesses the gravity of their conduct," and "to alleviate the danger of one-sided interrogations."²³ By contrast, the Court in *Crawford* suggested that the Confrontation Clause is less about oath and presence than it is about cross-examination by the defendant. *Crawford* stated that the Sixth Amendment requires that "reliability be assessed in a particular manner: by testing in the crucible of cross-examination."²⁴ The goals of the two positions are overlapping, but fundamentally, the former envisions a Confrontation Clause that does work even when the defendant is passive in

¹⁹ Ala. Code 12-21-302(b) (2008); Nev. Rev. Stat. 50.315 (6) (a)-(b) (2007).

²⁰ *Melendez-Diaz*, 129 S. Ct. at 2541 n.12.

²¹ *Miller v. Georgia*, 472 S.E.2d 74, 79 (Ga. 1996) (discussing O.C.G.A. § 35-3-16 (c)).

²² *California v. Green*, 399 U.S. 149, 165-68 (1970).

²³ *Melendez-Diaz*, 129 S. Ct. at 2548 (Kennedy, J., dissenting).

²⁴ *Crawford v. Washington*, 541 U.S. 36, 61 (2004).

court, while the latter envisions a Clause that works only when the defendant acts to cross-examine the witness. If the Court sets the rationales of the Clause more broadly, then such statutes may be disallowed; alternatively, under a rationale that focuses on cross-examination, a requirement that the defendant cross-examine the witness would be permissible.

This option seems to present an ideal compromise: it accepts the holding of *Melendez-Diaz*, but (for good or ill) it leaves for another day some fundamental questions about the impact of the Confrontation Clause, while allowing the Court, if it chooses, to lay some foundations for consideration of those other questions. In adopting this option the Court in *Briscoe* would do well to choose its language carefully and to pay attention to the ramifications of that language for later restrictions on the right.

OPTION FOUR: SOTOMAYOR JOINS THE MELENDEZ-DIAZ MAJORITY, BUT
DRAWS A LINE AT WHICH ANALYST REPORTS ARE CONSIDERED
“TESTIMONIAL” UNDER *MELENDEZ-DIAZ*

The Court in *Briscoe* might also reduce the practical consequences of *Melendez-Diaz* by defining more narrowly which analyst reports are “testimonial.”²⁵ Some language from that opinion, however, may hinder the Court’s ability to adopt such alternatives.

In *Briscoe*, the Court can define what analyst reports are “testimonial” in one of two meaningful ways. The Court could hold that a report that summarizes machine maintenance—as opposed to the results from a test by the machine—is not testimonial. This is consistent with Scalia’s statement in *Melendez-Diaz* that “documents prepared in the regular course of equipment maintenance may well qualify as nontestimonial records.”²⁶ Yet such a distinction might be difficult to justify. The Court could reason that maintenance records are excluded because evidence is “testimonial” only when it presents direct evidence of guilt. Unfortunately, this goes against the language of *Melendez-Diaz*, which noted that the Constitution identifies only two classes of witnesses: those “against” the defendant, and those “in his favor.”²⁷ Alternatively, the Court in *Briscoe* could reason that maintenance records are nontestimo-

²⁵ See *Melendez-Diaz*, 129 S. Ct. at 2544–45 (Kennedy, J., dissenting) (noting problems defining “analyst”).

²⁶ *Id.* at 2532 n.1 (majority opinion).

²⁷ *Id.* at 2534.

nial because they are analogous to business records—that is, evidence is “testimonial” only when the evidence is created with “the purpose of establishing or proving some fact at trial,” or at least “prepared specifically for use at [a particular defendant’s] trial.”²⁸ Yet this reasoning might be difficult to apply by lower courts, because the purpose for any given act of maintenance may be unclear.

A better way to achieve the same result might be to declare that only the results of the test itself are testimonial, and therefore only the analyst who reads or interprets the results of the test must appear in court. A test based on this distinction screens out witnesses who perform maintenance tasks, but it would also keep out evidence of the handling or preparation of a sample. This test would be easier to justify under existing precedent: the Court could reason that such evidence goes to the chain of custody, which does not implicate the Confrontation Clause. Yet in *Melendez-Diaz*, Scalia noted that for evidence of chain-of-custody, “what testimony *is* introduced must (if the defendant objects) be introduced live.”²⁹ If the majority relies on a distinction that chain of custody is normally not testimonial, *Melendez-Diaz* might therefore nevertheless bring those analysts into court. Indeed, this language has already had seemingly unintended consequences; Virginia’s General Assembly recently revised its DUI statutes no longer to require proof that the breath analysis machine had been maintained within the previous six months, since a Virginia intermediate appellate court had held that under *Melendez-Diaz* such maintenance reports must be presented via live testimony.³⁰ This controversial move took away the prosecution’s burden to prove the machine’s reliability, and thus it was originally opposed by the Virginia Senate.³¹

Ultimately, this option would have the most practical impact on life in the forensics lab, since labs will structure their policies to reduce the number of analysts that could be required to testify in person. For these reasons, the Court should be wary to accept a distinction about testimonial reports without mapping out the policies that labs are likely to adopt in response, and whether they would benefit or hinder the fact-finding

²⁸ See *id.* at 2532 n.1 and 2539–40.

²⁹ See *id.* at 2532 n.1.

³⁰ *Grant v. Commonwealth*, 682 S.E.2d 84 (Va. Ct. App. 2009) (citing and quoting *Melendez-Diaz*, 129 S. Ct. at 2532 n.1). See generally Cooper, *supra* note 13 (discussing amendments to Virginia’s breath-test statute, Va. Code Ann. § 18.2-268.9).

³¹ Cooper, *supra* note 13.

process. In particular, the Court should be careful to avoid a holding that aims to reduce the burden on prosecutors but inadvertently encourages labs—or legislatures—to reduce maintenance or change procedures that would reduce the reliability of analyst testimony.

OPTION FIVE: SOTOMAYOR JOINS THE *MELLENDEZ-DIAZ* DISSENT IN FULL

If in *Briscoe* Sotomayor joins the dissenting Justices in *Melendez-Diaz* and overrules that opinion, as twenty-six states and the District of Columbia have suggested as amici curiae,³² the result is as predictable as that outlined in option one. Generally, this option would retain the “testimonial” test of *Crawford* and its originalist framework, since in *Melendez-Diaz* the majority and dissent put forward competing originalist interpretations. But specifically, the dissent argued that the Framers intended to extend the Confrontation Clause only to a “conventional” or “typical” witness, who recalls past events, observes a crime or related human action, and responds to questions under interrogation.³³ For the dissent, the analyst does none of these.³⁴ Thus, under this option the majority in *Briscoe* would hold that an analyst’s statement is not “testimonial.”

OPTION SIX: THE COURT DODGES THE QUESTION—OR TRIES

Given the high stakes of *Briscoe*, and the fact that the Justices may not want to contradict *Melendez-Diaz* so soon, the Justices may prefer to avoid these questions. The Court could attempt to dodge the question through inaction, either by vacating the case without an opinion or by dismissing the petition. In the event that the Court declines to hear the merits of the case, Petitioners would prefer vacatur, and Respondent Virginia would seek dismissal.³⁵

First, the Court could vacate and remand the case in light of *Melendez-Diaz*. Petitioners argue that if the Court declines to decide *Briscoe* on the merits, it should vacate and remand the case, rather than dismiss-

³² Brief 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).

³³ *Melendez-Diaz*, 129 S. Ct. at 2551–52 (Kennedy, J., dissenting).

³⁴ *Id.*

³⁵ Reply Brief of Petitioners at 28–30, *Briscoe*, No. 07-11191 (U.S. Dec. 7, 2009); Brief of Respondent, *supra* note 12, at 24 n.8.

ing the petition.³⁶ The Court might take this tack in order to avoid the questions of *Briscoe*; yet because of Scalia's strong language in *Melendez-Diaz*, if the Court passes on *Briscoe* it would actually endorse option one—or at least option four, which leaves room for later restrictions. Moreover, vacatur and remand might give such a signal to the Virginia Supreme Court. Since that court already held that the evidence was testimonial, vacatur and remand would suggest that the Court disagrees with the Virginia court's second holding: that the confrontation right is satisfied when the defendant is able to call the analyst as an adverse witness.

Second, the Court could dismiss the petition as improvidently granted. There is a justification for such a dismissal: because Virginia has amended its statute to require the prosecution to present the analyst in its case-in-chief, a question of *current* Virginia law is no longer at issue. And although the question remains of the permissibility of other state statutes that resemble the Virginia statute at issue in *Briscoe*, the question may not justify consideration by the Supreme Court.³⁷ Virginia recommends such a dismissal.³⁸ More generally, Virginia seems to hope that a dismissal would endorse option two, since a dismissal would leave untouched the Virginia court's holding that the confrontation right is satisfied when the defendant can call the analyst. Yet dismissing the petition in this way would not necessarily allow for option two; dismissing the petition leaves Scalia's language endorsing option one untouched.

There is one way that the Court can act to successfully avoid the key questions in *Briscoe*. Recall that on brief, Virginia hoped to read Scalia's comments in *Melendez-Diaz* to avoid the question of *when* the

³⁶ Reply Brief of Petitioners, *supra* note 35, at 28–30. Petitioners argue principally that *Melendez-Diaz* “dramatically altered the landscape against which the Virginia Supreme Court made its decision,” and therefore it would be inequitable to dismiss the case and let *Briscoe* stand upon an improper legal standard.

³⁷ Before *Melendez-Diaz*, North Dakota, Tennessee, and North Carolina all declared that such a statute satisfied the Sixth Amendment. Certiorari Granted in *Briscoe v. Virginia: Confrontation Clause Case Set for 2010 Supreme Court Term*, Federal Evidence Blog (July 2, 2009), available at <http://federalevidence.com/blog/2009/july/certiorari-granted-briscoe-v-virginia-confrontation-clause-case-2010-supreme-court-te>.

³⁸ Brief of Respondent, *supra* note 12, at 24 n.8. Virginia argues that a dismissal is proper because the defendants did not attempt to call the analysts, and therefore waived their rights. Then again, this argument is difficult to make in light of *Melendez-Diaz*, since in that case the defendant did not summon the analyst under Massachusetts law, and the Court did not find that he waived his rights.

analyst must appear at trial.³⁹ Such a position is difficult to maintain; Scalia seemed to foreclose a system that would require the defendant to call the witness to the stand when he argued that the Confrontation Clause is “not replaced by a system in which the prosecution presents its evidence via *ex parte* affidavits and waits for the defendant to subpoena the affiants if he chooses.”⁴⁰ But the Court in *Briscoe* could similarly conclude that while Scalia contemplated the order of proof, the necessary holding in *Melendez-Diaz* related only to which party has the burden to call the witness; under this reasoning, the Court in *Briscoe* could accept Scalia’s statements at their face value, but clarify that they were merely dicta. And because the defendant in *Briscoe* did not seek to call the analyst at trial, the Court could argue that the question of *when* the analyst must appear should be put off. This would technically solve the precedential problem posed by *Melendez-Diaz*, and it would allow the Court to delay answering the other questions the case presents until it has sufficient time to consider their practical consequences.

SOTOMAYOR’S CONTRIBUTIONS TO THE COURT IN *BRISCOE*

More generally, Sotomayor may leave her mark on the Court’s discussion in two particular ways: the first dealing with the content of the Confrontation Clause, and the second with the practical effects of *Melendez-Diaz* on attorney behavior. First, she will be able to provide a fresh perspective on *when* confrontation must take place under the Confrontation Clause. As the parties have already argued on brief, central to this inquiry of when the witness must appear are practical evidentiary concerns.⁴¹ Alito was a prosecutor, but Sotomayor was a trial judge, and during conference she will be able to provide a unique sense of what difference exists, if any, between a witness being called by the prosecution or by the defense. Her understanding may well inform and influence the other Justices on what sorts of procedures satisfy and safeguard the right of confrontation.

Second, Sotomayor may be able to lend insight into the discussion of the effect of *Melendez-Diaz* on conduct by prosecutors and defense attorneys. Since the opinion was handed down, Virginia has seen a dra-

³⁹ Id. at 27; see supra notes 8–13 and accompanying text.

⁴⁰ *Melendez-Diaz*, 129 S. Ct. at 2540.

⁴¹ See Brief of Petitioners, supra note 11, at 18–26; Brief of Respondent, supra note 12, at 20–23.

matic increase in the number of analyst subpoenas. But the real import of *Melendez-Diaz* may take place behind the scenes, at the plea bargain stage. Sotomayor and Alito have both served as prosecutors. But Alito was a federal prosecutor, and federal prosecutors often exercise considerable power at that stage, most notably because of the ability to bring multiple charges if the case goes to trial. Sotomayor, by contrast, was an assistant district attorney for the state of New York. She may be able to bring to the Court an understanding of how plea bargains take place at the state level and to what extent *Melendez-Diaz* will affect the decisions of prosecutors and defense attorneys in that system.

CONCLUSION

In *Briscoe*, the Court will be forced to answer some of the questions posed by *Melendez-Diaz*. It will have to either determine again what sorts of analyst evidence is “testimonial,” or, alternatively, it will spell out the content of a defendant’s rights under the Confrontation Clause. Possible dispositions remain available that would again leave these questions open—although even in these compromises, the Court will probably be forced to consider broader issues of the Confrontation Clause, such as when the analyst must appear at trial. Ultimately, although Justice Scalia’s language in *Melendez-Diaz* made clear his vision of the proper outcome in *Briscoe* and the content of the right of Confrontation, the decision in *Briscoe* is likely to turn on Justice Sotomayor’s.