

FROM THE SUPREME COURT ORAL ARGUMENT TRANSCRIPTS

MELENDEZ-DIAZ (NOVEMBER 10, 2008)

Chief Justice Roberts: You say--you say "the analyst." I suppose it doesn't have to be the analyst but whoever they decide to call. So if you had a supervisor who runs the cocaine testing lab and he is the one whose report is submitted, I take it he is the one who would have to show up.

Defense Counsel: That's right. Our position--our position is that whoever the Commonwealth wants to use to prove the fact that they are trying to prove is the person that needs to take the stand. In this case, it would be the analyst.

Justice Scalia: But--but you would ask--if a supervisor did it, what would you ask the supervisor? You'd say, you know, did you--did you do this? Can you testify to your own knowledge that this is what the analysis showed? And he would have to say, no, it was one of my subordinates who did it, but I can tell you he was a very reliable person. How would that--I don't understand how that would work.

Defense counsel: I took the Chief Justice's hypothetical to be that the supervisor had actually done the testing, but if the supervisor had not--

Chief Justice Roberts: No, no, no, no, I'm saying that he would testify, I guess: I run the lab, these are the people I hire. they know how to do these tests, and this guy did the test. And since he was the one that the Government decided to--on whose affidavit they decided to rely, that's the only person you could get. Now, you could--to impeach him, you say, well did you do the test? No. But you could say, well--but I mean you don't have a right to an analyst at a particular level.

Defense counsel: That's right. There is no substantive right. I think everything you've said is right as far as it goes. It just depends what the Commonwealth wants to put in in terms of evidence.

[Transcript at 4-5]

Defense Counsel: But let me say one other way that this problem can be addressed by States is that they could have a supervisor take the stand and rely on raw data--on raw data and give his or her explanation of raw data. It's just that the person cannot take the stand and rely on somebody else's conclusion to the jury.

[Transcript at 28]

BRISCOE (JANUARY 11, 2010)

Justice Alito: If all the prosecution does is call the analyst on the stand and admit--have the analyst provide a foundation for the admission of the report, let's say, pursuant to the hearsay exception for recorded recollection, and does nothing more, would there be a Confrontation Clause problem?

Defense counsel: And there is--there is the question, is this your report, do you stand by it? Then--then I don't think there is a Confrontation Clause problem, because--because the prosecution has put the witness on the stand, has asked those questions and then the witness--
[Transcript at 8-9]

Justice Ginsburg: [O]ne of the problems that have been brought up, is that this is an inordinate expense and you're wasting the time of the analysts. Do you recognize any economy--for example, that the analyst could testify from the lab, have a video conferencing; and so the analyst, while the prosecutor must call her, can testify from the lab instead of coming down to the courthouse?

Defense counsel: That--that is a--certainly a possibility, at least on consent of the defendant, and some States . . . have been experimenting with that. And I think that's a plausible possibility. Now if a defendant were to insist on--on live testimony, that is an open--that is an open question, as to whether video testimony would be acceptable.
[Transcript at 15]

Defense counsel: I do want to respond also to the premise. I--I believe that sufficient data is available to show rather clearly that the expense is not inordinate.

Justice Alito: How can you say that? We have an amicus brief from 26 states plus the District of Columbia arguing exactly to the contrary

Justice Alito: If it is not a burden on these 26 states and the District of Columbia, why are they bothering to make this argument? For amusement

Justice Breyer: --will defense attorneys, if they have the right under the Constitution to insist that a lab technician be present, in cases where they happen to know that the lab technician's left the job and is married and is living in a different state, and say, okay, let's call her, and that way the prosecution really cannot present the case except at inordinate expense. And I'm concerned about that
[Transcript at 16-20]

Justice Scalia: Why--why do we have to say anything? Why is this case up here except as an opportunity to upset Melendez-Diaz. . . .

Justice Scalia: I'm not criticizing Virginia; I'm criticizing us for taking the case. (Laughter).
[Transcript at 55]

