



## US Supreme Court will hold that all statements prepared in anticipation of litigation are barred under the Confrontation Clause. But where will they draw the line?

By Mitchell Ignatoff, Esq.

On Monday, November 10 I went to the US Supreme Court to listen to the argument in *Melendez-Diaz v. Massachusetts*, a case which concerns whether, under the 6<sup>th</sup> Amendment Confrontation Clause, the state must bring in the lab tech who analyzed a sample of cocaine to testify in the state's case in chief regarding a prosecution for possession of cocaine.

Massachusetts law provides that a certificate from the lab tech is enough to prove that the sample tested contained cocaine and its amount; and that if the defendant wants to cross examine the lab tech the defendant can simply subpoena him or her. Many states follow Massachusetts' example and provide by law that a lab tech's certificate is enough to prove what the sample contained and the amount of the substance in the sample. New Jersey permits the defense to require the state to bring in the lab tech in the state's case in chief upon simple notice to the prosecutor.

My sense of the argument is that the Court wanted to set a precedent for all lab tests such as ballistics, drugs, DNA, among others. I also believe that a number of the justices were quite concerned about the impact their holding might have on the states. Yet it seemed to me that the Court was going to rule, in line with *Palmer v. Hoffman*, that any statement made in anticipation of litigation was testimonial and thus barred by the 6<sup>th</sup> Amendment.

The Court wasted little time dispensing with the business record exception to the hearsay rule. They found no historical precedent for the proposition that a statement made in anticipation of litigation was a business record. The Court clearly felt that the lab tech's certificate was a statement made in anticipation of litigation. And this is so even though the lab tech was supposedly neutral, the machine doing the test was largely automated, and the lab tech did these tests routinely.

The real issue in this case, unfortunately not really addressed by the parties, was where the Court was going to draw the line for the end of the right of confrontation; that is, at what point does the state not have to bring in the lab tech to testify. Analytically the Confrontation Clause has no limit. Even in a speeding ticket case the state would have to bring in the designer and programmer of the particular radar gun used by this police officer so they could be cross-examined as to bias in the machine. And every American has a right under the Confrontation Clause in every criminal prosecution.

I don't know where the Court will draw the line. The 6<sup>th</sup> Amendment right to trial by jury is limited to any case where the penalty is more than six months in jail. In *Crawford v. Washington* the Court held that the Marian bail<sup>1</sup> and committal statutes passed by Parliament in the 1500's for felony cases were exceptions to the right of confrontation. This implies that in non-felony cases confrontation was routine at common law. So even in cases of petty offenses, at common law there was a requirement of full confrontation; the state had to bring in the lab tech to testify. People were prosecuted for such petty offenses as public drunkenness, working on the Sabbath, and not being in church on the Sabbath at common law.

My personal position is that any statute that includes an option for jail time requires full confrontation. If the judge can -- not will

-- throw your client in jail, your client should be entitled to full confrontation. The state must bring in its lab tech in the case in chief.

The history of confrontation is really a history of the accused trying to prevent oppression. In the church courts, which punished for sin in England, heresy could be prosecuted on the basis of rumor. People were often tortured and killed based on whether the bishop believed them. And the accused were always denied the right to confront the witnesses against them. The same is true of the magistrates court at common law in England. People were often killed based on whether the magistrate believed them. And the accused was routinely denied the right to confront his accusers.

The New Jersey Supreme Court will never agree to full confrontation for any case that could result in jail for your client. They, like almost all state courts, dislike *Crawford* because *Crawford* takes power away from judges and gives it to juries. The test for reliability of evidence is not whether the judge feels the evidence is reliable but whether the jury thinks it's reliable after cross examination.

The extension of the Confrontation Clause will cost the state more money. It will require the state, at a minimum, to hire more lab techs.. It will mean more trials. Liberty is expensive. But there is no alternative.

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<sup>1</sup> So called after Mary Tudor, Queen of England at the time.

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All entries must be postmarked not later than the last business day in February and sent to the Middlesex County Bar Association, 87 Bayard Street, New Brunswick, NJ 08901.

The Award will be made at the Association's Annual Membership Meeting in May.