

Thursday, November 20, 2008

### **Waiting for Melendez: The Confrontation Clause Revisited.**

Â Bill of RightsÂ (From public domain.)Â Sometimes theÂ United States Supreme Court does true justice for criminal defendants. *Miranda v. Arizona*Â remains the best protection from the CourtÂ for suppressing coerced statements. *U.S. v. Booker*Â and its progeny led more judges to sentence below sentencing guidelines and prevented appellateÂ courts from changing such departures. *Crawford v. Washington*Â put stronger teeth into the Sixth Amendment right to confront the witnesses against a criminal defendant, so long as testimonial evidence is involved. Â Being only four years old, *Crawford* spells a radical overruling of the 1980Â *Ohio v. Roberts*Â case that took an overly-crabbed view of the Confrontation Clause. Because *Crawford* is so relatively new, and because it departs so radically from what judges and the vast majority of lawyers learned in law school, judges must not only be educated about *Crawford*, but also divested of any temptation to do mental gymnastics to issue rulings more crabbed than *Crawford* dictates. Â *Crawford* only gives cursory direction about the difference between testimonial evidence -- which receives *Crawford*'s protection -- and non-testimonial evidence, which does not receive *Crawford*'s protection. With oral arguments on November 10, 2008, theÂ United States Supreme CourtÂ further visited the meaning of "testimonial evidence" inÂ *Melendez-Diaz v. Massachusetts*Â (Supreme Court No. 07-591), which challenges a Massachusetts appellate decision that drug certificates of analysis "are akin to a business or official record, and therefore, would not be subject to the holding in the *Crawford* case."Â Even pre-*Crawford*, I have obtained many successes defending against Maryland state drug prosecutions, based on Maryland's statutory law keeping drug certificates of analysis out of evidence if the defense files a demand for the chemist's testimony at least five days before trial and if the chemist does not appear at trial. The neighboring District of Columbia Court of Appeals views drug certificates of analysis as containing testimonial evidence under *Crawford*. The Virginia Supreme Court acknowledges the latter view in *Thomas v. U.S.*, 914 A.2d 1, 20Â (D.C. Cir. 2006), but rejects it. *Magruder v. Virginia*, 275 Va. 283 (2008). Nevertheless, the latter *Magruder* case gives the defendant the right to have the chemist testify, but does not seem to make clear whether such a right may be exercised merely by filing a demand for the chemist's presence at trial, versus requiring the defendant to take the responsibility of having the chemist subpoenaed to court. Â Hopefully the Supreme Court's decision in *Melendez*Â will breathe more expansive life into *Crawford*. Considering the 7-2 vote in *Crawford*, with the seven-justice majority still sitting on the Supreme Court and the remaining two gone from the Court -- the Court should be expected to give *Crawford* stare decisis effect. Further supporting thatÂ the Supreme Court will not retreat from *Crawford* is *Davis v. Washington*, 547 U.S. 813 (2006), where an 8-1 majority of the currently sitting justices reversed a conviction obtained after the introduction of evidence from a police interview of an alleged crime victim after the crime already had occurredÂ (but also where all nine justices affirmed a conviction obtained after introduction of evidence of a 911 caller's identification of the defendant as committing the reported crime that was then in progress). However, the foregoing considerations do notÂ answer whether the Court will reverse the Massachusetts appellate court's decision in *Melendez* that drug certificates of analysis do not constitute testimonial evidence, and, therefore, fall outside the protections of *Crawford*. Â Massachusetts' attorney general's officeÂ wants the justices to worry that a Supreme Court victory for *Melendez* will causeÂ drug chemists to spend more time traveling to and being in court than testing alleged drugs. However, such concerns should not trump the Confrontation Clause. Nothing in the Constitution mandates the insane drug war that drains cash-strapped governments' coffers, so the drug war cannot be permitted to trump the Constitution, even though too many judges permit that to happen with the Fourth Amendment.Â Besides, as I repeatedly have urged, we need to legalize marijuana now and heavily decriminalize all other drugs. Following such an approach will reduce the number of drug prosecutions, and will thusly reduce the need to have so many tax-paid drug chemists in the first place. Â Here are some useful links in the *Melendez* case: SCOTUS Blog's links in the case; transcript of the Supreme Court oral argument; SCOTUS Blog's coverage of the *Melendez* oral arguments; including Justice Scalia's questions favoringÂ *Melendez*'s argument that certificates of drug analyses constitute testimonial evidence; *Melendez*'s brief; and Massachusetts' brief.Â Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:00

Thanks for the insight, Jon. I am fascinated with *Crawford* and decisions following it. Not to mention that it is nice to have a ruling that protects our client's rights. Not many of those around.

Anonymous on Nov 21 2008, 09:11

Thanks, Cheryl, for your comment. Hopefully Obama will pick judicial candidates who will produce opinions that truly protect everyone's Constitutional rights.

Anonymous on Nov 24 2008, 08:07