January 11, 2010

EDITORIAL

The Right to Confront Witnesses

Just last June, the Supreme Court decided that when prosecutors rely on lab reports they must call the experts who prepared them to testify. It was an important ruling, based on a defendant’s right to be confronted with witnesses against him, but the court is about to revisit it. The justices should reaffirm that the Sixth Amendment requires prosecutors to call the lab analysts whose work they rely on.

On Monday, the court hears arguments in Briscoe v. Virginia, in which a man was convicted on drug charges. The prosecutors relied on certificates prepared by forensic analysts to prove that the substance seized was cocaine. They did not call the analysts as witnesses.

The defendant should be able to get his conviction overturned based on Melendez-Diaz v. Massachusetts, the ruling from last June, which held, by a 5-to-4 vote, that using lab reports without calling the analysts violates the Sixth Amendment.

The amendment’s confrontation clause guarantees defendants the right to see prosecution witnesses in person and to cross-examine them, unless they are truly unavailable. In cases that involve drugs, and many that do not, lab analysts’ work can be a critical part of the prosecution’s case. If the prosecutors want to use the reports, they should be required to call the analysts as witnesses.

Critics of the ruling last June argue that it imposes too great a burden and excessive costs on prosecutors. But in states where analysts have to testify, the burden is easily manageable. Ohio’s 14 forensic scientists appeared in 123 drug cases in 2008, less than one appearance each per month.

It is not clear why the Supreme Court is rushing to reconsider this issue. There are some differences in the rules on witnesses between Virginia and Massachusetts. But it may be that with Justice Sonia Sotomayor having replaced Justice David Souter, the dissenter believe they have a fifth vote to erode or undo last June’s ruling.

As a former assistant district attorney, some court analysts argue, she may be more sympathetic to the burden on prosecutors. As a circuit court judge, Justice Sotomayor did often rule for the government in criminal cases, but making predictions of this sort is perilous. Justice Antonin Scalia, one of the court’s most conservative members, wrote the majority opinion in Melendez-Diaz.

If the court changes the rule, it would be a significant setback for civil liberties, and not just in cases involving lab evidence. Prosecutors might use the decision to justify offering all sorts of affidavits, videotaped statements and other evidence from absent witnesses.