

Supreme Court Cites Tulane Professor's Law Review Article

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Supreme Court Justice Antonin Scalia cited an article written by Tulane Associate Professor of Law Pamela Metzger in the court's ruling last week that forensic evidence in the form of an affidavit cannot be substituted for testimony from a live witness in criminal cases. In a 5-4 decision handed down June 25, Scalia, writing for the majority, quoted from Metzger's 2006 article "Cheating the Constitution," that appeared in the *Vanderbilt Law Review*.

In that article Metzger argued that crime laboratory affidavits are subject to the Constitution's Confrontation Clause that guarantees an accused person an opportunity to confront and cross-examine an accuser.

Scalia wrote that "serious deficiencies have been found in the forensic evidence used in criminal trials. One commentator (Metzger) asserts that "[t]he legal community now concedes, with varying degrees of urgency, that our system produces erroneous convictions based on discredited forensics."

Metzger's involvement with the issue dates back to 2004, when the Tulane Criminal Law Clinic argued that the state could not introduce a forensic affidavit in lieu of live testimony in order to prove an essential element of a crime. Although the clinic lost the case in the Louisiana Supreme Court, Metzger remained interested in the issue and as the U.S. Supreme Court began to redefine its interpretation of the Confrontation Clause, Metzger began researching the forensic affidavit question nationwide.

In 2006, Metzger published "Cheating the Constitution," and the article became the core source for a series of petitions to the Supreme Court. In 2008, the Supreme Court examined the case *Melendez-Diaz v. Massachusetts* for the express purpose of considering whether forensic affidavits are testimonial and thus subject to the

Confrontation Clause guarantees.

Last week in the Supreme Court, the dissent also took note of Metzger's article, highlighting an issue that she predicted the court will have to determine: whether states can lawfully burden the Confrontation Clause by requiring defendants to demonstrate a need to cross-examine a forensic witness in court. Yesterday (June 29), the Supreme Court announced that it had accepted a new case that will test this very issue.

Metzger will continue working on the issue of confrontation and crime laboratory reports. Said Metzger, "I am consulting with local public defenders about the legality of the Louisiana statute and will be working with the National Association of Criminal Defense Attorneys to raise and brief the burden-shifting question highlighted by the dissent."