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How eight words in the Constitution set Kenneth Millard free—for now.

By Brendan L. Smith

With crack and marijuana stashed in his pocket, Kenneth Millard and some friends scattered when an unmarked police car rolled into the parking lot outside his apartment building in Southeast. The cops were looking for someone else, but Millard fell into the trap.

After bolting through a cut in the woods and stumbling down a steep hill, Millard bounced off the side of another police car blocking his escape route. He dodged and weaved down Jasper Road SE until two officers tackled and cuffed him on the pavement. Police said a Colt .22 handgun, loaded with 11 rounds, flew out of Millard's waistband during the chase and landed near a manhole.

When officers caught Millard that February night in 2005, they found 10 plastic bags filled with crack cocaine and marijuana in the right front pocket of his coveralls, according to court records. Millard's lengthy rap sheet

was growing longer, and he was heading back to jail.

At his trial in 2006, the jury convicted Millard on five drug and firearm charges, and the judge sentenced him to four-and-a-half years in prison.

But he just caught a break.

The D.C. Court of Appeals has reversed all of Millard's convictions, wiping them off his record with a unanimous decision in March.

After overturning one of its own earlier precedents, the highest court in the District has reversed convictions in at least 14 cases involving drug dealers and others caught with drugs. The reversals hinge on an important constitutional issue stemming from eight words tucked in the Sixth Amendment known as the Confrontation Clause. In all criminal prosecutions, the accused has the right "to be confronted with the witnesses against him."

In Millard's case, the "missing" witness was a chemist from the Drug Enforcement Administration whose drug analysis report stated that the baggies in Millard's pocket contained cocaine and marijuana. Because the analyst didn't appear in court, Millard's drug



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convictions were reversed, but the firearm convictions were tossed out, too, because of weak evidence and their connection to the drug case.

The legal fight playing out in D.C. will be spreading across the nation after a Supreme Court decision in June in a case with striking similarities to Millard's. The 5-4 ruling in *Melendez-Diaz v. Massachusetts* could result in thousands of reversed convictions and dismissed drug, drunken-driving, and other charges, creating the potential for chaos in the justice system.

Supreme Court Justice Anthony Kennedy, who wrote a biting dissent by four justices, predicted a "crushing burden" for law enforcement that will be caused by pulling chemists into courtrooms potentially hundreds of miles away from their labs for cases they might not even remember.

Kennedy said the court's "meddling" with the Confrontation Clause came "at a dear price" not measured just in taxpayer dollars. "Guilty defendants will go free, on the most technical grounds, as a direct result of today's decision," he wrote, "adding nothing to the truth-finding process."

Despite the legal technicalities that have wiped at least part of his record clean, Millard maintains that the case against him was flawed from the start.

"I never should have been convicted," he says. "They never got their case right from jump street."

A GUN IN THE STREET

The jury easily convicted Millard of possession of 1.3 grams of cocaine and 6.7 grams of marijuana, but the gun evidence was more problematic.

A D.C. police officer who tackled Millard testified that he saw the gun fall out of Millard's waistband, but fingerprints taken from the gun didn't match Millard's. Other suspects had fled through the area that night, and a second gun was recovered in a nearby Dumpster. Because Millard was wearing coveralls, the defense argued the gun couldn't have fallen out of his nonexistent waistband.

After hearing the evidence, jury members reported in a note that they were deadlocked on the firearm charges, but D.C. Superior Court Judge Lynn Leibovitz ordered them to keep deliberating. Two days later, the jury delivered a guilty verdict on all three firearm charges.

The Confrontation Clause has been a subject of legal debate for decades. The D.C. Court of Appeals acted before many courts to require testimony from chemists because of a 2004 Supreme Court decision which found that judges had been given too much power to decide whether out-of-court statements were reliable and could be admitted at trial without testimony.

That Supreme Court opinion and the new precedent from the D.C. Court of Appeals that followed two years later were a stroke of luck for Millard and the

other drug-case defendants who had their convictions reversed. It didn't matter if the drug tests were accurate. The missing testimony from the DEA chemists had torpedoed the convictions on constitutional grounds.

More drug convictions may be reversed in other local cases, but the D.C. Court of Appeals included some legal loopholes that have, at least so far, blocked most appeals, says Richard Stolker, a former federal prosecutor in D.C. who is now a defense attorney.

Stolker says a loophole snagged one of his clients. Gualyn C. Williams was convicted for cocaine distribution for selling three bags of crack to an undercover officer for \$25 in 2006. The Court of Appeals found the admission of the drug analysis report unconstitutional, but it allowed Williams and another defendant to be convicted for attempted cocaine distribution, which doesn't require proof that real cocaine was sold. While that sounds like a better deal for Williams, cocaine distribution and attempted distribution are both felonies with similar sentences.

The court also shot down appeals from defendants if their defense attorneys didn't object to the drug analysis reports at trial, even though it acknowledged that constitutional violations had occurred.

"I believe it would be unacceptable politically for the D.C. Court of Appeals to invalidate a huge number of sentences," says Stolker. "There are a lot of cases in the system for which [the Confrontation Clause] is an issue."

Like many of the defendants who had their convictions reversed, Millard's victory was a hollow one. His appeal dragged on for years, and his convictions weren't reversed until five months after he was released from federal prison last October.

"That [decision] came down after I already had done all my time. I was on parole," Millard says. "I'm not even the same guy they locked up for all that dumbass stuff."

"HEARTACHE AND HARDSHIP"

Before his stint in prison, Millard's convictions reveal almost a decade filled with crime and violence in D.C.

Since he was a teenager, he has pleaded guilty in at least seven cases containing a laundry list of felonies and misdemeanors. The charges against him included assault with intent to kill while armed, possession with intent to distribute PCP and marijuana, destruction of property, assault, unlawful entry, and theft. D.C. Superior Court records don't indicate whether he entered plea deals or the amount of time he served.

Millard won't elaborate on the night he was arrested four years ago on Jasper Road SE. "I don't even remember. I don't even care," he says. "The police jump out of their car. They chase 40 people and catch four and did whatever they do from there."

The morning after his arrest, while Millard was still in jail, the police searched his apartment but didn't find any drugs or guns. "There was no evidence where I lived. No bullet, no gun, not even a grain of sand. Nothing," he says.

At Millard's trial, his public defender was barred from presenting testimony about the lack of drugs or guns found in Millard's home because the judge ruled it was irrelevant to his case.

During the police search of his apartment, Millard says, officers shot his dog four times and shocked the mother of his child with a stun gun. "They killed my



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dog,” he says. “They are the goddamn police, and they do what they want to do.”

D.C. Police spokeswoman Traci Hughes wouldn’t comment on Millard’s allegations, but she says officers don’t use stun guns.

Millard is still angry about the death of his dog, and he has a message for the officer he says is responsible. “Tell him to come see me with his badge off if he wants to,” he says.

Millard, who turned 30 on Sunday, now

lives in northern Baltimore in a block of row houses bordered by a church and a deli at the end of the street.

“Ain’t nothing good came out of it,” he says about his upbringing. “I have a few people that I would call friends. For the most part, I’ve had more trouble and heartache and hardship in D.C.”

He has struggled to find work, aside from temp jobs he got through an agency. “You’ve

got people out here with college degrees without a job. You got me just coming out of prison. You think they going to hire me?” he says. “They keep the rich man rich and the poor man poor.”

On weekends, he attends a 24-week program at All-State Career in Baltimore so he can get a commercial driver’s license to become a truck driver.

“I paid my debt to society. All I want to do

is live,” he says. “Trust me, I have been rehabilitated. That situation [in prison] alone will rehabilitate you.”

Millard was back at Superior Court on July 6 for a hearing before Leibovitz, the same judge who presided over his 2006 trial.

Wearing black Nikes, jeans, and a striped polo shirt, Millard sat in Courtroom 310 waiting for his name to be called. Lanky with a beard and glasses, he looked slightly stunned when he got the bad news: His second trial will be held in October.

Millard is being tried again on the same charges stemming from his 2005 arrest even though his convictions have been reversed and he has served his time; it’s as if his first trial never took place. It’s a legal maneuver by the U.S. Attorney’s Office that is allowed despite the Fifth Amendment’s protection against double jeopardy.

“I did the crime. I did the time, and they trying to make me do it all over again,” Millard says. “If a person commits a crime, he goes to jail for it. They call it paying your debt to society. Doesn’t that seem like paying your debt to society twice?”

The U.S. Attorney’s Office decided not to retry defendants with reversed convictions in at least a dozen cases, except for Millard and one other drug defendant. Both cases contained more serious charges—including Millard’s felony gun charges—than most of the cases that were dropped.

“Public safety is always a concern when previously convicted drug dealers are being released, but we also have to respect the law of the court and proceed accordingly,” says Acting U.S. Attorney Channing Phillips.

For Millard, the law of the court hasn’t made much of a difference. In legal terms, he’s back where he started four years ago after his arrest on Jasper Road SE.

Prosecutors offered a plea deal in an attempt to avoid another trial, but Millard turned it down. If a jury convicts him a second time, he will receive credit for his prior prison sentence, but he could still end up serving more time if he receives a longer sentence.

“I can’t get a clean slate,” Millard says. “This is, like, unbelievable.”

After his hearing, Millard went back to Baltimore, hoping his weekend classes will pay off with a new job. But it all might veer off the rails in a few months when he returns to Courtroom 310 to face another jury.

“This is my life. It isn’t a joke,” he says. “I done moved out of D.C. I don’t even live there anymore. Why don’t they leave me alone?” CP