Melendez Diaz v Massachusetts – Impact on Toxicology Laboratories.

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On June 25th, 2009 the US Supreme Court ruled in the case of Luis Melendez-Diaz v. Massachusetts. This case has major implications for forensic laboratories and for prosecutors offering expert forensic evidence at trial.

In what was a routine case from a forensic point of view, three defendants were arrested for suspected drug sales and trafficking. During the ride to the police station, the defendants were observed making furtive movements in the back of the police car. When the area was subsequently searched plastic bags containing suspected drug material were found, and submitted to the Massachusetts state crime lab for analysis. The laboratory conducted the tests and issued three "certificates of analysis", which stated in part that the bags "[h]a[ve] been examined with the following results: The substance was found to contain: Cocaine". The certificates were notarized, and at trial, consistent with relevant Massachusetts state law, were admitted over the objection of the defendant who asserted that the Supreme Court's ruling in Crawford v Washington (54 U.S. 36 (2004)) required the analyst to testify in person. Melendez-Diaz was convicted, and appealed to the US Supreme Court that the Massachusetts statute, which allows the use of the certificates as "prima facie evidence of the composition, quality, and the net weight of the narcotic… analyzed." violated his sixth amendment rights.

The sixth amendment to the US constitution states "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district where in the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; *to be confronted with the witnesses against him* [italics added]; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence [sic]". The interpretation of what constitutes a witness against the defendant has been subsequently litigated, most recently in Crawford v. Washington, where a taped statement regarding an assault was played to the jury in lieu of the witness appearing in person, and without the opportunity for the defendant to cross-examine her. The court ruled that anyone testifying to material facts about the evidence were witnesses against the defendant, and the defendant had a right "to be confronted with" the witnesses at trial, unless the witness was unavailable and the defendant had had a prior opportunity to cross examine them.

The majority opinion in Melendez-Diaz written by Justice Scalia, reaffirmed the Court's earlier finding in Crawford, and ruled that the analyst's affidavits were testimonial statements, and that the analysts were "witnesses" for the purposes of the sixth amendment. Consequently the defendant has the right to be confronted by the analysts in court. Four dissenting justices in an opinion by Justice Kennedy said that scientific evidence should be treated differently than statements from an eyewitness to a crime, and warned that the decision would subject the nation's criminal justice system to "a crushing

burden" and that "guilty defendants will go free, on the most technical grounds." As an example, Justice Kennedy wrote that Philadelphia's 18 drug analysts would each be required to testify in more than 69 trials next year, and Cleveland's six drug analysts in 117 trials each. Talking about analysts from the FBI Laboratory in Quantico who, he said, conduct more than a million tests each year, he observed "The court's decision means that before any of those million tests reaches a jury, at least one of the laboratory's analysts must board a plane, find his or her way to an unfamiliar courthouse and sit there waiting to read aloud notes made months ago."

The majority scoffed at those concerns that "the sky was falling" and argued that the defense's interests in not putting prejudicial testimony before the jury, and their interest in not aggravating the courts with spurious demands for testimony without any intent to present the witness, would protect the legal system against wasting of an analysts time, while permitting the right and opportunity for confrontation. They justified their decision by noting that the impact of the right to confrontation is mitigated by the use of "notice-and-demand" rules, which are constitutional, and appear to work well where they are in place. "Notice-and-demand" statutes allows for the state to give "notice" that they intend to rely on admitting testimony through a certificate, and for the defense in turn to "demand" the witness appear in person. Typically these statutes require that the defendant "request[s], by notifying the prosecuting attorney at least [some number of] days before the trial, that the [analyst] testify in person at the trial on behalf of the state". In effect the statute simply requires an early assertion of the confrontation right, without which, an affidavit or certificate may be admitted in lieu of testimony.

Within days of the Court's decision, there were reports from across the country of scores of DUI and drug cases being continued, or dismissed by judges where an analyst was unavailable, evidence being suppressed and there were knee jerk reactions from prosecutors from coast to coast demanding an analyst in court "just in case", even in notice-and-demand states, where no demand for an appearance had been made. Other fallout included the Governor of the State of Virginia calling a special session of the legislature to amend that state's statute in response.

What are the long-term implications for toxicology laboratories from this ruling? At present there are more questions than answers. Melendez-Diaz dealt with a drug chemistry case, so many of the specific aspects of toxicological laboratory operation were not before the court. Toxicology differs from the way in which much forensic science is done, and in many respects is more similar to clinical laboratory practice than to other forensic disciplines such as drug chemistry or firearms examination. The most notable difference in toxicology is the practice of batching and dividing analytical toxicology casework, say to an alcohol department, where the alcohols are done by analyst A, then to the screening department where immunoassay and spot tests are performed by analyst B, and then to confirmation for GCMS or LCMS, where analysts C and D may be involved in the preparation, analysis, and review of the chromatographic extracts and results. Finally, the case goes to a certifying reviewer or equivalent whose signature typically appears on the report, but who may have performed none of the analytical work themselves. In this scenario, who is "the analyst", and who is the witness against the

defendant? Does this mean for toxicology cases, that every person who touched the sample or who handled a tray of extracts is subject to appear in court to confront the defendant? This would seem ludicrous for several reasons. While some smaller laboratories may adopt a "cradle to grave" approach to their casework where each analyst is responsible for all aspects of the analysis and sample handling, these are few and far between. Also, small laboratories are the ones who can least afford to have an analyst in court on every case, as productivity will plummet dramatically. In larger laboratories with a "departmental" approach, employee turnover may be higher, analysts will change jobs, leave the county or state, become incapacitated, or die. Does the unavailability of one of those analysts, result in the suppression of that report, or sections of it?

An important distinction between the eye-witness testimony analysis of the Crawford decision and the expert witness testimony of Melendez-Diaz, is that in the latter case, the laboratorian likely has no knowledge of whose sample was being analyzed on a particular day in a particular batch, since most laboratories use case numbers or accessioning numbers. Additionally, in handling hundreds or thousands of specimens or extracts each year, an analyst will have no specific recollection of any individual defendants specimen. If asked on the stand their testimony will be general about what they usually do, as opposed to what they actually did on this particular case, and will be based on their review of the documents on file. The individual analysts at the bench often do not know the toxicological significance of the findings, how they relate to the results of tests done in other departments, and other aspects of the overall integration of data from tests into a final conclusion. Their testimony lends little weight to the validity of the final report.

A strong argument can be made that in a toxicology case, the "analyst" for the purposes of the sixth amendment would be the person who reviews and assesses all the data, who is familiar with the laboratory's standard operating procedures, accreditation requirements, quality assurance and quality control policies, has a technical knowledge and qualifications to interpret the result, and who signs the report. This person is the author of the report, and responsible for its content. Identifying the author of the report as the analyst of record allows the defendant to confront an important witness who is offering the testimony about the test results; it provides the court with most qualified person to explain what was done and why, and what it means; and it minimizes the impact on the daily operation of the laboratory. The majority opinion in Melendez-Diaz appears to recognize at least part of this dilemma, since they specifically state that the ruling did not require everyone involved in establishing the chain of custody, or instrument maintenance to appear in person, noting that any questions about the integrity of the chain of custody, or by extension the proper operation of the instrument would go to the weight, not the admissibility of the evidence. A military case which supports this approach, and is currently relied upon by at least one federal laboratory is U.S. v. Magyari (63 M.J. 123 (2006)) which ruled that random drug testing results were non-testimonial hearsay evidence and therefore did not require the technician who ran the test to appear in court. The person running the test did not know the identity of the individual and therefore did not provide testimony against the accused. The person signing and rendering the opinion based on the totality of the tests conducted is considered the accuser, and therefore is the appropriate witness for purposes of the sixth amendment.

Importantly, this approach relies on the laboratory's ability to meet certain standards emerging in the profession, and embodied in the requirements for accreditation. Specifically, having comprehensive policies and procedures detailed in the standard operating documents, having a structured quality assurance program that requires appropriate standards, calibrators, controls and proficiency testing, and having periodic inspections by qualified peer laboratory directors. In each specific case, a case file should be available that contains all the chain of custody information, instrumental printouts, and documentation in support of a specific result Together these form the basis for the final reviewer to arrive at a conclusion about the findings in a case, and to testify to their reliability. The material relied on by the reviewer must also be available to the defendant in a litigation pack format for their independent review.

Toxicology laboratories are already short-staffed, facing cuts in funding, trying to keep up with new technology, manage backlogs, and deal with increasing demands for service and testimony, so the impact of this decision cannot be understated. With the Supreme Court's reiteration of its expectations on the right to confrontation, things will not be the same again for forensic evidence in court. Lower courts will have to develop rules and processes to keep cases coming to trial without broad dismissal of cases, slowing the system to a crawl, or emptying out the labs. The use of video testimony, a designated analyst of record, notice-and-demand statutes, and accountability for appropriate use by attorneys of witnesses that are required to appear in court, will all be important parts of the solution.

The parallels between the expectations of the Supreme Court in Melendez-Diaz and the recent National Academies of Science Report on the Future of Forensic Science are hard to miss. The bar is being raised, and although toxicology was recognized as having taken steps to standardize and professionalize the field, the need for accreditation of laboratories, certification of individuals, and appropriate tertiary and continuing education for forensic scientists, all help reduce the potential for error, and provide the criminal justice system with the most appropriate, reliable and relevant testimony that both protects the defendants constitutional rights and serves the interests of justice.

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Resources:

Transcript of oral argument before the Supreme Court in Melendez-Diaz: http://www.oyez.org/cases/2000-2009/2008/2008_07_591/argument

Petitioners Brief: http://www.abanet.org/publiced/preview/briefs/pdfs/07-08/07-591_PetitionerAmCuLawProfs.pdf

Respondents Brief: http://www.abanet.org/publiced/preview/briefs/pdfs/07-08/07-591_RespondentAmCu35StatesDC.pdf

Ruling: http://www.law.cornell.edu/supct/html/07-591.ZO.html

Dissent: http://www.law.cornell.edu/supct/html/07-591.ZD.html