Right of Confrontation: Lab Reports

BY PAUL C. GIANNELLI

In *Commonwealth v. Melendez-Diaz*, 129 S. Ct. 2527, 2009 WL 1789468 (2009), the Supreme Court concluded, in a 5-4 decision, that a laboratory certificate identifying a substance as cocaine was a "testimonial" statement under *Crawford v. Washington*, 541 U.S. 36 (2004). Thus, the certificate's admission, in the absence of an opportunity to cross-examine the analyst, violated the confrontation clause. According to Justice Scalia, the certificate was nothing more than an "affidavit" and an objective witness would reasonably believe that it would be available for use at a later trial. Indeed, "under Massachusetts law the *sole purpose* of the affidavits was to provide 'prima facie evidence of the composition, quality, and the net weight' of the analyzed substance." (*Id.* at 2532.)

Notice-and-Demand Statutes

The Court did note that the right of confrontation may be waived: "The right to confrontation may, of course, be waived, including by failure to object to the offending evidence; and States may adopt procedural rules governing the exercise of such objections." (*Id.* at 2534 n.3.) A number of states have adopted notice-and-demand statutes, under which the defense, once served with a laboratory report, may demand the analyst's presence at trial. Failure to make the demand constitutes a waiver of the right of confrontation.

One commentator has divided these statutes into four categories: (1) "notice and demand" statutes, (2) "notice and demand-plus" provisions, (3) "anticipatory demand" statutes, and (4) "defense subpoena" procedures. Under this classification, the "notice and demand-plus" procedures impose substantive requirements on the defense. The "anticipatory demand" statutes impose no notice obligation on the prosecution as a prerequisite to a defense waiver. The last category specifies a defense subpoena of the examiner as the mechanism for trial confrontation. (Pamela Metzger, *Cheating the Constitution*, 59 Vand. L. Rev. 475, 481-91 (2006).)

In *Melendez-Diaz*, Justice Scalia approved only the first category:

> In their simplest form, notice-and-demand statutes require the prosecution to provide notice to the defendant of its intent to use an analyst's report as evidence at trial, after which the defendant is given a period of time in which he may object to the admission of the evidence absent the analyst's appearance live at trial. Contrary to the dissent's perception, these statutes shift no burden whatever. The defendant *always* has the burden of raising his Confrontation Clause objection; notice-and-demand statutes simply govern the *time* within which he must do so. States are free to adopt procedural rules governing objections. It is common to require a defendant to exercise his rights under the Compulsory Process Clause in advance of trial, announcing his intent to present certain witnesses. There is no conceivable reason why he cannot similarly be compelled to exercise his Confrontation Clause rights before trial.

(*Id.* at 2541 (citations omitted).)

The second type of notice-and-demand provisions require more than a simple "demand," and the Court did not sanction their use. (*Id.* at 2541 n.12.)

The last two categories are also suspect. The Court rejected outright the argument that an accused's failure to exercise the right of compulsory process to require the attendance of the analyst constitutes a forfeiture of confrontation rights:

> Converting the prosecution's duty under the Confrontation Clause into the defendant's privilege under state law or the Compulsory Process Clause shifts the consequences of adverse-witness no-shows from the State to the accused. More fundamentally, the Confrontation Clause imposes a burden on the prosecution to present its witnesses,

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> not on the defendant to bring those adverse witnesses into court. Its value to the defendant is not replaced by a system in which the prosecution presents its evidence via *ex parte* affidavits and waits for the defendant to subpoena the affiants if he chooses.

(*Id.* at 2540.)

The Court agreed to a review notice-and-demand provision next term in *Briscoe v. Virginia* (07-11191), 657 S.E.2d 113 (Va. 2008).

Autopsy Reports

As with lab reports, the admissibility of autopsy reports has divided the courts. Some courts have concluded that these reports are testimonial, while others have reached the opposite conclusion. The underlying rationale of *Melendez-Diaz* would seem to encompass autopsy reports. (*See generally* 1 Paul C. Giannelli and Edward J. Imwinkelried, Scientific Evidence ch. 6 (4th ed. 2007).)

Calibration Certificates

Sometimes a report is not offered on the merits but rather to satisfy a foundational requirement for the admissibility of another item of evidence. For example, the proponent of scientific evidence is typically required to show that any instrumentation used in an examination had been in proper working order at the time of the analysis. Thus, the results of an intoxilyzer test are not admissible unless the instrument has been properly calibrated. A report establishing the calibration of the intoxilyzer equipment may be offered for this purpose. This type of report differs from a report specifying intoxilyzer test results.

In *Melendez-Diaz*, the Supreme Court addressed this issue in a footnote: "Contrary to the dissent's suggestion . . . , we do not hold, and it is not the case, that anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device, must appear in person as part of the prosecution's case. . . . [D]ocuments prepared in the regular course of equipment maintenance may well qualify as nontestimonial records." (*Id.* at 2532 n.1.)

Chain of Custody Documents

Many police departments track the chain of custody of seized evidence through various forms. In a footnote, the Court mentioned chain of custody documents:

> While the dissent is correct that "[i]t is the obligation of the prosecution to establish the chain of custody," . . . this does not mean that everyone who laid hands on the evidence must be called. As stated in the dissent's own quotation, . . . from *United States* v. *Lott*, 854 F.2d 244, 250 (CA7 1988), "gaps in the chain [of custody] normally go to the weight of the evidence rather than its admissibility." It is up to the prosecution to decide what steps in the chain of custody are so crucial as to require evidence; but what testimony *is* introduced must (if the defendant objects) be introduced live.

(*Id.* at 2532 n.1.)

Comments on Forensic Science

In February 2009, the National Academy of Sciences published a landmark report on forensic science: *Strengthening Forensic Science in the United States: A Path Forward*. The Supreme Court referred to this report several times in its opinion:

> Nor is it evident that what respondent calls "neutral scientific testing" is as neutral or as reliable as respondent suggests. Forensic evidence is not uniquely immune from the risk of manipulation. According to a recent study conducted under the auspices of the National Academy of Sciences, "[t]he majority of [laboratories producing forensic evidence] are administered by law enforcement agencies, such as police departments, where the laboratory administrator reports to the head of the agency." And "[b]ecause forensic scientists often are driven in their work by a need to answer a particular question related to the issues of a particular case, they sometimes face pressure to sacrifice appropriate methodology for the sake of expediency." A forensic analyst responding to a request from a law enforcement official may feel pressure—or have an incentive—to alter the evidence in a manner favorable to the prosecution.

(*Id.* at 2536.)

Later the Court observed: "Confrontation is designed to weed out not only the fraudulent analyst, but the incompetent one as well. Serious deficiencies have been found in the forensic evidence used in criminal trials."(*Id.* at 2537.) ■