E31 Can Cold Hit Cases Be Tried Fairly?: Confrontation Clause and DNA Analysis

Bicka Barlow, JD, Office of the Public Defender, 555 7th Street, San Francisco, CA 94103*

After attending this presentation, attendees will have a better understanding of the implications of the recent U.S. Supreme Court case *Melendez-Diaz* which disapproves the use of sworn statements in drug analysis based on the defendant's right to confront testimonial statements. Based on the broad language of the case, it appears that all scientific evidence will be impacted by the right to confrontation of the analyst that actually conducted the analysis.

The presentation will impact the forensic science community by providing a road map for the legal requirements of testimony regarding DNA evidence.

In the recent U.S. Supreme Court case *Melendez-Diaz v. Massachusetts*, 557 U.S. (2009), the court held that the forensic drug analysis was "testimonial" evidence as defined by the Sixth Amendment and therefore subject to cross examination at trial. Justice Scalia explains the meaning of testimonial, describing the signed affidavits in the case as falling squarely within "the 'core class of testimonial statements'" set forth in *Crawford v. Washington*, 541 U. S. 36, 51-52 (2004). Justice Scalia elaborated:

> The fact in question is that the substance found in the possession of Melendez-Diaz and his codefendants was, as the prosecution claimed, cocaine—the precise testimony the analysts would be expected to provide if called at trial. The "certificates" are functionally identical to live, in-court testimony, doing "precisely what a witness does on direct examination." (*Id*. at 4 [citations omitted]).

The question now for the forensic science community is the extent and nature of the requirements of the Confrontation Clause to all scientific evidence. The far reaching language of Melendez-Diaz appears to apply to all types of evidence from drug testing to fingerprint analysis to DNA testing to medical examiner reports.

In the context of cold hit cases where many if not all witnesses who collected and analyzed scientific evidence are deceased or otherwise unavailable, a fair trial may not be possible. The Confrontation Clause may require that important witnesses such as the medical examiner who conducted the autopsy or the crime scene technician who collected blood evidence at the scene, testify so that defendant's can challenge not only the factual basis of the evidence – how it was collected for example—but also the validity and reliability of the opinion of the expert who actually conducted the analysis.

However, not all chain of custody witnesses necessarily fall under the class of testimonial witnesses:

> Contrary to the dissent's suggestion, post, at 3–4, 7 (opinion of KENNEDY, J.), 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. . . "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 5 n.1).

One open question of particular concern is whether or not medical examiners who conducted the autopsy in homicide cases will be required to testify. Although the autopsy report itself may be considered a business or government record that on its face complies with the hearsay exceptions for those types of documents, the Sixth Amendment may still require that the medical examiner be called to testify. The dissent argues that there are better ways to check the veracity of a particular test such as retesting a sample, however, in a footnote, Justice Scalia rejects this arguments noting that some forensic analysis such as autopsies or breathalyzer tests can only be done once and that samples can be lost or degraded. (*Id*. at 12, n.5). The implication being that if the testing or examination cannot be repeated, then the only way to ensure a fair trial and comply with the Sixth Amendment is for the defendant to have the opportunity to confront the analyst.

Cold Hit, DNA, Confrontation Clause

 ** Presenting Author*