



### E47 Life After Melendez-Diaz: Confrontation Accomplished Through Technical Review Testimony

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After attending this presentation, attendees will understand the legal landscape that has developed in reaction to the United States Supreme Court's decision in *Melendez-Diaz vs. Massachusetts*, 557 U.S. —, 129 S.Ct. 2527 (2009). *Melendez-Diaz* held that the admission of a laboratory analyst's certificate of analysis in a drug case without the benefit of live testimony from the analyst violated the Confrontation Clause of the Sixth Amendment.

This presentation will impact the forensic science community by explaining a post-*Melendez-Diaz* avenue of admissibility for the opinions and conclusions of expert witnesses who did not physically manipulate forensic samples or operate analytical instruments, but who did conduct the technical review of the non-testifying analyst's work or who otherwise reviewed the data and materials generated from the test at issue.

In the wake of the *Melendez-Diaz* decision, numerous courts have addressed whether and to what extent a testifying expert witness may testify to the procedures followed, the data generated, and the results obtained by a non-testifying expert. The vast majority of courts in the post-*Melendez-Diaz* era have held that although the Supreme Court's decision does not permit the introduction of a testimonial certificate absent live witness testimony, the common law rule embodied in Federal Rule 703, which permits experts to testify based on "facts or data . . . reasonably relied upon by experts in the particular field in forming opinions or inferences," allows a testifying expert to state his or her independent conclusions and opinions based upon data generated by a non-testifying expert. Post-*Melendez-Diaz* state and federal courts have widely held that eliciting an expert's testimony through this evidentiary method does not violate the Confrontation Clause. Thus, the independent opinions and conclusions of a testifying analyst who conducts the technical review of a non-testifying colleague's work should be admissible. The path to admissibility under this rationale; however, is nuanced and legally specific.

After the *Melendez-Diaz* decision, the United States Supreme Court denied *certiorari* and let stand decisions from the Indiana Supreme Court in *Pendergrass v. State*, 913 N.E.2d 703 (2009), *cert. denied*, — S.Ct. — (2010), and the California Supreme Court in *Geier v. California*, 161 P.3d 104 (Cal. 2007), *cert. denied*, 129 S.Ct. 2856 (2009). However, in *State v. Crager*, 879 N.E.2d 745 (Ohio 2007), *cert. granted, judgment vacated, and remanded by*, 129 S.Ct. 2856 (2009), and *People v. Barba*, No. B185940, 2007 WL 4125230 (Cal. Ct. App. 2007), *cert. granted, judgment vacated, and remanded by*, 129 S.Ct. 2857 (2009), the Court granted *certiorari*, vacated the judgments, and remanded the cases for reconsideration in light of *Melendez-Diaz*.

Each of the four cases involved a Sixth Amendment challenge to the testimony of a DNA analyst who testified at trial but who did not personally manipulate the samples or operate the analytical instruments. The bench notes, worksheets, raw test data, and laboratory report in each case were generated by a non-testifying expert. Analysis of the underlying opinions from the respective state courts reveals a salient factor that may explain the Supreme Court's disparate treatment of these cases.

In the *Pendergrass* and *Geier* cases, the testifying expert relied on the non-testifying expert's report, documentation, and data as the basis for his or her opinions and conclusions. However, the laboratory reports and the underlying materials were apparently *not* admitted into evidence as exhibits. By contrast, in the *Crager* and *Barba* cases, the laboratory reports that contained the non-testifying analysts' opinions and conclusions were admitted into evidence as business records. Further, the *Crager* court explicitly held that scientific tests that qualified as business records were non-testimonial in nature. The *Barba* court made the same finding. These findings were in direct contravention of *Melendez-Diaz*, which held that a "certificate of analysis" was testimonial in nature. Thus, the admission of the lab report into evidence in the latter two cases seems to be the salient factor that led to vacation of the judgment and remand.

The U.S. Supreme Court's treatment of the cited cases, as well as numerous post-*Melendez-Diaz* state and federal decisions, indicates that there is life after *Melendez-Diaz* for prosecutions in which laboratory witnesses are no longer available to testify. Accordingly, it appears that a defendant's right to confrontation is not violated if: (1) the testifying expert has based his or her opinion on "facts and data" generated by a non-testifying expert that are "reasonably relied upon by experts" in that particular field; (2) it is clear that the opinion offered belongs to the testifying expert; (3) the non-testifying expert's opinion is not offered or elicited; and, (4) the underlying laboratory report is not admitted into evidence.

#### **Expert Witness, Technical Review, Confrontation**