The North Carolina General Assembly's Response to *Melendez-Diaz*

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S.L. 2009-473 (S. 252) is the North Carolina General Assembly's response to *Melendez-Diaz v. Massachusetts,* 129 S. Ct. 2527, 557 U.S. __ (June 25, 2009). The new law becomes effective October 1, 2009, and applies to offenses committed on or after that date. The full text of the new law is available online at: http://www.ncga.state.nc.us/gascripts/BillLookUp/BillLookUp.pl?Session=2009&BillID=s+252

In *Melendez-Diaz,* the United States Supreme Court held that forensic laboratory reports are testimonial and thus subject to the new *Crawford* Confrontation Clause rule. Under the *Crawford* rule, testimonial statements by declarants who do not testify at trial may not be admitted unless the declarant is unavailable and the defendant has had a prior opportunity for cross-examination. The effect of the *Melendez-Diaz* decision is that absent an exception to the *Crawford* rule or a waiver of Confrontation Clause rights by a defendant, the prosecution must, as a general rule, produce a forensic analyst in order to overcome a Confrontation Clause objection to the admissibility of forensic laboratory reports and chemical analyst affidavits.

In an earlier paper on the implications of *Melendez-Diaz* in North Carolina (available online at: http://www.sog.unc.edu/programs/crimlaw/faculty.htm), I addressed the issue of whether the Confrontation Clause objection is waived if the defendant fails to object to the introduction of forensic reports and chemical analyst affidavits through existing state notice and demand statutes. I noted that *Melendez-Diaz* deemed constitutional "simple" notice and demand statutes that require the State to give 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 to object to the admission of the evidence absent the analyst's appearance live at trial. Approving of these statutes, the Court noted that states are free to adopt procedural rules governing the time within which a defendant must assert a Confrontation Clause objection. The Court expressly declined to rule on the constitutionality of variations on the simple notice and demand statutes that require the defendant to take some additional action—such as issuing a subpoena for the witness—or to make some further showing—such as good cause—before the analyst would be required to be produced. However, the Court indicated that a procedure requiring the defendant to subpoena the witness would offend the Confrontation Clause. I then went on to evaluate North Carolina's notice and demand statutes in light of this guidance from the *Melendez-Diaz* Court, and noted several potential deficiencies which could be corrected by the General Assembly. The new session law addresses those deficiencies, establishing what are designed to be constitutional notice and demand procedures for waiver of a defendant's Confrontation Clause rights. This paper summarizes the changes the new law makes to existing statutes and provides a table summarizing the key provisions of North Carolina's notice and demand statutes, as amended by S.L. 2009-473.

Among the provisions affected by the new law is G.S. 8-58.20, pertaining to forensic analysis generally. Currently, G.S. 8-58.20 sets out a notice and demand procedure for a laboratory report of a written forensic analysis, including one of the defendant's DNA. It provides that in any criminal prosecution, a laboratory report that states the results of the analysis

and is signed and sworn to by the person performing the analysis is admissible in evidence without the testimony of the analyst who prepared the report. The State must give notice of its intent to use the report and the defendant has a period of time to object. The new law makes a small change to G.S. 8-58.20(d), clarifying that when the prosecution serves a copy of the report on the defense, it must indicate whether the report and affidavit will be offered as evidence at any proceeding against the defendant. This change simply amplifies the existing notice provision. The session law also enacts a new subsection (g) to the statute, establishing a simple notice and demand procedure for a chain of custody statement for evidence that has been subjected to forensic testing as provided in G.S. 8-58.20. This subsection was modeled on the existing simple notice and demand statute in G.S. 90-95(g1), applying to chain of custody statements in drug cases.

S.L. 2009-473 also amends G.S. 20-139.1(c1), which provides for the use of chemical analyses of blood or urine in any court. As currently written, this subsection provides that the results of a chemical analysis of blood or urine by certain specified laboratories are admissible without further authentication, unless the defendant lodges an objection. The new law amends this provision, providing that the State must notify the defendant at least 15 business days before the proceeding of its intent to introduce the report into evidence, and provide a copy of the report to the defendant. The defendant has until 5 business days before the proceeding to file a written objection with the court. If the defendant fails to object, then the evidence may be admitted without the testimony of the analyst. Also, the new law makes the notice and demand provisions applicable for cases tried in both district and superior courts and in adjudicatory hearings in juvenile court.

In a related change, the new law also amends G.S. 20-139.1(c3), the statute on chain of custody for tested blood or urine. The amendments create a simple notice and demand statute for chain of custody statements in district and superior court and in adjudicatory hearings in juvenile court. The new law requires that the State notify the defendant at least 15 business days before the proceeding at which the statement will be used of its intention to use the statement and provide a copy of the statement to the defendant. The defendant has until 5 business days before the proceeding to object. If the defendant fails to object, the statement is introduced into evidence without a personal appearance of the preparer.

S.L. 2009-473 also amends G.S. 20-139.1(e1), which provides for the use of a chemical analyst's affidavit in district court. Under this statute, a sworn affidavit is admissible in evidence without further authentication with regard to, among other things, alcohol concentration or the presence of an impairing substance. The new law removes the existing provision requiring a defendant who wants the analyst to testify in court to subpoena the analyst. It also enacts a new G.S. 20-139.1(e2) providing for a simple notice and demand procedure—the State must provide notice to the defendant at least 15 business days before the proceeding that it intends to use the affidavit, and provide the defendant with a copy of that document. The defendant must file a written objection to the use of the affidavit at least 5 business days before the proceeding at which it will be used. Failure to file an objection will be deemed a waiver of the right to object to the affidavit's admissibility. The new law clarifies that nothing in subsection (e1) or (e2) precludes the right of any party to call a witness or introduce evidence supporting or contradicting that contained in the affidavit. Finally, carrying over a related provision deleted

from subsection (e1), new subsection (e2) provides the case must be continued until the analyst can be present and that the criminal case may not be dismissed due to the failure of the analyst to appear, unless the analyst willfully fails to appear after being ordered to appear by the court.

The last statute affected by the new law is G.S. 90-95(g), setting out a simple notice and demand procedure for the use of chemical analyses in drug cases. S.L. 2009-473 makes that provision apply in all court proceedings. It also requires the State to provide notice 15 business days before the proceeding at which the report will be used. The defendant has until 5 business days before the proceeding to object.

Finally, it is important to put the new law into context. The new law attempts to set up constitutional procedures by which a defendant may waive any Confrontation Clause objection to forensic laboratory reports and chemical analyst affidavits. Of course, a defendant can choose not to waive his or her Confrontation Clause rights. If a defendant declines to waive—by filing an objection under the amended procedures—*Crawford* and *Melendez-Diaz* apply. The "gold standard" response by the prosecution when a defendant fails to waive is to produce the analyst in court, thus complying with those cases. In impaired driving cases where the arresting officer also is the chemical analyst, this should present no particular problems. But when the analyst is, for example, one with the North Carolina State Bureau of Investigation, producing the analyst may present logistical problems that the prosecution will need to address before trial. In the event that the analyst is not available, the prosecution's fall-back position will be to produce the analyst who performed peer review at the time the report was prepared or some other expert who can form an independent opinion as to the relevant issue—e.g., that tests revealed the substance to be cocaine—based on facts or data reasonably relied upon by experts in the field.

North Carolina's Notice & Demand Statutes

For offenses committed on or after October 1, 2009

Statute	Relevant Evidence	Proceedings	Time for State's Notice	Time for D's Objection/Demand
8-58.20(a)-(f)	Laboratory report of a written forensic analysis	Any criminal proceeding	No later than 5 business days after receipt or 30 days before the proceeding, whichever is earlier	Within 15 business days of receiving the State's notice
8-58.20(g)	Chain of custody statement for evidence subject to forensic analysis	Any criminal proceeding	At least 15 business days before the proceeding	At least 5 business days before the proceeding
20-139.1(c1)	Chemical analysis of blood or urine	Cases tried in district & superior court & adjudicatory hearings in juvenile court[1]	At least 15 business days before the proceeding	At least 5 business days before the proceeding
20-139.1(c3)	Chain of custody statement for tested blood or urine	Cases tried in district & superior court & adjudicatory hearings in juvenile court[2]	At least 15 business days before the proceeding	At least 5 business days before the proceeding
20-139.1(e1)-(e2)	Chemical analyst affidavit	Hearing or trial in district court	At least 15 business days before the proceeding	At least 5 business days before the proceeding
90-95(g)	Chemical analyses in drug cases	All proceedings in district & superior court	At least 15 business days before the proceeding	At least 5 business days before the proceeding
90-95(g1)	Chain of custody statement in drug cases	All proceedings in district & superior court	At least 15 days before trial	At least 5 days before trial

[1] G.S. 20-139.1(c1) also applies in administrative hearings, but the notice and demand provisions do not apply in those proceedings.

[2] G.S. 20-139.1(c3) also applies in administrative hearings, but the notice and demand provisions do not apply in those proceedings.