

## ***Melendez-Diaz & the Admissibility of Forensic Laboratory Reports & Chemical Analyst Affidavits in North Carolina Post-Crawford***

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**Background.** In 2004, the United States Supreme Court decided *Crawford v. Washington*, 541 U.S. 36 (2004), radically revamping the constitutional confrontation clause analysis. *Crawford* held that 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. *Crawford* overruled the old *Ohio v. Roberts* test and put in place a new analysis that is much more difficult for the prosecution to satisfy. Because *Crawford* expressly declined to provide a comprehensive definition of the operative term “testimonial,” the case resulted in a tremendous amount of litigation in North Carolina and all around the country.<sup>2</sup> One question that has been brewing in the lower courts for some time is whether forensic laboratory reports—such as those identifying a substance as a controlled substance—are testimonial and subject to the new *Crawford* rule.<sup>3</sup> In *Melendez-Diaz v. Massachusetts*, 557 U.S. \_\_\_ (June 25, 2009), the United States Supreme Court settled that debate, ruling that such reports are testimonial and thus subject to *Crawford*.

This paper discusses *Melendez-Diaz* and addresses questions that I anticipate arising or that already have been posed to me about its implications in North Carolina criminal prosecutions. I view this paper as a work in progress. If you have questions that are not answered here, please contact me. I also am interested in any views that are contrary to those expressed here.

***Melendez-Diaz: Facts & Procedural History.*** A tip to Boston police officers reported that a store employee, Thomas Wright, was engaging in suspicious activity. The informant reported that Wright repeatedly received phone calls at work, after each of which he would be picked up in front of the store by a blue sedan, and would return to the store a short time later. After the police set up surveillance at the store and witnessed these events occur, they detained and searched Wright, finding four clear white plastic bags containing a substance resembling cocaine. Officers then arrested the two men in the car—one of whom was Luis Melendez-Diaz. The officers placed the men in a police cruiser and drove them to the police station. During the drive, the officers observed the men fidgeting and making furtive movements. When the officers searched the cruiser, they found a plastic bag containing 19 smaller plastic bags hidden in the partition between the front and back seats. They submitted the seized evidence to a state laboratory for chemical analysis.

Melendez-Diaz was charged with distributing and trafficking in cocaine. At trial, the prosecution offered into evidence the bags seized from Wright and the cruiser. It also submitted three “certificates of analysis” showing the results of the forensic analysis performed on the

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<sup>2</sup> For more information about *Crawford* and the post-*Crawford* litigation nationwide, see my earlier publications on point: *Crawford v. Washington: Confrontation One Year Later* (on line at: <http://shopping.netsuite.com/s.nl/c.433425/it.A/id.79/.f>) (hereinafter *Confrontation One Year Later*), *Emerging Issues in Confrontation Litigation* (on line at: <http://shopping.netsuite.com/s.nl/c.433425/it.A/id.973/.f>) (hereinafter *Emerging Issues*), and *Evidence Issues in Criminal Cases Involving Child Victims and Child Witnesses* (on line at: <http://shopping.netsuite.com/s.nl/c.433425/it.I/id.369/.f>).

<sup>3</sup> I discussed this issue in *Emerging Issues*, *supra* n.2. at pp. 13-18.

seized substances. The certificates reported the weight of the seized bags and stated that they “[h]a[ve] been examined with the following results: The substance was found to contain: Cocaine.” The certificates were sworn to before a notary public by analysts at the State Laboratory Institute of the Massachusetts Department of Public Health, as required by state law. Melendez-Diaz objected, arguing that admission of the certificates violated *Crawford*. This objection was overruled, and the certificates were admitted as “prima facie evidence of the composition, quality, and the net weight of the narcotic . . . analyzed.” After Melendez-Diaz was found guilty, he appealed, arguing, among other things, that admission of the certificates violated his rights under the Confrontation Clause. The Appeals Court of Massachusetts affirmed and the Supreme Judicial Court denied review. The United States Supreme Court granted certiorari to determine whether the affidavits are testimonial.

**Melendez-Diaz: Holding and Analysis.** *Melendez-Diaz* held, in a 5-to-4 decision, that the reports at issue are testimonial. Writing for the majority, Justice Scalia found the case to be a “straightforward application of . . . *Crawford*.” Slip Op. at 6. He noted that *Crawford* itself categorized affidavits in the core class of testimonial statements covered by the Confrontation Clause. *Id.* at pp. 3-4. He concluded that “[t]here is little doubt that the documents at issue . . . fall within [this core class].” *Id.* at p. 4. The Court noted that although the documents were called “certificates,” they were clearly affidavits in that they contained declarations of fact written down and sworn to by the declarant. *Id.* As such they were “incontrovertibly” solemn declarations or affirmations made for the purpose of establishing or proving some fact. *Id.* The fact in question, the Court explained, was that the substance seized was cocaine—the precise testimony that the analysts would be expected to provide if called at trial. *Id.* As such, the certificates were functionally equivalent to live, in-court testimony. Moreover, the Court noted, “not only were the affidavits made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial,” but also their sole purpose was to provide evidence as to the composition, quality and weight of the substances at issue. *Id.* at pp. 4-5 (quotation omitted).

### **Implications of *Melendez-Diaz* in North Carolina.**

**What is the status of the existing North Carolina case law that is favorable to the State on this issue?** The North Carolina appellate courts have decided a number of cases post-*Crawford* dealing with laboratory reports and related documents. They include the following:

- *State v. Cao*, 175 N.C. App. 434 (2006) (dealing with a confrontation clause objection to a laboratory report identifying the substance at issue as cocaine; holding that the laboratory report and notes of a laboratory technician prepared for use in a criminal prosecution are nontestimonial when the testing is mechanical and the information constitutes objective facts not involving opinions or conclusions drawn by the analyst; holding that the report’s statement regarding the weight of the controlled substance likely would be an objective fact obtained through mechanical means but concluding that the record was insufficient make that determination as to the procedures for identifying the substance as cocaine).
- *State v. Melton*, 175 N.C. App. 733 (2006) (record was insufficient to determine whether the testing done in connection with a report finding that the defendant tested positive for genital herpes was mechanical).

- *State v. Forte*, 360 N.C. 427 (2006) (SBI Special Agent’s report identifying fluids collected from the victim was nontestimonial; relying, in part, on the fact that the reports contained chain of custody information).
- *State v. Heinricy*, 183 N.C. App. 585 (2007) (affidavit by a chemical analyst containing the defendant’s blood-alcohol level was nontestimonial).
- *State v. Hinchman*, \_\_ N.C. App. \_\_, 666 S.E.2d 199 (2008) (chemical analyst’s affidavit was nontestimonial when it was limited to an objective analysis of the evidence and routine chain of custody information).

After *Melendez-Diaz*, the cases holding that laboratory reports in drug cases and chemical analyst affidavits in impaired driving cases are nontestimonial—*Cao* and *Heinricy*—are no longer good law. Furthermore, the reasoning in the other cases has been called into question or rejected.

**Is the confrontation clause objection waived if the defendant fails to object to the introduction of the reports through our notice and demand statutes?** To answer this question, I will begin with a summary of what *Melendez-Diaz* said and then move on to a discussion of the relevant North Carolina statutes. *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 in which he or she may object to the admission of the evidence absent the analyst’s appearance live at trial. Slip Op. at pp. 21-22 & n.12. 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. *Id.* at p. 21. 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. *Id.* at p. 22 n.12. However, in another portion of the opinion, the Court indicated that a procedure requiring the defendant to subpoena the witness would offend the Confrontation Clause.<sup>4</sup>

North Carolina has several relevant statutes that apply to laboratory reports and related affidavits. Some apply in district court, some apply in superior court, and some apply in both courts.<sup>5</sup> The first statute is in G.S. 90-95(g) and provides for the use of chemical analyses in drug cases. It provides that when matter is submitted to certain specified laboratories for chemical analysis to determine the presence of a controlled substance, the report of that analysis is admissible without further authentication in district and superior court as evidence of the identity, nature, and quantity of the matter analyzed. For the report to be admissible in a criminal proceeding in superior court or in an adjudicatory hearing in juvenile court, the state must notify the defendant, at least 15 days before trial, of its intent to introduce the report into evidence and provide a copy of the report to the defendant. A timely objection by the defendant precludes admissibility. As it applies in superior court and adjudicatory hearings in juvenile court, this statute appears to be a “simple” notice and demand statute endorsed by the Court in *Melendez-Diaz*. Thus, if the State properly provides notice of its

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<sup>4</sup> See the discussion below regarding whether failing to subpoena a witness can constitute waiver of the Confrontation Clause objection.

<sup>5</sup> For a discussion of the applicability of the Confrontation Clause in district court, see the question on point addressed later in this paper.

intent to use the report at trial and the defendant fails to make a timely objection, it appears that this failure would constitute a waiver of any Confrontation Clause objection. However, the statute's notice and demand provisions do not apply in district court. Although this appears to be a fatal flaw in light of *Melendez-Diaz*, it is one that the General Assembly can fix by making the notice and demand provisions apply in all courts.

The second statute is G.S. 8-58.20, pertaining to forensic analysis generally. It provides that in any criminal prosecution, a laboratory report of a written forensic analysis, including an analysis of the defendant's DNA, that states the results of the analysis and is signed and sworn to by the person performing the analysis may be admissible in evidence without the testimony of the analyst who prepared the report. To be admissible, the analyst must complete an affidavit stating, among other things, that he or she is qualified to do the analysis, the tests were performed pursuant to specified standards, and the evidence was handled in accordance with certain procedures. A properly prepared affidavit is admissible without further authentication in any criminal proceeding with respect to the forensic analysis administered and the procedures followed. The prosecutor must serve a copy of the report and affidavit on the defense, no later than five business days after receiving those items, or 30 business days before any proceeding in which the report may be used against the defendant, whichever occurs first. The defense has 15 business days to file a written objection to the use of the report and affidavit. If the defense fails to timely object, then the report and affidavit may be admitted in evidence in any proceeding without the testimony of the analyst, subject to the presiding judge ruling otherwise. If a written objection is filed, admissibility is governed by the appropriate rules of evidence. This statute appears to be a simple notice and demand statute endorsed by the Court in *Melendez-Diaz*. Thus, if the State provides proper notice of its intent to use the report at trial and the defendant fails to make a timely objection, it appears that this failure would constitute a waiver of any confrontation clause objection.

The third statute is G.S. 20-139.1(c1), which provides for the use of chemical analyses of blood or urine in any court. It provides that the results of a chemical analysis of blood or urine by certain specified laboratories are admissible in any court without further authentication. However, if the defendant objects at least five days before trial in superior court or an adjudicatory hearing in juvenile court, the admissibility of the report must be determined and governed by the appropriate rules of evidence. This statute is a variation on a simple notice and demand statutes described by *Melendez-Diaz* in that the State is not required to provide notice that it intends to use the document. Rather, the defense must assume that the analysis will be admitted and must make a timely objection to require live testimony. It is not clear whether this variation is constitutionally significant. Of course, the General Assembly may choose to bring this statute in line with the simple notice and demand statutes approved of in *Melendez-Diaz*, thus eliminating the constitutional issue for future cases.

The fourth statute is G.S. 20-139.1(e1), which provides for the use of a chemical analyst's affidavit in impaired driving cases 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. If a defendant wants the chemical analyst to testify in person, the defendant may subpoena the analyst and conduct examination as if the analyst were an adverse witness. The subpoena may not be issued unless the defendant files and serves, at least five days before trial, an affidavit specifying the

factual grounds on which the defendant believes the chemical analysis was not properly administered and the facts that the chemical analyst will testify about and stating that the presence of the analyst is necessary for the proper defense of the case. The district court then determines if there are grounds to believe that the presence of the analyst requested is necessary for the proper defense. If so, the case is continued until the analyst can appear.

Like G.S. 20-139.1(c1), this statute does not require notice by the State. As noted above, it is not clear whether this variation is constitutionally significant. Additionally, there are other aspects of this statute that may be problematic in light of *Melendez-Diaz*. First, this statute requires that the defendant subpoena the witness. In *Melendez-Diaz*, Justice Scalia rejected a contention by the State of Massachusetts that no Confrontation Clause violation occurred because Melendez-Diaz had the ability to subpoena the analyst. Slip Op. at pp. 18-19. The Court noted that this ability is of no use when the witness is unavailable or refuses to appear. *Id.* at p.19. “More fundamentally,” it concluded, “the Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court.” *Id.* Thus, the procedure set out in G.S. 20-139.1(e1) requiring the defendant to subpoena the witness may not withstand constitutional attack.<sup>6</sup>

Additionally, this statute is a notice and demand “plus” statute, in that a simple demand or objection is not sufficient to require the presence of the analyst. The defense has to submit an affidavit specifying the factual grounds on which the defendant believes the chemical analysis was not properly administered and the facts that the chemical analyst will testify about and stating that the presence of the analyst is necessary for a proper defense. The district court then has to determine whether there are grounds to believe that the presence of the analyst requested is necessary for the proper defense. In light of the distinction drawn by Justice Scalia between the simple notice and demand statutes and variations on them that require, for example, a showing of good cause, this aspect of G.S. 20-139.1(e1) may be problematic. Although the General Assembly clearly could cure these deficiencies, it is not clear whether a district court judge could judicially modify the statute to make it constitutional (by, for example, interpreting it to require the presence of the analyst upon a defense objection or demand with no further showing or finding required).<sup>7</sup>

**Separate from the notice and demand statutes, can the State successfully argue that the confrontation clause objection is waived if the defendant fails to call or subpoena a witness?** The majority opinion in *Melendez-Diaz* rejects this argument. Slip Op. at p. 19. The Court stated: “the Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court.” *Id.* Any support that the State previously found in *State v. Brigman*, 171 N.C. App. 305 (2005), for a contrary conclusion is now questionable. However, on June 29, 2009—four days after the Court decided *Melendez-Diaz*—it granted certiorari in *Briscoe v. Virginia* (No. 07-11191). The question presented in that case is: If a state allows a prosecutor to introduce a certificate of a forensic laboratory analysis, without presenting the testimony of the analyst who prepared

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<sup>6</sup> For further discussion of this issue, see the next section of this paper.

<sup>7</sup> In addition to the statutes discussed in the text, two other statutes provide for notice and demand procedures in the context of chain of custody. *See* G.S. 90-95(g1) (notice and demand statute with regard to chain of custody information in drug cases); G.S. 20-139.1(c3) (chain of custody for blood or urine that is tested; not requiring notice and providing for a demand in superior court and in an adjudicatory hearing in juvenile court but not in district court). Both statutes are mentioned below in the discussion about the implications of *Melendez-Diaz* on chain of custody issues.

the certificate, does the state avoid violating the Confrontation Clause by providing that the accused has a right to call the analyst as his or her own witness? Thus, the Court will have more to say on this issue.

**If the analyst is unavailable, can a State expert testify to an opinion that the substance is a controlled substance based on the original analyst's report?** *Melendez-Diaz* does not address this issue. Clearly, the State could not offer a witness to simply read the report into evidence. In this instance, the report would be received as substantive evidence. Since the report is now testimonial under *Melendez-Diaz*, it may not be admitted unless the preparer testifies or if the State can establish unavailability and a prior opportunity to cross-examine.

Another scenario occurs when the State tenders an expert witness to testify to an opinion that the substance is a controlled substance, based on facts or data found or stated in the underlying report. Before *Melendez-Diaz*, the law in North Carolina and in the vast majority of jurisdictions was that the underlying report is not being admitted for the truth of the matter asserted but rather as a basis of the testifying expert's opinion. See *Confrontation One Year Later*, *supra* n.2 at p. 27 & n. 146 (collecting cases); *Emerging Issues*, *supra* n.2 at pp. 25-26 (same). Courts reasoned that since the evidence is not hearsay, it is not covered by the *Crawford* rule. After all, *Crawford* itself recognized that the Confrontation Clause "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." *Crawford*, 541 U.S. at 59 n.9. Furthermore, the expert is on the stand and may be cross-examined about the basis of his or her opinion.<sup>8</sup> As noted, *Melendez-Diaz* does not address this issue. However, it does provide the defense with a roadmap for superb cross-examination of the State's expert. See Slip Op. at pp. 12-14 (noting reports of manipulation, fraud, and incompetence in forensic analysis).

Some have questioned whether an expert can testify to an opinion based solely on a bare-bones conclusion in a report—e.g., suppose that the report simply contains the conclusion that the substance is cocaine. Slip Op. at p. 14 (the report in *Melendez-Diaz* contained only the bare-bones statement that the substance was cocaine; *Melendez-Diaz* did not even know what tests were performed). It seems to me that unless the expert has some facts or data upon which to form an opinion, the expert cannot offer an admissible expert opinion. In this scenario the expert's testimony is a "sham" for simply admitting the underlying testimonial report and the testimony should not be allowed. *Cf. Davis v. Washington*, 547 U.S. 813, 826 (2006) ("[W]e do not think it conceivable that the protections of the Confrontation Clause can readily be evaded by having a note-taking policeman *recite* the unsworn hearsay statement of the declarant, instead of having the declarant sign a deposition."). Other potential arguments that could be leveled at such a practice are that the expert does not have an adequate basis for his or her opinion or that the opinion in the underlying report is not a type of "fact" upon which experts in the field reasonably rely.

**Is the confrontation clause issue waived if the defense fails to object to the testimonial evidence at trial?** Several North Carolina appellate decisions have held that if the *Crawford*

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<sup>8</sup> For example, a defense lawyer could ask: Did you personally perform the tests that you relied upon? Can you personally verify that the sample was not contaminated? Can you personally verify that the sample size was as indicated in the report? Can you personally verify that no other tests were done on the substance? Can you personally verify that the substance was in the testing instrument for the required period of time? Can you personally verify anything about the conditions of the laboratory during testing?

issue is not raised at trial, it is waived on appeal. See Emerging Issues, *supra* n.2 at p. 28. *Melendez-Diaz* confirms that the right to confrontation may be waived by “fail[ing] to object to the offending evidence.” Slip Op. at n.3.

**Both *Crawford* and *Davis v. Washington*, 547 U.S. 813 (2006), involved interrogation by the police or their agents; why didn’t the Court distinguish forensic reports on this basis?** The Court did address this issue, rejecting that distinction. In *Melendez-Diaz*, the Court reiterated what it said in *Davis*: “[t]he Framers were no more willing to exempt from cross-examination volunteered testimony or answers to open-ended questions than they were to exempt answers to detailed interrogation.” Slip Op. at pp. 10-11 (quotation omitted). In any event, the Court noted, the affidavits at issue were prepared in response to a police request. *Id.* at 11.

**What about the argument that the confrontation clause doesn’t apply in district court because the right is protected by the de novo system?** As a practical matter, all of the district court judges that I have spoken with routinely apply *Crawford* in district court.<sup>9</sup> Relying on *State v. Smith*, 312 N.C. 361 (1984), some have argued that the confrontation clause right does not apply in district court and that it is ultimately protected by the trial de novo system. My colleague Bob Farb wrote about that issue after *Crawford* but before the Court reinforced its commitment to its new Confrontation Clause analysis in *Davis* and *Melendez-Diaz*.<sup>10</sup> Nothing in *Melendez-Diaz* directly addresses this issue. However the case further undercuts other aspects of the *Smith* decision.

**Does *Melendez-Diaz* say anything about the testimonial nature of chain of custody evidence?** Yes. The majority opinion indicates that chain of custody information is testimonial. However, in footnote 1 of the majority opinion, Justice Scalia took issue with the dissent’s assertion that “anyone whose testimony may be relevant in establishing the chain of custody . . . must appear in person as part of the prosecution’s case.” Scalia noted that while the State has to establish a chain of custody, gaps go to the weight of the evidence, not its admissibility. He concluded: “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.” This language calls into question statements in post-*Crawford* North Carolina appellate case law (summarized above) suggesting that chain of custody information is nontestimonial. Finally, North Carolina has two notice and demand statutes pertaining to chain of custody: G.S. 90-95(g1) (notice and demand statute with regard to chain of custody information in drug cases), and G.S. 20-139.1(c3) (chain of custody for blood or urine that is tested; not requiring notice and providing for a demand in superior court and in an adjudicatory hearing in juvenile court but not in district court).<sup>11</sup>

**What does *Melendez-Diaz* say about records regarding equipment maintenance?** Justice Scalia stated that “documents prepared in the regular course of equipment maintenance may

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<sup>9</sup> Because of *Heinricy* (chemical analyst affidavits are nontestimonial), until now *Crawford* has had the most impact in district court in domestic violence cases.

<sup>10</sup> For Farb’s paper, click on “Chemical Analyst’s Affidavit and *Crawford v. Washington*” on line at: <http://www.sog.unc.edu/programs/crimlaw/faculty.htm>

<sup>11</sup> See the discussion about waiver and notice and demand statutes above.

well qualify as nontestimonial records.” Slip Op. at n.1. This statement is in accord with many post-*Crawford* cases from around the country. See Emerging Issues, *supra* n.2 pp. 17-18.

**Does *Melendez-Diaz* have any implications for medical reports?** Although *Melendez-Diaz* deals with forensic laboratory reports, in addressing an argument by the dissent, the majority opinion notes that “medical reports created for treatment purposes . . . would not be testimonial under our decision today.” Slip Op. at p. 6 n.2.

**Does the decision say anything about the testimonial nature of other official documents?**

Yes. Records regarding equipment maintenance are discussed above. Additionally, the majority opinion indicates that certificates of non-existence of records are testimonial. Slip Op. at p. 17. The Court also distinguished between business records “created for the administration of an entity’s affairs” and those created for the purpose of establishing or proving a fact at trial. Slip Op. at p. 18. The former category is nontestimonial and the latter is testimonial. *Id.*

**In light of the changing composition of the Court, can we expect any change in the law?**

As noted above, the opinion was a 5-to-4 decision. Since one of the justices in the majority will be leaving the Court, the vote line up could shift. And as noted above, on June 29, 2009, the Court granted certiorari in *Briscoe*, another *Crawford* case involving forensic analysis. Thus, the Court will have an opportunity to revisit the issue.