

## **Melendez-Diaz: The Case Heard Round the Defense World**

On June 25, 2009 of this year the United States Supreme Court issued a decision which has had a profound impact on the practice of criminal law within Virginia. In Melendez-Diaz v. Massachusetts, the Supreme Court held that a statute allowing certificates of analysts entered into evidence at trial without the person who prepared the certificate being present was unconstitutional. The Court ruled, that this statute, similar to the one in place in Virginia, was hearsay and violated a person's 6<sup>th</sup> Amendment right to confront their accusers.

Prosecutors have routinely used these certificates as evidence that the drug seized or breath analyzers, were in fact illegal narcotics or the actual blood/alcohol content of a person, in their prosecutions against those charged with these types of crimes. Defense attorneys have routinely argued that the people who perform these tests simply sign a piece of paper and are not required to appear in court, and are therefore not subject to cross-examination. At first glance, this may seem very trivial, after all scientists are scientists and if they say that green leafy substance that smells like marijuana then most likely it is marijuana. However, Justice Scalia pointed to a number of studies that have examined the many different problems these forensic tests may encounter before making their way into the courtroom; problems which defense attorneys are unable to address and unable to ascertain because science has yet to provide us with a piece of paper that talks and can answer questions.

Justice Scalia referenced studies, such as those conducted by the National Academy of Sciences, which noted that a majority of laboratories responsible for forensic testing are administered by law enforcement agencies, such as police departments, where the laboratory administrator reports to the head of the agency. This can occasionally produce the unwanted burden of facing pressure to sacrifice appropriate methodology for the sake of expediency. Many forensic labs are overburdened with a heavy amount of tests to perform, not enough analysts to perform them, and an ever ticking speedy trial clock. A brief from the National Innocence Network referenced the documented practice of "drylabbing" where forensic analysts have actually reported results of tests that were never even performed. Scalia's decision asserts that confrontation is a means of assuring the accuracy of the tests just as, "the eyewitness who has fabricated his account to the police, the analysts who provides false results may, under oath in open court, reconsider his false testimony."

Some of you may be thinking, oh sure, here we go again, another article from a crazy defense attorney who thinks everyone is lying except for his client. Well not only does the confrontation clause provide protection from the fraudulent analysts, but it also serves as a safeguard from the incompetent one as well. Another study referenced in the Melendez-Diaz case concluded that invalid forensic testimony was a contributing factor in 60% of cases in which exonerating evidence resulted in the overturning of criminal convictions. Defense attorneys simply don't know from looking at the certificate what type of test was done, if it was routine or unusual, how many times the analysts had performed these types of tests, or if the tests conducted required specific knowledge or a skill set that the performing analysts did not, or has not yet possessed.

All of these are valid issues which can be addressed on cross-examination and have the potential to apply not only to drug tests, but also to the accuracy of test results returned from a breath analysis machine, and possibly even the person who calibrates radar gun in speeding cases. Although the Court was very careful not to stray too far away from the drug analysis issue, many defense attorneys, have raised these accuracy and accountability of test results issues in our various jurisdictions with different degrees of success. Nonetheless the Virginia Legislature has since called a special session, and amended numerous laws to come into compliance with what the Supreme Court provided as acceptable statutes to excuse the lab analysts from appearing, provided the defense has had the opportunity to raise these issues or had time to object to the certificate being admitted as evidence.

So in the end, although Melendez-Diaz sent initial waves of shock through the legal system, giving many prosecutors temporary headaches on how to proceed with scientific evidence, providing many defense attorneys a variety of new and creative arguments, and ultimately required a special session of the General Assembly to convene and bring previous laws back into compliance with the Constitution, it still provides one useful lesson. Laws, or their interpretation, can change almost overnight, if you or someone you know is faced with a criminal or traffic offense, you should always seek out the advice of competent and well informed legal counsel.