Conference of District Attorneys

# For the Record

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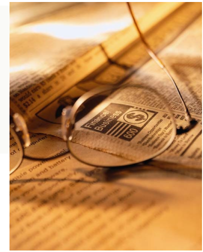

## Melendez-Diaz v. MA - The reason the Supreme Court should watch CSI or at least go to district court

*by: Ike Avery, TSRP*

The United States Supreme Court five years ago decided Crawford v. Washington, 541 U.S. 36 (2004), and changed decades of cases and the rules of evidence of every state in a new constitutional confrontation clause analysis. Crawford held that testimonial statements by witnesses who do not testify at trial may not be admitted unless the witness is unavailable and the defendant has had a prior opportunity to cross examine the witness. As is the norm, the Crawford decision expressly declined to provide a comprehensive definition of the operative term "testimonial." The predictable result is extensive litigation in the trial courts and more issues presented in the appellate courts and inconsistent rulings. The Supreme Court answered one question left open by Crawford – is a laboratory report in a drug case "testimonial" evidence? In Melendez-Diaz v. Massachusetts, 557 U.S. __ (June 25, 2009), the United States Supreme Court in a 5-4 decision ruled that the report showing the white powdery substance seized from the defendant to be cocaine is testimonial and thus subject to Crawford.

Justice Scalia authored the opinion which held that the affidavit of the analysis of the white powdery substance was inadmissible. The opinion spends many pages attempting to rebut the dissenting opinion's criticism. The majority did address several issues. First, the Court in footnote 1 stated:

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. While the dissent is correct that "[i]t is the obligation of the prosecution to establish the chain of custody," post, at 7, this does not mean that everyone who laid hands on the evidence must be called. As stated in the dissent's own quotation, ibid., from United States v. Lott, 854 F. 2d 244, 250 (CA7 1988), "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. Additionally, documents prepared in the regular course of equipment maintenance may well qualify as nontestimonial records. See infra, at 15-16, 18.(emphasis added)

Second, the majority later in the opinion indicated that "notice and demand" statutes are constitutional. These statutes provide for the State to notify the defendant of its intent to use the report unless there is a demand for the analyst to appear or an objection to the affidavit or report. For an extensive analysis of Melendez-Diaz see School of Government Professor Jessica Smith's July 2, 2009 paper. http://www.sog.unc.edu/programs/crimlaw/menlendez_diaz.pdf

The General Assembly was in session when this opinion was issued and the Conference of District Attorneys along with legislative staff and the School of Government sought amends to our law to assure that our notice and demand statutes complied with this decision. Senator John Snow agreed to allow his bill, Senate Bill 252, which had passed the Senate on an issue involving local emergency management, to be rewritten to address this case. As a result, SB 252 was enacted and signed by the Governor provides that effective for all charges filed October 1, 2009 or after, if the State gives the defendant 15 business days (three weeks) notice of its intent to offer (1) the chain of custody statement, (2) the drug analysis report, and/or (3) the Chemical Analyst's affidavit for analyzing blood or breath and the defendant fails to file a written objection within five business days of trial (one week) the statement or affidavit is admissible. If the defendant objects to the chemical analyst affidavit in district court, then the "The case shall be continued until the analyst can be present. The criminal case shall 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 procedure for providing the required notice is being developed at this time.

District Attorneys need to work closely with law enforcement agencies on scheduling DWI cases. We need to recognize that these cases are different from other district court cases and may require a different schedule. Law enforcement agencies need to review their policy on training officers as chemical analysts. Melendez-Diaz has no impact, if the officer runs his or her own test.

**Norwegian fined $109,000 for drunk driving - $272.50 per yard driven**

The Associated Press
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OSLO -- A rich Norwegian has been ordered to pay a 700,000 kroner ($109,000) fine after driving his car 400 yards while drunk. Police stopped the 49-year-old man in October near the airport for southern Norway's Kristiansand. Tests showed he had a blood alcohol content of .188 percent. Norway's maximum is .02 percent.

The man pleaded guilty in court on Tuesday.

Norwegian courts set drunken driving fines based on income and personal wealth. Tuesday's ruling said the man's income is 751,769 kroner ($117,000) and personal wealth is 228 million kroner ($36.6 million). It also revoked his license for two years and three months.

## Malice

*by: Sarah Garner, ADA District 13, Regional TSRP*

What is the difference between felony death by motor vehicle and second degree murder (besides an additional ten or more years in prison)? Malice. In common usage, malice is a proactive word. Webster's Dictionary defines malice as a desire to cause pain, injury, or distress to another; or the intent to commit an unlawful act or cause harm without legal justification. Simply put, most jurors think of a malicious person as someone who is mean or evil. In the context of second degree vehicular homicides, the definition is very different, and often quite easy to prove.

The pattern jury instruction for second degree vehicular homicide states that "(m)alice arises when an act which is inherently dangerous to human life is intentionally done so recklessly and wantonly as to manifest a mind utterly without regard for human life and social duty and deliberately bent on mischief". It is clear when the traditional definition of

malice is compared to the jury instruction that you have the difference between *wanting to hurt another* contrasted with *not caring if you hurt another*. Since mental intent can be so tough to prove, the burden of proof regarding malice in the context of DWI deaths is dramatically reduced and far more simple. Indeed, the only intent you are proving is driving impaired, not the consequences of the act.

Unfortunately, jurors have preconceived notions of what malice entails. Your job is to educate. Start in jury selection and never stop throughout the trial. If you can climb the malice obstacle, the rest is easy. Generally malice is proven through prior convictions, pending cases, and other bad acts. Teach your jury the law by showing them quotes from cases in a power point presentation during your closing argument. My favorites are:

- "The State was not required to show that defendant had a conscious, direct purpose to do specific harm or damage, or had a specific intent to kill." *State v. Rich*, 351 N.C. 386 (2000)
- "The State need only show that the defendant had the intent of driving in such a reckless manner as reflects knowledge that injury or death would likely result, thus evidencing depravity of mind." *State v. Rich*, 351 N.C. 386 (2000)
- "Any reasonable person should know that an automobile operated by a legally intoxicated driver is reasonably likely to cause death to any and all persons who may find themselves in the automobile's path." *State v. Fuller*, 138 N.C.App. 481 (2000)

"The prior driving while impaired arrest should have alerted him to the hazards of driving while impaired". *State v. Locklear*, 159 N.C.App. 588 (2003)

Also define "deliberately bent on mischief". The Courts have defined this term as meaning "conscious indifference to consequences wherein probability of harm to another within the circumference of such conduct is reasonable apparent, though no harm to such other is intended"; "an entire absence of care for the safety of others which exhibits indifference to consequences"; "conduct where an actor, having reason to believe his act may injure another, does it, being indifferent to whether it injures or not"; and "a realization of the imminence of danger, and reckless disregard, complete indifference and unconcern for probable consequences". Good stuff for juries. If you carefully define these terms in the context of second degree vehicular homicide malice as opposed to their preconceived definition, your jury will only think one thing on the way to deliberate: **that could have been me in the other car.**

## HALL OF FAME

On May 5, Superior Court Judge Ronald Stephens qualified Lt Tim Tomczak as an expert in Drug Recognition, HGN and DWI Enforcement - ADA Trish Jacobs (Wake)

On May 22, District Court Judge James Fullwood qualified Lt. Tim Tomczak as a Drug Recognition Expert and an expert in Drug Impaired Driving - ADA Katie Pomeroy-Carter (Wake)

On June 8, Superior Court Judge D. Jack Hooks, Jr. qualified Trooper J.B. Davis as a Drug Recognition Expert – ADA Hugh Bailey (Lee)

On June 10, District Court Judge Tom Lambeth qualified Trooper Tim Clapp as an expert in HGN – ADA Meredith Bishop (Alamance)

On June 17, District Court Judge Charles Bullock qualified Deputy Charles Galloway as an expert in DWI Investigation, Drug Recognition, and Drug Impaired Driving - ADA Sumit Gupta (Harnett)

On June 19, Thomas Honeycutt with the Charlotte-Mecklenburg Police Department was qualified as an expert in HGN.

On June 30, Chief District Court Judge James K. Roberson qualified Trooper Jerry Deardorff as an expert in HGN – ADA Meredith Bishop (Alamance)

June 30, District Court Judge Dale Stubbs qualified Sgt. Marshall Cox as an expert in HGN – ADA Hugh Bailey (Lee)

On July 16, Federal Court Judge James E. Gates qualified Lt. Tim Tomczak as a Drug Recognition Expert - AUSA David Bragdon. This was a suppression hearing in a Possession of Firearm by Felon case. The defense alleged that the defendant was impaired by heroin at the time of his in-custody interview and was unable to knowingly waive his rights.

On July 31, District Court Judge Dale Stubbs qualified Officer Bradley Upchurch as an expert in HGN and Sgt Marshall Cox as a Drug Recognition Expert – ADA Hugh Bailey (Lee)

On August 12, Superior Court Judge Joe Crosswhite qualified Tina Fleming Director of Basic Law Enforcement Training at Mitchell Community College as a Drug Recognition Expert – ADA Brandon Crouse (Iredell)

On September 9, District Court Judge Paul A. Holcombe qualified Deputy Charles Galloway as an expert in HGN - ADA Sumit Gupta (Harnett)

The Honorable Judge John H. Horne qualified Trooper Perry Marshall as a Drug Recognition Expert for the purpose of DRE Reconstruction - ADA Allan Adams (Scotland)

On August 28, Superior Court Judge Jones qualified Senior Officer PG Manukas as an expert in HGN - ADA Meredith Parris and Intern Mike Easley Jr (Wake)

On September 9, District Court Judge William Farris qualified Sgt. Luke Marcum as a Drug Recognition Expert and an expert in Standardize Field Sobriety Tests - ADA Peter Glasgow (Wilson) District Court.

On September 25, District Court Judge William Farris qualified Sgt. Luke Marcum as a Drug Recognition Expert and an expert in Standardize Field Sobriety Tests - ADA Joel Stadiem (Wilson)

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*We support law enforcement's ability to detect and deter crime.*



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