

# DUI defense attorneys pursue new argument

By Sylvia Hsieh

Staff writer

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Criminal defense attorneys are already taking advantage of a recent U.S. Supreme Court ruling to challenge breath test evidence of blood alcohol levels.

In [Melendez-Diaz v. Massachusetts](#), the High Court held that forensic lab report analysts must be made available at trial for cross-examination to satisfy a defendant's Sixth Amendment rights under the Confrontation Clause.

DUI attorneys wasted no time in pouncing on the decision.

"The impact will be huge. You're going to see challenges being filed everywhere," said James Nesci of Nesci, St. Louis & West in Tucson, Ariz.

*Melendez* challenges will ask courts to force prosecutors to make witnesses appear at trial to testify about breath or blood test evidence that normally is admitted through documents or affidavits.

Nesci has already filed a motion in one of his cases asking the court to require that the state present four live witnesses as a condition of admitting Intoxilyzer results. And on July 17, a Virginia trial court [dismissed drunk driving charges](#) in a case where the state presented a breath test certificate, without the testimony of the officer who performed the test.

Prosecutors, on the other hand, are not signaling alarm yet.

"It's our position that *Melendez-Diaz* doesn't change the landscape. It does not require that anyone who had anything to do with a breath test come in and testify," said M.J. Raciti, principal assistant prosecuting attorney with the Tucson City Attorney's Office, which is prosecuting the DUI case against Nesci's client. Others are taking a wait-and-see attitude.

"It's a really new case. The issue of whether multiple people have to testify is just starting to percolate through," said Scott Thorpe, CEO of the California District Attorneys Association in Sacramento, Calif.

## **Patchwork of rules**

*Melendez* challenges to breath tests will vary depending on whether, and to what extent, states already require prosecution witnesses to appear in DUI cases.

*Melendez* will be an issue only in criminal DUI prosecutions, not in civil or administrative hearings, noted Bruce Kapsack a criminal defense attorney with Kapsack & Bair in San Francisco.

The rules vary from state to state, and even from jurisdiction to jurisdiction, as to how much documents may be relied on to prove a breath test result.

Some states routinely present all blood alcohol evidence, including test results, through documents or affidavits only; others call the officer who gave the breath test as a witness; and others may present the testing officer as well as the person responsible for regular maintenance of the breath machine.

Most states have passed statutes making the results of a breath test admissible without further testimony, by admitting records related to maintenance of the device as business records.

Most of the litigation is likely to occur in these jurisdictions.

Michael DelSignore, a criminal defense attorney who practices in Massachusetts and Rhode Island, contends that at a minimum the *Melendez* decision will require the government to produce as live witnesses the breathalyzer operator and the officer in charge of maintaining the machine.

He noted, however, that even when these two witnesses typically testify, such as Massachusetts, defense attorneys are likely to argue that the government must also call as a witness the officer who performs the annual certification of the machine.

“There is always some reliance on a third party company for how the machine works,” said DeISignore. “Every attorney is definitely going to raise it and try to extend it further to argue that the state needs another witness.”

In Arizona, Nesci is going for a quadruple-play.

He is arguing that before the results of his client’s breath test can be admitted, the prosecutor must make available four witnesses for cross-examination: the breath test operator, the analyst who calibrated the machine, the quality assurance specialist who maintains the machine and the outside analyst who prepared the dry-gas standard in the machine.

Two of the four experts are from outside companies and would have to be brought in from out of state.

Nesci says he has three other cases he is positioned to make similar arguments in.

The easiest type of test cases to challenge will be those relying on blood alcohol tests with a borderline result and no other evidence of impairment, said J.J. Paul of Voyles, Zahn, Paul, Hogan & Merriman in Indianapolis, former dean of the National College for DUI Defense.

#### **A footnote to remember**

A footnote in *Melendez* may give prosecutors their own ammunition.

In Footnote 1, the majority says, “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. ... Additionally, documents prepared in the course of equipment maintenance may well qualify as nontestimonial records.”

How far courts go in requiring live witnesses depends on whether a particular record is a “testimonial statement” subject to the Confrontation Clause, which in turn depends on “whether they are statements made in anticipation of their evidentiary use at trial,” said Professor Jeffrey Fisher of Stanford Law School, who represented the defendant in *Melendez*.

He suggests a breath machine’s maintenance records fall into a grey area.

“In one sense they are done in the ordinary course of business; on the other hand, they are used for testing evidence in cases. There is overlap which makes it a hard question,” said Fisher.

*Questions or comments can be directed to the writer at: [sylvia.hsieh@lawyersusaonline.com](mailto:sylvia.hsieh@lawyersusaonline.com)*