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Views of the Commission Regarding Notice and Demand Provisions

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Overview

As a result of decisions of the Supreme Court of the United States examining the right of confrontation, many Forensic Science Service Providers (FSSP) are required to attend trials even though the results of their examinations are not challenged by the defense—thus, creating an unnecessary workload burden on FSSPs. To avoid this situation, some jurisdictions have adopted notice-and-demand provisions, which (1) require the prosecutor to notify the defense before trial that a laboratory report will be offered in evidence and (2) provide the defense with the opportunity to demand that the analyst testify at trial. Failure to demand the analyst's presence permits the admission of the report and waives the right to the analyst's presence at trial—if (1) the notice is given in sufficient time for defense counsel to consult an expert and (2) sufficient information is provided to permit counsel to make an informed decision regarding waiver.

Views of the Commission

It is the view of the National Commission that jurisdictions should adopt notice-and-demand provisions that meet these requirements. The Supreme Court has decided a number of cases involving the relationship of expert evidence—testimony and laboratory reports—and the Sixth Amendment right of confrontation.[1]

[1] The seminal case in recent confrontation law jurisprudence is Crawford v. Washington, 541 U.S. 36 (2004), in which the Supreme Court held that a hearsay declaration that is "testimonial" in nature is not admissible unless the declarant is subject to cross-examination. There are some exceptions.

In *Melendez-Diaz v. Massachusetts*,[2] the Court ruled that a laboratory report is not admissible unless the person making the report is subject to cross-examination. In *Bullcoming v. New Mexico*,[3] the Court ruled that introducing a laboratory report through a surrogate examiner—one who worked in the laboratory and knew its procedures but neither performed the analysis, observed the testing, nor signed the report—violated the right of confrontation. The Court's latest case, *Williams v. Illinois*,[4] did little to clarify when, if ever, these requirements may be relaxed. It is clear, however, that such requirements may be waived, if the waiver is knowing and intelligent.

Notice-and-Demand Statutes

To avoid having FSSP attend trials when their findings are not contested, some jurisdictions have enacted what are known as notice-and-demand procedures.[5] These pretrial procedures permit the admission of a laboratory report if (1) the defense is notified that the prosecution intends to introduce the report at trial and (2) the defense fails to demand the presence of the FSSP as a witness. In other words, failure to demand the FSSP's presence constitutes a waiver of the right of confrontation. Of course, the report must accompany the notification.

In *Melendez-Diaz*, the Court seemed to approve one type of notice-and-demand statute. The Court wrote: "The right to confrontation may, of course, be waived, including by failure to object to the offending evidence; and States may adopt procedural rules governing the exercise of such objections."[6] In a subsequent passage, the Court wrote: "It suffices to say that what we have referred to as the 'simplest form [of] notice-and-demand statutes' . . . is constitutional . . .."[7]

The "simplest" notice-and-demand statutes do not place any additional burden on the defense—i.e., simply notifying the prosecution that the defense "demands" the examiner's presence suffices. In contrast, statutes that require the defense to comply with requirements in addition to a simple demand may be constitutionally suspect. For example, a statute that makes the

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[2] 557 U.S. 305 (2009).

[3] 564 U.S. 647 (2011). There was no majority opinion in *Williams*, and the fifth vote in favor of the judgment disagreed with the plurality's reasoning. The lower courts have adopted disparate positions when interpreting *Williams*.

[4] 132 S. Ct. 2221 (2013).

[5] One commentator has divided these statutes into four categories: (1) notice-and-demand statutes, (2) notice-and-demand-plus provisions, (3) anticipatory demand statutes, and (4) defense subpoena procedures. Metzger, *Cheating the Constitution*, 59 Vand. L. Rev. 475, 481–91 (2006).

[6] 557 U.S. at 314 n.3.

[7] *Id.* at 327 n.12.

defense (1) call the examiner in the defense case-in-chief,[8] (2) state an objection,[9] (3) satisfy a good faith requirement,[10] or (4) comply with a "substantial dispute" requirement[11] are impermissible because they add conditions that would not be permitted at trial.[12]

Waiver

However, the Supreme Court's observations concerning the "simplest" notice-and-demand provisions did not contain a detailed analysis of the waiver issue. Defense counsel cannot intelligently waive an examiner's presence unless counsel understands the basis of the examiner's opinion.[13] Waiving a client's constitutional right without adequate information would be ineffective assistance of counsel. For example, in *State v. Caulfield*,[14] the Minnesota Supreme Court found the state notice-and-demand statute unconstitutional because the defense was not provided sufficient notice: "At a minimum, any statute purporting to admit testimonial reports without the testimony of the preparer must provide adequate notice to the defendant of the contents of the report and the likely consequences of his failure to request the testimony of the preparer. Otherwise, there is no reasonable basis to conclude that the defendant's failure to request the testimony constituted a knowing, intelligent, and voluntary waiver of his

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[8] In Briscoe v. Virginia, 130 S. Ct. 1316 (2010), the Supreme Court vacated the judgment of the Supreme Court of Virginia and "remand[ed] the case for further proceedings not inconsistent with the opinion in *Melendez-Diaz*." The Virginia statute permitted a certificate of analysis to be admitted in evidence without testimony from the forensic analyst but gave the defendant the "right to call" the analyst as an adverse witness. In sum, it did not require the Commonwealth to call the forensic analyst in its case-in-chief. On remand, the Virginia Supreme Court held the statute unconstitutional because it "placed an impermissible burden" on the defense. Cypress v. Commonwealth, 699 S.E.2d 206, 213 (Va. 2010).

[9] In State v. Laturner, 218 P.3d 23 (Kan. 2009), the Kansas Supreme Court held that the state notice-and-demand statute was unconstitutional because it required the defendant to state an objection and the grounds for the objection.

[10] *See* State v. Cunningham, 903 So. 2d 1110, 1122 (La. 2005) ("Consequently, the burden to demonstrate good faith must be featherweight so as not to adversely impact the defendant's right to confrontation. The defendant can satisfy the good-faith requirement by merely indicating a preference for live testimony by requesting a subpoena issue for the preparer of the certificate of analysis.").

[11] *See* City of Reno v. Howard, 318 P.3d 1063, 1068 (Nev. 2014) ("We conclude that the U.S. Supreme Court's decision in *Melendez–Diaz* requires us to overrule our prior decision in *Walsh*, where we held that NRS 50.315(6) adequately protected the rights provided by the Confrontation Clause. Therefore, we now hold that the requirement of NRS 50.315(6)—that a defendant must establish a substantial and bona fide dispute regarding the facts in a declaration made and offered as evidence pursuant to NRS 50.315(4)—impermissibly burdens the right to confrontation.").

[12] *Melendez-Diaz* addressed this issue:
Converting the prosecution's duty under the Confrontation Clause into the defendant's privilege under state law or the Compulsory Process Clause shifts the consequences of adverse-witness no-shows from the State to the accused. More fundamentally, the Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court. Its value to the defendant is not replaced by a system in which the prosecution presents its evidence via ex parte affidavits and waits for the defendant to subpoena the affiants if he chooses. 557 U.S. at 324.

[13] *See* Johnson v. Zerbst, 304 U.S. 458 (1938) ("A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege.").

[14] 722 N.W.2d 304 (Minn. 2006).

confrontation rights."[15]

Right to Challenge Report at Trial

The admissibility of a laboratory report pursuant to a notice-and-demand provision does not preclude a substantive challenge to the report.[16] For example, in *State v. Gai*[17] the court pointed out that admissibility did not foreclose an attack on the reliability of the report: "Nothing in the text of M.R. Evid. 803(6) provides that a defendant's failure to challenge the reports prior to trial results in a forfeiture of his right to do so at trial. The Rule speaks to the admission of the reports, not the effect of the admitted evidence."

[15] *Id.* at 313.

[16] In other words, the defense is stipulating only to the content of the report, not its accuracy.

[17] 288 P.3d 164, 167 (Mont. 2012).