

COA Opinion: Expert testimony based on laboratory analysis by non-testifying analysts violated the Confrontation Clause

27. August 2010 By Jason Byrne

On August 24, 2010, the Court of Appeals published Judge's Saad's opinion in [People v. Dendel, No. 247391](#). The defendant in this case had been convicted of second-degree murder for causing the death of her domestic partner by injecting him with a fatal dose of insulin. This case had been remanded by the Michigan Supreme Court for examination of Confrontation Clause issues in light of the recent United States Supreme Court decision in *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009). Here, these Confrontation Clause issues related to the testimony of a toxicologist who had testified about the level of glucose found in the alleged victim's system based upon the findings of forensic toxicology tests he did not perform compiled in a report he did not prepare. The Court of Appeals concluded that, under the current standards, the report of a zero-glucose level in the body was a testimonial statement, and that the defendant's constitutional right to confront his accusers was violated where the trial court allowed an expert witness to give hearsay testimony about those glucose levels. The Court of Appeals, however, found that this was error was harmless beyond a reasonable doubt because of the wealth of other evidence, establishing the cause of death and supporting defendant's conviction.

To begin with, the Court of Appeals reviewed the state of the law regarding the Confrontation Clause in the wake of *Melendez-Diaz*, which had held that, in connection with a narcotics trafficking case, certificates from a state laboratory that a particular substance was a certain quantity of cocaine were testimonial in nature and their admission, without the analysts' testimony, violated the Confrontation Clause. After this decision, another panel of the Michigan Court of Appeals found that an autopsy report prepared by two non-testifying medical examiners could be admitted, through the testimony of a third medical examiner, without a violation of the Confrontation Clause because the report was not testimonial in light of the fact that it was prepared pursuant to a statutory duty, and not a request from law enforcement. [People v. Lewis, No. 274508](#).

Judge Saad distinguished the present case from *Lewis*, because here the lab tests were not done pursuant to an independent statutory duty, but to assist in determining if the decedent died from an insulin injection. Thus, the report of a zero glucose level, which supported the insulin injection theory, was testimonial in nature and its admission violated the Confrontation Clause.

The Court noted that, at trial, the defendant did not object on Confrontation Clause grounds, but also found the existing jurisprudence at the time of trial would have made such an objection futile. Thus, the majority of the Court of Appeals decided to treat the issue as if it had been preserved, and determine if the constitutional error was harmless beyond a reasonable doubt. The Court found that it was harmless error because there was other

expert testimony that supported the conclusion that death was due to hypoglycemic shock; because the defendant raised the defense that the decedent had injected the insulin himself; and because of the other evidence which supported motive and a guilty state of mind. Thus, despite the constitutional violation, the Court of Appeals affirmed the conviction.

In a [concurring opinion](#), Judge Wilder disagreed with the majority's decision to use a legal fiction to treat the Confrontation Clause issue as properly preserved.