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Lab Analyst Decision Complicates Prosecutions

High Court Requires Scientists to Testify

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The predictions are dire. In New York, murderers could walk free. In Fairfax County, drunken driving cases could be dismissed. And nationwide, thousands of drug cases might have to be thrown out of court annually.

Legal experts and prosecutors are concerned about the results of last month's U.S. Supreme Court ruling that requires lab analysts to be in court to testify about their tests. Lab sheets that identify a substance as a narcotic or breath-test printouts describing a suspect's blood-alcohol level are no longer sufficient evidence, the court ruled. A person must be in court to talk about the test results.

The opinion, written by Justice Antonin Scalia, has prosecutors and judges shaking their heads in disgust and defense lawyers nodding with satisfaction at the notion that the Constitution's Sixth Amendment guarantee that defendants "shall enjoy the right . . . to be confronted with the witnesses against him" is not satisfied by a sheet of paper.

"This is the biggest case for the defense since *Miranda*," said Fairfax defense lawyer Paul L. McGlone, referring to the Supreme Court ruling that required police to inform defendants of their Fifth Amendment right against self-incrimination. He said judges "are no longer going to assume certain facts are true without requiring the prosecution to actually put on their evidence."

Four drunken driving cases in Fairfax and at least one in Prince William County have been thrown out by judges after defense attorneys used the new ruling to challenge the prosecution's evidence.

States and counties across the country handle evidence differently, so the problems caused by the ruling vary widely. But many jurisdictions have a similar issue: Crime labs that test drug and DNA samples face huge backlogs even when scientists and analysts do not have to testify. If the workers are taken out of the labs to appear in court, those backlogs will grow.

In drug cases, more than 1.5 million samples are analyzed by state and local labs each year, resulting in more than 350,000 felony convictions, national statistics show. "Even if only 5 percent of drug cases culminate in trials, the burden on the states is oppressive," a group of state attorneys general wrote in a brief for the case.

The percentage of cases going to trial could well go up if defense lawyers think that bringing lab analysts to court will help their cases. Lawyers also could go to trial with the hope of a dismissal if the analyst cannot be there.

Scott Burns, executive director of the National District Attorneys Association, was a prosecutor in Utah for 16 years. "Sometimes it's the game within the game," he said. With less incentive to plea bargain, defense attorneys might try more cases, and "that's going to put more stress on the system," Burns said.

In Prince George's County, lab analysts testify regularly, but the volume of cases is so great that "we still are not able to process all the drug cases," State's Attorney Glenn F. Ivey said. "There's a triage going on in court cases. Some marijuana cases don't get tested, and we end up throwing them out."

Then there are the big rural states, where crime labs are hours away from many county courthouses. "It'll have a huge impact," said Ladd Erickson, state's attorney in McLean County, N.D. "It's not volume as much as it is distance. For some counties, round trip is going to be 10 to 12 hours to testify" for the lab analyst to travel to court.

Burns said 42 states and the District are affected by the Supreme Court case, *Melendez-Diaz v. Massachusetts*.

The court might be looking to blunt the impact. It has agreed to hear an Alexandria case that could provide prosecutors with an escape hatch from the requirement of bringing lab analysts to court. The court will rule on whether Virginia's law requiring the defense to provide advance notice when it wants the lab analyst to testify is constitutional. But a ruling on that case probably will not come until next year, and many lawyers believe Virginia's law is deficient.

Last month's Supreme Court ruling emerged from a case in which Luis E. Melendez-Diaz allegedly stashed cocaine in a Boston police car while he was under arrest. The certificate of analysis, determining that the white powder found in the car was cocaine, was entered without a technician's testimony and with only minor objection.

Scalia wrote that Melendez-Diaz "was entitled to 'be confronted with' the [lab] analysts at trial."

The ruling was 5 to 4, and the dissent written by Justice Anthony M. Kennedy predicted a real-world disaster. "The Court threatens to disrupt forensic investigations across the country and to put prosecutions nationwide at risk of dismissal . . . when a particular laboratory technician . . . simply does not or cannot appear," Kennedy wrote.

Kennedy added, "Guilty defendants will go free, on the most technical grounds, as a direct result of today's decision, adding nothing to the truth-finding process."

In Manhattan, a unique situation in the medical examiner's office could result in disaster for homicide cases, Chief Assistant District Attorney Mark Dwyer said. The personnel turnover in the medical examiner's office is so great that the pathologist who performs an autopsy on a victim often is not still employed there 18 months later, when the case goes to trial. So the accepted practice in courts has been to admit the autopsy report without any testimony by the person who determined the cause of death, Dwyer said.

In addition, New York's DNA lab uses an assembly line approach in which as many as 12 people have roles in breaking down and analyzing a piece of evidence for traces of DNA, Dwyer said. "We would be extremely concerned if the [Melendez] issue extended into DNA analysis and autopsy reports," he said. "That would have a major and negative impact on the ability to process serious cases."

In drunken driving cases, Fairfax also faces a problem. In most DWI cases, the county uses breath-test

technicians stationed in the jail to perform the blood-alcohol tests rather than the arresting officers so the entire 1,300-officer force does not have to be trained on the machines. But there are only a few dozen technicians in Fairfax processing about 4,000 DWI cases a year. Training Virginia's largest police force on the machines is not feasible financially, spokeswoman Mary Ann Jennings said.

"I think the effect of this could be very, very bad for public safety," said Fairfax Commonwealth's Attorney Raymond F. Morrogh. "If we are not able to use this evidence, which is reliable, but it's excluded because we can't get the technician here, the guilty will go free. It's a real challenge for us to deal with it." Fairfax is asking for continuances in any case with a *Melendez-Diaz* challenge. Loudoun County also is asking for continuances.

On Friday, state Sen. Ken Cuccinelli (R-Fairfax), a candidate for attorney general, called for a special session of the General Assembly to amend Virginia's law. His proposal would require defendants to provide advance notice that they object to a lab analysis, and then prosecutors would have enough time to bring in the technician.