INSIDE THE MINDS

Witness Preparation and Examination for DUI Proceedings

Leading Lawyers on Selecting, Preparing, and Examining Expert Witnesses in DUI Cases

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The Impact of 2009 Case Decisions on DUI Prosecution and Defense Expert Witnesses

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Overview

Two major Supreme Court decisions within this past year have opened the door to significant change in how driving under the influence (DUI) prosecutions and their respective defenses will be conducted in California courts. In June 2009, the U.S. Supreme Court issued its decision in *Melendez-Diaz v. Massachusetts*, which addressed a defendant's right to confrontation under the Sixth Amendment. The *Melendez-Diaz* decision affects the prosecution's burden with respect to the production of scientific expert witnesses in DUI trials. Conversely, the California Supreme Court's decision last July in *People v. McNeal* affects the defense by allowing the defense to affirmatively introduce scientific expert witness testimony in its case in chief. How each of these two cases will affect the calling and examination of expert witnesses by both the prosecution and the defense will be discussed below.

The Prosecution's Burden—the Right to Confrontation

No matter how talented the defense lawyer is, that lawyer cannot cross-examine (i.e., impeach, discredit, rattle, undermine, or expose) the witness who is not present at trial. As it presently stands, the prosecution is attempting to and being allowed by judges to introduce otherwise inadmissible hearsay testimony through the use of expert witnesses. Through this circuitous method of presenting evidence, the prosecution is presenting the most damaging aspects of their DUI case to the jury while protecting their scientific expert witnesses from the critical cross-examination that can undermine their case. In effect, the prosecution is skirting the defendant's right to confrontation, which is promised to him or her under the Sixth Amendment of the U.S. Constitution.

Examples of how detrimental to the defense this method of presenting evidence can be in a DUI trial are demonstrated by, but not limited to, the following:

1. Prosecution introducing and the court admitting the results of the defendant's blood test through an expert who did not perform the blood test (See *People v. Lopez*, discussed below.)

2. Prosecution introducing and the court admitting evidence that a breath-testing instrument was properly maintained and functioning through an expert witness that did not maintain or check the accuracy of the breath-testing instrument
3. Prosecution introducing and the court admitting evidence that an evidential breath-testing instrument was properly calibrated through the use of an expert witness who did not calibrate the instrument (See Appendix A.)

To have a fighting chance in defending a defendant in a DUI trial, the defense lawyer must ensure that the people who actually played a role in analyzing the defendant's blood, breath, or urine test results are the people who are testifying at trial concerning the work they have performed. Given that most of the prosecution's scientific expert witness testimony is devoted to proving that the defendant drove with a blood-alcohol concentration (BAC) of greater than 0.08 percent, this chapter will focus primarily on these witnesses and how to ensure their presence at trial. Accordingly, the sections below will focus on California law governing the admission of breath test results, the U.S. Supreme Court's decisions affecting Sixth Amendment right of confrontation, and the response from the California Supreme Court and California Courts of Appeal.

Admission of the Breath Test Results

In California, breath test results can be admitted under either of two methods. The first method is by laying a foundation, pursuant to *People v. Adams*. Under *Adams*, breath test results may be admitted, provided that the prosecution establishes: (1) the reliability of the breath-testing instrument, (2) the proper administration of the breath test, and (3) a competent breath test operator. *People v. Williams*, 28 Cal.4th 408, 414 (Cal. 2002). To meet these requirements, the prosecution may show either independent proof of each of these three elements or compliance with Title 17 of the California Code of Regulations. *Williams,* Cal.4th at 414.

Laying the Adams *Foundation*

Establishing the three elements of an *Adams* foundation should require testimony from at least two witnesses. The first witness the prosecution

needs to demonstrate the reliability of the breath-testing instrument, if it is a preliminary alcohol-screening device (PAS), is a PAS test coordinator. Alternatively, if the breath-testing device is a non-portable evidential breath-testing device (i.e., not a roadside breath-testing device), the prosecution usually needs to call a forensic alcohol supervisor, analyst, or trainee. Any of these people, assuming they are the ones responsible for either maintaining or calibrating (only with respect to the portable breath-testing devices) the device can testify to the reliability of the instrument based upon its reading of a known solution of ethanol.

The second witness that the prosecution will need to testify to establish the proper administration of the breath test and a competent operator is usually the officer who administered the test. This officer will qualify as an expert witness for the narrow purpose of reciting to the judge or jury how to properly administer a breath test, and his or her training on the operation of the breath-testing instrument itself. As will be discussed below, the importance of the *Melendez-Diaz* decision will more likely affect the prosecutor's burden in producing the PAS test coordinator or forensic alcohol supervisor, analyst, or trainee than the officer as an expert witness.

Demonstrating Compliance with Title 17

To demonstrate the reliability of a breath-testing instrument in compliance with Title 17 of the California Code of Regulations, the district attorney must be able to show, among other things, that the:

1. Breath-testing instrument was calibrated every 10 days or 150 subjects, whichever comes sooner (§ 1221.4(a)(2))
2. Reference samples (i.e., the known solution of ethanol) were provided by a properly licensed laboratory (§1221.4(a)(2)(A))
3. Person responsible for the device is a forensic alcohol supervisor, analyst, or trainee (§1215.1 (f),(h); § 12l6(e)-(g))
4. Test solution used is from 33.8 to 34.2 degrees centigrade
5. Temperature of the PAS device itself is in the range 20 to 36 degrees centigrade
6. PAS numerical result is within plus or minus 0.01 of the test solution (*People v. Hallquist*, 133 Cal.App.4th 291, 294 (Cal. Ct. App. 2005))

Moreover, in order for the district attorney to demonstrate the proper administration of an evidential breath test in compliance with Title 17 of the California Code of Regulations, the district attorney must be able to show that there was at least a fifteen-minute observation period of the defendant prior to its use. § 1219.3.

Yet, despite the apparently long list of requirements that must be shown to demonstrate compliance with Title 17, the California Supreme Court has made it clear that breath test results will be admitted even if all of the requirements of Title 17 are not strictly complied with, so long as an *Adams* foundation can be laid. *Williams*, Cal.4th at 414. What is even more disturbing, however, is that the California Supreme Court stated that the admission of breath test results by showing compliance with Title 17 "*guarantees* the People *quick* and *certain admission* of evidence, *eliminating* laborious *qualification*, critical *cross-examination*, and the *risk of exclusion*." *Williams*, Cal.4th at 418.

This chapter will attempt to address this dictum from the California Supreme Court in its concluding remarks to the *Williams* case. Although the California Supreme Court has indirectly reaffirmed this dictum post *Crawford v. Washington* and *Davis v. Washington* in its decision in *People v. Geier*, this line of thought seems certainly foreclosed after the court's holding in *Melendez-Diaz*. However, despite the efficacy of *Melendez-Diaz*, the California Courts of Appeal have split on whether *Geier* is still good law post *Melendez-Diaz*. Four critical cases from the California Courts of Appeal are currently under a grant of review by the California Supreme Court concerning the continued vitality of *Geier*. Until the California Supreme Court rules on these four cases, and even thereafter, it is important that defense counsel understand the debate contained in these cases concerning a defendant's right to confrontation so that he or she can object to the admission of certain evidence in DUI cases under both state and federal law.

The U.S. Supreme Court's Revival of the Sixth Amendment

In *Crawford v. Washington*, the U.S. Supreme Court held that the Sixth Amendment guarantees a defendant's right to confront those witnesses "who 'bear testimony'" against him or her. *Melendez-Diaz*, 129 S.Ct at 2531;

citing to *Crawford*, 541 U.S. at 54. The *Crawford* court then identified three core classes of testimonial statements as:

1. *Ex parte* in-court testimony or its functional equivalent material, such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pre-trial statements that declarants would reasonably expect to be used prosecutorially
2. Extra-judicial statements contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions
3. Statements that were made under circumstances that would lead an objective witness reasonably to believe the statement would be available for use at a later trial (*Crawford* , 541 U.S. at 52)

The *Crawford* court described "statements taken by police officers in the course of interrogations" as testimonial under any definition. *Crawford*, 541 U.S. at 52. Since this definition of testimony was sufficient to decide whether the declarants' statements in *Crawford* were testimonial, the court declined to further define testimonial statements. Thereafter, the *Crawford* court made clear that "[a] witness's testimony against a defendant is thus inadmissible unless the witness appears at trial or, if the witness is unavailable, the defendant had a prior opportunity for cross-examination." *Crawford*, 541 U.S.

In *Davis v. Washington*, the court was forced to further define what is testimony within the meaning of the Sixth Amendment, although it did not attempt to set forth an exhaustive classification of testimonial or non-testimonial statements. *Davis v. Washington*, 547 U.S. 813, 822 (2006). Accordingly, in *Davis*, the court simply defined "statements as nontestimonial for purposes of the Confrontation Clause when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency." Id. at 822. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution. Id.

Of course, where exactly breath, blood, or urine test results would fit into the court's definition of "testimony" was not expressly answered. Therefore, following the *Crawford* and *Davis* decisions, lower courts across the United States were free to determine how they wished to characterize the admission of scientific evidence at trial depending upon their particular view of the reach of the defendant's Sixth Amendment right to confrontation. How the California Supreme Court weighed in in 2007 is discussed below.

The California Supreme Court's Response—Limitations Abound

In *People v. Geier*, DNA Expert B testified about a laboratory report prepared by DNA Expert A, which indicated that the semen found in the rape-murder victim must have come from the defendant. The issue that the California Supreme Court addressed in *Geier* was whether the defendant's Sixth Amendment right to confrontation was violated by the trial court's admission of Expert B's testimony concerning the analysis performed by Expert A. *People v. Geier*, 41 Cal.4th 555, 604 (Cal. 2007). Interestingly, the California Supreme Court tacitly declined to follow the definition of testimony set forth in *Davis*, and instead created its own definition of testimony to apply in the context of the admission of scientific evidence—a definition it purported to "extrapolate" from *Crawford* and *Davis*. Accordingly, the *Geier* court stated that the rule it extrapolated is that "a statement is testimonial if (1) it is made to a law enforcement officer or by or to a law enforcement agent and (2) describes a past fact related to criminal activity for (3) possible use at a later trial." Id. at 607. Conversely, the *Geier* court held that a statement that does not meet all three criteria is not testimonial. Id. at 607.

However, not only was it unnecessary to create a new definition of testimony under the Sixth Amendment of the U.S. Constitution, but the *Geier* court's application of its own definition manifestly subterfuges both *Crawford* and *Davis*. While conceding that elements one and three of its definition clearly reflected that that analyst's report was testimonial, the *Geier* court disputed that the second element reflected the same. Under the second element of the *Geier* court's definition of testimony, the pertinent analysis should have been whether the laboratory report (i.e., a statement) was made in response to a non-emergency police interrogation (or at their

request) for the primary purpose of establishing past events potentially relevant to a later criminal prosecution. Stated more succinctly, was the primary reason for having the defendant's DNA analyzed to establish whether he raped the decedent victim? Clearly, the answer was yes, and under *Crawford* and *Davis*, this testimonial statement was subject to confrontation.

Though having considered this application of *Davis*, the *Geier* court rejected the above-mentioned analysis. Id. at 607. The *Geier* court held that because the district attorney may or may not use the laboratory report at trial, depending upon whether the report implicated or exonerated the defendant, the "primary purpose" of the laboratory report (i.e., statement) was not to be used at trial and was therefore not "testimonial" under *Davis*. The California Supreme Court perverted the "primary purpose" test in *Davis* by shifting the relevant focus from whether the primary purpose of obtaining the statement (i.e., laboratory report) was to establish prior criminality to whether the primary purpose of obtaining the statement was for later use at trial. Under the California Supreme Court's enunciation of the "primary purpose" test in *Davis*, no scientific evidence would ever be subject to confrontation under the Sixth Amendment because that evidence always has a 50 percent chance of exonerating the defendant.

Moreover, the *Geier* court threw in four other reasons to find the laboratory report non-testimonial. The court stated that the report was not testimonial because: (1) the statement (i.e., laboratory report) represents the contemporaneous recordation of observable events, (2) the laboratory report was made as part of the analyst's job and not to incriminate the defendant, (3) the laboratory results could lead to either incriminatory or exculpatory results, and (4) an expert can testify to hearsay if the expert is relying on reliable hearsay to form his or her own opinion.

However, all of these last four reasons can be quickly disposed of as violative of *Crawford* and *Davis*. First, regardless of whether the laboratory analyst is simply recording what he or she is presently seeing, the laboratory analyst is making these recordations for the primary purpose of establishing past criminality. This makes the laboratory analyst's "contemporaneous recording" still testimonial. Second, the fact that the analyst is simply doing his or her job does not change the fact that it is a testimonial statement

within the meaning of *Davis*. Rather, the California Supreme Court's use of this factor strikes more as an attempt to overrule *Crawford* and revert to the reliability test in *Ohio v. Roberts*. Third, the fact that the laboratory results can be incriminatory or exculpatory was addressed in the paragraph above. Finally, the court in *Crawford* held that the Sixth Amendment is not bound to the state laws of evidence.

Strengthening the Sixth Amendment—Melendez-Diaz v. Massachusetts

In *Melendez-Diaz v. Massachusetts*, the U.S. Supreme Court looked into whether the admission of certificates from a laboratory analyst identifying a substance as cocaine in lieu of that analyst's live testimony at trial was violative of the Sixth Amendment. *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527, 2531 (2009). The court in *Melendez-Diaz* held that it was. Id. at 2532. In fact, the *Melendez-Diaz* court described the certificates as a type of core class of testimonial statements that were subject to confrontation because they are like affidavits. Id. These certificates were like affidavits because they are "incontrovertibly a solemn declaration or affirmation made for the purpose of establishing or proving some fact." The "certificates" are functionally identical to live, in-court testimony, doing "precisely what a witness does on direct examination." *Melendez-Diaz*, 129 S.Ct at 2532; citing to *Davis v. Washington*, 547 U.S. 813, 830 (2006). Accordingly, absent a showing that the analysts were unavailable to testify at trial and that the petitioner had a prior opportunity to cross-examine them, the petitioner was entitled to "'be confronted with'" the analysts at trial. *Melendez-Diaz*, 129 S.Ct at 2532.

Though, on its face, the *Melendez-Diaz* holding does not expressly overrule *Geier*, the testimonial statements in the two cases are entirely different. In *Geier*, the California Supreme Court addressed a testimonial statement that was admitted by an expert relying upon another expert's report. In *Melendez-Diaz*, the court addressed the admission of a testimonial statement in the form of an affidavit, to which no expert testified. In the latter case, the court found the statement to be within the core class of testimonial statements identified thrice in *Crawford, Davis*, and *Melendez-Diaz* and subject to confrontation. Whether the laboratory report in *Geier* is within the core class of testimonial statements is a point the court has yet to consider. However, regardless of the absence of an express holding on the issue, the

Melendez-Diaz court makes it abundantly clear through the cited language below that the preparer of the laboratory is subject to confrontation:

> 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," 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 (7th Cir. 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.
>
> *Melendez-Diaz*, 129 S.Ct at 2532, FN 1.

The strongest counterpoint that the defendant is not entitled to confront the laboratory analyst at trial when another expert testifies concerning the analyst's report is if the laboratory analyst was merely preparing documents in the regular course of "equipment maintenance." In this instance, the court indicates that the analyst's report may be non-testimonial. However, this statement is substantially limited later in the court's opinion wherein the court rejected the notion that affidavits like the one at issue in *Melendez-Diaz* can be admitted as a "business-records" exception to the hearsay rule. *Melendez-Diaz,* 129 S.Ct at 2538. The *Melendez-Diaz* court stated that although "[d]ocuments kept in the regular course of business may ordinarily be admitted at trial despite their hearsay status…that is not the case if the regularly conducted business activity is the production of evidence for use at trial." Id. at 2538.

The implications of the *Melendez-Diaz* decision to defense counsel in any DUI case across the nation are addressed in the section below. For the time being, it suffices to say that defense counsel should consider objecting to the admission of any scientific laboratory reports if the preparing analyst does not testify. In preparing your *in limine* motions to object to the admission of this evidence, the chart below can be used to quickly identify the repudiated justifications that the dissent raised in *Melendez-Diaz* to dispense with the defendant's right to confrontation when dealing with the admission of scientific evidence, as well as a majority of the court's rationale for why the proffered justifications fail.

Proffered Reason for Dispensing with Sixth Amendment when Admitting Scientific Evidence	***Melendez-Diaz* Majority's Rationale for Rejecting Reasons to Dispense with Sixth Amendment**
1. Analysts are not subject to confrontation because they are not "accusatory" witnesses, in that they do not directly accuse the petitioner of wrongdoing; rather, their testimony is inculpatory only when taken together with other evidence linking the petitioner to the contraband.	1. The text of the Sixth Amendment contemplates two classes of witnesses—those against the defendant and those in his favor. The prosecution *must* produce the former; the defendant *may* call the latter. Contrary to respondent's assertion, there is not a third category of witnesses, helpful to the prosecution but somehow immune from confrontation.
2. A second reason the dissent contends that the analysts are not "conventional witnesses" (and thus not subject to confrontation) is that they "observe[d] neither the crime nor any human action related to it."	2. The dissent provides no authority for this particular limitation of the type of witnesses subject to confrontation. Nor is it conceivable that all witnesses who fit this description would be

	outside the scope of the Confrontation Clause. For example, is a police officer's investigative report describing the crime scene admissible absent an opportunity to examine the officer? The dissent's novel exception from coverage of the Confrontation Clause would exempt all expert witnesses—a hardly "unconventional" class of witnesses.
3. A third respect in which the dissent asserts that the analysts are not "conventional" witnesses (and thus not subject to confrontation) is that their statements were not provided in response to interrogation.	3. As we have explained, "[t]he Framers were no more willing to exempt from cross-examination volunteered testimony or answers to open-ended questions than they were to exempt answers to detailed interrogation." Respondent and the dissent cite no authority, and we are aware of none, holding that a person who volunteers his testimony is any less a "'witness against the defendant," than one who is responding to interrogation. In any event, the analysts' affidavits in this case *were* presented in response to a police request. If an affidavit submitted in response to a police officer's request to "write down what happened" suffices to trigger the *Sixth Amendment's* protection (as it apparently does, see *Davis*, 547 U.S. at 819-820 (THOMAS, J., concurring in judgment in part and

	dissenting in part)), then the analysts' testimony should be subject to confrontation as well.
4. Respondent claims that there is a difference, for Confrontation Clause purposes, between testimony recounting historical events, which is "prone to distortion or manipulation," and the testimony at issue here, which is the "resul[t] of neutral, scientific testing."	4. This argument is little more than an invitation to return to our overruled decision in Ohio v. *Roberts*, 448 U.S. 56 (1980), which held that evidence with "particularized guarantees of trustworthiness" was admissible notwithstanding the Confrontation Clause. What we said in *Crawford* in response to that argument remains true: "To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination… Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes."
5. Respondent argues that the analysts' affidavits are admissible without confrontation because they are "akin to the types of official and business records admissible at common law."	5. Documents kept in the regular course of business may ordinarily be admitted at trial despite their hearsay status. See Fed. Rule Evid. 803(6). But that is not the case if the regularly conducted business

	activity is the production of evidence for use at trial. The analysts' certificates—like police reports generated by law enforcement officials—do not qualify as business or public records for precisely the same reason.

Discord in the California Courts of Appeal

In the wake of *Melendez-Diaz*, the California Courts of Appeal have struggled to harmonize whether the California Supreme Court's decision in *Geier* survives *Melendez-Diaz*. Of the four cases to address the issue, the courts have split 3/1 in favor of finding *Geier* to still be good law post *Melendez-Diaz*. Although none of the decisions are citable because they are currently under review by the California Supreme Court, they are discussed to provide defense counsel an understanding of how to frame their confrontation clause objections to the admission of scientific evidence pending and after the California Supreme Court weighing in.

People v. Rutterschmidt

In *Rutterschmidt*, the Second Appellate District addressed essentially the same issue as *Geier*—whether the admission of Expert B's testimony concerning a laboratory report by Expert A, whom he supervised, violated the defendant's Sixth Amendment right to confrontation. *People v. Rutterschmidt*, 176 Cal.App.4th 1047 (Cal. Ct. App. 2009). In *Rutterschmidt*, the prosecution introduced the testimony of the chief laboratory director of the Los Angeles County Department of Coroner that a report prepared by another criminalist demonstrated that the decedent had various prescription drugs and alcohol in his blood at the time of his death. The prosecution argued that the fact that the defendant had possession of an identical prescription drug in her home was circumstantial evidence that the defendant drugged the decedent before running him over with her car and killing him.

In rejecting the defendant's claim that her right to confrontation was violated, the *Rutterschmidt* court quite convincingly asserted that there was no violation because "there can be no violation of a defendant's confrontation rights where the challenged statement was not admitted for its truth." *Rutterschmid* , 176 Cal.App.4th at 1076; citing to *Tennessee v. Street*, 471 U.S. 409, 414 (1985); *Crawford,* 541 U.S. at 59, FN 9 ("The [confrontation c]lause…does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.")) Instead, the *Rutterschmidt* court reasoned that Expert B's testimony was admitted for the non-hearsay purpose under California Evidence Code Section 802, which permits an expert to testify about inadmissible hearsay if it is the type of evidence that experts reasonably rely upon in forming their opinions.

The majority's reasoning in *Rutterschmidt* would have been persuasive except for the fact that the prosecutor argued that it was true that the decedent was drugged and the defendant was the one who killed him because she had possession of the same prescription pills. Clearly, the expert's report was used for the truth of the matter asserted. The defendant's right to confrontation was subverted by a state law of evidence. As the court has previously stated in *Crawford*, the Sixth Amendment will not be thwarted by state laws of evidence.

People v. Lopez

In *People v. Lopez*, the court addressed whether the defendant's right to confrontation was violated by: (1) the *Geier* and *Rutterschmidt* fact pattern with respect to a chain of custody issue, plus (2) the trial court's admission of the defendant's blood test results absent the expert who tested the blood testifying. *People v. Lopez*, 177 Cal.App. 4th 202 (Cal. Ct. App. 2009). The *Lopez* court did not satisfactorily explain why they found no violation with the first issue. However, the *Lopez* court stated that the second issue was indistinguishable from *Melendez-Diaz* and a confrontation clause violation.

People v. Dungo

In *People v. Dungo*, the analogous situation to *Geier* and *Rutterschmidt* is presented. *People v. Dungo*, 176 Cal.App.4th 1388 (Cal. Ct. App. 2009). Except here, the court raises a fantastic challenge to the almost persuasive

reasoning in *Rutterschmidt* (i.e., that expert witness testimony is not presented for the truth of the matter asserted and therefore is exempt from confrontation). In *Dungo*, the court pointed out that in the jury's instructions, the jury was told that in evaluating Expert B's testimony, the jury was to consider the reasons the expert relied upon in making his decision. Moreover, the jury was instructed to decide whether the information the expert relied upon was true and accurate, meaning the jury was to decide whether the laboratory report (here a coroner's report) of Expert A was true and accurate.

The *Dungo* court had little difficulty calling a spade a spade. In fact, the *Dungo* court bluntly stated that:

> To pretend that expert basis statements are introduced for a purpose other than the truth of their contents is not simply splitting hairs too finely or engaging in an extreme form of formalism. It is, rather, an effort to make an end run around a constitutional prohibition by sleight of hand.
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> *Dungo*, 176 Cal.App.4th at 1403.

Thereafter, the court explained that the people's reliance on Evidence Code Section 801, Subdivision (b), which allows an expert witness to offer opinions based on matters made known to him or her, whether or not admissible, if such material is reasonably relied upon by experts in the field, is misplaced. Where testimonial hearsay is involved, the confrontation clause trumps the rules of evidence. Otherwise, "[l]eaving the regulation of out-of-court statements to the law of evidence would render the confrontation clause powerless to prevent even the most flagrant inquisitorial practices." *Dungo*, 176 Cal.App.4th at 1403, citing to *Crawford*, 541 U.S. at 51.

People v. Gutierrez

People v. Gutierrez is another *Geier* and *Rutterschmidt* scenario coupled with the admission of a report as in *Lopez*. *People v. Gutierrez*, 177 Cal.App.4th 654 (Cal. Ct. App. 2009). In *Gutierrez*, the court concludes that *Melendez-Diaz* did not overrule *Geier* for the reason discussed above. In addition, the *Gutierrez*

court believed that because the report prepared by the Sexual Assault Response Team nurse was a contemporaneous statement as opposed to a near-contemporaneous statement like that described in *Melendez-Diaz*, *Geier* survives. However, the *Melendez-Diaz* court had already considered and rejected this latter argument made by the dissent. Specifically, the majority wrote that:

> The dissent first contends that a "conventional witness recalls events observed in the past, while an analyst's report contains near-contemporaneous observations of the test."

In reply, the court stated the following:

> It is doubtful that the analyst's reports in this case could be characterized as reporting "near-contemporaneous observations"; the affidavits were completed almost a week after the tests were performed. See App. to Pet. for Cert. 24a-29a (the tests were performed on November 28, 2001, and the affidavits sworn on December 4, 2001). But regardless, the dissent misunderstands the role that "near-contemporaneity" has played in our case law. The dissent notes that that factor was given "substantial weight" in *Davis, post,* at 17, but in fact that decision disproves the dissent's position. There, the court considered the admissibility of statements made to police officers responding to a report of a domestic disturbance. By the time officers arrived, the assault had ended, but the victim's statements—written and oral—were sufficiently close in time to the alleged assault that the trial court admitted her affidavit as a "present sense impression." *Davis*, 547 U.S. at 820. Though the witness's statements in *Davis* were "near-contemporaneous" to the events she reported, we nevertheless held that they could not be admitted absent an opportunity to confront the witness.
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> Id. at 830.

In any event, the *Gutierrez* court rejected the defendant's challenge to Expert B's testimony concerning Expert A's report. However, it did conclude that admission of Expert A's report violated the defendant's right to confrontation.

California Supreme Court to Weigh In

Which of the four cases currently under review the California Supreme Court will find persuasive is still to be determined. Although the court's opinion in *Dungo* appears to be the most fundamentally correct, it is questionable whether the California Supreme Court will go out of its way to declare that *Melendez-Diaz* has rendered the reasoning of *Geier* unpersuasive. By the time this chapter is published, the California Supreme Court will probably have let us all know.

How Do These Cases Affect My DUI Case?

Defense counsel in any DUI case should consider whether it is in their client's best interests to object to the admission of evidence from a non-testifying expert through a different testifying expert (i.e., a *Geier* situation). Below, I will detail where I believe objections in a typical DUI case for driving with greater than the statutory amount of permissible blood alcohol, or DUI drugs, can and should be made. The examples will focus on breath test cases.

In a DUI prosecution for driving with a BAC of greater than 0.08 percent, the prosecutor will usually present scientific evidence concerning the roadside or PAS breath test and the implied consent or evidential breath test. The prosecutor will usually present this evidence by laying an *Adams* foundation or demonstrating substantial compliance with Title 17. Yet, regardless of which method the prosecutor chooses to admit the breath test records, the prosecutor will invariably seek to introduce evidence that the breath-testing instruments were properly calibrated and maintained.

With respect to a PAS device, a typical maintenance and calibration log may look like Appendix B. Notice from Appendix B that there are different places for officers to place their initials, indicating that they have calibrated and/or maintained the breath-testing instrument. It is not uncommon for

several different officers within any particular police department to be responsible for the maintenance and calibration of a PAS device. Under *Geier*, the prosecutor has been able to lay an *Adams* foundation or demonstrate substantial compliance with Title 17 by simply calling one of the officers responsible for maintaining the PAS device. As an expert witness, that officer could testify to the maintenance and calibration work of the other officers. Therefore, it has not been uncommon for one officer to testify that his or her work and the work of the other officers were technically flawless. When the testifying officer is forced to admit an error by another officer, it is also not uncommon for that officer to wash his or her hands of the error and simply state that he or she has no personal knowledge of the error.

Through this system that is in place, the prosecutor is presenting his or her strongest case while shielding the case's weaknesses from cross-examination. Defense counsel can expose the error; however, the attorney is incapable of exposing the negligent officer or flawed device. In this hypothetical situation, where the prosecution is calling his or her strongest witness and shielding the weakest witness, it is advisable to object on the grounds identified in *Dungo*. However, assuming that there is no weakness to expose in the records, it is probably advisable to hold off on objecting under *Dungo* grounds because doing so may simply strengthen the prosecutor's case.

The admission of maintenance records for implied consent breath tests can be handled the same way as above. However, a key difference is that the forensic laboratories in charge of maintaining these instruments usually do not have the ability to calibrate these instruments. For example, the Draeger Alcotest 7110 MK III-C, the evidential breath-testing instrument used across San Mateo County, must be calibrated in Durango, Colorado, by Draeger Safety Diagnostics Inc. Each Draeger Alcotest employed in San Mateo County is theoretically calibrated yearly, and Draeger Inc. sends back a certificate that attests that the instrument was properly calibrated. (See Appendix A.) What if defense counsel objected under *Melendez-Diaz* and *Lopez* grounds that the certificate was inadmissible? Without much doubt, this objection must now be sustained by the trial court.

However, what about the prosecutor's ability to inform the jury that the Draeger Alcotest was properly calibrated by Draeger Inc. by having a forensic toxicologist who maintains the instrument testify that they have reviewed the certificate, and in their opinion the Draeger Alcotest was properly calibrated? Is this end around the Sixth Amendment permitted post *Melendez-Diaz*? Of course, since as you read above, your guess is 4:1 that courts like those in *Geier*, *Rutterschmidt*, *Lopez*, and *Gutierrez* will say yes. Although, as defense counsel, are you not going to argue that *Dungo* expresses the correctly reasoned position (i.e., the prosecutor is getting to argue that the Draeger Alcotest was properly calibrated without my ability to confront the person who calibrated the instrument)?

Think about it. What if you could successfully keep out evidence that the Draeger Alcotest was properly calibrated, because the prosecutor cannot fly in the person who calibrated the instrument from Durango, Colorado? Would that not be a nice victory? Of course it would. Although, as you probably guessed, the prosecutor is not without recourse here. All the prosecutor has to do to mitigate the loss of evidence is to call the local forensic alcohol supervisor, analyst, or trainee to state that, based upon his or her maintenance of the device, the device is properly calibrated. (See Appendix C.) However, defense counsel is still in a good position here, because he or she is now in the same situation as faced earlier with respect to challenging the admission of the PAS device maintenance and calibration records.

The reasoning from *Melendez-Diaz* and *Dungo* can apply in all sorts of situations. For example, in a DUI drug case, the defendant's right to confrontation can be asserted with respect to the laboratory technician who performed the analysis of the controlled substance through the GC/MS device. If there were differing presumptive or confirmatory tests that were performed by the prosecution's agents, the same objections can be raised. Post *Melendez-Diaz*, it should not be so easy anymore for the district attorney to prove your client guilty of DUI. If defense counsel can stymie the prosecutor on the technical aspects of his or her case, the defense attorney may secure a not-guilty verdict for his or her client at trial.

The Defense Case

A defendant accused of driving under the influence of alcohol can be charged under two separate code sections. *People v. McNeal*, 46 Cal.4th 1183, 1187 (Cal. 2009). The "generic DUI" provision prohibits driving "under the influence" of alcohol. Cal. Veh. Code, § 23152(a), (West, 2010). The "*per se* DUI" provision prohibits driving with a blood-alcohol level of 0.08 percent or more. Cal. Veh. Code, § 23152(b), (West, 2010). In July 2009, the California Supreme Court in *People v. McNeal* changed the common perception of "how a generic DUI charge can be…defended, at trial." *McNeal* , 46 Cal.4th at 1188. Now it is unequivocal that "competent evidence about partition ratio variability may be admitted [at trial] to defend against a generic DUI charge." Id. at 1188. (For a discussion of partition ratio, see the *McNeal* decision included as Appendix D.)

The goal in conducting individualized partition ratio testing is to determine whether the defendant's partition ratio is higher or lower than the 2100:1 standard. If the defendant's individualized partition ratio is lower than 2100:1, it can be argued that the defendant's BAC, as determined by the breath-testing instrument, was artificially high. In layman's terms, individualized partition ratio testing can be performed to see if the defendant's BAC as reflected in his or her breath test results matches his or her BAC as indicated by his or her blood test results. If the defendant's BAC as reflected by his or her breath test results is higher than his or her BAC as reflected by his or her blood test results, the defendant has the opportunity to argue at trial that the same phenomenon occurred at the time of his or her breath test on the date of arrest.

However, the California Supreme Court did not approve of any form of individualized partition ratio testing as generally accepted within the scientific community in order to satisfy the court's decision in *People v. Kelly*. *McNeal*, 46 Cal.4th at 1203; citing to *People v. Kelly,* 17 Cal.3d 24, 30-32 (Cal. 1976). Undoubtedly, there is more than one way to conduct an individualized partition ratio testing of a defendant in a DUI case. The method discussed below is a broad overview of a method that should satisfy the *Kelly* test.

To determine if the defendant's BAC as measured by breath and blood match, the defendant needs a forensic toxicologist with access to a breath-testing device (preferably an identical model used to test the defendant on the date of arrest), as well as blood-testing capabilities. Since most breath-testing instrument manufacturers are not selling evidential breath-testing devices to non-law-enforcement (i.e., Draeger Inc.), the defendant may only have access to a PAS device. Accordingly, at trial, the defendant may be forced to argue that his or her PAS and implied consent breath tests have overstated his or her BAC, even though he or she was only able to calculate his or her individualized partition ratio using a PAS device.

In any event, a forensic toxicologist may ask the defendant to meet early in the morning. The defendant will be admonished not to have consumed any alcohol or food from the previous midnight. This request is made to ensure that the defendant has a 0.00 percent BAC. The defendant will also be instructed to bring his or her alcoholic beverage of choice to the testing facility. The forensic toxicologist will then request that the defendant imbibe the alcohol at a controlled rate. The defendant's BAC will be tested by both breath and blood at approximately the same time after consuming his or her last drink that he or she was breath-tested on the date of the DUI arrest. Alternatively, the defendant may be breath- and blood-tested twenty, forty, and sixty minutes following the consumption of his or her last drink. The results are then compared. If they are favorable, the defendant can seek to introduce them at trial. If the results are not favorable, no problem. The defendant does not have to disclose the results of his or her tests to the prosecutor. See Penal Code Section 1054, *et seq*., *People v. Alford*, citing to *People v. Prince.*

Admitting Partition Ratio Evidence

The defense attorney must lay a foundation that satisfies the *Kelly* test in order to admit the defendant's individualized partition ratio evidence into evidence at trial. Among the defense attorney's greatest challenges is to establish that the scientific method used to calculate the defendant's partition ratio is generally accepted within the scientific community. The reason this is so challenging is that the calculation of an individual's partition ratio is readily subject to manipulation. The proof of the ready manipulability of partition ratio evidence was the California legislature's

amendment of Vehicle Code Section 23152(b) to eliminate the relevance of partition ration evidence. See *People v. Bransford*, 8 Cal.4th 885 (Cal. 1994).

Because a defendant's partition ratio can be calculated so that it can appear at its lowest (i.e., by having the defendant consume distilled liquors on an empty stomach, since the defendant will be able to absorb the distilled liquors much more rapidly than beer and wine and therefore has a greater chance of establishing a lower partition ratio than 2100:1), a more appropriate way to ensure that your expert's calculation of the defendant's partition ratio evidence is admitted into evidence at trial is by calculating the defendant's partition ratio based upon the alcohol imbibed and the drinking pattern identified in the police report. By performing the defendant's partition ratio calculation in this manner, the judge has less ground to exclude the partition ratio evidence.

The Direct and Cross-Examination of the Defense Expert

Assuming the court permits the defendant to introduce partition ratio evidence at trial, the defense attorney must still present this evidence to the jury. The defense attorney will need to walk the defense expert through the steps that were taken in his or her particular testing of the defendant to calculate his or her partition ratio. Once this is complete, the defense attorney will ask the expert to explain the significance of the finding to the jury. The expert's likely conclusion will be that because the defendant's partition ratio was lower than the 2100:1 assumed ratio, the defendant's BAC on the night in question could actually have been less than 0.08 percent.

The district attorney will be able to cross-examine the defense expert by asking questions, such as whether the expert is assuming that the alcohol imbibed and the drinking pattern in the police report are true. The district attorney will be setting the expert up to point out that the defendant's partition ratio would have been different if any of the assumed factors were not true (i.e., alcohol imbibed or drinking pattern). Moreover, the district attorney will ask the expert whether it is true that the most accurate way of calculating the defendant's BAC at the time of driving would be to test the defendant at or near the time of driving as opposed to days, weeks, or months later.

The defense expert will have to concede that testing the defendant at the scene for his or her partition ratio would be more accurate than testing days, weeks, or months later. However, the defense expert will point out that the officer was not testing the defendant for his or her partition ratio at or near the time of driving. Instead, the officer was simply testing the defendant's BAC based upon an assumption that the defendant's partition ratio was 2100:1. Moreover, the defense expert will be able to respond that since the defendant's partition ratio was not known at or near the time of driving, the defendant's BAC was likely overstated by some percentage of error (i.e., one that brings the defendant below a 0.08 percent BAC).

In the end, the defendant's ability to present this evidence is another tool to attack the generic DUI count. However, the greatest benefit of this defense is to subconsciously inform the jury of the flaws of breath testing evidence when determining whether the defendant is guilty of the *per se* DUI charge. If the defendant's client can afford to perform testing of his or her own partition ratio, this line of defense should be looked at in most cases where the defendant's BAC is below 0.15 percent.

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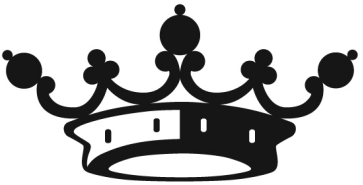

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