

## MEMORANDUM

TO: All Criminal Justice agencies  
COPY: All State's Attorneys  
FROM: Attorney General Wayne Stenehjem  
DATE: July 21, 2009  
RE: **Analytical Breath & Blood Alcohol Reports and Drug Reports  
Melendez-Diaz v. Massachusetts**

The United States Supreme Court held in a recent decision, Melendez-Diaz v. Massachusetts, that a test analyst's statements in analytical reports, including blood alcohol analytical test reports and Intoxilyzer reports, are testimony and subject to the Confrontation Clause under the Sixth Amendment.

This means that unless the defendant stipulates to the admission of the report or waives the right to cross-examination of the analyst or Intoxilyzer operator, the prosecution will need to present the Intoxilyzer test operators and Crime Laboratory analysts in court. It will not be the responsibility of the defendant to bring the test operators and test analysts into court as adverse witnesses.

The Crime Laboratory has only five analysts who perform the blood tests.

Under N.D.C.C. § 39-20-01, the **arresting law enforcement officer** has the authority to determine which chemical test is to be used to determine the individual's blood alcohol content. (The defendant is not precluded from requesting a blood test.)

Therefore, law enforcement officers who arrest individuals for violations of N.D.C.C. § 39-08-01 or equivalent ordinance for driving under the influence **are encouraged, whenever possible, to direct the individual to take the Intoxilyzer test** instead of requesting the defendant to undergo a blood test. This will help keep the five Crime Laboratory analysts in the crime lab doing analytical tests rather than waiting around in courthouses to testify in DUI cases.

Thank you.