Retroactivity of Melendez-Diaz

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Melendez-Diaz v. Massachusetts, 557 U.S. __, 129 S. Ct. 2527 (2009), decided by the United States Supreme Court last month, already has had significant implications for criminal prosecutions in North Carolina. The original wave of questions posed to me about the case pertained to its application in pending prosecutions. I wrote about *Melendez-Diaz* generally and addressed a number of those questions in an earlier paper posted here. A significant part of the second wave of questions posed to me has pertained to application of *Melendez-Diaz* in post-conviction proceedings, including motions for appropriate relief and federal habeas petitions. Specifically, a number of people have asked about whether *Melendez-Diaz* applies retroactively to cases that became final before it was decided. I will begin to address that question in this post.

I wrote about retroactivity of judge-made rules five years ago in a paper posted here. That paper sets out the general retroactivity rules and I won't repeat all of them in this post. However, if you need a primer on retroactivity, that is a good place to start. Since that paper was published, the United States Supreme Court has held that *Crawford* is not retroactive under the rule of *Teague v. Lane,* 489 U.S. 288 (1989). *See Whorton v. Bockting*, 549 U.S. 406 (2007) (*Crawford* was a new procedural rule but not a watershed rule of criminal procedure). The *Teague* anti-retroactivity rule applies to new rules of federal criminal procedure. One of the arguments being asserted by defense lawyers is that *Melendez-Diaz* is not a new rule but rather was mandated by *Crawford v. Washington,* 541 U.S. 36 (2004). If that is correct, *Melendez-Diaz* would apply retroactively at least back to the date *Crawford* was decided, March 8, 2004. *See Whorton,* 549 U.S. at 416 (old rules apply retroactively).

The United States Supreme Court's retroactivity analysis requires that, in order to determine whether a rule is new, the court must first determine the date on which the case became final. It then must "assay the legal landscape" at the time the conviction became final and ask whether the rule later announced was "*dictated* by then-existing precedent-whether, that is, the unlawfulness of [defendant's] conviction was apparent to all reasonable jurists." *Beard v. Banks,* 542 U.S. 406, 413 (2004) (quotation omitted); *see also* Graham v. Collins, 506 U.S. 461, 467 (1993) (new rule not *"dictated*" by precedent) (quoting *Teague,* 489 U.S. at 301). It is not enough that earlier cases support the new rule. *See Beard,* 542 U.S. at 410. The question is "whether reasonable jurists could differ as to whether precedent compels the sought-for rule." *Id.* at 416 n.5; *see also Graham,* 506 U.S. at 467 ("compelled by existing precedent"). Obviously, "precedent" includes decisions of the United States Supreme Court. But it also includes decisions of the lower courts, both state and federal. *See* Caspari v. Bohlen, 510 U.S. 383, 395 (1994) ("in the *Teague* analysis, the reasonable views of state courts are entitled to consideration along with those of the federal courts"); O'Dell v. Netherland, 521 U.S. 151, 166 n.3 (1997) (noting that conclusion that rule is new finds support in the decisions of the state and lower federal courts). And finally, when the rule at issue emerged in a prior case, a lack of unanimity of the deciding Justices is relevant. *See O'Dell,* 521 U.S. at 159-60 (the "array of views expressed in [the opinion] itself suggests that the rule announced there was, in light of the Court's precedent, susceptible to debate among reasonable minds") (quotation omitted). *But see Beard,* 542 U.S. 416 n.5 (noting that because the focus is on reasonable jurists, the "mere existence of a dissent" does not suffice to show that the rule is new).

When a case explicitly overrules an earlier holding, it clearly creates a new rule. *See* Saffle v. Parks, 494 U.S. 484, 488 (1990); Butler v. McKellar, 494 U.S. 407, 412 (1990); *Graham,* 506 U.S. at 467. The inquiry is more difficult when the decision extends the reasoning of prior cases. *See Saffle,* 494 U.S. at 488; *Butler,* 494 U.S. at 412-13; *Graham,* 506

U.S. at 467. *Beard* is a relatively recent example of how the analysis plays out in the latter context. At issue in *Beard* was whether the rules announced in *Mills v. Maryland*, 486 U.S. 367 (1988), and *McKoy v. North Carolina*, 494 U.S. 433 (1990), applied retroactively. Those cases invalidated capital sentencing schemes that required juries to disregard mitigating factors not found unanimously by the jury. The *Beard* Court noted that *Mills* and *McKoy* relied on a line of cases holding that the sentencer in a capital case must be allowed to consider any mitigating evidence. The *Beard* Court concluded that although this line of cases supported the Court's rulings in *Mills* and *McKoy,* it did not mandate their holdings. The Court found that the earlier cases considered only obstructions to the sentencer's ability to consider mitigating evidence whereas *Mills* focused on individual jurors. The Court thought it "clear" that reasonable jurists could have differed as to whether the [earlier cases] "compelled" *Mills*. In fact, it noted that in *Mills* itself, four justices dissented, arguing that the rule from the prior case law did not control. Likewise, three Justices dissented in *McKoy,* asserting that the prior cases did not mandate the holding. In the end, the Court concluded: "Given the brand new attention *Mills* paid to individual jurors . . . we must conclude that the *Mills* rule br[o]k[e] new ground."

The strongest support for the defense argument that *Melendez-Diaz* is not a new rule is found in the opinion itself. Writing for the majority, Justice Scalia described the case as a "straightforward application of . . . *Crawford,"* Slip Op. at 6, involving "little more" than an application of the holding of that case. *Id.* at 23. Thus, the defense could argue, since *Melendez-Diaz* was mandated by *Crawford,* it is not a new rule for cases that became final after *Crawford* was decided and the *Teague* anti-retroactivity rule does not apply. In making this argument, the defense might focus on the fact that *Melendez-Diaz* involved application of the general *Crawford* rule to a specific situation, as opposed to a modification of the *Crawford* rule. To amplify this position, the defense might assert that both cases involved precisely the same issue: whether the evidence was testimonial; the only difference between the cases was the type of evidence at issue.

A prosecutor might respond by arguing that Scalia did not make these statements in the context of retroactivity analysis. Also, the prosecution might argue that given the state of North Carolina law (and the law around the country) after *Crawford* and before *Melendez-Diaz,* it would be difficult to say that the testimonial nature of forensic laboratory reports was apparent to "all reasonable jurists." After all, both the North Carolina Court of Appeals and the North Carolina Supreme Court had concluded (more than once) that such items were non-testimonial. Additionally, the decision in *Melendez-Diaz* was a fractured 5-to-4 decision, indicating that reasonable jurists on the Supreme Court disagreed with its very holding. While *Crawford* overruled prior precedent (*Ohio v. Roberts)*, the same cannot be said of *Melendez-Diaz*. However, it can be argued that *Melendez-Diaz* is an extension of *Crawford. Crawford* dealt with the testimonial nature of statements by a suspect to the police at a station house after *Miranda* warnings had been given. *Melendez-Diaz* by contrast dealt with the testimonial nature of forensic laboratory reports. Thus the argument goes: *Melendez-Diaz* was not dictated by *Crawford;* rather, it required an extension of the *Crawford* rule and thus is a new rule.

Ultimately, the appellate courts will resolve this issue. In the meantime, I hope that this post helps to clarify the relevant law and some of the arguments that might be asserted on both sides. And finally, litigation over the retroactivity of *Melendez-Diaz* has not been confined to the new rule prong of the *Teague* test. Another issue that has arisen is whether the *Teague* test applies in North Carolina state courts in light of *Danforth v. Minnesota,* 128 S. Ct. 1029 (2008) (holding that *Teague* does not limit the authority of states to give broader effect to new rules of criminal procedure in state post-conviction proceedings than is required by the *Teague* rule). I will address that issue in a separate post.