North Dakota Law Review

Volume 88 | Number 2 Article 2

1-1-2012

It's a Long Way for the Shortcut: The Evolution of North Dakota Rule of Evidence 707 and Its Impact on DUI Prosecutions

Cherie L. Clark

Reid A. Brady

IT'S A LONG WAY FOR THE SHORTCUT: THE EVOLUTION OF NORTH DAKOTA RULE OF EVIDENCE 707 AND ITS IMPACT ON DUI PROSECUTIONS

CHERIE L. CLARK* AND REID A. BRADY**

ABSTRACT

Before adoption of Rule 707 of the North Dakota Rules of Evidence, North Dakota Century Code section 39-20-07 permitted a prosecutor to introduce at a DUI trial a blood test report without testimony from the person who tested the blood. Rule 707 was created to remedy this violation of the defendant's right to confront the witnesses against him. When originally adopted, the Rule merely required the prosecutor to give notice of her intent to offer the blood test report, and the defendant could then demand the prosecutor produce at trial the person who authored the report. The Rule was later amended and now allows the defendant to identify the persons he demands the prosecutor produce at trial to testify about the report. The potential persons a defendant may demand now includes the nurse who drew his blood, which is often burdensome on the State. This Article focuses on the development of Rule 707 and its impact on DUI prosecutions. The origin of Rule 707 – *Melendez-Diaz v. Massachusetts*, – is discussed in Part II. The adoption of the Rule is addressed in Part III. Part IV outlines the amendment of the Rule. Part V discusses the impact of the amendment on DUI prosecutions and suggestions to reduce the costs of the amendment. Finally, Part VI restates the need for prosecutors to adapt to the Rule.

---

* Assistant State's Attorney, Cass County, North Dakota. J.D., University of South Dakota School of Law, 2000; B.S., University of South Dakota, 1995. Law Clerk, Eighth District of Minnesota, 2000-2001. Assistant County Attorney, Otter Tail County, Minnesota 2001-2007.

** Assistant State's Attorney, Cass County, North Dakota. J.D., University of North Dakota School of Law, 1999; B.S., Minnesota State University Moorhead, 1996. Law Clerk, Justice Carol Ronning Kapsner, North Dakota Supreme Court, 1999-2000. Assistant Attorney General, North Dakota, 2000-2003.

I. INTRODUCTION

Less than four years ago, the Supreme Court in *Melendez-Diaz v. Massachusetts*[1] ruled a criminal defendant's Sixth Amendment right to confront adverse witnesses is violated when an analytical report is admitted into evidence without affording the defendant a right to confront the author of the report.[2] At the time, several North Dakota statutes permitted what *Melendez-Diaz* prohibited.[3] In the DUI context, which this Article will focus on, North Dakota Century Code section 39-20-07 permitted – without testimony from the lab analyst – admission of an analytical report to show the alcohol concentration of a driver's blood.[4] To remedy this constitutional defect, the North Dakota Supreme Court adopted North Dakota Rule of Evidence 707.[5] Rule 707 created a notice-and-demand procedure endorsed in *Melendez-Diaz*.[6] Under the procedure, a prosecutor would serve written notice of the state's intent to offer an analytical report

1. 557 U.S. 305 (2009).
2. *Melendez-Diaz*, 557 U.S. at 311.
3. *See* N.D. CENT. CODE §§ 19-03.1-37(5) (2009), 20.1-13.1-10(7), 20.1-15-11(9) (2012), 39-20-07(9), 39-24.1-08(7) (Supp. 2011).
4. N.D. CENT. CODE § 39-20-07 (Supp. 2011).
5. *Melendez-Diaz*, 557 U.S. at 311; North Dakota Supreme Court Order of Adoption No. 20090381 (Dec. 16, 2009) [hereinafter Order of Adoption No. 20090381], *available at* http://www ndcourts.gov/court/Notices/20090381/Order htm.
6. *Melendez*-Diaz, 557 U.S. at 325-27; N.D. R. EVID. 707.

showing the alcohol concentration in the defendant's blood at the time of driving.[7] The defendant could then object by demanding the prosecutor present at trial the analyst who tested the defendant's blood sample.[8]

Since adoption, the North Dakota Supreme Court has amended Rule 707 to allow a defendant to identify the person he or she demands the prosecution produce at trial.[9] Under the existing rule, a defendant may demand the prosecution produce the person who drew a defendant's blood – regardless of whether a law enforcement officer or other witness observed the drawing of the blood and could testify precisely how it was drawn.[10] Because the person who draws blood is often a registered nurse at a private hospital,[11] the amendment has been costly.

Following this brief introduction, Part II of this Article discusses the origin of the Rule: *Melendez-Diaz*, a watershed Confrontation Clause case. Part III covers the North Dakota Supreme Court's adoption of Rule 707. The amendment of the Rule – based on comments, Joint Procedure Committee meetings, and, in large part, the North Dakota Supreme Court's independent acts – is outlined in Part IV. Part V considers the impact of the Rule on DUI prosecutions – primarily the defendant's authority to demand production of the nurse who drew a defendant's blood – and suggests to prosecutors some methods for dealing with its costs. Lastly, Part VI restates the need for prosecutors to adapt to the Rule.

II. ORIGIN OF RULE 707: *MELENDEZ-DIAZ* AND NOTICE-AND-DEMAND STATUTES

In its order adopting North Dakota Rule of Evidence 707, the North Dakota Supreme Court explained the Rule was a response to the United States Supreme Court's decision in *Melendez-Diaz.*[12] A review of *Melendez-Diaz* thus provides the framework for Rule 707's birth. In *Melendez-Diaz*, police received a tip that Thomas Wright was behaving suspiciously – repeatedly receiving phone calls at work; after each call, going to the front of the store and getting picked up by a blue sedan; and

---

7. N.D. R. EVID. 707(a). For a "per se" violation of the DUI statute, the sample must be obtained within two hours of a defendant's operating or being in physical control of a vehicle. N.D. CENT. CODE § 39-08-01 (Supp. 2011).

8. N.D. R. EVID. 707(b).

9. *Id.*; Joint Procedure Committee Minutes 10-13 (Sept. 23-24, 2010) [hereinafter Sept. 2010 Minutes].

10. State *ex rel.* Roseland v. Herauf, 2012 ND 151, ¶ 15, 819 N.W.2d 546, 553.

11. Telephone Interview with Sergeant William Ahlfeldt, Fargo Police Dep't (Dec. 7, 2012). Sergeant Ahlfeldt estimated that he had taken DUI arrestees for blood tests approximately 450-500 times during his career, and, in each case, the person who drew blood was a nurse.

12. Order of Adoption No. 20090381, *supra* note 5.

returning a short time later.[13] Police set up surveillance and observed Wright's suspicious behavior.[14] After Wright got out of the blue sedan upon his return, an officer searched him and found four bags containing a substance believed to be cocaine.[15] Other officers then detained Luis Melendez-Diaz, who was one of two men in the blue sedan.[16] Officers put Wright and the third man into a squad car.[17] On the drive to the police station, officers observed the suspects "fidgeting" and making suspicious movements in the backseat of the squad car.[18] Officers later searched the squad car, and found a bag containing nineteen small plastic bags hidden between the front and back seats.[19] Those nineteen bags found in the car and the four bags found in Wright's possession were sent to a state lab for testing.[20]

Melendez-Diaz was charged with distributing and trafficking cocaine.[21] At trial, the prosecutor offered as evidence state lab analysts' certificates showing the results of the testing of the bags.[22] The certificates reported the weight of the bags, and that the substance found in the bags was cocaine.[23] The certificates were sworn to, before a notary, by the analysts.[24] Melendez-Diaz objected to the admission of the certificates, arguing his constitutional right to confront adverse witnesses required the analysts to testify in person.[25] Melendez-Diaz's objection was overruled, and the certificates were admitted.[26] Melendez-Diaz was found guilty, and he appealed.[27] He argued admission of the certificates violated his Sixth Amendment right to confront the witnesses against him.[28] After the state appellate court affirmed, the United States Supreme Court granted certiorari.[29]

13. Melendez-Diaz v. Massachusetts, 557 U.S. 305, 308 (2009).
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.* at 309.
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*

At the outset, the Supreme Court identified the issue: whether the analysts' affidavits were "testimonial," rendering the analysts witnesses subject to the defendant's right to confront under the Sixth Amendment.[30] Citing *Crawford v. Washington*,[31] the Court emphasized that the Confrontation Clause in the Sixth Amendment "guarantees a defendant's right to confront those who bear testimony against him," and 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 to cross-examine the witness.[32]

Explaining what is considered testimony (i.e., a testimonial statement) under the Confrontation Clause, the Court reviewed the description it previously gave:

> Various formulations of this core class of testimonial statements exist: *ex parte* in-court testimony or its functional equivalent – that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially; extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions; statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.[33]

Using this description, the Court found the certificates were testimonial statements.[34] Indeed, the certificates were "quite plainly affidavits" and "functionally identical to live, in-court testimony, 'doing precisely what a

30. *Id.* at 307.

31. 541 U.S. 36 (2004).

32. *Melendez-Diaz*, 557 U.S. at 309 (internal quotation marks omitted).

33. *Id.* at 310 (emphasis in original) (quoting Crawford v. Washington, 541 U.S. 36, 51-52 (2004)).

34. *Id.* After *Melendez-Diaz*, the Court encountered a similar issue in *Bullcoming v. New Mexico*, 131 S. Ct. 2705 (2011). The issue was whether the Confrontation Clause allows a prosecutor to introduce a lab report containing a testimonial certification – made for purposes of proving a DUI defendant's blood alcohol concentration – through the courtroom testimony of a scientist who did not certify, conduct, or observe the actual test reported in the certification. *Id.* at 2710. An analyst named Caylor tested Bullcoming's blood and issued the certification of the results. *Id.* at 2710-11. Caylor did not testify at trial, and instead another analyst testified about Caylor's certification. *Id.* at 2712. The Court reasoned that the right to confront is not satisfied when a surrogate or substitute witness testifies about another's statements. *Id.* at 2715-16. "In short, when the State elected to introduce Caylor's certification, Caylor became a witness Bullcoming had the right to confront." *Id.* at 2716.

witness does on direct examination.'"[35] As a result, the Court concluded that unless the analysts were unavailable and the defendant had a prior opportunity to cross-examine them, the defendant was entitled to confront the analysts at trial.[36]

Explaining the Sixth Amendment contemplates only two classes of witnesses, the Court identified "[(1)] those against the defendant and [(2)] those in his favor."[37] The prosecution must produce the latter (under the Confrontation Clause), and the defendant may call the former (under the Compulsory Process Clause).[38] "[T]here is not a third category of witnesses, helpful to the prosecution, but somehow immune from confrontation."[39]

The Court, appropriately, indicated in an oft-cited footnote that even chain of custody testimony offered by a prosecutor must be introduced live if the defendant objects.[40] Although the footnote's first sentence is often relied upon for the conclusion that chain of custody testimony is immune from the Confrontation Clause, such a conclusion ignores the remainder of the footnote. The first sentence provides, "we do not hold, and it is not the case, that anyone whose testimony may be relevant in establishing chain of custody, authenticity of the sample, or accuracy of the testing device, must appear in person as part of the prosecution's case."[41] However, that does not mean testimonial[42] statements from chain of custody witnesses are admissible without in-court testimony. Indeed, the remaining sentences clarify the first sentence.[43] They show that "gaps in the chain [of custody]

35. *Melendez-Diaz*, 557 U.S. at 310-11 (quoting Davis v. Washington, 547 U.S. 813, 830 (2006)).

36. *Id.* at 311.

37. *Id.* at 313.

38. *Id.* at 313-14.

39. *Id.* at 314.

40. *Id.* at 311 n.1.

41. *Id.*

42. When discussing chain of custody statements and what must be introduced live, the Court focused on "testimony." *Id.* Of course, while some chain of custody statements will be testimonial, others will be nontestimonial. For instance, a person's statements, on a form expressly designated for use in a DUI case, that a blood sample was sent or received likely would be testimonial. *See* Crawford v. Washington, 541 U.S. 36, 51-52 (2004) (providing "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial" are testimonial) (citations omitted). On the other hand, regularly kept postal records showing that a package was mailed by a police department to the state lab likely would be nontestimonial. *See id.*

43. The North Dakota Supreme Court has cited the footnote in several recent decisions. *See* State *ex rel.* Madden v. Rustad, 2012 ND 242, ¶ 11, 837 N.W.2d 767, 771; State v. Lutz, 2012 ND 156, ¶ 9, 820 N.W.2d 111, 114; State *ex rel.* Roseland v. Herauf, 2012 ND 151, ¶ 9, 819 N.W.2d 546, 550; State v. Gietzen, 2010 ND 82, ¶ 3, 786 N.W.2d 1, 6-7.

normally go to the weight of evidence rather than its admissibility[,]"[44] and that "[it] is up to the prosecution to decide what steps in the chain of custody are so crucial as to require evidence . . . ."[45] And most importantly, "what testimony *is* introduced must (if the defendant objects) be introduced live."[46]

Despite the prosecution's duty to produce the witnesses[47] offering evidence against a defendant, the Court noted one exception:[48] notice-and-demand statutes.[49] Such statutes "require the prosecution to provide notice to the defendant of its intent to use an analyst's report as evidence at trial, after which the defendant is given a period of time in which he may object to the admission of the evidence absent the analyst's appearance live at trial."[50] Justifying the exception, the Court indicated a defendant "*always*

---

44. *Melendez-Diaz*, 557 U.S. at 311 n.1 (alteration in original) (quoting United States v. Lolt, 854 F.2d 244, 250 (7th Cir. 1988)). The North Dakota Supreme Court has followed that principle. *See* State v. Huffman, 542 N.W.2d 718, 721 (N.D. 1996) ("The State need not prove an 'unbroken chain of custody' before physical evidence can be admitted at trial."); State v. Haugen, 448 N.W.2d 191, 196 (N.D. 1989); State v. Bohe, 447 N.W.2d 277, 279 (N.D. 1989); State v. Hartsoch, 329 N.W.2d 367, 370 (N.D. 1983); *see also* State v. Skjonsby, 319 N.W.2d 764, 789 (N.D. 1982) (indicating the trial court "must be satisfied that, in all reasonable probability, the item offered is the same as the item seized and is substantially unchanged in condition[,]" "that it is reasonably probable that tampering or substitution did not occur[,]" and that "[c]ontrary speculation may well affect the weight of the evidence accorded it by the factfinder but does not affect its admissibility"); State v. Berger, 285 N.W.2d 533, 540 (N.D. 1979); State v. Lange, 255 N.W.2d 59, 66 (N.D. 1977).

45. *Melendez-Diaz*, 557 U.S. at 311 n.1. The Court did distinguish from chain of custody witnesses with testimonial evidence, "documents prepared in the regular course of equipment maintenance [, which] may well qualify as nontestimonial records." *Id.*

46. *Id.* (emphasis in original).

47. Three years after *Melendez-Diaz*, the Court gave instruction on who is considered a witness in the context of DNA testing. *See* Williams v. Illinois, 132 S. Ct. 2221, 2240 (2012). The issue in *Williams* was whether the Confrontation Clause barred "an expert from expressing an opinion based on facts about a case that have been made known to the expert but about which the expert is not competent to testify." *Id.* at 2227. An expert testified that she produced a DNA profile from a sample of the defendant's blood that matched the profile that a separate lab produced from semen found on vaginal swabs of the sexual assault victim, and no witness from the separate lab testified. *Id.* at 2229-30. The Court concluded that the Confrontation Clause did not bar the expert's testimony for two independent reasons. *Id.* at 2228. First, the expert referred to the separate lab report not to prove the truth of the matter in that report but to establish that the report contained a DNA profile that matched the DNA profile developed from the defendant's blood. *Id.* at 2235, 2240 (recognizing that the Confrontation Clause "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted"). Second, even if the separate lab report had been offered for its truth, it was not prepared for the primary purpose of accusing a targeted individual, i.e., a testimonial purpose. *Id.* at 2243.

48. *Melendez-Diaz*, 557 U.S. at 326. The Court did not characterize these statutes as an "exception" to the rule requiring the prosecutor to produce at trial the witnesses against a defendant. *Id.*

49. *Id.* at 325-27. The Court cited multiple examples of notice-and-demand statutes. *Id.* at 326-27 (referencing GA. CODE ANN § 35-3-154.1 (2006); TEX. CODE CRIM. PROC. ANN., ART. 38.41, § 4 (Vernon 2005); OHIO REV. CODE ANN. § 2925.51(C) (Lexis 2006)); *see also* MINN. STAT. § 634(15)(2)(b) (2012).

50. *Melendez-Diaz*, 557 U.S. at 326.

has the burden of raising his Confrontation Clause objection; notice-and-demand statutes simply govern the *time* within which he must do so."[51]

III. ADOPTION OF RULE 707

A few months after *Melendez-Diaz* was decided, the North Dakota Supreme Court ordered that Rule 707 be adopted, effective February 1, 2010, subject to a comment period.[52] In the adopting order, the court reasoned "*Melendez-Diaz* held that analysts' certificates of analysis were testimonial statements, and the analysts [thus] were witnesses for Sixth Amendment confrontation purposes[;]" that "a defendant's ability to subpoena the analyst under state law did not abrogate the state's obligation to produce the analyst for cross-examination[;]" and that the use of notice-and-demand statutes was acceptable.[53] Furthermore, several statutes – including North Dakota Century Code sections 19-03.1-37(5),[54] 20.1-13.1-10(7),[55] 20.1-15-11(9),[56] 39-20-07(9),[57] and 39-24.1-08(7)[58] – were

51. *Id.* at 327 (emphasis in original).

52. Order of Adoption, No. 20090381, *supra* note 5.

53. *Id.*

54. This subdivision relates to drug and drug paraphernalia prosecutions and provides that an indigent defendant may subpoena "the director or an employee of the state crime laboratory . . . ." N.D. CENT. CODE § 19-03.1-37(5) (2009). North Dakota Century Code subdivision 19-03.1-37(4) would have violated a defendant's right to confront. It provides that "a certified copy of the analytical report signed by the director or the director's designee must be accepted as prima facie evidence of the results of the analytical findings." *Id.* § 19-03.1-37(4). Providing an indigent defendant the ability to subpoena a state crime laboratory employee could coexist with a notice-and-demand statute. For instance, a defendant could decide after his demand deadline that he wished to question an analyst or he could strategically believe that it would be more persuasive, to present the evidence through a state criminal laboratory employee rather than during cross-examination of the employee.

55. This subdivision relates to operating a boat while under the influence of alcohol or drugs and provides that an indigent defendant may subpoena "the individual who conducted the chemical test" to determine the alcohol or drug concentration of the defendant's blood, breath, or urine. N.D. CENT. CODE §§ 20.1-13.1-10(7), 20.1-13.1-01 (2012) (outlining the purpose of testing under N.D. CENT. CODE ch. 20.1-13.1 and identifying the bodily fluids that can be tested). North Dakota Century Code subdivision 20.1-13.1-10(3) would have violated a defendant's right to confront. It provides that "[t]he results of the chemical test must be received in evidence when it is shown that the sample was properly obtained and the test was fairly administered . . . ." *Id.* § 20.1-13.1-10(3). Subdivision 6 – which provides that a certified copy of the analytical report must be accepted as prima facie evidence – would have also violated a defendant's right to confront. *Id.* § 20.1-13.1-10(6).

56. This subdivision relates to hunting while under the influence of alcohol or drugs and provides that an indigent defendant may subpoena "the individual who conducted the chemical test" to determine the alcohol or drug concentration of the defendant's blood, breath, or urine. N.D. CENT. CODE §§ 20.1-15-11(9), 20.1-15-01 (outlining the purpose of testing under N.D. CENT. CODE ch. 20.1-15 and identifying the bodily fluids that can be tested). North Dakota Century Code subdivision 20.1-15-11(5) would have violated a defendant's right to confront. It provides that "[t]he results of the chemical test must be received in evidence when it is shown that the sample was properly obtained and the test was fairly administered . . . ." *Id.* § 20.1-15-11(5). Subdivision 8 – which provides that a certified copy of the analytical report must be accepted as

constitutionally suspect, because they merely allowed a defendant to subpoena an analyst but did not require the state to produce the analyst to testify.[59]

To remedy the constitutional concerns, the Rule provided a notice-and-demand procedure.[60] The prosecution, accordingly, had to give notice of its intent to offer at trial an analytical report under any of the statutes.[61] If the

---

prima facie evidence – would have also violated a defendant's right to confront. *Id.* § 20.1-15-11(8).

57. This subdivision relates to DUI prosecutions and provides that an indigent defendant may subpoena "the individual who conducted the chemical analysis" to determine the alcohol or drug concentration of the defendant's blood, breath, or urine. N.D. CENT. CODE §§ 39-20-07(9), 39-20-01 (Supp. 2011) (outlining the purpose of testing under N.D. CENT. CODE ch. 39-20 and identifying the bodily fluids that can be tested). North Dakota Century Code subdivision 39-20-07(5) would have violated a defendant's right to confront. It provides that "[t]he results of the chemical analysis must be received in evidence when it is shown that the sample was properly obtained and the test was fairly administered . . . ." Subdivision 8 – which provides that a certified copy of the analytical report must be accepted as prima facie evidence – would have also violated a defendant's right to confront. *Id.* § 39-20-07(8).

58. This subdivision relates to snowmobiling while under the influence of alcohol or drugs and provides that an indigent defendant may subpoena "the individual who conducted the chemical test" to determine the alcohol or drug concentration of the defendant's blood, breath, or urine. N.D. CENT. CODE §§ 39-24.1-08(7), 39-24.1-01 (outlining the purpose of testing under N.D. CENT. CODE ch. 39-24.1 and identifying the bodily fluids that can be tested). North Dakota Century Code subdivision 39-24.1-08(3) would have violated a defendant's right to confront. It provides that "[t]he results of the chemical test must be received in evidence when it is shown that the sample was properly obtained and the test was fairly administered . . . ." *Id.* § 39-24.1-08(3). Subdivision 6 – which provides that a certified copy of the analytical report must be accepted as prima facie evidence – would have also violated a defendant's right to confront. *Id.* § 39-24.1-08(6).

59. *Id.*

60. The full text of the originally adopted rule was as follows:

> **RULE 707. ANALYTICAL REPORT ADMISSION; CONFRONTATION**
>
> **(a) Notification to Defendant.** If the prosecution intends to introduce an analytical report issued under N.D.C.C. chapters 19-03.1, 19-03.2, 19-03.4, 20.1-13.1, 20.1-15, 39-06.2, or 39-20 in a criminal trial, it must notify the defendant or the defendant's attorney of its intent to introduce the report at least 30 days before the trial.
>
> **(b) Objection.** At least 10 days before the trial, the defendant may object in writing to the introduction of the report. If objection is made, the prosecutor must produce the person who prepared the report to testify at the trial. If the witness is not available to testify, the court must grant a continuance.
>
> **(c) Waiver.** If the defendant does not timely object to the introduction of the report, the defendant's right to confront the person who prepared the report is waived and the report, if otherwise admissible, must be accepted as prima facie evidence of the results contained in the report.

N.D. R. EVID. 707(a) (2010), *available at* http://www ndcourts.gov/court/Notices/20090381/Rule707.ev htm.

61. *Id.*

defendant timely objected, the prosecution would have to produce "the person who prepared the report" to testify at trial.[62] For analytical tests conducted at the North Dakota State Crime Lab, the person who prepared the report was, and continues to be, the analyst who tested the sample at issue.[63] So under the originally adopted rule, the only person that a defendant could demand produced for trial was the analyst who tested the sample.[64]

IV. AMENDMENT OF RULE 707

When the Rule was originally adopted, the North Dakota Supreme Court ordered it "effective February 1, 2010, subject to a comment period."[65] Comments were due one month later.[66] Attorney Tom Tuntland submitted comments and raised concerns "in two principal areas, namely timing and modification of substantive law."[67] Emphasizing the Rule only required the prosecution to give thirty days' notice of its intent to offer an analytical report, Tuntland asserted the Rule would force a defendant to choose between his right to a speedy trial and his right to confront the analyst.[68] Thus he recommended the deadline for the prosecution's notice be changed to an earlier date.[69] Tuntland also recommended the Rule be amended to omit the language indicating the "unobjected to" report must be accepted as prima facie evidence of the results.[70] Tuntland argued the Rule should address only the admissibility of the analytical report, not the effect (prima facie evidence) of the report.[71]

Besides Tuntland, the North Dakota Association of Criminal Defense Lawyers (NDACDL) submitted comments.[72] The NDACDL indicated its concerns about the Rule were threefold: "(1) it appears to procedurally and substantively favor the State; (2) it was not subjected to the normal judicial

62. *Id.*

63. Telephone Interview with Hope Olson, Dir., Crime Lab. Div., Office of Attorney Gen. (Nov. 29, 2012).

64. *See* N.D. R. EVID. 707(b) (2010).

65. Order of Adoption No. 20090381, *supra* note 5.

66. *Id.*

67. E-mail from Tom Tuntland, J.D., to Andrew Forward, J.D., Office of Clerk of N.D. Supreme Court (Feb. 2, 2010) (on file with author).

68. *Id.*

69. *Id.* Tuntland suggested using the same deadline as the one for pre-trial motions. *Id.*

70. *Id*. (referencing N.D. R. EVID. 707(c) (2010)).

71. *Id.*

72. Letter from Michael R. Hoffman, President, N.D. Ass'n of Criminal Def. Lawyers, to Penny L. Miller, Clerk of the Supreme Court (Feb. 25, 2010) (on file with author). Hoffman signed the letter containing the comments, and forty-seven other lawyers, including Tuntland, electronically endorsed the letter. *Id.*

rulemaking process; and (3) it raises substantive, constitutional concerns under the Sixth Amendment."[73] Outlining its first concern, the NDACDL pointed out that the Rule did not require the prosecution to provide its notice in writing and did not establish a remedy if the prosecution failed to provide proper notice.[74] The NDACL, like Tuntland, also asserted the Rule would unfairly establish the analytical report results as prima facie evidence, and infringe on defendants' rights to a speedy trial.[75] On its second concern, the NDACDL emphasized that the Rule was adopted by the court sua sponte without input from the Joint Procedure Committee.[76] The NDACDL recommended the Joint Procedure Committee be involved in the process of adopting the Rule.[77] Addressing its third concern, the NDACDL indicated its concern "can be simplified [to] stating that 'subpoena statutes' or 'notice-and-demand statutes' improperly circumvent a defendant's Sixth Amendment right to confront and cross-examine witnesses in a criminal trial."[78]

The NDACDL's and Tuntland's comments were the only ones submitted during the comment period. Based on the comments, the North Dakota Supreme Court proposed amendments to the Rule. The proposed amendments required the prosecution's notice to be in writing and eliminated the prima facie effect of admission of the analytical report.[79]

---

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.* Two attorneys, Robert G. Hoy and Bruce D. Quick, electronically endorsed the NDACDL comments and were also members of the Joint Procedure Committee. *Id.*

77. *Id.*

78. *Id.* The NDACDL cited *Melendez-Diaz* but argued its principles on notice-and-demand statutes were dicta. *Id.*

79. The proposed amendments, in their entirety, were as follows:

RULE 707. ANALYTICAL REPORT ADMISSION; CONFRONTATION

(a) Notification to Defendant. If the prosecution intends to introduce an analytical report issued under N.D.C.C. ~~chapters~~ chs. 19-03.1, 19-03.2, 19-03.4, 20.1-13.1, 20.1-15, 39-06.2, or 39-20 in a criminal trial, it must notify the defendant or the defendant's attorney in writing of its intent to introduce the report at least 30 days before the trial. The prosecution must also serve a copy of the report on the defendant or the defendant's attorney.

(b) Objection. At least ~~10~~ 14 days before the trial, the defendant may object in writing to the introduction of the report. If objection is made, the prosecutor must produce the person who prepared the report to testify at the trial. If the witness is not available to testify, the court must grant a continuance.

(c) Waiver. If the defendant does not timely object to the introduction of the report, the defendant's right to confront the person who prepared the report is waived~~ and the~~

The court also requested that the Joint Procedure Committee review the proposed amendments.[80]

At its September 2010 meeting, the Joint Procedure Committee reviewed the proposed amendments,[81] which the committee later adopted.[82] The committee also recommended two additional amendments: (1) ensure the Rule applied not just to criminal trials but also to juvenile delinquency proceedings[83] and (2) require the prosecution to serve the analytical report at least thirty days before trial.[84] At one point, a committee member commented "the state may be required to produce multiple witnesses in some cases, as defense attorneys have argued that everyone involved with filling out the report should be made available for cross examination."[85] But neither that member nor any other member recommended changing the provision requiring the prosecutor to produce "the person who prepared the report . . . ."[86]

Three months after the Joint Procedure Committee meeting, the North Dakota Supreme Court also ordered the adoption of the committee's proposed amendments, with some changes by the court, effective March 1, 2011.[87] The court's further amendments included significant ones to the objection section – adding the defendant's power to identify the witness to testify about the analytical report and, accordingly, changing the prosecution's duty to produce the person identified, rather than the person who prepared the report.[88] The amended objection section thus provided that "the defendant may object in writing to the introduction of the report and identify the name or job title of the witness to be produced to testify

~~report, if otherwise admissible, must be accepted as prima facie evidence of the results contained in the report~~.

PROPOSED AMENDMENTS TO RULE 707 OF THE NORTH DAKOTA RULES OF EVIDENCE, http://www ndcourts.gov/court/JP/Agendas/Sep2010/Rule.707.ev htm [hereinafter Amendments Rule 707].

80. Sept. 2010 Minutes, *supra* note 9, at 10.

81. *Id.*

82. *Id*. at 13.

83. *Id.* at 12. The specific recommendation was to amend section (a) by adding "or juvenile delinquency proceeding" after the existing phrase "criminal trial." *Id.*

84. *Id.* at 12-13. The specific recommendation was to amend section (a) by adding the phrase "must also serve a copy of the report on the defendant or the defendant's attorney" after the existing phrase "intent to introduce the report." *Id.*

85. *Id.* at 11.

86. *Id.* at 10-13; Amendments Rule 707, *supra* note 79.

87. Order of Adoption No. 20090381, http://www ndcourts.gov/court/Notices/20090381/order2 htm [hereinafter Amended Order of Adoption No. 20090381].

88. *Id.*

about the report at trial" and "[i]f objection is made, the prosecutor must produce the person requested."[89]

V. IMPACT OF AMENDMENT ON DUI PROSECUTIONS

The amendments to Rule 707 have been costly on DUI prosecutions in one major way: requiring the prosecution to produce at trial the person who drew a defendant's blood[90] – often a registered nurse from a private hospital.[91] First, this Part provides some background about DUI prosecutions to help illustrate the impact of *Melendez-Diaz* and Rule 707. After generally explaining DUI prosecutions in North Dakota, Section B of this Part explains the process of DUI prosecutions prior to the court creating and amending Rule 707. Section C explains the process after the amendments, leading to the increased costs explained in Section D. Finally, Section E provides several solutions to reduce the costliness of DUI prosecution in North Dakota.

A. DUI PROSECUTIONS GENERALLY

In a DUI prosecution in North Dakota, proving the alcohol concentration in a driver's body is very important.[92] Indeed, unless the prosecution relies on a "non per se" provision[93] (i.e., a driver was simply too impaired to drive safely), an alcohol concentration of at least .08% (a "per se" violation) is an essential element that must be proven beyond reasonable doubt.[94] An alcohol concentration is determined by obtaining a defendant's blood or breath sample.[95] When a blood sample is sought,[96] a law enforcement officer typically takes an arrestee to a hospital and seeks an individual medically qualified to draw blood.[97] That individual is often a

89. N.D. R. EVID. 707(b) (2011).

90. State *ex rel.* Roseland v. Herauf, 2012 ND 151, ¶ 15, 819 N.W.2d 546, 553.

91. Telephone Interview with Sergeant William Ahlfeldt, *supra* note 11.

92. *See* N.D. CENT. CODE § 39-08-01(1)(a) (Supp. 2011).

93. "Non per se" provisions prohibit a person from driving when he is "under the influence of intoxicating liquor[,]" when he is "under the influence of any drug or substance or combination of drugs or substances to a degree which renders [him] incapable of safely driving[,]" and when he is "under the combined influence of alcohol and any other drugs or substances to a degree which render [him] incapable of safely driving." *See id.* § 39-08-01(1)(b)-(d).

94. *Id.* § 39-08-01(1)(a).

95. *See id.* § 39-20-01 (identifying potential chemical tests of "the blood, breath, or urine"). Although the statute provides for the testing of urine, the state crime lab rarely conducts tests to determine the alcohol concentration from urine. Telephone Interview with Charles E. Eder, N.D. State Toxicologist (Dec. 21, 2012).

96. The officer has discretion to choose whether a blood, breath, or urine sample is sought. N.D. CENT. CODE § 39-20-01.

97. *See* N.D. CENT. CODE § 39-20-02 ("The director of the state crime laboratory or the director's designee shall determine the qualifications or credentials for being medically qualified

nurse.[98] For sake of efficiency in this Article, "nurse" will be used interchangeably with "individual medically qualified to draw blood."

In drawing blood, the nurse should[99] follow an approved method[100] – a procedure designated by the state toxicologist.[101] The approved method is set out in a document entitled "Form 104."[102] It provides the following checklist for the nurse as specimen collector: "used an intact kit; observed powder in vacutainer tube; used disinfectant provided in kit; used needle, guide and tube provided in kit; [and] drew blood into tube and inverted several times."[103] As the nurse draws blood, the officer is present[104] and usually observes as the nurse draws the blood.[105] Once the nurse has drawn the blood, the officer follows Form 104's approved method for packaging it and sends it to the state lab for testing.[106]

---

to draw blood, and shall issue a list of approved designations including medical doctor and registered nurse."). The state toxicologist, as the state crime laboratory director's designee, lists the approved designations of individuals medically qualified to draw blood as follows: clinical laboratory scientist, clinical laboratory technician, medical doctor, medical laboratory scientist, medical laboratory technician, medical technician, nurse practitioner, osteopathic physician and surgeon, physician assistant, certified physician assistant, registered nurse, and other designations covered in North Dakota Century Code section 43-17-01 of the "Physicians and Surgeons" chapter. Aff. of Charles E. Eder, N.D. State Toxicologist (Sept. 29, 2011), *available at* http://www.ag nd.gov/CrimeLab/BloodAlcoholProgram/MeciallyQualIndviduals/09-29-11.pdf.

98. Telephone Interview with Sergeant William Ahlfeldt*, supra* note 11.

99. If the nurse does not follow the approved method, expert testimony may be used to show the blood test was still accurate. *See infra* discussion Part V.E.

100. The "approved method" is the term used for the scientific processes designated by the state crime lab director or the director's designee for analyzing samples. Telephone Interview with Mark A. Friese, Attorney-At-Law, Vogel Law Firm (Mar. 21, 2013); N.D. CENT. CODE § 39-20-07(5). The term, though, has been sometimes expanded to include other designated procedures. *See* City of West Fargo v. Hawkins, 200 ND 168, ¶ 3, 616 N.W.2d 856, 857 (noting a registered nurse "had drawn the blood in accordance with the State Toxicologist's approved method"); State v. Jordheim, 508 N.W.2d 878, 881 (N.D. 1993) (referring to a blood sample "drawn according to the method approved by the State Toxicologist"). This Article uses the expanded definition of "approved method" to include the state toxicologist's designated procedures for nonscientific processes.

101. The state toxicologist acts as the state crime laboratory director's designee. *See* N.D. CENT. CODE § 39-20-07(5).

102. *See* State v. Schwalk, 430 N.W.2d 317, 322 (N.D. 1988) (explaining the state toxicologist "drafted From 104 to be used when a blood sample is drawn for blood alcohol testing").

103. Submission for Blood (104) (capitalization and boxes omitted).

104. Telephone Interview with Sergeant William Ahlfeldt, *supra* note 11. Because the defendant has been arrested and is considered a prisoner, the officer must ensure that the defendant is kept in law enforcement's custody. *Id.*

105. *Id.*

106. The state toxicologist provides the following checklist as the approved method for the specimen submitter:

> used an intact kit; affixed completed specimen label/seal over the top and down the sides of the blood tube; placed the blood tube inside the blood tube protector and then place it in the plastic bag provided (do not remove liquid absorbing sheet); placed the plastic bag and completed top portion of this form in the kit box and closed it; [and] affixed tamper-evident kit box shipping seal on kit box.

After testing, North Dakota Century Code section 39-20-07 provides a streamlined process – often referred to as the "shortcut"[107] – for admission of the results into evidence. Using the shortcut, the prosecutor must show that the sample was properly obtained and the test was fairly administered.[108] Form 104 can be used to show "fair administration, chain of custody, and compliance with the State Toxicologist's approved methods."[109] In addition to providing the approved methods for the nurse to draw blood and the officer to package it, Form 104 includes sections for the officer, the nurse, and the "specimen receiver" (an intake person at the state lab) to complete.[110] The nurse's section of Form 104 contains space for the time and date the blood was obtained, and for other remarks.[111] It also has a space where the nurse signs and certifies the nurse "withdrew the blood specimen from the [defendant] and the information in this section is true and correct."[112]

B. DUI PROSECUTIONS PRE-AMENDMENT

Before the amendments to Rule 707, DUI prosecutions remained relatively streamlined – with or without Form 104. The North Dakota Supreme Court repeatedly recognized that an officer's testimony could overcome the failure to introduce a complete Form 104.[113]

In *Schlosser v. North Dakota Department of Transportation*,[114] the court encountered a case involving a "failure to introduce Form 104 into

---

Submission for Blood (104) (capitalization and boxes omitted).

107. State *ex rel.* Madden v. Rustad, 2012 ND 242, ¶ 11, 837 N.W.2d 767, 773; State v. Lutz, 2012 ND 156, ¶ 13, 820 N.W.2d 111, 116; Schlosser v. N.D. Dep't of Transp., 2009 ND 173, ¶ 10, 775 N.W.2d 695, 698.

108. State *ex rel.* Roseland v. Herauf, 2012 ND 151, ¶ 12, 819 N.W.2d 546, 552 (citing Schlosser v. N.D. Dep't of Transp., 2009 ND 173, ¶ 9, 775 N.W.2d 695, 698). The prosecutor must also show that the method and devices used in testing the sample were approved by the state toxicologist and that the blood test was performed by an authorized person. *Id.* (citing Schlosser v. N.D. Dep't of Transp., 2009 ND 173, ¶ 9, 775 N.W.2d 695, 698).

109. State v. Jordheim, 508 N.W.2d 878, 881 (N.D. 1993).

110. *See* Submission for Blood (Form 104); State Form No. 50491 (Mar. 2009).

111. Submission for Blood (Form 104).

112. *Id.*; *see also* State v. Friedt, 2007 ND 108, ¶ 3, 735 N.W.2d 848, 849-50 (providing that on Form 104, the nurse "marked that she used an intact blood sample kit; used the disinfectant, needle, guide, and blood tube provided in the blood sample kit; observed powder in the blood tube; and drew blood into the blood tube and inverted the blood tube several times[;] . . . recorded the date and time she drew [the defendant's] blood and signed the form").

113. *See Friedt*, ¶¶ 11-13, 735 N.W.2d at 849-55; Schlosser v. N.D. Dep't of Transp., 2009 ND 173, ¶¶ 11-13, 775 N.W.2d 695, 698-99; State v. Skarsgard, 2007 ND 160, ¶¶ 12-13, 739 N.W.2d 786, 792; *Jordheim*, 508 N.W.2d at 881; McNamara v. N.D. Dep't of Transp., 500 N.W.2d 585, 590 (N.D. 1993).

114. 2009 ND 173, 775 N.W.2d 695. Although *Schlosser* was not a criminal case, the North Dakota Supreme Court has recently relied on it in criminal cases. *See* State *ex rel.* Roseland v. Herauf, 2012 ND 151, ¶ 14, 819 N.W.2d 546, 552-93.

evidence."[115] The court explained that "[w]hile introducing Form 104 is a shortcut to show fair administration, chain of custody, and compliance with the approved method, this Court has previously allowed an officer's testimony to overcome the failure to introduce a complete Form 104."[116] The court reviewed the officer's testimony.[117] Characterizing it as "conclusory and perfunctory," the court indicated the officer failed to establish that he and the nurse followed all the steps listed on Form 104 while collecting a blood sample from a DUI arrestee.[118] At the end of its opinion, the court again summarized that "[w]hile testimony can overcome the failure to submit a completed Form 104, the testimony in this case is insufficient."[119]

In *State v. Jordheim*,[120] the court indicated that an officer's testimony can be used to establish that the approved method in Form 104 was followed.[121] The bottom half of Form 104 (the specimen submitter section) was not offered by the prosecution in *Jordheim*.[122] But the officer who arrested the defendant for DUI testified that he performed the steps set out on Form 104.[123] The court explained "this testimony, coupled with the documentary exhibits, established fair administration through scrupulous compliance with Form 104."[124]

In *State v. Friedt*,[125] the court rejected a defendant's contention that the prosecution must produce at trial the nurse who drew the defendant's blood.[126] Instead, the court ruled that the prosecution could rely upon a law enforcement officer who observed the nurse draw the blood.[127] The court emphasized that the officer "personally observed the blood draw by the registered nurse, and based on his personal observations, he was able to testify how [the defendant's] blood was obtained."[128] The court, accordingly, concluded that the officer's testimony "showed that [the defendant's] blood was properly obtained[.]"[129] The ruling in *Friedt*,

115. *Schlosser*, ¶ 1, 775 N.W.2d at 696.
116. *Id.* ¶ 11, 775 N.W.2d at 699.
117. *Id.* ¶ 3, 775 N.W.2d at 696-97.
118. *Id.* ¶ 13, 775 N.W.2d at 699.
119. *Id.*
120. 508 N.W.2d 878 (N.D. 1993).
121. *Jordheim*, 508 N.W.2d at 882.
122. *Id.*
123. *Id.*
124. *Id.* (citing McNamara v. N.D. Dep't of Transp., 500 N.W.2d 585, 590 (N.D. 1993)).
125. 2007 ND 108, 735 N.W.2d 848.
126. *Friedt*, ¶¶ 11-13, 735 N.W.2d at 849-55.
127. *Id.* ¶ 13, 735 N.W.2d at 855.
128. *Id.*
129. *Id.*

however, went further. Indeed, the court indicated that the officer's testimony "laid the foundation for the admission of Form 104[,]" which, of course, included the nurse's statements.[130]

Repeatedly citing *Friedt*, the court in *State v. Gietzen*[131] again rejected a defendant's contention that the prosecution must produce at trial the nurse who drew the defendant's blood.[132] Unlike *Friedt*, the officer in *Gietzen* did not establish that the nurse properly obtained the defendant's blood.[133] So the court had to look elsewhere for "the foundation for [the defendant's] chemical analysis . . . ."[134] The court turned to Form 104.[135] Emphasizing the streamlined procedure under North Dakota Century Code section 39-20-07(5), the court concluded that Form 104 established that the defendant's blood sample was properly obtained.[136]

In making its conclusion, the court rejected the defendant's argument that his right to confrontation was violated by the admission of Form 104, because he was not allowed to cross-examine the nurse whose statements were included in the form.[137] The court viewed *Melendez-Diaz* as clarifying a defendant's right to confront merely lab analysts.[138] The court cited the famous footnote in *Melendez-Diaz*, which indicates the Court was not holding 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."[139] The court reasoned that the statements of the nurse "fall squarely within footnote one because they serve the evidentiary function of establishing the propriety of [the defendant's] blood draw, not the conclusory function of establishing [the defendant's] blood-alcohol concentration . . . ."[140] Under this reasoning, evidence providing foundation for admission of the lab results was not testimonial, while evidence directly proving an element of a crime was testimonial.[141]

---

130. *Id.*
131. 2010 ND 82, 786 N.W.2d 1.
132. *Gietzen*, ¶¶ 13-18, 786 N.W.2d at 5-7.
133. *Id.* ¶ 15, 786 N.W.2d at 5-6.
134. *Id.*
135. *Id.*
136. *Id.* ¶ 18, 786 N.W.2d at 7.
137. *Id.* ¶ 16, 786 N.W.2d at 6.
138. *Id.* ¶ 17.
139. *Id.* (quoting Melendez-Diaz v. Massachusetts, 557 U.S. 305, 311 n.1 (2009)).
140. *Id.* This reasoning was supported by case law in other jurisdictions. *See* Commonwealth v. Sylvia, 921 N.E.2d 968, 975 n.15 (Mass. 2010).
141. *Lutz*, 2012 ND 156, 820 N.W.2d 111; *Rustad*, 2012 ND 424, 837 N.W.2d 767.

C. DUI PROSECUTIONS POST-AMENDMENT

After Rule 707 was amended, three cases sprung up. Two limited the persons whom the prosecution needed to produce at trial. In one, *State ex rel. Madden v. Rustad*,[142] the court ruled a defendant could not require the prosecutor produce at trial the State Crime Lab Director.[143] The court explained that no provision required the Director to make testimonial statements in the prima facie evidence authorized under the shortcuts of North Dakota Century Code section 39-20-07 and that the Director's anticipated testimony would not prove the blood sample was properly drawn or the "substance of the results of the analytical report . . . ."[144]

In the other case, *State v. Lutz*,[145] the court concluded that the prosecution need not produce either the analyst who prepared the volatiles solution used by another analyst in conducting the chemical test or mail carriers or evidence custodians involved in transporting or maintaining a sample.[146] Noting that "documents prepared in the regular course of equipment maintenance may well qualify as nontestimonial records[,]" the court explained that the statements of the volatiles solution preparer were not prepared in anticipation of trial and thus were not testimonial.[147] Further, "the prosecution is not required to produce all individuals who laid hands on the evidence [i.e., mail carriers and evidence custodians] when establishing the chain of custody."[148] *Lutz*, though, also required the prosecution to produce at trial a witness other than the analyst. In doing so, the court relied on the third[149] Rule 707 case – *State ex rel. Roseland v. Herauf*[150] – which was the most detrimental to prosecutors.

The defendant in *Herauf* was arrested for DUI and submitted to a blood draw by a nurse.[151] The prosecutor gave notice under Rule 707 that he

142. 2012 ND 242, 823 N.W.2d 767.

143. *Rustad*, ¶¶ 17, 19, 823 N.W.2d at 773.

144. *Id.* ¶ 17.

145. 2012 ND 156, 820 N.W.2d 111.

146. *Lutz*, ¶¶ 7-12, 820 N.W.2d at 117-19.

147. *Id.* ¶¶ 7-8, 820 N.W.2d at 117 (quoting Melendez-Diaz v. Massachusetts, 557 U.S. 305, 311 n.1 (2009)). The court also noted that the prosecution was not intending to introduce the statements of the volatiles solution preparer. *Id.* ¶ 8, 820 N.W.2d at 117-19.

148. *Id.* ¶ 12, 820 N.W.2d at 119 (citing Melendez-Diaz v. Massachusetts, 557 U.S. 305, 311 n.1 (2009)). It is unclear whether Form 104 and the specimen receiver's statements contained in it were challenged. If so, admission of Form 104 without testimony from the specimen receiver likely would violate the defendant's right to confront. Melendez-Diaz v. Massachusetts, 557 U.S. 305, 311 n.1 (2009). Indeed, the prosecutor could choose to forgo chain-of-custody evidence, but "what testimony is introduced must (if the defendant objects) be introduced live." *Id*.

149. "Third" is meant as the last to be discussed in this Article, not the last in time chronologically. *Herauf* was actually decided before *Lutz* and *Rustad*.

150. 2012 ND 151, 819 N.W.2d 546.

151. *Herauf*, ¶ 2, 819 N.W.2d at 548.

intended to introduce at trial the analytical report showing the results from testing of the defendant's blood.[152] The defendant responded by sending the prosecutor a subpoena to serve upon the nurse who drew the defendant's blood.[153] The prosecutor moved to quash the subpoena.[154] The district court denied the motion and ordered that the prosecutor must produce the nurse at trial.[155]

The prosecutor then petitioned the North Dakota Supreme Court for a writ directing the district court to withdraw its order.[156] The prosecutor argued that the plain language of Rule 707 only requires the production of witnesses to testify "about the [analytical] report," which the nurse knew nothing about;[157] that the nurse was unnecessary for confrontation because an officer observed the nurse draw blood and would testify, thereby establishing the blood was properly obtained;[158] and that even if the officer could not establish that the nurse followed the approved method in drawing the defendant's blood, fair administration could be proven through expert testimony.[159]

In considering the petition, the court[160] reasoned that because Rule 707 references North Dakota Century Code chapter 39-20, it "must be interpreted in light of N.D.C.C. § 39-20-07, which governs the admission of analytical reports . . . ."[161] The court explained that "the legislature intertwined analytical reports and blood draws within N.D.C.C. § 39-20-07, requiring us to include blood draws, as well as analytical reports, in our interpretation of [Rule] 707."[162]

The court then reviewed North Dakota Century Code section 39-20-07(10), which provides:

> A signed statement from the individual medically qualified to draw the blood sample for testing as set forth in subsection 5 is

152. *Id.*
153. *Id.*
154. *Id.*
155. *Id.*
156. *Id.* ¶ 1.
157. Brief for Petitioner ¶ 30, State *ex rel.* Roseland v. Herauf, 2012 ND 151, 819 N.W.2d 546.
158. Brief for Petitioner, *supra* note 157, ¶ 31 (citing Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009); State v. Friedt, 2007 ND 108, ¶¶ 12-13, 735 N.W.2d 848, 853-55).
159. Brief for Petitioner, *supra* note 157, ¶ 31 n.2 (quoting State v. Schwalk, 430 N.W.2d 317, 324 (N.D. 1988)).
160. The court's majority included Chief Justice VandeWalle, Justice Kapsner, and Justice Maring. *Herauf*, ¶ 20, 819 N.W.2d at 555. Justice Sandtrom concurred and Justice Crothers dissented. *Id.* ¶¶ 20, 28, 819 N.W.2d at 555, 557.
161. *Id.* ¶ 11, 819 N.W.2d at 551.
162. *Id.*

> prima facie evidence that the blood sample was properly drawn and no further foundation for the admission of this evidence may be required.[163]

Citing *Schlosser*, the court concluded that "under the statute, a prerequisite to admission of an analytical report is a signed statement from the individual medically qualified to draw the blood sample that the blood sample was properly drawn."[164] That conclusion paved the way for the court's ultimate ruling.

Indeed, if the officer's testimony about observing the specific method followed by the nurse in drawing blood was sufficient to show the blood sample was properly drawn, no Sixth Amendment issue would exist. The prosecutor could choose to forgo presenting the nurse's statement and any testimony from her. But the court's conclusion ensured that the nurse was necessary; the nurse's signed statement is obviously testimonial.[165] And so came the court's ultimate ruling: Rule 707 requires the prosecutor to produce at trial the individual who drew the defendant's blood if the defendant objects and demands that the individual be produced.[166] The court further announced that "[t]o the extent our previous cases, such as *Gietzen* . . . and *Friedt* . . . are inconsistent with our holding today, they are overruled."[167]

Gietzen and *Friedt* each had flaws, namely, allowing admission of the blood drawing nurse's statements in Form 104 without testimony from the nurse.[168] Yet *Friedt's* principle that an officer's testimony could establish – based on his personal observations – that a nurse properly obtained blood did not need correcting.[169] In fact, "correcting" *Friedt* required

---

163. N.D. CENT. CODE § 39-20-07(10) (Supp. 2011).

164. *Herauf*, ¶ 14, 819 N.W.2d at 552 (citing Schlosser v. N.D. Dep't of Transp., 2009 ND 173, ¶ 9, 775 N.W.2d 695, 698).

165. *Id.* ¶ 15, 819 N.W.2d at 553. The court noted that the Nebraska Supreme Court recently ruled that a defendant's right to confrontation was violated when the certificate of the nurse who drew the defendant's blood was admitted at trial without the nurse's testimony. *Id.* ¶ 17, 819 N.W.2d at 554-55 (citing State v. Sorenson, 814 N.W.2d 371 (Neb. 2012)). The court did not cite *Sorenson* for the conclusion that the nurse's statement is a prerequisite to show that the blood sample was properly drawn. *Id.* ¶¶ 16-18, 819 N.W.2d at 553-55. On that point, a key distinction exists between *Herauf* and *Sorenson*: In *Herauf*, the prosecutor had no intent to offer the nurse's statement, while in *Sorenson*, the prosecutor relied exclusively on the nurse's certificate. Brief for Petitioner, *supra* note 157, ¶¶ 30-31; State v. Sorenson, 814 N.W.2d 371, 377 (Neb. 2012)).

166. *Herauf*, ¶ 15, 819 N.W.2d at 553 (citing Melendez-Diaz v. Massachusetts, 557 U.S. 305, 311 (2009); Crawford v. Washington, 541 U.S. 36, 51-52 (2004)).

167. *Herauf*, ¶ 15, 819 N.W.2d at 553 (citing State v. Gietzen, 2010 ND 82, 786 N.W.2d 1; State v. Friedt, 2007 ND 108, 735 N.W.2d 848).

168. State v. Gietzen, 2010 ND 82, ¶¶ 16-18, 786 N.W.2d 1, 5-7; State v. Friedt, 2007 ND 108, ¶ 13, 735 N.W.2d 848, 855.

169. An officer testifying about his personal observations does not trigger confrontation issues. *See generally* Crawford v. Washington, 541 U.S. 36, 51-52 (2004) (showing that the

manipulating *Schlosser*. As noted in *Herauf*, the court cited *Schlosser* to support its conclusion that the nurse's statement is a prerequisite to show a blood sample was properly obtained.[170] But in *Schlosser*, the court explained that an officer's testimony can be a sufficient substitute for the nurse's statement.[171] Indeed, the court in *Schlosser* twice recognized that an officer's testimony could "overcome the failure to introduce a complete Form 104."[172] And the court actually reviewed the officer's testimony to determine whether it was sufficient to show that the steps in Form 104 were followed and, accordingly, that the sample was properly obtained.[173] Simply put, *Schlosser* established that Form 104 (i.e., a document with a nurse's statement)[174] was not a prerequisite to show a blood sample was properly obtained.[175] *Herauf* thus recharachterized *Schlosser*.

D. COSTS OF AMENDMENT

Herauf's recharachterization of *Schlosser* was costly. By establishing the nurse as a necessary witness, the Rule pits prosecutors against private hospitals for a high demand resource: nurses. The competition is exacerbated by the large number of DUI blood draws. In 2012, the state crime lab in North Dakota will analyze approximately five thousand blood samples.[176] For each sample, a nurse or other medically qualified individual drew blood.[177] That means many potential trial subpoenas for nurses. Of course, many DUI cases end in guilty pleas.[178] But many of those cases first get set for trial, and prosecutors then issue subpoenas for

---

Confrontation Clause is implicated by testimonial statements not by a witness's observations of another's conduct).

170. *Herauf*, ¶ 11, 819 N.W.2d at 551.

171. Schlosser v. N.D. Dep't of Transp., 2009 ND 173, ¶ 11, 775 N.W.2d 695, 698-99.

172. *Id.* ¶ 11, 775 N.W.2d at 699.

173. *Id.* ¶ 3, 775 N.W.2d at 696-97.

174. Form 104 includes the nurse's statement. *See supra* discussion Part IV.A.

175. *Schlosser*, ¶¶ 11-13, 775 N.W.2d at 698-99. Some argue that even if an officer observed the nurse and thus can testify that the nurse followed the approved method in drawing blood, the nurse is still needed to establish that she is a nurse (i.e., a person medically qualified to draw blood). Even assuming that the premise is true (that the officer cannot testify that the nurse is a nurse), nontestimonial documents certainly could establish the nurse's occupation. For instance, a hospital business record or roster would not lead someone to reasonably believe "that the statement would be available for use at a later trial." *See* Crawford v. Washington, 541 U.S. 36, 52 (2004).

176. E-mail from Hope R. Olson, *supra* note 63. Crime Lab statistics through December 6, 2012, showed 4859 blood alcohol cases (categorized as including both "traffic and non-highway safety") were submitted. *Id.*

177. *See generally* N.D. CENT. CODE § 39-20-02 (Supp. 2011).

178. It should be noted that some of the five thousand blood draws likely did not result in continued DUI prosecution. For instance, if the test result showed an alcohol concentration below .08%, a DUI conviction would be unlikely.

nurses.[179] When nurses receive subpoenas, employers (hospitals) plan their schedules for potential trials. This disrupts hospital business.

Indeed, within three months of *Herauf*, Saint Alexius Medical Center (SAMC) – a major provider serving Burleigh and Morton Counties – gave notice that as of 2013, it will no longer offer blood draw services.[180] SAMC cited the requirement that the prosecution now "produce at trial the nurse who drew the blood sample" and the fact that its nurses were currently doing fifty blood alcohol draws per month.[181] SAMC explained it "does not have the ability to adequately staff the ER as required to meet the ever increasing needs for quality patient care and responding to court appearances required by subpoenas."[182] Sanford Health in Bismarck has also advised law enforcement that it will no longer provide blood draw services.[183] And those advisories have been effective immediately.[184]

Other counties are concerned about Sanford and SAMC-like responses. In Ward,[185] Wells,[186] McHenry,[187] and Cass[188] Counties, prosecutors fear that hospitals will opt out of the blood-drawing business. Understaffed hospitals striving for maximum efficiency may simply decide, as SAMC and Sanford did, that providing blood drawing services – with the accompanying subpoenas and potential court appearances – now undermines that goal.[189]

Prosecutors have concerns beyond the fear of hospitals choosing not to offer blood draw services. The burden of producing nurses for trial is one concern. While hospitals have been cooperative thus far in Fargo,

---

179. Interview with Assistant Cass Cnty. State's Attorney Tristan J. Van de Streek, in Fargo, N.D. (Dec. 14, 2012).

180. Letter from Amy J. Hornbacher, Vice President, Corporate Compliance/Risk Management, St. Alexius Medical Ctr., to Burleigh Cnty. State's Attorney (Oct. 22, 2012) [hereinafter Amy J. Hornbacher Burleigh Cnty. Letter] (on file with author); Letter from Amy J. Hornbacher, Vice President, Corporate Compliance/Risk Management, St. Alexius Medical Ctr., to Ladd Erickson, Mclean Cnty. State's Attorney (Oct. 22, 2012) [hereinafter Amy J. Hornbacher Mclean Cnty. Letter] (on file with author).

181. Amy J. Hornbacher Burleigh Cnty. Letter, *supra* note 180.

182. *Id.*

183. Telephone Interview with Sergeant Jason Stugelmeyer, Bismarck Police Dep't (Dec. 10, 2012).

184. *Id.*

185. Telephone Interview with Sean B. Kasson, Assistant Ward Cnty. State's Attorney (Dec. 10, 2012).

186. E-mail from Kathleen K. Trosen, Wells Cnty. State's Attorney to Cherie L. Clark, Asst. Cass Cnty. State's Attorney (Dec. 4, 2012) (on file with author).

187. Telephone Interview with Marie A. Roller, McHenry Cnty. State's Attorney (Dec. 11, 2012).

188. Interview with Tristan J. Van de Streek, *supra* note 179. Cass County is particularly concerned because Sanford is one of its two major providers. *Id.*

189. *See generally* Telephone Interview with Sean B. Kasson, *supra* note 185. A main issue in Ward County is understaffing at Trinity Hospital in Minot, N.D. *Id.*

coordinating nurses to testify at trial has been difficult.[190] This is sometimes exacerbated by the nature of many DUIs – committed at night by drivers who are taken to night-shift blood drawers.[191] Others add that the "cyclical hiring process and the transitory nature of the workforce," especially in oil-impacted areas, make producing the nurse for trial very burdensome.[192]

E. OPTIONS TO REDUCE COSTS

Prosecutors must deal with the costs associated with the existing Rule. One option is to seek another amendment of the Rule. It could be changed to eliminate the state's requirement to produce the nurse for trial. This would allow the prosecutor to prove through a law enforcement officer or other witness that a blood sample was properly obtained. But convincing the North Dakota Supreme Court to change the Rule back to a version like its original form may be difficult.[193]

Another option is to seek amendment of North Dakota Century Code section 39-20-07. Like the Rule, the statute could be changed to eliminate the state's requirement to produce the nurse for trial. That is because the court has construed the Rule in light of the statute.[194] Subdivision 10 of the statute is the real trigger for the requirement to produce the nurse under the Rule.[195] As noted, the court has interpreted North Dakota Century Code section 39-20-07(10) as establishing the nurse's statement as a prerequisite to admission of the blood test result under chapter 39-20.[196] So the statute could be changed to explicitly provide (1) that the nurse's statement is not a prerequisite, and (2) that another witness can establish that a blood sample was properly drawn. Then the court's interpretation would have to change.

Still another option is for a prosecutor to not use the shortcut procedure in North Dakota Century Code section 39-20-07 and thus not be subject to Rule 707.[197] The Rule applies when a prosecutor intends to introduce an

190. Interview with Tristan J. Van de Streek, *supra* note 179.

191. Telephone Interview with Sean B. Kasson, *supra* note 185.

192. E-mail from Aaron W. Roseland, Adams Cnty. State's Attorney to Cherie L. Clark, Assistant Cass Cnty. State's Attorney (Dec. 4, 2012) (on file with author); *see also* Telephone Interview with Marie A. Roller, *supra* note 187 (indicating that several crimes – including DUI – have increased significantly since the oil boom). Roseland, who was the petitioner in *Herauf*, points to that case as a prime example; the nurse who did the blood draw had moved before trial to Texas. E-mail from Aaron W. Roseland, *supra*.

193. *See infra* discussion Part IV.

194. State *ex rel.* Roseland v. Herauf, 2012 ND 151, ¶ 11, 819 N.W.2d 546, 551.

195. *See id.*

196. *Id.*

197. Some might suggest that law enforcement could just stop seeking blood tests and rely on breath tests. But that does not produce an acceptable outcome. Blood tests generally are

analytical report "issued under . . . N.D.C.C. chapter[] 39-20[.]"[198] So presumably the prosecutor could forgo serving notice[199] under the Rule, forgo offering Form 104,[200] and choose to simply offer at trial the officer's testimony to establish the authenticity of a blood sample sent for testing and an expert's testimony to establish the accuracy of the blood testing done. Indeed, the North Dakota Supreme Court has repeatedly stated that if the approved method is not followed, the state can present expert testimony to show the test was fairly administered.[201] In such instances, the analytical report is not "issued[202] under" North Dakota Century Code chapter 39-20. Nothing in that chapter is relied upon for admission of the report. Instead, general evidentiary rules are followed.

In addition, an option is to contemplate a process under which private hospital nurses are not the persons drawing blood and the prosecutor and hospital thus are not competing against each other. Morton County serves as one example. In Morton County, a registered nurse has an independent contract with the county to provide blood draw services. Similarly, in Bismarck, sexual assault nurse examiners on contract with the city have been handling blood draws.[203] Finally, in Cass County, the sheriff is considering a process whereby medically qualified persons – possibly

preferred over breath tests because breath test results are more often challenged by defendants, regardless of merit. Telephone Interview with Sean B. Kasson, *supra* note 185; Telephone Interview with Kristjan Helgoe, Trooper, N.D. State Highway Patrol (Dec. 11, 2012). Moreover, some DUI arrestees are incapable of producing a sufficient breath sample for testing. E-mail from Kathleen K. Trosen, *supra* note 186.

198. N.D. R. EVID. 707(a).

199. If a prosecutor serves notice and the defendant demands production of the nurse, the prosecutor should consider withdrawing the notice.

200. As noted, Form 104 includes statements (testimony) from the nurse and the specimen receiver at the state lab.

201. *See* City of W. Fargo v. Hawkins, 2000 ND 168, ¶ 17, 616 N.W.2d 856, 860; State v. Jordheim, 508 N.W.2d 878, 882 (N.D. 1993); City of Grand Forks v. Soli, 479 N.W.2d 872, 875 (N.D. 1992); State v. Nodland, 493 N.W.2d 697, 699 (N.D. 1992); State v. Sivesind, 439 N.W.2d 530, 533 (N.D. 1989); State v. Schwalk, 430 N.W.2d 317, 324 (N.D. 1988); Moser v. N.D. State Highway Comm'r, 369 N.W.2d 650, 653 (N.D. 1985).

202. "Issued" seems to be a misnomer. *See* BLACK'S LAW DICTIONARY 577 (6th ed. 1991) (defining "issue" as "[t]o send forth; to emit; to promulgate"). The analytical report is issued by the state crime laboratory's analyst and is based on the testing completed at the lab. The prosecutor can choose to offer the report under North Dakota Century Code chapter 39-20, but the report is not issued under the chapter.

203. Telephone Interview with Sergeant Jason Stugelmeyer, *supra* note 183. This may be a temporary fix and could be problematic when there are several DUIs or several DUIs and sexual assaults during one period.

cross-trained employees[204] or independent contractors – would provide blood draw services.[205]

VI. CONCLUSION

Melendez-Diaz and its progeny are tricky.[206] Justice Kennedy aptly explained, "without guidance from an established body of law, the States can only guess what future rules this Court will distill from the sparse constitutional text [of the Confrontation Clause]."[207]

Herauf and its interpretation of Rule 707 exemplify the problems stemming from *Melendez-Diaz*. When Rule 707 was adopted, no one envisioned it as establishing that a blood-drawing nurse is a necessary witness in a DUI prosecution.[208] And at adoption, it did not do so.[209] Indeed, the originally-adopted rule stemmed from *Melendez-Diaz* and targeted lab analysts.[210] "The concept outlined by the United States Supreme Court and already practiced in numerous states was to provide defendants the ability to assert their right to confront the makers of reports that ultimately would be used to implicate them in criminal activity."[211]

Yet the Rule evolved, and now the nurse has become a necessary witness.[212] As Rule 707 has evolved, so too have DUI prosecutions. The former shortcut (North Dakota Century Code section 39-20-07) has become the long way.[213] Indeed, the costs of producing nurses for trials are great – for both prosecutors and hospitals.[214] Beyond seeking statutory or rule changes, prosecutors should consider either avoiding the Rule by forgoing the "shortcut" procedure under North Dakota Century Code chapter 39-20 or implementing a process that does not use private hospital employees for blood draws.[215] The bottom line is that prosecutors must respond.

---

204. Drawbacks of using cross-trained employees include (1) the significant impact on the Sheriff's operations and (2) the time needed to implement the system. E-mail from Paul Laney, Cass Cnty. Sheriff, to Reid Brady, Assistant Cass Cnty. State's Attorney (Dec. 10, 2012).

205. *Id.*

206. Melendez-Diaz v. Massachusetts, 557 U.S. 305, 331 (2009) (Kennedy, J., concurring).

207. *Id.*

208. Order of Adoption No. 20090381, *supra* note 5.

209. N.D. R. EVID. 707 (2010).

210. Order of Adoption No. 20090381, *supra* note 5.

211. E-mail from Aaron G. Birst, N.D Ass'n of Cntys, to Cherie L. Clark, Assistant Cass Cnty. State's Attorney (Dec. 10, 2012) (on file with author). Moreover, the Rule still today provides that if the defendant does not timely object, "the defendant's right to confront the person who prepared the report is waived." N.D. R. EVID. 707(c).

212. State *ex rel.* Roseland v. Herauf, 2012 ND 151, ¶ 1, 819 N.W.2d 546, 548.

213. *See* discussion *supra* Part IV.D.

214. *See* discussion *supra* Part IV.D.

215. *See* discussion *supra* Part IV.E.