

In the  
**Supreme Court of Ohio**

STATE OF OHIO, :  
 : Case No. 07-2443  
 :  
 Plaintiff-Appellant, :  
 :  
 : On Appeal from the  
 v. : Ashtabula County  
 : Court of Appeals,  
 THOMAS A. PASQUALONE, : Eleventh Appellate District  
 :  
 :  
 Defendant-Appellee. : Court of Appeals Case  
 : No. 2007-A-0005  
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**MERIT BRIEF OF *AMICUS CURIAE***  
**OFFICE OF THE OHIO ATTORNEY GENERAL**  
**IN SUPPORT OF PLAINTIFF-APPELLANT STATE OF OHIO**

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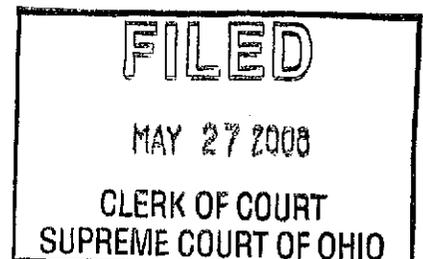
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## INTRODUCTION

The court of appeals committed three fundamental errors in concluding that a drug analysis report was improperly admitted at trial and violated Defendant-Appellee Thomas Pasqualone's rights under the Confrontation Clause of the Sixth Amendment. First, the Eleventh District held that admission of the drug analysis report contravened *Crawford v. Washington* (2004), 541 U.S. 36, because Pasqualone had no opportunity to cross-examine the analyst who prepared the report. However, this Court's precedent shows that the report fits within the "business records" exception to the hearsay rule, and *Crawford* expressly mentioned the business records hearsay exception as an example of nontestimonial hearsay not subject to Confrontation Clause analysis. *Crawford*, 541 U.S. at 55-56. The report should have been admitted under *Crawford*.

Second, the Eleventh District failed to recognize that the Confrontation Clause only protects a defendant's *opportunity* to cross-examine all adverse witnesses; if a defendant chooses to forgo the opportunity, his confrontation rights are not violated. Pasqualone failed to meet Ohio's statutory requirements for obtaining the testimony of the drug report's author. In doing so, he waived the opportunity to cross-examine the author, and admitting the report without the author's testimony in those circumstances creates no Confrontation Clause problems.

Third, the Eleventh District incorrectly held that a defendant's attorney cannot waive the defendant's confrontation rights. Not only is defense counsel permitted to waive these rights, but defense attorneys do so every time they perform limited cross-examination or choose not to cross-examine a witness at all. Defense attorneys must have the ability to waive some of their clients' rights in the name of strategy and trial tactics. The Eleventh District's rule—requiring the defendant personally to waive his confrontation rights—wastes judicial resources and hampers the adversarial system.

For these reasons, the Court should reverse the judgment below.

## STATEMENT OF AMICUS INTEREST

The Office of the Ohio Attorney General acts as Ohio's chief law officer. R.C. 109.02. Accordingly, it has a strong interest in helping local prosecutors use all reliable and probative evidence—including scientific tests—to convict those guilty of crimes. Scientific testing adds an enormous potential for discovering the truth in criminal cases. The criminal justice system routinely relies on accurate and highly reliable scientific evidence and the decision below improperly hinders Ohio's efforts in that regard. The Office of the Attorney General therefore joins the State of Ohio in urging this Court to reverse the judgment of the Eleventh District Court of Appeals.

## STATEMENT OF THE CASE AND FACTS

During his midnight shift on November 9, 2005, Trooper Jason Bonar of the Ohio State Highway Patrol noticed a vehicle—being driven by Pasqualone—with a loud exhaust system. *State v. Pasqualone* (11th Dist.), 2007 Ohio App. Lexis 5888, 2007-Ohio-6725, ¶ 2-3. Because the vehicle's license plate light was not illuminated, Trooper Bonar stopped Pasqualone's vehicle. *Id.* at ¶ 2.

Trooper Bonar asked Pasqualone for his driver's license and Pasqualone responded that he was not permitted to have a license. *Id.* at ¶ 3. Trooper Bonar verified this assertion, finding that Pasqualone's license was suspended. *Id.* Trooper Bonar placed Pasqualone under arrest and conducted a search incident to arrest. *Id.* During that search, Trooper Bonar discovered a pack of cigarettes that contained a large white rock. *Id.* Trooper Bonar advised Pasqualone of his *Miranda* rights and then asked Pasqualone if the rock was cocaine or methamphetamine. *Id.* Pasqualone responded that he did not know what "they" gave him. *Id.*

Two tests were performed on the rock. First, Trooper Bonar conducted a field test, and the rock tested positive as cocaine. *Id.* Second, the Ohio State Highway Patrol Crime Laboratory

provided that the substance tested as .446 grams of cocaine. *Id.* The Ohio State Highway Patrol's Crime Laboratory created a report of its findings. *Id.* at ¶ 5. This report, which satisfied all of the requirements of R.C. 2925.51(A), was given to Pasqualone's defense attorney, under R.C. 2925.51(B). But Pasqualone did not demand the analyst's testimony, as Ohio Revised Code Section 2925.51(C) required. *Id.*

Later, at trial, over defense counsel's objection, the trial court admitted the drug analysis report without any testimony. The jury found Pasqualone guilty of possession of cocaine and the trial court sentenced him to eight months in jail. *Id.* at ¶ 6.

Pasqualone appealed his conviction to the Eleventh District Court of Appeals, citing two assignments of error. The first, regarding a denial of his speedy trial rights, was denied. *Id.* at ¶ 28. The second, regarding a denial of his Confrontation Clause rights, was granted. *Id.* at ¶ 55. The Eleventh District concluded that the drug analysis report was testimonial, that Pasqualone did not properly waive his rights, that Pasqualone's attorney could not waive his client's rights, and that Pasqualone was not given sufficient notice of the expectations contained within R.C. 2925.51. Therefore, the Eleventh District remanded the case for retrial. *Id.* at ¶ 56.

The State appealed the Eleventh District's decision and this Court accepted that appeal on April 9, 2008.

## ARGUMENT

The Eleventh District Court of Appeals erred in its application of the Confrontation Clause to a drug analysis report for three reasons. First, the drug analysis report is nontestimonial and falls within the business records exception to the hearsay rules, making it admissible under *Crawford*. Second, the Confrontation Clause protects only a defendant's *opportunity* to cross-examine a witness, and Pasqualone gave up the opportunity to confront the report's author by failing to demand her presence within seven days of receiving the report, under R.C. 2925.51. Third, Pasqualone's defense counsel was permitted to and did waive Pasqualone's confrontation rights by failing to adhere to Ohio statutory requirements for cross-examining the author of a drug analysis report.

### **Amicus Curiae Attorney General's First Proposition of Law:**

*Laboratory reports and other scientific tests conducted and maintained in the regular course of business are nontestimonial business records, so admission of those documents into evidence does not violate a defendant's Confrontation Clause rights under Crawford v. Washington (2004), 541 U.S. 36.*

#### **A. The Confrontation Clause does not apply to lab reports and other scientific tests conducted and maintained in the regular course and scope of an agency's business because they are nontestimonial business records.**

The Sixth Amendment's Confrontation Clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI.<sup>1</sup> As *Crawford* explains, the Confrontation Clause precludes the admission of certain hearsay evidence that is "testimonial" because such evidence is a "solemn declaration" resembling trial testimony by a "witness against" the defendant. 541 U.S. at 51. For "testimonial" hearsay, the Confrontation Clause requires that the declaring witness be

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<sup>1</sup> In *Pointer v. Texas* (1965), 380 U.S. 400, 406, the Court held that the Sixth Amendment Confrontation Clause guarantee applies to state as well as federal prosecutions.

unavailable at trial and that the defendant have a prior opportunity to cross-examine the witness before the hearsay statements may be admitted. *Id.* at 53-54, 59, 68.

Under *Crawford*, however, “the Confrontation Clause has no application” to non-testimonial hearsay. *Whorton v. Bockting* (2007), 127 S.Ct. 1173, 1183. After all, “only [testimonial] statements . . . cause the declarant to be a ‘witness’ within the meaning of the Confrontation Clause . . . [and] [i]t is the testimonial character of the statement that separates it from other hearsay that, while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause.” *Davis v. Washington* (2006), 547 U.S. 813, 821 (citing *Crawford*, 541 U.S. at 51).

In distinguishing between testimonial and nontestimonial hearsay, the *Crawford* Court observed that some hearsay was, by its nature, nontestimonial. The Court gave an example that is critical here: business records. In responding to the concern that several hearsay exceptions existed at the time the Sixth Amendment was ratified, and thus should serve as exceptions to the Confrontation Clause, the *Crawford* majority recognized that

there is scant evidence that [hearsay] exceptions were invoked to admit *testimonial* statements against the accused in a *criminal case*. Most of the hearsay exceptions covered statements that by their nature were not testimonial—for example, business records or statements in furtherance of a conspiracy.

541 U.S. at 56 (footnote omitted).

The drug analysis report at issue here is clearly nontestimonial. The Framers’ adoption of the Confrontation Clause was driven in large measure by concerns with *ex parte* testimony. *Crawford*, 541 U.S. at 50. But those concerns do not apply to the drug analysis report at issue here. The report admitted at trial was not the result of a closed-door examination of a witness by a government investigator. Rather, the drug analyst received physical evidence, conducted tests, identified the substance, and wrote a report as part the Ohio State Highway Patrol Crime

Laboratory's normal course of business. The drug analysis report bears little resemblance to core testimonial hearsay. Instead, the report more closely resembles common business records which "by their nature," according to the Court, "[are] not testimonial." *Id.* at 56.

Courts in Ohio and in other States have held that *Crawford's* rule for testimonial hearsay does not apply to routine scientific reports because those reports have the characteristics of business records. Two recent decisions by this Court, *State v. Craig* (2006), 110 Ohio St. 3d 306, 2006-Ohio-4571, and *State v. Crager*, (2007), 116 Ohio St. 3d 369, 2007-Ohio-6840, are directly on point. In *Craig*, the Court held that autopsy reports are nontestimonial and a defendant's confrontation rights are not violated by a report's admission into evidence, even though someone other than the report's author testified about its contents. The jury was fully aware that the person testifying did not author the report or conduct the autopsy, and the defense had the opportunity to question the witness regarding her opinion of the findings, so the defendant's confrontation rights were not violated. *Craig*, 2006-Ohio-4571 at ¶ 79. Additionally, the Court found that the autopsy report was a nontestimonial business record because it documented objective findings (which are not testimonial) and an examiner prepared the report within the normal course of business. *Id.* at ¶ 85. Therefore, the report's admission did not, and could not, violate the Confrontation Clause.

One year later, this Court analyzed the nature of DNA reports, holding that DNA reports, like autopsy reports, are nontestimonial. *Crager*, 2007-Ohio-6840 at ¶ 51. The Court held that to determine if documentary evidence is testimonial, the proper focus is on "whether the statement represents the contemporaneous recordation of observable events." *Id.* at ¶ 68. Essentially, if a report includes a past fact, it is testimonial. *Id.* at ¶ 66. But if the report "constitutes a contemporaneous recordation of observable events [and] the analyst recorded her

observations regarding the receipt of the [substance being tested], her preparation of the samples for analysis, and the results of that analysis[.]” the analyst is not acting as a witness and is therefore not testifying. *Id.* at ¶ 67.

The Court noted that whether the DNA report was requested by the prosecution or whether the DNA laboratory was owned and operated by the government are irrelevant to the analysis. *Id.* at ¶¶ 51-53, 71. The DNA test performed and results reached would not change depending on these facts. Government agencies do not strive to arrive at any predetermined result. *Id.* at ¶ 53. The report was the product of a non-adversarial process, created in the normal course of business activity rather than specifically for trial. Thus, the report was found to be a business record, and nontestimonial evidence outside the scope of the Confrontation Clause. *Id.* at ¶¶ 59, 64.

Pasqualone asserts, and the Eleventh District erroneously held, that this Court’s analysis in *State v. Stahl* (2006), 111 Ohio St. 3d 186, 2006-Ohio-5482, demonstrates that the laboratory reports here are testimonial in nature. *Pasqualone*, 2007-Ohio-6725 at ¶¶ 43-44; Appellee’s Memorandum in Response to Memorandum in Support of Jurisdiction, p. 4. But this Court specifically noted in *Crager* that *Stahl* had no application to the business records at issue in *Crager*. *Crager*, 2007-Ohio-6840 at ¶ 45 (citing *Stahl*, 2006-Ohio-5482, at paragraph one of the syllabus). *Stahl* dealt with the Confrontation Clause’s applicability to oral witness testimony; *Crager* applied the Confrontation Clause to scientific reports—documentary evidence. *Id.* This case, like *Crager*, involves documentary evidence; *Stahl* is therefore inapplicable.

Additionally, this Court specifically held that although *Stahl* provided that one of the three criteria for determining if evidence is testimonial is if it “may reasonably be expected to be introduced at a later trial,” this criterion may not be an appropriate consideration in certain non-

oral testimonial analysis. *Id.* Because the DNA reports at issue in *Crager* were neutral and equally likely to exonerate or exculpate the defendant, and the laboratory technician had no personal interest in the test results, the fact that the report would likely be later used in court was irrelevant. *Id.* at ¶¶ 56, 69.

Courts outside of Ohio have come to the same conclusion. In *Commonwealth v. Verde* (Mass. 2005), 827 N.E.2d 701, 705, the Massachusetts Supreme Judicial Court held that a laboratory report that detailed the weight of cocaine found in the defendant's possession was not testimonial because "[c]ertificates of chemical analysis are neither discretionary nor based on opinion; rather, they merely state the results of a well-recognized scientific test determining the composition and quantity of a substance." The chemical analysis records were "akin to a business or official record, which the [*Crawford*] Court stated was not testimonial in nature." *Id.* at 706; see also *People v. Johnson* (Cal. Ct. App. 2004), 18 Cal. Rptr. 3d 230, 233 (laboratory report analyzing rock cocaine that defendant sold was not "testimonial," because it was "routine documentary evidence"); *People v. Hinojos-Mendoza* (Colo. Ct. App. 2005), 140 P.3d 30 (drug analysis report showing presence of cocaine in tested substance was held to be admissible as a nontestimonial business record).

Because the drug analysis report at issue here is a non-testimonial business record, it is not subject to Confrontation Clause analysis. The Eleventh District's holding that admission of the report violated the defendant's confrontation rights was therefore erroneous and should be reversed.

**B. The Confrontation Clause protects only a defendant's opportunity to cross-examine the witnesses against him.**

The Confrontation Clause secures the "primary interest" in the right of cross-examination. *Davis v. Alaska* (1974), 415 U.S. 308, 315. Although the text of the Confrontation Clause

simply states that an accused in a criminal prosecution has the right “to be confronted with the witnesses against him,” this right goes beyond providing the defendant “the idle purpose of gazing upon the witness, or of being gazed upon by him,” but seeks to provide the defendant with the ability to “cross-examin[e the witness], which cannot be had except by direct and personal putting of questions and obtaining immediate answers.” *Id.* at 315-16. “Cross-examination is the principle means by which the believability of a witness and the truth of his testimony are tested.” *Id.* at 316.

The primary reason for protecting the defendant’s right to cross-examine is to provide the defendant with an “opportunity to show that [the Government’s evidence] is untrue.” *Id.* at 317 n.4. And, under the Confrontation Clause, the relevant question is whether the defendant had the *opportunity* to cross-examine all adverse witnesses, not whether a defendant *actually* cross-examined all adverse witnesses. *Arnett v. Kennedy* (1974), 416 U.S. 134, 215.

Several states, including Ohio, have held that if a defendant chooses not to “avail himself of the opportunity to confront a witness,” his Confrontation Clause rights are not violated. *State v. Campbell* (N.D. 2006), 719 N.W.2d 374, 377-78. An Ohio court specifically held that a defendant’s failure to demand the testimony of laboratory technicians under Ohio Revised Code Section 2925.51(C) constitutes a waiver of his confrontation rights. *State v. Smith* (3d Dist.), 2006 Ohio App. Lexis 1555, 2006-Ohio-1661, ¶ 18.

North Dakota has a statute similar to R.C. 2925.51. The North Dakota statute provides in part that a defendant may subpoena a scientific report’s author. *Campbell*, 719 N.W.2d at 378. The North Dakota Supreme Court held that because the Defendants did not properly “avail themselves of [the] opportunity” to subpoena the author, no Confrontation Clause right was violated. *Id.* Finding that trial tactics may lead a defendant to refrain from calling the author as

a witness, the court pointed out that “unless there are very sound reasons for challenging the report’s accuracy,” calling the author to testify “could elevate the importance of the report to the factfinder.” *Id.* Ultimately, it is the “opportunity to confront that is constitutionally required[;] this right can be waived.” *Id.*

A defendant’s decision not to fully cross-examine a witness or to forgo cross-examination entirely does not result in a Confrontation Clause violation. For example, the Kentucky Supreme Court held that despite the fact that the defendant voluntarily exited a court-ordered deposition before it concluded, his Confrontation Clause rights were not violated because the defendant had the opportunity to confront the witness. *Parson v. Kentucky* (2004), 144 S.W.3d 775. Additionally, a defendant’s Confrontation Clause rights are not offended if a defense attorney declines, for tactical reasons, to cross-examine a witness. In *Colorado v. District Court of El Paso* (Colo. 1994), 869 P.2d 1281, the defendant requested that the State not be permitted to call the defendant’s cousin as a witness, because in order for the defendant to “explore [the cousin’s] biases and prejudices” on cross-examination, the fact that the defendant was convicted of manslaughter for the death of the cousin’s father would need to be disclosed. *Id.* at 1283. Although the defense attorney decided not to cross-examine, the court held that because defense counsel had the full opportunity to cross-examine the cousin, and could have effectively demonstrated the cousin’s bias to potentially discredit the truthfulness of the cousin’s testimony, the defendant’s Confrontation Clause right was not denied. The fact that the defendant had to choose between exposing his prior criminal conduct and discrediting his cousin’s testimony by showing his cousin’s bias against him did not create a Confrontation Clause concern. *Id.* at 1288.

Finally, a State is permitted to require a defendant to exercise his confrontation rights at a specific time. *Smith*, 2006-Ohio-1661 at ¶ 18. “[N]othing in *Crawford* or in the text of the *Sixth Amendment* requires that the right of confrontation must occur at trial; the Amendment merely states that the defendant has the right to confrontation during the course of prosecution. U.S. Const. amend. VI. The ‘prosecution’ has commenced once the defendant has been indicted.” *Id.*

Here, Pasqualone was provided an opportunity to cross-examine the drug analysis report’s author. According to the statute, Pasqualone simply had to demand the author’s testimony within seven days of receiving the report (or within a time extended beyond seven days if called for by the interests of justice). Upon making that request, no additional burden is placed on the defendant, as the State is charged with ensuring that the report’s author is in court. Pasqualone possessed the actual report. He had the necessary time and means to effectively challenge the report; he simply chose not to do so. The defense’s failure to adhere to the statute’s requirements resulted in the waiver of Pasqualone’s confrontation right.

**Amicus Curiae Attorney General’s Second Proposition of Law:**

*A defendant’s waiver of Confrontation Clause rights is knowing, intelligent, and voluntary and therefore proper, when waived by counsel, so long as the prosecution has complied with the procedures of R.C. 2925.51(B).*

A defense attorney is permitted to waive some of a defendant’s constitutional rights, including those under the Confrontation Clause. While defense counsel clearly may not waive all of a defendant’s constitutional rights, in exercising his or her necessary tactical judgment, counsel may properly waive some of those rights.

As the United States Supreme Court has explained: “[w]hether a particular right is waivable; whether the defendant must participate personally in the waiver; whether certain procedures are required for waiver; and whether the defendant’s choice must be particularly informed or voluntary, all depend on the right at stake.” *United States v. Olano* (1993), 507 U.S.

725, 733. The rights that can only be waived by the defendant personally, after being fully informed of his rights, include the rights to a jury trial, to counsel, to plead not guilty, to pursue an appeal, and to testify. *United States v. Aptt* (10th Cir. 2004), 354 F.3d 1269, 1282 (citing *Johnson v. Zerbst* (1938), 304 U.S. 458, 464-65 (right to counsel); *Brookhart v. Janis* (1966), 384 U.S. 1 (right to plead not guilty)).

At the same time, however, the lawyer has—and must have—full authority to manage the conduct of the trial. *Taylor v. Illinois* (1988), 484 U.S. 400, 417-18; see also *Wilson v. Gray* (9th Cir. 1965), 345 F.2d 282, 286 (The waiver of the defendant’s rights to cross-examination and confrontation “may be accomplished by the accused’s counsel as a matter of trial tactics or strategy.”); *Illinois v. Phillips* (Ill. 2005), 840 N.E.2d 1194, 1200 (stating that an attorney is authorized to act for his client on procedural matters and decisions of trial strategy and tactics, and “this principle of agency is necessary for a representative system of litigation to function”); *Aptt*, 354 F.3d at 1282 (stating that “some rights are firmly in the domain of trial strategy, and can be waived by counsel.” (citing *Jones v. Barnes* (1983), 463 U.S. 745, 751)). Rights that can be waived by defense attorneys on behalf of defendants include decisions regarding the introduction of evidence, stipulations, objections, which witnesses to call, whether and how to conduct cross-examination, which jurors to accept or strike, and what pre-trial and trial motions to file. *United States v. Plitman* (2d Cir. 1999), 194 F.3d 59, 64; *Phillips*, 840 N.E.2d at 1201.

The Confrontation Clause is plainly among those rights that can be waived by counsel. As Justice Scalia has stated, “I doubt many think that the Sixth Amendment right to confront witnesses cannot be waived by counsel.” *Gonzalez v. United States*, 2008 U.S. Lexis 3887, \*26 (Scalia, J., concurring) (citing *United States v. Diaz* (1912), 223 U.S. 442)). Indeed, as one court has noted, “[t]he majority of circuits” have held that “a defendant’s attorney can waive his

client's Sixth Amendment confrontation right so long as the defendant does not dissent from his attorney's decision, and 'so long as it can be said that the attorney's decision was a legitimate trial tactic or part of a prudent trial strategy.'" *United States v. Cooper* (7th Cir. 2001), 243 F.3d 411, 418 (citing *United States v. Reveles* (5th Cir. 1999), 190 F.3d 678, 683, n.6); *Hawkins v. Hannigan* (10th Cir. 1999), 185 F.3d 1146, 1155-56); see also *Plitman*, 194 F.3d at 64 (noting that defense counsel can waive a defendant's confrontation rights if it is a part of the trial tactics).

Additionally, requiring the defendant's express, personal waiver for every issue potentially affecting the Confrontation Clause is highly impractical. In fact, every time a defense attorney chooses to limit or forgo the cross-examination of any adverse witness, the defense attorney effectively waives the defendant's right of confrontation. *Hawkins v. Hannigan* (10th Cir. 1995), 185 F.3d 1146, 1155, n.5. "The notion that a defendant would have to approve every aspect of defense counsel's cross-examination—including whether and how to cross-examine—highlights the impracticality" of such a rule. *Phillips*, 840 N.E.2d at 1202-03; see also *Gonzalez*, 2008 U.S. Lexis 3887, \*14 ("To hold that every instance of waiver requires the personal consent of the [criminal defendant] himself or herself would be impractical.").

Many strategies and arguments can be made to advance a defendant's interests at trial. Some tactics may be weak or repetitive. It is up to the attorney to decide which trial route to take. "Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments and focusing at most on a few key issues." *Jones*, 463 U.S. at 751-52. For example, "where the central issue is whether the defendant possessed a controlled substance, defense counsel may reasonably decide to forgo the opportunity to cross-examine a forensic expert in order to focus on other theories of the defense." *Phillips*, 840 N.E.2d at 1203.

The Eleventh District suggested that providing the report to the defendant's attorney, rather than to the defendant himself, hinders the likelihood that the defendant will know about the existence and contents of the report. *Pasqualone*, 2007-Ohio-6725 at ¶ 52. Therefore, if the report is served on the defendant personally, the Eleventh District suggested, any resulting waiver will more likely be made knowingly, intelligently, and voluntarily. *Id.* (“[W]e disagree . . . with [the] conclusion that such waiver can be accomplished by the warning contained in the report, which is only served on the defendant’s attorney.”).

However, requiring the prosecutor to serve the defendant personally violates ethical rules. First, according to the Rules of Professional Conduct, “a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter.” Ohio Code of Prof'l Responsibility Rule 4.2. Accordingly, all communication concerning a criminal defendant's trial must be sent to the defense attorney, not to the defendant personally, and it is then the defense attorney's duty to ensure her client is fully informed. Ohio Code of Prof'l Responsibility Rule 1.4 (noting that the lawyer shall “promptly inform the client of any decision or circumstance with respect to which the client's informed consent is required,” “reasonably consult with the client about the means by which the client's objectives are to be accomplished,” and keep the client “reasonably informed about the status of the matter”). Therefore, the Eleventh District's implication that the prosecuting attorney should send the report directly to the defendant to enhance the probability of his personal notice violates the professional rules that govern all Ohio attorneys.

Even more, defense attorneys are more likely to know the law than defendants. The courts “presume that attorneys know the applicable rules of procedure. Given this knowledge, we can infer from the failure to comply with the procedural requirements that the attorney made a

decision not to execute the right at issue.” *State v. Belvin* (Fla.), 2008 Fla. Lexis 758, \*45. “Defense counsel, therefore, may waive a defendant’s right to confront the technician who prepared a lab report by not complying with [the statute’s] procedural requirements.” *Id.* (citing *People v. Hinojos-Mendoza*, 140 P.3d 30 (providing that a represented defendant’s failure to comply with statutory prerequisites waives the defendant’s confrontation rights, “just as the decision to forgo cross-examination at trial would waive that right”)).

The Eleventh District Appellate Court held that because the waiver was not asserted by the defendant personally on the record, he did not waive his Confrontation Clause right knowingly, intelligently, and voluntarily. *Pasqualone*, 2007-Ohio-6725 at ¶¶ 52-55. But Pasqualone’s defense counsel could and did waive Pasqualone’s confrontation rights for him. Although defense counsel objected to the admission of the drug analysis report at trial, his efforts were too late: due to the failure to demand the testimony under R.C. 2925.51(C), Pasqualone’s confrontation rights with respect to the drug analysis report were waived before he entered the courtroom. Admission of the drug analysis report was therefore proper, and this Court should reverse the decision below.

**CONCLUSION**

For the foregoing reasons, the Court should reverse the decision below and reinstate the original conviction, as Pasqualone's Confrontation Clause rights were not violated.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Merit Brief of *Amicus Curiae* Office of the Ohio Attorney General in Support of Plaintiff-Appellant State of Ohio was served by U.S. mail this 27th day of May, 2008, on the following counsel:

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