

In the
Supreme Court of Ohio

STATE OF OHIO,	:	Case No. 2007-2443
	:	
Plaintiff-Appellant,	:	On Appeal from the
	:	Ashtabula County
v.	:	Court of Appeals,
	:	Eleventh Appellate District
THOMAS A. PASQUALONE,	:	
	:	Court of Appeals Case
Defendant-Appellee.	:	No. 2007-A-0005
	:	

REPLY BRIEF OF *AMICUS CURIAE*
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IN SUPPORT OF PLAINTIFF-APPELLANT STATE OF OHIO

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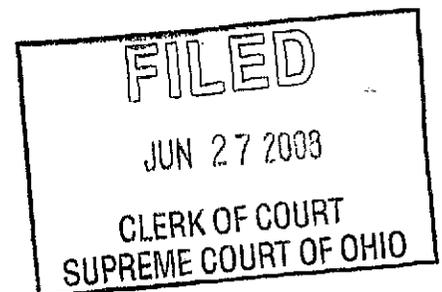


TABLE OF CONTENTS

	Page
TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
ARGUMENT.....	2
A. A drug analysis report is a business record that is, by its nature, non-testimonial, and its admission does not violate a defendant’s Confrontation Clause rights	2
B. Pasqualone’s attorney could and did waive his right to confront the report’s author by failing to comply with R.C. 2925.51	3
CONCLUSION.....	6
CERTIFICATE OF SERVICE	unnumbered

TABLE OF AUTHORITIES

Cases	Page
<i>Crawford v. Washington</i> (2004), 541 U.S. 36	1, 2, 3
<i>Davis v. Washington</i> (2006), 547 U.S. 813	2
<i>Jones v. Barnes</i> (1983), 463 U.S. 745	4
<i>State v. Crager</i> , 116 Ohio St. 3d 369, 2007-Ohio-6840	1, 2, 3
<i>State v. Craig</i> , 110 Ohio St. 3d 306, 2006-Ohio-4571	1, 2
<i>State v. Issa</i> , 93 Ohio St. 3d 49, 2001-Ohio-1290	4
<i>State v. Long</i> (1978), 53 Ohio St. 2d 91	4
<i>State v. Stahl</i> , 111 Ohio St. 3d 186, 2006-Ohio-5482	3
<i>State v. Williams</i> (1977), 51 Ohio St. 2d 112	4
<i>Taylor v. Illinois</i> (1988), 484 U.S. 400	4
<i>United States v. Olano</i> (1993), 507 U.S. 725	3
<i>United States v. Washington</i> (4th Cir. 2007), 498 F.3d 225	3
<i>Whorton v. Bockting</i> (2007), 127 S. Ct. 1173	2
Statutes and Rules	
R.C. 2925.51	1, 3

INTRODUCTION

The Eleventh District Court of Appeals wrongly decided that the admission of a drug analysis report without the author's testimony violated Defendant-Appellee Thomas Pasqualone's Sixth Amendment Confrontation Clause rights. First, the drug analysis report is non-testimonial and therefore falls outside of Confrontation Clause protections. Contrary to Pasqualone's assertion that business records in the form of drug analysis reports are testimonial, the United States Supreme Court specifically explained in *Crawford v. Washington* (2004), 541 U.S. 36, that business records "by their nature [are] not testimonial." 541 U.S. at 56 (emphasis added). This Court previously applied that rule to hold that both DNA reports, *State v. Crager*, 116 Ohio St. 3d 369, 2007-Ohio-6840, and autopsies, *State v. Craig*, 110 Ohio St. 3d 306, 2006-Ohio-4571, are non-testimonial. The Court should do so again here.

Second, Pasqualone's assertion that a defendant cannot knowingly and intelligently waive his right to cross-examine a witness without an on-the-record colloquy with the judge is inaccurate and impractical. A defendant's ability to waive his confrontation right is clearly established, and R.C. 2925.51 permissibly provides a procedure for waiving that right with respect to the author of a drug analysis report.

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

ARGUMENT

A. A drug analysis report is a business record that is, by its nature, non-testimonial, and its admission does not violate a defendant's Confrontation Clause rights.

“[T]he Confrontation Clause has no application” to non-testimonial hearsay. *Whorton v. Bockting* (2007), 127 S. Ct. 1173, 1183. The United States Supreme Court has explicitly stated that business records “by their nature [are] not testimonial.” *Crawford*, 541 U.S. at 56 (emphasis added). As a result, the admission of a business record, including a drug analysis report, without the opportunity to cross-examine the report's author does not violate the Confrontation Clause.

Contrary to this clear statement from the Supreme Court, Pasqualone erroneously claims that evidence rules are irrelevant in determining if a report is testimonial. Appellee Br. at 7-8. In addition to being inconsistent with *Crawford* and other United States Supreme Court precedent, this assertion directly conflicts with this Court's prior holdings that both DNA reports, *State v. Crager*, 2007-Ohio-6840, and autopsies, *State v. Craig*, 2006-Ohio-4571, are non-testimonial, in part because they are business records.

A drug analysis report is a business record, and business records are, by their very nature, non-testimonial. The Supreme Court's analysis of 911 calls in *Davis v. Washington* (2006), 547 U.S. 813, is instructive. There, the Court distinguished between a caller relating past events that had concluded, and a caller describing current events as they are happening. *Id.* at 822. The former hearsay is testimonial, the latter is non-testimonial. *Id.* This Court recognized and applied that distinction in holding that a DNA report is non-testimonial because it “constitutes a contemporaneous recordation of observable events.” *Crager*, 2007-Ohio-6840 at ¶ 67. Like a DNA report, a drug analysis report records an analyst's contemporaneous observations during the course of a lab test. Thus, a drug report is non-testimonial because it carries with it those attributes that both the United States Supreme Court and this Court find essential for non-

testimonial hearsay: It is a business record that records events and observations as they happen. See also *United States v. Washington* (4th Cir. 2007), 498 F.3d 225, 232 (laboratory blood tests showing the presence of drugs and alcohol in the defendant's blood were not testimonial because "they were not relating past events but the current condition of the blood").

Pasqualone further confuses the issue by pointing to an alleged conflict in this Court's precedent between *Crager* and *State v. Stahl*, 111 Ohio St. 3d 186, 2006-Ohio-5482. In *Stahl*, the Court adopted the "objective witness" test, whereby, for Confrontation Clause purposes, a "testimonial statement includes one made 'under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.'" *Id.* at ¶ 36 (quoting *Crawford*, 541 U.S. at 52). But *Stahl* dealt only with oral testimony, not the documentary evidence at issue in *Crager* and here. *Crager* explicitly distinguished *Stahl*, finding that it did not apply to documentary evidence "because *Stahl* involved the testimonial nature of actual oral 'statements' of a declarant and did not involve records of scientific tests or the business-records exception to the hearsay rule." 2007-Ohio-6840 at ¶ 45. *Stahl*, therefore, does not apply.

Because the report is a business record, which by its very nature is non-testimonial, and because it contains an account of contemporaneous events rather than relating back to past events, the report is admissible non-testimonial hearsay. Therefore, the Eleventh District decision to exclude the report was erroneous and should be reversed.

B. Pasqualone's attorney could and did waive his right to confront the drug analysis report's author by failing to comply with R.C. 2925.51.

A defendant's attorney may waive some of his client's constitutional rights, including his Confrontation Clause rights. While the appropriate type of waiver depends on the right at stake, see *United States v. Olano* (1993), 507 U.S. 725, 733, rights related to trial strategy, such as

Confrontation Clause rights, may be waived by defendant's counsel. The United States Supreme Court recognized that trial counsel necessarily must have full authority to manage the conduct of the trial, see *Taylor v. Illinois* (1988), 484 U.S. 400, 417-18; *Jones v. Barnes* (1983), 463 U.S. 745, 751, and therefore confrontation rights, which fall wholly within the realm of trial strategy or tactics, may be waived by defense counsel.

Pasqualone suggests that this Court erect a new requirement for waiving the defendant's Confrontation Clause rights when drug analysis reports are at issue. He requests a "30 second colloquy" between the judge and defense attorney in the defendant's presence. Appellee Br. at 17-19. But Pasqualone is effectively asking this Court to usurp the General Assembly's lawmaking role. Ohio Revised Code contains no provision providing for such a colloquy before a defense attorney waives his client's confrontation rights. And for good reason: creating such a requirement would result in its application for every waiver of confrontation rights. This would include a defense attorney's decision to forgo or limit cross-examination of every witness presented by the prosecution. Such a practice would have an impractically burdensome impact on the conduct of criminal trials in Ohio. But, regardless of its prudence or burden, Pasqualone's suggested Confrontation Clause requirement does not currently exist, and this Court is not the appropriate entity to create it out of whole cloth.

Pasqualone also contends, without citing a single case or providing a single example, that the courts may not require him to affirmatively act to safeguard his rights. Appellee Br. at 15-16. But he is wrong. In fact, many rights are contingent on the defendant's action. For example, no one would question that a defendant's rights are waived through procedural default if he fails to object in trial court or raise an issue in the court of appeals. See *State v. Issa*, 93 Ohio St. 3d 49, 56, 2001-Ohio-1290 (citing *State v. Long* (1978), 53 Ohio St. 2d 91 and *State v. Williams* (1977),

51 Ohio St. 2d 112). And this is true even if the failure to object results in a defendant's loss of a constitutional right. In sum, Pasqualone's assertion that his Confrontation Clause rights may not be contingent on his own affirmative action finds no support in the law.

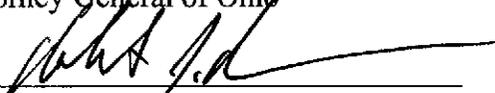
Here, Pasqualone's counsel was served with the requisite notice allowing him to demand the presence at trial of the lab report's author. Whether Pasqualone and his counsel made a strategic choice to waive his rights or whether they simply ignored Ohio law, their failure to follow the statutory requirements for making that demand waived Pasqualone's confrontation rights under Ohio law. Because he waived his confrontation rights, his claim that those rights were violated must be rejected, and the decision below must be reversed.

CONCLUSION

For the above reasons, the Court should reverse the decision below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Reply Brief of *Amicus Curiae* Ohio Attorney General Nancy H. Rogers in Support of Plaintiff-Appellant State of Ohio was served by U.S. mail this 27th day of June, 2008 upon the following counsel:

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