

ORIGINAL

In the
Supreme Court of Ohio

STATE OF OHIO,	:	Case Nos. 2006-0294,
	:	2006-0298
Plaintiff-Appellant,	:	
	:	On Appeal from the
v.	:	Marion County
	:	Court of Appeals,
LEE CRAGER,	:	Third Appellate District
	:	
Defendant-Appellee.	:	Court of Appeals Case
	:	No. 9-04-54

**MEMORANDUM OF AMICUS CURIAE OHIO ATTORNEY GENERAL
RICHARD CORDRAY IN SUPPORT OF MOTION FOR RECONSIDERATION OF
PLAINTIFF-APPELLANT STATE OF OHIO**

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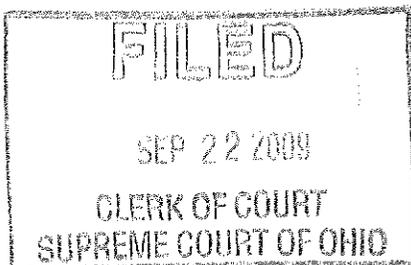


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INTRODUCTION

The Ohio Attorney General urges reconsideration because this Court’s decision to vacate Defendant-Appellee Lee Crager’s conviction and remand for a new trial discards one of the Court’s original holdings in this very case, without explanation. Accordingly, the Court should reconsider its decision and resolve this action consistent with its original holding—unaffected by *Melendez-Diaz v. Massachusetts* (2009), 129 S. Ct. 2527—that a defendant’s confrontation rights are not violated when a qualified expert testifies in place of an expert who performed scientific testing.

The Court initially issued judgment in favor of Plaintiff-Appellant State of Ohio in December 2007, articulating two holdings of law:

1. Records of scientific tests are not “testimonial” under *Crawford v. Washington* (2004), 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177.
2. A criminal defendant’s constitutional right to confrontation is not violated when a qualified expert DNA analyst testifies at trial in place of the DNA analyst who actually conducted the testing.

State v. Crager (“*Crager P*”), 116 Ohio St. 3d 369, 2007-Ohio-6840, syllabus.

In June 2009, the United States Supreme Court decided *Melendez-Diaz*, holding that drug analysis reports are “testimonial” and their admission without witness testimony violates a defendant’s confrontation rights under the Sixth Amendment of the United States Constitution. *Melendez-Diaz* thus overruled this Court’s first holding in *Crager I*, but said nothing about its second holding. In accord with *Melendez-Diaz*, the United States Supreme Court vacated this Court’s judgment in *Crager I* and remanded to this Court “for further consideration in light of *Melendez-Diaz v. Massachusetts*.” *Crager v. Ohio* (2009), 129 S. Ct. 2856.

On remand, this Court vacated the trial court’s judgment and “remand[ed] the cause to the trial court for a new trial consistent with *Melendez-Diaz v. Massachusetts*.” *State v. Crager*

(“*Crager II*”), 2009-Ohio-4760, at ¶ 3. The Ohio Attorney General urges this Court to reconsider that decision for two reasons.

First, this Court carefully considered the question whether confrontation rights are “violated when a qualified expert DNA analyst testifies at trial in place of the DNA analyst who actually conducted the testing” and decided this issue in *Crager I*. *Crager I*, 2007-Ohio-6840, at paragraph two of the syllabus. Following full briefing and oral argument, the Court held that confrontation rights are not violated under these circumstances. *Id.* at syllabus. *Melendez-Diaz* did not explicitly or implicitly question this holding, and in no way requires this Court to reevaluate its initial analysis of the issue. This case is readily distinguished from *Melendez-Diaz*, where *no one* testified about the scientific report, because here a qualified expert testified about the DNA reports and was subject to cross-examination.

Second, the Court’s current decision will create significant confusion among Ohio’s lower courts, prosecutors, and scientists. By vacating the trial court’s judgment and remanding for “a *new trial* consistent with *Melendez-Diaz*,” *Crager II*, 2009-Ohio-4760, at ¶ 3 (emphasis added), this Court has implicitly called into doubt the second holding of *Crager I*. If this Court still accepts the reasoning of *Crager I*’s second holding, then the new trial could presumably be exactly the same as *Crager*’s original trial. In other words, the trial court could admit the same DNA reports in conjunction with the testimony of the same analyst who testified at the first trial, even though that analyst testified in place of the authoring analyst. But because the Court has ordered a *new trial*, the trial court and the parties are likely to assume that the trial court needs to do something different to comply with *Melendez-Diaz*. Specifically, they may mistakenly conclude that *Melendez-Diaz* requires the authoring analyst—and not a qualified substitute expert—to testify about the contents of scientific reports.

If the Court did not intend to retreat from the second holding of *Crager I*, then it should reconsider *Crager II* and instead hold that Crager's conviction is valid because his confrontation rights were not violated by the testimony of a substitute analyst.

If the Court is abandoning *Crager I*'s second holding, however, then it should at least say so explicitly after giving the parties an opportunity to brief the issue.

For these reasons, the Court should reconsider its judgment and reinstate Crager's conviction.

STATEMENT OF AMICUS INTEREST

Attorney General Richard Cordray is Ohio's chief law officer. R.C. 109.02. He has a strong interest in helping local prosecutors use all reliable and probative evidence—including a full-range of forensic scientific tests—to convict those guilty of crimes. Moreover, the Attorney General's Bureau of Criminal Identification and Investigation ("BCI") performs many forensic tests, including the tests in this case. The Attorney General similarly has a strong interest in ensuring that BCI analysts are able both to perform valuable scientific testing and to testify about the results of that testing in Ohio courts. This Court's decision in *Crager II* creates uncertainty among Ohio's trial courts, prosecutors, and scientists about what is constitutionally required when introducing scientific reports at trial.

ARGUMENT

- A. Melendez-Diaz does not call into question, either explicitly or implicitly, this Court's holding that a criminal defendant's constitutional right to confrontation is not violated when a qualified expert DNA analyst testifies at trial in place of the DNA analyst who actually conducted the testing.**

Although *Melendez-Diaz* expressly overruled *Crager I*'s holding that scientific reports are nontestimonial—and therefore outside the scope of the Confrontation Clause—it said nothing about whether a defendant's confrontation rights are satisfied when one qualified analyst testifies

about a scientific report in place of another. The United States Supreme Court did not contradict or even undermine *Crager I*'s second holding. Therefore, the Court has no reason to modify its holding that a defendant's confrontation right "is not violated when a qualified expert DNA analyst testifies at trial in place of the DNA analyst who actually conducted the testing." *Crager I*, 2007-Ohio-6840, paragraph two of the syllabus.

In *Melendez-Diaz*, the United States Supreme Court held that "certificates of analysis," drug lab reports admitted in Massachusetts courts, are "quite plainly affidavits" and "are functionally identical to live, in-court testimony." 129 S. Ct. 2527, 2532. Because these reports are testimonial, they implicate a defendant's confrontation rights. *Id.* The defendant in *Melendez-Diaz* did not have an opportunity to confront anyone about the contents of the drug reports because no one testified about the reports. Accordingly, his confrontation rights were violated. *Id.* at 2542.

But here, unlike in *Melendez-Diaz*, a qualified expert testified about the DNA reports admitted during *Crager*'s trial. *Crager I*, 2007-Ohio-6840, at ¶ 73. Jennifer Duvall, the BCI analyst who originally prepared the reports, was on maternity leave at the time of *Crager*'s trial. *Id.* at ¶ 8. However, the State called another qualified DNA expert, BCI analyst Steven Wiechman, to testify about the DNA evidence at trial. *Id.* at ¶¶ 8-31. Wiechman had "fully reviewed the complete file . . . and had reached his own conclusion about both [DNA] reports 'to a reasonable degree of scientific certainty.'" *Id.* at ¶ 83.

This Court found no confrontation problem in *Crager I* for two independent reasons. First, the Court held that records of scientific tests are nontestimonial and do not implicate the Confrontation Clause. *Id.* at paragraph one of the syllabus. That is the holding that was overruled by *Melendez-Diaz*. But second, the Court articulated an alternative ground for

upholding Crager's conviction: A defendant's confrontation rights are not violated "when a qualified expert DNA analyst testifies at trial in place of the DNA analyst who actually conducted the testing." *Id.* at paragraph two of the syllabus. This alternate holding clearly recognized that, for purposes of a confrontation clause analysis, there is a significant difference between introducing a scientific report without any testimony and introducing a scientific report with the testimony of a qualified expert, even if that expert was not the testing analyst.

In *Crager I*, the Court explained the reasoning for its second holding, concluding that it was "of no import that [Wiechman] did not actively participate in both rounds of DNA testing." *Id.* at ¶ 73. In fact, the Court saw "no indications that Crager was not able to conduct a meaningful cross-examination" about the DNA reports. *Id.* at ¶ 76. Duvall's answers to the questions Crager asked on cross-examination of Wiechman "likely would have been very similar, if not identical, to Wiechman's." *Id.* Moreover, a contrary holding would have adverse consequences:

If all the DNA analysts who had actively participated in the testing and review process that generated the DNA reports were unavailable to testify (for example, if all had died), should that mean that no expert DNA witness, after reviewing the relevant materials, would have been qualified to testify? If that were the situation, would the DNA tests have to be redone, even though there are no questions about the accuracy of the tests, and there are no indications of any discrepancies?

Id. at ¶ 77.

This reasoning is neither explicitly nor implicitly contradicted by *Melendez-Diaz*. Thus, when the United States Supreme Court vacated *Crager* and remanded for reconsideration in light of *Melendez-Diaz*, this Court had no reason to resolve this case any differently than it did in *Crager I*. Although *Crager I*'s first holding has been overruled, here the trial court did not violate Crager's confrontation rights when it allowed a qualified analyst to testify in place of the analyst who conducted the DNA testing.

B. If the Court is retreating from the second holding of *Crager I*, then it should clearly articulate that decision, after giving the parties a full opportunity to brief the issue.

Although *Melendez-Diaz* does not require this Court to reconsider the second holding of *Crager I*, the Court has implicitly questioned that holding by remanding to the trial court “for a new trial consistent with *Melendez-Diaz v. Massachusetts*.” *Crager II*, 2009-Ohio-4760, at ¶ 3. If the Court wanted to ensure that the trial court had an opportunity to determine the admissibility of the DNA analyst’s testimony in this case in light of *Melendez-Diaz*, then it should have remanded to the trial court for additional *proceedings* consistent with *Melendez-Diaz*, rather than expressly requiring a new trial. In fact, by requiring a new trial, the Court has given no court an opportunity to determine the admissibility of Wiechman’s testimony post-*Melendez-Diaz*. *Crager II* thus suggests that the Court is retreating from, or has already abandoned, the second holding of *Crager I*. If that is the case, then the Court should at least clearly say so to avoid confusion about what is required to protect a defendant’s confrontation rights.

By contrast, if the Court stands by the reasoning of *Crager I*’s second holding, then there is no reason to conduct a new trial: The trial court could presumably admit the exact same evidence in the exact same way without violating *Crager*’s confrontation rights. But there is no reason for the Court to remand for a new trial if it stands by *Crager I*’s second holding. Confusion will persist among lower courts, prosecutors, and the analysts who testify about scientific results until this Court explains what is constitutionally required when the analyst who performed a scientific test is unavailable to testify at a criminal trial. There is no reason for this Court to wait for the issue to arise in a future case when the issue is now before the Court, especially because the Court specifically addressed the issue in the now-vacated *Crager I*.

If the Court is uncertain about whether the *Crager I*'s second holding is correct after *Melendez-Diaz*, then it should give the parties an opportunity to brief the issue. The parties briefed and argued the question of whether confrontation rights are violated when a qualified expert DNA analyst testifies at trial in place of the testing analyst before the Court decided *Crager I*. But if the Court believes that *Melendez-Diaz* calls *Crager I*'s second holding into question, then it should give the parties an opportunity to explain what, if any, impact *Melendez-Diaz* has on that issue.

CONCLUSION

For the above reasons, this Court should reconsider its decision and reinstate Crager's conviction. Alternatively, at the very least, the Court should allow the parties to brief the question of whether, under *Melendez-Diaz*, a defendant's confrontation rights are violated when a qualified expert DNA analyst testifies at trial in place of a testing analyst and issue a clear ruling on that issue.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Memorandum of *Amicus Curiae* Ohio Attorney General Richard Cordray in Support of Motion for Reconsideration of Plaintiff-Appellant State of Ohio was served by U.S. mail this 22nd day of September, 2009, upon the following counsel:

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