ORIGINAL

In The
Supreme Court of Ohio

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

MOTION FOR RECONSIDERATION 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	3
A. This Court's holding in paragraph two of the syllabus—that a criminal defendant's right to confrontation is not violated when BCI lab reports are admitted in conjunction with the testimony of a qualified DNA expert who testifies at trial in place of the DNA analyst who actually conducted the testing—is not impacted by the holding in *Melendez-Diaz* that scientific reports are "testimonial," the admission of which without accompanying witness testimony violates a criminal defendant's right to confrontation.	3
B. If this Court has decided to abandon its alternative holding in paragraph two of the syllabus, it should declare so in a reasoned decision after first giving the parties an opportunity to brief the issue in light of *Melendez-Diaz*.	5
CONCLUSION	6
CERTIFICATE OF SERVICE	7

TABLE OF AUTHORITIES

Cases **Page(s)**

State v. Crager ("Crager I"), 116 Ohio St.3d 369, 2007-Ohio-6840 ..... *passim*

State v. Cook, 6th Dist. No. WD-04-029, 2005-Ohio-1550 1

Melendez-Diaz v. Massachusetts (2009), 557 U.S. ____, 129 S. Ct. 2527 ..... *passim*

Crager v. Ohio (2009), 129 S. Ct. 2856 2

State v. Crager ("Crager II"), 2009-Ohio-4760 2

INTRODUCTION

On December 27, 2007, this Court reversed the Third District Court of Appeals and affirmed the conviction and sentence of defendant-appellee Lee Crager for aggravated murder and aggravated burglary. *State v. Crager ("Crager I")*, 116 Ohio St.3d 369, 2007-Ohio-6840. Specifically, this Court held as follows:

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.

Crager I, 2007-Ohio-6840, at syllabus.

This Court addressed the first issue listed above as a certified conflict between the Third District Court of appeals in the instant case, and the Sixth District Court of Appeals in *State v. Cook*, 6th Dist. No. WD-04-029, 2005-Ohio-1550. This court agreed to hear and decide the second question listed above by way of allowing a discretionary appeal by the state on that specific issue.

On June 25, 2009, the United States Supreme Court announced its decision in *Melendez-Diaz v. Massachusetts* (2009), 129 S. Ct. 2527, holding that the reports of scientific tests are "testimonial" under *Crawford v. Washington* and that the admission of such without accompanying witness testimony violates a criminal defendant's right to confrontation under the Sixth Amendment of the United States Constitution. This holding, in effect, overruled this Court's first holding in *Crager I*, but did not touch upon the issue resolved by *Crager I's* second holding – whether a criminal defendant's right to

confrontation is violated when one DNA expert witness testifies at trial in place of another DNA expert who actually conducted the DNA testing.

Thereafter, the United States Supreme Court vacated this Court's judgment in *Crager I* and remanded "for further consideration in light of *Melendez-Diaz v. Massachusetts.*" *Crager v. Ohio* (2009), 129 S. Ct. 2856.

On remand, this Court, without elaboration or explanation, ordered a new trial. *State v. Crager ("Crager II")*, 2009-Ohio-4760, at ¶ 3.

The State of Ohio hereby respectfully moves this Court to reconsider this decision for two reasons. First, the holding in *Melendez-Diaz* did not address, and therefore does not impact, this Court's holding in paragraph two of the syllabus in *Crager I*. The issue of whether substituting one DNA expert to testify in place of another who actually did the lab work would violate a criminal defendant's right to confrontation is an issue that this Court specifically decided to hear by means of a discretionary appeal by the state. This Court's holding in paragraph two of the *Crager I* unequivocally answered that question. Since *Melendez-Diaz* does not touch upon the issue, it would appear that this Court's holding is still the final word, and the defendant-appellee's conviction is valid.

Second, although neither *Melendez-Diaz* nor *Crager II* expressly or impliedly reject the second paragraph in the syllabus of *Crager I*, if this Court intends to do so by ordering a new trial, then it should make its intentions clear by allowing the parties to brief the issue in light of *Melendez-Diaz*, and then issue a reasoned opinion making this point of law clear.

ARGUMENT

A. This Court's holding in paragraph two of the syllabus—that a criminal defendant's right to confrontation is not violated when BCI lab reports are admitted in conjunction with the testimony of a qualified DNA expert who testifies at trial in place of the DNA analyst who actually conducted the testing—is not impacted by the holding in *Melendez-Diaz* that scientific reports are "testimonial," the admission of which without accompanying witness testimony violates a criminal defendant's right to confrontation.

In deciding this case, this Court set out to address two separate and distinct issues: 1) whether BCI lab reports resulting from DNA testing are "testimonial" under *Crawford v. Washington*, and 2) whether a criminal defendant's right to confrontation is violated by allowing one DNA expert to testify at trial in place of the DNA expert who actually conducted the DNA testing. *Crager I*, 2007-Ohio-6840, at ¶¶ 34, 37. The first issue was placed before this Court by way of a certified conflict between the Third District and Sixth District Courts of Appeals. *Id.* at ¶ 35. This Court decided to hear as a discretionary appeal the second issue as raised by the state. *Id. at ¶ 37.*

As this Court is well aware, the United States Supreme Court overruled this Court's holding on the first issue in *Melendez-Diaz*. The facts in *Melendez-Diaz* involved the admission at trial of a scientific "certificates of analysis" (i.e. drug test reports) without any accompanying testimony. The United States Supreme Court held that such scientific reports are "testimonial" and therefore implicate a defendant's right to confrontation. Since the drug reports were admitted without live testimony, the defendant was deprived of his opportunity to confront anyone about the contents or accuracy of the reports, and therefore the admission of the reports violated his right to confrontation. *Melendez-Diaz*, 129 S. Ct. at 2542.

In this case, unlike the facts in *Melendez-Diaz*, the scientific DNA reports were admitted in conjunction with live testimony of a DNA expert. After finding that the DNA reports were not "testimonial" and therefore did not implicate the defendant-appellee's right to confrontation, this Court went on to address, as an alternative issue, the question of whether his right to confrontation was adequately protected when the state presented the testimony of one DNA expert in the place of another who actually did the lab testing. After carefully and thoroughly exploring this issue, this Court held that the defendant's right to confrontation was not violated. This Court's alternative holding clearly recognizes that, for purposes of a confrontation clause analysis, there is a significant difference between introducing a scientific report with no witness testimony as in *Melendez-Diaz*, and introducing a scientific report in conjunction with the testimony if a qualified expert, notwithstanding that the expert did not perform the actual tests.

There is nothing in *Melendez-Diaz* that would reject, or even bring into question, this Court's alternative holding. When the United States Supreme Court vacated *Crager I* and remanded for further consideration in light of *Melendez-Diaz*, this Court had no reason to depart from its alternative holding, as this Court has already determined that, even if the defendant's right to confrontation was implicated by admission of "testimonial" scientific reports as *Melendez-Diaz* now holds, the trial court did not violate the defendant's right to confrontation by admitting the DNA reports and allowing a qualified DNA expert to testify in place of the one who actually conducted

the DNA testing. Accordingly, the defendant-appellee's conviction is still valid, and a new trial is not necessary.

B. If this Court has decided to abandon its alternative holding in paragraph two of the syllabus, it should declare so in a reasoned decision after first giving the parties an opportunity to brief the issue in light of *Melendez-Diaz.*

As already stated, this Court specifically chose to address the issue raised by the state on a discretionary-appeal basis of whether allowing a qualified DNA expert to testify in place of another DNA analyst who actually conducted the DNA testing would violate a criminal defendant's right to confrontation. In paragraph two of the syllabus in *Crager I,* this Court unequivocally answered that question and found no violation. However, by ordering a new trial in light of *Melendez-Diaz*—which dealt with the admission of lab reports with no accompanying witness testimony and did not touch upon the issue raised here—this Court appears now to be retreating from that holding.

There is nothing in *Melendez-Diaz* that would prohibit the trial court from allowing Steven Weichman to again testify in place of Jennifer Duvall. And there is no reasoned opinion from this Court holding that doing so would violate the defendant-appellee's right to confrontation. Similarly, other trial courts, prosecutors, and forensic scientists will now be uncertain how to proceed when the analyst who actually performs scientific testing is unavailable to testify at trial.

This Court made a considerable effort in *Crager I* analyzing the impact of allowing one qualified DNA expert to testify in place of another DNA analyst who actually conducted the testing on the defendant's right to confront his accusers. If this Court now intends to abandon its reasoning and hold something different, then it

should at least say so. There is certainly nothing in *Melendez-Diaz* that requires such a retreat.

Accordingly, if this Court is uncertain as to whether *Melendez-Diaz* undermines its holding in paragraph two of the syllabus, it should give the parties the opportunity to brief the issue, and then issue a reasoned opinion that clarifies the issue for all stakeholders.

CONCLUSION

For the above-stated reasons, this Court should reconsider its decision and reinstate defendant-appellee's convictions and sentences. Alternatively, the Court should allow the parties to brief the specific issue of the impact of *Melendez-Diaz* on this Court's holding in paragraph two of the syllabus in *Crager I*, and then render a reasoned opinion clarifying this issue.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion for Reconsideration was served, by regular U.S. Mail postage prepaid this 28th day of September 2009, upon:

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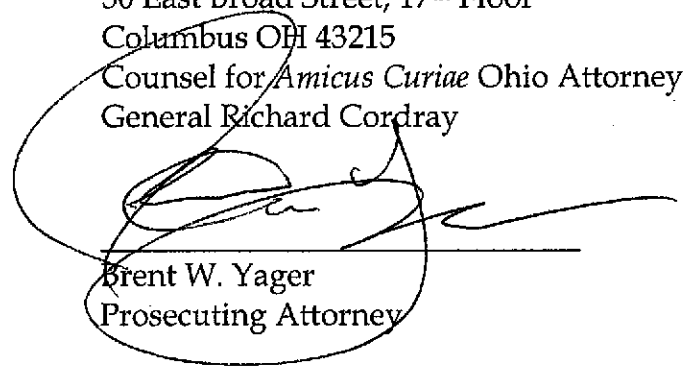

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