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.	:	

SUPPLEMENTAL BRIEF OF
PLAINTIFF-APPELLANT STATE OF OHIO

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INTRODUCTION

On December 27, 2007, this Court reversed the Third District Court of Appeals and affirmed the trial court's admission of the testimony of BCI forensic scientist Steven Wiechman and two BCI DNA reports which helped result in 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, nullifying this Court's first holding in *Crager I*, above. Since the facts in *Melendez-Diaz* involved the admission of a drug report without any testimony whatsoever, that case said nothing about whether a qualified expert can testify about his own interpretation of scientific data generated by another technician or analyst.

This Court has now asked the parties to "brief the issue of the impact of *Melendez-Diaz v. Massachusetts* on this Court's holding in paragraph two of the syllabus in *State v. Crager*." 11/18/2009 *Case Announcements*, 2009-Ohio-6015 (internal citations omitted).

In granting the state a discretionary appeal from the appellate court below, this Court specifically chose to hear and decide the issue of whether a criminal defendant's right to confrontation is violated when a qualified expert DNA analyst testifies at trial in place of the DNA analyst who actually conducted the testing that generated the data upon which the testifying expert bases his opinion. This Court unequivocally answered that question in the negative. The holding in *Melendez-Diaz* that scientific reports are testimonial under *Crawford* does not impact this Court's conclusion one way or the other. In this case, Steven Wiechman was properly qualified as a DNA expert, and testified about his own conclusions after reviewing the work of Jennifer Duvall. The scientific reports generated by Duvall—which *Melendez-Diaz* now holds are testimonial and cannot be admitted without at least the opportunity of cross-examination of accompanying live testimony—were properly admitted into evidence to show the basis of Wiechman's expert testimony. Unlike *Melendez-Diaz*, in this case the reports were never offered as a substitute for live testimony

The State of Ohio respectfully submits that, since *Melendez-Diaz* does not touch upon the issue of whether a qualified expert can testify to his own conclusions based upon scientific data generated by another analyst, this Court's holding in the second paragraph in the syllabus of *Crager I*—that the testimony of one qualified DNA expert offered in the place of another who actually generated the data that is the basis of the testifying expert's opinion does not violate the defendant's right to confrontation—is still the final word.

ARGUMENT

A. Melendez-Diaz has no impact on this Court's holding that a criminal defendant's right to confrontation is not violated when a qualified DNA expert analyst testifies at trial in place of the DNA analyst who actually conducted the testing.

As this Court is well aware, the United States Supreme Court in *Melendez-Diaz* overruled this Court's holding that scientific reports are not testimonial under *Crawford v. Washington* (2004), 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d. 177. The facts in *Melendez-Diaz* involved the admission at trial of scientific "certificates of analysis" (i.e. drug reports in the form of affidavits signed by the analyst) without any accompanying live testimony. The U.S. Supreme Court held that such scientific reports are "testimonial" under *Crawford* and therefore implicate the Confrontation Clause of the Sixth Amendment. Since the drug reports were admitted without live testimony (or any sort of notice-demand provision as used in Ohio for drug reports), 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.

It should be noted that the facts in *Melendez-Diaz* involved the state's introduction of the affidavits without any testimony whatsoever. The affidavits stated that the substance seized by the police contained cocaine, and gave the net weight of the substance, facts that were essential to the prosecution's case. However, it was virtually impossible for the defense to cross-examine paper documents or otherwise confront the contents or accuracy of the conclusions contained therein. Accordingly, Justice Scalia in his majority opinion stated: "This case involves little more than the application of our holding in *Crawford v. Washington*. The Sixth Amendment does not permit the prosecutors to prove its case via *ex parte* out-of-court affidavits, and the admission of such evidence against Melendez-Diaz was error." *Id.* at 2542 (citations omitted).

In this case, the prosecutor did not attempt to prove his case by the introduction of the DNA reports. Rather, the prosecutor called Steven Wiechman as an expert DNA analyst who had completely reviewed the entire BCI file and who had reached his own independent conclusions from the raw data contained in Jennifer Duvall's case jacket. His testimony concerned five items of physical evidence containing DNA profiles that were consistent with either Esta Boyd or Lee Crager: a bloodstain on Crager's shirt that was consistent with Boyd's DNA profile, DNA on Boyd's ring that had a profile consistent with Crager's DNA profile, and finally three cigarette butts containing DNA with profiles consistent with Crager's DNA profile. Wiechman testified that, after thoroughly reviewing everything in the BCI case jacket (which contained far more data and records than Duvall's final reports) and performing his own interpretation of the raw data and calculations of frequency, his expert conclusion was that the DNA profiles from the physical evidence were consistent with either Boyd or Crager's DNA as indicated above, with frequencies of occurrence ranging from one-in-7.8 million people (the ring), to one-in-13.7 quadrillion (cigarette butts) to one-in-1.028 quintillion (the shirt).

Thus, it was Wiechman's testimony that conveyed the testimonial aspects of Duvall's reports, and not Duvall's reports themselves. The reports (Exhibits 56 and 57), which were admitted during Wiechman's testimony without objection, were not introduced to convey any factual information themselves, but to show the jury part of the underlying basis for Wiechman's own expert conclusions. There was no factual information contained in the reports that Wiechman did not provide in his own testimony. This was not simply a case where one witness got on the stand and simply read another witness's report to the jury. Wiechman's testimony stood on its own factual merit.

Accordingly, unlike *Melendez-Diaz*, in this case the prosecution did not seek to introduce scientific reports and let the unconfronted documents speak for themselves. Instead, the prosecution presented an expert witness who testified to his own independent conclusions based on the raw data generated by another analyst, and was subject to cross-examination about the contents and accuracy of his conclusions. Wiechman's testimony conveyed the testimonial aspects of the scientific DNA reports, and was subject to cross-examination. As this Court noted in its majority opinion in *Crager* I: "In that situation, the testifying expert analyst is the witness who is subject to cross-examination and is the one who presents the true "testimonial" statements." *Crager I*, 2007-Ohio-6840 at ¶ 79. Therefore, *Melendez-Diaz* has no impact on this Court's holding that Wiechman's testimony did not violate the defendant's right to confrontation.

B. When Wiechman testified that he had reviewed Duvall's data and had independently reached the same conclusions, Wiechman in effect became the defendant's accuser for Confrontation Clause purposes. Since Wiechman was subject to cross-examination regarding his expert conclusions, the defendant's right to confront his accuser was adequately protected.

In her majority opinion in *Crager I*, Justice O'Connor correctly noted that the defense in this case did not object to the admission of Exhibits 56 and 57, the scientific DNA reports, and only objected to Wiechman's testimony on hearsay grounds, never raising the defendant's confrontation rights as an issue. *Crager I*, 2007-Ohio-6840 at ¶¶ 9-10. In addition, the defense never challenged the contents or accuracy of either the reports or Wiechman's own independent conclusions. Instead, the defense effectively used Wiechman's testimony to explore the limits of DNA analysis in a forensic setting: 1) Wiechman could not say how the suspect stains got there, or even when. Wiechman admitted that all he could say is that the profiles were consistent with one another, and that the most likely explanation is that the DNA source and the item came into

contact at some point in time and there was a transfer. 2) Wiechman's conclusions could not rule out the defense theory that Crager could have intervened between Boyd and her assailant, thereby accounting for the DNA transfers, and 3) Wiechman could not say what DNA profiles might or might not be on items that were submitted to BCI but never tested.

Thus, the defense's cross-examination of Wiechman downplayed the "accusatory" nature of Wiechman's conclusions as a DNA expert, and even sought to use Wiechman's testimony to tie in the defense theory that Crager could have intervened between Boyd and her real killer. Still, to the extent that the DNA evidence presented by the prosecution was "accusatory" with regard to Lee Crager, it was Wiechman's testimony that conveyed the "accusatory" or "testimonial" aspects of the DNA evidence, and Wiechman was subject to cross-examination.

Wiechman testified that he had reviewed the entire BCI case jacket prior to his testimony. He testified that he had previously performed the technical review for Exhibit 57, the DNA report containing conclusions regarding the ring and three cigarette butts. Thus, in the technical review process he had reviewed all of Jennifer Duvall's raw data, made his own interpretations of the electropherograms, reached his conclusions, and made his own calculations for frequency of occurrence. In addition, once he realized he would be testifying in this case, he also performed the same steps with regard to Exhibit 56, the DNA report for Boyd's shirt. Thus, Exhibit 56 was actually subject to three layers of review: a technical review by some BCI analyst other than Duvall or Wiechman, an administrative review, and then Wiechman's own independent prepare-for-testimony review. Thus, Wiechman was able to testify to the jury that he had reviewed all of the same raw data as Jennifer Duvall, but had reached his own independent conclusions. Thus, for Confrontation Clause purposes, Wiechman became the defendant's accuser. He took the stand and testified to those conclusions, and was subject to cross-examination. Again, as this

Court noted in its majority opinion in *Crager* I: "In that situation, the testifying expert analyst is the witness who is subject to cross-examination and ***is the one who presents the true "testimonial" statements.***" *Crager I*, 2007-Ohio-6840 at ¶ 79 (empasis added). Therefore, the defendant's Sixth Amendment right to confront his accuser was adequately protected.

C. This Court's departure from its second holding in *Crager I* would effect an unnecessary hardship on prosecutors, Ohio crime laboratories, and the criminal justice system.

The Ohio Attorney General, in his *amicus* brief in support, has very thoroughly explored the practical hardships involved in the DNA-testing field. The state joins in his claim that requiring the actual analyst who performs any significant part of the DNA testing to testify would be an imposing burden, if not an unrealistic one, given the current methodologies of DNA testing.

It should be noted that this is a murder case. Murder has no statute of limitations. This Court is no doubt aware of the CODIS database and the fairly recent statutory provisions that require DNA testing of all convicted felons. Because of these tools, law enforcement is closing cold cases at an ever-increasing rate, sometimes decades after the crime was committed. The Attorney General has cited the case of *North Carolina v. Forte* (N.C. 2006), 629 S.E.2d 137, in which DNA tests were conducted in three related aggravated murder cases in 1990, and a "hit" was not obtained until 2001. *Id.* 140-142. While DNA testing is obviously an awesome law enforcement tool, cold cases can create a practical problem for prosecutors to locate the actual analysts involved, especially when long periods of time elapse between the testing of the crime scene evidence and the identification of a suspect. What if the analyst moved to a new job in a new state? What if the analyst retired, or has passed away? The prosecution has no case without

the DNA evidence, and if this Court requires the testimony of the DNA analyst who actually performs the testing, the murderer may very well walk free.

Forensic scientists and other experts, like all human beings, live at the speed of life. Jennifer Duvall had a baby and was unavailable to testify while on maternity leave. Steven Wiechman was available to testify, and was able to bring himself completely up-to-speed on the case so that his testimony could stand on its own professional and scientific merit. However, even Wiechman himself is an interesting case in point, as he testified that prior to working for BCI, he was a DNA analyst at the Tennessee state crime lab for more than two years. It is not hard to imagine that there may still be cold cases pending in Tennessee in which Wiechman did the actual testing. It is challenging enough for Ohio prosecutors to schedule the testimony of BCI forensic scientists when the scientists have to juggle the demands of competing (and often conflicting) demands of subpoenas issued by courts in other Ohio counties, not to mention other states.

In *State v. Craig*, 110 Ohio St.3d 306, 2006-Ohio-4571, this Court held that one forensic pathologist could testify about the time and cause of death based upon the autopsy report of another retired pathologist who performed the autopsy but was unable to testify. Although this Court held that, unlike the DNA reports in this case, the autopsy report in *Craig* was not "testimonial" under *Crawford*, the practical problems presented are exactly the same. One pathologist performs an autopsy in 1996, writes a report, and subsequently retires. DNA testing identifies a suspect in 2002, and the matter proceeds to trial. The prosecutor calls the sitting county coroner to testify about her own expert opinions regarding the time and cause of death, which were based upon the autopsy report of the retired coroner. This Court upheld the admission of her ***testimony***, finding that the defendant's confrontation rights were not violated

because the jury was aware the witness had not personally performed the autopsy or been present at the time, and she was subject to cross-examination about the procedures that were performed, the test results, and her own expert opinion about the time and cause of death. *Craig*, 2006-Ohio-4571, at ¶ 79.

If this Court were to affirm the Court of Appeals below and remand this case to the trial court for a new trial, the state would face a similar problem to the prosecutor in *Craig*. In this case, Dr. Patrick M. Fardal performed the autopsy of Esta Boyd, and testified in the defendant's 2004 trial. As this Court is probably aware, Dr. Fardal was a preeminent forensic pathologist and for a time was the chief forensic pathologist at the Franklin County Coroner's Office. However, Dr. Fardal has since retired and his availability to testify at a new trial is uncertain. Under *Craig*, the prosecution would have the option of having another qualified forensic pathologist testify to his or her own expert opinion as to Esta Boyd's cause of death, which would depend in part on a review of Dr. Fardal's work product in performing the autopsy. If that option were not available under *Craig*, prosecuting murder cases could become a difficult dilemma for prosecutors, and pathologists could never retire.

The same practical issues apply to DNA testimony in this case because the analogy is very close. A forensic pathologist who performs an autopsy generates a written report. However, as this Court is aware, there is much more to an autopsy than just the final report. The pathologist conducts a very thorough external and internal examination, which is documented by the doctor's handwritten notes and diagrams. The doctor or his assistant takes dozens, and sometimes hundreds, of photographs, which are preserved as slides in the case file. The internal organs are sectioned and subjected to microscopic examination. Tissue samples are preserved in

appropriate cases. Other samples are provided to the in-house toxicologist, who performs her own set of tests and generates resulting documentation, which also goes into the case file.

As this Court found in *Craig*, another properly qualified pathologist can enter the case after the autopsy, review the data from the autopsy, and reach her own qualified expert opinions, and do so without violating the defendant's right to confrontation. Whether the underlying report is "testimonial" or not is not the real issue. The pathologist is conveying the testimonial information to the jury, and is subject to cross-examination. Like the DNA reports in this case, an autopsy report will not reveal a lot of useful information to a lay person on the jury without a qualified expert on the witness stand to explain the significance of facts summarized in the report. Indeed, unlike the drug-report affidavits in *Melendez-Diaz*, DNA reports and autopsy reports are not something prosecutors would normally seek to introduce without accompanying live-witness testimony because they would make little sense to lay persons on the jury. The fact that the testifying pathologist did not perform the autopsy is clearly conveyed to the jury, and the jury is free to decide what weight to give to the pathologist's independent expert conclusions.

From a scientific standpoint, a DNA analysis is very much like an autopsy in that another properly qualified expert can examine the case file, review the data, and reach his or her own expert conclusions, as Wiechman was able to do in this case. In his dissenting opinion, Justice Pfeiffer acknowledged that more than one person can testify as to the contents of a DNA report:

> Finding that DNA reports are testimonial in this case would not create an unnecessary practical hardship for the state in future cases. Although the reports admitted into evidence in this case contained the signature of Duvall alone, the practical reality of a DNA analysis is that it represents the work of more than one person. As Wiechman testified, the protocol in place at BCI required input from two analysts and a supervisor on every DNA report. One analyst performs the tests, a second reviews the results, and a supervisor reviews them again. ***Since more than one person is responsible for the production of the DNA report, more than one person can testify as to the contents of a report.***

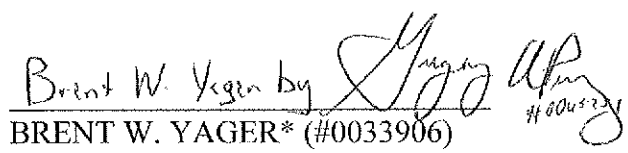
Crager I, 2007-Ohio-6840 at ¶ 110 (emphasis added).

The state respectfully submits that the practical realities of DNA testing in this state demand that more than one person be permitted to testify, as the DNA testing process represents the work of more than one person. By requiring that the actual testing analyst testify, this Court would seriously undermine a prosecutor's use of the wide availability of DNA evidence. Moreover, as the Attorney General so thoroughly explains, it would also impose an enormous burden on BCI. *See* Supplemental Brief of *Amicus* Ohio Attorney General, at pp. 19-21.

CONCLUSION

For the above-stated reasons, this Court should affirm its holding in the second paragraph of the syllabus of *Crager I*, reverse the court of appeals, and remand this case to the court of appeals to address the unresolved assignments of error.

Respectfully submitted,



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I hereby certify that a copy of the foregoing Supplemental Brief was served, by regular U.S. Mail postage prepaid this 8th day of December 2009, upon:

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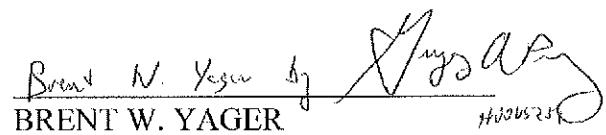

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