

ORIGINAL

IN THE SUPREME COURT OF OHIO

State of Ohio,	:	
	:	
Appellant,	:	Case No. 06-0294
	:	Case No. 06-0298
v.	:	
	:	On Appeal from the Marion
	:	County
Lee A. Cramer,	:	Court of Appeals, Third
	:	Appellate District
Appellee	:	

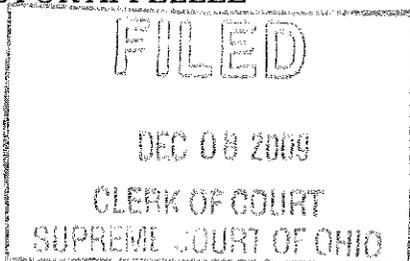
**SUPPLEMENTAL BRIEF
OF AMICUS CURIAE,
OHIO PROSECUTING ATTORNEYS ASSOCIATION**

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**STATEMENT OF INTEREST OF OHIO
PROSECUTING ATTORNEY'S ASSOCIATION**

The Ohio Prosecuting Attorney's Association (OPAA) is an association of county prosecutors from the eighty-eight counties in the State of Ohio. The members of the O.P.A.A. are responsible for the prosecution of all felony crimes which are committed in Ohio. The O.P.A.A. is very concerned about the possible extension of *Crawford v. Washington* (2004), 541 U.S. 36, 124 S. 1354 and *Melendez-Diaz v. Massachusetts* (2009), 129 S. Ct. 2527, beyond their holdings in the instant case and how it may affect the ability to effectively prosecute and convict dangerous criminals.

This Court's previous 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 is still valid in light of the United States Supreme Court's holding in *Melendez- Diaz, supra. State v. Crager*, 116 Ohio St. 3d 369, 2007-Ohio-6840, ¶2 of the syllabus. (*Crager I*). It is also consistent with Ohio Evid. R. 702, which permits an expert to testify to the result of a procedure if the theory upon which the procedure is based is objectively verifiable, the design of the procedure implements the theory, and the procedure was conducted in a way that will yield an accurate result. There is no requirement for an expert to actually perform the testing in order to be able to testify. In fact, holding otherwise would create a double standard for defense experts who review the State's expert reports and testify to the inaccuracies or infirmities in the State's case. For instance, defense pathology experts frequently do not examine a body, but testify to their conclusions based upon the autopsy report and photos prepared by the State's expert pathologist. The State of Ohio,

and OPAA are simply asking this Court to afford the same opportunity to the State when an analyst is unavailable, to still allow reliable and probative forensic evidence to be admitted at trial when introduced through expert testimony that has independently reviewed the raw data, formed its own conclusions, and can testify to any defects in procedure that may affect the weight of the evidence.

The effect of this decision is not limited to DNA tests, nor is it limited to situations when the testing analyst is unavailable. In most scientific testing, multiple laboratory personnel may have some role in the testing process. Routinely, the testifying analyst relies upon the business records created by other laboratory employees. If this Court reverses its second holding in *Crager I*, this would no longer be possible because this would result in a violation of the right to confrontation. Thus, it would be necessary to bring in every laboratory employee who had any involvement in the testing process. Moreover, as stated more fully below, the United States Supreme Court noted in *Melendez-Diaz* that this is not the rule that are writing, and not every witness in a chain of custody must testify in order for evidence to be admissible. *Id.*, 129 S.Ct. 2527, 2532 at FN1.

Reversal of ¶2 of the syllabus in *Crager I* would also cause significant additional expense. Most of these witnesses are traveling from out of town. When private labs are used, the cost of bringing in a single witness may be \$1000 or much more depending on how far they must travel. Additional witnesses from a private lab would result in additional billing and the purchase of additional plane tickets. While additional witnesses from a government laboratory will not result in an additional bill to the prosecutor's office, it still results in additional expense to the taxpayers. Additionally, every hour the laboratory personnel spend in court testifying, is an hour they are not in

the laboratory working on their backlog. Furthermore, more of the court's time would be used as multiple witnesses would become necessary for each scientific test.

In some cases, it would result in the evidence being excluded as one of the laboratory personnel may not be available, or in trials being delayed to a later date when all of the witnesses are available. In other cases, time would be wasted by laboratories retesting evidence because the testing analyst left their employment, relocated, and in some cold cases, may have even passed away. In a majority of DNA cases, retesting is not even an option because the entire sample has been consumed by the DNA test.

Consequently, the Ohio Prosecuting Attorney's Association supports the position of the State of Ohio, Appellant in this matter.

STATEMENT OF THE CASE AND FACTS

Amicus Curiae Ohio Prosecuting Attorneys Association adopts the statement of the case and facts as presented by Appellant-State of Ohio.

ARGUMENT

PROPOSITION OF LAW NO.1:

A CRIMINAL DEFENDANT'S CONSTITUTIONAL RIGHT TO CONFRONTATION IS NOT VIOLATED WHEN A QUALIFIED EXPERT DNA ANALYST TESTIFIES AT TRIAL IN PLACE OF OR INSTEAD OF THE DNA ANALYST WHO ACUTALLY CONDUCTED THE TESTING. *State v. Crager*, 116 Ohio St. 3d 369, 2007-Ohio-6840, ¶2 of the syllabus, *construed*.

In *Melendez-Diaz v. Massachusetts*(2009), 129 S.Ct. 2757, the United States Supreme Court held that a Massachusetts statute was unconstitutional where the statute shifted the burden to a defendant to subpoena a state's expert forensic chemist, who analyzed the concentration and composition of drugs at issue in a drug case, when the chemist prepared an affidavit to authenticate the report to be submitted at trial, in lieu of appearance and testimony. In making its determination, the Court reasoned the under its analysis in *Crawford v. Washington* (2004), 541 U.S. 36, the analyst's affidavit is testimonial, and the analyst is a witness for Sixth amendment purposes. However, in so holding, the Court noted that it specifically did not hold that anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device must appear in person to testify. *Melendez-Diaz*, 129 S. Ct. 2527, 2532 at FN1. The Court reasoned that this is because gaps or defects in chain of custody go to weight of evidence and not admissibility. *Id.*

The majority wrote that requiring confrontation of forensic analysts will help to weed out both fraudulent and incompetent analysts. *Id.* at 2537. The OPAA submits that this is still achieved in the situation case at bar, where a DNA expert who reviewed all of the data collected and presented and testified to his own determination, that the DNA collected was that of the Defendant, Lee Crager and victim, Esta Boyd. All of the

fraudulent conclusions or practices of the lab, as well any error in procedure could be ferreted out by examination of a similarly trained DNA expert.

Indeed, in *Crager I*, ¶73, this Court wrote, “[a]lthough we acknowledge that the record shows that Wiechman played no role in developing the DNA analysis that resulted in State’s Exhibit 56 in this case, that concern is irrelevant. As in *Geier*[(2007), 41 Cal.4th 555] and in *Craig*, the testifying witness, Wiechman, conveyed the ‘testimonial’ aspects of the DNA results against Crager, and Wiechman was subject to cross-examination. Just as in *Craig*, the defense had the opportunity to question Wiechman ‘about the procedures that were performed, the test results, and [his] expert opinion about’ the conclusions to be drawn from the DNA reports. [*State v. Craig*], 110 Ohio St.3d 306, 2006-Ohio-4571, 853 N.E.2d 621, at ¶ 79. Wiechman had fully reviewed the complete file, not just the DNA reports admitted into evidence and not just the report he participated in preparing, and had reached his own conclusions about both reports ‘to a reasonable degree of scientific certainty.’ It is thus of no import that he did not actively participate in both rounds of DNA testing.”

The OPAA submits that *Melendez-Diaz* simply has no application to this Court’s sound reasoning cited above. The Majority in *Crager I* wisely considered the untenable practical implications of adopting a rule that would always require the analyst who conducted the DNA testing to testify in court. With the advances and increased availability of DNA testing and profile databases (CODIS), many “cold cases” are getting solved and prosecuted. The OPAA submits that some of these cold cases have been prosecuted more than 30 years after the crime has been committed. It is very likely that in a cold case, an analyst would no longer be available to testify due to retirement, change of employment, or even death, but it is likely that a similarly trained analyst

could testify to the protocols in the lab and could testify to the procedures used. Similarly, retesting of a sample may be impossible in a cold case, thereby excluding valuable, reliable and probative evidence from jury consideration.

Even the majority in *Melendez-Diaz* limited its holding to the finding that the certificates or affidavits as introduced were testimonial and expressed no view as to whether the error was harmless. *Id.* 129 S.Ct at 2542 FN14. Therefore, the mere fact that a testimonial lab report was admitted at trial does not mean that a conviction must be overturned or a good rule of law abandoned.

Further, this Court's holding in *Crager I*, ¶2 of the syllabus, is consistent with post *Melendez-Diaz* holdings in other jurisdictions as well as in other Ohio Appellate Courts. In a case very similar to the one at bar, the Division 1 Court of Appeals of Washington held that *Melendez-Diaz* does not require the actual analyst who performed the DNA testing to testify at trial in order for the profile developed to be admitted. *Washington v. Lui*, ___ P.3d___, 2009 WL 4160609(Wash. App. Div. 1. No. 61804-7-I, 11/23/09). Like the instant case, the expert that testified in *Lui* also conducted an independent review of the raw data and made her own conclusions. The court of appeals further distinguished *Melendez-Diaz*, as it rejected affidavits in lieu of live testimony, and the expert in *Lui's* case was available for cross-examination and testified to their own interpretation of the raw data. In the instant case, Weichman testified to his own expertise, the protocols and procedures used in his lab, and the tests employed in this particular case. *Crager* had the opportunity to cross-examine all of his assertions. Accordingly, *Crager's* right to confrontation was protected.

In *People v. Rutterschmidt*, 176 Cal.App.4th 1047, 98 Cal.Rptr.3d 390, 409 (2009), the Second District Court of Appeals held the expert testimony of a laboratory

director regarding his laboratory's toxicology results did not violate the confrontation clause because the director did not personally test the samples. The appeals court noted, "There is no federal Supreme Court or California authority for the proposition that *Crawford* precludes a prosecution scientific expert from testifying as to an opinion in reliance upon another scientist's report." *Rutterschmidt*, 98 Cal.Rptr.3d at 411. It distinguished *Melendez-Diaz* on the grounds that the report itself was not admitted in evidence, the toxicology results were not proved via an ex parte out-of-court affidavit, the expert relied upon the data in the report to formulate his opinions, and the expert's opinion and its basis were subject to cross-examination. *Rutterschmidt*, 98 Cal.Rptr.3d at 412. It further noted that experts are permitted to offer opinions based on inadmissible hearsay and to explain the reasons for their opinions. *Rutterschmidt*, 98 Cal.Rptr.3d at 412-13. Finally, it reasoned that such testimony does not violate the confrontation clause because it is offered to explain the expert's opinion, not for its truth. *Rutterschmidt*, 98 Cal.Rptr.3d at 413.

Most notably, the Fifth Circuit Court of Appeals rejected a similar argument in *U.S. v. Rose*, ___ F. 3d___, 2009 WL 3683127 (11/6/09, 5th Cir. App. No. 08-10813). In *Rose*, like the case at bar, the defendant claimed for the first time on appeal that a lab report was testimonial hearsay, requiring for admission the testimony of the analyst who performed the testing. The government countered that the defendant's confrontation rights were not violated because Lopez, a laboratory supervisor and the reviewer of the analysis, testified in court and was subject to cross-examination by Rose. The Fifth Circuit Court of Appeals held that it is not plain error to admit the report and testimony of Lopez.

In *State v. Woods*, 4th App. No. 09CA3090, 2009-Ohio-6169, ¶23, the Ross County Court of Appeals examined the a similar issue where an analyst from BCI testified as to his own conclusion and examination, but another analyst conducted the actual testing. However, the Fourth District decided the case on a waiver basis, holding that because *Melendez-Diaz* noted that a defendant could waive his right to confrontation, counsel's failure to object at trial waived his right to confront the witness.

Lastly, although decided prior to *Crawford and Melendez-Diaz*, the Eighth District Court of Appeals reviewed this very issue of whether the defendant's right to confrontation was violated in *State v. Fontenette* (September 19, 1991), Cuyahoga County App. No. 59014. The Eighth District found that although the DNA analyst who testified was not the analyst who actually performed the results, the results were properly admitted under the business records exception to the hearsay rule under Evid. R. 803(6) because the witness established that he is sufficiently familiar with the circumstances of the record's preparation, maintenance and retrieval. *Id. qtg. State v. Knox* (1984), 18 Ohio App. 3d 36; *State v. Jordan* (June 1, 1989), Cuyahoga County App. No. 55450. Thus, the Defendant was able to confront any procedural defects in the administration of these tests, and therefore, there is no violation of the confrontation clause.

CONCLUSION

Based upon the foregoing, the majority's decision in *Melendez-Diaz* did not overrule this Court's holding in ¶2 of the syllabus in *Crager I*. The majority further noted that the Confrontation Clause of the Sixth Amendment of the U.S. Constitution does not require every person who conducts testing evidence to testify, in order for that evidence to be admissible at trial. Moreover, where an expert testifies to his own conclusions and opinions, and is subject to cross-examination of laboratory procedures employed in producing the profile, a criminal defendant is afforded a constitutional right to confrontation, and the DNA profile is admissible. Accordingly the OPAA urges this Court to reaffirm its holding in ¶2 of the syllabus in *Crager I*.

Respectfully Submitted,

OFFICE OF THE GREENE COUNTY
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been sent to Brent W. Yager, Marion County Prosecutor, 134 East Center Street, Marion, Ohio 43302, Elisabeth Long, Deputy Solicitor, 30 E. Broad St., 17th Floor, Columbus, OH 43215, and Kevin P. Collins, 125 South Main Street, Marion, Ohio 43302 by regular U.S. Mail the date same as filed of record above.