ORIGINAL

In the
Supreme Court of Ohio

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

REPLY BRIEF ON SUPPLEMENTAL ISSUE OF *AMICUS CURIAE* OHIO ATTORNEY GENERAL RICHARD CORDRAY 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. Analysis of whether an expert's testimony violated the Confrontation Clause should focus on the expert's testimony, regardless of whether the underlying scientific data was admitted into evidence. 2

B. Even after *Melendez-Diaz*, no confrontation problem arises when a qualified expert testifies about his interpretation of data generated by another analyst, because the testifying expert is stating his own opinions and is available for cross-examination. 4

1. Wiechman's testimony was admissible because he testified about his own conclusions, based on his own observations of the pertinent data. 5

2. Wiechman's expert testimony did not violate Crager's confrontation rights. 6

C. The United States Supreme Court's orders granting certiorari in *Crager I* and a handful of other cases, vacating the judgments below, and remanding the cases for reconsideration after *Melendez-Diaz* did not invalidate *Crager I*'s second holding. 9

CONCLUSION 11

CERTIFICATE OF SERVICE ..... unnumbered

TABLE OF AUTHORITIES

Cases **Page(s)**

Barba v. California (2009),
129 S. Ct. 2857 10

Crager v. Ohio (2009),
129 S. Ct. 2856 10

Ellis v. Phillips (S.D.N.Y. 2005),
2005 U.S. Dist. Lexis 13910 7

Engebretsen v. Fairchild Aircraft Corp. (6th Cir. 1994),
21 F.3d 721 4

Hamilton v. Texas (Tex. App.),
2009 Tex. App. Lexis 6923 7

Henry v. City of Rock Hill (1964),
376 U.S. 776 9

Illinois v. Johnson (Ill. App. Ct.),
915 N.E.2d 845, 2009 Ill. App. Lexis 1103 7

Kansas v. Appleby (Kan.),
2009 Kan. Lexis 1080 7

Kansas v. Lackey (Kan. 2005),
120 P.3d 332 8

Larkin v. Yates (C.D. Cal.),
2009 U.S. Dist. Lexis 60106 7

Louisiana v. Garner (La. Ct. App. 2005),
913 So. 2d 874 8

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

North Carolina v. Mobley (N.C. Ct. App.),
2009 N.C. App. Lexis 1713 ..... 4, 8

North Carolina v. Watts (N.C. Ct. App. 2005),
616 S.E.2d 290 7

Rector v. Georgia (Ga. 2009),
681 S.E.2d 157 ..... 7, 8

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

State v. Craig,
110 Ohio St. 3d 306, 2006-Ohio-4571 5

State v. Solomon (1991),
59 Ohio St. 3d 124 5

Tyler v. Cain (2001),
533 U.S. 656 10

United States v. Johnson (4th Cir. 2009),
2009 U.S. App. Lexis 26187 ..... 7, 8

United States v. Moon (7th Cir. 2008),
512 F.3d 359 8

Washington v. Lui (Wash. Ct. App.),
2009 Wash. App. Lexis 2892 7

Wisconsin v. Barton (Wis. Ct. App. 2005),
709 N.W.2d 93 8

Wisconsin v. Williams (Wis. 2002),
644 N.W.2d 919 7

Wood v. Texas (Tex. App.),
2009 Tex. App. Lexis 7882 8

Statutes, Rules and Provisions

Ohio Evid. R. 703 5

Other Authorities

11/18/2009 Case Announcements,
2009-Ohio-6015 1

A. Hellman, "Granted, Vacated, and Remanded * * *": *Shedding Light on a Dark Corner of Supreme Court Practice*, 67 Judicature 389, 392-95 (1984) 9, 10

E. Gressman et al., Supreme Court Practice (9th ed. 2007) 9, 10

INTRODUCTION

The Court asked the parties to brief the impact of *Melendez-Diaz v. Massachusetts* (2009), 129 S. Ct. 2527, on 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," *State v. Crager* ("*Crager I*"), 116 Ohio St. 3d 369, 2007-Ohio-6840, syl. ¶ 2. See 11/18/2009 *Case Announcements*, 2009-Ohio-6015. As such, the question now before the Court is whether DNA analyst Steven Wiechman's expert testimony was consistent with Defendant-Appellee Lee Crager's confrontation rights. Accordingly, the Court's analysis should begin and end with Wiechman's testimony; the trial court's admission of the DNA reports is secondary.

Contrary to Crager and the Ohio Public Defender's efforts to portray *Crager I*'s two holdings as "inextricably intertwined," *Crager I* articulated two distinct holdings, each of which independently supported the conclusion that Crager's confrontation rights were not violated. *Melendez-Diaz* affected the first holding—that the DNA reports were nontestimonial and did not implicate the Confrontation Clause. But *Melendez-Diaz* said nothing about *Crager I*'s second holding—that Wiechman's expert testimony analyzing raw DNA data generated by another analyst's laboratory ("lab") work did not violate Crager's confrontation rights. And it in no way follows from the conclusion that DNA reports are testimonial that an expert DNA analyst cannot testify about the results of DNA testing physically conducted by another analyst or technician.

In fact, *Crager I*'s second holding is correct, even after *Melendez-Diaz*. Wiechman, a DNA analyst at the Ohio Attorney General's Bureau of Criminal Identification and Investigation ("BCI"), reviewed voluminous data generated by another analyst's testing, formed his own conclusions, and testified about those conclusions. Because Wiechman personally perceived the

DNA data, testified only about his own opinions, and was available for cross-examination, his testimony was both admissible and consistent with Crager's confrontation rights.

The Ohio Public Defender misunderstands the significance of the United States Supreme Court's decision to grant certiorari in *Crager I*, vacate the judgment below, and remand the case to this Court. This summary reconsideration order, commonly known as a "GVR," did not indicate the Supreme Court's dissatisfaction with *Crager I*'s second holding, or even necessarily with its first holding. Instead, the Supreme Court's issuance of GVR orders in *Crager I* and a handful of other cases after *Melendez-Diaz* reflects only the Supreme Court's judgment that the lower courts should reconsider these judgments in light of *Melendez-Diaz*. The Supreme Court did not reverse *Crager I* outright; instead, it directed the Ohio Supreme Court to decide whether and how *Melendez-Diaz* affected the outcome of this litigation.

For all of the reasons explained in the Ohio Attorney General's Supplemental Brief and below, this Court should stand by the second holding of *Crager I* and reverse the decision below.

ARGUMENT

A. Analysis of whether an expert's testimony violated the Confrontation Clause should focus on the expert's testimony, regardless of whether the underlying scientific data was admitted into evidence.

In *Crager I*, the Court issued two independent holdings finding no confrontation problem: first, DNA reports are not testimonial; and, second, an expert DNA analyst can testify about his opinions based on DNA results generated by another analyst's lab testing. 2007-Ohio-6840, syl. These are alternative holdings, and they are not inextricably linked such that *Melendez-Diaz*'s impact on the first holding necessarily affects the second holding. Therefore, in analyzing whether *Melendez-Diaz* had any effect on *Crager I*'s second holding, this Court should focus on Wiechman's testimony, and not on the DNA reports.

Crager and the Ohio Public Defender conflate the first and second syllabus holdings of *Crager I*. See Supplemental Brief of Amicus Curiae Office of the Ohio Public Defender ("OPD Br.") at 5-6; see generally Merit Brief of Appellee, Lee A. Crager ("Crager Br."). This Court's holding that Wiechman's testimony did not violate Crager's confrontation rights is valid regardless of whether the DNA reports were nontestimonial. In other words, the constitutionality of Wiechman's expert testimony does not turn on analysis of the DNA reports. In fact, if *Crager I*'s second holding were "inextricably linked with and dependent upon the first syllabus," as the Ohio Public Defender claims, OPD Br. at 5, there would have been no need for the second holding at all. That is, if the DNA reports are nontestimonial, *no one* would need to testify, and there would be no reason for this Court to explain *who* could testify about them.

Because Crager and the Ohio Public Defender misunderstand that *Crager I* issued two separate, distinct holdings, they commit a second error by mischaracterizing the issue now before the Court. They incorrectly assert that the DNA reports were inadmissible and that Wiechman's expert testimony was therefore inadmissible as well. But "the premise that DNA reports, like the certificates in *Melendez-Diaz*, are testimonial" is *not* the proper "starting point for this analysis." Crager Br. at 4. Instead, this Court's analysis should focus on Wiechman's testimony.

This misunderstanding of the relationship between *Crager I*'s first and second holdings also underlies the Ohio Public Defender's arguments that *Melendez-Diaz* rejected the premises of *Crager I*'s second holding when it dismissed the business records rationale and the contemporaneous recordation of observable events test as irrelevant to determining whether scientific reports are testimonial. See OPD Br. at 10. Even if *Melendez-Diaz* had rejected *Crager I*'s second holding to the extent it relied on these principles, see *id.*, that argument is beside the point because the discussion of those principles in *Crager I* spoke *only* to *Crager I*'s

first holding; it had nothing to do with *Crager I*'s second holding. Stated simply, the business records rationale and contemporaneous recordation of observable events test had no bearing on this Court's conclusion that *Wiechman's testimony* did not violate Crager's confrontation rights.

The Court should answer the question it asked the parties to brief on reconsideration—what impact, if any, did *Melendez-Diaz* have on the second syllabus holding of *Crager I*? And, to answer that question, the Court's analysis should begin and end with Wiechman's testimony. Any question about whether the DNA reports were properly admitted is secondary.[1]

B. Even after *Melendez-Diaz*, no confrontation problem arises when a qualified expert testifies about his interpretation of data generated by another analyst, because the testifying expert is stating his own opinions and is available for cross-examination.

As the Court properly determined in *Crager I*, Wiechman's testimony as a qualified expert DNA analyst was both admissible and consistent with Crager's confrontation rights. *Melendez-Diaz* prohibits the admission of testimonial scientific reports without any testimony, but it does not modify the longstanding practice of allowing experts to testify about their opinions, even if those opinions are based on data gathered by others, and even if the records containing that data are not admitted into evidence. *Crager I*'s second holding is therefore legally sound even after *Melendez-Diaz* and, furthermore, it is sound policy.

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[1] As explained in the Attorney General's Supplemental Brief, the trial court did not err by admitting the DNA reports. Supplemental Brief of Amicus Curiae Ohio Attorney General Richard Cordray ("AG Br.") at 9-11. Moreover, the admission of the reports did not violate Crager's confrontation rights because the reports were offered to show the basis of Wiechman's expert opinions and not for their truth. *Id.* (listing cases supporting this proposition); see *Engebretsen v. Fairchild Aircraft Corp.* (6th Cir. 1994), 21 F.3d 721, 728-29; *North Carolina v. Mobley* (N.C. Ct. App.), 2009 N.C. App. Lexis 1713, at *10-11. Further, Wiechman actively participated in the second round of testing as a technical reviewer and therefore was qualified to testify about those results. See *Crager I*, 2007-Ohio-6840, at ¶ 110 (Pfeifer, J., dissenting); AG Br. at 9. Finally, even if the trial court had erred by admitting the reports—and it did not—any such error was harmless. See AG Br. at 11-12.

1. Wiechman's testimony was admissible because he testified about his own conclusions, based on his own observations of the pertinent data.

The trial court properly admitted Wiechman's expert testimony because he testified about his own opinions, based on facts or data that he perceived. See Ohio Evid. R. 703. Under Rule 703, an expert may testify about his opinion as long as the facts or data upon which he bases the opinion were either "perceived by [him] or admitted in evidence at the hearing." As this Court has explained, the rule is satisfied when an expert bases his opinion "in major part" on facts or data that he personally perceives. *State v. Solomon* (1991), 59 Ohio St. 3d 124, 126. An expert need not perform, observe, or direct every aspect of scientific testing so long as he personally reviews the data upon which he bases his opinions. See *State v. Craig*, 110 Ohio St. 3d 306, 2006-Ohio-4571, ¶ 77 (permitting a medical examiner's expert testimony under Evid. R. 703, based "in whole or in major part on facts and data that she reviewed in [an] autopsy report" written by a retired medical examiner because the expert's opinions were "based upon her knowledge and experience, as applied to the facts and data included in the autopsy report").

Crager's assertion that Wiechman lacked personal knowledge upon which to base his expert opinions, see Crager Br. at 5, misconstrues Rule 703's requirement that facts or data be "perceived by the expert." According to Crager, because Wiechman did not participate in the lab testing, he could not personally "perceive the facts or data" and thus lacked personal knowledge. See Crager Br. at 6. But Rule 703 regularly permits experts to render opinions after reviewing data generated by others. See *Craig*, 2006-Ohio-4571, at ¶ 77. And Wiechman's expert opinions here were based on his independent review of DNA analyst Jennifer Duvall's voluminous records documenting every step of the testing process and the test results. Wiechman perceived the raw data for himself—he "look[ed] at the same data [Duvall] looked at"—then drew his own conclusions. Trial Tr. at 804. Because Wiechman personally perceived

the data generated by Duvall's testing, the State did not even need to introduce that data (or the DNA reports) for Wiechman's expert testimony to be admissible.

2. Wiechman's expert testimony did not violate Crager's confrontation rights.

Wiechman's testimony also did not violate Crager's confrontation rights, *Crager I*, 2007-Ohio-6840, at syl. ¶ 2, because Wiechman testified about his own opinions, and Crager had a meaningful opportunity to cross-examine him about those opinions, see *id.* at ¶ 76. When Wiechman testified about the DNA evidence in this case, *he* was "*the witness* who [was] subject to cross-examination and [was] the one who present[ed] the true 'testimonial' statements." *Id.* at ¶ 79 (emphasis added). Therefore, the Ohio Public Defender's argument that Crager was "deprived . . . of the opportunity to confront the real witness against him—Duvall," OPD Br. at 9, fails because the issue here is whether Crager had an opportunity to confront Wiechman, and he did.

Melendez-Diaz held that certain scientific reports are testimonial and thus cannot be admitted without testimony, 129 S. Ct. at 2532, but it said nothing about whether a defendant's confrontation rights are violated when one expert testifies about his opinions based on data generated by someone else's scientific testing. See *id.* at 2544-45 (Kennedy, J., dissenting) (observing that *Melendez-Diaz* does not clarify exactly *who* must testify). The Ohio Public Defender nevertheless argues that *Melendez-Diaz* "directly reject[ed] the second syllabus of *Crager I*" because it did not "indicate that some other expert could testify in the shoes of the analysts who conducted the testing." OPD Br. at 4. But the Supreme Court's silence on this issue can in no way be construed as a rejection of *Crager I*'s second holding. To the contrary, the Supreme Court's silence confirms that *Melendez-Diaz* did not have any impact on the second holding of *Crager I*.

"*Melendez-Diaz* is distinguishable from instances in which a witness testifies at trial about scientific analyses in which he or she did not participate." *Illinois v. Johnson* (Ill. App. Ct.), 915 N.E.2d 845, 2009 Ill. App. Lexis 1103, at *25; see *Kansas v. Appleby* (Kan.), 2009 Kan. Lexis 1080, at *76. As explained in the Attorney General's Supplemental Brief, "[a]n expert may base [his] opinions on data gathered by others," *Rector v. Georgia* (Ga. 2009), 681 S.E.2d 157, 160 (internal citation and quotation omitted), and the expert's testimony about these opinions does not present a confrontation problem, *United States v. Johnson* (4th Cir. 2009), 2009 U.S. App. Lexis 26187, at *21. "[T]he presence and availability for cross-examination of a highly qualified witness, who is familiar with the procedures at hand, supervises or reviews the work of the testing analyst, and renders her own expert opinion is sufficient to protect a defendant's right to confrontation, despite the fact that the expert was not the person who performed the mechanics of the original tests." *Wisconsin v. Williams* (Wis. 2002), 644 N.W.2d 919, 926; see *Johnson*, 2009 U.S. App. Lexis 26187, at *21 ("As long as [the expert] is applying his training and experience to the sources before him and reaching an independent judgment," there is typically no confrontation problem); but see *Williams*, 644 N.W.2d at 926 (explaining that an expert cannot merely summarize the work of others).

Consistent with these principles, courts before and after *Melendez-Diaz* have found no confrontation problem when a qualified DNA expert testifies about his own opinions based on scientific data generated by another DNA analyst's testing. See AG Br. at 7, 13-14; see, e.g., *Larkin v. Yates* (C.D. Cal.), 2009 U.S. Dist. Lexis 60106, at *3-4; *Washington v. Lui* (Wash. Ct. App.), 2009 Wash. App. Lexis 2892, at *24; *Johnson*, Ill. App. Lexis 1103, at *15-16; *Hamilton v. Texas* (Tex. App.), 2009 Tex. App. Lexis 6923, at *19; *North Carolina v. Watts* (N.C. Ct. App. 2005), 616 S.E.2d 290, 293, 296-97; *Ellis v. Phillips* (S.D.N.Y. 2005), 2005 U.S. Dist.

Lexis 13910, at *79, *87. Courts have widely recognized this principle in the context of other expert scientific testimony as well. See AG Br. at 6-8, 14; see also, e.g, *United States v. Moon* (7th Cir. 2008), 512 F.3d 359, 362; *Mobley*, 2009 N.C. App. Lexis 1713, at *10; *Wood v. Texas* (Tex. App.), 2009 Tex. App. Lexis 7882, at *33; *Rector*, 681 S.E.2d at 160; *Wisconsin v. Barton* (Wis. Ct. App. 2005), 709 N.W.2d 93, 96; *Louisiana v. Garner* (La. Ct. App. 2005), 913 So. 2d 874, 884-85; *Kansas v. Lackey* (Kan. 2005), 120 P.3d 332, 352.

As in those cases, the facts here are "a far cry" from those of *Melendez-Diaz*, "where the expert was nowhere to be found." *Johnson*, 2009 U.S. App. Lexis 26187, at *25. Wiechman, a qualified DNA expert, reviewed Duvall's extensive case file and the data generated by her testing and testified about his own conclusions. *Crager I*, 2007-Ohio-6840, at ¶ 73. Wiechman's testimony about his *own opinions* cannot raise confrontation concerns because Wiechman was available for cross-examination. *Id.* at ¶ 76; see *Johnson*, 2009 U.S. Lexis 26187, at *21. *Melendez-Diaz* did not suggest that any confrontation problem arises when a qualified expert testifies about his own opinions, even if they are based in part on a testimonial scientific report. And that is so for good reason: An expert's testimony about his own opinions does not violate the Confrontation Clause.

If this Court were to require more than the Confrontation Clause mandates—for example, by forbidding expert testimony about conclusions based on data generated by scientific testing performed by someone else—it would do so at a tremendous cost to Ohio's criminal justice system and Ohio's labs. See *Crager I*, 2007-Ohio-6840, at ¶ 77 (describing practical problems of requiring all testing analysts to testify); AG Br. at 14-22; Supplemental Brief of Amicus Curiae Ohio Prosecuting Attorneys Association at 2-3; Supplemental Brief of Plaintiff-Appellant State of Ohio at 7-11. If experts could not testify about their opinions derived from raw

scientific data, then prosecutors would arguably have to call *every* person who participated in a scientific test (because *Melendez-Diaz* fails to distinguish between the various players in scientific testing). This would not only slow the trial process, thereby frustrating victims, law enforcement, and the courts, but it would also exacerbate backlogs at Ohio's labs. Moreover, in many cases, the testing analyst (or analysts) would be unavailable to testify because cases are regularly tried years after scientific testing occurred. See AG Br. at 21-22. In such cases, the State would have to retest evidence—if retesting is even possible—at great expense. Thus, in addition to being correct as a matter of law, *Crager I*'s second holding is also good policy.

C. The United States Supreme Court's orders granting certiorari in *Crager I* and a handful of other cases, vacating the judgments below, and remanding the cases for reconsideration after *Melendez-Diaz* did not invalidate *Crager I*'s second holding.

The United States Supreme Court's decision to grant certiorari in *Crager*, vacate the judgment below, and remand the case to this Court for reconsideration in light of *Melendez-Diaz* did not indicate that *Crager I*'s second syllabus holding is invalid. Instead, when the Supreme Court issues a GVR order, it directs a lower court to reconsider its reasoning in light of intervening precedent. Accordingly, this Court should reconsider *Crager I* and, for the reasons explained above, reaffirm its second holding.

A GVR is not "the functional equivalent of a summary reversal order," E. Gressman et al., Supreme Court Practice 349 (9th ed. 2007), and it does not "amount to a final determination on the merits" of a case, *Henry v. City of Rock Hill* (1964), 376 U.S. 776, 777. Instead, the Supreme Court issues a GVR order when an intervening case indicates "that the judgment below is in error, but . . . because of other aspects of the case [different facts or alternate grounds of decision], the Court is not prepared to reverse outright." Gressman at 349 n.102 (quoting A. Hellman, "Granted, Vacated, and Remanded * * *": *Shedding Light on a Dark Corner of Supreme Court Practice*, 67 Judicature 389, 392-95 (1984)). In other words, a GVR merely tells

"the lower court . . . to reconsider the entire case in light of the intervening precedent—which may or may not compel a different result." *Id.*; see *Tyler v. Cain* (2001), 533 U.S. 656, 666 n.6 ("[GVR order] simply indicated that, in light of 'intervening developments,' there was a 'reasonable probability' that the [lower court] would reject a legal premise on which it relied and which may affect the outcome of the litigation." (internal citation omitted)). Indeed, in a substantial number of cases in which the Supreme Court has issued a GVR, lower courts have adhered to their original ruling—and very few of those decisions have been reversed. Gressman at 349 n.103 (discussing Hellman, *supra*).

In light of these principles, the GVR orders in *Crager v. Ohio* (2009), 129 S. Ct. 2856, and *Barba v. California* (2009), 129 S. Ct. 2857, lack the significance that the Ohio Public Defender attributes to them. See OPD Br. at 11. Neither order—nor any other GVR following *Melendez-Diaz*—indicated that an expert's testimony about conclusions derived from results of scientific tests performed by another analyst violates the Confrontation Clause. Thus, contrary to the Ohio Public Defender's suggestion, the State is not asking this Court "to adopt a position that the United States Supreme Court clearly rejected." *Id.* at 12. Instead, the State is asking this Court to reaffirm a holding that is sound as a matter of law and policy.

CONCLUSION

For the above reasons, this Court should reaffirm the second holding of *Crager I* and reverse the decision below.

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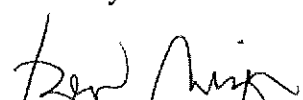

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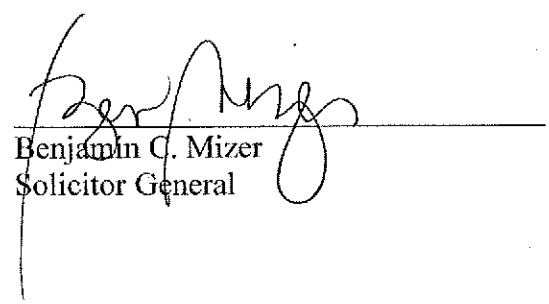

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