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.	:	

REPLY BRIEF ON SUPPLEMENTAL ISSUE OF PLAINTIFF-APPELLANT STATE OF OHIO

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ARGUMENT

Wiechman's expert testimony was properly admissible under Evid.R. 703 in that his testimony was based upon facts he perceived—his technical review of Duvall's raw data in the BCI case jacket—notwithstanding the fact that he did not perform the "physical bench work."

The Ohio Attorney General, as *amicus* in support of the state, has thoroughly addressed the impact of *Melendez-Diaz* on this Court's second holding in *Crager I*, both in his supplemental brief and his reply brief. Rather than needlessly restate those arguments, the state respectfully hereby joins the Attorney General and adopts them in full. However, the state does want to further address Appellee's assertion that Wiechman's expert testimony violated Evid.R. 703.

The Appellee argues that Wiechman's expert testimony was not admissible under Evid.R. 703 because Wiechman did not perform the actual "physical bench work" during the DNA testing process. (Appellee's Supplemental Brief, at pp. 5, 7). The state submits that Wiechman's testimony not only did not violate the Constitution, it also did not violate the Rules of Evidence.

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. This Court upheld the admission of her expert ***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. Moreover, this Court specifically found that the medical examiner's expert testimony was properly admissible under Evid.R. 703 because her testimony was "based upon her knowledge and experience, as applied to the facts and data

included in the autopsy report," i.e. based upon facts she had perceived in her review of another expert's report. *Id.* at ¶ 77. The fact that the testifying expert did not personally conduct the autopsy (i.e. the actual physical bench work) was immaterial.

Evid.R. 703 requires that expert testimony be based upon: 1) the expert's perceptions, or 2) facts or data admitted in evidence. *See State v. Solomon* (1991), 59 Ohio St.3d 124, 126. In *Craig*, this court noted that the autopsy report had been admitted into evidence, and thus the medical examiner's reliance on the autopsy report was based on facts or data already admitted in evidence. *Craig*, 2006-Ohio-4571, at ¶ 77. However, the state submits that Evid.R. 703 permits expert testimony based upon facts or data perceived by the expert, notwithstanding whether those facts or data are otherwise admissible. *See* Supplemental Brief of *Amicus Curiae* Ohio Attorney General, at p. 5. The state submits that the "perceptions" contemplated by Evid.R. 703 include the technical review of the raw data in a case jacket which allows a DNA expert to reach his own independent interpretations and conclusions.

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 raw 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.***

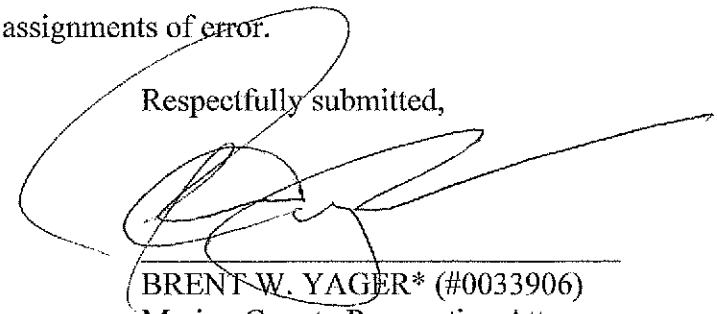
Crager I, 2007-Ohio-6840 at ¶ 110 (emphasis added).

Accordingly, Wiechman's expert testimony did not violate Appellee's right to confrontation, and, his testimony was admissible under Evid.R. 703.

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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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Supplemental Brief was served, by regular U.S. Mail postage prepaid this 18th day of December 2009, upon:

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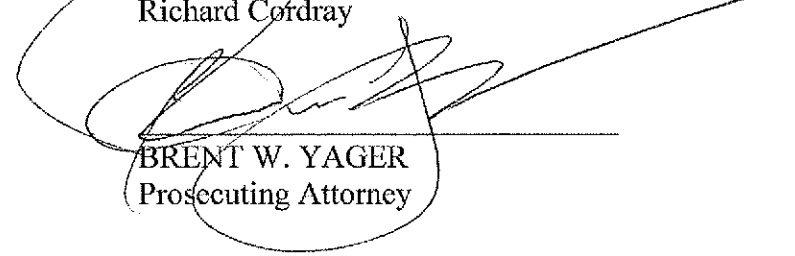

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